

The London School of Economics and Political Science

THE LEGAL CONSTRUCTION OF CHILDHOOD
IN THE ISRAELI-PALESTINIAN CONFLICT

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A thesis submitted to the Department of Law
of the London School of Economics and Political Science
for the degree of Doctor of Philosophy

London, July 2012

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ACKNOWLEDGMENTS

This thesis is dedicated to Emily Jackson, Niki Lacey, and Jenny Kuper, for their invaluable guidance and support.

This project has been made possible by the generous funding of the LSE Law Department, the LSE Middle East Institute, and the Anglo-Israeli Association.

ABSTRACT

This study examines how Israeli criminal law and its HRO (human rights organisations) critics conceptualise and construct childhood in the OPT (Occupied Palestinian Territories), and what the socio-legal implications and significance are of their conceptualisation and construction of childhood.

The first portion of this thesis, comprising of the first two chapters, lays the foundations for the chapters that follow. Chapter 1 explains the research framework, analyses the relevant existing literature, discusses the research methodology and sources, and provides basic background information. Chapter 2 provides the legal framework for this study, by reviewing the Israeli statutory law applicable to child offenders in the OPT.

The next three chapters investigate three central aspects of the relationship between law and childhood in the OPT: the age of child defendants (Chapter 3), the spatial separation of child offenders from their elders (Chapter 4), and child-related trauma (Chapter 5). These chapters analyse legal and HRO discourses and practices concerning these issues, explore their socio-political context, examine the factors and conceptions that inform these discourses and practices, and discuss their symbolic and practical implications – in the Israeli-Palestinian context and beyond.

The final chapter summarises the research findings, and discusses four meta-themes which are interwoven throughout the previous chapters: the spatio-temporality of childhood, the boundaries of childhood, the construction of adulthood, and the use of the child as a source of evidence. The implications and contribution of this study are explained, in light of these findings and analysis.

TABLE OF CONTENTS

LIST OF FIGURES AND VISUAL MATERIALS	8
CHAPTER 1: INTRODUCTION	9
1. The research topic	9
(a) The research framework	10
(b) The importance of the research topic	11
(c) Clarifications on what falls outside the research framework	16
(d) Background on the OPT	17
1. Basic background	17
2. The Israeli law in force in the OPT	19
2. Literature analysis	22
(a) This study in the context of the existing legal literature on childhood	22
(b) This study in the context of the existing legal literature on the OPT	28
3. Methodology	32
(a) Methods	32
(b) Ethical guidelines	33
(c) The relationship between theory and methodology	34
(d) The relationship between primary and secondary sources	35
(e) Primary sources	36
1. Israeli military legislation concerning Palestinian children	36
2. Military court decisions concerning Palestinian child defendants	37
(a) The decisions and the process of obtaining them	37
(b) Characteristics and methodological implications	39
(c) Concluding reflection	40
3. Israeli civil legal documents	41
(a) Civil court files	41
(b) Transcripts of parliamentary committee meetings	42
4. Court decisions concerning Israeli soldiers who abused Palestinian children	42
5. HRO publications concerning children in the OPT	44
6. Publications of Israeli authorities	44
(f) Reflection on my personal position	45
4. Limitations of this study	46
5. Terminology	48
(a) "Occupied Palestinian Territories"	48
(b) "The West Bank"	50

(c) "Disengagement"	51
(d) "Security prisoners"	51
(e) The "IDF/IOF"	52
(f) "Israeli-Palestinian"	53
(g) "Childhood"	53
6. The dissertation outline	54
 CHAPTER 2: THE LAW OF CHILDHOOD	56
1. Introduction	56
2. The domestic Israeli law applicable to Israeli child offenders	57
(a) The trial	58
(b) Sentencing	59
(c) Outside the courtroom (arrest, interrogation, detention, and incarceration)	59
(d) The pardoning of child opponents of the "disengagement"	61
3. The Israeli military law applicable to Palestinian child offenders	62
(a) The trial	63
(b) Sentencing	64
(c) Outside the courtroom (arrest, interrogation, detention, and incarceration)	66
4. A comparative summary: the Israeli law applicable to child offenders	69
5. Conclusion	74
 CHAPTER 3: THE AGE OF CONFLICT	76
1. Introduction: age, childhood, and law	76
2. Considering young age	77
(a) Disregarding young age	77
(b) Overriding considerations	78
(c) Youth as an aggravating factor	79
3. Age terminology	82
(a) Unitary / fragmentary classifications	82
(b) The definition of "minor"	85
1. 1967-2009: No Statutory definition; ambiguity in court rulings	85
2. 2009-2011: Statutory definition added; ambiguity persists in court rulings	87
3. 2011-to date: The statutory age of criminal majority raised	92
4. Coevity – the coexistence of age(s)	94
5. Bodies of age	97
6. (Not) knowing age	101

(a) Reverting to childhood	101
(b) Withholding age	103
7. The elusiveness of childhood and age – beyond Israel/Palestine	106
8. Conclusion	108
 CHAPTER 4: SEPARATING CHILDHOOD	111
1. Introduction: putting children in their place	111
(a) Separation in detention and prison facilities	112
(b) Military youth courts	113
2. Justifications for increased separation	114
(a) HROs' developmentalist anxieties	114
(b) The Israeli judiciary: avoiding intergenerational interactions among Palestinians	116
1. Israeli prison as a university – and other surprising coalitions	118
(c) Contextualising the separation of Palestinian children	122
3. Separatist imagination: tensions and blind spots	125
(a) Preoccupied with Palestinian children's "rights" and "best interests"?	125
(b) The absence of rehabilitation	130
(c) Uncovering overlooked anti-separatist voices	132
4. The separation of children beyond Israel/Palestine	135
5. The non-separation of Israeli settler children	138
6. Conclusion	140
 CHAPTER 5: RE-PRESENTED WITH CHILDHOOD TRAUMA	142
1. Introduction: representing trauma	142
2. Psycho-legal representation: "trauma" and "loss"	145
(a) Palestinian childhood – traumatised and lost	146
(b) Jointly lost: childhood and the homeland	149
(c) Psychological vocabulary meets the visual image: Israeli and Palestinian children	153
(d) The Israeli child-soldier	158
1. Militarised children	158
2. Infantilised soldiers	160
3. Visual representation of Palestinian children's abuse	164
(a) Palestinian children's invisible traumatising	164
(b) The visible invisibility of the abuse	169
(c) Looking invisibility in the face	172
4. "Traumatised"/"lost" childhood beyond Israel/Palestine	179
5. Conclusion	182

CHAPTER 6: CONCLUSION	184
1. Summary	184
2. Meta-themes	187
(a) Spatiotemporality	188
(b) Boundaries	190
(c) Adulthood	192
(d) The child as a source of evidence	194
3. The contribution of this study	195
(a) Israel/Palestine: law, childhood, and more	195
(b) Law and childhood beyond Israel/Palestine	197
4. Avenues for further study	200
APPENDICES:	
1. Acronyms and abbreviations	202
2. Details of HROs	203
3. Additional provisions in Israeli law relating to child offenders	207
4. The pertinent international law: sources and application	211
5. Map of Israel/Palestine	216
BIBLIOGRAPHY	217

LIST OF FIGURES AND VISUAL MATERIALS

Diagrams, Tables, and Maps

1. Primary sources used for this project	45
2. Comparison: the provisions in Israeli law relating to Israeli and Palestinian children in the OPT	71
3. A map of Israel/Palestine (including military courts, interrogation and detention centres, and prisons)	216

Pictures

1. A therapist interpreting Israeli children's drawings at a meeting of the Israeli parliamentary Child's Rights Committee	155
2. A slide of an Israeli child's drawing, presented to the parliamentary Child's Rights Committee	156
3. Sixteen-year-old Palestinian Sawsan Abu Turki's drawing of her abuse position	170
4. A photo showing Abu Turki holding her drawing	170
5. A drawing depicting five Palestinian detainees in "position abuse"	173
6. Four images showing arrested Palestinian children whose faces are fully or partly invisible	174
7. Photos showing Palestinian children re-enacting their arrest	175

INTRODUCTION

1. THE RESEARCH TOPIC

“Childhood”, sociologist Nikolas Rose claims, “is the most intensively governed sector of personal existence”.¹ Others argue that the social significance of childhood has increased through the past few decades.² Put more cautiously, most contemporary societies are preoccupied, in different ways, with issues that are framed as concerning those whom society classifies as “children”, and these children are subject to potent forms of social control (although this does not necessarily mean that society pays due attention to children’s experiences and circumstances).³ Law is arguably one of the main regulatory devices that shape childhood.⁴

This study examines the relationship between childhood and law in the OPT (Occupied Palestinian Territories). How do Israeli criminal law and its HRO (human rights organisations) critics conceptualise and construct childhood in the OPT? And what are the socio-legal implications and significance of their conceptualisation and construction of childhood? These are the main research questions.

Before delving into the details of this study, some preliminary explanation is in order about the framing and importance of the research topic, as well as necessary background information.

¹ NIKOLAS ROSE, *GOVERNING THE SOUL: THE SHAPING OF THE PRIVATE SELF* 121 (2nd ed., Free Association Books, London and New York, 1999).

² DAVID ARCHARD, *CHILDREN: RIGHTS & CHILDHOOD* 31 (Routledge, New York, 1993); ALLISON JAMES, CHRIS JENKS AND ALAN PROUT, *THEORIZING CHILDHOOD* 5 (Polity Press, Cambridge, 1998).

³ Jo Bridgeman and Daniel Monk, *Introduction: Reflections on the Relationship Between Feminism and Child Law*, in *FEMINIST PERSPECTIVES ON CHILD LAW* 1, 3 (Jo Bridgeman and Daniel Monk eds., Cavendish, London and Sydney, 2000); CHRIS JENKS, *CHILDHOOD* 103 (2nd ed., Routledge, New York, 2005). See also ARCHARD, *supra* note 2, at 10; JAMES, JENKS AND PROUT, *supra* note 2, at 27-28, 71. On children’s marginalisation and “disempowerment” in contemporary society see, e.g., JAMES, JENKS AND PROUT, *supra* note 2, at 40, 107, 211. For an example of attempts to conceptualise children as “beings” rather than (only) “becomings”, i.e., as competent social agents rather than merely incomplete adults-to-be, see Emma Uprichard, *Children as ‘Being and Becomings’: Children, Childhood and Temporality*, 22 *CHILDREN & SOCIETY* 303 (2008).

⁴ Allison James, Penny Curtis and Joanna Birch, *Care and Control in the Construction of Children’s Citizenship*, in *CHILDREN AND CITIZENSHIP* 85, 88 (Antonella Invernizzi and Jane Williams eds., Sage, London and Thousand Oaks CA, 2008).

1.(a). The research framework

This study analyses discourses and practices which have taken place in, or directly refer to, a particular geographical setting: the OPT – namely the West Bank and the Gaza Strip.⁵

Our timeframe is from 1967 (the beginning of the Israeli occupation) onwards. However, most attention will be given to the past decade; this allows a focus on relatively recent developments, but also stems from practical constraints (explained below).⁶

Our main legal framework is that of the Israeli law applicable to child offenders in the OPT – including both Palestinian children and Israeli (Jewish) settler children. With regard to the legal treatment of Israeli settler children, we will focus on a particular context: Israel's "disengagement" (pullout) from the Gaza Strip in 2005, which included the withdrawal of Israeli armed forces and the eviction of Israeli settlers from this territory.⁷ This context was initially chosen for pragmatic reasons (described below),⁸ but our discussion benefits from its relative similarity to the circumstances of Palestinian child offenders under Israeli law: both groups of children are relatively large,⁹ and their offences were aimed against Israeli policies, practices, and/or armed forces.

As regards institutional framework, the "protagonists" of this study are the Israeli legal system and its HRO critics. With respect to the Israeli legal system, we will focus on three legal "sites", details of which will be provided later:¹⁰ (a) Israeli military courts, in which Palestinian residents of the OPT are tried according to Israeli military criminal law; (b) Israeli civil courts, in which Israeli settlers are tried in accordance with domestic Israeli criminal law; and (c) Israeli parliamentary committees. The HROs to be examined specialise in the OPT and/or in children's rights, and comprise Palestinian, Israeli, and international NGOs (non-governmental organisations), international human rights bodies (e.g., the *UN Committee on the Rights of the Child*), and legal clinics in Israeli higher education institutions. Details on the HROs that are mentioned in the

⁵ On the current legal-political status of the Gaza Strip see *infra* notes 63-64, 67-69 and accompanying text.

⁶ *Infra* text accompanying notes 210, 227, and 238.

⁷ On the "disengagement" see *ENCYCLOPEDIA OF THE ISRAELI-PALESTINIAN CONFLICT* 713-717 (Cheryl A. Rubenberg ed., Lynne Rienner, Boulder CO, 2011). About 8,000 settlers were evicted, including about 3,400 children. Research and Information Centre of the Knesset, *The Governmental Treatment of the Children of those Evicted from Gush Katif – a Follow-up Report 3* (2009) (Hebrew), available at <http://www.knesset.gov.il/imm/data/pdf/m02257.pdf>.

⁸ *Infra* text accompanying note 227.

⁹ Three hundred and fifteen Israeli children were charged with offences against the backdrop of the "disengagement". *Infra* note 343 and accompanying text. In recent years, Israel is estimated to have brought to trial around 700 Palestinian children from the West Bank (excluding East Jerusalem) each year; in the past, the incarceration rate reached as high as more than two percent of all Palestinian children in the OPT. *Infra* notes 350, 385 and accompanying text.

¹⁰ For specific details on the law relating to child offenders, see Chapter 2 and Appendix 3. On the parliamentary committees see *infra* text accompanying notes 230-231.

dissertation are provided in Appendix 2, and the importance and relevance of HROs for this research will be explained shortly.¹¹

Thematically, our discussion will revolve around three main foci: the child defendant's age (Chapter 3), the spatial separation of child offenders from their adult counterparts (Chapter 4), and representations of child-related trauma (Chapter 5). These themes were chosen for three reasons: First, they occupy a central place in the texts and practices of Israeli law and its HRO critics in relation to children in the OPT.¹² Second, these themes raise interesting theoretical questions. And third, they have the potential to broaden the scope of existing academic and public discussion – in terms of content (i.e., these important themes have not received due attention)¹³ and conceptually (i.e., these themes evince complexities which challenge some conventional conceptions).¹⁴ Interwoven throughout these themes are important meta-themes, which Chapter 6 will tease out and discuss: the spatiotemporality of childhood, the boundaries of childhood, the construction of adulthood, and the use of the child as a source of evidence.

1.(b). The importance of the research topic

The OPT is a promising setting in which to explore childhood, law, and their relationship. If we define a child – provisionally and doubtfully – as any person under the age of 18 years, most people residing in the OPT (53 percent of Palestinians¹⁵ and about a half of Israeli settlers¹⁶) will appear to be “children”. The OPT population is significantly younger than populations in the Global North¹⁷ and within Israel proper.¹⁸ Beyond their demographic weight, children have played key socio-

¹¹ *Infra* text accompanying notes 34-47.

¹² “Central place”, here, should not be reduced to quantitative terms. Cf. GILLIAN ROSE, *VISUAL METHODOLOGIES: AN INTRODUCTION TO THE INTERPRETATION OF VISUAL MATERIALS* 157 (2nd ed., Sage, Los Angeles and London, 2007) (“the most important words and images may not be those that occur most often”). Methodologically, after identifying key and sub-themes, I returned to the primary sources and looked for opposite themes.

¹³ On the neglect of these themes in the existing child-centred legal literature see *infra* note 139 and accompanying text.

¹⁴ I have changed and modified the above themes several times during the writing of this dissertation, on the basis of new empirical findings and new theoretical insights. On the methodology of this project see *infra* text accompanying notes 172-247.

¹⁵ Menachem Klein, *The Intifada: The Young Generation in the Front*, in *PROTECTION OF CHILDREN DURING ARMED POLITICAL CONFLICT: A MULTIDISCIPLINARY PERSPECTIVE* 45, 45-46 (Charles W. Greenbaum et al. eds., Hart, Oxford, 2006).

¹⁶ Forty-six percent of Israeli settlers are under-18-year-olds. The Israeli Central Bureau of Statistics, *Selected Data for International Child Day 2* (2008) (Hebrew), available at http://www1.cbs.gov.il/reader/newhodact/hodaa_template.html?hodaa=200811235.

¹⁷ For example, in the UK, under-20-year-olds comprise 25 percent of the population. Office for National Statistics, *Census 2001* (2001), available at http://www.statistics.gov.uk/census2001/pop2001/united_kingdom.asp.

¹⁸ About 33 percent of the Israeli population is under 18. The National Council for the Child, *A Collection of Data from the Annual 'Children in Israel—2009'* 1 (2009) (Hebrew), available at

political roles in the Israeli-Palestinian conflict, symbolically and practically.¹⁹ Furthermore, the legal construction of childhood affects “adults” no less than it does “children”, as Chapter 6 will explain at length.²⁰

Law is a particularly apt arena in which to examine the construction of childhood in the OPT, due to the legalistic nature of the Israeli occupation.²¹ Israeli authorities tend to rely on law as a basis to undertake and justify their actions in the OPT.²² Furthermore, since its inception in 1967, the Israeli occupation has been shaped and directed by Israeli lawyers and legal institutions.²³ The Israeli military courts, in which Palestinian residents of the OPT are tried (and which are at the heart of this study), have been particularly central in this respect. These courts hold tens of thousands of hearings each year,²⁴ and are, in the words of sociologist of law Lisa Hajjar,

<http://www.children.org.il/Files/File/Leket%20Shnaton2009.doc>. This figure excludes non-citizen children, 74 percent of whom reside in East Jerusalem. *Id.*, at 2.

¹⁹ Lori A. Allen, *Martyr Bodies in the Media: Human rights, aesthetics, and the politics of immediation in the Palestinian intifada*, 36 AMERICAN ETHNOLOGIST 161, 166 (2009); Brian K. Barber, *Political Violence, Social Integration, and Youth Functioning: Palestinian Youth from the Intifada*, 29 JOURNAL OF COMMUNITY PSYCHOLOGY 259, 260 (2001); JOHN COLLINS, OCCUPIED BY MEMORY: THE INTIFADA GENERATION AND THE PALESTINIAN STATE OF EMERGENCY 2, 11-14, 17-20, 35-74 (New York Press, New York and London, 2004); Daniel Dor, “Arafat Has Decided to Sacrifice Ishmael”: *The Intifada Children in the Israeli Press*, in PROTECTION OF CHILDREN DURING ARMED POLITICAL CONFLICT: A MULTIDISCIPLINARY PERSPECTIVE 257 (Charles W. Greenbaum et al. eds., Hart, Oxford, 2006); Jonathan Kuttab, *The Children's Revolt*, 17 JOURNAL OF PALESTINE STUDIES 26 (1988); NEW PROFILE – THE MOVEMENT FOR THE CIVILIZATION OF ISRAELI SOCIETY, CHILD RECRUITMENT IN ISRAEL (2004), available at http://www.newprofile.org/data/uploads/child_soldiers/english.pdf; Julie Peteet, *Male Gender and Rituals of Resistance in the Palestinian Intifada – A Cultural Politics of Violence*, in IMAGINED MASCULINITIES: MALE IDENTITY AND CULTURE IN THE MIDDLE EAST 103, 113, 117 (Mai Ghoussoub and Emma Sinclair-Webb eds., Saqi Books, 2000); DAVID ROSEN, ARMIES OF THE YOUNG: CHILD SOLDIERS IN WAR AND TERRORISM 91-131 (Rutgers University Press, New Brunswick NJ and London, 2005); Siraj Sait, *Have Palestinian Children Forfeited Their Rights?*, 35 JOURNAL OF COMPARATIVE FAMILY STUDIES 211, 211-212 (2004).

²⁰ *Infra* text accompanying notes 1046-1049.

²¹ Characterising 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 4, 27, 218-219, 248 (University of California Press, London, 2005). Cf. Orna Ben-Naftali, Aeyal M. Gross and Keren Michaeli, *Illegal Occupation: Framing the Occupied Palestinian Territory*, 23 BERKLEY JOURNAL OF INTERNATIONAL LAW 551 (2006).

²² George E. Bisharat, *Courting Justice? Legitimation in Lawyering under Israeli Occupation*, 20 LAW & SOCIAL INQUIRY 349, 349, 352-353, 390 (1995); HAJJAR, *supra* note 21, at 27-28, 49-61, 129, 235-236, 243-244, 247-248; Emma Playfair, *Playing on Principle? Israel's Justification for its Administrative Acts in the Occupied West Bank*, in INTERNATIONAL LAW AND THE ADMINISTRATION OF OCCUPIED TERRITORIES 205 (Emma Playfair ed., Clarendon Press, Oxford and New York, 1992); Yuval Shany, *Introduction: Forty Years After 1967: Reappraising the Role and Limits of the Legal Discourse on Occupation in the Israeli-Palestinian Context*, 41 ISRAELI LAW REVIEW 6, 7-8 (2008); RAJA SHEHADEH, THE DECLARATION OF PRINCIPLES AND THE LEGAL SYSTEM IN THE WEST BANK 25 (Palestinian Academic Society for the Study of International Affairs, Jerusalem, 1994); Eyal Weizman, *Legislative Attack*, 27 THEORY, CULTURE & SOCIETY 11 (2010).

²³ HAJJAR, *supra* note 21, at 24, 247-248; IDITH ZERTAL AND AKIVA ELIDAR, LORDS OF THE LAND: THE WAR OVER ISRAEL'S SETTLEMENTS IN THE OCCUPIED TERRITORIES, 1967-2007, at 341, 343-344, 361-371 (Nation Books, New York, 2007).

²⁴ For example, according to the Israeli military, these courts held over 37,000 hearings in 2006. The Spokesperson of the Israel Defence Forces, *Response to the Yesh Din report Draft: "Backyard Proceedings"* para. 18 (November 12, 2007) (Hebrew), available at <http://www.yesh-din.org/site/images/BPIDFResHeb.pdf>.

an institutional centrepiece of the Israeli state's apparatus of rule over Palestinians in the [OPT...]. Virtually all Palestinians have had some experience with the military court system, whether personally or through the arrest and prosecution of relatives, friends, neighbours, and/or colleagues.²⁵

Furthermore, estimates are that Israel has imprisoned at least one quarter of the Palestinian population since the beginning of the occupation of the Palestinian territories.²⁶ The incarceration rate in the OPT during the first *Intifada* (Palestinian uprising)²⁷ was about one percent of the population – by far the highest in the world.²⁸ Several writers have accordingly described incarceration as a key control mechanism for the Israeli occupation.²⁹ This is yet another aspect of the centrality of the Israeli military courts, since it is these courts which sentence Palestinians to prison. Indeed, in recent years, up to a half of the prisoners in Israeli prisons have been Palestinians

²⁵ HAJJAR, *supra* note 21, at 2, 187. See also *id.*, at 3, 16, 24, 26, 44. On the political role of these courts see *id.*, at 81, 118, 121, 124-126.

²⁶ DCI – PALESTINE, BOUND, BLINDFOLDED AND CONVICTED: CHILDREN HELD IN MILITARY DETENTION 7 (2012), available at http://www.dci-palestine.org/sites/default/files/report_0.pdf; HAJJAR, *supra* note 21, at 185-186; ESMAIL NASHIF, PALESTINIAN POLITICAL PRISONERS: IDENTITY AND COMMUNITY 10 (Routledge, London and New York, 2008) (referring to the period of 1967-1993); Sharon Weill, *The Judicial Arm of the Occupation: The Israeli Military Courts in the Occupied Territories*, 89 INTERNATIONAL REVIEW OF THE RED CROSS 395, 396 (2007); Nir Yahav, *Report: Since 1967, Israel Has Arrested About 800 Thousand Palestinians*, WALLA! – NEWS (January 14, 2012) (Hebrew), available at <http://news.walla.co.il/?w=%2F%2F2500294>. Others estimate that Israel has detained about 700,000 Palestinians (a fifth of the existing Palestinian population in the OPT) during the course of the occupation. Rifat Kassis, *Palestinian Children Face Abuse in Israeli Military Courts*, JURIST (November 4, 2011), available at <http://jurist.org/hotline/2011/11/rifat-kassis-palestinian-children.php>; NO LEGAL FRONTIERS, ALL GUILTY! OBSERVATIONS IN THE MILITARY JUVENILE COURT 9 (2011), available at http://nolegalfrontiers.org/images/stories/report_2011/report_en.pdf. For figures relating to specific years during the occupations see Netanel Benichou, *Criminal Law in the Regions of Judea, Samaria, and Gaza*, 18 MISHPAT VE-TSAVA (LAW & MILITARY) 293, 294 (2004) (Hebrew); HAJJAR, *supra* note 21, at 66; YESH DIN, BACKYARD PROCEEDINGS: THE IMPLEMENTATION OF DUE PROCESS RIGHTS IN THE MILITARY COURTS IN THE OCCUPIED TERRITORIES 41-42 (Tel Aviv, 2007), available at <http://www.yesh-din.org/site/images/BackyardProceedingsENG.pdf>.

²⁷ The term *Intifada* refers to either of two periods of Palestinian popular uprising: 1987-1993 (the first Intifada), and 2000-2005 (the second Intifada). See generally ENCYCLOPEDIA OF THE ISRAELI-PALESTINIAN CONFLICT, *supra* note 7, at 621-630.

²⁸ HAJJAR, *supra* note 21, at 3, 107; HUMAN RIGHTS WATCH, PRISON CONDITIONS IN ISRAEL AND THE OCCUPIED TERRITORIES (New York, 1991) (cited in CATHERINE COOK, ADAM HANIEH AND ADAH KAY (IN ASSOCIATION WITH DCI – PALESTINE), STOLEN YOUTH: THE POLITICS OF ISRAEL'S DETENTION OF PALESTINIAN CHILDREN 7 (Pluto Press, London, 2004)). See also YESH DIN, *supra* note 26, at 39-40. In comparison, this incarceration rate is about 1.4 times higher than the current highest incarceration rate in the world. International Centre for Prison Studies, *World Prison Brief – Prison Population Rates per 100,000 of the national population* (last visited on May 25, 2012), available at http://www.prisonstudies.org/info/worldbrief/wpb_stats.php?area=all&category=wb_poprate. See also NICOLA LACEY, THE PRISONERS' DILEMMA: POLITICAL ECONOMY AND PUNISHMENT IN CONTEMPORARY DEMOCRACIES 27, 60, 118-120, 140 (Cambridge University Press, Cambridge and New York, 2008).

²⁹ Avram Bornstein, *Military Occupation as Carceral Society: Prisons, Checkpoints, and Walls in the Israeli-Palestinian Struggle*, in AN ANTHROPOLOGY OF WAR: VIEWS FROM THE FRONTLINE 106, 108, 117 (Alisse Waterston ed., Bergahn Books, New York and Oxford, 2008); NASHIF, *supra* note 26, at 10, 40-41; James Ron, *Savage Restraint: Israel, Palestine and the Dialectics of Legal Repression*, 47 SOCIAL PROBLEMS 445, 455-456 (2000). On the centrality of the Israeli prisons see generally NASHIF, *supra* note 26, at 70, 72, 94.

tried and convicted by the military court system³⁰ (as opposed to Israelis tried by the civil courts). This is a staggering figure, given that the Palestinian population under the jurisdiction of the military courts is significantly smaller than the Israeli population,³¹ and considering that most Palestinian offenders are tried by Palestinian courts rather than by the Israeli military courts³² (as will be explained shortly).³³

HROs – the other “protagonist” of this study (alongside the Israeli legal system) – are also of socio-political importance in the OPT. HROs have burgeoned remarkably in Israel/Palestine in the past two decades,³⁴ and although their influence on Israeli authorities is unclear,³⁵ their critique sometimes leads Israel to justify, refine, or reform its policies in the OPT.³⁶ Moreover, HROs’ impact on the general course and discourse of the Israeli-Palestinian conflict is significant;³⁷ for example, human rights have come to infuse Palestinians’ communication with each other and with foreigners.³⁸

Of specific relevance to this study is HROs’ centrality in legal sites and discourses. HROs’ activities include: providing legal aid to Palestinians in Israeli custody; pressing foreign governments to implement international law in the hope of curtailing Israeli occupation activities; offering workshops to Palestinians on their due rights according to international law; publishing reports about human rights violations; and guiding legal organisations on tours aimed to expose

³⁰ For further details and discussion see *infra* text accompanying notes 276-279.

³¹ The military courts currently have jurisdiction over Palestinians residing in the West Bank, excluding East Jerusalem, as will be explained below (*infra* text accompanying notes 24,55-64). As of 2007, this population comprises 2,125,167 people. UNRWA, WEST BANK & GAZA STRIP: POPULATION CENSUS OF 2007, at 9 (2010), available at <http://www.unrwa.org/userfiles/2010012035949.pdf>. In comparison, as of 2010, the Israeli population consists of 7,624,000 people. The World Bank, *Data: Israel* (last visited: April 24, 2011), available at <http://data.worldbank.org/country/israel>.

³² For example, the Palestinian courts are estimated to have tried nearly 1,120 Palestinian children in 2006. DCI – PALESTINE AND SAVE THE CHILDREN – SWEDEN, CHILD RIGHTS – SITUATION ANALYSIS: RIGHT TO PROTECTION IN THE OCCUPIED PALESTINIAN TERRITORY – 2008, at 45-46 (2009), available at <http://www.dci-pal.org/english/publ/research/SRSARReport.pdf>. In comparison, the Israeli military courts are estimated to have tried about 700 Palestinian children in 2008. DCI – PALESTINE, PALESTINIAN CHILD PRISONERS: THE SYSTEMATIC AND INSTITUTIONALISED ILL-TREATMENT AND TORTURE OF PALESTINIAN CHILDREN BY ISRAELI AUTHORITIES 97 (Jerusalem, 2009), available at <http://www.dci-pal.org/english/publ/research/CPReport.pdf>.

³³ *Infra* text accompanying notes 55-57, 63.

³⁴ Allen, *supra* note 19, at 164 (regarding Palestinian-run HROs); Amichai Cohen, *Administering the Territories: An Inquiry into the Application of International Humanitarian Law by the IDF in the Occupied Territories*, 38 ISRAEL LAW REVIEW 24, 73 (2005) (regarding Israeli HROs). For further discussion of Palestinian HROs see BENOÎT CHALLAND, PALESTINIAN CIVIL SOCIETY: FOREIGN DONORS AND THE POWER TO PROMOTE AND EXCLUDE (Routledge, Abingdon and New York, 2009); ENCYCLOPEDIA OF THE ISRAELI-PALESTINIAN CONFLICT, *supra* note 7, at 272-277.

³⁵ Cohen, *supra* note 34, at 75-76. See also HAJJAR, *supra* note 21, at 28 (“the impact of human rights activism in Israel/Palestine has been limited”); Yagil Levy, Kobi Michael and Assaf Shapira, *Extra-Institutional Control of the Military: A Conceptual Framework*, 4 HA-MERHAV HA-TSIBURI [THE PUBLIC SPHERE] 45 (2010) (Hebrew) (discussing Israeli HROs’ influence on military conduct since the 1970s). See also Bisharat, *supra* note 22; Michael Sfard, *The Price of Internal Legal Opposition to Human Rights Abuses*, 1 JOURNAL OF HUMAN RIGHTS PRACTICE 37 (2009) (both Bisharat and Sfard discuss whether human rights litigation legitimises and helps to perpetuate the Israeli occupation).

³⁶ HAJJAR, *supra* note 21, at 49-50.

³⁷ *Id.*, at 28.

³⁸ Allen, *supra* note 19, at 165.

them to the realities of life under occupation.³⁹ Furthermore, most of the (scarce⁴⁰) texts on Israeli military law are HRO reports. Thus, HROs are fully-fledged legal players – within the Israeli legal system, in reaction to that system, as producers of “knowledge” about it, and by virtue of their reliance on legal standards and sources.⁴¹

HROs have played a particularly important role regarding the legal construction of childhood in the OPT. The Palestine section of *DCI* (Defence for Children International) – the HRO most discussed in this dissertation – illustrates this well. *DCI – Palestine* was established to promote children’s rights as articulated in the *UN Convention on the Rights of the Child*, and this convention has been a main reference point for the HRO’s work.⁴² In addition to disseminating numerous reports on violations of Palestinian children’s rights (including special reports for UN bodies), *DCI – Palestine* is the biggest provider of legal counsel to Palestinian children in the Israeli legal system: it claims to represent between 30 and 40 percent of Palestinian child defendants in the Israeli military courts,⁴³ as well as about 60 percent of Palestinian children who are arrested or detained in East Jerusalem⁴⁴ (and tried in civil courts⁴⁵). Like other HROs in the region, *DCI – Palestine* is additionally involved in lobbying, documenting, monitoring, training, and networking activities.⁴⁶ There are also (much rarer) examples of HROs playing a legal role in relation to Israeli settler children.⁴⁷

³⁹ *Id.*, at 165.

⁴⁰ On the scarcity of information about that legal system see *infra* text accompanying notes 159-163.

⁴¹ Additionally, many of the founders, leaders, and prominent members of HROs in Israel/Palestine have been lawyers, to the extent that “it is hardly conceivable to imagine how the setting of human rights NGOs could have been developed without the major contribution of lawyers.” Gad Barzilai, *The Ambivalent Language of Lawyers in Israel: Liberal Politics, Economic Liberalism, Silence and Dissent* in *FIGHTING FOR POLITICAL FREEDOM: COMPARATIVE STUDIES OF THE LEGAL COMPLEX AND POLITICAL LIBERALISM* 247, 261-262 (Terry C. Halliday et al eds., Hart, Portland, 2007).

⁴² Allen, *supra* note 19, at 166; DCI – Palestine, *Organisation Profile* (last visited: June 3, 2012), available at <http://www.dci-palestine.org/content/organisation-profile>.

⁴³ DCI – PALESTINE, *supra* note 32, at 8; DCI – Palestine, *Israeli Juvenile Military Court – four months on* (February 16, 2010), available at <http://www.dci-pal.org/english/display.cfm?DocId=1371&CategoryId=1>.

⁴⁴ DCI – PALESTINE, *VOICES FROM EAST JERUSALEM: THE SITUATION FACING PALESTINIAN CHILDREN* 41 (2011), available at http://www.dci-palestine.org/sites/default/files/east_jerusalem_final_design.pdf. See *infra* note 60 and accompanying text.

⁴⁵ Allen, *supra* note 19, at 166; DCI – Palestine, *supra* note 42.

⁴⁷ An example is the active participation of lawyers from Israeli HROs the *National Council for the Child* and *The Association for Civil Rights in Israel* in relevant meetings of the Israeli parliamentary Child’s Rights Committee: THE CHILD’S RIGHTS COMMITTEE – THE 16TH KNESSET, TRANSCRIPT NO. 135 (July 26, 2005) (Hebrew), available at <http://www.knesset.gov.il/protocols/data/html/yeled/2005-07-26.html>; THE CHILD’S RIGHTS COMMITTEE – THE 17TH KNESSET, TRANSCRIPT NO. 11 (October 17, 2006) (Hebrew), available at <http://www.knesset.gov.il/protocols/data/rtf/yeled/2006-10-17.rtf>. See also a letter the latter HRO sent to the Israeli police in criticism of its handling of some settler girls: ACRI – Association for Civil Rights in Israel, *Letter to the Head of the Samaria and Judea Prosecution Unit of the Police* (2008) (Hebrew).

1.(c). Clarifications on what falls outside the research framework

After having discussed the importance of this study, a clarification is in order about two elements which fall outside its scope. First, this study is not about the experiences or perspectives of “actual” children in the OPT (although these are undoubtedly affected by legal and HRO discourses and practices). Examining how the law and HROs conceptualise and construct childhood – differs significantly from writing about the lived experiences of those whom these institutions define as children.

There are two important scholarly critiques of socially dominant conceptions of children’s experiences or voices. First, some scholars have argued that children’s “authentic” voices are prevented from being heard, because these voices are usually represented and shaped by adults, and are therefore framed through adults’ conceptions and ideologies. This critique has been voiced against both the children’s rights movement and child-centred research.⁴⁸ Another, more fundamental critique, has expressed skepticism toward conventional conceptions of “voice” and “authenticity”: as education scholars Lisa Mazzei and Alecia Jackson note, poststructuralist⁴⁹ scholarship has challenged and deconstructed the modern assumption of a unitary subject with an authentic voice speaking the truth.⁵⁰ In light of these important critiques, HRO publications which quote children are not described in this dissertation as simply conveying children’s “voices”, but rather as echoing mediated versions of children’s (verbal⁵¹) testimonies.

Second, this study, despite having relevance for policy, is not policy-oriented. Its (sociological) critique of existing conceptions and mechanisms concerning childhood (in the OPT and beyond) is not formulated in policy terms. And its aim is not to outline, for instance, some way of “advancing” protection or implementation of children’s rights – especially given the often-problematic nature of rights (in relation to children⁵² and generally⁵³). In this sense, to quote jurist

⁴⁸ See, e.g., Bridgeman and Monk, *supra* note 3, at 11-12; JAMES, JENKS AND PROUT, *supra* note 2, at 144; Ann Lewis, *Silence in the Context of “Child Voice”*, 24 CHILDREN & SOCIETY 14, 16-17 (2010); Spyros Spyrou, *The Limits of Children’s Voices: From Authenticity to Critical, Reflexive Representation*, 18 CHILDHOOD 151, 151 (2011); Gill Valentine, *Boundary Crossings: Transitions from Childhood to Adulthood*, 1 CHILDREN’S GEOGRAPHIES 37, 39 (2003).

⁴⁹ On poststructuralist thinking and its influence on this research see *infra* text accompanying notes 113, 123-126, 186-188, 1020-1021.

⁵⁰ Cited in Spyrou, *supra* note 48, at 152. See also David M. Trubek and John Esser, ‘Critical Empiricism’ in *American Legal Studies: Paradox, Program, or Pandora’s Box?*, 14 LAW & SOCIAL INQUIRY 3, 17 (1989).

⁵¹ Cf. Lewis, *supra* note 48, at 18-20 (point out the importance of children’s silences); Spyrou, *supra* note 48, at 157-158 (arguing that much of a child’s testimony is to be found in non-verbal actions and materials).

⁵² See, e.g., Lynn D. Wardle, *The Use and Abuse of Rights Rhetoric: The Constitutional Rights of Children*, 27 LOYOLA UNIVERSITY OF CHICAGO LAW JOURNAL 321 (1996).

⁵³ See, e.g., Duncan Kennedy, *The Critique of Rights in Critical Legal Studies*, in LEFT LEGALISM / LEFT CRITIQUE 178 (Wendy Brown and Janet Halley eds., Duke University Press, Durham NC and London, 2002).

Paul Kahn, “an imaginative distance” will be established “that shakes off the scholarly [legal] compulsion to point the way toward reform.”⁵⁴

1.(d). Background on the OPT

Let us now discuss the basic legal-political context for this study. Further necessary details will be provided throughout the following chapters.

1.(d).1. Basic background

The OPT comprise three territories, which differ in their political-legal status (a map of Israel/Palestine appears in Appendix 5):

- a) *The West Bank (excluding East Jerusalem)*: Alongside the Israeli military courts (discussed earlier),⁵⁵ the Palestinian Authority has, since the 1990s, operated its own court system in the West Bank regions under its jurisdiction.⁵⁶ The Israeli military generally allows these courts to try Palestinians in inter-Palestinian civil and criminal matters,⁵⁷ but denies them jurisdiction over Israeli settlers in the OPT (including settlers who commit offences within Palestinian Authority territory).⁵⁸
- b) *East Jerusalem*: Following the occupation of the West Bank in 1967, Israel purported to annex East Jerusalem, and applied to it its domestic law – an annexation which the international

⁵⁴ PAUL KAHN, *THE CULTURAL STUDY OF LAW: RECONSTRUCTING LEGAL SCHOLARSHIP* 6 (University of Chicago Press, Chicago and London, 1999). See also Austin Sarat and Susan Silbey, *The Pull of the Policy Audience*, 10 *LAW & POLICY* 97 (1988) (explaining the importance of distancing socio-legal research from the policy audience and from the methods and subjects of research it promotes).

⁵⁵ *Supra* text accompanying notes 24-33.

⁵⁶ For further information on the legal system of the Palestinian Authority, see Feras Milhem and Jamil Salem, *Building the rule of law in Palestine: Rule of law without freedom*, in *INTERNATIONAL LAW AND THE ISRAELI-PALESTINIAN CONFLICT: A RIGHTS-BASED APPROACH TO MIDDLE EAST PEACE* 253 (Susan M. Akram et al eds., Routledge, Abingdon and New York, 2011). For an English translation of the Palestinian criminal legislation see *THE SECURITY SECTOR LEGISLATION OF THE PALESTINIAN NATIONAL AUTHORITY* 405-504 (Ronald Friedrich et. al. eds., Geneva Centre for Democratic Control of Armed Forces, Geneva and Ramallah, 2008).

⁵⁷ COOK, HANIEH AND KAY, *supra* note 28, at 25; Asem Khalil, *Formal and Informal Justice in Palestine: Dealing with the Legacy of Tribal Law*, 184 *ETUDES RURALES* 169 (2009); Yuval Shany, *Binary Law Meets Complex Reality: The Occupation of Gaza Debate*, 41 *ISRAELI LAW REVIEW* 68, 78 (2008). See also Birzeit University – The Institute of Law, *Legal Status in Palestine* (Birzeit, date unknown), available at http://lawcenter.birzeit.edu/iol/en/index.php?action_id=210. Israel consistently retains the right to try Palestinians in its courts even if they committed offences in Palestinian Authority territories. *Infra* note 74.

⁵⁸ ZERTAL AND ELDAR, *supra* note 23, at 372-373. See also Ben-Naftali, Gross and Michaeli, *supra* note 21, at 584.

community views as invalid under international law.⁵⁹ Palestinian residents of East Jerusalem are thus usually tried in Israeli civic courts, in accordance with domestic Israeli law.⁶⁰ However, according to HRO reports, in practice Palestinian children resident in East Jerusalem often do not enjoy the protections offered by the domestic law, because the local police make frequent use of exceptions established in the domestic law,⁶¹ or even contravene that law.⁶²

- c) *The Gaza Strip*: As mentioned earlier, in 2005 Israel unilaterally “disengaged” from the Gaza Strip. The Hamas party has governed this territory since 2007, and has established there its own military court system.⁶³ In 2007, Israel declared the Gaza Strip an “enemy entity”, and has since carried out multiple military incursions into this territory.⁶⁴

The intricacies of the situation in the OPT far exceed the scope this chapter.⁶⁵ In 2004, anthropologist Maya Rosenfeld succinctly characterised the Israeli occupation as a

control system [which] has rested on five ‘institutionalized pillars’: (1) concentration of all authority, legislative, executive, and judiciary, in the hands of regional military commanders; (2) administration by military orders of all spheres of civilian affairs [...]; (3) prohibition of Palestinian political-social institutions and activities; (4) full control over Palestinian land and water resources, including ongoing land confiscation (especially after 1977), the establishment of numerous civilian Jewish settlements and dozens of military bases, and the construction of a vast road infrastructure; and (5) the restructuring of the judicial system so as to invest military courts with overriding jurisdictional power that practically dispensed with the authority of preexisting civil courts.⁶⁶

⁵⁹ B’TSELEM, CAUTION: CHILDREN AHEAD – THE ILLEGAL BEHAVIOR OF THE POLICE TOWARD MINORS IN SILWAN SUSPECTED OF STONE THROWING 6 (2010), available at http://www.btselem.org/Download/201012_Caution_Children_Ahead_Eng.pdf; B’Tselem, *Legal Status of East Jerusalem and its Residents* (last visited: July 15, 2011), available at http://www.btselem.org/jerusalem/legal_status.

⁶⁰ See, e.g., DCI – PALESTINE AND SAVE THE CHILDREN – SWEDEN, *supra* note 32, at 55-56. However, according to DCI – Palestine, Palestinian children resident in East Jerusalem can be tried in the military courts in accordance with Israeli military law, depending on where they are alleged to have committed the offence. DCI – PALESTINE, *supra* note 32, at 8.

⁶¹ ACRI, VIOLATIONS OF THE “YOUTH LAW (ADJUDICATION, PUNISHMENT AND METHODS OF TREATMENT) – 1971” BY THE ISRAELI POLICE IN EAST JERUSALEM (2011), available at http://reliefweb.int/sites/reliefweb.int/files/resources/Full_Report_1007.pdf.

⁶² B’TSELEM, *supra* note 59; DCI – PALESTINE, *supra* note 44, at 42-44.

⁶³ Alongside these courts, and the Palestinian Authority courts in the West Bank, there is an informal and mostly tribal Palestinian justice system. On this informal system of law see Milhem and Salem, *supra* note 56, at 263-264.

⁶⁴ For further details see ENCYCLOPEDIA OF THE ISRAELI-PALESTINIAN CONFLICT, *supra* note 7, at 715-716.

⁶⁵ On the Israeli-Palestinian conflict in general see, e.g., ENCYCLOPEDIA OF THE ISRAELI-PALESTINIAN CONFLICT, *supra* note 7; BARUCH KIMMERLING, CLASH OF IDENTITIES: EXPLORATIONS IN ISRAELI AND PALESTINIAN SOCIETIES (Columbia University Press, New York and Chichester, 2008).

⁶⁶ MAYA ROSENFELD, CONFRONTING THE OCCUPATION: WORK, EDUCATION, AND POLITICAL ACTIVISM OF PALESTINIAN FAMILIES IN A REFUGEE CAMP 8-9 (Stanford University Press, Stanford, 2004). See also *id.*, at 33-42.

Israel's "disengagement" from the Gaza Strip in 2005 might have made these characteristics less applicable to this territory. At the same time, despite its formal pullout from the Gaza Strip, Israel has retained significant control over this territory, including control over the entrance of goods into it; over export from it; over travel into and out of it (including travel to and from the West Bank); over access to and from it by sea and air; and over fishing – the largest industry there – which Israel limits to three miles from the shore. This has led many to conclude that the Israeli occupation of the Gaza Strip has not terminated,⁶⁷ or at least that the current legal status of this territory is unclear.⁶⁸ Additionally, Israeli armed forces have occasionally arrested Gazan Palestinians (during the previously mentioned incursions), interrogated and tried them.⁶⁹

1.(d).2. *The Israeli law in force in the OPT*

As mentioned above, Israel has operated two separate legal systems concurrently in the OPT, effectively dividing the population there along ethnic lines.⁷⁰ On the one hand, the previously mentioned military court system was established in 1967,⁷¹ in which Palestinians in conflict with the military orders are brought to trial.⁷² Over the years, the Israeli military courts have been given the authority to try Palestinians for all sorts of offences – even those considered unrelated to

⁶⁷ Kathleen Cavanaugh, *The Israeli Military Court System in the West Bank and Gaza*, 12 JOURNAL OF CONFLICT & SECURITY LAW 197, 199 footnote 6 (2007); Shane Darcy and John Reynolds, *An Enduring Occupation: The Status of the Gaza Strip from the Perspective of International Law*, 15 JOURNAL OF CONFLICT AND SECURITY LAW 211 (2010); Mustafa Mari, *The Israeli Disengagement from the Gaza Strip: An End of the Occupation?*, 8 YEARBOOK OF INTERNATIONAL HUMANITARIAN LAW 356 (2005); Nicholas Stephanopoulos, *Israel's Legal Obligations to Gaza after the Pullout*, 31 YALE JOURNAL OF INTERNATIONAL LAW 524, 525-527 (2006).

⁶⁸ Susan Power, *War, Invasion, Occupation – A Problem of Status on the Gaza Strip*, 12 TRINITY COLLEGE LAW REVIEW 25 (2009); Shany, *supra* note 57, at 76-77.

⁶⁹ DCI – PALESTINE AND SAVE THE CHILDREN – SWEDEN, *supra* note 32, at 63. I do not have data on the exact frequency of such arrests. These Gazan Palestinians are tried in Israeli civil courts (as opposed to the military courts in which Israel tries West Bank Palestinians). Cavanaugh, *supra* note 67, at 199; DCI – PALESTINE, *supra* note 32, at 8. Alternatively, Gazan Palestinian can be held in administrative detention without trial. *Infra* notes 401-403.

⁷⁰ Ben-Naftali, Gross and Michaeli, *supra* note 21, at 584; Ardi Imseis, *On the Fourth Geneva Convention and the Occupied Palestinian Territory*, 44 HARVARD INTERNATIONAL LAW JOURNAL 65, 106 (2003).

⁷¹ Some have argued that the military government of the OPT originated in the experience of the military rule over Palestinian citizens of Israel, which existed until 1966. See, e.g., Cohen, *supra* note 34, at 39-43.

⁷² There have nonetheless been notable exceptions, when Palestinians from the OPT were tried in Israeli civil courts. Cavanaugh, *supra* note 67, at 199-200; HAJJAR, *supra* note 21, at 234; CrimC 4506/08 *Ajaj v. the State of Israel* [2008] (Jerusalem Dist. Ct.).

security (such as traffic violations).⁷³ These courts also retain jurisdiction over offenses committed in territories under the Palestinian Authority's control.⁷⁴

On the other hand, Israeli settlers in the OPT have been extra-territorially placed under domestic Israeli law,⁷⁵ and are tried in civil courts.⁷⁶ Accordingly, whereas Palestinians in violation of Israeli (military) law are prosecuted by the Israeli military prosecution, Israeli settlers who violate the (domestic) law are prosecuted by the State Attorney.⁷⁷

Notwithstanding some similarities between these two legal systems – including some rules of procedure and evidence⁷⁸ – their overall disparity is considerable,⁷⁹ resulting in Israelis being granted a substantially broader array of rights than Palestinians in the OPT.⁸⁰ Additionally, HROs, Israeli military personnel, and others have reported poor standards of law enforcement on settlers who harm Palestinians.⁸¹

In 1989, a military court of appeals was established, which hears appeals against the judgments of the first instance military courts.⁸² The Israeli High Court of Justice has been

⁷³ HAJJAR, *supra* note 21, at 255; Weill, *supra* note 26, at 405-406. According to information provided by the Israeli military, more than a third of indictments against Palestinians in the OPT between 2002-2006 were for traffic violations, five percent were for murder or attempted murder, and another five percent were for other "classic" criminal offences such as theft, robbery, and trading in stolen property. YESH DIN, *supra* note 26, at 42-44.

⁷⁴ ORDER NO. 1651 CONCERNING SECURITY PROVISIONS (INTEGRATED VERSION) (JUDEA AND SAMARIA) (2009), available at http://www.law.idf.il/SIP_STORAGE/files/5/685.pdf, arts. 10(d)-10(e); MilC 2016/07 Issa v. The Military Prosecutor [2007] (Mil. Ct. App.); MilC 3924/06 Sa'adi v. The Military Prosecutor [2006] (Mil. Ct. App.). For discussion see Weill, *supra* note 26, at 407-409.

⁷⁵ Ben-Naftali, Gross and Michaeli, *supra* note 21, at 584; HAJJAR, *supra* note 21, at 58-59; SHEHADEH, *supra* note 22, at 24-25; Raja Shehadeh, *The Legislative Stages of the Israeli Military Occupation*, in *THE LAW AND THE LAND* 103 (Raja Shehadeh ed., Palestinian Academic Society for the Study of International Affairs, Jerusalem, 1993).

⁷⁶ In principle the military courts are authorised to try Israeli settlers, but in practice settlers are almost always tried in the civil courts. HAJJAR, *supra* note 21, at 5, 58-59, 81, 255; AMNON STRASHNOV, *JUSTICE UNDER FIRE* 39-40 (Yedioth Ahronoth, Tel Aviv, 1994) (Hebrew); ZERTAL AND ELDAR, *supra* note 23, at 372-373. See also Zvi Hadar, *The Military Courts*, in *MILITARY GOVERNMENT IN THE TERRITORIES ADMINISTERED BY ISRAEL – 1967-1980: THE LEGAL ASPECTS – VOLUME I* at 171, 194 (Meir Shamgar ed., The Hebrew University, Jerusalem, 1982); YESH DIN, *supra* note 26, at 57-59.

⁷⁷ STRASHNOV, *supra* note 76, at 40-41.

⁷⁸ Benichou, *supra* note 26, at 300-304; HAJJAR, *supra* note 21, at 225.

⁷⁹ Benichou, *supra* note 26, at 306-308, 328; HAJJAR, *supra* note 21, at 4-5, 58-61, 80-81; Sudha Setty, *Comparative Perspectives on Specialized Trials for Terrorism*, 63 *MAINE LAW REVIEW* 131, 158-161 (2011).

⁸⁰ See, e.g., HAJJAR, *supra* note 21, at 58-61; ZERTAL AND ELDAR, *supra* note 23, at 373, 380.

⁸¹ See, e.g., *ENCYCLOPEDIA OF THE ISRAELI-PALESTINIAN CONFLICT*, *supra* note 7, at 1353; STRASHNOV, *supra* note 76, at 40-41; YESH DIN, *A SEMBLANCE OF LAW: LAW ENFORCEMENT UPON ISRAELI CIVILIANS IN THE WEST BANK* (2006), available at <http://www.yesh-din.org/userfiles/file/Reports-English/SemblanceofLawfullreportEng.pdf>. Notwithstanding this, and for reasons I shall not speculate on, the rate of police investigation files opened against Israeli settlers in the OPT is 22 percent higher than within Israel proper. Nadav Shragai, *The Fertility Rate in Judea and Samaria – 3 Times Higher than the Rest of the Country*, HAARETZ (December 15, 2008) (Hebrew), available at <http://www.haaretz.co.il/hasite/spages/1046752.html>.

⁸² Benichou, *supra* note 26, at 296; YESH DIN, *supra* note 26, at 37-38.

authorised to review the military's legislative and administrative activities in the OPT, but tends to be deferential to the military's decisions.⁸³

The military court judges are Israeli military officers, and they sit in three-judge or single-judge panels.⁸⁴ Until the early 2000s, two judges in the three-judge panels would have no legal training whatsoever, but now all military judges are lawyers.⁸⁵ The prosecutors in these courts are Israeli soldiers – either officers or not – with a Bachelor's degree in law.⁸⁶ Palestinian defendants may avail themselves of Israeli or Palestinian defence attorneys;⁸⁷ the courts are required by law to appoint an attorney for defendants who are charged with an offence for which the maximum sentence is 10 years or more, and who have not chosen an attorney for themselves (subject to the defendants' consent).⁸⁸

Although the Palestinian defendants speak Arabic, proceedings are conducted in Hebrew. Most investigation material, the indictments, the judgments, and almost all case material – are also in Hebrew.⁸⁹ The court employs interpreters during the hearings,⁹⁰ but part of their function is also to ensure the order and proper conduct of the proceedings.⁹¹ The interpreters are Israeli soldiers,

⁸³ EYAL BENVENISTI, *THE INTERNATIONAL LAW OF OCCUPATION* 120 (Princeton University Press, Princeton, 2004); Cohen, *supra* note 34, at 56-58, 62-63, 68-70; Aeyal M. Gross, *Human Proportions: Are Human Rights the Emperor's New Clothes of the International Law of Occupation?*, 18 *EUROPEAN JOURNAL OF INTERNATIONAL LAW* 1 (2007); HAJJAR, *supra* note 21, at 256-258; Guy Harpaz and Yuval Shany, *The Israeli Supreme Court and the Incremental Expansion of the Scope of Discretion under Belligerent Occupation Law*, 43 *ISRAEL LAW REVIEW* (forthcoming), draft available at <http://law.huji.ac.il/upload/Shany.Harpaz.pdf>; Ardi Imseis, "Moderate" Torture on Trial: Critical Reflections on the Israeli Supreme Court Judgement Concerning the Legality of the General Security Service Interrogation Methods, 5 *INTERNATIONAL JOURNAL OF HUMAN RIGHTS* 71 (2001); DAVID KRETZMER, *THE OCCUPATION OF JUSTICE: THE SUPREME COURT OF ISRAEL AND THE OCCUPIED TERRITORIES* (State University of New York Press, Albany NY, 2002); Setty, *supra* note 79, at 161; ZERTAL AND ELDAR, *supra* note 23, at 340-341.

⁸⁴ First instance court proceedings are heard by either sort of panels; appeals court hearings are generally heard by a three-judge panel, except for extension-of-detention hearings (which a single judge hears). Cases can be transferred from a single judge to three judges and vice versa. The main difference between these two panels is that a court sitting as a single judge cannot impose prison sentences of more than 10 years. ORDER NO. 1651, *supra* note 74, arts. 15, 17-19.

⁸⁵ Benichou, *supra* note 26, at 305-306; YESH DIN, *supra* note 26, at 50-51. A single-judge panel, however, would be a lawyer. In practice, the change took place in 2001, but only in 2004 it was anchored in the military legislation. *Id.* See also Eyal Rozin, *The Silent Revolution in the Courts in the Occupied Territories*, 48 *HA-PRAKLIT [THE ATTORNEY]* 58 (2004) (Hebrew).

⁸⁶ For further information on the military prosecutors see HAJJAR, *supra* note 21, at 11, 96-97, 118-119, 222, 254; YESH DIN, *supra* note 26, at 51-53.

⁸⁷ ORDER NO. 1651, *supra* note 74, arts. 74, 76. Several years ago, HRO *Yesh Din* estimated the number of defence attorneys regularly appearing before the military courts to be "a few dozen", YESH DIN, *supra* note 26, at 56. On defence attorneys' views of the military court system see HAJJAR, *supra* note 21, at 11, 92, 232.

⁸⁸ ORDER NO. 1651, *supra* note 74, art. 77(a). Other provisions concerning defence attorneys can be found *id.*, arts. 51, 52(f), 75, 77(b)-85. On the appointment of defence attorneys for minors see *infra* text accompanying note 360.

⁸⁹ For a discussion of this matter see YESH DIN, *supra* note 26, at 15-18, 116. Defendants may sometimes write their confession or statement in Arabic, upon the interrogators' suggestion. *Id.*, at 116.

⁹⁰ ORDER NO. 1651, *supra* note 74, art. 161.

⁹¹ HAJJAR, *supra* note 21, at 133, 135-137; Shira L. Lipkin, *Norms and Ethics Among Military Court Interpreters: the Unique Case of the Judea Court* 81-86 (Master's thesis, Department of Translation and Interpreting Studies – Bar-Ilan University, Ramat-Gan Israel, 2006) (Hebrew); YESH DIN, *supra* note 26,

mostly Druze,⁹² with no professional training in translation or law prior to their enlistment, and whose training after the enlistment is often partial and unsystematic.⁹³

A noteworthy characteristic of the Israeli military courts is their relatively quick proceedings.⁹⁴ HRO *Yesh Din* conducted observations of detention hearings in the military courts between 2006 and 2007, and found the average length of hearings to be three minutes and four seconds for extension of detention for the purpose of interrogation (prior to filing an indictment); a minute and 54 seconds for authorising continued remand until completion of trial; and three minutes and 20 seconds for detention hearings concerning minors.⁹⁵ Full evidentiary trials – in which witnesses give testimony, evidence is examined, and closing arguments are made – rarely take place in the military courts,⁹⁶ possibly due to the prevalence of plea bargaining (although the exact plea bargain rate is in dispute).⁹⁷

2. LITERATURE ANALYSIS

Let us now discuss the relationship between this study and the existing legal scholarship on two topics: childhood and the OPT. Rather than merely providing a literature review, this section will critically analyse the coverage of the existing literature in relation to this project.

2.(a). *This study in the context of the existing legal literature on childhood*

The existing child-centred legal scholarship can be crudely divided into two (partly overlapping) bodies of literature. The first corpus of writing employs a rights-based approach to child-related

at 147-148. For further discussion of Druze interpreters' perspectives and position see HAJJAR, *supra* note 21, at 132-153.

⁹² The Druze are a religious community which emerged from Islamism in the 11th century. In Israel, their native tongue is Arabic, and they learn Hebrew in elementary and high school. KAIS M. FIRRO, *THE DRUZES IN THE JEWISH STATE: A BRIEF HISTORY* (Brill, Leiden, 1999); YESH DIN, *supra* note 26, at 145. Unlike most Israeli Arabs, Israeli Druze are usually conscripted. Liav Orgad, *The Israeli Arab Minority and the Exemption from Military Service*, 19 HA-MISHPAT [THE LAW] 26 (2005) (Hebrew).

⁹³ Lipkin, *supra* note 91, at 63-72, 88-91; YESH DIN, *supra* note 26, at 146-147.

⁹⁴ HAJJAR, *supra* note 21, at 93.

⁹⁵ YESH DIN, *supra* note 26, at 13, 160. See also NO LEGAL FRONTIERS, *supra* note 26, at 27-28.

⁹⁶ For example, in 2010, of over 9,500 military court cases only 82 (0.86%) included evidentiary trials. B'Tselem, *13 Dec. '11: Military court partially acquits Palestinian due to forced confession* (2011), available at http://www.btselem.org/torture/20111213_hamidah_verdict. See also B'TSELEM, NO MINOR MATTER: VIOLATION OF THE RIGHTS OF PALESTINIAN MINORS ARRESTED BY ISRAEL ON SUSPICION OF STONE-THROWING 52-53, 55 (2011), available at http://www.btselem.org/download/201107_no_minor_matter_eng.pdf; HAJJAR, *supra* note 21, at 93; YESH DIN, *supra* note 26, at 136.

⁹⁷ YESH DIN, *supra* note 26, at 28, 136-137. On plea bargains in the military court system and the reasons for their prevalence see also B'TSELEM, *supra* note 96, at 55-57; HAJJAR, *supra* note 21, at 3, 83, 218-219, 220-226, 234; YESH DIN, *supra* note 26, at 138-141.

issues, including juvenile justice issues (in Israel/Palestine⁹⁸ and elsewhere⁹⁹) and other legal contexts relevant to this study (again, in Israel/Palestine¹⁰⁰ and elsewhere¹⁰¹). This literature is committed to establishing, prescribing, and protecting children's rights, and is dominated by themes such as children's autonomy and participation rights, or the relationship between children's rights and parental rights.¹⁰² The present study uses this extensive literature mainly as a source of information on international and domestic child law.

The second body of writing can be crudely classified as "socio-legal" child-centred scholarship. For the most part, this literature too is policy-oriented, but legal policy issues are often more implicit and placed within broader social discussions. Thus, among other things, this literature examines children's encounter with the law from comparative¹⁰³ and historical¹⁰⁴ perspectives, and explains the social ramifications of that encounter. Examples of predominant themes in this scholarship are discrimination between different populations of children (for example, on the basis

⁹⁸ See, e.g., Christina Clark, *Juvenile Justice and Child Soldiers: Trends, Challenges, Dilemmas*, in PROTECTION OF CHILDREN DURING ARMED CONFLICT: A MULTIDISCIPLINARY PERSPECTIVE 311 (Charles W. Greenbaum et al. eds., Intersentia, Antwerp and Oxford, 2006); Philip Veerman and Adir Waldman, *When can children and adolescents be detained separately from adults?: The case of Palestinian children deprived of their liberty in Israeli Military jails and prisons*, 4 INTERNATIONAL JOURNAL OF CHILDREN'S RIGHTS 147 (1996).

⁹⁹ See, e.g., CLAYTON A. HARTJEN, *YOUTH, CRIME, AND JUSTICE: A GLOBAL INQUIRY* (Rutgers University Press, Piscataway, 2008); INTERNATIONAL HANDBOOK ON JUVENILE JUSTICE (Donald J. Shoemaker ed., Greenwood Press, Westport CT, 1996); JUVENILE JUSTICE SYSTEMS: INTERNATIONAL PERSPECTIVES (John Winterdyk ed., 2nd ed., Canadian Scholars' Press, Toronto, 2002); Charles Mayr, *Little Girls Lost: Can the International Community Protect Child Soldiers?*, 29 UNIVERSITY OF LA VERNE LAW REVIEW 219 (2008).

¹⁰⁰ See, e.g., Tamar Morag, *The Case Law Following the Ratification of the U.N. Convention on the Rights of the Child – A New Era?*, 22 HA-MISHPAT [LAW] 22 (2006) (Hebrew); Tamar Morag, *The Effect of the Commission for Examination of the Basic Principles Concerning the Child and the Law on the Israeli Case Law's Underlying Conceptions*, 3 MISHPAHA BA-MISHPAT [FAMILY IN LAW] 68 (2010) (Hebrew); Sait, *supra* note 19.

¹⁰¹ See, e.g., CLAIRE BREEN, *AGE DISCRIMINATION AND CHILDREN'S RIGHTS: ENSURING EQUALITY AND ACKNOWLEDGING DIFFERENCE* (Martinus Nijhoff, Leiden, 2005); TREVOR BUCK ET AL., *INTERNATIONAL CHILD LAW* (2nd ed., Routledge, Abingdon and New York, 2011); JENNY KUPER, *INTERNATIONAL LAW CONCERNING CHILD CIVILIANS IN ARMED CONFLICT* (Oxford University Press, Oxford, 1997); REVISITING CHILDREN'S RIGHTS: 10 YEARS OF THE UN CONVENTION ON THE RIGHTS OF THE CHILD (Deirdre Fotrell ed., Kluwer Law International, London and Boston, 2000).

¹⁰² Didier Reynert et al., *A Review of Children's Rights Literature Since the Adoption of the United Nations Convention on the Rights of the Child*, 16 CHILDHOOD 518, 520-526 (2009) (reviewing literature on the UN Convention on the Rights of the Child).

¹⁰³ See, e.g., Barry Goldson and John Muncie, *Towards a global 'child friendly' juvenile justice?*, 40 INTERNATIONAL JOURNAL OF LAW, CRIME AND JUSTICE 47 (2012); John Muncie, *The Punitive Turn in Juvenile Justice: Cultures of Control and Rights Compliance in Western Europe and the USA*, 8 YOUTH JUSTICE 107 (2008); John Muncie and Barry Goldson, *States of Transition: Convergence and Diversity in International Youth Justice*, in COMPARATIVE YOUTH JUSTICE: CRITICAL ISSUES 196 (John Muncie and Barry Goldson eds., Sage, Los Angeles and London, 2006).

¹⁰⁴ See, e.g., Mimi Ajzenstadt, *Constructing Juvenile Delinquency: The Socio-Legal Control of Young Offenders in Israel, 1920-1975*, in CONSTRUCTING SOCIAL WORK PRACTICES 193 (Arja Jokinen, Kirsu Juhila and Tarja Pösö eds., Ashgate Publishing, Hampshire, 1999); Mimi Ajzenstadt, *The Construction of Juvenile Delinquency in Light of the Definition of 'Normalcy': 1922-1944*, 41 MEGAMOT 71 (2001) (Hebrew); Margaret May, *Innocence and experience: the evolution of the concept of juvenile delinquency in the mid-nineteenth century*, in YOUTH JUSTICE: CRITICAL READINGS 98 (John Muncie et al eds., Sage, London and Thousand Oaks CA, 2002); Satadru Sen, *A Separate Punishment: Juvenile Offenders in Colonial India*, 63 JOURNAL OF ASIAN STUDIES 81 (2004).

of gender,¹⁰⁵ race,¹⁰⁶ and ethnicity¹⁰⁷), and the global children's rights "industry".¹⁰⁸ This study draws upon the valuable insights of this literature.

Jurist Annette Appell recently described both of these sub-groups of the existing literature on child-related issues thus:

child-centered jurisprudence has assumed a natural childhood, even while calling for the law to apply [...] with nuance to children. [...] the child at the center of this jurisprudence is a developmental being in need of protection and education during a legally-defined period of childhood. [...] This is not to say that there is no critical [...] literature about children and the law. [...] However, [...] most of this very important [...] work [...] has not taken on, in a systematic way, [...] questions about why and how the law creates and defines childhood [...]. Instead, thus far child-centered jurisprudence, as vital and important as it is, confines itself primarily to legalistic or individualizing approaches to rights, agency, and representation.¹⁰⁹

In contrast, this study – in addition to not being policy-oriented – takes as its starting point that the law, rather than simply regulating a "pre-existing" child, is heavily implicated in the production of the category "child" (as a few jurists have noted).¹¹⁰ This research thus adopts a constructivist¹¹¹ view of childhood, which, as sociologists Allison James, Chris Jenks, and Alan Prout explain,

rejects any idea that childhood rests on some pre-given essential nature and contends that notions of childhood, indeed the very term and concept itself, are a way of looking, a category of thought, a representation. The idea of childhood, in this view, came into being through discourses that created their

¹⁰⁵ See, e.g., Bridgeman and Monk, *supra* note 3; Loraine Gelsthorpe and Anne Worrall, *Looking for Trouble: A Recent History of Girls, Young Women and Youth Justice*, 9 YOUTH JUSTICE 209 (2009); Nura Taefi, *The Synthesis of Age and Gender: Intersectionality, International Human Rights Law and the Marginalisation of the Girl-Child*, 17 INTERNATIONAL JOURNAL OF CHILDREN'S RIGHTS 345 (2009).

¹⁰⁶ See, e.g., George S. Bridges and Sara Steen, *Racial Disparities in Official Assessments of Juvenile Offenders: Attributional Stereotypes as Mediating Mechanisms*, 63 AMERICAN SOCIOLOGICAL REVIEW 554 (1998); BARRY C. FELD, *BAD KIDS: RACE AND THE TRANSFORMATION OF THE JUVENILE COURT* (Oxford University Press, New York and Oxford, 1999).

¹⁰⁷ See, e.g., Yael Hassin, *Juvenile Delinquency in Israel 1948-1977: Patterns and Trends*, 9 RESEARCH IN LAW, DEVIANCE AND SOCIAL CONTROL 25 (Steven Spitzer and Andrew T. Scull eds., JAI Press, Greenwich CT, 1983); Yael Hassin, *Minority Juvenile Delinquents in the State of Israel and the Social Reaction to Their Delinquency*, 17 HEVRA U-REVAHA (SOCIETY AND WELFARE) 283 (1997) (Hebrew); Yael Hassin and Menachem Horovitz, *Juvenile and Adult Probation in Israel*, in CRIME AND CRIMINAL JUSTICE IN ISRAEL: ASSESSING THE KNOWLEDGE BASE TOWARDS THE TWENTY-FIRST CENTURY 315 (Robert R. Friedmann ed., State University of New York Press, Albany, 1998).

¹⁰⁸ Reynert et. al., *supra* note 102, at 526-528 (reviewing literature on the UN Convention on the Rights of the Child).

¹⁰⁹ Annette Ruth Appell, *The Pre-Political Child of Child-Centered Jurisprudence*, 46 HOUSTON LAW REVIEW 703, 724-727 (2009).

¹¹⁰ Appell, *supra* note 109, at 704-715; Bridgeman and Monk, *supra* note 3, at 4; MICHAEL KING AND CHRISTINE PIPER, *HOW THE LAW THINKS ABOUT CHILDREN* 1, 63-81 (2nd ed., Ashgate, Aldershot, 1995).

¹¹¹ "Constructivism" generally denotes the position that any knowledge of "reality" is socially constructed. IAN BUCHANAN, *A DICTIONARY OF CRITICAL THEORY* 96 (Oxford University Press, Oxford and New York, 2010).

own objects. The plural ['childhoods'] is important here because it is also held that childhood can be constructed in diverse and shifting ways.¹¹²

More broadly, this study is influenced by poststructuralism – a loosely applied term denoting a critical theoretical movement characterised by skepticism toward any form of completeness of knowledge or understanding. Underlying poststructuralist thinking is the assumption that no concept or thing is ever fully what it is thought to be.¹¹³

The value of this non-essentialist¹¹⁴ approach is that, rather than taking for granted (and thereby reproducing) dominant, often unequivocal, conceptions about the “true” nature of the subjects of our inquiry – law, childhood, or the Israeli-Palestinian situation – it acknowledges, and is attentive to, the complexity, fluidity, and often self-contradictory character of these subjects.

It is worth clarifying that the flexible, varied, socially constructed, nature of childhood does not mean that the physical characteristics of those whom society classifies as “children” are unimportant. On the contrary: children’s (material) bodies are certainly among the factors that determine the diverse possible constructions of childhood. Nonetheless, the human body is in itself socially constructed; for example, as childhood came to be thought of as distinct from adulthood, so did children’s bodies come to be *conceptualised as* different from adult ones.¹¹⁵

While Appell’s above description may apply to most existing child-centred legal literature, there is nevertheless some valuable scholarly work on the legal construction and conceptualisation of childhood. These studies, however, are scarce, mostly short, and/or tend to focus more on policy-related issues than on broader theoretical questions.¹¹⁶ Furthermore, much of this literature holds essentialist¹¹⁷ (and developmentalist¹¹⁸) conceptions of childhood, as criticised by Appell above.¹¹⁹

¹¹² JAMES, JENKS AND PROUT, *supra* note 2, at 139-140. See also ARCHARD, *supra* note 2, at 25-27; Bridgeman and Monk, *supra* note 3, at 3-4. The roots of this view are often traced to PHILIPPE ARIÈS, *CENTURIES OF CHILDHOOD* (Vintage Books, New York, 1962). Although not the first to approach childhood as a human artifact, Ariès is in many ways considered the “father” of childhood studies, due to his radical assertion that childhood is an invention of modernity. JAMES, JENKS AND PROUT, *supra* note 2, at 4, 27.

¹¹³ BUCHANAN, *supra* note 111, at 381.

¹¹⁴ Crudely defined, essentialism is the belief that things have distinct properties that are essential to them. For example, some essentialist notions of gender assume sexual differences to be essential differences between men and women. BUCHANAN, *supra* note 111, at 154.

¹¹⁵ JAMES, JENKS AND PROUT, *supra* note 2, at 147, 150-151. See also ALLISON JAMES AND ADRIAN JAMES, *KEY CONCEPTS IN CHILDHOOD STUDIES* 39 (Sage, Los Angeles and London, 2008); Alan Prout and Allison James, *A New Paradigm for the Sociology of Childhood? Provenance, Promise and Problems*, in *CONTEMPORARY ISSUES IN THE SOCIOLOGICAL STUDY OF CHILDHOOD* 7, 25-26 (Allison James and Alan Prout eds., Routledge Falmer, London and New York, 1997).

¹¹⁶ See, e.g., Bridgeman and Monk, *supra* note 3, at 2-6; Julia Fionda, *Legal Concepts of Childhood: An Introduction*, in *LEGAL CONCEPTS OF CHILDHOOD* 3 (Julia Fionda ed., Hart Publishing, Oxford and Portland, 2001); KUPER, *supra* note 101, at 10-18; Elizabeth S. Scott, *The Legal Construction of Childhood*, in *A CENTURY OF JUVENILE JUSTICE* (Margaret K. Rosenheim ed., University of Chicago Press, Chicago, 2002).

¹¹⁷ On essentialism see *supra* note 114.

¹¹⁸ See, e.g., Scott, *supra* note 116, at 113-114 (“American [...] policymakers have no clear image of adolescence. Generally they ignore this developmental stage, classifying adolescents legally either as

There are a few exceptional, more comprehensive, and non-essentialist studies of law and childhood. For example, Michael King and Christine Piper's *How the Law Thinks About Children* has made a significant contribution to legal scholarship, by presenting "the child" as a legally constructed semantic artifact.¹²⁰ However, this work not only benefits from, but is also limited by, its theoretical framework: Teubner's (adaptation of Luhmann's) version of social systems theory.¹²¹ On the one hand, there is great merit in King and Piper's constructivist orientation, which pays due attention to legal discourse, recognises that "truth" and "reality" are discursively constructed rather than absolute, and rejects conventional causal explanations.¹²² On the other hand, Teubner's structuralist¹²³ depiction of law as a relatively distinct and autonomous system; his denial of overlap between the operation of psychological and social processes; and his under-playing of anything outside social discourse (e.g., the material world and non-verbal practices)¹²⁴ – misrepresent social life, which is much more complex (and ambiguous) than he portrays it to be. This dissertation, as part of its previously discussed poststructuralist orientation,¹²⁵ rejects structuralist views of this sort.¹²⁶

Another noteworthy example is legal philosopher David Archard's work on law and childhood. Drawing on philosophical, historical, and other literature, Archard argues that childhood is a social construct, examines the main characteristic of the modern conception of childhood, and provides an extensive and sophisticated theoretical discussion of children's rights and legal status.¹²⁷

Following works such as Archard's, and in an attempt to further advance legal scholarship on childhood, this study draws upon sociological,¹²⁸ anthropological,¹²⁹ historical,¹³⁰ geographical¹³¹ and other¹³² studies of childhood. Specific chapters of the dissertation make use of additional bodies of literature: Chapter 3 draws upon sociological and other writing on age;¹³³ Chapter 4 utilises

children or as adults"). See also *id.*, at 118. For more on developmentalist conceptions of childhood see *infra* notes 467-471 and accompanying text.

¹¹⁹ *Supra* text accompanying note 109.

¹²⁰ KING AND PIPER, *supra* note 110, at 1, 27, 63-81.

¹²¹ For their account of this theoretical framework see *id.*, at 24-37.

¹²² *Id.*, at 23-24, 66.

¹²³ "Structuralism" generally denotes the belief that human creations are interrelated, and that these interrelations constitute a larger "system" or "structure". BUCHANAN, *supra* note 111, at 452-454.

¹²⁴ For a sympathetic discussion of these aspects of Teubner and Luhmann's writing see KING AND PIPER, *supra* note 110, at 25-30.

¹²⁵ *Supra* text accompanying note 113. See also *supra* note 49.

¹²⁶ On the alternative approach of this study in relation to each of these views see *infra* notes 175-180 and 773 and accompanying text.

¹²⁷ ARCHARD, *supra* note 2.

¹²⁸ See, e.g., *supra* sources mentioned notes 1, 4, and 115.

¹²⁹ See, e.g., *infra* sources mentioned notes 545, 629, and 712.

¹³⁰ See, e.g., *infra* sources mentioned notes 741-747 and 1003-1007.

¹³¹ See, e.g., *supra* sources mentioned note 48 and *infra* sources mentioned notes 600 and 847.

¹³² See, e.g., *infra* sources mentioned notes 467, 598, and 1038.

¹³³ See, e.g., *infra* sources mentioned notes 434, 469, and 579.

theoretical work on space,¹³⁴ and on space and law,¹³⁵ and Chapter 5 uses trauma studies,¹³⁶ visual studies,¹³⁷ and writing on the relationship between trauma, representation and law.¹³⁸ On the basis of this cross-disciplinary and multi-thematic literature, this study endeavours to produce a rich analysis of the multi-faceted issues concerning law and childhood.

Existing child-centred legal scholarship has almost entirely overlooked the above important themes – spatiality, representation (in its non-legal sense), trauma, and even age.¹³⁹ Consequently, this scholarship currently holds a very partial conception of childhood. By exploring these themes in depth, this study aims to broaden the scope of questions that can be asked, and frontiers that can be explored, in relation to law and childhood.

Another characteristic of the existing child-centred legal (and “extra-legal”) literature is its tendency to equate, often unconsciously, childhood with children.¹⁴⁰ “Childhood” is a broad category that, beyond being socially applied to individuals classified as “children”, also denotes particular temporal and spatial boundaries, connotes behaviours or personality characteristics, evokes certain emotions and moral judgements,¹⁴¹ and can be associated with certain modes of social control.¹⁴² Even seemingly non-essentialist works, such as Archard’s or King and Piper’s, focus entirely on discourses concerning “children” (rather than “childhood” more broadly). This study challenges this prevalent (and essentialist) equation of “childhood” with “children”, by exploring some circumstances in which it is not “children”, but rather “adults”,¹⁴³ or even the law itself,¹⁴⁴ that are characterised as children.

Finally, another contribution the present study hopes to make to the existing literature lies in its contextualised and empirically rich nature. The (scarce) theoretically informed scholarship on the legal construction and conceptualisation of childhood acknowledges, in principle, that childhood is constructed differently in different contexts, and yet, this literature tends to make broad

¹³⁴ See, e.g., *infra* sources mentioned notes 605, 714, and 1024.

¹³⁵ See, e.g., *infra* sources mentioned notes 603 and 1044-1045.

¹³⁶ See, e.g., *infra* sources mentioned notes 774-775 and 912.

¹³⁷ See, e.g., *infra* sources mentioned notes 770, 777, and 783.

¹³⁸ See, e.g., *infra* sources mentioned notes 771, 781, and 788.

¹³⁹ See, e.g., ARCHARD, *supra* note 2, at 8, 24. On the relative scholarly neglect of age, as compared with other social categories, see *infra* note 602 and accompanying text. On the importance of these themes see *infra* notes 430-433 and accompanying text (regarding age); *infra* notes 736-738 and accompanying text (regarding spatiality); and *infra* notes 775-777 and accompanying text (regarding trauma and representation).

¹⁴⁰ See, e.g., Fionda, *supra* note 116, at 5 (“An identification of legal concepts of *childhood* can offer many insights into our treatment of *children*”) (emphases added).

¹⁴¹ For some discussion of the difference between “childhood” and “children” see Daniel Thomas Cook, *Introduction: Interrogating Symbolic Childhood*, in *SYMBOLIC CHILDHOOD* 1, 2-4, 7 (Daniel Thomas Cook ed., Peter Lang Publishing, New York and Oxford, 2002); JENKS, *supra* note 3, at 61.

¹⁴² See, e.g., MICHEL FOUCAULT, *MADNESS AND CIVILIZATION* 239 (Routledge, Abingdon, 1989) (“Madness is childhood. Everything in the Retreat is organized so that the insane are transformed into minors. They are regarded as ‘children who have an overabundance of strength and make use of it.’”). Discussed in JENKS, *supra* note 3, at 144-145.

¹⁴³ *Infra* text accompanying notes 566-571, 892-913.

¹⁴⁴ *Infra* text accompanying notes 584-585.

generalisations about the way in which the law “thinks” or “operates”.¹⁴⁵ In contrast, this study refrains from such abstract generalisations, and instead anchors any claims about law and childhood in a specific context and in abundant empirical materials.¹⁴⁶

2.(b). *This study in the context of the existing legal literature on the OPT*

Like child-centred legal literature, legal scholarship on the OPT is extensive. However, it suffers from at least three major limitations. First, legal literature on *children* in the OPT is scarce,¹⁴⁷ despite children’s great socio-political importance in this context.¹⁴⁸ The scarcity of legal literature on children in the OPT is particularly salient as compared with the abundance of “extra-legal” scholarship on this topic.¹⁴⁹ This gap of the legal literature has resulted in the topic of law and children in the OPT being examined almost entirely by HROs and the media. Socio-legal, theoretically informed, studies of the legal construction or conceptualisation of childhood in the OPT are hence virtually non-existent. *Israeli settler children* have been particularly disregarded: the few existing legal studies of children in the OPT discuss only Palestinian children.

The lack of legal writing on Israeli settler children is symptomatic of a second limitation of the existing legal literature: its neglect of Israeli settlers in the OPT, despite their major socio-political role.¹⁵⁰ While legal scholarship has addressed the legal ramifications of the Israeli settlements in the OPT,¹⁵¹ and to a limited extent the settlers’ legal status,¹⁵² almost no attention has been given to the settlers’ encounter with the Israeli legal system. This topic too has therefore been

¹⁴⁵ Cf. Reynaret et al., *supra* note 102, at 528 (characterising “children’s rights” as a decontextualised discourse, which overlooks the social and historical disparity among child-related contexts).

¹⁴⁶ For details of these empirical materials see *infra* text accompanying notes 201-242.

¹⁴⁷ Noteworthy examples include: Nadera Shalhoub-Kevorkian, *Crimes of War, Culture, and Children’s Rights: The Case of Female Palestinian Detainees under Israeli Military Occupation*, in CHILDREN’S RIGHTS AND TRADITIONAL VALUES 228 (Gillian Douglas and Leslie Sebba eds., Ashgate, Aldershot, 1998); Philip Veerman and Barbara Gross, *Implementation of the United Nations Convention on the Rights of the Child in Israel, the West Bank and Gaza*, 3 INTERNATIONAL JOURNAL OF CHILDREN’S RIGHTS 296 (1995); Philip Veerman and Hephzibah Levine, *Protecting Palestinian Intifada children: Peaceful demonstrations, child soldiers or child martyrs?*, 9 INTERNATIONAL JOURNAL OF CHILDREN’S RIGHTS 71 (2001); Veerman and Waldman, *supra* note 98.

¹⁴⁸ *Supra* note 19 and accompanying text.

¹⁴⁹ See, e.g., Barber, *supra* note 19; COLLINS, *supra* note 19; Robbie Duschinsky, *Slaughtered Innocence: child victims in political discourse during the second Intifada and Gaza conflict*, 21 SOCIAL SEMIOTICS 33 (2011); Salman Elbedour, David T. Bastien and Bruce A. Center, *Identity Formation in the Shadow of Conflict: Projective Drawings by Palestinian and Israeli Arab Children from the West Bank and Gaza*, 34 JOURNAL OF PEACE RESEARCH 217 (1997); Julia Emberley, *A Child is testifying: Testimony and the cultural construction of childhood in a trans/national frame*, 45 JOURNAL OF POSTCOLONIAL WRITING 378 (2009); Kuttub, *supra* note 19; Mark Robson, *The Baby Bomber*, 3 JOURNAL OF VISUAL CULTURE 63 (2004); ROSEN, *supra* note 19; Graham Usher, *Children of Palestine*, 32 RACE & CLASS 1 (1991); and *infra* sources mentioned notes 784-785.

¹⁵⁰ On settlers’ socio-political role see generally ZERTAL AND ELDAR, *supra* note 23.

¹⁵¹ See, e.g., Ben-Naftali, Gross and Michaeli, *supra* note 21, at 579-592, 601-605.

¹⁵² See, e.g., Tobias Kelly, “Jurisdictional Politics” in the Occupied West Bank: Territory, Community, and Economic Dependency in the Formation of Legal Subjects, 31 LAW & SOCIAL INQUIRY 39 (2006).

left to be dealt with by HROs, which have focused on law enforcement on settlers who harm Palestinians,¹⁵³ while leaving other important issues unexamined. “Extra-legal” literature on Israeli settler children in the OPT is scarce, noncomprehensive, and mostly in Hebrew.¹⁵⁴

A third, substantial, limitation of the existing legal scholarship on the OPT is its focus on international law,¹⁵⁵ and neglect of the immensely important Israeli law operating in the OPT.¹⁵⁶ To date, there has been no study (academic or other) of Israeli military court rulings, and there has been very little writing on Israeli military legislation. Literature on the military legal system is generally scarce – as several jurists have noted¹⁵⁷ – and much of this literature consists of outdated publications by Israeli military personnel.¹⁵⁸

One of the possible explanations for this state of affairs is the difficulty of accessing Israeli military legislation and court rulings, and the difficulty of obtaining clear information about the military legal system.¹⁵⁹ Among the few comprehensive HRO reports on the military legal system is a report by Israeli HRO *Yesh Din* from 2007, which remarks:

¹⁵³ *Supra* note 81.

¹⁵⁴ See, e.g., Brian J. Hall et al., *The Psychological Impact of Impending Forced Settler Disengagement in Gaza: Trauma and Posttraumatic Growth*, 21 JOURNAL OF TRAUMA STRESS 22 (2008); Hani Zubeida, Miro Michael and David Makelberg, *Kaleidoscope of Framings: The Case of “The Hills Youth”*, in GATED COMMUNITIES 219 (Amnon Lehasi ed., Nevo, Tel Aviv, 2010) (Hebrew).

¹⁵⁵ See, e.g., Ben-Naftali, Gross and Michaeli, *supra* note 21; Orna Ben-Naftali and Yuval Shany, *Living in Denial: The Application of Human Rights in the Occupied Territories*, 37 ISRAEL LAW REVIEW 17 (2003); BENVENISTI, *supra* note 83, at 203-248; Eyal Benvenisti, *The Applicability of Human Rights Conventions to Israel and to the Occupied Territories*, 26 ISRAEL LAW REVIEW 24 (1992); Darcy and Reynolds, *supra* note 67; Gross, *supra* note 83; Inseis, *supra* note 70; Mari, *supra* note 67; Power, *supra* note 68; Adam Roberts, *Prolonged Military Occupation: The Israeli-Occupied Territories since 1968*, 84 AMERICAN JOURNAL OF INTERNATIONAL LAW 44 (1990); Shany, *supra* note 57; Stephanopoulos, *supra* note 67.

¹⁵⁶ On the importance of Israeli law in the OPT see *supra* notes 21-32 and accompanying text.

¹⁵⁷ Benichou, *supra* note 26, at 294; HAJJAR, *supra* note 21, at 8, 97 endnote 3; Ron Harris, Alexandre (Sandy) Kedar, Prina Lahav and Assaf Likhovsky, *Israeli Legal History: Past and Present*, in THE HISTORY OF LAW IN A MULTICULTURAL SOCIETY: ISRAEL 1917-1967, at 1, 16 (Ron Harris et al eds., Ashgate, Dartmouth, 2002); Weill, *supra* note 26, at 396 footnote 1.

¹⁵⁸ Examples of publications written by members, or former members, of the Israeli military legal system are: MOSHE DRORI, THE LEGISLATION IN THE JUDEA AND SAMARIA REGION (The Hebrew University, Jerusalem, 1975) (Hebrew); Hadar, *supra* note 76; ISRAEL, THE ‘INTIFADA’ AND THE RULE OF LAW (David Yahav ed., Israel Ministry of Defense Publications, Tel Aviv, 1993); Meir Shamgar, *The Observance of International Law in the Administered Territories*, 17 ISRAEL YEARBOOK OF HUMAN RIGHTS 262 (1971); STRASHNOV, *supra* note 76. More recent publications of this sort are: Benichou, *supra* note 26; Tsvi Lekah and Amir Dahan, *A Conviction Rate of 99.9% in Israel: Is the Law Distorted or is Only The Statistics Distorted?*, 5 DEN U-DVARIM 185 (2010) (Hebrew); Rozin, *supra* note 85. Noteworthy studies whose authors are not staff, or former staff, of the Israeli military legal system are: Cavanaugh, *supra* note 67; HAJJAR, *supra* note 21; Lipkin, *supra* note 91; Weill, *supra* note 26. On the limitations of this literature see *infra* text accompanying notes 147-170.

¹⁵⁹ With regard to this latter issue, several HROs have described as acutely insufficient and imprecise the information the Israeli military and police have provided about their treatment of Palestinian children. See, e.g., B’TSELEM, *supra* note 96, at 17, 19 footnote 63, 51-52, 55 footnote 165, 67 footnote 198; UN 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 at para. 16 (2010), available at <http://www2.ohchr.org/english/bodies/crc/docs/CRC-C-OPAC-ISR-CO-1.pdf>.

Although [Israeli] Security Legislation stipulates that sessions in Military Courts are public, severe restrictions are imposed on those wishing to enter the courts [...]. What is more, verdicts of the Military Courts are not published. The *de facto* restrictions on the presence of the public in the Military Courts, combined with the lack of publicity of their verdicts, creates a legal system operating outside the public view and, therefore, substantially lacking public scrutiny. [...] The number of [HRO] reports issued to the public so far on the Military Courts in the OT [i.e., Occupied Territories] is [...] very small. [...] In the absence of research and regular, comprehensive review (by academics, civil society or others) [...], [t]he Military Court system, the operations of which affect the lives of tens of thousands of Palestinian suspects and defendants, has [...] acted [...] under a veil of darkness [...]. This report does not [...] study the content of the Military Court judgments [...].¹⁶⁰

Two years earlier, in 2005, sociologist of law Lisa Hajjar published her book *Courting Conflict: The Israeli Military Court System in the West Bank and Gaza*. Instead of examining (mostly inaccessible) Israeli military legislation and court rulings, Hajjar relied primarily on observations of military court hearings, and on interviews with the main players in the military courts: (retired) Israeli military court judges, Israeli military prosecutors, defence attorneys representing Palestinian defendants, former Palestinian defendants, and military court translators. Notwithstanding Hajjar's valuable insights into the Israeli military courts, the actual law to which the military courts are subject is conspicuous in its near absence from her otherwise important study, as are the rulings produced by these courts. Indeed, Hajjar herself explains:

Although Israeli authorities have claimed that military orders [i.e., military legislation] were properly promulgated and distributed in Hebrew and Arabic, IDF [the Israeli military] has never published a comprehensive compendium of orders in force in the territories. Furthermore, assessing the enforcement of this legislation has been difficult because of the scarcity of publicly available information about rulings of the military courts. [...] Only a small number of military court decisions have been published [by the military] in volumes entitled *Select Judgments of the Military Courts in the Administered Territories*.¹⁶¹

The inaccessibility of many military legal documents has had additional consequences: among other things, it has made it difficult for defence attorneys to effectively fulfil their duty,¹⁶²

¹⁶⁰ YESH DIN, *supra* note 26, at 14, 25-26 (emphasis in the original). See also *id.*, at 82-88. This year (2012), attention to the military court system has increased following the release of Israeli documentary *The Law in These Parts*, which presents rare interviews with former high-ranking members of the Israeli military legal system.

¹⁶¹ HAJJAR, *supra* note 21, at 59 (emphasis in the original). On additional hurdles Hajjar faced when trying to obtain permission to interview Israeli military officials see *id.*, at 16-17.

¹⁶² COOK, HANIEH AND KAY, *supra* note 28, at 25; HAJJAR, *supra* note 21, at 225; YESH DIN, *supra* note 26, at 17.

and (as Chapter 3 will demonstrate) has led HROs to misinterpret Palestinians' status under Israeli military law.¹⁶³

Fortunately, after laborious efforts, I have obtained updated versions of the relevant military orders (i.e., legislation), as well as copies of hundreds of military court rulings concerning Palestinian children. Detailed information on these sources and on how I obtained them will be provided later in this chapter.¹⁶⁴ By bringing such important legal sources to light for the first time, this study endeavours to substantially advance understanding of the important yet under-studied Israeli military law.

The scarcity and insufficiency of academic writing on Israeli military law required me to produce knowledge about this law almost *ex nihilo*. Israeli law schools (where I acquired my legal education) do not teach courses on the Israeli military law¹⁶⁵ – again, despite its great importance – and nothing close to a textbook exists on this law. As part of this study, great efforts therefore had to be put into exploring the fundamentals of Israeli military law, before delving into how this law constructs and conceptualises childhood.

This task has been all the more challenging since the military legislation is prone to changes.¹⁶⁶ During the past few years, the military has repeatedly amended its legislation concerning child offenders¹⁶⁷ and these changes, while attesting to the importance and relevance of this study, have required frequent revision of this dissertation.

Another challenge to understanding the military law is its obscurity: as the next chapters will demonstrate, there is consequential divergence between the military legislation and military court practice,¹⁶⁸ in addition to substantial confusion among HROs about the military law.¹⁶⁹

Beyond its in-depth examination of the under-studied military law, the contribution of this study also lies in its theoretically-informed nature. As Hajjar has rightly observed, “the texts tackling the subject of the military courts (and related themes) [demonstrate ...] very little use of critical social theory – or theory of any kind, for that matter.”¹⁷⁰ Similarly to its use of cross-disciplinary literature on childhood, this study draws extensively on cross-disciplinary writing on

¹⁶³ *Infra* text accompanying notes 485-489, 499-500, 513-516, 521-531.

¹⁶⁴ *Infra* text accompanying notes 201-242.

¹⁶⁵ The few elective courses which are defined as dealing with “military law” focus entirely on the law applicable to Israeli soldiers in courts-martial.

¹⁶⁶ For example, according to HRO *No Legal Frontiers*, the military has amended its main piece of criminal legislation – ORDER NO. 378 CONCERNING SECURITY PROVISIONS (1967) – over 120 times since enacting it. NO LEGAL FRONTIERS, *supra* note 26, at 10.

¹⁶⁷ These amendments and their implications will be discussed in depth in Chapters 2-4.

¹⁶⁸ *Infra* text accompanying notes 440-460, 482-516, 621-624 and accompanying text. About the confusion in the military legal system about its own law see also HAJJAR, *supra* note 21, at 227.

¹⁶⁹ *Infra* text accompanying notes 485-489, 499-500, 513-516, 521-531.

¹⁷⁰ HAJJAR, *supra* note 21, at 66 endnote 65.

Israel/Palestine,¹⁷¹ in order to best understand this socio-political context. Thus, this research project aims to contribute to the existing literature empirically and theoretically alike.

3. METHODOLOGY

After discussing the topic of this study – its framing, importance, and background – let us turn to the research methodology and related matters. This section will describe the qualitative and quantitative research methods, and the ways in which they have been informed by the theoretical framework of this project; the sources analysed in this study, their characteristics, how I obtained them, and what ethical principles guided the process of collecting them; and the implications of my identity as an Israeli adult.

3.(a). *Methods*

The methodology of this study can be broadly described as discourse analysis. Of the various definitions ascribed to the term “discourse”, let us adopt cultural theorist Michel Foucault’s definition of discourse as “the general domain of all statements, sometimes as an individualizable group of statements, and sometimes as a regulated practice that accounts for a number of statements”.¹⁷²

For Foucault, knowledge is discursive and discourse is saturated with power.¹⁷³ Discourse analysis accordingly addresses questions of what Foucault termed “power/knowledge”.¹⁷⁴ usually by conducting either or both of the following: (a) textual analysis – focusing on language, discourse formation, and the possible effects of certain discourses; and (b) examination of non-textual practices – focusing on social technologies and institutional practices that produce discourse.¹⁷⁵

¹⁷¹ See, e.g., *supra* sources mentioned notes 19, 29 and *infra* sources mentioned notes 35.

¹⁷² MICHEL FOUCAULT, *THE ARCHAEOLOGY OF KNOWLEDGE* 80 (A.M. Sheridan Smith trans, Routledge, London, 1972). Foucault defined discourse in a number of different ways throughout his work. For discussion see, e.g., SARA MILLS, MICHEL FOUCAULT 53-66 (Routledge, London and New York, 2003).

¹⁷³ See, e.g., MICHEL FOUCAULT, *THE HISTORY OF SEXUALITY, VOLUME I: AN INTRODUCTION* (Robert Hurley trans., Penguin, Harmondsworth, 1978); MICHEL FOUCAULT, *DISCIPLINE AND PUNISH: THE BIRTH OF THE PRISON* (2nd ed., Alan Sheridan trans., Vintage Books, New York, 1995).

¹⁷⁴ MICHEL FOUCAULT, *POWER/KNOWLEDGE: SELECTED INTERVIEWS AND OTHER WRITINGS, 1972-1977* (Colin Gordon ed., Harvester Press, Brighton, 1980). On the centrality of power/knowledge in determining what counts as childhood see Valerie Walkerdine, *Safety and Danger: Childhood, Sexuality, and Space at the End of the Millennium*, in *GOVERNING THE CHILD IN THE NEW MILLENNIUM* 15, 20 (Kenneth Heltqvist and Gunilla Dahlberg eds., Routledge, New York and London, 2001). On power/knowledge as a central object of discourse analysis see ROSE, *supra* note 12, at 144, 147.

¹⁷⁵ ROSE, *supra* note 12, at 145-146, 164-165.

This study combines both these approaches: on the one hand, it examines “texts” – in the broad sense of this term, including mostly written but also visual materials¹⁷⁶ – which the Israeli legal system and its HRO critics have produced. By analysing how these documents frame, characterise, interpret, and also highlight or marginalise, child-related issues (such as the rights, future, or suffering of the child), this study aims to identify the kinds of knowledge these texts (re)produce.¹⁷⁷ My work process has been to read each document in its entirety, highlight potentially relevant or important segments in it,¹⁷⁸ identify what it is silent about,¹⁷⁹ and later revisit it as many times as necessary while structuring and writing this dissertation.

Additionally, this study examines non-textual practices. For example, in Chapter 4, in addition to examining what various documents “have to say” about separating child offenders from adults, we will also discuss concrete changes concerning this separation in the physical world.

In addition to this qualitative discourse analysis, this study employs a quantitative method: a sample of 155 military court cases concerning Palestinian children. This sample – further details on which are provided below¹⁸⁰ – has enabled me to provide figures such as the conviction rate, the rate of custodial sentences, or the average length of prison sentences in the sampled cases.

3.(b). *Ethical guidelines*

Prior to collecting primary sources for this doctoral project, I filled out the LSE Research Review Questionnaire¹⁸¹ – which sets out a series of questions researchers should consider when devising and undertaking research – and carefully read the LSE Research Policy.¹⁸² These documents, while primarily focusing on issues surrounding direct contact with research subjects (whom the present study does not involve), nonetheless provided two useful principles which I followed while collecting my primary sources: (a) ensuring privacy and data protection; and (b) ensuring that harm or distress to parties (individuals and communities) directly affected by this study is minimised. The process through which the primary sources were obtained will be detailed shortly.¹⁸³

¹⁷⁶ Cf. *id.*, at 143 (describing visuality as a sort of discourse).

¹⁷⁷ Cf. *id.*, at 156.

¹⁷⁸ This is reminiscent of, but intentionally less procedure- and quantity-oriented than, grounded theory methodology.

¹⁷⁹ Throughout the next chapters, we will discuss not only what the primary sources “say”, but also their silences.

¹⁸⁰ *Infra* text accompanying note 217.

¹⁸¹ The questionnaire is available at http://www2.lse.ac.uk/intranet/researchAndDevelopment/ethicsGuidanceAndForms/ResearchEthicsQuestionnaire_March2011.doc. I am happy to make the completed questionnaire available.

¹⁸² The ethics policy is available at http://www2.lse.ac.uk/intranet/researchAndDevelopment/ethicsGuidanceAndForms/Research_Ethics_Review_Policy_FINAL.pdf.

¹⁸³ *Infra* text accompanying notes 201-242.

3.(c). *The relationship between theory and methodology*

Sociologists of law Reza Banakar and Max Travers note that “theory and method are inextricably inter-linked. Methods [...] are always used as part of a commitment to a theoretical perspective”.¹⁸⁴ In this vein, a few words are in order about how the influence of poststructuralist thinking on this study (as described above)¹⁸⁵ has informed the research methodology.

An important aspect of this theory-method relationship concerns the question of whether the texts we examine represent “the truth”. According to jurist Peter Goodrich, one of the impacts of poststructuralism in the domain of legal theory has been

a generic challenge to all modernist claims [...] that asserted certainty and universality, absolute truth, or textual determinacy. The notion that texts, legal or other, were amenable to authoritative interpretation and, in the case of law, application, by virtue of the univocal and certain uncovering of their meaning was anathema to [poststructuralist jurists ...].¹⁸⁶

Since empiricism is often identified with an objectivist and structuralist discourse,¹⁸⁷ marrying poststructuralism with empirical methodology might at first seem paradoxical. However, this project does not profess to “uncover the truth” through its empirical materials, to construct an “objective” account of socio-legal “reality”. What this study aims to provide is not “real” data, but a rigorous, reflexive – and hopefully rich, nuanced, and innovative – interpretation of the materials at hand (which were chosen according to criteria and constraints detailed below¹⁸⁸).

More specifically, the sample of all available court files concerning Palestinian minors from the Samaria court from the years 2008-2009 (see details below¹⁸⁹), while aiming to facilitate a better contextualised discussion, does not profess to represent “reality” any more than the textual analysis does. This is contrary to the tendency of some quantitative researchers, to reduce representativeness to numbers and size – a reductive view of “representativeness” which has also pervaded some disputes between the Israeli military legal system and its HRO critics. For example, the Israeli military dismissed a report by HRO *Yesh Din* whose findings were based on over 800 observations

¹⁸⁴ Reza Banakar and Max Travers, *Introduction and Law, Sociology and Method*, in *THEORY AND METHOD IN SOCIO-LEGAL RESEARCH* ix and 1, ix-x, 4-5 (Reza Banakar and Max Travers eds., Hart, Oxford and Portland OR, 2005).

¹⁸⁵ *Supra* note 49.

¹⁸⁶ Peter Goodrich, *Postmodern Justice*, in *LAW AND THE HUMANITIES: AN INTRODUCTION* 188, 202 (Austin Sarat, Matthew Anderson and Catherine O. Frank eds., Cambridge University Press, Cambridge and New York, 2010). Goodrich refers specifically to deconstruction, but his argument is generally applicable to poststructuralism.

¹⁸⁷ Trubek and Esser, *supra* note 50, at 12.

¹⁸⁸ *Infra* text accompanying notes 201-242. See also *supra* text accompanying notes 12-14.

¹⁸⁹ *Infra* text accompanying note 217.

of military court hearings,¹⁹⁰ by characterising these observations as “not a statistically representative sample”.¹⁹¹

3.(d). *The relationship between primary and secondary sources*

Rather than treating collecting primary sources as a phase that needed to end before analysis (including use of secondary sources) could start, this dissertation was produced by constantly moving back and forth between primary and secondary sources, and expanding these two groups of sources as necessary (further details are provided below).¹⁹² In this process, I have endeavoured to balance two goals: on the one hand, to approach primary materials with fresh eyes as much as possible and suspend my preconceptions. This has required attentiveness to the details of these materials, to the insights they may offer me,¹⁹³ to findings which challenge my expectations, and to matters I might have ignored or underplayed. On the other hand, I have also carried “conceptual baggage” from secondary sources, and it has inevitably informed my encounter(s) with the primary materials. Thus, theoretical literature has not simply been “applied” to empirical materials – as if theory was a technology that required application; instead, the encounter between theory and empirical materials has been continually used to rethink theoretical writing on, and empirical representations of, the relationship between law and childhood.

In this study, the distinction between “primary” and “secondary” sources is a distinction between materials that are the object of our analysis, and other materials whose chief function is to aid that analysis. This distinction should not be understood as a distinction between facts and concepts,¹⁹⁴ since the “facts” of “real” world are inseparable from the conceptual framework which renders these facts legible.¹⁹⁵ Furthermore, the conceptual framework of this study draws on primary sources just as much as it draws on secondary ones.

¹⁹⁰ YESH DIN, *supra* note 26.

¹⁹¹ The Spokesperson of the Israel Defence Forces, *supra* note 24, at para. 15. *See also id.*, at paras. 14, 16–18. In 1991, the military similarly described a report by HRO *Amnesty International* as based on unrepresentative data. *See* HAJJAR, *supra* note 21, at 66.

¹⁹² Cf. Michael Meyer, *Between theory, method, and politics: positioning of the approaches to CDA*, in *METHODS OF CRITICAL DISCOURSE ANALYSIS* 14, 18, 23–24, 27 (Ruth Wodak and Michael Meyer eds., Sage, London and Thousand Oaks CA, 2001).

¹⁹³ On the importance of such an approach in discourse analysis *see* ROSE, *supra* note 12, at 157, 161.

¹⁹⁴ Cf. Trubek and Esser, *supra* note 50, at 12 (discussing legal scholarship which has questioned whether facts and theories could be distinguished).

¹⁹⁵ On this point *see also infra* text accompanying note 271.

3.(e). Primary sources

3.(c).1. Israeli military legislation concerning Palestinian children

Prior to the Israeli occupation, the law in the OPT was an amalgamation of remnants from the Ottoman, British Mandate, and Jordanian (in the West Bank) or Egyptian (in the Gaza Strip) periods, as well as Islamic law.¹⁹⁶ Since the inception of the Israeli occupation in 1967, the Israeli military has issued thousands of orders in these territories,¹⁹⁷ which have amended and added to the previously existing legislation there.¹⁹⁸ These military orders, which Israeli authorities define as primary legislation,¹⁹⁹ have extended military jurisdiction over very diverse facets of life in the OPT.²⁰⁰

Although in principle, the military legislation is not secret, there was no publicly available compendium of it when I devised this project. In 2008, three HROs jointly published a compilation of Israeli military legislation,²⁰¹ but while reading military court rulings I realised this compilation was significantly out-of-date. Israeli university law libraries, to which I also turned, only hold few, dispersed military orders.

In 2009, after being informed by a lawyer working for HRO *DCI –Palestine* that the military prosecution had up-to-date versions of the military legislation on file, I contacted the prosecution and received from them the updated version of the main military order concerning child offenders.²⁰²

Public access to the military legislation has increased over the past few years: since 2008, the military has gradually published most of its legislation online.²⁰³ Additionally, in 2010, the

¹⁹⁶ Milhem and Salem, *supra* note 56, at 257. Some of the legislation from these different periods has remained in force in the OPT to date. *Id.*

¹⁹⁷ The Israeli military has issued more than 2,500 orders in the West Bank and more than 2,400 orders in the Gaza Strip. Milhem and Salem, *supra* note 56. The orders issued in the Gaza Strip were similar to the ones issued in the West Bank. Hadar, *supra* note 76, at 171. This dissertation hence refers to the West Bank orders.

¹⁹⁸ Benichou, *supra* note 26, at 297; Cavanaugh, *supra* note 67, at 201; SHEHADEH, *supra* note 22, at 18-23, 25.

¹⁹⁹ ISRAEL, THE “INTIFADA” AND THE RULE OF LAW, *supra* note 158, at 23 (cited in SHEHADEH, *supra* note 22, at 31).

²⁰⁰ HAJJAR, *supra* note 21, at 59; Milhem and Salem, *supra* note 56, at 266; SHEHADEH, *supra* note 22, at 23, 25.

²⁰¹ THE PUBLIC COMMITTEE AGAINST TORTURE IN ISRAEL, MACHSOM WATCH AND THE PALESTINIAN PRISONER CLUB, COMPILATION OF SOURCES ON ISRAELI MILITARY LAW THAT RELATES TO THE OPT (2008) (Hebrew and Arabic).

²⁰² I received this legislation from an authorised member of the military prosecution, and am happy to make available my email correspondence with that person.

²⁰³ The legislation is available on the website of the military prosecution: <http://www.law.idf.il/487-he/Patzar.aspx> (last visited on May 25, 2012).

military codified its criminal legislation, so that a single order included the abundant criminal provisions in force.²⁰⁴

Another source of information is the Israeli military archive, to which I turned in 2010 in an attempt to trace the historical rationale for the delineation of age categories in the military legislation (an issue discussed in Chapter 3²⁰⁵). I applied to the archive to read all potentially-relevant internal military correspondence from the years 1966-1967. I was quickly granted access to hundreds of documents, but unfortunately did not find in them any reference to the relevant military legislation.

3.(e).2. Military court decisions concerning Palestinian child defendants

3.(e).2.(a). The decisions and the process of obtaining them

Obtaining Israeli civil court decisions (concerning Israelis) is relatively easy: notwithstanding some exceptions, court decisions are available on a government website and on several commercial online legal databases (the latter provide advanced search options). In contrast, military court decisions (concerning Palestinians) have usually not been published, as described above²⁰⁶ – although there is no formal legal reason not to publish them: they are not secret, and military court hearings are generally open to the public.

Here are details of five courses of action I have pursued to obtain such documents:

- 1) In 2007, a year before starting this project, I conducted a preliminary keyword-based search of military court decisions through Israeli legal databases, in order to have some empirical basis for a research proposal. This search only yielded 31 decisions, all by the Military Court of Appeals, from the years 2001-2006.²⁰⁷ These rulings contained details of 32 other court rulings (the 31 corresponding first instance military court rulings and another Military Court of Appeals ruling). An acquaintance of mine, an Israeli jurist, connected me with the president of the Courts-Martial, who assigned a soldier to find these 32 additional rulings for me. After

²⁰⁴ ORDER NO. 1651, *supra* note 74. According to the Military Attorney General, this codification did not substantially amend the existing orders. The Military Attorney General, *Completion of The Order Concerning Security Provisions (Integrated Version)* (November 19, 2009) (Hebrew), available at <http://www.law.idf.il/163-3820-he/Patzar.aspx?pos=4>. References in this dissertation are usually made to this code rather than to the original orders.

²⁰⁵ *Infra* text accompanying notes 461-466.

²⁰⁶ *Supra* text accompanying notes 159-163.

²⁰⁷ I also found several court-martial rulings. For discussion of the cases involving abusive soldiers which this study examines see *infra* text accompanying notes 232-239.

several months, the soldier informed me that most of these rulings could not be found. She sent me the few which had been found,²⁰⁸ and most of these had missing pages.²⁰⁹

- 2) Since 2008, the military court system has been sending the Israeli legal database *Nevo* copies of (new) decisions of the Military Court of Appeals. However, first instance military court decisions remain unpublished, as do military court rulings from previous years. In October 2010, I conducted a thorough keyword-based search²¹⁰ of military court decisions through the *Nevo* database, and found 614 decisions from the year 2000 onwards. Of these, 193 were irrelevant (e.g., only mentioned adult defendants' children). And of the remaining decisions, "only" 318 were military court decisions, since the *Nevo* database also includes court-martial decisions (concerning Israeli soldiers) under the "military court decisions" category (despite the fundamental difference between the military courts and the courts-martial).
- 3) Another source is the few, previously mentioned,²¹¹ compilations of court rulings published by the military. The main value of these compilations is their inclusion of earlier rulings, dating back to the beginning of the occupation in 1967. On the downside, these rulings are small in number (the 12 volumes published thus far contain 28 rulings identifiable as involving child defendants), and the criteria according to which the military selected (and sometimes edited) them are unknown.
- 4) The documents obtained through the above procedures, while sufficient in number, were mostly decisions by the Military Court of Appeals – whose characteristics likely differ from those of most court cases.²¹² I therefore applied to the military court system, in late 2009, for access to *all* military court decisions concerning Palestinian child "security" offenders. Permission was granted in February 2010, but I was required to provide details of specific cases. First, I provided details of 124 court decisions,²¹³ which seemed most "promising" according to the limited information in the court decisions I already had; after being told this was an "unreasonable" amount, I shortened my list to 53 cases.²¹⁴

²⁰⁸ I am happy to make available my correspondence with the military on these documents.

²⁰⁹ No explanation was given for the missing pages, but my impression is that they stem from inefficiency or carelessness – especially given that I later found some of these court rulings online with no missing pages.

²¹⁰ The keywords were the Hebrew equivalents of "child", "youth", "boy/girl", "minor", "juvenile delinquent", "toddler", "youngster", "baby", "tender adults", "Order 132" (the primary military order concerning young offenders at the time), and associated terms (e.g., "childhood", "children").

²¹¹ *Supra* text accompanying note 161.

²¹² According to information published by the Israeli military, about 42,000 hearings took place in the first instance military courts in 2006. The Spokesperson of the Israel Defence Forces, *supra* note 24, at para. 14. In comparison, only 267 appeals were heard by the Military Court of Appeals in that year. THE MILITARY PROSECUTION, ANNUAL ACTIVITY REPORT – 2010, at 71 (2011) (Hebrew), available at http://www.mag.idf.il/sip_storage/FILES/7/967.pdf.

²¹³ These included 60 rulings and 64 decisions in extension-of-detention hearings.

²¹⁴ These cases had been heard between the years 1993-2009.

longer).²¹⁸ This short length might seem surprising, considering that these cases concern child criminals, most of whom the courts sentenced to prison.²¹⁹ Possible explanations for the shortness of these decisions are the scant scholarly and public attention they usually receive, the lax legal supervision of the military courts,²²⁰ and the rarity of full evidentiary trials.²²¹

Due to the relative shortness of military court decisions, many of the decisions I have obtained are too concise to include any useful text, and are hence not analysed in the dissertation. Many verdicts, for example, only briefly presented the sentence components (prison sentence, fine, probation sentence), with no substantive explanation of how the sentence was determined. Indeed, without obtaining hundreds of military court decisions, the overall textual material to be analysed would not be sufficiently “rich”.²²²

Our textual analysis understandably pays greater attention to longer (and “textually richer”) court decisions.²²³ Counterbalancing this emphasis on such texts are the broader court case sample, and the general legal overview Chapter 2 provides.

3.(c).2.(c). Concluding reflection

My experiences in the military courts – especially interacting with soldiers there – were fascinating. For example, the soldiers often mistook me for an HRO worker, because academic researchers do not normally visit these courts.

Several observations of hearings in the Ofer military courts, which I conducted in 2009,²²⁴ made me aware, for example, of the architecture of the courtrooms – including the fact that they are portakabins (although larger and better equipped than the portakabin of the Salem military court “archive”).

²¹⁸ This, in my experience as an Israeli lawyer, is much shorter than comparable Israeli civil judgments, although I do not have exact figures. Usually, the minimum amount of information contained in military court rulings consists of the details I gathered in my sample (the sentence, the charges, etc.).

²¹⁹ On the rate of custodial sentences in military court cases concerning Palestinian children *see infra* text accompanying note 411.

²²⁰ *Supra* text accompanying notes 83 and 160. *See also infra* text accompanying notes 405–406.

²²¹ *Supra* note 96 and accompanying text.

²²² *Cf.* ROSE, *supra* note 12, at 150 (stressing the importance of the richness of textual detail, rather than the number of texts analysed).

²²³ This means that Military Court of Appeals decisions are analysed more extensively than first instance military court decisions.

²²⁴ In this visit I was accompanied by a DCI – Palestine lawyer whom I had previously contacted.

3.(c).3. Israeli civil legal documents

3.(c).3.(a). Civil court decisions

Unlike Israeli civil statutes, civil court decisions concerning Israeli children have proven difficult to access. In 2009, I applied to the civil court system, requesting access to all cases concerning child offenders residing in the OPT, from 1987 onwards.²²⁵ In April 2010, the deputy manager of the civil courts granted me access to such cases – excluding *in camera* hearings. This conditional permission was virtually useless, since Israeli civil youth court hearings concerning Israeli child offenders are normally held behind closed doors.²²⁶

A lawyer in the civil court administration nonetheless advised me to request details of specific cases (in line with the Israeli Freedom of Information Law), since access to them might be granted more easily. I decided to focus on cases heard between the years 2004-2005, when Israeli demonstrations against Israel's "disengagement" (pullout) from the Gaza Strip took place. As advised, I applied to the Israeli Ministry of Justice in July 2010, requesting the numbers and names of all criminal court cases involving settler children from the years 2004-2005. In August 2010, the Ministry of Justice provided me with details of 10 cases²²⁷ involving children who took part in demonstrations against the "disengagement"²²⁸ (this reply noted that some of those cases involved several defendants). In March 2011, I applied to the president of the (civil) youth courts, requesting access to the 10 cases whose details I had received from the Ministry of Justice. Although I promised not to disclose the minors' details and offered to cover any related costs, my request was refused.

The reply I received from the Ministry of Justice, containing the details of the 10 cases, noted that the police had information on many other criminal cases concerning child opponents of the "disengagement", which had been dealt with by the Police Prosecution Unit (rather than the State Prosecution). In August 2010, I requested from the police information on these additional court cases. Their reply, which arrived two months later, included no information on the relevant court cases, and instead referred only to police files (which are not open to the public). In April 2011, following my further inquiry, the police refused my request to receive the details of the court cases, on the grounds that finding these details would be too time-consuming.

²²⁵ 1987 was the beginning of the first *Intifada* (the popular Palestinian uprising in the OPT) – on which see *supra* note 27.

²²⁶ *Infra* note 309 and accompanying text. On some of the implications of the inaccessibility of civil youth court files see Morag 2010, *supra* note 100, at 74.

²²⁷ This reply detailed 11 cases, but the Ministry of Justice later clarified that there were in fact 10 cases.

²²⁸ My request did not mention the "disengagement".

As a result, this study does not examine civil youth court cases (concerning Israeli children). The few cases involving settler child offenders that are analysed were heard by courts other than the youth court.

More generally, the civil court rulings examined in this study can be divided into two groups: (a) Supreme Court rulings concerning Israeli or Palestinian children in the OPT; and (b) civil court cases concerning Palestinian child offenders (mostly children residing in East Jerusalem, who are subject to domestic Israeli law²²⁹). All of these rulings were obtained through Israeli online legal databases.

3.(e).3.(b). Transcripts of parliamentary committee meetings

The Israeli parliament (the *Knesset*) operates 12 permanent committees, such as the Foreign Affairs and National Security Committee, and the Constitution, Statute and Law Committee. There are additional, special, parliamentary committees – including the Child’s Rights Committee, which was established in 1991 following Israel’s ratification of the *UN Convention on the Rights of the Child*.²³⁰ These various committees hold meetings to discuss issues under their mandate, upon the request of their MP members, and experts and interested people are usually invited to participate in these meetings.

Some parliamentary committee transcripts provide a record of lawmakers’ (and others’) deliberations about children – including Israeli settler children evicted from the Gaza Strip, and to a lesser degree, Palestinian children. The previously discussed impossibility of using most Israeli court decisions concerning Israeli settler children renders these materials especially valuable to our analysis. In 2010, through the Parliament’s website, I obtained the transcripts of all potentially relevant parliamentary committee meetings from 2004 (a year before the “disengagement”) to 2010.²³¹

3.(e).4. Court decisions concerning Israeli soldiers who abused Palestinian children

In Chapter 5, I will discuss the abuse of Palestinian children by Israeli soldiers. As explained earlier, many of the court decisions I obtained through the online database *Nevo* are court-martial

²²⁹ For further details on the law applicable to these children see *infra* text accompanying notes 300-338. See also *supra* text accompanying notes 61-62.

²³⁰ For discussion of Israel’s stance on this convention see *infra* text accompanying notes 1147-1162.

²³¹ These comprise relevant transcripts of three committees: (a) the *Child’s Rights Committee*; (b) the *Constitution, Statute and Law Committee*; and (c) the subsidiary (and temporary) *Committee on the State Comptroller’s Report on the Disengagement*.

cases (concerning Israeli soldier defendants), and six of these cases concern charges of physically or verbally abusing Palestinian children. The scarcity of such court cases may have to do with what HROs have described as the Israeli military's dismissal of almost all Palestinian complaints against soldiers²³² – an issue discussed in Chapter 5.

Unlike most soldiers, whom the military interrogates and courts-martial try, Border Police soldiers are interrogated by the police and tried by civil courts.²³³ Indeed, I obtained six additional (civil) court cases, involving Border Police soldiers who abused Palestinian children.²³⁴

Appeals were made to higher civil courts in some of these 12 cases, and I obtained the rulings of these higher courts through commercial online legal databases.

In some of these 12 cases, the abuse occurred during the children's arrest or transfer to detention, and these cases hence fall well within the research framework; in other cases, the abused children were not formally in the soldiers' custody, but due to the overall scarcity of similar cases these cases too will be discussed in Chapter 5.

Unlike the military court cases examined in this dissertation, these cases are easily accessible, and some of them are relatively well known.²³⁵ It is also noteworthy that a few textbooks²³⁶ and articles²³⁷ have been published about the military law applicable to Israel soldiers (in contrast to the scarce literature on the Israeli military law applicable to Palestinians in the OPT); nonetheless, this is the first *socio-legal* study of this body of law.

²³² According to HRO *Yesh Din*, 96% of the complaints made to the military law enforcement bodies about soldiers' offences against Palestinians are dismissed without the suspected soldiers being indicted. YESH DIN, ALLEGED INVESTIGATION: THE FAILURE OF INVESTIGATIONS INTO OFFENCES COMMITTED BY IDF SOLDIERS AGAINST PALESTINIANS (2011), available at <http://yesh-din.org/userfiles/file/Reports-English/Alleged%20Investigation%20%5BEnglish%5D.pdf> (based on 192 discrete complaints monitored by *Yesh Din*, as well as 67 additional military investigation files from recent years).

²³³ The Israeli Border Police consist of soldiers who carry out their military service there, as well as civil police officers. For further information on the Border Police see ENCYCLOPEDIA OF THE ISRAELI-PALESTINIAN CONFLICT, *supra* note 7, at 202-203.

²³⁴ Five of these cases (which I found through commercial legal databases) involve criminal trials of such soldiers, and the remaining ruling (which I found through the website of Israeli HRO *Hamoked*) concerns a civil claim against a soldier.

²³⁵ The fact that these cases are well-known and easily accessible may have to do with two factors: (a) Israeli soldiers are rarely charged with abusing Palestinian children, so when such charges are pressed they tend to draw public attention; (b) Unlike military court hearings of Palestinian children (which receive little public attention in Israel), and civil youth court hearings of Israeli settler children (which are held behind closed doors), the hearings in these 12 cases were held in open court, and sometimes reached higher courts.

²³⁶ THE CRIMINAL LAW OF THE IDF (Irena Fein et al eds., Ministry of Defence Press, Tel Aviv, 2006) (Hebrew); ODED MUDRIK, MILITARY JUSTICE (Ministry of Defence Press, Tel Aviv, 1993) (Hebrew).

²³⁷ There are numerous articles in Hebrew; for a recent article in English see Menachem Finkelstein, *The Israeli Military Legal System – Overview of the Current Situation and a Glimpse into the Future*, 52 AIR FORCE LAW REVIEW 137 (2002).

3.(c).5. HRO publications concerning children in the OPT

My main source for HROs' relevant publications has been their websites. Most of the HRO publications available online are from the past decade, and I have also found some additional reports (not available online) through references in HRO or academic publications.²³⁸

There are significant differences among the HROs whose publications I analyse, as regards their agenda, resources and legal expertise.²³⁹ For this reason, this dissertation does not treat HROs as a single entity, and specifies the HROs relevant to each matter. References to HROs as a general group are made cautiously, only when there are no known exceptions among HROs to the trend or characteristic being discussed.

3.(c).6. Publications of Israeli authorities

Alongside the above materials, this study analyses various publications of Israeli authorities. These include: (a) relevant Israeli police regulations, which I obtained either from the police website or from *The Israel Policy Center* – a political lobbying and promotional organisation which defines itself as “devoted to strengthening Israel’s character as a Jewish democracy”.²⁴⁰ I was referred to this organisation by an Israeli lawyer whom I contacted in April 2011, and who had represented Israeli settler child offenders (in non-youth court cases); (b) relevant Israeli police publications – available on the police website; (c) publications and data of the Israeli Prison Service (IPS) – obtained either from the IPS website, or from the IPS spokesperson; (d) regulations of the Military Police Corps concerning Palestinian child detainees – obtained from their legal advisor.

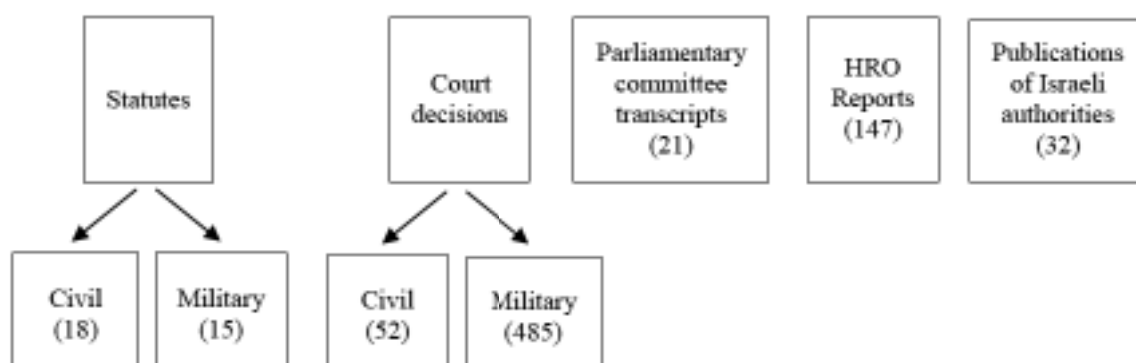
For purposes of clarity, the following diagram summarises the types of primary sources used for this project²⁴¹ (figures in parentheses indicate the number of files examined in each category²⁴²):

²³⁸ Examples of such reports are HUMAN RIGHTS WATCH, *supra* note 28; PHYSICIANS FOR HUMAN RIGHTS – ISRAEL, *IN HOSTILE HANDS: PALESTINIAN PRISONERS AT MEGIDDO COMPOUND* (2001) (Hebrew).

²³⁹ Cf. Aryeh Neir, *Not All Human Rights Groups are Equal*, NEW YORK TIMES (May 27, 1989), reprinted in HENRY J. STEINER AND PHILIP ALSTON, *INTERNATIONAL HUMAN RIGHTS IN CONTEXT* 945 (Clarendon Press, New York, 2000).

²⁴⁰ The Israeli Policy Center, *About Us* (last visited: June 3, 2012), available at http://merkazmedini.org/index.php/our_staff/.

²⁴¹ In addition to these sources, I consulted with a few attorneys to ascertain information unavailable elsewhere: In 2009, I met with a *DCI – Palestine* lawyer and consulted with another lawyer working for the HRO. Later, in January 2012, I met with an Israeli attorney who had represented a Palestinian child in a precedential military court case (mentioned *infra* note 918).



3.(f). Reflection on my personal position

It is common for scholars engaged in discourse analysis to critically reflect on their personal position.²⁴³ Yet personal position is much more ambiguous than these discussions often portray it to be: I am an Israeli adult writing about childhood in the OPT, but what do these labels – “Israeli” and “adult” – actually mean?

My Israeliness is fluid and complex in several senses: first, Israeli society is highly heterogeneous, and “Israeli” therefore does not entail particular views or characteristics. Second, I have resided outside Israel for nearly four years now, and the question arises of how much of the Israeli currently resides in me. Third, I have “performed” my Israeliness in different ways in different circumstances, downplaying or emphasising certain biographical elements. And fourth, my national identity is not under my sole control. For example, when I presented my doctoral work in a conference in the UK, a question from the audience explicitly assumed that I was Palestinian.²⁴⁴

From a practical standpoint, I have experienced my Israeliness as both a resource and a challenge. As a resource, I believe it has helped me gain the trust of Israeli military staff and some Israeli organisations, thereby allowing me to obtain valuable Israeli legal materials (which, despite not being secret, might otherwise be more difficult to obtain). Additionally, my proficiency in Hebrew and Israeli culture has been crucial for translating most of the primary sources into English. My Israeliness has also proven to be a twofold challenge when presenting my work to non-Israelis: first, non-Israelis often lack socio-political background information that many Israelis might take for granted; and second, some non-Israelis are more interested in the relevance of the Israeli-Palestinian case to more familiar contexts than in Israel/Palestine *per se*.

²⁴² There is some overlap between the court rulings obtained through online databases and those obtained as hard copy through other sources.

²⁴³ ROSE, *supra* note 12, at 167-169.

²⁴⁴ As argued in Chapter 3 with regard to age categories, assigning to people national categories influences their constitution as national subjects. See *infra* note 472 and accompanying text.

My identity as an “adult” is equally complex. In line with the constructivist view of childhood which this study adopts, I consider the essentialist “child”/“adult” distinction to be misguided (the fluidity of that distinction will be discussed in the dissertation²⁴⁵). Furthermore, even if this distinction could be sustained, this study is not about “actual” children’s standpoints and experiences, but about the ways in which (mostly “adult”) institutions and individuals construct and conceptualise childhood.²⁴⁶ In this sense, this study is about adults no less than it is about children.²⁴⁷

In any case, no research can be “objective” or “a-political”; every word used, any methodology chosen, any theoretical framework employed, inevitably entail certain normative choices and ramifications, even without an explicit or conscious normative agenda. I have striven to be reflective and explicit about my choices, and attentive to the empirical sources – while recognising that being fully reflective and attentive is an impossible ideal.

4. LIMITATIONS OF THIS STUDY

This research project has several noteworthy limitations, in terms of scope and methodology. First, Palestinian girls, notwithstanding their active involvement in the national struggle against the Israeli occupation,²⁴⁸ receive relatively little attention in this study, since the vast majority of Palestinian children in conflict with Israeli military law are boys. In the 155 military court cases I sampled, all of the Palestinian child defendants were boys; HROs similarly estimate girls to constitute a very small percentage of Palestinian children in Israeli custody.²⁴⁹ More broadly, according to the Israeli Prison service, in 2007, only 0.8 percent of Palestinian “security prisoners”²⁵⁰ were female.²⁵¹ Notwithstanding the importance of this population, most Palestinian women and girls are affected by the Israeli military criminal law not as offenders but as mothers, daughters, or wives of

²⁴⁵ *Infra* text accompanying notes 587-601, 811-812, 908-909, 955, 1038-1042.

²⁴⁶ *Supra* text accompanying note 48.

²⁴⁷ On the difference between “childhood” and “children” see *supra* notes 141-144 and accompanying text.

²⁴⁸ ENCYCLOPEDIA OF THE ISRAELI-PALESTINIAN CONFLICT, *supra* note 7, at 624; Shalhoub-Kevorkian, *supra* note 147, at 235-241.

²⁴⁹ DCI – PALESTINE, *supra* note 32, at 99 (estimating girls to constitute 1.1% of Palestinian child defendants in 2007, and 4% in 2008); DCI – PALESTINE, SUPPLEMENTARY REPORT TO THE UN HUMAN RIGHTS COMMITTEE 4-5 (2010), available at <http://www.dci-pal.org/english/doc/press/ICCPR20100601.pdf> (estimating girls to constitute 1.47% of Palestinian child detainees in 2008, and 1.07% in 2009). See also NO LEGAL FRONTIERS, *supra* note 26, at 19.

²⁵⁰ For discussion of this term see *infra* text accompanying notes 276-279.

²⁵¹ THE OFFICE OF THE ISRAELI PRISON SERVICE’S SPOKESPERSON, SECURITY PRISONERS INCARCERATED IN THE ISRAELI PRISON SERVICE 6 (2007) (Hebrew), available at http://www.ips.gov.il/NR/rdonlyres/B696DA63-1D78-4417-ABCC-ODE64B4E71D5/0/bitichonim_heb_2007.pdf. On Palestinian women prisoners see generally Nahla Abdo, *Palestinian Women Political Prisoners and the Israeli State*, in THREAT: PALESTINIAN POLITICAL PRISONERS IN ISRAEL 57 (Abeer Baker and Anat Matar eds., Pluto Press, New York, 2011); NASHIF, *supra* note 26, at 93-94; Peteet, *supra* note 19, at 118-119; Shalhoub-Kevorkian, *supra* note 147.

defendants or prisoners.²⁵² It is worth noting that, in contrast, a substantial number of the Israeli settler children who were detained against the backdrop of the “disengagement” were girls,²⁵³ as we will see in Chapter 3.²⁵⁴ I shall not speculate about reasons for this disparity between Palestinians and Israeli settlers, in the absence of sufficient information.

As a whole, this study also discusses matters related to Israeli settler children less extensively than issues concerning Palestinian children, due to two reasons explained earlier: first, (civil) youth court proceedings concerning Israeli settler children cannot be analysed, since they were held behind closed doors (unlike military court proceedings concerning Palestinian children),²⁵⁵ and second, the context in which this study examines the legal treatment of Israeli settler children – namely, the “disengagement”²⁵⁶ – is narrower than that in which Palestinian children’s encounter with the law is discussed. Additionally, according to my primary sources, Israeli settler children’s legal status has been more stable and clear-cut than that of their Palestinian peers, with respect to issues concerning their age and spatial separation; Chapters 3 and 4, which deal with these issues, therefore award greater attention to Palestinian children (an outline of the dissertation chapters will be provided shortly). At the same time, Palestinian children far outnumber Israeli settler children in the OPT,²⁵⁷ and their legal status differs significantly from that of Israeli settler children (as will be explained in the dissertation, and especially in the next chapter); in addition, possibly due to these differences between the two populations, HROs have been significantly less preoccupied with Israeli settler children’s rights than with Palestinian children’s rights (some exceptions notwithstanding²⁵⁸). The asymmetry in this study between these two populations could hence be viewed as representing their actual socio-legal differences.

Another, methodological, limitation of this study is that the majority of its primary sources – namely all of the court decisions, the statutory law, transcripts of parliamentary committee meetings, some Israeli HRO publications, and publications by Israeli authorities – are in Hebrew. I have invested much time and thought into translating these materials in a way that would best

²⁵² On the way in which Palestinian women’s lives are defined by the presence or absence of men see Lotte Buch, *Derivative Presence: Loss and Lives in Limbo in the West Bank*, in *THE ANTHROPOLOGY OF ABSENCE: MATERIALIZATIONS OF TRANSCENDENCE AND LOSS* 83, 93–94 (Mikkel Bille, Frida Hastrup and Tim Flohr Sørensen eds., Springer, New York and London, 2010).

²⁵³ I do not have precise figures, and cannot provide figures about the court cases concerning Israeli children since they were held behind closed doors (as will be explained below). For reference to Israeli girls’ prominent role in the opposition to the “disengagement” from the Gaza Strip see YAIR SHELEG, *THE POLITICAL AND SOCIAL RAMIFICATIONS OF EVACUATING SETTLEMENTS IN JUDEA, SAMARIA, AND THE GAZA STRIP – DISENGAGEMENT 2005 AS A TEST CASE* 60 (The Israel Democracy Institute, Jerusalem, 2007) (Hebrew).

²⁵⁴ *Infra* text accompanying notes 573–583.

²⁵⁵ *Supra* text accompanying notes 225–229.

²⁵⁶ On the reasons for choosing this context see *supra* text accompanying note 227.

²⁵⁷ 3,767,126 Palestinians resided in the OPT in 2007. UNRWA, *supra* note 31, at 9. About two million of them were under-18-year-olds (*supra* note 15 and accompanying text). In comparison, the number of Israeli settler children in the OPT in that same year was about 126,600. The Israeli Central Bureau of Statistics, *supra* note 16, at 2.

²⁵⁸ See, e.g., *supra* note 47 and accompanying text.

convey their wording and connotations, their style and register (including, among other things, grammar mistakes, vague or “muddy” language, and “poor” word choices), and their sentiment. And yet, the translated text in this dissertation inevitably differs from the original.

An additional methodological limitation concerns the way in which this study uses some of its primary materials. Occasionally, these texts are used not only as objects of analysis, but also as sources of “information” about non-textual practices and phenomena, such as the conditions in certain legal sites, or figures concerning child offenders in the OPT. For the sake of transparency and caution, when used in this manner, such sources of “information” are preceded with phrases such as “according to”. Whenever possible, this information will be compared with my own findings (e.g., my sample of court files). Factual claims whose empirical or methodological basis is unclear will be described as “estimates”. It is particularly worth noting, in this context, that when I visited the Ofer military courts, I saw that some of the things said during the hearings were not recorded in the transcripts; for this and other reasons, this study analyses court transcripts primarily as indicating the judges’ views, and draws on other sources when making arguments about the actual court procedures. In this sense, this research project complements Lisa Hajjar’s previously mentioned ethnographic study of the military court system.²⁵⁹

5. TERMINOLOGY

Terms structure the way we see and understand the world, and terminological disputes are specifically integral to the Israeli-Palestinian conflict.²⁶⁰ Hence, let us now discuss seven central terms used in this dissertation.²⁶¹

5.(a). “Occupied Palestinian Territories”

HROs,²⁶² the International Court of Justice,²⁶³ and some international law scholars²⁶⁴ use, sometimes interchangeably, the terms “the occupied territories” and “the Occupied Palestinian

²⁵⁹ See *supra* note 161 and accompanying text.

²⁶⁰ Julie Peteet, *Words as Interventions: Naming in the Palestine – Israel conflict*, 26 *THIRD WORLD QUARTERLY* 153, 153-154, 157 (2003).

²⁶¹ On other terminological disputes in the Israeli-Palestinian conflict see *id.*, at 155, 163-165.

²⁶² See, e.g., DCI – PALESTINE, *supra* note 26; SAVE THE CHILDREN – SWEDEN, ONE DAY IN PRISON – FEELS LIKE A YEAR: PALESTINIAN CHILDREN TELL THEIR OWN STORIES (2003), available at <http://sca.savethechildren.se/Global/scs/MENA/Resources/One%20day%20in%20Prison%20-%20English.pdf>; UN COMMITTEE ON THE RIGHTS OF THE CHILD, CONCLUDING OBSERVATIONS/COMMENTS: ISRAEL (CRC/C/15/Add.195, 2002), available at [http://www.unhcr.ch/tbs/doc.nsf/\(Symbol\)/CRC.C.15.Add.195.En?Opendocument](http://www.unhcr.ch/tbs/doc.nsf/(Symbol)/CRC.C.15.Add.195.En?Opendocument). Most Israeli HROs

Territories" (or OPT) to denote the West Bank and Gaza Strip. In Arabic, these territories are popularly named "Palestine" and "the Occupied Territories".²⁶⁵

In contrast to the position of most of the international community, Israel governments have contended that these territories are not occupied (and therefore are not subject to the international law of occupation). Israel formally refers to these territories as "administered" (rather than occupied),²⁶⁶ and in Israeli public discourse, the most popular terms are "the territories" and "Judea, Samaria, and the Gaza Strip"²⁶⁷ (the latter term will be discussed shortly).

Some academic critics of Israel's policies in these territories have called for abandoning the term "occupation", for a different reason: this term, they argue, is misleading and insufficiently critical. For example, sociologist Yehuda Shenhav argues that the term "occupation" assumes temporariness and clear geographical boundaries – neither of which the so-called Israeli "occupation" possesses. Israel has governed the supposedly "occupied" territories for 45 years in a deeply institutionalised manner, many of its control mechanisms in these territories have existed in Israel proper since long before 1967 (when the "occupation" supposedly started), and the boundaries between Israel and the purportedly "occupied" territories are somewhat ambiguous, conceptually and practically.²⁶⁸

International law scholars Orna Ben-Naftali, Aeyal Gross, and Keren Michaeli have suggested replacing the term "occupation", in the Israeli-Palestinian context, with the neologism "dennepeation", which incorporates the words "occupation", "annexation", and "deprivation".²⁶⁹ On the other hand, social scientist Lev Greenberg suggests referring to the so-called "occupation" as

prefer the former term ("Occupied Territories"), presumably since it does not characterise these territories as Palestinian. See, e.g., B'TSELEM, *supra* note 96; YESH DIN, *supra* note 26.

²⁶³ LEGAL CONSEQUENCES OF THE CONSTRUCTION OF A WALL IN THE OCCUPIED PALESTINIAN TERRITORIES, ADVISORY OPINION (INT'L CT. JUSTICE, JULY 9, 2004), 43 ILM 1009 [2004].

²⁶⁴ See, e.g., Ben-Naftali, Gross and Michaeli, *supra* note 21; Imseis, *supra* note 70.

²⁶⁵ Peteet, *supra* note 260, at 163.

²⁶⁶ For the Israeli position see Shamgar, *supra* note 158. For discussion see Cohen, *supra* note 34, at 24-25, 38-39, 46; KRETZMER, *supra* note 83, at 32-34.

²⁶⁷ Peteet, *supra* note 260, at 163.

²⁶⁸ Yehuda Shenhav, *Why Not "The Occupation"*, 31 TEORIYA U-VIKORET [THEORY & CRITIQUE] 5, 5-9 (2007) (Hebrew). For further discussion of the ambiguity of the geographical boundaries of the Israeli "occupation" see Ariella Azoulay, *Forward: Disciplinary and Undisciplined Spaces*, in HETEROTOPIA: ON OTHER SPACES 107, 127-128 (Resling, Tel Aviv, 2010) (Hebrew); Brenna Bhandar, *Plasticity and Post-Colonial Recognition: 'Owning, Knowing and Being'*, 22 LAW & CRITIQUE 227, 245-247 (2011); Kelly, *supra* note 152, at 44, 47, 49; Julie Peteet, *Cosmopolitanism and the Subversive Space of Protests*, 37 JERUSALEM QUARTERLY 86, 87 (2009); Shenhav, *supra* note 268. See also Meron Benvenisti, *In Favor of a Binational Solution of the Conflict*, 20 MITA'AM (2009) (Hebrew) (contending that Israel has, in effect, annexed about 60 percent of the so-called "occupied" territories).

²⁶⁹ Orna Ben-Naftali, Aeyal M. Gross and Keren Michaeli, *Dennepeation: Occupation, Annexation, Deprivation – On the Legal Structure of the Occupation Regime*, 31 TEORIYA U-VIKORET [THEORY & CRITIQUE] 15 (2007) (Hebrew).

“that which has no name”, contending that alternatives to the term “occupation” tend to be co-opted by dominant discourses and fail to convey the complexity of the Israeli-Palestinian situation.²⁷⁰

While acknowledging the complexity of the Israeli-Palestinian situation (and exploring it throughout this dissertation), I do not share the above scholars’ formalistic-legalistic conception of “occupation” as a term which has a single, fixed meaning. Like all signifiers, “occupation” inevitably means different things in different texts and contexts – and from a sociological perspective, none of these meanings is any more “true” than, or superior to, others. The meaning of “occupation”, like that of any other word, is constituted and transformed by the ways in which it is used.²⁷¹ In the last decades, across most public and professional discourses, the Israeli-Palestinian case has arguably become a paradigm for occupation (and especially for belligerent occupation). Therefore, in order to heed the ways in which the West Bank and Gaza Strip operate, not only as geopolitical places but also as socio-political signifiers, I would argue against ignoring their prevalent association with “occupation”.

For a similar reason, I have chosen to refer to these territories as Palestinian. In practice, these territories are not entirely Palestinian – as evident from Israel’s control over them, its alleged *de facto* annexation of most of them, and the presence of hundreds of thousands of Israeli settlers in them. However, the vast majority of the international community nonetheless conceptualises these territories as Palestinian and not Israeli; omitting the adjective “Palestinian” will veil this predominant conception of these territories. The term “the Occupied Palestinian Territories” (OPT) is therefore used in the dissertation.

5.(b). “The West Bank”

Another aspect of the dispute about how to name the OPT concerns the territory which is commonly termed – except by some Israelis – “the West Bank”. Shortly after occupying this territory in 1967, Israel started referring to it by its biblical names of “Judea” and “Samaria”. According to several scholars, these terms were aimed to “annex” this territory, discursively and conceptually, to Israel and into the district of the “historical rights” of the Jewish nation.²⁷² As part of this trend, the

²⁷⁰ Lev Greenberg, “Unwanted Inclusion”: *The Plight of Speech Against the Occupation*, 27 TEORIYA U-VIKORET [THEORY & CRITIQUE] 187 (2005) (Hebrew).

²⁷¹ See generally J. L. AUSTIN, *HOW TO DO THINGS WITH WORDS* (Clarendon Press, Oxford, 1962); JACQUES DERRIDA, *WRITING AND DIFFERENCE* (Alan Bass trans., Routledge, London, 1978); LUDWIG WITTGENSTEIN, *PHILOSOPHICAL INVESTIGATIONS* (revised 4th ed., P.M.S. Hacker and Joachim Schulte eds., G.E.M. Anscombe et al trans., Blackwell, Chichester, 2009).

²⁷² HAJJAR, *supra* note 21, at 58; Peteet, *supra* note 260, at 158-159, 163; ZERTAL AND ELDAR, *supra* note 23, at 336. For further discussion of this terminological discord see *ENCYCLOPEDIA OF THE ISRAELI-PALESTINIAN CONFLICT*, *supra* note 7, at 797, 1287-1288.

official names of the two main Israeli military courts whose rulings I analyse are the Judea court and the Samaria court.

The term “the West Bank” – undoubtedly much more widely accepted than “Judea and Samaria” – is used in this dissertation. The two above military courts will be referred to as the Ofer and Salem courts (after the names of the military bases in which these courts reside). As I found in my visits to these courts, even military personnel generally refer to them as Ofer and Salem, reserving the terms Judea and Samaria for official military documents.

5.(c). “Disengagement”

As clarified earlier, with regard to Israeli settler children, this study concentrates on the context of Israel’s pullout from the Gaza Strip in 2005.²⁷³ In Israeli law²⁷⁴ and public discourse, this pullout has been termed “the disengagement”.

However, as also explained earlier, due to the effective control Israel retains over the Gaza Strip, the question of whether the Israeli occupation of that territory has terminated is in dispute.²⁷⁵ This means that the extent to which Israel has indeed disengaged from the Gaza Strip is unclear – and scare quotes will hence be used around “disengagement” throughout the dissertation.

5.(d). “Security prisoners”

Another dispute concerns the term “security offences”, which generally denotes, according to the regulations of the Israeli Prison Service (IPS), offences committed “against a security backdrop or for nationalistic motives” – although these regulations leave the classification of each individual prisoner open to the discretion of the IPS.²⁷⁶

In recent years, between a fifth and a half of the IPS prison population has been “security prisoners”.²⁷⁷ According to information obtained from the IPS, in 2006 about 94 percent of all

²⁷³ *Supra* notes 7 and 63 and accompanying text.

²⁷⁴ See, e.g., THE DISENGAGEMENT PLAN IMPLEMENTATION LAW (2005), available in Hebrew at <http://www.knesset.gov.il/Laws/Data/law/1982/1982.pdf> (with corrections of typographical errors available in Hebrew at <http://www.knesset.gov.il/Laws/Data/law/1985/1985.pdf>).

²⁷⁵ *Supra* notes 67-69 and accompanying text.

²⁷⁶ ISRAEL PRISON SERVICE COMMISSION ORDINANCE NO. 04.05.00: THE DEFINITION OF SECURITY PRISONER (2006), art. 1. Different Israeli statutory laws define “security offence” differently, according to their purposes. See, e.g., THE CRIMINAL PROCEDURE LAW (ENFORCEMENT AUTHORITIES – ARRESTS) (1996), art. 35(b) (applying the term “security offence” to a number of specific offences, such as membership of an illegal association, arms sales, and unauthorised entry into a military zone).

²⁷⁷ See, e.g., Ofer Zaltsberg, *A Mapping of Information About the Population of Palestinian Security Prisoners Detained in Israel 2* (Van Leer Institute, Jerusalem, 2006) (Hebrew), available at

“security prisoners” were Palestinian residents of the OPT, of which 98 percent had been tried by the military courts.²⁷⁸

In light of the extensive critical literature on the Israeli “security discourse”,²⁷⁹ scare quotes will be used around “security prisoners” and similar terms throughout the dissertation.

The Palestinians whom Israel defines as “security prisoners” generally reject this term, and refer to themselves as “political prisoners”. This term – “political prisoners” – is only used in Chapter 4, when discussing the question of whether Palestinian child prisoners should be held separately from their adult counterparts (and even then, Israel’s naming of this population “security offenders” is mentioned).

5.(e). The “IDF”/“IOF”

Since this study analyses in depth the Israeli *military* law relating to Palestinian children, the question arises of how to refer to that military. Whereas most Israelis refer to it by its official name, “the IDF” (Israeli Defence Forces),²⁸⁰ some critics of Israel, including some non-Israeli HROs, term it “the IOF” (Israeli Occupation Forces). In this dissertation, except when these acronyms appear in quoted texts, the phrase “Israeli military” will be used.

http://www.vanleer.org.il/Data/UploadedFiles/Files/db_political_prisoners.pdf (noting that according to IPS information, in 2006 about a half of prisoners – 9,083 out of a population of 18,157 – were “security prisoners”). Figures provided to me by the office of the spokesperson of the IPS are slightly different, suggesting that in 2006, there were 9,628 “security prisoners” in the IPS facilities – about 47% of the total 20,628 prisoner population. The IPS has provided slightly different figures on other occasions: see THE OFFICE OF THE ISRAELI PRISON SERVICE’S SPOKESPERSON, THE ISRAELI PRISON SERVICE – AN IDENTITY CARD 3 (2008) (Hebrew), available at http://www.ips.gov.il/NR/rdonlyres/2690B766-416D-4FAB-89C0-15E4008EDC10/0/Shabas_Id_Heb_08.pdf; THE OFFICE OF THE ISRAELI PRISON SERVICE’S SPOKESPERSON, ANNUAL REPORT – 2008, at 53 (2009) (Hebrew), available at http://www.ips.gov.il/NR/rdonlyres/51E5C70D-238D-40D7-8D10-CE568C8F0A54/0/Report_2008_Ips.pdf; THE OFFICE OF THE ISRAELI PRISON SERVICE’S SPOKESPERSON, *supra* note 251, at 4-5. See also No Legal Frontiers, *Prisons in Israel* (last visited: August 4, 2011), available at <http://nolegalfrontiers.org/en/general-information/military-prisons>.

²⁷⁸ Adalah, *Palestinian Political Prisoners: The Numbers*, 35 ADALAH’S NEWLETTER (2007), available at <http://www.adalah.org/newsletter/eng/apr07/ar3.php>; YESH DIN, *supra* note 26, at 25.

²⁷⁹ See, e.g., Bornstein, *supra* note 29, at 107-108, 124; BARUCH KIMMERLING, THE INVENTION AND DECLINE OF ISRAELINESS: STATE, SOCIETY, AND THE MILITARY 208-228 (University of California Press, Berkeley and London, 2001); JULIANA OCHS, SECURITY AND SUSPICION: AN ETHNOGRAPHY OF EVERYDAY LIFE IN ISRAEL (University of Pennsylvania Press, 2010); THREAT: PALESTINIAN POLITICAL PRISONERS IN ISRAEL vii-ix, 37-56 (Abeer Baker and Anat Matar eds., Pluto Press, New York, 2011); Weill, *supra* note 26, at 415, 417.

²⁸⁰ See, e.g., THE PALESTINIAN CENTRE FOR HUMAN RIGHTS, CONFIRM THE KILL: IOF KILLINGS OF CHILDREN DURING THE AL AQSA INTIFADA (2006), available at http://www.pchrgaza.org/files/S&r/English/pdf/confirm_study_38.pdf.

5.(f). "Israeli-Palestinian"

The phrase "the Israeli-Palestinian conflict" will be used throughout this dissertation. However, the situation in Israel/Palestine is more complex than this convenient phrase suggests, in at least two regards:²⁸¹ First, characterising the conflict as Israeli-Palestinian overlooks the fact that Israelis and Palestinians are not mutually exclusive groups. About a fifth of Israeli citizens self-identify as Palestinian (whereas Israeli Jews usually refer to them as "Israeli Arabs"²⁸²); these Palestinian citizens of Israel reside in Israel, rather than in the Palestinian territories. Unfortunately, I have found no better alternatives to the commonly used phrase "Israeli-Palestinian conflict". For example, the phrase "Jewish-Palestinian conflict" would be inaccurate, among other things because about a half of Jews and most Palestinians live outside Israel/Palestine. Another alternative phrase, "the Zionist-Palestinian conflict", obscures the existence of different, sometimes competing, strands in both Zionism and Palestinian nationality, some of which strive against this conflict.

Second, the term "conflict" itself is problematic; Israeli-Palestinian relations are often about disregard rather than conflict, and there are some (albeit few) initiatives of bi-national cooperation and dialogue. Notwithstanding these challenges, the term "Israeli-Palestinian conflict" seems most apt to describing the context in which this study examines law and childhood.

5.(g). "Childhood"

The situation in Israel/Palestine appears to be a terminological minefield, with disputes surrounding countless words.²⁸³ Another word, whose often contested meaning is of particular importance to this study, is "childhood".

As explained earlier, this study employs a constructivist approach to childhood, which acknowledges and examines the ways in which the categories of "child" and "childhood" are socio-legally constructed.²⁸⁴ These categories are riddled with various indeterminacies – including their different age-based definitions, in different circumstances and by different institutions or

²⁸¹ For additional discussion of the shortcomings of the term "Israeli-Palestinian conflict" see HAJJAR, *supra* note 21, at 26, 28-29, 32.

²⁸² On this terminological issue see Dani Rabinowitz, *Oriental Nostalgia: The Transformation of the Palestinians into "Israeli Arabs"*, 4 TEORIA U-VIKORET [THEORY & CRITIQUE] 141 (1993) (Hebrew) (English abstract available at <http://www.vanleer.org.il/Data/UploadedFiles/Publications/TUV/4/eng.pdf>). See also Peteet, *supra* note 260, at 161.

²⁸³ On some of the political aspects of researching the Israeli-Palestinian conflict see HAJJAR, *supra* note 21, at 7-8; NASHIF, *supra* note 26, at 2-3, 17, 19.

²⁸⁴ *Supra* text accompanying notes 111-112.

individuals.²⁸⁵ Although this constructivist study rejects the socially-dominant, essentialist, and reductive desire to define childhood through age (as explained earlier²⁸⁶ and in Chapter 3²⁸⁷), in my empirical sources – Israeli legislation, international legislation, and HRO publications – the term “children” generally designates under-18-year-olds. In order to be attentive to these sources, this term is used in the dissertation – provisionally and sceptically – in this meaning (unless indicated otherwise).

While terminological issues may seem more visible or explicit with regard to Israel/Palestine or childhood, the meaning of all words and phrases in this dissertation – and in any text for that matter – is inevitably ambiguous and unstable. As suggested earlier, rather than having any “true” meaning, words are defined and redefined by the ways and contexts in which they are used.²⁸⁸ Thus, several scholars’ description of childhood as a “hollow category” or an “empty signifier” – a term with no determinate essence, inscribed with competing and temporary social meanings²⁸⁹ – is equally applicable to any other term.

6. THE DISSERTATION OUTLINE

The next chapter will review the domestic Israeli law applicable to Israeli settler children in the OPT and the Israeli military law applicable to Palestinian children in the OPT, and will briefly compare between these two legal systems. The chapter will thus provide the general legal framework for this study, and serve as a reference point for the following chapters, which, in turn, will delve into specific socio-legal aspects.

Chapter 3 will examine socio-legal issues concerning the age of Israeli and Palestinian child defendants. The chapter will discuss the factors and conceptions that inform the law’s age-based demarcation of childhood, and the implications of this demarcation in relation to both law and childhood (in the OPT and generally).

Chapter 4 will focus on the way in which the law spatially demarcates childhood in the OPT – by separating child offenders from their elders. Significant changes which have recently taken place in the law applicable to Palestinians will be discussed, as will the various discourses

²⁸⁵ See, e.g., Scott, *supra* note 116, at 118-127; Valentine, *supra* note 48, at 38; CHRISTINE WILKIE-STIBBS, *THE OUTSIDE CHILD IN AND OUT OF THE BOOK* 7-8 (Routledge, London and New York, 2008). We will investigate this issue at length in Chapter 3.

²⁸⁶ *Supra* notes 141-144 and accompanying text.

²⁸⁷ *Infra* notes 434-436 and accompanying text.

²⁸⁸ *Infra* text accompanying note 271.

²⁸⁹ Allen, *supra* note 19, at 160; Inés Dussel, *Childhood and the Politics of Memory in Argentina*, in *GOVERNING THE CHILD IN THE NEW MILLENNIUM* 193, 194 (Kenneth Heltqvist and Gunilla Dahlberg eds., Routledge, New York and London, 2001); KAREN SÁNCHEZ-EPPLER, *DEPENDENT STATES: THE CHILD’S PART IN NINETEENTH-CENTURY AMERICAN CULTURE* xix (University of Chicago Press, Chicago and London, 2005).

leading up to these changes. Also to be examined are the legislation specially enacted concerning Israeli children in the context of Israel's "disengagement" from the Gaza Strip, and the discourses surrounding this legislation.

Chapter 5 will explore a central theme in legal and human rights discourses concerning children in the OPT: trauma. We will analyse how, in these discourses, child-related traumatic events have been represented, verbally and visually. The socio-legal significance and implications of these representations, symbolic and practical, will be discussed.

Chapters 3-5 focus on different *themes*: age (Chapter 3), spatial separation (Chapter 4), and the representation of trauma (Chapter 5). Additionally, these Chapters cover the different *stages of the legal process*, with Chapter 3 focusing on the trial and especially the sentencing stage; Chapter 4 examining, in addition to the courtroom trial, issues concerning detention and imprisonment; and Chapter 5 centring on the arrest, interrogation, and detention stages. All these chapters analyse, through different lenses, the discourses and practices involving HROs, Israeli courts (military and civil), and Israeli legislators. Interwoven throughout these chapters are *common themes*, such as the spatiotemporality of childhood, the boundaries of childhood, the construction of adulthood, and the use of the child as a source of evidence.

Chapter 6 will summarise the research findings, and discuss the above recurrent themes.²⁹⁰ The implications and contribution of this study will be explained in light of its findings and analysis, and directions will be suggested for further research.

²⁹⁰ Teasing out recurrent themes is typical of discourse analysis. ROSE, *supra* note 12, at 155.

THE LAW OF CHILDHOOD

1. INTRODUCTION

In addition to the general information provided in the previous chapter on Israeli law in the OPT, the present chapter discusses specifically the Israeli criminal law relating to child offenders in the OPT, thereby laying the basic legal foundations for the chapters to come.

Further information can be found in Appendices 3-4: Appendix 3 describes provisions in Israeli law relating to child offenders which – due to their lesser relevance to the dissertation – are not discussed in the present chapter. And Appendix 4 provides an overview of the pertinent international law and of Israel's application of it (or lack thereof) in the OPT.

The task which this chapter and Appendices 3-4 endeavour to undertake is not trivial. Relevant literature is scarce (as discussed in the previous chapter),²⁹¹ and the pertinent law is exceptionally complex. This complexity concerns, among others, the fact that several legal frameworks – often at odds with each other – simultaneously apply to the same individuals;²⁹² the fact that different ethnic groups in the same territory are subject to different Israeli legal systems; and the fact that Israeli military law (which applies to Palestinians in the OPT) is remarkably inconsistent, vague, and prone to changes.²⁹³

For purposes of clarity, many of these intricacies will be dealt with in the following chapters, while the present chapter offers a relatively straightforward account of the statutory law.²⁹⁴ To place the statutory law within its relevant context, some empirical and historical details will also be provided.

For the sake of clarity and coherence, the following account of the Israeli law(s) applicable to children in the OPT is divided into three categories: (a) “the trial”; (b) “sentencing”; and (c) “outside the courtroom (arrest, interrogation, detention, and incarceration)”.

²⁹¹ *Supra* text accompanying notes 159-163.

²⁹² The coinciding of different legal frameworks is, in and by itself, not exclusive to the OPT. *See, e.g.*, Boaventura de Sousa Santos, *Law: A Map of Misreading. Toward a Postmodern Conception of Law*, 12 JOURNAL OF LAW AND SOCIETY 279, 298 (1987) (“We live in a time of porous legality or of legal porosity [...]. Our legal life is constituted by an intersection of different legal orders, that is, by *interlegality*.”) (emphasis in original). However, the conflict between various legal frameworks in the OPT seems to be particularly manifest.

²⁹³ *Cf.* HAJJAR, *supra* note 21, at 225, 256 (arguing that there is a great deal of disparity in the sentences which the Israeli military court system issues for similar charges). These characteristics of Israeli military law will be discussed throughout the dissertation.

²⁹⁴ For example, we cannot delve into relevant internal police ordinances. *See* ACRI, *supra* note 61, at 3-4, 12-13, 19.

2. THE DOMESTIC ISRAELI LAW APPLICABLE TO ISRAELI CHILD OFFENDERS

In the 1920s and 1930s, the British Mandate government in Palestine enacted legislation which marked a major change in social reaction to “juvenile delinquents” in Palestine.²⁹⁵ Among other things, this legislation introduced the youth court system to Palestine, and developed a wide array of regulations aiming to rehabilitate not only young offenders but also deserted and “wayward” children (thus making Palestine the first territory in the British Empire where a system of probation was implemented).²⁹⁶ In 1947, the British *Emergency Regulations* were amended to provide that military courts could act as juvenile courts.²⁹⁷ With the establishment of Israel in 1948, all British Mandate law – including the above laws – remained in force.²⁹⁸ The law concerning child offenders has significantly transformed since then,²⁹⁹ until reaching its current form.

Since Israel applies its domestic law to Israeli settlers in the OPT, Israeli children in these territories are granted a significantly more extensive array of rights than their Palestinian counterparts (to whom the military law applies). There are several statutes determining the legal status of Israeli child offenders, the main one being the *Youth Law*, which has been amended several times since its enactment in 1971. This piece of legislation was thoroughly revised in 2008,³⁰⁰ to expand the protection of child offenders’ rights, predominantly in line with international law standards. Since this statute is very detailed, only its most relevant and central provisions will be discussed in this chapter.³⁰¹

Before delving into the three categories mentioned above (“the trial”, “sentencing”, and “outside the courtroom”), a few general remarks are in order. The domestic law generally defines a minor as anyone under the age of 18 years.³⁰² Among other things, this law requires that measures concerning minors be executed in protection of their dignity, in consideration of their age and maturity level, and in giving due weight to their rehabilitation, care, and reintegration into

²⁹⁵ The main statute was THE JUVENILE DELINQUENTS ORDINANCE. Earlier statutes did not exclusively concern children and were far less extensive. See also Ajzenstadt 2001, *supra* note 104; Hassin and Horovitz, *supra* note 107, at 323-324. On child legislation in Mandate Palestine see also ASSAF LIKHOVSKI, LAW AND IDENTITY IN MANDATE PALESTINE 84-105 (University of North Carolina Press, Chapel Hill, 2006).

²⁹⁶ Ajzenstadt 1999, *supra* note 104, at 196-197; TAMMY RAZI, FORSAKEN CHILDREN: THE BACKYARD OF MANDATE TEL-AVIV 219-220 (Am Oved, Tel-Aviv, 2009) (Hebrew).

²⁹⁷ THE DEFENCE REGULATIONS (TIME OF EMERGENCY) (1945) (art. enacted: 1947), art. 33a.

²⁹⁸ THE GOVERNANCE AND LAW ORGANISATION ORDINANCE (1948), art. 11. See also *infra* note 370.

²⁹⁹ See also Ajzenstadt 1999, *supra* note 104; Hassin 1983, *supra* note 107.

³⁰⁰ THE YOUTH LAW (ADJUDICATION, PUNISHMENT, AND MODES OF TREATMENT) (1971, 14th amendment 2008) (*hereinafter*: YOUTH LAW). See also Arik Bendat, *The New Youth Law: A Helping Hand for Minor Offenders*, NRG (July 22, 2008) (Hebrew), available at <http://www.nrg.co.il/online/1/ART1/763/302.html>.

³⁰¹ The following will hence not be discussed: YOUTH LAW, *supra* note 300, arts. 1c, 2(b)-(c), 3(b), 5a(b), 6, 9a(a)-(e), 9b(b)-(c), 9c-9e, 9a(f), 9b(a), 9b(d)-(e), 9k-9l, 10, 13c, 18(c), 21-23, 25a-25b, 27-34a, 34d, 35-37, 39-44a, 46-49. However, some of these articles are discussed in Appendix 3, due to their lesser relevance to this study.

³⁰² YOUTH LAW, *supra* note 300, art. 1.

society.³⁰³ The law further requires that due weight be given to their wishes when reaching decisions concerning them, and generally grants minors the right to express their opinion at different stages of the criminal process (for example, before the court makes any decision).³⁰⁴ Moreover, according to the law, the court must explain its decisions to minors in a manner suitable to their age and maturity level. When making a decision which goes against the minor's wishes, the court is required to explain to the minor the reasons for this decision.³⁰⁵

2.(a). *The trial*

Israeli minors are tried by specially trained judges³⁰⁶ in youth courts,³⁰⁷ separately from adult defendants,³⁰⁸ and *in camera*.³⁰⁹ Israeli settler children can also be tried by Israeli municipal courts in the West Bank, which usually deal with municipal issues pertaining to Israeli settlements but are authorised to act as youth courts.³¹⁰

The court must appoint an attorney for unrepresented minors before deciding on their detention, and for unrepresented minors against whom charges have been pressed. The court may also appoint an attorney at its discretion, if it considers the minor's best interests to require it.³¹¹

The court is authorised to order the presence of the minor's parent or guardian in the courtroom at any time.³¹² As regards the parents' rights in the trial: they are entitled (unless the court orders otherwise) to be present in the hearings; the court is required to hear their opinion before making certain decisions concerning the minor, including among others the determining of the convicted minor's treatment or punishment; parents may make any request to the court on

³⁰³ *Id.*, art. 1a(a). See also *id.*, art. 1a(b).

³⁰⁴ *Id.*, arts. 1b, 9b(b), 9f(a), 9f(c)(2), 13a, 17a-17b.

³⁰⁵ *Id.*, arts. 17a and 1b(e) respectively. For exceptions to this provision see *id.*, art. 17b.

³⁰⁶ *Id.*, art. 2(a). There are currently eight regular youth court judges. Israeli Justice Authority, *Youth Courts* (last visited: July 12, 2011) (Hebrew), available at http://elyon1.court.gov.il/heb/rashut/bm_naor.htm.

³⁰⁷ YOUTH LAW, *supra* note 300, art. 3(a). See also *id.*, arts. 5, 7. There are four central exceptions to this rule: (a) regular judges sit in Supreme Court hearings concerning minor defendants; (b) 18 year old adults who were minors at the time of the offence are tried by youth courts; (c) minors charged with traffic violations can be tried by traffic courts, under certain circumstances and restrictions; and (d) soldiers are tried by courts-martial. See *id.*, arts. 3(a), 5a(a), 45b, and 45-45a respectively. During Israeli's "disengagement" from the Gaza Strip 2005, due to the large number of Israeli children detained for offences committed in opposition to the "disengagement", some of these children's cases were heard by "adult" (non-youth) courts. See THE CHILD'S RIGHTS COMMITTEE – THE 17TH KNESSET, TRANSCRIPT NO. 32 (June 12, 2007) (Hebrew) (statements by the president of the Israeli youth courts).

³⁰⁸ YOUTH LAW, *supra* note 300, arts. 4, 8.

³⁰⁹ *Id.*, art. 9.

³¹⁰ THE LOCAL COUNCILS REGULATIONS (JUDEA AND SAMARIA) (1981), art. 138. Cited in AdminC 743/03 *Shahar Pipe Damages Ltd v. Rozen* (2004) (Jerusalem Small Claims Ct.), art. 22. See also ORDER NUMBER 1559 CONCERNING THE YOUTH LAW (2005), art. 3 (authorising the Israeli municipal courts in the West Bank to try Israeli settler children according to the *Youth Law*).

³¹¹ YOUTH LAW, *supra* note 300, arts. 10f, 18.

³¹² *Id.*, art. 19(b).

behalf of the minor, they may interrogate witnesses and make arguments on behalf of or alongside the minor, and they must be given copies of the subpoena and the indictment.³¹³

2.(b). Sentencing

In 2007, minors constituted 8.57 percent of all those convicted in the domestic Israeli legal system.³¹⁴ When sentencing a minor, the court can pursue any of these courses of action: place the minor in secure accommodation (a rehabilitation facility which the minor is prevented from leaving); order the minor to pay compensation to any injured person; order the minor or her/his parents to guarantee (with or without providing a bond) that the minor will not reoffend; not convict the minor at all and thereby avoid a criminal record; and/or convict the minor and impose a prison sentence, a probation sentence, and/or a fine.³¹⁵ The many alternatives to prison are facilitated by a comprehensive system of diagnostic and rehabilitation services and facilities for young offenders.³¹⁶

Defendants under the age of 14 years at the time of their sentencing may not be sentenced to prison at all.³¹⁷ There are no set limits on sentence length for over-14-year-olds, but in general, courts are required by law to sentence minors taking into consideration their age at the time of committing the offence(s).³¹⁸

2.(c). Outside the courtroom (arrest, interrogation, detention, and incarceration)

Ten percent of the suspects whom the Israeli police interrogated in 2008 were minors. In eight percent of the police files opened in that year the suspects were minors – most commonly arrested for property offences.³¹⁹

³¹³ *Id.*, art. 19. For the specific decisions before which the court is required to hear the parent's opinion see *id.*, art. 19(d) (referring to arts. 20, 20a, 24, 25a, 30, 31(d), and 33).

³¹⁴ THE ISRAELI POLICE AND CENTRAL BUREAU OF STATISTICS, OFFENDING 1999-2008, at 5 (2009) (Hebrew), available at <http://www.cbs.gov.il/www/statistical/crime08h.pdf>.

³¹⁵ YOUTH LAW, *supra* note 300, arts. 24-26. See also *id.*, art. 38. See also ORDER 1651, *supra* note 74, art. 268 (authorising the implementation in the OPT of sentences which domestic Israeli youth courts impose on Israeli settler children); ORDER 1559, *supra* note 310, art. 2 (authorising Israeli welfare workers to apply the provisions of the *Youth Law* to Israeli children in the West Bank); THE YOUTH LAW (TREATMENT AND SUPERVISION) (1960) (among others, concerning the care and supervision of child offenders who are not brought to trial).

³¹⁶ For a discussion of these services see, e.g. NO LEGAL FRONTIERS, *supra* note 26, at 13-15.

³¹⁷ YOUTH LAW, *supra* note 300, art. 25(d). In 2006, the deputy to the legal advisor to the Israeli government remarked that normally charges had not been pressed against Jewish settlers under the age of 14 years. THE CHILD'S RIGHTS COMMITTEE 2006, *supra* note 47.

³¹⁸ YOUTH LAW, *supra* note 300, art. 25(c).

³¹⁹ THE ISRAELI POLICE AND CENTRAL BUREAU OF STATISTICS, *supra* note 314, at 3, 5. In 2008, property offences were the charges in 38 percent of police files concerning minor suspects, and in 48 percent of all police files (i.e., those concerning either adult or minor suspects). *Id.*, at 3.

The law requires the police, as much as possible, to inform a parent, relative, or another adult acquaintance of the minor before summoning the minor for interrogation as a suspect.³²⁰ The interrogator is required to explain to the minor, before the interrogation, her/his right to have an adult parent/relative/acquaintance present, and also her/his right to legal counsel and representation.³²¹ The adult's attendance is not required if considered potentially harmful to the minor's wellbeing, or with a few exceptions such as minors accused of "security offences"³²² – but even under these circumstances an adult should normally be contacted within six hours of the minor's arrival at the police station.³²³ The minor would usually have the right to have this adult present during the interrogation and, as much as possible, to consult with the adult prior to the interrogation.³²⁴

The law requires that the interrogation itself be conducted according to several further conditions. Minors may not be interrogated during the night, except under particular exceptions.³²⁵ Additionally, interrogations of Israeli minors are usually audio-visually recorded (as are those of adults), unless they are suspected of "security offences".³²⁶ The interrogation is usually done by specially trained youth interrogators.³²⁷

A minor should only be detained if the purpose of the detention cannot be achieved in a manner which is less restrictive of the minor's liberty. When deciding whether to arrest a minor, the police are required to take into account the minor's age, as well as the effect of the arrest on her/his wellbeing and development.³²⁸ Under-14-year-olds must normally be brought before a judge within 12 hours after their arrest, or 24 hours when urgent interrogation is required. Older child detainees are to be brought before a judge within 24 hours from their arrest, or 48 hours if necessary interrogation is required.³²⁹

³²⁰ YOUTH LAW, *supra* note 300, art. 9f. The police should ascertain the minor's wishes as to which adult should be informed. *Id.*, art. 9f(a).

³²¹ *Id.*, art. 9i(a). If the minor has no attorney, the interrogator should contact the Public Defender's Office so that it could see whether the minor is entitled to be represented by them at this stage. *Id.*, art. 9i(b).

³²² *Id.*, art. 9g(a). Another main exception is suspicion that the adult took part in the offence and might therefore obstruct the investigation. *Id.*

³²³ *Id.*, art. 9g(c). However, the police may inform an adult within eight (rather than six) hours, if after six hours there remains concern that this action would either harm the minor's wellbeing or obstruct the investigation, or if this action would substantially harm national security. *Id.*, art. 9g(d).

³²⁴ *Id.*, art. 9h. This article details elaborate instructions and restrictions on which I cannot elaborate due to space limitations.

³²⁵ *Id.*, art. 9j. Under usual circumstances, minors under the age of 14 years may not be interrogated between 8pm and 7am, and older minors may not be interrogated between 10pm and 7pm. *Id.*, arts. 9d(a) and 9j. An Israeli court recently criticised the Israeli police operating in the West Bank for illegally interrogating a settler minor during the night. Chaim Levinson, *Court Criticizes the Samaria and Judea Police: Policemen Illegally Arrested Minors*, HAARETZ (January 15, 2012) (Hebrew), available at <http://www.haaretz.co.il/news/law/1.1617269>.

³²⁶ THE CRIMINAL PROCEDURE LAW (SUSPECTS INTERROGATION) (2002), arts. 4, 17.

³²⁷ YOUTH LAW, *supra* note 300, arts. 1, 9f-9j. See also ORDER 1559, *supra* note 310, art. 2 (authorising Israeli youth interrogators to implement the provisions of the *Youth Law* to Israeli children in the West Bank.).

³²⁸ YOUTH LAW, *supra* note 300, art. 10a.

³²⁹ *Id.*, art. 10c-10d.

The law requires that minor detainees and prisoners be held separately from adults: either in a special detention/prison facility for minors, or in a separate wing for minors in a general facility.³³⁰ Similarly, according to the law, minors detained in police stations for interrogation must be separated from adult suspects and detainees.³³¹ When deciding to place a minor in a detention cell with other minors, the minor's wellbeing must be taken into account, as well as other considerations: the age difference between the minors, the type of charges against them, their criminal record, their arrest history, and the likelihood of violence between the minors.³³² The minor may be held alone if his/her best interests or the wellbeing of other minor inmates require so – provided that his/her opinion on this matter is heard.³³³

There are notable exceptions to the general requirement to separate minors from adult inmates. One exception concerns girls, who may be detained and imprisoned with a woman inmate if the authorised person in the facility considers it to be in the girl's best interests. This measure is subject to the girl's consent, and must be approved by the court within 24 hours.³³⁴ Another exception is that 17-year-olds may be imprisoned with an adult inmate aged 18 to 20 years, provided that this is not considered harmful to the minor's interests, and that the minor's opinion is heard.³³⁵ Minor and adult inmates can also be held together for up to 24 hours, and in certain circumstances up to 72 hours, prior to court hearings concerning the minor, or when a decision is pending on whether to detain and/or press charges against the minor.³³⁶

The law generally stipulates that the detention conditions must be in keeping with the minor detainee's age and needs, and that the minor inmate's wellbeing should be taken care of (including the provision of education and leisure services).³³⁷ Additionally, according to the law a social worker must usually see minor detainees within 24 hours of their arrival at the Israeli Prison Service facility.³³⁸

2.(d). *The pardoning of child opponents of the "disengagement"*

Our discussion of Israeli criminal law's encounter with Israeli children focuses on the context of the "disengagement" – Israel's unilateral pullout from the Gaza Strip. As explained in the previous chapter, this context has been chosen due to empirical constraints (lack of access to court cases

³³⁰ *Id.*, arts. 13(a), 34b(a).

³³¹ *Id.*, art. 13(b). Minors may not be detained in a police station if there is a detention facility for minors nearby. *Id.*

³³² *Id.*, art. 13b(c).

³³³ *Id.*, art. 13a.

³³⁴ *Id.*, art. 13(b1).

³³⁵ *Id.*, art. 34b(b).

³³⁶ *Id.*, arts. 34b(d)-34b(e).

³³⁷ *Id.*, art. 13b(a), 34c.

³³⁸ *Id.*, art. 13(b2).

outside this context), but is also valuable due to its relative similarity to the circumstances concerning Palestinian child offenders.³³⁹

The present discussion would thus be incomplete without mentioning that prior to the completion of the “disengagement”, public calls started being made – including in parliamentary deliberations concerning settler children’s eviction³⁴⁰ – to pardon those arrested for violently protesting against the “disengagement”. And indeed, in 2009, the Israeli president pardoned 59 such defendants, most of whom – 48 – were minors.³⁴¹

Shortly afterwards, in early 2010, the *Knesset* (Israeli parliament) expanded the pardon, by passing an unusual law which erased criminal records, terminated ongoing legal proceedings, and nullified sentences of opponents of the “disengagement”, excluding persons charged with severe offences and those with a prior criminal record.³⁴² According to the Israeli police, this law applied to 1,483 of 2,367 opponents of the “disengagement” to whom offences had been attributed; of these 1,483 eligible persons, 315 were minors when committing the offences.³⁴³ The Israeli High Court of Justice recently rejected an appeal against this law.³⁴⁴

3. THE ISRAELI MILITARY LAW APPLICABLE TO PALESTINIAN CHILD OFFENDERS

Palestinian children are generally subject to Israeli military law, including several specific provisions concerning child offenders which the military enacted shortly after the inception of the occupation in 1967. These provisions relate mainly to the detention and sentencing of children, and to the payment of fines and bonds for children.³⁴⁵

More recently, in July 2009, the military enacted several further provisions relating to youth offenders, most notably concerning the procedures of the newly-established military youth courts.³⁴⁶

³³⁹ *Supra* text accompanying notes 9-10.

³⁴⁰ THE CONSTITUTION, LAW, AND STATUTE COMMITTEE – 16TH KNESSET, TRANSCRIPT NO. 579 (August 28, 2005) (Hebrew) (calls by MP Yoel Edelstein and by settler Miriam Goldfischer).

³⁴¹ Arik Bendar, *Peres Erased Criminal Records for Opponents of the Disengagement*, NRG (June 14, 2009), available at <http://www.nrg.co.il/online/1/ART1/903/455.html> (Hebrew).

³⁴² THE LAW TO TERMINATE PROCEEDINGS AND ERASE RECORDS CONCERNING THE DISENGAGEMENT PLAN (2010).

³⁴³ The State Attorney’s reply to Appeal HCJ 1213/10 *Nir v. The Speaker of the Knesset* [2011] (Sup. Ct.).

³⁴⁴ HCJ 1213/10 *Nir v. The Speaker of the Knesset* [2012] (Sup. Ct.). See also Gilad Grossman, “Pardon for the Opponents of the Disengagement is Discrimination”, WALLA NEWS (15.2.2010) (Hebrew), available at <http://news.walla.co.il/?w=/9/1643497>.

³⁴⁵ ORDER NO. 132 CONCERNING THE ADJUDICATION OF JUVENILE DELINQUENTS (1967), art. 1. Other relevant regulations appear in *infra* notes 367, 1114; in ORDER NO. 558 CONCERNING DANGEROUS DRUGS (1975), arts. 21-25 (prohibiting the provision of drugs to minors); and in ORDER NO. 1160 CONCERNING THE KEEPING OF CLEANNESS (1986), art. 3 (requiring drivers to prevent minor passengers from throwing litter from vehicles).

³⁴⁶ ORDER 1644 CONCERNING SECURITY PROVISIONS (TEMPORAL ORDER) (AMENDMENT NO. 109) (2009). These provisions were defined as temporary, and have been renewed annually – most recently by ORDER 1676 CONCERNING SECURITY PROVISIONS (JUDEA AND SAMARIA) (AMENDMENT NO. 10) (2011). It is

However, HROs have argued that, other than generally trying children separately from adults, the military procedures for trying Palestinian children have not changed significantly³⁴⁷ (contrary to some Israeli statements³⁴⁸) – a point which will be further explored later in the dissertation.³⁴⁹

3.(a). *The trial*

According to recent estimates by HRO *DCI – Palestine*, the Israeli armed forces brings to trial approximately 700 Palestinian children from the West Bank (excluding East Jerusalem) each year.³⁵⁰ Palestinians under the age of 12 bear no criminal responsibility³⁵¹ (like their Israeli peers), and therefore may not be tried by the military.³⁵² As noted above, older Palestinian children are tried in military youth courts,³⁵³ according to military legislation enacted in 2009.³⁵⁴ The statutory military law requires that youth court hearings be held separately from those of adults “as much as possible”,³⁵⁵ except in extension-of-detention and bail hearings,³⁵⁶ and with other notable

noteworthy that the military youth courts started operating provisionally in June 2009 – three months before their operation was anchored in the military legislation. Hanan Greenberg, *Military Ushers Juvenile Court Pilot Program*, YNET NEWS (June 9, 2009), available at <http://www.ynetnews.com/articles/0,7340,L-3728449,00.html>.

³⁴⁷ ACRI, HUMAN RIGHTS IN ISRAEL – 2011 REPORT 25-27 (2011) (Hebrew), available at <http://acri.us2.list-manage.com/track/click?u=3476224e38bd22add086658b6&id=ddc4da5309&e=fb2b59633>; B'TSELEM, *supra* note 96, at 20, 58-59, 70; DCI – Palestine, *supra* note 43; NO LEGAL FRONTIERS, *supra* note 26, at 51.

³⁴⁸ See, e.g., this response article by the spokesperson of the Israeli embassy in London: Amir Ofek, *Israel does not mistreat detained Palestinian children*, THE GUARDIAN (February 2, 2012), available at <http://www.guardian.co.uk/commentisfree/2012/feb/02/israel-not-mistreat-palestinian-children> (“a special juvenile court has been established [by Israel] to guarantee professional care for [Palestinian] minors in detention. The above and other measures have succeeded in making legal proceedings easier for [these] minors”).

³⁴⁹ *Infra* text accompanying notes 693-695, 721-724, and 915-941.

³⁵⁰ DCI – PALESTINE, IN THEIR OWN WORDS: A REPORT ON THE SITUATION FACING PALESTINIAN CHILDREN DETAINED IN THE ISRAELI MILITARY COURT SYSTEM 3-4 (2011), available at <http://www.dci-pal.org/English/Doc/Press/JANUARY2011.pdf> (based on data provided by the IPS and on DCI estimates). HRO B'Tselem interviewed 50 Palestinian children whom the Israeli military had arrested between November 2009 and February 2011; of these 50 children, 35 had been detained or imprisoned, 14 had been released promptly after their interrogation (13 of whom had no charges filed against them), and one had been hospitalised due to a heart defect. B'TSELEM, *supra* note 96, at 24, 30-31.

³⁵¹ ORDER 1651, *supra* note 74, art. 191(a). This provision was originally anchored not only in ORDER 132, *supra* note 345 (which until recently was the main order regarding juvenile delinquency), but also in ORDER NO. 225: RULES OF RESPONSIBILITY FOR OFFENCE (1968), art. 4.

³⁵² ORDER 1651, *supra* note 74, art. 191(b).

³⁵³ *Id.*, art. 138(a). According to DCI – Palestine, there are still some instances of Palestinian children and adults brought to trial together. DCI – Palestine, *supra* note 43.

³⁵⁴ Previously, Palestinian children and adults were tried in the same military courts. For extensive discussion of this subject, see *infra* text accompanying notes 523-524, 693-695, and 721-724. In response to HRO queries, the Israeli military announced that it had no information on the number of children tried in its courts. YESH DIN, *supra* note 26, at 156.

³⁵⁵ ORDER 1651, *supra* note 74, arts. 143, 140(a).

³⁵⁶ *Id.*, art. 138(b).

exceptions.³⁵⁷ The military youth courts are first instance courts, presided over by military court judges who have undergone “appropriate training”³⁵⁸ (the exact nature of this training is not publicly known³⁵⁹).

As of 2009, the military legislation authorises (but does not require) military youth courts to appoint defence attorneys for Palestinian minors, when the court considers it to be in the minor’s best interests.³⁶⁰ The court is required to assist unrepresented minors in examining witnesses³⁶¹ – although full evidentiary trials (in which witnesses testify) rarely take place in the military courts (as explained in the previous chapter).³⁶²

Military courts are authorised to order the presence of a parent or guardian in the courtroom. The military law entitles parents to submit to the court requests on behalf of the minor, and to examine witnesses and make claims instead of or alongside the minor.³⁶³ At the same time, according to HRO reports, the requirement that the parents be present might lead the court to adjourn hearings when they are absent, resulting in the prolonging of minors’ detention,³⁶⁴ when parents are present they usually do not actively participate in their children’s hearings, since the courts generally do not inform them of their right to do so.³⁶⁵

Military courts have discretion over the publicity of hearings involving minors (unlike the civil youth court system³⁶⁶). They may hold such hearings *in camera* when they consider it necessary for the protection of a minor’s wellbeing³⁶⁷ – although in practice this is rarely done.³⁶⁸

3.(b). Sentencing

The current Israeli military legislation classifies Palestinians according to four age-based categories: a “minor” is defined as anyone under the age of 18 years;³⁶⁹ a “child” is defined as any person under

³⁵⁷ *Id.*, arts. 139 (stipulating that a minor can be tried together with an adult if they were jointly charged, subject to the approval of the military prosecution. Their trial will take place either in a military youth court, or in a “regular” military court acting according to the procedures of a youth court); and also arts. 140(b), 140(c), 141, and 142 (specifying the procedures for when a defendant in a youth court is found to be an adult, or when a defendant in a “regular” court is found to be a minor).

³⁵⁸ *Id.*, art. 136, and art. 137.

³⁵⁹ DCI – Palestine, *supra* note 43.

³⁶⁰ ORDER 1651, *supra* note 74, art. 146(a).

³⁶¹ *Id.*, art. 146(c).

³⁶² *Supra* note 96 and accompanying text.

³⁶³ ORDER 1651, *supra* note 74, art. 147.

³⁶⁴ B’TSELEM, *supra* note 96, at 53.

³⁶⁵ NO LEGAL FRONTIERS, *supra* note 26, at 34.

³⁶⁶ *Supra* note 309 and accompanying text.

³⁶⁷ ORDER 1651, *supra* note 74, art. 89(b). Additionally, without permission from a military court it is prohibited to publish details of minor defendants, witnesses, complainants, or injured persons. *Id.*, art. 93.

³⁶⁸ YESH DIN, *supra* note 26, at 161 (based on observation of a DCI – Palestine attorney, and also on the Israeli military spokesperson’s statement that closed hearings in the military courts are a “rare exception”).

the age of 12 years; a “youth” denotes any person aged 12 or 13 years old; and a “tender adult” designates a person aged 14 or 15 years old.³⁷⁰

When determining sentences of “youths” and “tender adults” (i.e., 12-15-year-olds), the military courts are required to take into account their age at the time of the offence.³⁷¹ However, in practice the stance of the military courts in relation to the defendant’s age is inconsistent and vague, often diverging from the letter of the military law – as the next chapter will explain.³⁷² Since 2009, military youth courts are authorised (but not obliged) to order pre-sentence reports, which can provide information on child defendants’ personal circumstances and assess the likelihood of their rehabilitation. However, such reports are rarely requested – an issue discussed in Chapter 4.

The statutory military law limits the maximum sentences for “youths” (12-13-year-olds) and “tender adults” (14-15-year-olds) to six months and a year respectively.³⁷³ However, these restrictions are limited in two senses:³⁷⁴ first, the date used to classify the defendants is their age at the time of the *sentencing* – and not their age at the time of the alleged offences.³⁷⁵ Hence, for instance, a defendant who was a “tender adult” in the beginning of the trial could cease to be so by the time of the sentencing – and would therefore be ineligible for the maximum-sentence restriction.³⁷⁶ Furthermore, when “tender adults” are charged with offences for which the maximum sentence would otherwise exceed five years, no maximum-sentence restriction applies.³⁷⁷ And indeed, the maximum sentences for the most common charges against Palestinian “tender adults” do exceed five years. For example, for stone throwing – the most common charge against Palestinian minors according to my court case sample,³⁷⁸ HRO reports,³⁷⁹ and the Israeli military³⁸⁰ – the

³⁶⁹ ORDER 1651, *supra* note 74, art. 136 (amended in 2011 by ORDER 1676, *supra* note 346, art. 3). But see *infra* notes 482-516 and accompanying text (on the complexities, and transformation, of the term “minor” in the military law since the beginning of the occupation).

³⁷⁰ The terms “child”, “youth”, and “tender adult” are all defined in ORDER 1651, *supra* note 74, art. 1.

³⁷¹ *Id.*, art. 168(a).

³⁷² *Infra* text accompanying notes 440-460 and 547-564.

³⁷³ ORDER 1651, *supra* note 74, arts. 168(b) and 168(c). In one case, a first instance military court ruled that the maximum sentence does not include the probation period, and therefore sentenced a Palestinian “youth” to six months in prison in addition to eight months on probation. MilC 3900/03 *The Military Prosecutor v. Al-Nasirat* [2003] (Judea Mil. Ct.). The Military Court of Appeals overturned this ruling, concluding that the maximum sentence covers the prison sentence together with the probation period. MilC 358/03 *Al-Nasirat v. The Military Prosecutor* [2003] (Mil. Ct. App.). However, there have been reports of later military court rulings which nonetheless imposed sentences exceeding six months. B’TSELEM, *supra* note 96, at 21.

³⁷⁴ This issue will be discussed further *infra* text accompanying notes 475-477 and 537-546.

³⁷⁵ ORDER 1651, *supra* note 74, arts. 168(b) and 168(c).

³⁷⁶ In my sample of military court rulings concerning Palestinian children, the proceedings extended for 3.24 months on average from the moment of arrest to the sentencing. On the length of remand of Palestinian minors and the factors which prolong it see B’TSELEM, *supra* note 96, at 53, 56; NO LEGAL FRONTIERS, *supra* note 26, at 27-28.

³⁷⁷ ORDER 1651, *supra* note 74, art. 168(c). Until 1970, this article did not refer to offences for which the maximum sentence is five years; instead, it referred to a number of specific offences which can all be characterised as illegal political expression (e.g., flying political flags or symbols, disseminating political documents, and partaking in unlicensed marches or gatherings).

³⁷⁸ In my sample of 155 cases of Palestinian child defendants, stone throwing was the most common charge against children: In 98 cases (63%), the defendant was charged with stone throwing, and this was the sole

maximum sentence is 10 years, or 20 years if the stones were thrown at a moving vehicle.³⁸¹ As a result, the one-year-sentence restriction seldom applies to defendants in this age group.³⁸²

The sentencing of Palestinian children under Israeli military law will be investigated in depth in Chapter 3.

3.(c). Outside the courtroom (arrest, interrogation, detention, and incarceration)

Palestinian children can be arrested individually or as part of a mass arrest, at different locations (including the child's home, the street, a checkpoint, or the scene of the alleged offence), throughout the day or night, and by different Israeli state agents (military units, special Border Police units, and occasionally even by settlers).³⁸³ It is estimated that during the first *intifada*, when the incarceration rate in the OPT reached its peak and was the highest in the world,³⁸⁴ Israel arrested a remarkable rate of more than two percent of all Palestinian children.³⁸⁵ Data provided by the Israeli military and the Israeli Prison Service indicate that on average, 321 Palestinian children were held in Israeli detention facilities in any given month between 2008 and 2010.³⁸⁶ Between 2001 and

charge in the vast majority (82) of these cases. Other common charges were: political association and activity (30% of all cases), Molotov cocktail throwing (17% of all cases), and possession/trade/use of arms (excluding Molotov cocktails and stones) (25% of all cases).

³⁷⁹ According to HRO DCI – Palestine, of the cases represented in the military courts by DCI lawyers, stone throwing was the most common charge against minors throughout the period between 2004 and 2008. DCI – PALESTINE, *supra* note 32, at 99. For similar reports see B'TSELEM, *supra* note 59, at 5; B'TSELEM, *supra* note 96, at 3, 17; DCI – PALESTINE, *supra* note 350, at 3; NO LEGAL FRONTIERS, *supra* note 26, at 20.

³⁸⁰ According to information provided by the military spokesperson, in 2010 31% of military youth court files included charges of stone throwing. B'TSELEM, *supra* note 96, at 17.

³⁸¹ ORDER 1651, *supra* note 74, art. 212. The offence is defined as “throwing objects”, and thus is not limited to stones. On the proportion of Palestinian minors whom the military courts sentence to more than one year for throwing stones see B'TSELEM, *supra* note 96, at 21-22.

³⁸² HRO DCI – Palestine observed in 2011 that Palestinian children are usually sentenced to between two weeks and 10 months for throwing stones. DCI – PALESTINE, *supra* note 350, at 9. However, my sample includes two cases in which the only charge was stone throwing and the prison sentences were 11 and 13 months. Cf. HAJJAR, *supra* note 21, at 192 (“Palestinians sixteen and younger have received sentences of up to four years in prison for throwing stones.”).

³⁸³ COOK, HANIEH AND KAY, *supra* note 28, at 51-52, 56-62, 64 (Pluto Press, London, 2004); HAMOKED – CENTER FOR THE DEFENCE OF THE INDIVIDUAL AND B'TSELEM – THE ISRAELI INFORMATION CENTER FOR HUMAN RIGHTS IN THE OCCUPIED TERRITORIES, ABSOLUTE PROHIBITION: THE TORTURE AND ILL-TREATMENT OF PALESTINIAN DETAINEES 25-27 (2007), available at http://www.btselem.org/Download/200705_Utterly_Forbidden_eng.doc.

³⁸⁴ *Supra* note 28 and accompanying text.

³⁸⁵ JAMES GRAFF, PALESTINIAN CHILDREN AND ISRAELI STATE VIOLENCE 110 (Near East Cultural and Educational Foundation of Canada, Toronto, 1991). Cited in HAJJAR, *supra* note 21, at 286.

³⁸⁶ DCI – PALESTINE, *supra* note 350, at 8 (based on information obtained from the IPS and the Israeli military).

2007, the proportion of under-18-year-olds among Palestinian detainees and prisoners in Israel's custody ranged between about three and six percent.³⁸⁷

The military law allows the arrest of Palestinians over the age of 12 years,³⁸⁸ although younger Palestinians have been reported to be arrested occasionally.³⁸⁹ The law requires that a parent or another adult relative be informed promptly about the minor's arrest and place of detention,³⁹⁰ excluding circumstances in which this is considered potentially harmful to the minor's wellbeing.³⁹¹ This requirement of informing a parent/adult rarely applies, however, due to the broad exceptions included in the relevant articles (including minors suspected of an offence for which the maximum sentence exceeds three years,³⁹² among other exceptions).³⁹³ According to HRO reports, even when these broad exceptions do not apply, this measure is almost never enforced.³⁹⁴ Another requirement is to inform minors, before their interrogation, of their right to legal counsel. However, the law does not guarantee that legal counsel actually be provided, and in fact explicitly authorises interrogations of minors without prior notification of an attorney.³⁹⁵ Moreover, these two requirements – to notify a parent/relative and to allow legal counsel – do not apply when the minor cannot provide contact details of an attorney, parent, or relative.³⁹⁶ HROs have reported that Palestinian child detainees rarely see their family or an attorney outside the courtroom – an issue

³⁸⁷ Cited in YESH DIN, *supra* note 26, at 157. The data does not include detainees in administrative detention, detainees and persons convicted of "criminal" category offenses (as opposed to "security" offences"), and children held by the Israel Police. In addition, the data relates to a specific point of time in each year and does not constitute the total number detained that year. *Id.*

³⁸⁸ ORDER 1651, *supra* note 74, art. 191(b). Of 206 cases represented by DCI – Palestine in the Israeli military courts in 2008, 76.7% of the defendants were aged 16 or 17, 21.9% were aged 14 or 15, and the remaining 1.4% were aged 12 or 13. DCI – PALESTINE, *supra* note 32, at 98. In my sample, the average age of the defendants at the time of their arrest was 16.76 years and at the time of the sentence was 17.02 years; the ages (at the time of the sentence) ranged between 12.18 and 19.08 years. These figures do not include cases in which the defendant's age at the time of the arrest, verdict, or sentence is unknown or unspecified.

³⁸⁹ See, e.g., B'TSELEM, *supra* note 96, at 24, 32-34; Ma'an, *Israeli forces 'detain 6-year-old' in Jerusalem*, MA'AN NEWS AGENCY (January 4, 2011), available at <http://www.maannews.net/eng/ViewDetails.aspx?ID=449915>; CivC 11330/08 *Matir v. The State of Israel* [2008] (Jerusalem Magistrate Ct.). Cf. HAJJAR, *supra* note 21, at 191.

³⁹⁰ ORDER 1651, *supra* note 74, art. 53(b). See also DCI – PALESTINE, *supra* note 350, at 4 (arguing that this article is poorly enforced).

³⁹¹ ORDER 1651, *supra* note 74, art. 53(b). The law requires that the minor be notified in advance about the intent to contact his/her parent. *Id.*, art. 136a(a)(1). If the minor objects to notifying his/her parent for reasonable reasons, another relative may be notified instead – in consideration of the minor's age and maturity level. *Id.*, art. 136a(a)(2). However, article 136a only applies to the police, although according to HRO reports it is the military which arrests most Palestinian children in the West Bank, and which often detains them for hours and days before handing them over to the police. DCI – PALESTINE, *supra* note 26, at 19.

³⁹² ORDER 1651, *supra* note 74, art. 54(a). In such a case, a military judge may order that the arrest remain secret for up to 96 hours, and this measure can be prolonged to eight days. *Id.*, art. 54(b).

³⁹³ A parent/relative should also not be notified in these circumstances: (a) the minor is suspected of any of a wide list of offences, ranging from insulting a soldier, throwing stones, and arson, to murder; (b) any family member of the minor is suspected of collaborating with the minor suspect. *Id.*, arts. 136b(a)(2)-(3) (installed in 2011 by ORDER 1676, *supra* note 346, art.4).

³⁹⁴ DCI – PALESTINE, *supra* note 26, at 19.

³⁹⁵ ORDER 1651, *supra* note 74, art. 136c. See also DCI – PALESTINE, *supra* note 26, at 19.

³⁹⁶ ORDER 1651, *supra* note 74, arts. 136a(a)(1), 136a(b), 136c(b).

discussed in Chapter 4.³⁹⁷ Israel's arrest and interrogation of Palestinian children will be examined in depth in Chapter 5.

According to the military law, Palestinian "security offenders"³⁹⁸ (adults and children) can be detained for 96 hours, and even – if the police deems it necessary for the success of their interrogation – for eight days, before judicial review.³⁹⁹ Military court judges can extend the detention for up to three months.⁴⁰⁰

The military statutory law further allows for holding Palestinians – adults and children – in administrative detention without charge or trial for up to six months, for "security reasons".⁴⁰¹ Indeed, up to 18 Palestinian children were held in administrative detention at any given time between 2008 and mid-2011.⁴⁰² The military is authorised to extend administrative detentions for additional periods of up to six months each,⁴⁰³ without there being a maximum cumulative detention period. According to information provided by the Israeli Prison Service, as of September 2009, eight percent of Palestinian administrative detainees had been held continuously for two to five years.⁴⁰⁴ Judicial review of administrative detention is held in military courts behind closed doors, within eight days from the arrest, often on the basis of secret evidence not disclosed to the defence, and the judges are not bound by the regular rules of evidence.⁴⁰⁵ Between 2000 and 2010, the Israeli

³⁹⁷ See *infra* text accompanying notes 666–668.

³⁹⁸ On Israeli authorities' interpretation of the term "security" in relation to Palestinian prisoners see *supra* text accompanying notes 276–279.

³⁹⁹ ORDER 1651, *supra* note 74, arts. 31(c), 32.

⁴⁰⁰ *Id.*, arts. 37–38, 42a.

⁴⁰¹ According to information provided by the Israeli government authorities, as of April 2011 administrative detainees constitute four percent of Palestinians in Israeli custody, and in recent years their proportion has been higher. B'Tselem, *Statistics on Palestinians in the custody of the Israeli security forces* (last visited: July 8, 2011), available at http://www.btselem.org/statistics/detainees_and_prisoners. In addition, there are Palestinians administratively detained in accordance with THE INTERNMENT OF UNLAWFUL COMBATANTS LAW (2002; amended 2008). In recent years (2009–2011) the size of this latter group ranged between 0–22 detainees, but in previous years (2001–2008) it was much higher, often exceeding one or two thousand detainees. *Id.*

⁴⁰² B'Tselem, *Statistics on Palestinian minors in the custody of the Israeli security forces* (last visited: February 16, 2012), available at http://www.btselem.org/statistics/minors_in_custody (figures referring to the period between January 2008 and April 2011, and provided by the IPS). The age of most of these children has been 16 years or older. DCI – PALESTINE, *supra* note 32, at 75. According to B'Tselem, "[o]nly very few Israelis have been administratively detained [...], and generally for shorter periods of time [as compared with Palestinians]." B'TSELEM – THE ISRAELI INFORMATION CENTER FOR HUMAN RIGHTS IN THE OCCUPIED TERRITORIES AND HAMOKED – CENTER FOR THE DEFENCE OF THE INDIVIDUAL, WITHOUT TRIAL: ADMINISTRATIVE DETENTION OF PALESTINIANS BY ISRAEL AND THE INTERNMENT OF UNLAWFUL COMBATANTS LAW 66 (2009), available at http://www.btselem.org/sites/default/files/publication/200910_without_trial_eng.pdf.

⁴⁰³ ORDER 1651, *supra* note 74, arts. 284–285. This provision is currently applied to Palestinians in the West Bank, whereas Palestinians from the Gaza Strip can be detained for unlimited periods according to THE INTERNMENT OF UNLAWFUL COMBATANTS LAW, *supra* note 401. See B'TSELEM AND HAMOKED, *supra* note 402, at 51–63.

⁴⁰⁴ B'TSELEM AND HAMOKED, *supra* note 402, at 12.

⁴⁰⁵ ORDER 1651, *supra* note 74, arts. 287–291. Other relevant articles are *id.*, arts. 39, 41, 271, 292–294.

Supreme Court heard 322 appeals against such decisions of the military courts, but not even a single case resulted in a release order or in a rejection of the secret evidence.⁴⁰⁶

Since the early 2000s, the majority of Palestinian detainees and prisoners are held in facilities managed by the Israeli Prison Service, where all inmates under the age of 18 years are generally separated from adults in accordance with domestic Israeli law.⁴⁰⁷ The military law was recently amended to require that in military facilities too, Palestinians under the age of 18 years generally be separated from the older inmates.⁴⁰⁸ The issue of separation between minors and adults within the Israeli legal system will be examined in depth in Chapter 4.

4. A COMPARATIVE SUMMARY: THE ISRAELI LAW APPLICABLE TO CHILD OFFENDERS

It is important to clarify that this dissertation is not, and is not intended to be, a methodical comparison of the treatment of Palestinian and Israeli children in the OPT. In many cases the subject matter is too complex to reduce to national comparisons, and our analysis in the next chapters will therefore not be limited to such comparisons.

Nonetheless, it cannot be denied that Israeli statutory law treats children in the OPT differently according to their national affiliation.⁴⁰⁹ Palestinian children are arrested, interrogated, and tried at different ages, in different places, by different people, and according to different rules and procedures than their Israeli counterparts. They can be detained for and sentenced to longer periods than Israeli children. Certain acts which Israeli military law (applicable to Palestinians) defines as illegal are not defined as offences in domestic Israeli law (applicable to Israelis).⁴¹⁰

This differential treatment is manifest, among other things, in sentencing trends: in my sample of 155 military court cases concerning Palestinian child defendants, the prison sentence rate was 93.55 percent, the probation sentence rate was 98.71 percent, fines were imposed in 96.77 percent of cases (indicating that most child defendants' sentences include all three components – prison, probation, and a fine), and not a single case ended in an acquittal.⁴¹¹ The average prison

⁴⁰⁶ Shiri Kröbs, *Lifting the Veil of Secrecy: Judicial Review of Administrative Detentions in the Israeli Supreme Court*, 45 VANDERBILT JOURNAL OF TRANSNATIONAL LAW 639, 643 (2012). On the Supreme Court's authority to review the military's activities see *supra* note 83 and accompanying text.

⁴⁰⁷ *Infra* text accompanying notes 610-613.

⁴⁰⁸ ORDER 1651, *supra* note 74, art. 149(a1) (installed in 2011 by ORDER 1676, *supra* note 346, art.6). Adult inmates can now be held in military facility wings otherwise allocated to minors only if no minors under the age of 16 years are held in that wing, if holding the adults there benefits the minors in that wing, and if the adult inmates have no access to minors during the night. *Id.*

⁴⁰⁹ See also Veerman and Gross, *supra* note 147, at 322-327.

⁴¹⁰ Benichou, *supra* note 26, at 306-307; B'TSELEM, *supra* note 96, at 4.

⁴¹¹ The few cases which ended with neither sentence nor acquittal were closed or deleted for different reasons.

sentence was 7.91 months, and the average fine was 1157 Israeli Shekels⁴¹² (the equivalent of three months' average income⁴¹³). Similar findings appear in HRO reports.⁴¹⁴ Analogous figures for Israeli children, as reported by HROs, are very different: Israeli civil youth courts impose custodial sentences only in 6.5 percent of cases.⁴¹⁵ In particular, Israeli children charged with offences comparable to those of Palestinian children – namely ideologically-motivated offences committed in opposition to the evacuation of Israeli settlements – were, unusually, pardoned (as described earlier).⁴¹⁶

This reflects a broader disparity between the military and the civil court systems with regard to conviction rates: according to information provided by the Israeli military, the conviction rate of Palestinians in the Israeli military courts was 99.76 percent in 2010, and the Military Court of Appeals was twice as likely to accept appeals by the military prosecution (against the leniency of the sentence) than defendants' appeals.⁴¹⁷ In comparison, the conviction rate of Israelis in the Israeli civil court system is 65 percent.⁴¹⁸

Detention trends also indicate the law's differential treatment of Israeli and Palestinian children in the OPT. As noted earlier, the domestic statutory law requires – with regard to Israeli children only – that detention should generally be a last resort.⁴¹⁹ In contrast, in my sample of military court cases concerning Palestinian child defendants, 81.7 percent of the children were

⁴¹² To calculate these averages, "no prison sentence" counted as a prison sentence of 0 days, and similarly "no fine" counted as a fine of 0 Shekels.

⁴¹³ In April 2012, 1157 Shekels were equivalent to £190. The gross national per capita income in the OPT (not including Israeli settlers) is \$1,250 (as of 2005) – the equivalent of £770 as of April 2012. In comparison, the figure for Israel (including Israeli settlers in the OPT) is \$27,180 (as of 2010) – the equivalent of £16,850 as of April 2012. The World Bank, *Data: West Bank and Gaza* (last visited: April 24, 2011), available at <http://data.worldbank.org/country/west-bank-and-gaza>; The World Bank, *supra* note 31.

⁴¹⁴ B'TSELEM, *supra* note 96, at 55 (reporting that of 642 military court cases of Palestinian children charged with stone throwing, only a single cases ended in an acquittal); NO LEGAL FRONTIERS, *supra* note 26, at 37, 44-46 (reporting that of 71 cases of Palestinian children, none ended in an acquittal, 70 cases ended with prison sentences, and in all of the cases the courts imposed probation sentences and fines); DCI – PALESTINE, *supra* note 350, at 4 (reporting that in 2009, Israeli military courts imposed custodial sentences on Palestinian children in 83 percent of cases). On the sentences which the military courts impose on Palestinian children see B'TSELEM, *supra* note 96, at 19-22; DCI – PALESTINE, *supra* note 32, at 98.

⁴¹⁵ DCI – PALESTINE, *supra* note 350, at 4 (figures referring to 2008 and provided by the Israeli National Council for the Child).

⁴¹⁶ *Supra* text accompanying notes 340-344.

⁴¹⁷ Chaim Levinson, *The Military Court in the West Bank: Only a Third of the Appeals by the Defence Succeed*, HAARETZ (November 29, 2011) (Hebrew), available at <http://www.haaretz.co.il/news/law/1.1578247>.

⁴¹⁸ OREN GAZAL-EYAL, INBAL GALON AND KEREN WINSHEL-MARGEL, THE CONVICTION AND ACQUITTAL RATES IN CRIMINAL PROCEEDINGS (The University of Haifa Center for the Study of Crime, Law & Society and the Information and Research Department of the Supreme Court, 2012) (Hebrew) (based on a sample of 1661 court files from 2010-2011).

⁴¹⁹ *Supra* note 328 and accompanying text. I have found no figures on the extent to which this provision is applied.

remanded until their trials ended, and only 14.5 percent of the children were released on bail;⁴²⁰ (similar findings appear in HRO reports⁴²¹).

Disparity also exists in relation to the rehabilitation of young offenders. Whereas the domestic statutory law places great importance upon Israeli child offenders' rehabilitation,⁴²² the military law offers no rehabilitative alternatives to prison sentences.⁴²³ The reasons for the absence of rehabilitation for Palestinian children in Israeli custody, and the implications of this absence, will be discussed in depth in Chapter 4.

Thus, domestic Israeli law regarding Israeli children is largely in conformity with international law and policy, as opposed to Israeli military law relative to Palestinian children. For purposes of convenience, the following table concisely compares the main provisions in Israeli law relating to Israeli and Palestinian children in the OPT (issues of practice and enforcement are italicised, to differentiate them from formal law):

Issue	Domestic Israeli criminal law (applicable to Israeli child offenders in the OPT)	Israeli military criminal law (applicable to Palestinian child offenders in the OPT)
Age categories in use	"Minor" – under 18 years	
	No sub-categories ⁴²⁴	<ul style="list-style-type: none"> • "Child" = under 12 years • "Youth" = 12-13-year-old • "Tender adult" = 14-15-year-old
Criminal responsibility	The age of criminal responsibility is 12 years	
	Israeli child (and adult) offenders whose offences were committed as part of their opposition to Israel's pullout from the Gaza Strip were collectively pardoned.	No equivalent

⁴²⁰ These figures refer to 131 cases in which the court files provide sufficient information.

⁴²¹ B'TSELEM, *supra* note 96, at 24 (reporting that of 50 Palestinian children arrested for stone throwing between 2009 and 2011, 35 were detained or imprisoned, seven of them for a few days and the rest for periods ranging from one week to ten months); DCI – PALESTINE, *supra* note 32, at 97 (reporting that 91% of the 265 Palestinian children represented by DCI – Palestine in 2008 were kept in pre-trial detention).

⁴²² *Supra* notes 303 and 315-316 and accompanying text. See also, e.g., CrimC 49/09 *The State of Israel v. John Doe* [2009] (Sup. Ct.) ("In cases of minors, the court must follow the recommendations of the Probation Service when there are chances of rehabilitation, unless there are weighty considerations [to the contrary]").

⁴²³ See, e.g., MilC 1261/09 *The Military Prosecution v. Al-Farukh* [2009] (Judea Mil. Ct.) ("The task of the [military] court [...] of sentencing a minor is especially difficult, in the absence of diagnostic and rehabilitative instruments such as those existing in Israel").

⁴²⁴ But see *infra* note 479.

Issue	Domestic Israeli criminal law (applicable to Israeli child offenders in the OPT)	Israeli military criminal law (applicable to Palestinian child offenders in the OPT)
Separation from adults in hearings, detention, and prison	Separate hearings in (civil) youth courts.	Separate hearings in military youth courts – excluding extension-of-detention hearings, bail hearings, and other exceptions.
	Minor detainees and prisoners are generally separated from the older inmates.	
	The minor's well-being must be taken into account when detaining him/her in a cell with other minors.	No equivalent
	<i>There are nearly no Jewish "security prisoners".</i> ⁴²⁵	<i>Most Palestinian prisoners are classified as "security prisoners" and therefore awarded narrower rights than "criminal prisoners".</i> ⁴²⁶
Arrest, detention, and interrogation	Detention is generally considered a last resort.	No equivalent
	Under-14-year-olds must be brought before a judge within 12 hours after their arrest, or 24 hours when urgent interrogation is required. The respective periods for older child detainees are 24 and 28 hours.	Palestinians (adults and minors) can be detained for up to eight days prior to judicial review. The courts can extend their detention for up to three months.
	<i>Very few Israelis have been administratively detained, and generally such detentions are for shorter periods than those involving Palestinians.</i> ⁴²⁷	Minors can be administratively detained without charge or trial indefinitely. Judicial review of administrative detention is often based on secret evidence and is not bound by regular rules of evidence.
	An adult related to the minor should normally be notified before the minor is summoned for interrogation.	There is a requirement to notify an adult related to the minor promptly after the minor is detained, <i>but it rarely applies.</i>
	The interrogator should normally inform the minor of his/her rights to legal counsel and to have an adult present.	The interrogator should normally inform the minor of his/her rights to legal counsel, but the minor must provide an attorney's name.

⁴²⁵ *Supra* notes 277-278.

⁴²⁶ *Infra* note 616 and accompanying text.

⁴²⁷ B" TSELEM AND HAMOKED, *supra* note 402, at 66. According to information obtained from the IPS, only a small minority of these Israelis have been Jews. Adalah, *supra* note 278.

Issue	Domestic Israeli criminal law (applicable to Israeli child offenders in the OPT)	Israeli military criminal law (applicable to Palestinian child offenders in the OPT)
Arrest, detention, and interrogation (continued)	<ul style="list-style-type: none"> Interrogations are normally not conducted during the night. Interrogations are normally audio-visually recorded. Interrogators are usually specially-trained youth interrogators. 	No equivalents ⁴²⁸
Sentencing	The court must consider the minor's age at the time of offending.	The court is required to consider the minor's age at the time of offending. <i>However, judicial practice is much more complicated.</i>
	Defendants under 14 at the time of the sentencing may not be sentenced to prison.	<ul style="list-style-type: none"> The maximum prison sentence for defendants whose age at the time of their sentencing is 12 or 13 years is six months. The maximum prison sentence for defendants whose age at the time of their sentencing is 14 or 15 years is a year. <i>This limitation rarely applies (since it does not apply to offences for which the maximum sentence otherwise exceeds five years).</i>
	The courts must order pre-sentence probation reports. ⁴²⁹	The courts can order pre-sentence reports for information on minors' circumstances and likelihood of rehabilitation. <i>However, such reports are rarely requested.</i>

⁴²⁸ On the common night arrests of Palestinian children see B'TSELEM, *supra* note 96, at 25-28, 36. The Military Court of Appeals has unequivocally clarified that, unlike the domestic law, the military law does not require that (Palestinian) minors be interrogated by youth interrogators. MilC 3230/05 *The Military Prosecutor v. Il-Kadi* [2005] (Mil. Ct. App.); MilC 1037/08 *The Military Prosecution v. Shehadah* [2008] (Mil. Ct. App.). For HRO criticism of the conditions of interrogations of Palestinian children see, e.g., PHYSICIANS FOR HUMAN RIGHTS – ISRAEL, ADALAH AND AL-MEZAN CENTER FOR HUMAN RIGHTS, COERCED FALSE CONFESSIONS BY PALESTINIAN CHILDREN AND YOUTH (2011) (Hebrew), available at <http://phr.org.il/uploaded/%D7%A0%D7%99%D7%99%D7%A8%20%D7%A2%D7%9E%D7%93%D7%94%20%D7%94%D7%95%D7%93%D7%90%D7%95%D7%AA%20%D7%A9%D7%95%D7%95%D7%90%20%D7%AA%D7%97%D7%AA%20%D7%9B%D7%A4%D7%99%D7%99%D7%94.pdf>. A petition by *Adalah* to order that interrogations of “security offence” suspects be audio-visually recorded is pending before the HCJ; Petition HCJ 9416/10 *Adalah – The Legal Center for Arab Minority Rights in Israel v. The Ministry of Interior Defence* [2010] (Sup. Ct.), available at <http://www.adalah.org/upfiles/9416-10.pdf>.

⁴²⁹ *Infra* text accompanying notes 722-723.

Issue	Domestic Israeli criminal law (applicable to Israeli child offenders in the OPT)	Israeli military criminal law (applicable to Palestinian child offenders in the OPT)
Legal representation	<ul style="list-style-type: none"> • Provided to unrepresented minor defendants and detainees. • Can also be provided in other circumstances, subject to the court's discretion. 	<ul style="list-style-type: none"> • Can be provided to minors, subject to the court's discretion. • The court should assist unrepresented minors in examining witnesses (<i>but witnesses rarely testify in the military courts</i>).
Rehabilitation and care	<ul style="list-style-type: none"> • The rehabilitation and care of the minor are guiding principles – as are the minor's dignity, wishes, opinion, age, and maturity level. • Instead of incarceration, minor defendants and convicts can be placed in facilities providing rehabilitation and supervision. • Comprehensive diagnostic and rehabilitation services are provided to young offenders. 	No equivalents
Parents/ guardians (excluding provisions mentioned above)	Are entitled, and may be ordered, to be present in hearings.	May be ordered to be present in hearings.
	May make requests on behalf of the minor, examine witnesses and make claims on behalf of or alongside the minor.	An identical provision exists. <i>However, HROs report that the courts rarely inform the parents/guardians of these rights.</i>
	<ul style="list-style-type: none"> • The court must consult with them before making certain decisions. • Must be given copies of the subpoena and indictment. 	No equivalents
Closed doors	Minors are tried <i>in camera</i> .	Holding hearings <i>in camera</i> is rare and subject to the court's discretion.

5. CONCLUSION

This chapter has aimed to lay the legal foundations for the following chapters, which will examine in depth some of the main issues and complexities characterising the legal conceptualisation and construction of childhood in the OPT. Yet, throughout the sea of details provided at this early stage, some preliminary hints already surface about law's role in constructing childhood. Thus, a major theme emerging from this chapter is the great disparity, along national lines, in the law's

classification and treatment of children. This disparity runs throughout children's encounter with the legal system: from the moment of their arrest, through their interrogation, detention, trial, and punishment (or treatment). Due to the significance of this disparity and of its socio-political implications, we will continue exploring its various aspects throughout the chapters to come.

However, as noted above, this study is not limited to questions of nationally-based differentiation, and the story of law and childhood in the OPT should not be reduced to such questions. On the basis provided by this chapter, the following chapters will examine in depth the complex, often contradictory effects – symbolic and practical – which the law's encounter with children in the OPT produces. The Israeli law relating to children, which the present chapter has portrayed as fairly straightforward, will be shown to be highly intricate, often incoherent, and dynamic.

THE AGE OF CONFLICT

1. INTRODUCTION: AGE, CHILDHOOD, AND LAW

"Child", as a socio-legal category, is essentially based on age.⁴³⁰ In both international child rights legislation⁴³¹ and national laws,⁴³² 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, marriage, voting, driving, or drinking.⁴³³

The legal fetishism of age is, in itself, questionable for reasons beyond the scope of this dissertation. Several scholars have argued, among other things, that it ignores differences between same-age children (and could hence be viewed as a form of ageism⁴³⁴), and overlooks disparities in the meaning of childhood in different societies, communities, and socio-economic circumstances.⁴³⁵ The aim of this chapter, however, is neither to provide a thorough critique of age nor an alternative to it.⁴³⁶ Instead, we will investigate the central factors which inform the interplay of childhood, age, and law in the OPT.

Our discussion will revolve around five legal issues concerning the age of child defendants (especially in relation to the military law applicable to Palestinian children): the requirement for the courts to consider children's young age when determining their sentence; the legal definition and

⁴³⁰ Cf. HARTJEN, *supra* note 99, at 1-2. However, the understanding of childhood as primarily an age category seems most salient within contemporary Western societies. ARCHARD, *supra* note 2, at 24, 26-27; JAMES, JENKS AND PROUT, *supra* note 2, at 60-63. For an example of a competing conception of childhood in which age is not accorded as much prominence, see THÉRÈSA BLANCHET, *LOST INNOCENCE, STOLEN CHILDHOOD* 41-44 (Bangladesh University Press, Bangladesh, 1996).

⁴³¹ 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 (*hereinafter: CRC*); AFRICAN CHARTER ON THE RIGHTS AND WELFARE OF THE CHILD (adopted 1990; entered into force 1999), art. 2. A "juvenile" is defined as any person under 18 years of age in, e.g., UNITED NATIONS GENERAL ASSEMBLY RESOLUTION 45/113: RULES FOR THE PROTECTION OF JUVENILES DEPRIVED OF THEIR LIBERTY (adopted: December 14 1990) available at <http://www.un.org/documents/ga/res/45/a45r113.htm>, art. 11(a).

⁴³² For a comparison of the age classification of young offenders in selected countries see HARTJEN, *supra* note 99, at 5-6; JUVENILE JUSTICE SYSTEMS, *supra* note 99, at XII-XIII.

⁴³³ For further information, see, e.g., HARTJEN, *supra* note 99; JUVENILE JUSTICE SYSTEMS, *supra* note 99; Scott, *supra* note 116, at 113, 113-114, 118-119, 121-122.

⁴³⁴ See, e.g., BREEN, *supra* note 101; Rachel Pain, *Theorising Age in Criminology: The Case of Home Abuse*, 2 BRITISH CRIM. CONFERENCES: SELECTED PROCEEDINGS 1, 5 (1997).

⁴³⁵ Erica Burman, *Local, Global or Globalized?: Child Development and International Child Rights Legislation*, 3 CHILDHOOD 45, 60-62 (1996); JAMES AND JAMES, *supra* note 115, at 7-8, 15; David Jefferess, *Neither Seen Nor Heard: The Idea of the "Child" as Impediment to the Rights of Children*, 7 TOPIAS: CANADIAN JOURNAL OF CULTURAL STUDIES 75, 75-76 (2006).

⁴³⁶ 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., Jefferess, *supra* note 435, at 80-82. This approach is anchored in, e.g., CRC, *supra* note 431, arts. 5, 12.

interpretation of age categories; the different ages which the law often ascribes to the same defendant; the collision between the child's chronological age and the child's appearance; and the anxieties of the legal system about defendants whom it views as obscuring their "real" age. Through these different yet interrelated issues, the socio-legal complexities surrounding children's age will be examined, and their symbolic and practical significance will be considered.

2. CONSIDERING YOUNG AGE

Israeli military legislation instructs military courts, when determining a (Palestinian) minor's sentence (as part of the minor's trial), to take into account her/his age at the time of committing the offences.⁴³⁷ As in many other jurisdictions, the association of young age with innocence⁴³⁸ leads here too to the legislative presentation of young age as requiring different treatment.

However, the manner in which Israeli military courts actually consider defendants' young age is complex. On the one hand, the military courts have held that young minors with no criminal record whose offences caused no harm should be treated leniently.⁴³⁹ On the other hand, these courts also often present the youth consideration as overridden by other considerations, or appear to ignore the youth consideration altogether, or even regard it as an aggravating factor. Let us now examine these issues and the way in which the military courts have justified them.

2.(a). *Disregarding young age*

In 2007, Israeli HRO *Yesh Din* published a report, denouncing what it described as Israeli military courts' tendency to ignore Palestinian child defendants' young age:

The fact that the defendant or detainee was a minor was usually expressed by the defense lawyer alone. [...] The judges [...] seldom addressed the fact that the defendant or detainee was a minor. The issue was mentioned by judges in only 13 of the 48 minors' hearings [concerning Palestinian child defendants] observed by Yesh Din. Then, too, the fact was raised almost exclusively in the context of the court's discussion of its considerations in whether to accept a proposed plea bargain.⁴⁴⁰

⁴³⁷ ORDER 1651, *supra* note 74, art. 168(a). This instruction was adopted from domestic Israeli law. YOUTH LAW, *supra* note 300, art. 25(c).

⁴³⁸ On this association see, e.g., ARCHARD, *supra* note 2, at 22, 37-41; JAMES AND JAMES, *supra* note 115, at 50, 74-76, 140; JENKS, *supra* note 3, at 49, 58, 62-64, 75-76, 119, 124-125.

⁴³⁹ See, e.g., MilC 2167/82 *The Military Prosecutor v. Ta'amra* [1983] (Ramalah Mil. Ct.), in THE GENERAL MILITARY CORPS, SELECTED RULINGS OF THE MILITARY COURT OF APPEALS IN THE ADMINISTERED TERRITORIES – VOL. 6(II), at 368, 387 (1987); MilC 58/00 *The Military Prosecutor v. Hatib* [2000] (Mil. Ct. App.); MilC 63/02 *The Military Prosecutor v. Hanawi* [2002] (Mil. Ct. App.).

⁴⁴⁰ YESH DIN, *supra* note 26, at 160.

This excerpt, other than shedding light on military court practice, also attests to the HRO's desire to ensure that children are treated "as children", that is, differently from adults. This urge to differentiate children, and by so doing to normalise their childhood, raises important questions; for now, let us temporarily leave this issue aside, until revisiting it in depth in the next chapter.⁴⁴¹

Whereas the judicial disregard for defendants' youth has been picked up by this HRO, the following two issues – overriding considerations and youth as an aggravating factor – have not received HROs' attention.⁴⁴²

2.(b). Overriding considerations

Israeli military courts often regard various factors as counterbalancing Palestinian child defendants' young age. For example, the military courts have often held that since Palestinian stone throwers are usually children, a hard line needs to be taken on Palestinian children charged with throwing stones. Such children, it has been maintained, should usually remain on remand until completion of their trial and, if convicted, should be sentenced harshly.⁴⁴³ Similar reasoning has been applied to Palestinian children convicted of throwing Molotov cocktails⁴⁴⁴ – another relatively widespread offence – or stabbing⁴⁴⁵ (though the actual prevalence of this latter offence among Palestinian children is questionable⁴⁴⁶). Additionally, military courts have occasionally held that during times of Palestinian riots, harsher sentencing of Palestinian children is justified.⁴⁴⁷

⁴⁴¹ *Infra* text accompanying notes 627-639, 694, and 713.

⁴⁴² The only reference to the issue of overriding considerations is a single sentence appearing in *Yesh Din's* above report: "the leniency in punishment based on the [Palestinian] minor's age is usually insignificant and depends on the kind of offense of which he is convicted". YESH DIN, *supra* note 26, at 160.

⁴⁴³ See, e.g., MilC 167/00 *The Military Prosecutor v. Shalaladeh* [2000] (Mil. Ct. App.); MilC 14/01 *The Military Prosecutor v. Abu-Hamad* [2001] (Mil. Ct. App.); MilC 63/02, *supra* note 439; MilC 71/04 *The Military Prosecutor v. Fakiah* [2004] (Mil. Ct. App.); MilC 1352/05 *The Military Prosecutor v. Yajmur* [2005] (Mil. Ct. App.); MilC 2891/06 *The Military Prosecutor v. Abu-Hashem* [2006] (Mil. Ct. App.); MilC 2888/07 *The Military Prosecutor v. Beduan* [2007] (Mil. Ct. App.); MilC 5047/08 *The Military Prosecution v. Salim* [2008] (Mil. Ct. App.); MilC 2261/09 *The Military Prosecution v. Zaul* [2009] (Mil. Ct. App.). On the criminalisation of stone throwing in the OPT see HAJJAR, *supra* note 21, at 43, 68, 99, 191. On the importance of Palestinian child stone throwers, both as symbolic figures and as socio-political actors, see COLLINS, *supra* note 19, at 2, 14; Marouf Hasian, Jr. and Lisa A. Flores, *Children of the Stones: The Intifada and the Mythic Creation of the Palestinian State*, 62 SOUTHERN COMMUNICATION JOURNAL 89, 94-96, 98-99 (1997); Pataet, *supra* note 19, at 113, 117; ROSEN, *supra* note 19, at 115-118; Usher, *supra* note 149, at 2; Veerman and Levine, *supra* note 147, at 73.

⁴⁴⁴ See, e.g., MilC 1413/06 *The Military Prosecutor v. Sabih* [2006] (Mil. Ct. App.); MilC 1552/06 *Najar v. The Military Prosecutor* [2006] (Mil. Ct. App.); MilC 1263/08 *Bragateh v. The Military Prosecution* [2008] (Mil. Ct. App.); MilC 2706/08 *Il'aza v. The Military Prosecution* [2008] (Mil. Ct. App.); MilC 1334/09 *Dib v. The Military Prosecution* [2009] (Mil. Ct. App.).

⁴⁴⁵ MilC 48/03 *Ganam v. The Military Prosecutor* [2003] (Mil. Ct. App.) (the dissenting opinion); MilC 355/03 *Abiyat v. The Military Prosecutor* [2004] (Mil. Ct. App.); MilC 1352/05, *supra* note 443.

⁴⁴⁶ Thus, in case 48/03 *Ganam* (*supra* note 445), the dissenting opinion described stabbing (which in that case occurred in 2002) as prevalent among Palestinian girls, although according to research Palestinian stabbings of Israelis decreased between 1998-2002. Leonard Weinberg, Ami Pedhazur and Daphna Canetti-Nisim, *The Social and Religious Characteristics of Suicide Bombers and Their Victims*, 15

2.(c). Youth as an aggravating factor

As noted above, Israeli military court rulings sometimes regard youth as a mitigating factor.⁴⁴⁸ On the other hand, on several occasions military court judges have held that young age can, in fact, be an aggravating factor. By so asserting, these judges departed from the prevalent understanding 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:

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 purposes young people are the best suited, and when these people hold weapons to realise 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.⁴⁴⁹

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/228/92⁴⁵⁰), and the court is obligated to make its contribution to eliminating this phenomenon.⁴⁵¹

TERRORISM AND POLITICAL VIOLENCE 139, 149 (2003). Additionally, in my sample of military court cases concerning Palestinian minors, only 6 of the 155 cases included charges of knife possession.
⁴⁴⁷ See, e.g., MilC 14/01, *supra* note 443; MilC 63/02, *supra* note 439; MilC 128/02 *Kudsi v. Military Prosecutor* [2002] (Mil. Ct. App.); MilC 1553/07 *Karini v. The Military Prosecution* [2007] (Mil. Ct. App.).

⁴⁴⁸ *Supra* note 437 and accompanying text.

⁴⁴⁹ MilC 331/68 *The Military Prosecutor v. Abd Al-Mussa* [1968] (Nablus Mil. Ct.) – abstract of the ruling in MILITARY ATTORNEY GENERAL'S OFFICE, SELECTED RULINGS OF THE MILITARY COURTS IN THE ADMINISTERED TERRITORIES – VOL. 1, at 252, 253 (1970). 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.

⁴⁵⁰ I have not been able to obtain these two military court rulings.

⁴⁵¹ MilC 3900/03, *supra* note 373 (emphases changed).

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 partake 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 gunshot terrorist attacks.⁴⁵²

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. Judge Egoz stated:

I am not happy 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 [i.e., in the West Bank] and the worry of an increase in such crimes, make this assertion inevitable.⁴⁵³

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.⁴⁵⁴

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.⁴⁵⁵ At the same time, the two judges hoped to deter different groups: Fechter aimed to deter "other young people",⁴⁵⁶ whereas Egoz endeavoured to discourage adults (from using minors for terrorist purposes).⁴⁵⁷ 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 more independent.

⁴⁵² *Id.* (emphases changed).

⁴⁵³ *Id.* (emphases changed).

⁴⁵⁴ For this reason, the Military Court of Appeals reversed this ruling, and clarified that the six months limit refers to the prison sentence together with the probation period. MilC 358/03, *supra* note 373.

⁴⁵⁵ 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.

⁴⁵⁶ *Supra* note 449.

⁴⁵⁷ *Supra* note 451. 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". MilC 358/03, *supra* note 373 (emphasis in original).

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 and the lives of others. Their purpose is to receive a lenient sentence thanks to the [sic] young age [...].⁴⁵⁸

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.⁴⁵⁹

We have so far seen that the consideration of age, while appearing in the Israeli military legislation as a fairly straightforward issue, is in practice much more complex. When sentencing Palestinian minors, Israeli military courts might often disregard their young age altogether, consider other factors as overriding it, and in some cases have even considered youth to be an aggravating factor. This complex legal dynamic, the courts' justifications of it, and the anxieties it arouses among HROs, are all part of the cultural politics of age and childhood – which are informed and infused by, but at the same time also constitutive of, competing social understanding of childhood, and competing agendas concerning Palestinian children in particular.⁴⁶⁰ To further examine this intricate cultural politics of age and childhood as it manifests itself in Israeli law's encounter with Palestinian children, let us now turn to the age terminology in use by Israeli military law, the forces that shape it, and its socio-political effects.

⁴⁵⁸ MilC 30/04 *Satita v. The Military Prosecutor* [2004] (Mil. Ct. App.) (emphasis added).

⁴⁵⁹ This portrayal is possibly shared also by the two rulings cited in judge Egoz's decision. See *supra* note 450 and accompanying text.

⁴⁶⁰ For a narrower understanding and use of the terms "politics of age" and "cultural politics of childhood", in the context of child soldiers, see David M. Rosen, *Child Soldiers, International Humanitarian Law, and the Globalization of Childhood*, 109 AMERICAN ANTHROPOLOGIST 296, 296 (2007). On the "cultural politics of childhood" in general see Nancy Scheper-Hughes and Carolyn Sargent, *Introduction*, in SMALL WARS: THE CULTURAL POLITICS OF CHILDHOOD 1 (Nancy Scheper-Hughes and Carolyn Sargent eds., University of Californian Press, Berkley LA and London, 1998). See also JAMES AND JAMES, *supra* note 115, at 37 ("the cultural politics of childhood refers to the combination of national and therefore cultural contexts, social practices and political processes through which childhood is uniquely constructed in different societies at different times.").

3. AGE TERMINOLOGY

3.(a). Unitary / fragmentary classifications

The government of the British Mandate, which ruled Palestine from 1920 to 1948, enacted the *Juvenile Offenders Ordinance* in 1922, and thoroughly amended it in 1937.⁴⁶¹ Among other things, the Ordinance divided “juvenile offenders” into three sub-categories, for each of which different provisions were tailored: “child” (under 14 years of age), “youth” (14-15 years of age), and “tender adult”⁴⁶² (16-17 years of age).⁴⁶³ As described in the previous chapter, this ordinance – and British Mandate law generally – remained in force with the establishment of Israel in 1948.⁴⁶⁴

In 1967, when Israel occupied the West Bank and the Gaza Strip, military legislation was enacted which adopted these categories, but lowered their thresholds by two years. Thus, “child” now applied to under-12-year-olds, “youth” to 12- and 13-year-olds, and “tender adult” to 14- and 15-year-olds. In domestic Israeli legislation, in contrast, the age thresholds of these categories remained unchanged.

I have gone to great lengths to find a possible explanation for the military’s lowering of the age thresholds of these categories – but to no avail. As mentioned in Chapter 1,⁴⁶⁵ I obtained access to hundreds of potentially-relevant internal military correspondence in the Israeli military archive, but found no reference to this issue in these documents.⁴⁶⁶

Following education scholar Nancy Lesko and others, the age-based classificatory model employed by Israeli military legislation can be described as echoing psychological (mainly developmental-psychological) and sociological conceptions of human life, in general, as a linear and cumulative development; and of childhood, in particular, as a distinct stage – or rather, a

⁴⁶¹ THE JUVENILE OFFENDERS ORDINANCE (1937).

⁴⁶² This is a literal translation of the age categories used in the Hebrew version of the *Ordinance*. The English version used the terms “young person” and “juvenile adult” (as opposed to “youth” and “tender adults”). THE JUVENILE OFFENDERS ORDINANCE (English version), art. 2. Notwithstanding the symbolic importance of the terminological disparity between the Hebrew and English versions, we will concentrate on the Hebrew terminology, due to space constraints.

⁴⁶³ THE JUVENILE OFFENDERS ORDINANCE, *supra* note 461, art. 2. The classification used in the Ordinance did not entirely match the one used in the UK law at the time: “child” (under 14) and “young person” (14-17 years old). THE CHILDREN AND YOUNG PERSONS ACT (1933), art. 107. In 1937, the Executive Council of the British Government in Palestine rejected a suggestion to amend the Ordinance by deleting the term “tender adult” (in the English version “juvenile adult”) from the Bill and by extending the definition of “youth” (in the English version “young person”) to cover a person between the ages of 14 and 18 years. *Minutes of the 605th Meeting of the Executive Council Held at the Government Offices, Jerusalem, on the 5th January, 1937 – art. 31*, in GOVERNMENT OF PALESTINE – EXECUTIVE COUNCIL DECISIONS (1937).

⁴⁶⁴ *Supra* note 298 and accompanying text.

⁴⁶⁵ *Supra* text accompanying note 205.

⁴⁶⁶ One possible explanation is that these age categories were tailored to reflect the domestic law’s definition of Israeli male delinquents, at the time, as under-16-year-olds. See *infra* note 478.

sequence of standard stages of cognitive and emotional development and socialisation.⁴⁶⁷ As is the case with Israeli military legislation, “developmentality”⁴⁶⁸ tends to intensify age norms:⁴⁶⁹ the age-groups into which children (in this case Palestinian child offenders) are divided are treated as homogenous, developmentally-distinct, and as possessing unique traits, needs, and crises.⁴⁷⁰

Developmentality and intensification of age norms are generally prevalent in the modern West,⁴⁷¹ but as the Israeli military legislation illustrates, their effects can differ across different settings, according to the particular lines along which they are reproduced and the factors informing their reproduction. Thus, in the case of the military legislation, with its specific developmental-like terminology and the particular delineation of that terminology, two noteworthy effects are that at 12 years old, Palestinians are considered “youth” – an interim stage between childhood and adulthood – and at 14 years old they are regarded as “tender adults” – that is, young adults, vulnerable adults, but adults all the same.

If calling individuals particular names, assigning to them particular categories, not only affects them but at some fundamental level constitutes them as subjects,⁴⁷² then what effects do the above age categories produce? This inevitably depends on the power Israeli military legislation invests in them. Thus, the category of “child” (under-12-year-old) is of great potency, as it endows

⁴⁶⁷ NANCY LESKO, *ACT YOUR AGE! A CULTURAL CONSTRUCTION OF ADOLESCENCE* 107-134 (Routledge, New York and London, 2001). On developmentalist conceptions of childhood see also ARCHARD, *supra* note 2, at 26-27, 32-36; Lynn Fendler, *Educating Flexible Souls: The Construction of Subjectivity through Developmentality and Interaction*, in GOVERNING THE CHILD IN THE NEW MILLENNIUM 119 (Kenneth Heltqvist and Gunilla Dahlberg eds., Routledge, New York and London, 2001); JAMES, JENKS AND PROUT, *supra* note 2, at 17-19, 20-24; DAVID KENNEDY, *THE WELL OF BEING: CHILDHOOD, SUBJECTIVITY, AND EDUCATION* 4-5, 12-15, 64, 98-99 (State University of New York Press, Albany NY, 2006); ROSE, *supra* note 1, at 142-154. On critiques of developmentality see, e.g., ARCHARD, *supra* note 2, at 34; DAVID BUCKINGHAM, *AFTER THE DEATH OF CHILDHOOD: GROWING UP IN THE AGE OF ELECTRONIC MEDIA* 14-15 (Polity, Cambridge, 2000); JAMES, JENKS AND PROUT, *supra* note 2, at 18-19; GILL VALENTINE, *PUBLIC SPACE AND THE CULTURE OF CHILDHOOD* 54 (Ashgate, Aldershot and Burlington, 2004). On possible alternatives to developmentality, see LESKO, *supra* note 467, at 195-196, 199.

⁴⁶⁸ This term is adopted from LESKO, *supra* note 467.

⁴⁶⁹ The phrase “intensification of age norms” is borrowed from HOWARD P. CHUDACOFF, *HOW OLD ARE YOU: AGE CONSCIOUSNESS IN AMERICAN CULTURE* 65-91 (Princeton University Press, Princeton NJ and Oxford, 1989).

⁴⁷⁰ On the uniqueness attributed to different age groups, see LESKO, *supra* note 467, at 107.

⁴⁷¹ On the growing cultural acceptance of developmental psychology in the West, and the increased strengthening of age norms, see CHUDACOFF, *supra* note 469, at 9, 163-167. On the prevalence of developmentality in HROs’ accounts of child soldiers see ROSEN, *supra* note 19, at 134. On the normalisation of age-graded schooling in the US see CHUDACOFF, *supra* note 469, at 30-40; William A. Fischel, “Will I See You in September?” – *An Economic Explanation for the Standard School Calendar*, 59 JOURNAL OF URBAN ECONOMICS 236, 239-241 (2006); LESKO, *supra* note 467, at 120-122. On the legal use of age categories in general see KING AND PIPER, *supra* note 110, at 108.

⁴⁷² See, generally LOUIS ALTHUSSER, *LENIN AND PHILOSOPHY, AND OTHER ESSAYS* (Ben Brewster trans., Monthly Review Press, New York, 1971); JUDITH BUTLER, *GENDER TROUBLE: FEMINISM AND THE SUBVERSION OF IDENTITY* (Routledge, New York and London, 1990). Cf., in relation to childhood, DUSSEL, *supra* note 289, at 194 (“being called a name is to be offered something, a space or locus in a social grid, a filiation or affiliation [...]. What’s in a child’s name, then? What’s in the name of ‘childhood,’ and what’s done on [sic] its name?”).

However, as already noted in the previous chapter, Israeli law's construction of childhood cannot be reduced to national differentiations. As we shall now see, in practice the age demarcations in use by Israeli military law function in a much more intricate, and often elusive and incoherent manner. This complexity, it will be argued, is revealing of broader characteristics of Israeli military law and the Israeli occupation on the one hand, and of childhood as a socio-legal construct on the other hand.

3.(b) *The definition of "minor"*

As noted above, in 1971 the *Youth Law* put the category "minor" into use in domestic Israeli criminal law (which applies to Israelis – including Israeli settlers). In comparison, in Israeli military law (applicable to Palestinians), the term "minor" has had a much more tumultuous history since the beginning of the occupation, which can be divided into three stages: (a) 1967-2009, (b) 2009-2011, and (c) 2011 to date. Let us now examine the complexities and trends which have emerged during these stages, and discuss their significance and implications.

3.(b).1. 1967-2009: No statutory definition; ambiguity in court rulings

For over four decades since the beginning of the Israeli occupation, Israeli military legislation included no definition of "minor",⁴⁸² and the only age categories in use were those discussed earlier – "child" (under 12 years of age), "youth" (12-13-year-old), and "tender adult" (14-15-year-old).

HROs criticised this legal state of affairs, which they understood as setting the age of criminal majority for Palestinians at 16 years – two years lower than that of Israelis.⁴⁸³ For instance, HRO *Save the Children – Sweden* submitted a briefing paper to the *UN Commission on Human Rights* in 2005, which among other things contended:

Under Israeli military law, a Palestinian child is considered a minor until the age of sixteen. The CRC [*UN Convention on the Rights of the Child*]

⁴⁸² 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. ORDER 1651, *supra* note 74, art. 181(a). This provision was originally anchored in ORDER 132, *supra* note 345, 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.

⁴⁸³ See, e.g., Addameer – Prisoner Support and Human Rights Association, *Palestinian Children Political Prisoners* (2004), available at <http://www.addameer.org/detention/children.html>; DCI – PALESTINE, STATUS OF PALESTINIAN CHILDREN'S RIGHTS: ISRAEL'S VIOLATIONS OF THE RIGHT TO LIFE AND SECURITY AND THE RIGHTS OF CHILDREN DEPRIVED OF THEIR LIBERTY DURING THE SECOND INTIFADA 9 (2004); DCI – PALESTINE AND SAVE THE CHILDREN – SWEDEN, *supra* note 32, at 67; SAVE THE CHILDREN – SWEDEN, *supra* note 262, at 31; YESH DIN, *supra* note 26, at 22, 155-156.

definition of a child is [meant to read: as] any person under eighteen years of age is only applied to children who are citizens of Israel. So in effect, Israel applies two sets of law on the same territories. Israeli settler children [...] are considered minors until they are 18, but Palestinian children who live on the same territories are not.⁴⁸⁴

Notwithstanding their importance, HROs' denunciations such as this, by focusing on the military legislation, ignored the question of how Israeli military courts interpreted and applied age categories in practice.

An analysis of military court rulings reveals that while the military legislation did not provide a definition of "minor", the military courts offered two competing interpretations of that term. On the one hand, some military court judges indeed defined "minor" as referring to Palestinians under the age of 16 years,⁴⁸⁵ in congruence with the above three sub-categories ("child", "youth", and "tender adult") which extended up to that age. Yet on the other hand, in numerous military court rulings, judges classified and referred to Palestinians aged 16⁴⁸⁶ and 17⁴⁸⁷ years old as minors. For example, in 2003, a Military Court of Appeals judge declared two defendants aged 16 years old (at the time of their offences) to be only "[f]ormally [...] adults according to the [military] law", and reiterated that "their adulthood is merely formal".⁴⁸⁸ Such interpretations of minority might have been influenced by domestic Israeli law's definition of "minor" as anyone under the age of 18 years.⁴⁸⁹

⁴⁸⁴ Save the Children – Sweden, *Briefing Papers on the Situation and Rights of Palestinian Children in the Occupied Palestinian Territories UN Commission on Human Rights* (2005).

⁴⁸⁵ See, e.g., MilC 2651/09 *The Military Prosecutor 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.

⁴⁸⁶ There are many examples. See, e.g., MilC 66/03 *The Military Prosecutor v. Abu Safra* [2003] (Mil. Ct. App.); MilC 2177/04 *Alhamur v. The Military Prosecutor* [2005] (Mil. Ct. App.); MilC 1014/05 *Ali v. The Military Prosecutor* [2004] (Mil. Ct. App.); MilC 2274/05 *The Military Prosecutor v. Abda* [2005] (Mil. Ct. App.); MilC 5008/05 *The Military Prosecutor v. Alkam* [2008] (Judea Mil. Ct.); MilC 2730/06 *Satuf v. The Military Prosecutor* [2006] (Mil. Ct. App.); MilC 3098/07 *The Military Prosecutor v. Harfush* [2007] (Mil. Ct. App.); MilC 3617/07 *Daraj v. The Military Prosecutor* [2007] (Mil. Ct. App.); MilC 3868/07 *The Military Prosecutor v. Hamari* [2007] (Mil. Ct. App.); MilC 1655/08 *The Military Prosecutor v. Jadallah* [2008] (Judea Mil. Ct.); MilC 4388/08, *supra* note 486; MilC 4595/08 *Shatia v. The Military Prosecutor* [2008] (Mil. Ct. App.); MilC 1442/09 *Kuwasma v. The Military Prosecutor* [2009] (Mil. Ct. App.).

⁴⁸⁷ Here, too, the examples are numerous. See, e.g., MilC 128/02, *supra* note 447; MilC 3386/02 *The Military Prosecutor v. Satita* [2003] (Judea Mil. Ct.); MilC 142/03 *The Military Prosecutor v. Kalibi* [2003] (Mil. Ct. App.); MilC 286/03 *Bisharat v. The Military Prosecutor* [2003] (Mil. Ct. App.); MilC 30/04, *supra* note 458; MilC 2273/04 *Mesalma v. The Military Prosecutor* [2005] (Mil. Ct. App.); MilC 1051/05 *Abu Hashas v. The Military Prosecutor* [2005] (Mil. Ct. App.); MilC 1531/05 *The Military Prosecutor v. Abu Salha* [2005] (Mil. Ct. App.); MilC 4361/07 *Amarna v. The Military Prosecutor* [2007] (Mil. Ct. App.); MilC 2285/08 *Farun v. The Military Prosecutor* [2008] (Mil. Ct. App.); MilC 4388/08, *supra* note 486; MilC 4635/08 *The Military Prosecutor v. Abiat* [2009] (Judea Mil. Ct.); MilC 4716/08 *Dvikat v. The Military Prosecutor* [2008] (Mil. Ct. App.); MilC 4811/08 *Banat v. The Military Prosecutor* [2008] (Mil. Ct. App.); MilC 4822/08 *The Military Prosecutor v. Bragata* [2008] (Mil. Ct. App.); MilC 1480/09 *The Military Prosecutor v. Kassab* [2009] (Samaria Mil. Ct.); MilC 2728/09 *Halil v. The Military Prosecutor* [2009] (Mil. Ct. App.).

⁴⁸⁸ MilC 65/03 *The Military Prosecutor v. Abu Hagier* [2003] (Mil. Ct. App.) (emphases added).

⁴⁸⁹ *Supra* note 302.

3.(b).2. 2009-2011: Statutory definition added; ambiguity persists in court rulings

In July 2009, the military legislation was amended to add a definition of “minor” as any person under the age of 16 years (alongside the sub-categories “child”, “youth”, and “tender adult”, which remained in force).⁴⁹⁰ This made the disparity between Israeli military law and domestic law as regards the definition of “minor” much starker.

The persistent disparity in the definition of “minor”, between Israeli and Palestinian children, evoked continued criticism from the *UN Committee on the Rights of the Child*,⁴⁹¹ the *UN Committee Against Torture*,⁴⁹² and many HROs.⁴⁹³ For example, in 2010, the *Concord Research Centre for Integration of International Law in Israel* – a legal clinic in the Israeli College of Management – published a position paper (that had been sent to the Israeli Military Attorney General), which states among other things:

As a result of setting the age of majority [in Israeli military legislation] at sixteen years, [...] Palestinians] over the age of sixteen are [...] not entitled to ‘youth adjudication’ [i.e., to trial in military youth courts ...]. [...] *splitting the concept of childhood*, so that [Palestinian] residents of the Territories who are over the age of sixteen are treated fundamentally differently than their peers who reside in Israel, constitutes unacceptable discrimination [...]. This situation contradicts the clear trend in international law to set the age of majority at eighteen years. [...] There is thus] a considerable discrepancy between the legislation applicable within Israel – which recognises the age of majority to be eighteen – and the military legislation. As a result of this discrepancy, a single legal system holds a *split concept of childhood*.⁴⁹⁴

This text, like the *Save the Children* briefing paper quoted earlier,⁴⁹⁵ makes two intertwined moves: first, it advocates a universal definition of childhood – which is based on age and space

⁴⁹⁰ ORDER 1644, *supra* note 346, art. 1.

⁴⁹¹ UN COMMITTEE ON THE RIGHTS OF THE CHILD, *supra* note 159, at 2 (“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).”).

⁴⁹² UN COMMITTEE AGAINST TORTURE, CONSIDERATION OF REPORT SUBMITTED BY STATES PARTIES UNDER ARTICLE 19 OF THE CONVENTION – ISRAEL: CONCLUDING OBSERVATIONS (CAT/C/ISR/CO/4) 8 art. 27 (2009), available at <http://www2.ohchr.org/english/bodies/cat/docs/cobs/CAT.C.ISR.CO.4.pdf> (“the Committee remains concerned at the differing definitions of a child in Israel – where legal age is attained at the age of 18 – and in the occupied Palestinian territories – where legal age is attained at 16.”). This condemnation was also quoted by *DCI – Palestine*: DCI PALESTINE, *supra* note 32, at 115.

⁴⁹³ See also, e.g., B’TSELEM, *supra* note 96, at 71; DCI – ISRAEL AND DCI – PALESTINE, ALTERNATIVE REPORT FOR CONSIDERATION REGARDING ISRAEL’S INITIAL OPAC PERIODIC REPORT TO THE CHILD’S RIGHTS COMMITTEE 31 (2009); Yesh Din and ACRI – Association for Civil Rights in Israel, *Granting Palestinian Minors Tried in the Military Courts Proper Protection* arts. 9-10, 18-26, 28 (2010) (Hebrew), available at <http://www.acri.org.il/story.aspx?id=2511>.

⁴⁹⁴ The Concord Research Center for Integration of International Law in Israel, *Letter to the Military Attorney General* 2-3, 9 (2010) (Hebrew), available at http://www.colman.ac.il/research/research_institute/concord/friend_law/news_last/Documents/Children%20in%20Military%20Cts_Concord%20Letter.pdf (emphases added).

⁴⁹⁵ *Supra* note 484 and accompanying text.

demarcations (18 years and youth courts, respectively); and second, it anchors this universal definition in international law.⁴⁹⁶ However, this taken-for-granted conception of childhood is, in fact, not cross-culturally grounded but a specific, modern-Western notion.⁴⁹⁷

The anxieties which these two HRO texts evince in relation to Israeli military law's definition of "minor" thus revolve around the violation of the "normal" boundaries of childhood. These HROs perceive these boundaries to be violated when Palestinian children are rendered adults "prematurely" (at age 16), or when they are not separated from their adult counterparts (and instead are tried alongside them in the same courts). Especially striking in the latter excerpt is the explicitness of these anxieties, as illustrated by the framing of the disparity in ages of majority not only as a matter of discrimination, but also as an issue of a "split concept of childhood". These two interrelated desires of HROs – to (re)produce a supposedly universal conception of childhood, and to "normalise" the temporal (here: age-based) and spatial boundaries of childhood – will be discussed in depth in the next chapters.⁴⁹⁸

Apart from this, HROs' assumption that the age of majority for Palestinians was unequivocally set at 16 years was misinformed, due to the HROs' continued reliance solely on the letter of the Israeli military legislation (and disregard of military court practice). While one might have expected the new statutory definition of "minor" as under-16-year-old to resolve the interpretive incoherence among the judiciary with regard to this age category, in practice, rulings given after this amendment indicate otherwise.⁴⁹⁹ 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"⁵⁰⁰ when perpetrating the offences attributed to him (an adult according to the military legislation), "was a minor when committing the offences".⁵⁰¹ Thus, in the Israeli military courts, the meaning of "minor" remained highly ambiguous, even after a definition of the term was added to the military legislation in 2009. This finding is quite remarkable, among other things because the definition of "minor" is not normally considered, and is not defined in the

⁴⁹⁶ On the relevant international law and its application in the OPT see Appendix 4.

⁴⁹⁷ On the globalisation of childhood by HROs and by international law, and on why the portrayal of childhood as globally uniform is false, see Jo Boyden, *Childhood and the Policy Makers: A Comparative Perspective on the Globalization of Childhood*, in *CONSTRUCTING AND RECONSTRUCTING CHILDHOOD: CONTEMPORARY ISSUES IN THE SOCIOLOGICAL STUDY OF CHILDHOOD* 187 (Allison James and Alan Prout eds., 2nd ed., Routledge, London, 1997); BUCKINGHAM, *supra* note 467, at 10; Rosen, *supra* note 460, at 296-297, 304.

⁴⁹⁸ *Infra* text accompanying notes 627-639, 694, 713, 811-813, 819-824, 972-973, 1038-1040, and 1083-1084.

⁴⁹⁹ Examples of military rulings which, even after the amendment to the military legislation, referred to defendants aged 16 and 17 years old as "minors" are: MilC 2689/09 *The Military Prosecution v. Yamin* [2009] (Samaria Mil. Ct.); MilC 3239/09 *The Military Prosecution v. Salameh* [2009] (Samaria Mil. Ct.); MilC 3291/09 *The Military Prosecution v. John Doe* [2010] (Samaria Mil. Ct.); MilC 3921/09 *The Military Prosecution v. Kashak* [2009] (Samaria Mil. Ct.); MilC 4770/09 *The Military Prosecution v. Safadi* [2009] (Samaria Mil. Ct.).

⁵⁰⁰ 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.

⁵⁰¹ MilC 1528/09 *Massarwah v. The Military Prosecution* [2009] (Mil. Ct. App.) (emphases added).

military legislation, as open to judicial discretion (unlike other legal issues, such as remand or sentencing).

What are the significance and implications of this persistent ambiguity of the term “minor”? For one thing, this ambiguity can be linked, to some degree, to the unclear 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.⁵⁰² “Some links” is the key phrase here, as 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).⁵⁰³ An example of the latter trend is a Military Court of Appeals ruling, which favoured the domestic law’s definition of “minor” as under-18-year-old on the grounds that

*a minor is a minor is a minor, whether he [sic] lives where [domestic] 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.*⁵⁰⁴

Moreover, the continued classification of 16- and 17-year-old Palestinians as “minors” by some military judges, even when this classification markedly violated the (supposedly) binding statutory definition, demonstrates the complexity of Israeli law’s encounter with Palestinian children. These children appear to be capable of evoking different, often competing, reactions and forces. Thus, Palestinian children were for decades in the conjunction of two competing demarcations of childhood: one, setting the boundary between childhood and adulthood at the age of 18 years – a demarcation which HROs perceive as universal and normal, and which is dominant in a myriad of childhood-related arenas including domestic Israeli law;⁵⁰⁵ the other demarcation of childhood, as extending only up to the age of 16 years, was anchored in Israeli military legislation. 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.

⁵⁰² See, e.g., MilC 2912/09 *The Military Prosecution v. Abu Rahma* [2009] (Mil. Ct. App.).

⁵⁰³ Judges who have emphasised 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., MilC 3975/04 *The Military Prosecution v. Nemer* [2006] (Judea Mil. Ct.).

⁵⁰⁴ MilC 2912/09, *supra* note 502 (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.

⁵⁰⁵ In domestic Israeli law, the age of 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.

Interestingly, some judges allowed the former demarcation (childhood = under 18) to prevail, even at the expense of the military legislation's delineation of childhood which these judges viewed as "merely formal".⁵⁰⁶ In simplistic terms, it could be said that notions about what childhood means and should mean do not automatically succumb to national agendas (in this case, the occupying power's desire to apply its legislation, which defines "minor" as under-16-year-old, to the occupied population).

The persistent ambiguity of the term "minor" thus illustrates both the complexity of the figure of the young Palestinian offender, and the complex relations between domestic and military laws. Ambiguities are not bad *per se*, and our aim is not to "resolve" them,⁵⁰⁷ but to examine how terminological ambiguity functions in the specific context at hand – how it affects its subjects: the Palestinian children, their attorneys and families. Individually, each instance in which a military court judge violated the military legislation and classified 16-17-year-old Palestinians as minors could (in principle at least⁵⁰⁸) allow for a more lenient treatment of these Palestinians than the legislation alone would prescribe. But at a broader institutional level, this ambiguity produced uncertainty: it prevented 16-17-year-old Palestinian suspects, their attorneys and families from predicting whether the military court would classify these suspects as minors. The courts' complex stance(s) on whether and how to consider Palestinian children's young age when determining their sentences (discussed above)⁵⁰⁹ further intensified this unpredictability.

These particular uncertainties are arguably symptomatic of a broader incoherence of the military court 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.⁵¹⁰ The Military Court of Appeals itself has admitted, specifically, that

⁵⁰⁶ *Supra* note 488 and accompanying text.

⁵⁰⁷ Cf. Nick Lee, *The Challenge of Childhood: Distributions of childhood's ambiguity in adult institutions*, 6 CHILDHOOD 455, 461 (1999) ("the point here is not to suggest that ambiguity is bad *per se*, nor that it could have or should have been resolved into a univocal understanding of children"); JAMES BOYD WHITE, *THE LEGAL IMAGINATION* xv (abridged ed., University of Chicago Press, Chicago and London, 1985) (proposing that lawyers should be given "a training [...] in the ways one can live with an increased awareness of the limits of one's knowledge and mind, accepting ambiguity and uncertainty as the condition of life.").

⁵⁰⁸ In practice, the courts' consideration of defendants' young age is more complex, as explained above. See *supra* text accompanying notes 439-460 and *infra* text accompanying notes 532-535.

⁵⁰⁹ *Supra* text accompanying notes 439-460.

⁵¹⁰ HAJJAR, *supra* note 21, at 256. While the military law sets maximum sentences for each offence, it does not provide sentencing guidelines – other than the youth consideration, which is employed incoherently, as shown above. These courts therefore have full discretion over sentences, subject to the previously discussed maximum sentence limitations. Although the domestic law does not provide clear sentencing guidelines either, civil court judges – unlike military court judges – have at their disposal statistical information (available on online legal databases) on the sentences imposed by the civil courts.

military court rulings have been inconsistent in relation to the punishment and detention of Palestinian minors.⁵¹¹

Moreover, the uncertainty concerning the interrelated issues discussed thus far – the meaning of “minor”, the consideration of young age, and the sentencing of minors – is illustrative of the unpredictability which, according to several Israeli social scientists, characterises the Israeli rule in the OPT in general. Examples of this unpredictability include the ever-changing distribution of Israeli checkpoints; the intricate, unpublished, and constantly-changing rules determining eligibility for permits to enter Israel or move within the West Bank; the vagueness of the instructions guiding the Israeli security authorities, which leaves these instructions open to on-the-spot interpretations; and the conflicting orders which different Israeli bodies sometimes issue. Deliberate or not, these unpredictable mechanisms amount to an effective control apparatus, which can therefore be described as producing “control through uncertainty”, or as evincing “effective ineffectiveness”.⁵¹²

We began our discussion of the ambiguity of “minor” in Israeli military law with an excerpt from the *Concord Research Centre*’s position paper. And we saw that, like other HRO publications, that position paper expressed misinformed criticism due to its reliance solely on the military legislation (and unawareness of the practical ambiguity of “minor” in the military courts). It is worth adding that the HRO made another misinformed assertion (also quoted above⁵¹³): that Palestinians aged 16 years old and over were not being tried in military youth courts. This misinformed assertion, too, relied on the formal military legislation, which was amended, in July 2009, to generally prescribe separate hearings in military youth courts for Palestinian “minors” – whom that legislation defined at the time as under-16-year-olds.⁵¹⁴ The military also released a public statement, announcing that: “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.”⁵¹⁵ But again, judicial practice rendered age much more ambiguous than the military’s legislation or

⁵¹¹ MilC 355/03, *supra* note 445; MilC 4497/08 *The Military Prosecution v. Hawajah* [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. MilC 1261/09, *supra* note 423.

⁵¹² Yael Berda, *The Bureaucracy of Occupation: Administratively Bare Life and Security Theology* (paper presented in the Bare Life conference at the Jerusalem Van Leer Institute, 2006) (Hebrew); Neve Gordon and Dani Filc, *Hamas and the Destruction of Risk Society*, 12 *CONSTELLATIONS* 542, 551-552 (2005); Ariel Hendel, *Uncertainty as a Control Technology*, 31 *TEORIYA U-VIKORET [THEORY & CRITIQUE]* 101, 104-115 (2007) (Hebrew); Yehuda Shenhav and Yael Berda, *The Colonial Foundations of the State of Exception: Juxtaposing the Israeli Occupation of the Palestinian Territories with Colonial Bureaucratic History*, in *THE POWER OF INCLUSIVE EXCLUSION: ANATOMY OF ISRAELI RULE IN THE OCCUPIED PALESTINIAN TERRITORIES* 337, 339-340, 355-360 (Adi Ophir, Michal Givoni and Sari Hanafi eds., Zone Books, New York, 2009). This is not unique to Israel/Palestine, but is characteristic of post-colonial and other regimes: *infra* text accompanying notes 1057-1059.

⁵¹³ *Supra* text accompanying note 494.

⁵¹⁴ However, the military law still allowed for non-separation in many cases, including extension-of-detention hearings and other exceptions. See *supra* notes 355-357 and accompanying text.

⁵¹⁵ THE MILITARY PROSECUTION, ANNUAL ACTIVITY REPORT – 2009, at 91 (2010) (Hebrew), available at http://www.law.idf.il/sip_storage/FILES/0/750.pdf.

public statements alone indicated: in practice, the military courts deviated from the legislation by which they were supposed to be bound, and voluntarily extended the separate adjudication of minors to Palestinians up to the age of 18 years. We will discuss this issue at length in the next chapter.⁵¹⁶

3.(b).3. 2011 to date: The statutory age of criminal majority raised

In September 2011, the statutory definition of “minor” was changed to denote under-18-year-olds,⁵¹⁷ similarly to domestic Israeli law.⁵¹⁸ As this is a very recent development, its influence on the military courts’ interpretation of “minor” cannot be assessed conclusively, although the persistent ambiguity of that term in court rulings is likely to subside or disappear. On the other hand, our analysis of military court rulings reveals that the other age categories – “child”, “youth”, and “tender adult” – have been applied inconsistently by the courts despite their unequivocal statutory definition.⁵¹⁹ For instance, whereas the military legislation defines “tender adults” as 14-15-year-olds, in 2004 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”.⁵²⁰

In practice, the impact of this statutory amendment on Palestinian child offenders was very limited – an issue the military’s statements and some HRO reports failed to realise, due to their continued reliance solely on the letter of the military legislation. To discuss why this statutory amendment had limited practical significance, and how HRO reports and military statements failed to understand this, let us examine two texts: a public letter by HROs from 2010 advocating this amendment, and a military public statement from 2011 praising this amendment.

⁵¹⁶ *Infra* text accompanying notes 621-623.

⁵¹⁷ ORDER 1676, *supra* note 346, art. 3.

⁵¹⁸ *Supra* note 302 and accompanying text.

⁵¹⁹ For military court rulings referring to 12- and 13-year-old Palestinians (“youth” according to military legislation) as “children” see, e.g., MilC 167/00, *supra* note 443; MilC 2903/05 *Jahalin v. The Military Prosecutor* [2005] (Mil. Ct. App.); MilC 1999/09 *Abu-Abeid v. The Military Prosecution* [2009] (Mil. Ct. App.). For rulings referring to 14- and 15-year-olds (“tender adults” according to the legislation) as “children” see, e.g., MilC 66/03, *supra* note 486; MilC 76/04 *The Military Prosecutor v. Barakkat* [2004] (Mil. Ct. App.); MilC 1951/04 *The Military Prosecution v. Hamam Zakki Barakkat* [2004] (Judea Mil. Ct.); MilC 1506/06 *The Military Prosecutor v. Sabih* [2006] (Judea Mil. Ct.); MilC 3008/08 *The Military Prosecution v. Alalu* [2008] (Judea Mil. Ct.). For rulings referring to 14- and 15-year-olds (“tender adults” according to the legislation) as “youth” see, e.g., MilC 104/68 *The Military Prosecutor v. Abu Assad* [1968] (Nablus Mil. Ct.), in MILITARY ATTORNEY GENERAL’S OFFICE, SELECTED RULINGS OF THE MILITARY COURTS IN THE ADMINISTERED TERRITORIES – VOL. 1, at 215, 217 (1970); MilC 168/00 *Abu-Adi v. The Military Prosecutor* [2001] (Mil. Ct. App.); MilC 48/03 *Anshadi v. The Military Prosecutor* [2003] (Mil. Ct. App.) (“MilC 48/03 *Anshadi*”); MilC 2903/05, *supra*; MilC 3647/05 *The Military Prosecutor v. Abu-Shama* [2006] (Mil. Ct. App.). For a ruling referring to a 15-year-old (“tender adult” according to the legislation) as both a “child” and a “youth” see MilC 167/00, *supra* note 443.

⁵²⁰ MilC 28/04 *Abu-AlShabab v. The Military Prosecutor* [2004] (Mil. Ct. App.). The frequency of such interpretations by the military courts is unknown, but examples are numerous, as indicated *supra* note 519.

The 2010 public letter, written jointly by Israeli HROs *Yesh Din* and the *Association for Civil Rights in Israel* and sent to the Israeli Military Attorney General, depicted the consequences of the statutory definition of “minor” (at the time) as under-16-year-old thus:

Palestinian minors aged 16 to 18 years are defined as adults for all intents and purposes, including not being tried in the military youth court but in the regular military court; not being entitled to the presence of a parent; being held in the regular detention and prison centres rather than a youth detention centre, and not being subject to the requirement that a welfare report be given about their matter before sentencing them.⁵²¹

The second text is a public statement the Israeli military spokesperson released in October 2011, a month after the statutory age of majority was raised. This statement attributes to this statutory amendment great practical consequence,

due to the special proceedings in place for minors. Their hearings are heard by specially-trained judges, [...] separately from adult hearings, and there is a requirement to separate minors from adults in detention and prison facilities. Additionally, with respect to minors, the military youth court is authorised to appoint them a defence attorney paid for by the State, to order the presence of the parents in a hearing, and to receive a [pre-sentence] report.⁵²²

In practice, however, raising the statutory age of criminal majority to 18 years has not affected Palestinian defendants in the way in which HROs predicted it would, and the military announced it did – in several respects.

First, contrary to the HROs’ public letter and the military’s statement, this amendment has not changed the procedures for trying 16- and 17-year-old Palestinians (whom the statutory law did not previously define as “minors”). As explained earlier, 16- and 17-year-old Palestinians have already been tried in military youth courts since two years prior to this amendment.⁵²³ In any case, military youth court hearings do not differ significantly from hearings involving adult defendants, other than being held separately from such hearings (as the previous chapter noted and the next chapter will explain further).⁵²⁴

Second, contrary to these two texts, this amendment has not significantly changed either the issue of parental presence or the issue of pre-sentence reports. The amended military legislation continues to deny Palestinian child defendants the right to have their parents present in their

⁵²¹ Yesh Din and ACRI, *supra* note 493, art. 10.

⁵²² The Spokesperson of the Israel Defence Forces, *Amendment to the Military Law: The Age of Minority in Judea and Samaria Has Been Raised from 16 to 18*, THE ISRAEL DEFENCE FORCES WEBSITE (October 4, 2011) (last visited: February 18, 2012) (Hebrew), available at <http://www.idf.il/1133-13409-he/Dover.aspx>.

⁵²³ *Supra* text accompanying note 516.

⁵²⁴ For discussion see *supra* text accompanying note 347 and *infra* text accompanying notes 693–695 and 721–724.

hearings⁵²⁵ or interrogations⁵²⁶ and the right to have pre-sentence reports⁵²⁷ – issues which will be discussed at greater length in the next chapters.⁵²⁸

Third, again contrary to these two texts, the amendment did not affect 16- and 17-year-old Palestinians' detention and prison arrangements. According to information provided by the Israeli military and the Israeli Prison Service, since June 2009 Palestinian children have already been held only in non-military facilities,⁵²⁹ where – as will be explained in the next chapter⁵³⁰ – they are separated from their adult counterparts up to the age of 18 years. Moreover, in the next chapter we will question whether the separation of Palestinian child detainees and prisoners from their elders is praiseworthy, in terms of its consequences and the motivation behind it.⁵³¹

One issue which, in principle, could have changed following the legislative redefinition of "minor", is the sentences imposed on 16- and 17-year-old Palestinians (whom the legislation only now defines as minors).⁵³² However, as we have seen earlier in this chapter, being a minor does not necessarily serve as a mitigating factor for Palestinian defendants: Israeli military courts often appear to ignore Palestinians' minority,⁵³³ or consider certain factors as overriding the minority factor,⁵³⁴ or in some cases even treat minority as an aggravating consideration.⁵³⁵ Time will tell whether these latter trends will suddenly change after the statutory age of criminal majority has been raised.

4. COEQUALITY – THE COEXISTENCE OF AGE(S)

So far we have seen that, at least in relation to Palestinian minors, age demarcations have been considerably more complex, ambiguous, and elusive than both HROs and Israeli legislation present

⁵²⁵ As explained in the previous chapter, since 2009 the military legislation authorises military youth courts to order Palestinian parents to be present in their child's hearings. However, unlike Israeli parents, these parents do not have a right to be present during their child's hearings, and neither does the child have a right to have them present. For discussion of this provision and its practical implications see *supra* text accompanying notes 363-365.

⁵²⁶ For further discussion see *supra* text accompanying notes 390-397 and *infra* text accompanying notes 915-941.

⁵²⁷ Pre-sentence reports are rarely ordered. See *infra* text accompanying notes 721-724.

⁵²⁸ For discussion see *infra* text accompanying notes 693-695, 721-724, and 915-941.

⁵²⁹ B'Tselem, *supra* note 402.

⁵³⁰ *Infra* text accompanying notes 610-613.

⁵³¹ For discussion see *infra* text accompanying notes 640-659, 682-713, and 727-735.

⁵³² This clearly does not concern the (limited) statutory restrictions of maximum sentences, since – as we have seen – they only apply to 12-15-year-old Palestinians (whom the military legislation had already defined as "minors" prior to this amendment). *Supra* text accompanying notes 373-382, 475-477, and 537-545.

⁵³³ *Supra* text accompanying notes 440-442.

⁵³⁴ *Supra* text accompanying notes 443-447.

⁵³⁵ *Supra* text accompanying notes 448-460.

them to be (later this will be shown to be the case with Israeli settler children as well).⁵³⁶ This elusiveness was shown to characterise the courts' consideration of defendants' youth as well, and to involve factors pertaining to broader complexities and trends of Israeli military law and Israeli occupation on the one hand, and childhood on the other.

Another manifestation of this elusiveness of childhood and age is the simultaneous application, by Israeli military legislation, of different ages to the same Palestinian child defendant. As noted in the previous chapter and again in this chapter, the military legislation limits the maximum sentences which may be imposed upon Palestinian "youth" (12- and 13-year-olds) and "tender adults" (14- and 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 s/he is when the sentence is determined.⁵³⁷ In comparison, no parallel provision exists in the domestic legislation (which applies to Israeli minors).

As the military court cases I obtained indicate, some Palestinian defendants inevitably shift from one age category to another (e.g., from "youth" to "tender adult") between their offending and sentencing.⁵³⁸ In such cases, defendants are simultaneously ascribed two different ages: their age at the time of the offending (which is supposed to be a consideration in the sentencing⁵³⁹), and 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 – a deviation from the previously discussed, socially prevalent, normalisation of age homogeneity.⁵⁴⁰ Let us term this coexistence of two different age regimes (different ages and different age groups) "coevality".

This coevality makes the military court's sentencing a moment when time both destabilises and intensifies. On the one hand it destabilises, since military legislation, by placing the defendant in two concurrent positions – the person s/he was when committing the offence and the person s/he is at the time of the sentencing – challenges the distinction between past and present. On the other hand, time also intensifies, as not one but two ages – and hence two times – coexist in relation to the defendant embodying them. The court retrospectively "brings to life" the defendant's past (the time

⁵³⁶ *Infra* text accompanying notes 573-582.

⁵³⁷ ORDER 1651, *supra* note 74, arts. 168(b) and 168(c).

⁵³⁸ See, e.g., MilC 4407/03 *The Military Prosecutor v. Harfush* [2004] (Judea Mil. Ct.) (in which the defendant was 13 years old – a "youth" – at the time of his offending, and 14 years old – a "tender adult" – by the time of his sentencing). See also, e.g., MilC 1091/02 *The Military Prosecutor v. Janan* [2003] (Hebron Mil. Ct.); MilC 1001/04 *The Military Prosecutor v. Dib* [2004] (Judea Mil. Ct.) (in both cases, the defendants were 15-year-olds – "tender adults" – when committing the offences, and 16-year-olds – "adults" according to the legislation of the time – when they were sentenced).

⁵³⁹ *Supra* note 437.

⁵⁴⁰ On the social normalisation and intensification of age homogeneity see *supra* text accompanying notes 468-471.

of the offence) through his/her present (and current age), thereby bearing in mind both these times (and ages).

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 they become and the longer their sentence might be.⁵⁴¹ *DCI – 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.⁵⁴²

Two years later, the HRO 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".⁵⁴³

These excerpts – and similar statements in other HRO documents⁵⁴⁴ – portray the defence's battle in such situations as a battle against time. In this battle, HROs both reaffirm and dread age norms: they reaffirm these norms by criticising the court's deviation from them (in the form of sentencing a defendant who offended at the age of 15 as an adult); but they also dread age norms, as illustrated by their consideration of birthday – a quintessential social mechanism of age normalisation⁵⁴⁵ – as a threat. Thus, the time with which HROs and the defence struggle concerns not only the moment of sentencing, but also the day on which the defendant's age changes.

Another form of coequality, which we encountered earlier, is also worth mentioning. As we saw, the discrepancy between military legislation and court practice has resulted in some Palestinian

⁵⁴¹ 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., MilC 3131/06 *The Military Prosecutor v. Arar* [2006] (Judea Mil. Ct.). However, the Military Court of Appeals described that case as unique and unrepresentative. MilC 2481/06 *The Military Prosecutor v. Arar* [2006] (Mil. Ct. App.).

⁵⁴² *DCI – PALESTINE, PALESTINIAN CHILD POLITICAL PRISONERS 1* (2007). Contrary to *DCI – Palestine's* unequivocal claim, we saw earlier that at the time this report was published, some military court judges did not classify 16-year-old Palestinians as "adults". *Supra* text accompanying notes 485–489. Although the military legislation no longer classifies 16-year-old Palestinians as "adults", at the age of 16 years Palestinians become ineligible to the one year maximum sentence restriction. See *supra* text accompanying notes 537–546.

⁵⁴³ *DCI – PALESTINE*, *supra* note 32, at 15.

⁵⁴⁴ *DCI – PALESTINE AND SAVE THE CHILDREN – SWEDEN*, *supra* note 32, at 67–68; *YESH DIN*, *supra* note 26, at 155.

⁵⁴⁵ On the significance of birthdays as cultural mechanisms of age normalisation, see, e.g., CHUDACOFF, *supra* note 469, at 126–137; Lea Shamgar-Handelman and Don Handelman, *Celebrations of Bureaucracy: Birthday Parties in Kindergartens*, in *PERSPECTIVES IN ISRAELI ANTHROPOLOGY* 111 (Esther Hertzog, Orit Abuhav, Harvey E. Goldberg and Emanuel Marx eds., Detroit, Wayne State University Press, 2010). On birthday celebration as a Western ritual, which represents a different conception of age than conceptions dominant in other cultures, see, e.g., BLANCHET, *supra* note 430, at 41–43.

defendants being classified as both “minors” (in court judgments) and “adults” (under the relevant statutory law).⁵⁴⁶

5. BODIES OF AGE

So far, we have seen how the elusiveness of the boundaries, meaning, and nature of childhood and age manifests itself through three different phenomena: the unclear status of the youth consideration, the ambiguity of age terminology, and the simultaneous application of different ages to the same defendant. Disparate, sometimes conflicting, conceptions of age and childhood have appeared to be at play with regard to these manifestations of elusiveness.

Also contributing to the elusiveness of age is the potentially competing “evidence” according to which age can be determined. Six of the Israeli military court rulings I obtained explicitly illustrate 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 (which was known to the judges⁵⁴⁷). As we will see, the judges’ willingness (and even desire) to observe children as “bodies of evidence”⁵⁴⁸ show age to be open for contention and negotiation.

Thus, in one case, a military court 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*.”⁵⁴⁹

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*.”⁵⁵⁰ The military prosecution successfully appealed this decision, and the Military Court of Appeals doubled the length of the

⁵⁴⁶ *Supra* text accompanying notes 485–489 and 499–504.

⁵⁴⁷ Unlike other contexts, the lack of birth registration is not a significant issue in the OPT.

⁵⁴⁸ This is a paraphrasing of Heather D’cruz, *The Social Construction of Child Maltreatment: The Role of Medical Practitioners*, 4 JOURNAL OF SOCIAL WORK 99, 105 (2004). Of course, adult bodies have also been used as a source of evidence. See, e.g., Louise Amoore and Marieke de Goede, *Transactions after 9/11: the banal face of the preemptive strike*, 33 TRANSACTIONS OF THE INSTITUTE OF BRITISH GEOGRAPHERS 173 (2008) (discussing how profiling and other techniques mark certain bodies as more or less threatening).

⁵⁴⁹ MilC 1506/06, *supra* note 519 (emphasis added). This decision was reversed, less than a week later, by the Military Court of Appeals, which sentenced the defendant to five months in prison, 10 months on probation, and a fine of 1000 New Israeli Shekels. MilC 1413/06, *supra* note 444. The Court of Appeals mentioned (but did not criticise) 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”).

⁵⁵⁰ MilC 4668/06 *The Military Prosecutor v. Halaf* [2006] (Juden Mil. Ct.) (emphases added).

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*."⁵⁵¹

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."⁵⁵² 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.⁵⁵³

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 person who according to his age, and *also according to his looks*, should have understood well the severe consequences of his acts.⁵⁵⁴

The court's assumption that the defendant's understanding somehow depends on his looks exemplifies, yet again, the predominance of developmentality – a conception which links, explicitly or implicitly, physical development to psychological and moral development.⁵⁵⁵

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, judge Menashe Vahnish of the Bet El Military Court extended an 18-year-old Palestinian's detention until the end of his trial. In explanation of his decision, judge Vahnish contended that treating the defendant's young appearance as an aggravating factor could protect him 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

⁵⁵¹ MilC 1350/07 *The Military Prosecutor v. Halaf* [2007] (Mil. Ct. App.) (emphases added).

⁵⁵² MilC 4380/08 *The Military Prosecution v. Hawajah* [2008] (Judea Mil. Ct.) (emphasis added).

⁵⁵³ MilC 1261/09, *supra* note 423 (emphasis added).

⁵⁵⁴ MilC 149/02 *Harbavi v. The Military Prosecutor* [2002] (Mil. Ct. App.) (emphasis added).

⁵⁵⁵ On developmentality see *supra* notes 467-471 and accompanying text.

influenced by others [...]. [R]eleasing him [from detention ...] might bring him to be again under the influence of those people.⁵⁵⁶

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.⁵⁵⁷ The childhood body – a constitutive and inseparable part of the category "child"⁵⁵⁸ – 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),⁵⁵⁹ and bodily stereotypes of "the normal child".⁵⁶⁰ Thus, at least as much as justice must be seen and observed with regard to Palestinian children, justice also appears to be in need of seeing and observing these children.

To further explore 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 conceptualisation 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, judge Tirosh held that the probation sentences imposed by the first instance court should be prolonged, but the prison sentence and the fine imposed by that court should 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 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.

⁵⁵⁶ MilC 1173/03 *The Military Prosecution v. Sha'alan* [2003] (Bet El Mil. Ct.) (emphasis added).

⁵⁵⁷ 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" emphasises the inextricability of childhood and embodiment. For another use of the term "childhood body" see Alan Prout, *Childhood Bodies: Construction, Agency and Hybridity*, in *THE BODY, CHILDHOOD AND SOCIETY* 109 (Alan Prout ed., MacMillan Press, London, 2000).

⁵⁵⁸ Allison James, *Embodied Being(s): Understanding the Self and the Body in Childhood*, in *THE BODY, CHILDHOOD AND SOCIETY* 19, 27 (Alan Prout ed., MacMillan Press, London, 2000). See also Allison James, *On Being a Child: The Self, the Group and the Category*, in *QUESTIONS OF CONSCIOUSNESS* 60, 63–66 (Anthony Paul Cohen and Nigel Rapport eds., Routledge, London, 1995).

⁵⁵⁹ For more on developmentalist conceptions of childhood see *infra* notes 467–471 and accompanying text.

⁵⁶⁰ 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, *supra* note 558, at 27. See also Berry Mayall, *Children, emotions and daily life at home and school*, in *EMOTIONS IN SOCIAL LIFE: CRITICAL THEMES AND CONTEMPORARY ISSUES* 135, 144–145 (Routledge, New York, 1998).

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 legitimised 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.”⁵⁶¹

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 youth 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.⁵⁶²

Judge Tirosh concurred, and rejected the prosecution’s appeal. In his ruling, judge Tirosh stipulated that

Formally, 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 [first instance court’s] decision [...], given the necessary balance between the security of the area [i.e., the OPT] and these appellants’ age and physical and mental maturity, as they appeared to the [first instance] court.⁵⁶³

The transformative judicial gaze at childhood bodies thus constitutes age as a site of competition between the corporeal and the chronological, between the “real” and the 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.⁵⁶⁴

In interim conclusion, Israeli law fills a dialectical function with regard to childhood and age. On the one hand, Israeli law has striven to forge and consolidate childhood, by enacting clear-cut age classifications, along a mixture of national and developmentalist demarcations. On the other hand, the legal construction of childhood is much more complex than both HROs and Israeli authorities present it to be: childhood is not merely an echo of the dominant national imaginary, or of unequivocal developmental demarcations. In fact, the boundaries of childhood – temporal (e.g.,

⁵⁶¹ MilC 66/03, *supra* note 486.

⁵⁶² MilC 65/03, *supra* note 488.

⁵⁶³ *Id.*

⁵⁶⁴ The “real”/“formal” interplay also appeared in another form of elusiveness discussed earlier: the meaning of “minor” (and the question of whether the defendant is “really” or merely “formally” a minor). *Supra* text accompanying notes 488, 504.

the ending of childhood, the time of transition between its supposed stages) and spatial (e.g., the type of courts where defendants of a certain age are tried) – are elusive.

6. (NOT) KNOWING AGE

Law's desire to know the child's age is, as we have thus far seen, highly potent although intricate – being informed by various, sometimes competing forces, which render age elusive. The legal system sees age and childhood as in need of being deciphered and known, and it considers itself to possess the authority to produce that knowledge.

Not only Israeli law, but its HRO critics as well have evinced a will to know children's age, and have expressed great concerns when the law failed to cater to this will. Thus, after conducting observations of military court hearings, Israeli HRO *Yesh Din* reported:

In 52 [...] cases the [*Yesh Din*] observers found it difficult to ascertain whether the detainee or defendant was a minor or an adult. The fact that the MCU [Military Court Unit] denied *Yesh Din* access to the records of the proceedings until near the end of the observations made it difficult to determine precisely whether the person was a minor or a legal adult.⁵⁶⁵

For *Yesh Din*, the military courts are the problem – in their failure to clarify the defendants' age – but could also be the solution (by rendering that age clear). A more complex situation would be if somehow the law would perceive itself as not being able to know the child's "true" age. How would the legal system react in such circumstances – and particularly if it is legal subjects whom it views as able to obscure "their" age? Of the military court cases I obtained, two involve legal subjects – a Palestinian defendant and Israeli settler girls – whose behaviour the courts viewed as deviating from, or obscuring their "true" chronological age. Let us now examine these cases.

6.1. 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.⁵⁶⁶

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

⁵⁶⁵ YESH DIN, *supra* note 26, at 158.

⁵⁶⁶ MilC 164/01 *The Military Prosecutor v. Abu Snima* [2001] (Erez Mil. Ct.).

would later pronounce to be his real name.⁵⁶⁷ When his fingerprints were taken, he was discovered to be “about 20 years old”, as the court would later put it.⁵⁶⁸ 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.⁵⁶⁹

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 [...] even managed to deceive the court and receive a short sentence by presenting himself as a minor.⁵⁷⁰

In this case, Abu Snima’s acts were conceptualised 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 (notwithstanding notable exceptions to this linear conception, such as the infantilisation – i.e., treatment or classification as children – of adult populations⁵⁷¹).

It is interesting to mention, at this point, the response of an Israeli military prosecutor to ethnographer Lisa Hajjar’s question about many Palestinian defendants’ young age. “Don’t let them fool you”, said the military 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.”⁵⁷² Rather than questioning whether the Israeli military prosecutor’s statement is “true” or “false”, accurate or paranoid, let us use it as yet another example of how the legal system might problematise its subjects’ production of knowledge about “their” age. Like the Abu Snima case, here too the figure of the legal subject enters the legal interplay of “truth” and age, and is depicted as able to subversively use her/his apparent age as deception, as trickery, as a stratagem.

⁵⁶⁷ MilC 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.*

⁵⁶⁸ *Id.* The above description of Abu Snima as a 15-year-old was meant to reproduce, to some extent, the effect of his supposed impersonation.

⁵⁶⁹ MilC 5/02 *The Military Prosecution v. Abu Snima* [2002] (Erez Mil. Ct.).

⁵⁷⁰ MilC 12/02, *supra* note 567.

⁵⁷¹ For example, on the infantilisation 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*, 52 INTERNATIONAL JOURNAL OF AGING AND HUMAN DEVELOPMENT 115 (2001); Erica Burman, *Innocents Abroad: Western Fantasies of Childhood and the Iconography of Emergencies*, 18 DISASTERS 238 (1994). Additionally, in Chapter 5 we will examine how Israeli courts have infantilised Israeli soldiers. *See infra* text accompanying notes 892-913.

⁵⁷² HAJJAR, *supra* note 21, at 117.

In the eyes of the legal system, then, it is not that chronological age cannot be challenged, but rather that the court alone has the authority to challenge it. And as we saw earlier, this authority is indeed implemented, when courts give precedence to defendants' apparent age over their chronological age (or when they overlook defendants' young age altogether). But while military court judges have been shown to use childhood bodies as evidence of children's "true" age,⁵⁷³ the prosecutor's assertion, as well as the Abu Snima case, demonstrate that alongside their great importance these bodies can be used to challenge law's will to ascertain "true" age. Consequently, Abu Snima's supposed "manipulation" of the boundaries and foundations of childhood did not go unpunished, as the eventual charges and sentence illustrate. Thus, the court attempted to restore its forcefully maintained self-image as the sole authorised arbiter of the child's "true" age.

6.2. *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.

Many settler children took active place in demonstrations – some of which were violent and some blocked transportation routes – against Israel's "disengagement" from the Gaza Strip in 2005.⁵⁷³ A great number of these children were detained as a result, and many of them refused to disclose their personal details to the police, including their ages. Consequently, some of them 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 for whom there was allegedly evidence of committing 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.⁵⁷⁴

While, in general, the settler girls' refusal to identify themselves baffled the legal system, it was the inability to conclusively "know" their ages which was seen as particularly challenging. The

⁵⁷³ On the "disengagement" see *supra* text accompanying notes 7, 63–64, 67–69, and 339–344.

⁵⁷⁴ THE CHILD'S RIGHTS COMMITTEE 2006, *supra* note 47.

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 parliamentary *Children's Rights Committee*, which dealt with the prolonged detention of the settler girls:

With regard to the detentions during the opposition to the disengagement, 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.⁵⁷⁵

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 realised), were arrested for entering a sealed-off military area during a protest at an outpost in the West Bank. Like their predecessors, these girls also refused to state their age or any other identifying information to the police when they were arrested.⁵⁷⁶

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.⁵⁷⁷ 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 children⁵⁷⁸ – 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. The legal urge to know a

⁵⁷⁵ THE CHILD'S RIGHTS COMMITTEE, *supra* note 307.

⁵⁷⁶ Chaim Levinson, *5 Religious Girls Sue Police for Allegedly Strip-Searching Them*, HAARETZ (31.12.2009), available at <http://www.haaretz.com/hasen/spages/1139049.html>.

⁵⁷⁷ Cf. VALENTINE, *supra* note 467, at 55 (“age is [...], like gender, [...] a performative act that is naturalized through repetition and therefore is both fluid and contested.”).

⁵⁷⁸ The legal subjects' gender is also noteworthy, yet I will not elaborate on this point due to space limitations.

child's age can be read as manifesting a broader social urge to decipher the child,⁵⁷⁹ and also a broader social urge to document and know people's age.⁵⁸⁰ 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 of children.⁵⁸¹ This deviates from the association – which is traditionally drawn in discourses on “children's voices”⁵⁸² (or on the voices of other groups characterised as “disempowered”) – between silence and impotence.⁵⁸³ But what rendered the settler girls' silence so effective, and in this 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.

During the meeting of the parliamentary *Children's Rights Committee*, the representative of the Israeli Public Defender's Office critically described as childish and irrational the state's insistence upon not releasing the girls from detention unless they sign an undertaking concerning their probation conditions. The Public Defence 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 [...],⁵⁸⁴ there should have been created conditions which do not depend on their active participation. Meaning, for instance, not forcing them to sign the undertaking [regarding their probation conditions].⁵⁸⁵

Perhaps this comparison, by an Israeli public lawyer, of Israeli legal authorities to an impatient child who needs to be taught restraint and reason, exemplifies that childhood can be not

⁵⁷⁹ See, e.g., JENNY HOCKEY AND ALLISON JAMES, *SOCIAL IDENTITIES ACROSS THE LIFE COURSE* 18 (Palgrave Macmillan, Basingstoke and New York, 2003); ROSE, *supra* note 1, at 135-154.

⁵⁸⁰ See, e.g., JAMES, JENKS AND PROUT, *supra* note 2, at 61 (on the documentation of age throughout people's lives in modern societies, which makes it hard for anyone not to know their age).

⁵⁸¹ Cf. Elaine Chase, *Agency and Silence: Young People Seeking Asylum Alone in the UK*, 40 *BRITISH JOURNAL OF SOCIAL WORK* 2050, 2052, 2059-2065 (2010); Ian Hutchby, *Resisting the Incitement to Talk in Child Counselling: Aspects of the Utterance "I Don't Know"*, 4 *DISCOURSE STUDIES* 147, 149, 165 (2002).

⁵⁸² For discussion of these discourses *supra* notes 48-51.

⁵⁸³ On the need to incorporate the concept of “child silence” in child-centred research and practice see Lewis, *supra* note 48. For a feminist critique of the association of silence with powerlessness see Susan Gal, *Between Speech and Silence: The Problematics of Research on Language and Gender*, in *GENDER AT THE CROSSROAD OF KNOWLEDGE: FEMINIST ANTHROPOLOGY IN THE POSTMODERN ERA* 175 (Micaela di Leonardo ed., University of California Press, Berkeley, Los Angeles and Oxford, 1991).

⁵⁸⁴ See *supra* note 317 and accompanying text.

⁵⁸⁵ THE CHILD'S RIGHTS COMMITTEE 2006, *supra* note 47. 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. *Id.*, 39-40.

only an object of legal regulation and imagination, but also a characteristic associated with the legal system. Thus, it is not only “actual” children who can occupy the category “child” in legal discourses, but others⁵⁸⁶ – including the legal system itself. In this sense, the question of who “really” is a child becomes all the more elusive.

7. THE ELUSIVENESS OF CHILDHOOD AND AGE – BEYOND ISRAEL/PALESTINE

We have identified in Israeli military law four different yet interrelated manifestations of the elusiveness of age and childhood – four challenges to age demarcations and age norms, which exemplify that childhood and age are far from being stable, clear, or definite. These are: (a) the courts’ complex, and often contradictory, consideration of young age; (b) the ambiguity of legal age terminology; (c) the simultaneous application of different ages to the same minor; and (d) the punishment of minors according to their apparent age (rather than their chronological age). We have additionally seen that the law views its subject – in this case Israeli and Palestinian defendants – as capable of rendering their age (and childhood) elusive, by “falsifying” or hiding it.

This elusiveness of age in relation to childhood, however, is far from exclusive to the Israeli-Palestinian case.⁵⁸⁷ For instance, the definition of “child” in the *UN Convention on the Rights of the Child* as “every human being below the age of eighteen years unless, under the law applicable to the child, majority is attained earlier”,⁵⁸⁸ renders the ending of childhood flexible and its beginning unresolved.⁵⁸⁹ Somewhat similarly, the use of different age limits for different purposes – for example, in relation to drinking alcohol, driving, compulsory schooling, or consent to medical treatment – challenges the notion that there is an absolute age-based boundary between childhood and adulthood.⁵⁹⁰ Israeli military law is also not entirely unique in its occasional consideration of youth as aggravating (which challenges dominant age norms): youth has been regarded as aggravating, for example, in several death penalty rulings of the Supreme Court of the US.⁵⁹¹ The “competition” between chronological age and physical appearance also appears in many

⁵⁸⁶ Later in the dissertation we shall examine court rulings which characterised adult soldiers as children or childish. *Infra* text accompanying notes 892-913. See also *supra* note 571.

⁵⁸⁷ Our focus here is on age-related elusiveness, but one may add the elusive capacity of the child in the context of the “evolving capacities” approach. See Lee, *supra* note 507, at 456-458. On the “evolving capacities” approach see also *supra* note 436.

⁵⁸⁸ CRC, *supra* note 431, art. 1.

⁵⁸⁹ KUPER, *supra* note 101, at 8-9.

⁵⁹⁰ Bridgeman and Monk, *supra* note 3, at 4-5; Scott, *supra* note 116, at 118-127.

⁵⁹¹ 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. Birkhead, *The Age of the Child: Interrogating Juveniles After Roper v. Simmons*, 65 WASHINGTON & LEE LAW REVIEW 385, 395-406 (2008); Elizabeth F. Emens, *Aggravating Youth: Roper v. Simmons and Age Discrimination*, 2005 SUPREME COURT REVIEW 51, 51-52 (2006). On similar prosecutorial rhetoric in at least seven other instances see Birkhead, *supra*, at 404-405; Emens, *supra*, at 75. See also Seung Oh Kang, *The Efficacy of Youth as a Mitigating Circumstance:*

contexts beyond the OPT. For example, in the British asylum system, disputes often arise about whether asylum seekers “truly” are children, and in such cases “childhood bodies” function as (contested) evidence of the child’s “real” age.⁵⁹² Similarly, the precedence of physical appearance over chronological age characterises, for instance, the social recourse to plastic surgery, the use of cosmetic products,⁵⁹³ and recently, the morphing of human bodies through digital technologies.⁵⁹⁴

This elusiveness illustrates a more fundamental, innate, fluidity of childhood and age – which goes beyond the inherently transitional nature of age (i.e., its constant changing).⁵⁹⁵ Among other things, childhood is socially understood (especially since Freud) to be present throughout the life cycle.⁵⁹⁶ Put differently, childhood – which is associated with purity, innocence, creativity, expressiveness, transformation, dependency, but also with unreason, confrontation, disruption, and sometimes with innate evil – is a category of personhood to which all individuals are subject, as legal philosopher David Archard and others have argued.⁵⁹⁷ In this sense, social (including legal) conceptions and representations of childhood evince anxieties, hopes, and attempts to gain control not only over “actual” children, but also over the child in every adult.⁵⁹⁸

Two further aspects of the fluidity of childhood, which will be discussed in the next chapters,⁵⁹⁹ are worth noting briefly: first, the association of children with boundary crossing, with

Preservation of the Capital Defendant’s Constitutional Rights Pursuant to Traditional Eighth Amendment Jurisprudence, 28 SUFFOLK UNIVERSITY LAW REVIEW 747, 774 (1994).

⁵⁹² HEAVEN CRAWLY, WHEN IS A CHILD NOT A CHILD? ASYLUM, AGE DISPUTES AND THE PROCESS OF AGE ASSESSMENT 48-53 (Immigration Law Practitioners’ Association, London, 2007), available at <http://www.ilpa.org.uk/data/resources/13266/ILPA-Age-Dispute-Report.pdf>; Peter Hopkins and Malcolm Hill, *Contested Bodies of Asylum-seeking Children*, in *CONTESTED BODIES OF CHILDHOOD AND YOUTH* 136, 141-144 (Kathrin Hörschelmann and Rachel Colls eds., Palgrave Macmillan, Basingstoke and New York, 2010).

⁵⁹³ Mike Featherstone and Mike Hepworth, *The Mask of Ageing and the Postmodern Life Course*, in *THE BODY: SOCIAL PROCESS AND CULTURAL THEORY* 371, 374 (Mike Featherstone, Mike Hepworth and Bryan S. Turner eds., Sage, London and Thousand Oaks CA, 1991) (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*, 17 AGEING AND SOCIETY 553 (1997).

⁵⁹⁴ Vivian Sobchack, *Scary Women: Cinema, Surgery, and Special Effects*, in *FIGURING AGE: WOMEN, BODIES, GENERATIONS* 200 (Kathleen Woodward ed., Indiana University Press, Bloomington and Indianapolis, 1999).

⁵⁹⁵ On the transitional nature of age see, e.g., SÁNCHEZ-EPPLER, *supra* note 289, at xxv-xxvi.

⁵⁹⁶ KENNEDY, *supra* note 467, at 12, 95.

⁵⁹⁷ ARCHARD, *supra* note 2, at 36-37; KENNEDY, *supra* note 467, at 144. Additionally, to some extent, the category “adulthood” could be argued to apply to children: JENKS, *supra* note 3, at 112; Valentine, *supra* note 48, at 38.

⁵⁹⁸ BUCKINGHAM, *supra* note 467, at 10; PATRICIA HOLLAND, *PICTURING CHILDHOOD: THE MYTH OF THE CHILD IN POPULAR IMAGERY* 15-16 (I.B. Tauris, London and New York, 2006).

⁵⁹⁹ *Infra* text accompanying notes 627-665, 768, 797-852, 811-812, 955, and 1003-1018, 1038-1042.

transgression, disorder, and pollution;⁶⁰⁰ and second, the prevalence of social anxieties that childhood is dissolving, disintegrating, and disappearing.⁶⁰¹

As indicated by this view of childhood as innately fluid, use of the term “elusiveness” in this chapter does not imply that childhood could be tracked down and unmasked and would then be fixed and tangible. This chapter provides a modest, contextualised, contribution to thinking on how childhood and age, as fluid socio-legal signifiers and constructs, function.

8. CONCLUSION

Despite being a constitutive legal signifier of childhood, age has remained relatively unexplored and under-theorised (as opposed to the attention given to other social categories, such as gender, race, and class).⁶⁰² This chapter has explored the intricate relationship between childhood, age, and law in the OPT. Further to our preliminary discussion in the previous chapter of Israeli law’s different treatment of Palestinian and Israeli children, we have focused here on age-related aspects of this legal disparity. First, we saw that although Israeli military and civil law drew their age categories from the same source (British Mandate law), Israeli military law rendered childhood fragmentary by maintaining its sub-categories, whereas domestic Israeli law abandoned these sub-divisions in favour of a unified category of “minor”. A second disparity, until very recently, concerned the age of criminal majority – which was set at 18 years for Israeli settler children as opposed to 16 years for Palestinian children.

Childhood and age therefore appear to be unequivocally contingent upon national identity. However, throughout this chapter, we have seen significant indications that the interplay of childhood, age, and law is much more complex than that. By closely examining military court rulings (as well as military legislation), we could tease out contrasting demarcations of childhood, different dimensions of age, various meanings assigned to age, and conflicting age norms – which together bear on law’s encounter with the child, and render age and childhood elusive.

⁶⁰⁰ HOLLAND, *supra* note 598, at 16–17; JENKS, *supra* note 3, at 145, 150; DAVID SIBLEY, *GEOGRAPHIES OF EXCLUSION* 34–35 (Routledge, London and New York, 1995); VALENTINE, *supra* note 467, at 80, 88, 95–97.

⁶⁰¹ BUCKINGHAM, *supra* note 467, at 3, 21–40; JAMES AND JAMES, *supra* note 115, at 23, 49–50; JENKS, *supra* note 3, at 117–118, 130–131.

⁶⁰² On the relative disregard for age in the social sciences *see, e.g.*, César Gonzáles, *Age-Graded Sexualities: The Struggles of Our Ageing Body*, 11 *SEX CULT* 31 (2007); Emma Halliwell and Helga Dittmar, *Qualitative Investigation of Women’s and Men’s Body Image Concerns and Their Attitudes Toward Aging*, 49 *SEX ROLES: A JOURNAL OF RESEARCH* 675 (2003). More specifically, on the neglect of age in childhood studies and in criminology, *see, respectively*, Anja Müller, *Introduction*, in *FASHIONING CHILDHOOD IN THE EIGHTEENTH CENTURY: AGE AND IDENTITY* 1, 5 (Anja Müller ed., Ashgate, Aldershot and Burlington, 2006); Pain, *supra* note 434, at 1.

Four different yet interrelated manifestations of this elusiveness have been at the heart of this chapter: First, the statutory requirement to consider minors' young age when determining their sentence is, in practice, open to different, not entirely predictable judicial interpretations – with some judges regarding youth as mitigating, others considering it to be overridden by other factors, others disregarding it entirely, and some even treating it as an aggravating factor. Thus, decisive age norms, and particularly the prevalent association of childhood with innocence and vulnerability, gave way to a seeming-mayhem of competing conceptions of youth.

Second, age categories in Israeli military law evince an ambiguous meaning, due to a discrepancy between legislation and court practice: the military courts have provided competing interpretations of the term “minor” and other age categories (such as “tender adult”), often in stark breach of the military legislation. The chronological boundaries of childhood, and within childhood, are thus equivocal – an important fact with practical implications of which HROs and Israeli statements are unaware due to their generally ignoring military judicial practice (and focus entirely on the letter of the military legislation).

The incoherence of military court rulings and their frequent breach of the statutory law that supposedly binds them – with regard to both the consideration of youth and the definition of age terms – provides an important insight into Israeli military law and occupation in general. The military legal system is characterised by institutional incoherence and unpredictability, which are illustrative of, and conducive to, the Israeli control of Palestinians through uncertainty. From a “bird’s eye view”, the intricacies of Israeli law’s treatment of Palestinian children’s can therefore be interpreted, to a large degree, as “control through uncertainty”, or as evincing “effective ineffectiveness”.

A third manifestation of the elusiveness of age and childhood is that Palestinian minors are often simultaneously ascribed two different ages: their age at the time of the offences (which the court is supposed to consider when determining their sentencing), and their age at the time of the sentencing (which determines their eligibility for maximum-sentence limitations). As we have seen, this coexistence of different ages in the same subject (the defendant) results in age and time both destabilising and intensifying.

Last, in relation to the elusiveness of age and childhood, is the “childhood body”, as it was termed above. Israeli military court judges have occasionally determined Palestinian minors’ sentences in consideration of their apparent age (rather than their chronological age). Through these cases, the childhood body was shown to function as a “body of evidence”, and – through this body – the judicial gaze appeared to profess to establish the child’s “true” age.

After examining law’s complex relationship with children’s age, we discussed the concerns and confusion evoked with the legal system in cases in which law’s subjects were seen as obscuring

their “real” age. This has been shown to be a formidable challenge to law’s urge to know the child’s age, and also to law’s self-image as the sole authorised determiner of that age.

In conclusion, we discussed manifestations of the elusiveness of age and childhood beyond the Israeli-Palestinian context. This elusiveness, it was then argued, illustrates an innate fluidity of childhood and age. This chapter hopes to provide a contextualised contribution to thinking on this multi-facted socio-legal fluidity.

SEPARATING CHILDHOOD

I. INTRODUCTION: PUTTING CHILDREN IN THEIR PLACE

This chapter will examine how childhood is shaped, demarcated, and imagined through, and in relation to, legal places, or legal sites – such as courtrooms, detention facilities, or prisons. “Place” – a concept of great import to law⁶⁰³ and to childhood⁶⁰⁴ – has been assigned a variety of meanings in the social sciences and the humanities; for the purposes of this chapter, we shall borrow sociologist Thomas Gieryn’s definition of “place” as a geographic-material location, which becomes a place not only by being physically constructed but also through social processes of naming, representation, and narration – processes which, among other things, associate it with certain histories or utopias, danger or security. As Gieryn explains, although a place may be viewed as materially finite, its boundaries are analytically and phenomenologically elastic, and its meaning and value are labile. Furthermore, place is not merely a setting or background for social phenomena, but a force that fundamentally affects social life.⁶⁰⁵ This chapter endeavours to enrich understanding of the legal places of childhood in the OPT, by exploring various factors that affect their character, the discourses surrounding them, and also their practical effects.

At the heart of this chapter will be the increase, in the last decade, in the separation of Palestinian children in Israeli custody from their adult counterparts. This first, introductory section of the chapter will provide an overview of this recent shift toward increased separation, as it has taken place through newly-established military youth courts, and through youth-specific detention and prison facilities/wings.

Section 2 of this chapter will examine Israeli judges’ and HROs’ justifications for a shift toward increased separation, and discuss the spatio-political context for this shift. Section 3 will then explore tensions in these pro-separation discourses concerning Palestinian children, and examine the significance of Israeli law’s and HROs’ “blind spots” as regards the non-separation issue. Finally, section 4 will discuss Israeli law’s approach toward Israeli settler children, and unveil

⁶⁰³ For relevant discussions in legal literature see, e.g., David Delaney, Richard T. Ford and Nicholas Blomley, *Preface: Where is Law?*, in *THE LEGAL GEOGRAPHIES READER: LAW, POWER, AND SPACE* xiii, xv-xx (David Delaney et al eds., Blackwell, Oxford and Malden MA, 2001); Jane Holder and Carolyn Harrison, *Connecting Law and Geography*, in *LAW AND GEOGRAPHY – CURRENT LEGAL ISSUES VOL. 5*, at 3 (Oxford University Press, Oxford, 2002).

⁶⁰⁴ For general discussion of the spatiality of childhood see, e.g., JAMES, JENKS AND PROUT, *supra* note 2, at 37-58.

⁶⁰⁵ Thomas F. Gieryn, *A Space for Place in Sociology*, 26 *ANNUAL REVIEW OF SOCIOLOGY* 463, 464-465 (2000). For a different definition of place and space see, e.g., John Agnew, *Space: Place, in SPACES OF GEOGRAPHICAL THOUGHT: DECONSTRUCTING HUMAN GEOGRAPHY’S BINARIES* 81 (Paul Cloke and Ron Johnstone eds., Sage, London, 2005).

stark differences in discourse and policy between Palestinian and Israeli children with regard to the (non-)separation issue.

1.(a). Separation in detention and prison facilities

For more than three decades since the beginning of the Israeli occupation, Palestinian defendants and convicts were held in Israeli military facilities, where there was no separation between child and adult prisoners. Israeli military legislation did prescribe partial separation for detainees (as opposed to prisoners): there was a general requirement to separate detainees under the age of 16 years from their elders⁶⁰⁶ (although this requirement was not always enforced, according to both HROs⁶⁰⁷ and Israeli military courts⁶⁰⁸). However, many Palestinian children were arrested and detained in police stations, where they were jointly held with adult detainees.⁶⁰⁹

During the early 2000s, responsibility for Israeli detention and prison facilities holding Palestinians transferred from the military to the (non-military⁶¹⁰) Israeli Prison Service (IPS), which is also in charge of all Israeli detainees and prisoners (excluding soldiers).⁶¹¹ Consequently, Palestinian children, and almost all Palestinian adults, are now held in facilities managed by the IPS.⁶¹² This civil system operates – as noted in Chapter 2 – in accordance with domestic Israeli law, and hence generally separates all inmates under the age of 18 years from their elders.⁶¹³ Additionally, as explained in Chapter 1, most Palestinian inmates in Israeli prisons are classified as

⁶⁰⁶ ORDER 132, *supra* note 345, art. 3 (“A youth or a tender adult [i.e., persons aged 12-14 or 14-16 respectively] shall be detained separately than the rest of the detainees, unless a military commander has ordered otherwise regarding a particular case or regarding a type of case”). No publicly available military records account for the difference between the separation of child detainees and the non-separation of child prisoners.

⁶⁰⁷ COOK, HANIEH AND KAY, *supra* note 28, at 83-105, 134; DCI – PALESTINE AND SAVE THE CHILDREN – SWEDEN, *supra* note 32, at 66-67, 73.

⁶⁰⁸ MilC 67/96 *Jasser v. The Military Prosecutor* [1996] (Mil. Ct. App.), in THE MILITARY PROSECUTION, SELECTED RULINGS OF THE MILITARY COURT OF APPEALS IN THE REGION OF JUDEA AND SAMARIA AND IN THE REGION OF THE GAZA DISTRICT 1996/7, at 188, 190 (1998).

⁶⁰⁹ See, e.g., DCI – PALESTINE AND SAVE THE CHILDREN – SWEDEN, *supra* note 32, at 53.

⁶¹⁰ While the Israeli Prison Service is a non-military body, it is worth noting that combat military service is a prerequisite for employment in it. Moreover, since 2008, it employs soldiers – who now constitute an eighth of its workforce. The Israeli Prison Service, *A Recruit's Guide 7* (last visited: February 11, 2010) (Hebrew), available at <http://www.ips.gov.il/NR/rdonlyres/F7B1AE8E-C118-4ACF-98E0-BC20FC434D51/0/jail2007.pdf>; The Israeli Prison Service, *The Recruitment Process to the IPS* (February 9, 2010) (Hebrew), available at <http://www.ips.gov.il/Shabas/PIRSUMIM/Shabas-Guide/JOIN+SHABAS+09.htm>; THE OFFICE OF THE ISRAELI PRISON SERVICE'S SPOKESPERSON, *supra* note 152, at 12-13; THE OFFICE OF THE ISRAELI PRISON SERVICE'S SPOKESPERSON 2008, *supra* note 277, at 3.

⁶¹¹ B'TSELEM, *supra* note 96, at 61; THE OFFICE OF THE ISRAELI PRISON SERVICE'S SPOKESPERSON 2008, *supra* note 277, at 3.

⁶¹² B'Tselem, *supra* note 402. According to information provided by the IPS, nearly five percent of “security prisoners” in IPS facilities in 2010 were minors. No Legal Frontiers, *supra* note 277. On the term “security prisoners” see *supra* text accompanying notes 276-279.

⁶¹³ *Supra* note 407 and accompanying text.

“security prisoners”, and conversely, almost all “security prisoners” are Palestinian.⁶¹⁴ The IPS incarcerates almost all “security prisoners” in separate facilities,⁶¹⁵ and in several respects awards them narrower entitlements than those given to “criminal prisoners”, including as regards welfare, education, and family visits.⁶¹⁶

However, Israel can still remand Palestinian children in military facilities, or (for interrogation) in police stations. In 2009, the Israeli military law was changed to require that in these facilities too, minors be held separately from the adult inmates.⁶¹⁷ As explained in Chapter 3, at that point in time (2009) the military legislation still defined Palestinian “minors” as persons under the age of 16, and in late 2011 the age of majority was raised to 18 years. However, as previously explained, this amendment has had little practical significance, since Israel rarely holds Palestinian children in military facilities.⁶¹⁸

1.(b). Military youth courts

For over four decades and until fairly recently, Israel brought Palestinian children to trial in the same military courts as Palestinian adults, without separating these two groups. In June 2009, the Israeli military announced that it was ushering a youth court pilot programme.⁶¹⁹ Four months later, a new military order entered into force, formally establishing military youth courts which would hear separately Palestinians under the age of 16 years.⁶²⁰

Military court practice, however, deviated from this legislation. The previous chapter explained that, although the military legislation defined “minor” at the time as under-16-year-old, military court judges applied this term inconsistently – with some judges breaching this legislation by classifying 16- and 17-year-old Palestinians as minors.⁶²¹ Similarly, although the military legislation required that only under-16-year-old Palestinians be tried in the military youth courts, in practice all under-18-year-old Palestinians were tried in these courts. As the president of the Military Court of Appeals commented in his ruling, less than a month after this legislation was enacted: “the [military] courts have voluntarily adopted the age of minority in Israel [i.e. 18 years,

⁶¹⁴ *Supra* note 278 and accompanying text.

⁶¹⁵ THE OFFICE OF THE ISRAELI PRISON SERVICE’S SPOKESPERSON, *supra* note 251, at 4-5.

⁶¹⁶ No Legal Frontiers, *Prisoner’s Rights* (last visited: August 4, 2011), <http://nolegalfrontiers.org/en/general-information/prisoners-rights>; THE PUBLIC DEFENDER’S OFFICE, DETENTION AND IMPRISONMENT CONDITIONS IN THE FACILITIES OF THE PRISON SERVICE AND ISRAELI POLICE 33-34 (2011) (Hebrew), available at <http://www.justice.gov.il/NR/rdonlyres/87763C09-FBC3-46A6-A885-B5557CB25C3E/0/Doch20092010.pdf>.

⁶¹⁷ ORDER 1644, *supra* note 346, art. 46n.

⁶¹⁸ *Supra* text accompanying notes 529-531.

⁶¹⁹ During this pilot period, two days a week were set aside to hold separate hearings concerning Palestinian children. Greenberg, *supra* note 346.

⁶²⁰ ORDER 1644, *supra* note 346, art. 1. See also *supra* text accompanying notes 346-349.

⁶²¹ *Supra* text accompanying notes 482-516.

according to the domestic Israeli law applicable to Israeli children], for the purpose of separating the proceedings of minors from those of adults.”⁶²² My sample of military court cases concerning Palestinian minors from the years 2008-2009 includes defendants who were arrested at the age of 16 or 17 years – and hence confirms that the courts indeed classified and treated such defendants as minors (even though the relevant statutory law classified them as adults).⁶²³ As explained in the previous chapter, the statutory definition of “minor” was extended in 2011 to apply to all under-18-year-old Palestinians,⁶²⁴ and this may have terminated the discrepancy between legislation and court practice as regards the age of separation in trial.

As described in Chapter 2, the military law still allows for non-separation in many cases, including extension-of-detention hearings and other exceptions.⁶²⁵ This point is worth emphasising, especially because the focus of this chapter on the increased separation might give the wrong impression that most hearings concerning Palestinian children are now required by law to be separate.

2. JUSTIFICATIONS FOR INCREASED SEPARATION

On what basis was the above shift toward increased separation justified? Since potentially relevant military documents are considered confidential, and are not publicly accessible,⁶²⁶ we will now examine two other sorts of documents which provide justifications for separating Palestinian children from their adult counterparts: HRO publications and Israeli court rulings.

2.(a). HROs’ developmentalist anxieties

In the previous chapter, we saw that HROs’ eagerness to have the statutory age of majority for Palestinians raised to 18 years presupposed, and reproduced, a supposedly universal conception of childhood. The raising of the age of majority was seen as a means to normalise the age-based boundaries of Palestinian childhood.⁶²⁷

⁶²² MilC 2919/09 *The Military Prosecutor v. Abu Rahma* [2009] (Mil. Ct. App.). See also Greenberg, *supra* note 346 (the “president of the Military Appeals Court [...] has ordered all hearings of Palestinians 18-year-old and under to be held separately”).

⁶²³ For further characteristics of the sampled cases see *supra* notes 217-218, 249, 378, 411-413, 420 and accompanying text.

⁶²⁴ See *supra* notes 517-535 and accompanying text.

⁶²⁵ *Supra* notes 356-357 and accompanying text.

⁶²⁶ Phone conversation with Ran Cohen, Head of the Security and Criminal Law Department, office of the Legal Advisor to the Judea and Samaria area [i.e. the West Bank], the Israeli Defence Forces (November 29, 2009).

⁶²⁷ *Supra* text accompanying notes 494-498.

In a similar vein, HROs have repeatedly called upon Israeli authorities to systematically separate Palestinian children in Israeli custody from their elders⁶²⁸ – thereby aiming to fortify the spatial boundaries of Palestinian childhood. With regard to this issue too, HROs aimed to apply a supposedly universal⁶²⁹ – separatist⁶³⁰ – conception of childhood, which is anchored in international legal norms.⁶³¹

HRO publications have framed the presumed problem of non-separation mostly through developmentalist⁶³² language, which emphasises the child's supposed immaturity, vulnerability, and special needs. For instance, in a letter sent to the Israeli government in 2008, an association of HROs named the *United Against Torture Coalition* remarked, among other things: "The requirement to separate minors and adults is based on the simple concern that [...] an account should always be taken of the needs particular to their stage of development."⁶³³

In 2007, Israeli HRO *Yesh Din* observed:

International law awards *special* protection to minors standing trial. However, the IDF [Israeli military] has refrained from erecting a *special juvenile court* in the OT [Occupied Territories], for instance like the one in Israel. Therefore, minors stand trial in the *regular* Military Courts, in proceedings *identical to those of adults*.⁶³⁴

DCI – Palestine has framed its concerns about the non-separation issue in a similar manner. In 2003, the HRO complained: "Child and adult prisoners are being held *together* without any attention to *children's special needs*."⁶³⁵ In 2004, a book published in association with the HRO remarked:

⁶²⁸ See, e.g. (beyond the examples quoted in this chapter below), UN COMMITTEE ON THE RIGHTS OF THE CHILD, *supra* note 262, art. 63.

⁶²⁹ In fact, this conception is predominantly Western. HARTJEN, *supra* note 99, at 85; Kenneth Hultqvist and Gunilla Dahlberg, *Governing the Child in the New Millennium*, in GOVERNING THE CHILD IN THE NEW MILLENNIUM 1, 6, 9 (Kenneth Hultqvist and Gunilla Dahlberg eds., Routledge, New York and London, 2001); HEATHER MONTGOMERY, AN INTRODUCTION TO CHILDHOOD: ANTHROPOLOGICAL PERSPECTIVES ON CHILDREN'S LIVES 43–44, 201–215 (Blackwell, Oxford, 2009); Rosen, *supra* note 460, at 297, 304; Julia Sloth-Nielsen, *Children in African Prisons*, in HUMAN RIGHTS IN AFRICAN PRISONS 117, 123 (Jeremy Sarkin ed., HSRC Press, Cape Town, 2008) (describing the non-separation of child offenders in many African countries).

⁶³⁰ "Separatism" usually denotes separation on the basis of ethnicity, religion, or gender. Here, I apply this term to age-based separation.

⁶³¹ BUCK ET. AL., *supra* note 101, at 289. See also Johan Dahlbeck, *On Childhood and the Logic of Difference: Some Empirical Examples*, 26 CHILDREN & SOCIETY 4, 5–6 (2012) (arguing that universal documents on children's rights construct the image of the child as different and separate from the adult). *Supra* notes 467–471 and accompanying text.

⁶³² UAT – The United Against Torture Coalition, *Joint Letter: The United Against Torture Coalition (UAT) calls upon the Israeli government, military and legal authorities to immediately release Salwa Salah (aged 17) and Sara Siureh (aged 16)* (November 13, 2008), available at <http://www.mezan.org/upload/2550.pdf> (emphasis added).

⁶³³ YESH DIN, *supra* note 26, at 156 (emphasis added). See also *id.*, at 22–23, 158, 162.

⁶³⁴ DCI – PALESTINE, CHILDREN OF THE SECOND INTIFADA: AN ANALYSIS OF HUMAN RIGHTS VIOLATIONS AGAINST PALESTINIAN CHILDREN IN 2003, at 32 (2003), available at <http://www.dci-pal.org/english/publ/research/2003/VAIALAT2.PDF> (emphases added).

Contrary to international guidelines, there are no juvenile courts, no *specifically trained* juvenile judges [...]. There is *no distinction* made between adult and child prisoners detained in [the] Megiddo or Ketziot [military facilities ...]. The children are *imprisoned as adults* because they meet the age criteria for 'adult' [16 years] set forth in [the military legislation...]. While there is a technical distinction afforded to minors detained in Ramle Prison, in practice *children are treated the same as adults*.⁶³⁶

And again, in 2008, the HRO protested that

there is no juvenile department within the Israeli military forces, and there are neither *separate pre- or post- trial detention centres for juveniles nor separate juvenile courts* established *specifically* to try children. As a result, *children are tried and detained along with adults*.⁶³⁷

DCI – Palestine problematised non-separation in a similar way in other reports,⁶³⁸ and it continues criticising what it describes as the insufficient separation between Palestinian children and adults. For example, in 2011 the HRO reported that out of a sample of 40 cases of Palestinian child detainees, nine children were detained with adults.⁶³⁹

2.(b). The Israeli judiciary: avoiding intergenerational interactions among Palestinians

In addition to HROs, rulings of Israeli courts (civil and military) have also expressed anxieties about the non-separation of Palestinian children. But whereas HROs have justified their separatist agenda mostly from a perspective of developmentality and international law, Israeli judges offered a very different justification: Palestinian child detainees and prisoners must be separated to prevent their nationalistic-terroristic indoctrination by their elders.

For example, in 2003, Israeli Military Court of Appeals judge Gordon shortened the sentence of a Palestinian who had been arrested at the age of 12 years, and who had been convicted of "security offences". Judge Gordon further accepted the suggestion by the defence to transfer the defendant to a Palestinian rehabilitation centre – a rare decision since, as explained in Chapter 2,

⁶³⁶ COOK, HANIEH AND KAY, *supra* note 28, at 6, 83, 86 (emphases added).

⁶³⁷ DCI – PALESTINE AND SAVE THE CHILDREN – SWEDEN, *supra* note 32, at 66, 73 (emphases in origin).

⁶³⁸ DCI – PALESTINE, PALESTINIAN CHILD POLITICAL PRISONERS – 2006 REPORT 8, 12-13 (2007), available at http://www.dci-palestine.org/sites/default/files/child_prisoners_report_2006.pdf; DCI – PALESTINE, *supra* note 542, at 18; DCI – PALESTINE, *supra* note 32, at 95.

⁶³⁹ DCI – PALESTINE, *supra* note 350, at 3, 10, 29. For further criticism of the insufficient separation see DCI – PALESTINE, *supra* note 26, at 17.

Israeli military law does not generally offer Palestinian defendants rehabilitative alternatives to prison sentences.⁶⁴⁰ Judge Gordon justified his decision as follows:

we have seen more than once that the terrorist forces make abhorrent and despicable use of minors [...]. Alongside the added deterrence which may stem from the appellant's completion of his full sentence, there is a real concern that his imprisonment will bring him closer to the activity of those terrorist organisations. [...] the appellant is being held in prison with other prisoners, older than him, who were convicted of security offences, some of which grave. [...] If [...] there is an alternative framework which may *distance the appellant from those adults who influenced him in the past*, and if it can [...] try to return him to [...] living in accordance with norms, then surely this framework must be preferred over prison. [...] the appellant may indeed be *distanced, for a while, from those adults who wished to capture his soul*, and may even receive rehabilitative treatment which will help him to oppose those adults and distance himself from such activity in the future. Furthermore, [...] there is a risk in the very imprisonment in the company of security prisoners, as *the exposure to the ideologies of those prisoners and the social pressure may also have their influence*.⁶⁴¹

According to this extract, the Palestinian child's "soul" (as the judge put it) is a site for a spatial and temporal battle. The battle is spatial – a battle between remoteness and proximity – with the Israeli side depicted as fighting to distance and isolate the child, and the Palestinian side presented as striving to fix the child near Palestinian adult prisoners. This battle is also temporal – a battle against time: the longer the child is jointly imprisoned with Palestinian adults, the more might their ideologies influence him or her. Palestinian children are perceived as needing to be caught in time, to be corrected, before it is too late, before they are inaugurated into a nationalistic adulthood and can no longer be salvaged.

To a large degree, then, the concern over the supposed indoctrination of these children, on the one hand, and the hope that these children can be salvaged, on the other hand, derive from the plasticity attributed to the child.⁶⁴² The child is seen as easily capable of changing and evolving, but also as susceptible to negative influence and manipulation.

In another ruling, judge Gordon conveyed the importance of this supposed plasticity of young Palestinian offenders. In that case, judge Gordon rejected the military prosecution's appeal to increase the sentence of an 18-year-old Palestinian (at the time of his sentencing) who had been convicted of conspiring to commit a suicide terrorist attack. Judge Gordon justified his decision, among other things, as follows: "The appellant is a young youth about 18 years old [...], and] if [he] has not yet adopted the ideology popular among many of the prisoners, then in fact a prolonged

⁶⁴⁰ *Supra* text accompanying notes 422-423.

⁶⁴¹ MilC 358/03, *supra* note 373 (emphases added).

⁶⁴² Cf. FELD, *supra* note 106, at 61-62; Steven Mintz, *Placing Children's Rights in Historical Perspective*, 44 CRIMINAL LAW BULLETIN 2, 5 (2008) (both arguing that emphasis on children's plasticity in 19th century US rendered them much more promising candidates for reform than adults).

imprisonment might lead him to adopt it".⁶⁴³ Judge Gordon's reference to an 18-year-old as a "young youth", who still possesses the plasticity associated with childhood, further conveys the ambiguity of the child/adult divide – an issue discussed extensively in the previous chapter.⁶⁴⁴

Similarly, in 2009, a 16-year-old Palestinian, who had been charged with throwing stones and attempting to throw a Molotov cocktail, was brought to trial in the Judea Military Court. The court transcripts note, among other things:

The defence attorney asked the court to [... prefer] a fine and a probation sentence [... over] a prison sentence, since there is no rehabilitation infrastructure [for Palestinians] in [Israeli] prison [...] and his proper rehabilitation would be returning him to school.⁶⁴⁵

In his decision, when detailing the considerations for leniency, military court judge Dahan remarked:

The defence attorney noted that the defendant's stay in prison hinders his education and the possibility of his rehabilitation: it is not difficult to guess what the consequences of a long, continuous and daily stay would be for a tender youth, *staying in the company of such adults and in an institutional doctrinal* [meant to say: *indoctrinating*] *framework* affiliated to a terrorist organisation as is the case in prison.⁶⁴⁶

Thus, military court judges underlined a need to distance young Palestinian prisoners from the purportedly indoctrinating influences of their elders, and to allow for some form of rehabilitation. As we shall now see, these sentiments were also expressed elsewhere: in judgements of the Israeli Supreme Court.

2.(b).1. Israeli prison as a university – and other surprising coalitions

In 2007, while rejecting the appeals of two Palestinian children who had been convicted of assaulting an Israeli in the outskirts of Jerusalem, Supreme Court judge Elyakim Rubinstein commented:

The question arises of why the necessary social and educational provisions do not exist [for young 'security prisoners'⁶⁴⁷ ...]. [N]obody wishes for minors (or others who are very young) [... convicted of] terrorist offences to

⁶⁴³ MilC 372/03 *The Military Prosecutor v. Sha'alan* [2004] (Mil. Ct. App.) (emphasis added).

⁶⁴⁴ *Supra* text accompanying notes 482-516, 561, 566-572, and 587-601.

⁶⁴⁵ MilC 4779/08 *The Military Prosecution v. Makhoul* [2009] (Judea Mil. Ct.).

⁶⁴⁶ *Id.* (emphasis added).

⁶⁴⁷ On "security prisoners", and the Israeli security discourse in general, see *supra* text accompanying notes 276-279.

be upgraded in criminality, and [for] prison to become their *university for terrorist science* [...]. This is in the interest not only of the minors [...]. It is in the public interest, in order to exhaust the possibility – even if it is not always likely – that the offences were juvenile blunders and [that] the people [i.e., the young ‘security offenders’] can be brought to function in accordance with norms and productively.⁶⁴⁸

Judge Rubinstein quoted the above extract, word for word, in two of his later rulings,⁶⁴⁹ and in one of these rulings he also warned that “assembling [...] minors [in prison] with no employment whatsoever, is almost by definition a *school for many future terrorist experts*”.⁶⁵⁰

Rubinstein reiterated these concerns, while also emphasising children’s supposed plasticity, in another of his rulings, from 2009: “we have repeatedly raised [...] the issue of] the absence of social or educational treatment in prison for those convicted of security offences, when they are minors or very young adults – *whose rehabilitation chances are better* [than those of older ‘security offenders’]”.⁶⁵¹ Rubinstein quoted his earlier portrayal of prison as a “university for terrorist science”, and also asked, rhetorically: “Should prison be [...] *an academy for terrorism*, in the absence of any counter-barrier of education and treatment?”⁶⁵²

In that same year, Military Court of Appeals judge Sharon Rivlin quoted Rubinstein’s reference to prison as a “university for terrorist science”, in the matter of a 17-year-old Palestinian (at the time of his sentencing – and 16-year-old at the time of offending) who was convicted of throwing stones at a military vehicle.⁶⁵³ Two years earlier, in a meeting of the Israeli parliamentary

⁶⁴⁸ CrimA 10118/06 *John Doe v. The State of Israel* [2007] (Sup. Ct.) (emphasis added). The defendants were 14- and 15-year-olds at the time of the offences attributed to them. Although the UN considers the place of the alleged offences to be an illegal settlement, Israel considers it to be a neighbourhood within the municipality of Jerusalem, and for that reason the defendants were brought to trial in Israeli domestic (rather than military) courts. On the legal status of Palestinian residents of East Jerusalem see *supra* notes 59–62 and accompanying text.

⁶⁴⁹ CrimA 1456/07 *John Doe v. The State of Israel* [2007] (Sup. Ct.) (rejecting appeals to shorten the sentences of two Palestinian children – 14- and 15-year-olds at the time of their offences – who had been convicted of crimes with weapons, conspiring to commit a crime, and attempting to illegally enter Israel. The trial was held in a domestic – rather than a military – court because the crimes were committed in a place which Israel considers to be part of its territory); CrimA 4102/08 *Dirbas v. The State of Israel* [2009] (Sup. Ct.) (shortening the sentence of a woman – 19 years old at the time of her offences – who had been convicted of contacting a “foreign agent” and conspiring to stab an Israeli youth).

⁶⁵⁰ CrimA 1456/07, *supra* note 649 (emphasis added).

⁶⁵¹ CrimA 7515/08 *The State of Israel v. Akarma* [2009] (Sup. Ct.) (emphasis added) (shortening the sentences of two defendants – one of whom was 17 years old at the time of the offences – who had been convicted of planning to assault Israeli soldiers and to carry out terrorist attacks).

⁶⁵² *Id.*

⁶⁵³ MilC 1261/09, *supra* note 423. Judge Rivlin also stipulated that “a prolonged imprisonment [of a minor with adult ...] is likely to fatally harm his chances of rehabilitation as well as the public interest.” Similar statements, emphasising the benefit to the Israeli public interest, have been made by the Supreme Court and the Israeli Public Defender’s Office: Crim 6248/05 *John Doe v. The State of Israel* [2006] (Sup. Ct.) (in that particular case, the young “security offenders” were Israeli rather than Palestinian); CrimA 6569/05 *Al-Eish v. The State of Israel* [2006] (Sup. Ct.); CrimA 1456/07, *supra* note 649; CrimA 4102/08, *supra* note 649; THE PUBLIC DEFENDER’S OFFICE, THE CONDITIONS OF DETENTION AND IMPRISONMENT IN POLICE AND PRISON FACILITIES IN THE YEAR 2008, at 20–22 (2009).

Committee on the Rights of the Child, a representative of the Public Defender's Office also referred to one of Rubinstein's above rulings, and described it as the basis on which the Public Defender's Office protested to the relevant legal authorities against the treatment of Palestinian child prisoners.⁶⁵⁴

Surprisingly, the source for the above image of the Israeli prison as a university for Palestinian inmates may have been those Palestinians themselves. The Israeli prison has been commonly termed "a university", "the other university", or "an academy of political activism", by Palestinian ex-prisoners⁶⁵⁵ (including children⁶⁵⁶) and in contemporary Palestinian discourses generally.⁶⁵⁷ This image of the Israeli prison as a university refers mainly to the study programmes long established by the Palestinian inmates. These programmes usually operate in self-segregated groups affiliated with different outside political organisations, and their teachings may include Palestinian and Zionist histories, Palestinian culture, Islam, security outside the prison, Arabic literacy, and Hebrew or English as a second language.⁶⁵⁸ This pedagogical system has made many Palestinian inmates view Israeli prison as a place where Palestinian history and struggles can be understood.⁶⁵⁹

The "journey" of the image of Israeli prison as a university, across Palestinian and Israeli discourses, is not coincidental: there is clear evidence that Israeli authorities are aware of the salience of this image in Palestinian discourses, and of the fact that this image refers to Palestinian inmates' self-education.⁶⁶⁰ The conceptualisation of Palestinian children's coming-of-age is thus a product of inter-discursive diffusion: diffusion between the texts and narratives of the occupied on

(Hebrew), available at <http://www.justice.gov.il/NR/rdonlyres/8C4C2F1C-3F34-4E1C-9F1E-930A8D557A4F/15102/DohKliaa2008.pdf>.

⁶⁵⁴ THE CHILD'S RIGHTS COMMITTEE, *supra* note 307.

⁶⁵⁵ Bornstein, *supra* note 29, at 116; ROSENFELD, *supra* note 66, at 252-259. See also NASHIF, *supra* note 26, at 72 (citing a Palestinian ex-prisoner who referred to the pedagogical systems Palestinian prisoners operated in Israeli prisons as consisting of "discussions [...] far more sophisticated than the university's").

⁶⁵⁶ Veerman and Waldman, *supra* note 98, at 152-153. See also Lisa Taraki, *The development of political consciousness among Palestinians in the occupied territories, 1967-1987*, in INTIFADA: PALESTINE AT THE CROSSROADS 53, 68 (Jamal R. Nassar and Roger Heacock eds., Praeger, New York, 1990) (explaining that during the first two decades of the Israeli occupation, Israeli prisons had great significance in the politicisation of Palestinian youth, and were often seen by their "graduates" as the ideal place to acquire political education). For information specifically on Palestinian female adult prisoners educating female child prisoners, see Addameer – Prisoner Support and Human Rights Association and the Mandela Institute, *Behind the Bars: Palestinian Women in Israeli Prisons* 5-6 (2008), available at http://www.arableagueonline.org/las/picture_gallery/EducationSheetEN8-02008.pdf.

⁶⁵⁷ HAJJAR, *supra* note 21, at 208, 210; Peteet, *supra* note 19, at 110-111.

⁶⁵⁸ Bornstein, *supra* note 29, at 116; ROSENFELD, *supra* note 66, at 252-259. See also Peteet, *supra* note 19, at 110-111.

⁶⁵⁹ Veerman and Waldman, *supra* note 98, at 153.

⁶⁶⁰ For instance, a publication by the IPS concludes, as regards Palestinian prisoners' self-education, that "[n]ot for nothing has prison been termed 'the national Palestinian academy'". Roni Shaked, *Security Prisoners in Israeli Prisons*, 23 SEEING SHABAS – THE JOURNAL OF THE IPS 26, 27 (2008) (Hebrew), available at http://www.ips.gov.il/NR/rdonlyres/0947556F-F6D6-49C9-B878-AC8737F8EA1B/0/Asirim_bithony_2326.pdf.

the one hand, and those produced by the occupiers' judicial arm on the other hand. Those who break the law (Palestinians), so it seems, have created the conceptual framework through which the (Israeli) legal system has come to problematise their intergenerational interactions.

In their political battle, including the battle over the Palestinian child's "soul" and future, Palestinian inmates on the one hand and Israeli judges (Rubinstein and Rivlin) on the other hand use this image differently. The prisoners view the so-called university as a counter-hegemonic site, in which to defy their detachment from their society by producing and disseminating national and cultural knowledge. Through the "university", the prisoners thus struggle to transcend the space of Israeli prison,⁶⁶¹ if not physically then through intergenerational national consciousness. This process is believed to equip the young Palestinian inmate with valuable knowledge and political potency. Indeed, in Palestinian discourses, Israel's detention and incarceration of Palestinian children has come to signify a rite of passage: a transition of the incarcerated from childhood to adulthood – and especially from boyhood to manhood.⁶⁶²

Our discussion of the shift toward increased separation of Palestinian children thus unveils surprising points of confluence, in conceptions and/or in policy, between the Israeli legal system and its alleged-opponents. Both Israeli judges and Palestinian prisoners use the same image (Israeli prison as a university), although each of these discourses infuses this image with different anxieties and hopes. Another surprising point of confluence is the separatist coalition of sorts between the Israeli legal system and its HRO critics. These two seemingly opposing "camps" have come to advocate a common agenda of "salvaging" Palestinian children by increasingly separating them from their elders. In HROs' developmentalist eyes, the Palestinian child had to be saved from premature adulthood (as also demonstrated in the previous chapter⁶⁶³), while for Israeli judges it is premature *nationalistic* adulthood from which this child required salvaging.

Yet, the following example illustrates that HROs could share not only the Israeli legal system's goal, but also its justifications. In 2010, the *Concord Research Center* – a legal clinic in the Israeli College of Management – sent a letter to the Israeli Military Attorney General, criticising Israel's treatment of Palestinian children. This letter reads:

⁶⁶¹ NASHIF, *supra* note 26, at 73-74.

⁶⁶² Peteet, *supra* note 19, at 112-13, 118-19. See also Bornstein, *supra* note 29, at 117; NASHIF, *supra* note 26, at 10, 16, 102, 108-109, 203-204; Samir Quota et al., *Prison Experience and Coping Styles Among Palestinian Men*, 3 PEACE AND CONFLICT: JOURNAL OF PEACE PSYCHOLOGY 19 (1997). For a discussion of the image, in Palestinian literature, of the young Palestinian as masculinised by his prison experience, see Amal Amireh, *Between Complicity and Subversion: Body Politics in Palestinian National Narrative*, 102 SOUTH ATLANTIC QUARTERLY 747, 756 (2003); COOK, HANIEH AND KAY, *supra* note 28, at 133. But see NINA GREN, *EACH DAY ANOTHER DISASTER: POLITICS AND EVERYDAY LIFE IN A PALESTINIAN REFUGEE CAMP IN THE WEST BANK* 133 (PhD Dissertation, University of Gothenburg, 2009) ("prison experiences [...] indirectly prevent Palestinian men from attaining ideal adulthood [...] by getting married, having children and providing for a family.").

⁶⁶³ *Supra* text accompanying notes 483-484, 492-498.

[...] the obligation to consider the wellbeing of child defendants [...] is also supported by instrumentalist considerations. The possibility of rehabilitating [Palestinian] children is, eventually, [...] *a security interest too*. Would it be better to treat a sixteen-year-old child as an adult [...] and incarcerate him [sic] *with adults who committed security offences, so that he is exposed to their influence?* Indeed, the need to consider rehabilitation [...] seems particularly essential in the common context with which the military courts deal [i.e., the context of ‘security offences’].⁶⁶⁴

While following other HROs in depicting Israeli law as harmful to Palestinian children, this HRO also adopted the law’s own rationale: it adopted Israeli judges’ reasoning that Palestinian children must be distanced from the influence of their elders, and that this measure will enhance Israel’s security. The HRO might (or might not) have adopted this reasoning for purely strategic reasons – hoping to increase its persuasiveness. But regardless of motives, this text reiterates the Palestinian child’s implicit image as a nationalistic ticking bomb which needs to be dismantled in time. This HRO, it appears, shared and reproduced the Israeli legal system’s desire to create a new, “non-terrorist”, Palestinian generation.⁶⁶⁵

2.(c). Contextualising the separation of Palestinian children

To fully understand Israeli law’s shift toward increased separation of Palestinian children in Israeli custody, as well as the justifications which have been provided for such a shift, we need to investigate this form of separation in light of other forms of separation which apply to these children.

Alongside their separation from adult suspects, defendants, and convicts, Palestinian children in Israeli custody are also separated from another group of adults: their parents. This separation goes far beyond merely removing them from their homes. In fact, according to HRO reports, Palestinian child detainees rarely see their families (and attorneys) outside the courtroom at all, among other reasons because obtaining permits for family visits in detention and prison facilities inside Israel (to which these children are usually transferred⁶⁶⁶) is a complicated and lengthy process.⁶⁶⁷ Additionally, Palestinian children might sometimes be denied contact with a

⁶⁶⁴ The Concord Research Center, *supra* note 494, at 11 (emphases added).

⁶⁶⁵ Cf. JAMES AND JAMES, *supra* note 115, at 23 (defining childhood as the social “space occupied by the next generation”).

⁶⁶⁶ All but one of the prisons where Israel detains Palestinian children are located inside Israel. DCI – PALESTINE, *supra* note 32, at 18.

⁶⁶⁷ B’TSELEM, *supra* note 96, at 31-32, 34-35, 67-68; COOK, HANIEH AND KAY, *supra* note 28, at 6, 78, 97-100, 134-135; DCI – PALESTINE, *supra* note 350, at 4-7, 18, 30. On the visitation issue in general see, e.g., Sigi Ben-Ari and Anat Barsella, *Family Visits to Palestinian Prisoners Held Inside Israel*, in THREAT: PALESTINIAN POLITICAL PRISONERS IN ISRAEL 201 (Abeer Baker and Anat Matar eds., Pluto Press, New York, 2011); B’TSELEM, BARRED FROM CONTACT: VIOLATION OF THE RIGHT TO VISIT

parent incarcerated by Israel (although on the other hand, children – due to their young age – are often the only family members granted access to detainees⁶⁶⁸).

On the face of it, this mode of separation may appear substantially different from the age-based separation of Palestinian suspects, defendants, and convicts which we have discussed so far. However, there is an important similarity between these two modes of separation: like the separation between child and adult Palestinians in Israeli custody, the separation of Palestinian child detainees from their parents also serves, perhaps unwittingly, the function of hindering Palestinian intergenerational interactions and intergenerational proximity; of constituting Palestinian childhood, within the Israeli legal system, as an increasingly detached space.

In addition to these modes of intergenerational or age-based separation, the Israeli law also subjects children in the OPT to two other forms of separation. First, the Palestinian and the Israeli settler populations are separated, on the basis of their national identity. This nationality-based separation is a matter of legal status – of Palestinians' substantially different status under Israeli law as compared with Israeli settlers' status,⁶⁶⁹ it is a matter of incarceration – most Palestinian prisoners are defined as "security prisoners" and therefore usually held separately from Israeli prisoners,⁶⁷⁰ and it is a matter of geography (beyond separation within the formal legal system), in the form of the barriers Israel has established between Israeli and Palestinian settlements, or the separate roads Israel allocates to Israelis and Palestinians.⁶⁷¹ At the same time, like the boundaries of childhood, the spatial boundaries of and within the OPT are also somewhat ambiguous, conceptually and practically, as noted in Chapter 1.⁶⁷²

PALESTINIANS HELD IN ISRAELI PRISONS (2006), available at http://www.btselem.org/download/200609_barred_from_contact_eng.pdf.

⁶⁶⁸ Since adult members are often denied entry on security grounds, there has been a growing number of unaccompanied Palestinian children making visits to Israeli prisons. B'TSELEM, *supra* note 667, at 14-16, 22-25. Furthermore, unlike older family members, children under the age of eight years are allowed (some) physical contact with the adult prisoner during family visits. Adalah, *News Update: After Six Years of Litigation by Adalah, Supreme Court Rules: Children under Eight may Embrace Parents, defined as 'Security Prisoners', during Family Visits* (19.4.2010), available at http://www.old-adalah.org/eng/pressreleases/pr.php?file=19_04_10.

⁶⁶⁹ See, e.g., Kelly, *supra* note 152, at 46-48 (and the sources quoted there). While the military courts bring together Palestinians and Israelis, these two populations remain markedly differentiated there. HAJJAR, *supra* note 21, at 4-5, 24-26, 28-29, 32, 80-81.

⁶⁷⁰ For further details see *supra* text accompanying notes 276-279.

⁶⁷¹ Azoulay, *supra* note 268, at 127-128; Bornstein, *supra* note 29, at 107-108, 111-112, 117-123; NEVE GORDON, *ISRAEL'S OCCUPATION* (University of California Press, Berkeley LA and London, 2008); Neve Gordon, *From Colonization to Separation: exploring the structure of Israel's occupation*, 29 *THIRD WORLD QUARTERLY* 25 (2008); EYAL WEIZMAN, *HOLLOW LAND: ISRAEL'S ARCHITECTURE OF OCCUPATION* (Verso, London, 2007). With regard to East Jerusalem see Ray Dolphin, *The Wall in Jerusalem: "Military Conquest by Architectural Means"*, 26 *JERUSALEM QUARTERLY* 11 (2006); Wendy Pullan, *The Space of Contested Jerusalem*, 39 *JERUSALEM QUARTERLY* 39 (2009); Valerie Zink, *A Quiet Transfer: The Judaization of Jerusalem*, 2 *CONTEMPORARY ARAB AFFAIRS* 122 (2009). On the separation between Jewish and Palestinian citizens in Israel see, e.g., Adrianna Kemp, *"Dangerous Populations": State Territoriality and the Constitution of National Minorities*, in *BOUNDARIES AND BELONGING: STATES AND SOCIETIES IN THE STRUGGLE TO SHAPE IDENTITIES AND LOCAL PRACTICES* 73 (Joel S. Migdal ed., Cambridge University Press, Cambridge, 2004).

⁶⁷² *Supra* note 268 and accompanying text.

With regard to this nationality-based separation, it is worth noting that although 94 percent of “security prisoners” in Israeli custody are Palestinian resident in the OPT,⁶⁷³ in some of the Supreme Court cases discussed earlier, the defendants accused of “security offences” were Palestinian citizens of Israel.⁶⁷⁴ In one such recent case, the defendant, being classified as a “security prisoner”, had been incarcerated with Palestinian OPT residents. This evoked great concern from Supreme Court judge Rubinstein, who warned:

The likely consequence [of this joint incarceration with OPT Palestinians] is [that the defendant...] will [eventually] exit [the prison] as a certified ‘graduate of a university for terrorism’ – which should not be called rehabilitation but *anti-rehabilitation*. [...] his placement [...] with Palestinian prisoners [from the OPT], when he is an Arab citizen of Israel, [...] raises the] concern of deterioration.⁶⁷⁵

In this ruling, the age-based and nationality-based regimes of separations intertwine. According to Rubinstein, the danger lies both in bi-national interactions⁶⁷⁶ and in intergenerational interactions.

Israeli law also separates Palestinians on a gender basis, since the Palestinians Israel incarcerates are predominantly male, as noted in Chapter 1.⁶⁷⁷ Although a predominantly male offender population is far from being unique to Palestinians under Israeli law,⁶⁷⁸ it has unique socio-political implications in the OPT, given the situation there. First, as noted in Chapter 1, incarceration rates in the OPT have been much higher than in most other places⁶⁷⁹ – and consequently the number of Palestinian boys excluded from public life is substantial. And second, most of these boys are not “regular” juvenile delinquents, but “political” prisoners.⁶⁸⁰

The increased separation of Palestinian children in Israeli custody from their adult counterparts is thus part of a broader web of separations operating in the OPT. This web of separation should be understood not merely as applied to already-different populations, but as producing, reproducing, and maintaining distinctions, differences, and distance between populations, along intertwined lines of age, gender, and nationality. The legal project of differentiating childhood is thus inseparable from a broader project of governance and identity construction through differentiation in the OPT.

⁶⁷³ See *supra* note 278 and accompanying text.

⁶⁷⁴ CrimA 4102/08, *supra* note 649; CrimA 7515/08, *supra* note 651. Another case will be discussed shortly.

⁶⁷⁵ CrimA 4682/11 *John Doe v. The State of Israel* [2012] (Sup. Ct.) (emphases added) (shortening the sentence of a defendant – 17 years old at the time of his offences – who had been convicted of various weapons-related offences).

⁶⁷⁶ The Supreme Court also evinced such anxieties – which also relate to the gender theme which is discussed next – in its rulings which upheld the Israeli *Citizenship Law*. For concise information see, e.g., AP Foreign, *Israel upholds limits on Palestinian spouses*, THE GUARDIAN (January 12, 2012), available at <http://www.guardian.co.uk/world/feedarticle/10037215>.

⁶⁷⁷ *Supra* text accompanying notes 249-252.

⁶⁷⁸ On the existence of this “gender gap” across countries see generally HARTJEN, *supra* note 99, at 52.

⁶⁷⁹ *Supra* text accompanying notes 26-33.

⁶⁸⁰ For further discussion see *infra* text accompanying notes 276-279.

3. SEPARATIST IMAGINATION: TENSIONS AND BLIND SPOTS

So far, we have explored different discourses advocating increased separation of Palestinian children from their elders; we discussed the interrelations between these discourses; and we contextualised this mode of separation within a broader project of governance and identity-construction through separation.

On this basis, we shall now turn to examine several important tensions and “blind spots” characterising the growing separatist consensus among HROs and the Israeli legal system. First, we will skeptically analyse Israeli statements depicting the shift toward increased separation as preoccupied with these children’s “rights” and “best interests”, and propose alternative accounts. The argument here will not be that this shift does or does not really serve these children’s rights, but rather that this change was not significantly conceptualised through “rights”. Secondly, we will discuss the absence of rehabilitation for Palestinian children in Israeli custody, and consider its theoretical and practical implications. And lastly, we will turn to an option which HROs’ separatist “imagination”⁶⁸¹ could not accommodate: that Palestinian children might be better off held *with* their adult counterparts. While HROs largely ignored this option, we will extract it from a surprising source: their own publications.

3.(a). *Preoccupied with Palestinian children’s “rights” and “best interests”?*

In 2009, shortly before the Israeli military established its youth courts, the *UN Committee against Torture*, in its concluding observations on Israel’s compliance with human rights norms, noted Israel’s “argument that several measures are being implemented to ensure children’s rights, including the preparation of a draft bill on the establishment of a new youth court”.⁶⁸² The Committee also noted Israel’s “explanation that Palestinian juveniles under age 18 are treated as minors when imprisoned within the State of Israel.”⁶⁸³

Later that year, the office of the Legal Advisor to the Israeli military in the West Bank issued a statement, presenting the rationale for establishing the military youth courts. The statement reads, among other things:

the amendment is aimed to reflect the legal approach which seeks to anchor in legislation the minor’s rights as defendant, while taking into account the principle of the best interests of the minor. This [move has been carried out]

⁶⁸¹ The term “imagination” is inspired by WHITE, *supra* note 507.

⁶⁸² UN COMMITTEE AGAINST TORTURE, *supra* note 492, at 8.

⁶⁸³ *Id.*

while comparing to some extent [the military law] with [domestic] Israeli legislation [...⁶⁸⁴], with the necessary changes.⁶⁸⁵

These two texts portray the increased separation as concerned entirely with Palestinian children's "rights" and "best interests". According to this portrayal, this legal change appears as an unequivocal victory for HROs' separatist campaign – which was similarly framed through children's supposedly special "interests" and "rights". Indeed, at first glance, Israel's mention of the increased separation as a means to justify itself to a human rights body (the UN committee) – and through that body to the international community – seems to indicate an influence of the human rights "community" on Israeli law and Israeli military.⁶⁸⁶

The Israeli statements also attribute the increased separation (through youth courts) to the influence of the Israeli civil legal system (which has long tried Israeli children in youth courts). Indeed, the president of the civil youth courts was present at the inaugural ceremony of the military youth courts, and prior to that ceremony gave a lecture to the new military youth court judges⁶⁸⁷ – which ostensibly suggests that the civil legal system played a significant role in bringing about this change.

However, if the criticism of human rights bodies, and domestic law, had such a substantial impact, then why has their influence not altered the legal treatment of Palestinian children on almost every other issue, including the manner in which these children are interrogated⁶⁸⁸ and their sentencing⁶⁸⁹ (to mention just two examples)?⁶⁹⁰

Additionally, as was explained in the previous chapter, the military court system does not see itself as bound by the domestic law.⁶⁹¹ Why, then, has Israeli military law not resolved the numerous other differences between Palestinian and Israeli children? In short, then, why was the non-separation issue picked and chosen, while almost all other legal matters concerning Palestinian children have remained unchanged?

⁶⁸⁴ The text omitted here – "(before the enactment of the [...] amendment to the Youth Law [...] in 2008)" – emphasises that recent amendments to the domestic law (e.g., the prohibition on interrogating minors during the night) are seen as irrelevant and inapplicable to Palestinian children.

⁶⁸⁵ The legal advisor to the IDF, *The Establishment of a Military Juvenile Court in Judea and Samaria* (August 26, 2009), available at <http://www.law.idf.il/163-3161-he/patzar.aspx?pos=1> (Hebrew).

⁶⁸⁶ For a discussion of HROs' role and impact in Israel/Palestine see *supra* text accompanying notes 34-47.

⁶⁸⁷ Tamir Yaniv and Daniel Yom-Tov, *A Military Youth Court Has Been Established*, ANNOUNCEMENTS OF THE OFFICE OF SPOKESPERSON FOR THE ISRAELI DEFENCE FORCES (November 2, 2009) (Hebrew), available at http://dover.idf.il/IDF/News_Channels/today/09/11/0202.html.

⁶⁸⁸ We will discuss this issue at great length in the next chapter. See *infra* text accompanying notes 914-924.

⁶⁸⁹ On sentencing trends with regard to Palestinian child defendants see *supra* text accompanying notes 411-418.

⁶⁹⁰ For concise comparison between the military law applicable to Palestinian children and the domestic law applicable to Israeli children see *supra* text accompanying notes 409-429.

⁶⁹¹ *Supra* text accompanying notes 502-505.

One possible explanation was already suggested earlier: from the perspective of the Israeli legal system, a primary goal of segregating Palestinian children was to prevent their association with their adult counterparts. It is anxieties about inter-generational Palestinian interactions which dominated the Israeli legal discourse regarding this particular reform – much more than the influence of domestic Israeli law, and more than Israel’s alleged will to protect Palestinian children’s “rights” and “interests”. That is, unless these rights and interests signify only preventing Palestinian intergenerational interactions.

Further, Israel’s selective implementation of human rights bodies’ particular call to separate Palestinian children can also be explained by pointing to the mostly symbolic nature of the changes in the Israeli law applicable to Palestinian children. Thus, as shown in the previous chapter, the military’s raising of the age of criminal responsibility for Palestinians to 18 years was mostly of symbolic rather than practical significance, among other reasons because for two years prior to that change the military had already tried Palestinians separately up to the age of 18 years.⁶⁹² Similarly, as also explained previously, the newly-established military youth courts have not significantly changed the treatment of Palestinian child defendants.⁶⁹³

Indeed, the “rights” selectively granted to Palestinian children in recent years – the “right to be separate” and the “right not to become an adult prematurely” – can be interpreted as concerned mostly with symbolically normalising the spatiotemporal boundaries of Palestinian childhood. Israeli military law thereby accommodates HROs’ desire to globalise childhood – to have a single, supposedly universal conception of childhood enforced⁶⁹⁴ – but due process issues are not addressed in a similar manner.

Moreover, in some respects, the separation of Palestinian child detainees and prisoners from the adult Palestinian inmates might have even done these children a disservice. Thus, in some military court cases, Palestinian children have been reported to have been detained in isolation due to the absence of other child detainees in their facilities; and although the children’s attorneys criticised this practice, the military authorities justified it by referring to the law’s requirement to separate child detainees from adults.⁶⁹⁵

Furthermore, 16 years ago, Philip Veerman and Adir Waldman, who were involved in the work of *DCI – Israel*, published an article entitled *When can children and adolescents be detained separately from adults?: The case of Palestinian children deprived of their liberty in Israeli Military jails and prisons*.⁶⁹⁶ This article explains that while the legal standard of separation was drafted with criminal prisoners in mind (who are seen as a moral and physical threat to child

⁶⁹² *Supra* notes 516, 523 and accompanying text.

⁶⁹³ *Supra* notes 347-348 and 524-535 and accompanying text.

⁶⁹⁴ *Supra* text accompanying notes 627-639.

⁶⁹⁵ MilC 20/02 *Ganam v. The Military Prosecutor* [2002] (Mi. Ct. App.); MilC 154/03 *Al-Najjar v. The Military Prosecutor* [2003] (Mil. Ct. App.).

⁶⁹⁶ Veerman and Waldman, *supra* note 98, at 148.

prisoners), most Palestinian prisoners in Israeli custody are not “regular” criminal prisoners but political (or in Israeli terms – “security”) prisoners.⁶⁹⁷ The article adds further arguments in favour of *not* separating Palestinian child inmates from their elders: Palestinian adult prisoners have been reported to give child prisoners educational services, while Israel has not provided such services to them – which again raises the issue of the struggle (discussed earlier in relation to the image of prison as a university) over who may educate these children;⁶⁹⁸ the adult prisoners have also been reported to provide child inmates with psychological and material care, which are particularly needed in light of the deprivation and obstacles to family visits;⁶⁹⁹ the adult inmates could – and had been reported to – represent the children’s concerns to the prison authorities and facilitate better relations among the children; these adults could also lower the likelihood of Israeli authorities recruiting Palestinian child collaborators (a collaboration which might prevent these children’s reintegration into Palestinian society, and create suspicion and atomisation within Palestinian families and communities⁷⁰⁰ – on top of the atomisation caused by child offenders’ separation from their parents and adult counterparts); and lastly, separation would be seen as an extra punishment because it is alien to the Palestinian culture – and especially to poor families, in which children and adults often sleep together in the same room.⁷⁰¹

Veerman and Waldman’s justifications for non-separation seem as relevant now as they were then: the Israeli Prison Services still provide Palestinian children with limited education,⁷⁰² these children are often denied family visits, as noted earlier;⁷⁰³ and in many Palestinian families children and adults sleep in the same rooms.⁷⁰⁴ However, I have found no references to their article in academic literature, and have found only a single HRO publication – a report by *DCI – Israel* from 2002 – referring to this article. The *DCI – Israel* report remarks:

Although in the past, Palestinian colleagues have found advantages in detaining security offending minors with adults [referring to Veerman and Waldman’s article], our colleagues from the Physicians for Human Rights

⁶⁹⁷ For further discussion of Palestinian “security prisoners” see *supra* text accompanying notes 276-279. One could add that security prisoners are generally separated from the other inmates. *Supra* note 615 and accompanying text.

⁶⁹⁸ *Supra* text accompanying notes 648-662.

⁶⁹⁹ *Supra* notes 666-668 and accompanying text.

⁷⁰⁰ On the recruitment of Palestinian collaborators and informants by Israel as creating suspicion and atomisation within the innermost family and community circles of Palestinian society see Shenhav and Berda, *supra* note 512, at 357.

⁷⁰¹ Veerman and Waldman, *supra* note 98, at 150, 153-155. See also COOK, HANIEH AND KAY, *supra* note 28, at 7 (arguing that most Palestinian children which Israeli authorities arrests come from poor families).

⁷⁰² Addameer and the Mandela Institute, *supra* note 656; B’TSELEM, *supra* note 96, at 63-65, 71; COOK, HANIEH AND KAY, *supra* note 28, at 117-119; DCI – PALESTINE, *supra* note 32, at 18.

⁷⁰³ See *supra* text accompanying notes 666-668.

⁷⁰⁴ See, e.g., DCI – PALESTINE, 60 YEARS AFTER THE NAKBA: THREE GENERATIONS OF PALESTINIANS REFLECT ON THEIR PAST AND FUTURE 13 (2008), available at http://www.dci-pal.org/english/doc/reports/2008/Nakba_60_Year_Report.pdf (describing how in Palestinian refugee camps in the West Bank, more than five family members sometimes share a single bedroom).

found evidence of sexual abuse, which strengthens the argument for separation.⁷⁰⁵

What exactly is this evidence of sexual assault? In 2001, *Physicians for Human Rights – Israel* reported that a member of staff in an Israeli prison had informed them of “six cases of sexual assault [among the Palestinian prisoners], at least one of which involved a minor”; while briefly acknowledging some arguments in favour of non-separation, *Physicians for Human Rights – Israel* warned that “this joint incarceration [...] may lead to injury to minors, as was indeed reported to us by the prison physician (see above).”⁷⁰⁶

Notwithstanding the severity of that single assault incident, it is curious – but unsurprising – that the HRO automatically generalised it into an issue of adults versus children. Many important questions were thus neglected: do only adults abuse minors, or could child abusers often be other children, in Palestinian society⁷⁰⁷ and elsewhere?⁷⁰⁸ And what is known of that single adult abuser – could it be that he was a criminal Palestinian prisoner wrongly incarcerated with political prisoners (e.g., stone throwers)? Apparently, the separatist conception of childhood has been powerful enough to allow a single incident to easily override the numerous above reasons for joint incarceration.

In any case, this study does not profess to determine which is “correct” – Veerman and Waldman’s article which brings forward convincing justifications for non-separation, or the HROs advocating separation (and the Israeli legal system increasingly implementing separation). As explained in Chapter 1, the approach of this dissertation to such issues is not rights-based.⁷⁰⁹ As a complex socially-constructed and socially-imagined category,⁷¹⁰ the “child” does not necessarily call for a clear-cut, either/or answer to the separation question.⁷¹¹ Moreover, very generally speaking, whether a particular person may benefit from being separated from others, in a particular

⁷⁰⁵ DCI – ISRAEL, A MIXED BAG: LAWMAKING TO PROMOTE CHILDREN’S RIGHTS, ONGOING DISCRIMINATION, AND MANY SERIOUS VIOLATIONS – COMMENTS ON THE INITIAL ISRAELI STATE REPORT ON IMPLEMENTING THE UN CONVENTION ON THE RIGHTS OF THE CHILD 46 (2002), available at http://www.crin.org/docs/resources/treaties/crc.../IsraelCoal_ngo_report.pdf.

⁷⁰⁶ PHYSICIANS FOR HUMAN RIGHTS – ISRAEL, *supra* note 238, at 11, 14.

⁷⁰⁷ COOK, HANIEH AND KAY, *supra* note 28, at 27 (“When asked who the main perpetrators of violence towards them are, children in both the West Bank and the Gaza Strip answered, ‘our parents and brothers at home, (...) also child gangs in the street’.”).

⁷⁰⁸ Anne-Marie Ambert, *Toward a Theory of Peer Abuse*, 7 SOCIOLOGICAL STUDIES OF CHILDREN 520 (1995) (cited in JENKS, *supra* note 3, at 88, 134); HARTJEN, *supra* note 99, at 157.

⁷⁰⁹ *Supra* text accompanying notes 52-54.

⁷¹⁰ The fact that a category is socially imagined does not mean that it is not “real”. See, in relation to the category “nationality”, BENEDICT ANDERSON, IMAGINED COMMUNITIES: REFLECTIONS ON THE ORIGIN AND SPREAD OF NATIONALISM (Verso, London and New York, 1983).

⁷¹¹ HRO *Physicians for Human Rights – Israel* proposed an unusual, non-binary solution: to have Palestinian child prisoners “separated from adults at night, thus balancing between the support given the minors [sic] by the adult inmates, and the need to protect them [from these adults]”. PHYSICIANS FOR HUMAN RIGHTS – ISRAEL, *supra* note 238, at 26. While commendable for its creativity, this solution is questionable due to the insufficient information on which it relies (*supra* text accompanying notes 705-708) and its overlooking of important anti-separation considerations (*supra* notes 696-704 and accompanying text).

time and place, is contingent upon the circumstances of that case (including, among other things, that person's characteristics).⁷¹²

Instead of "solving" this debate, this section aims to enrich it, by highlighting the "blind spots" of the increasingly dominant separatist approach toward Palestinian children. Clearly, the inability to "see" and consider arguments in favour of non-separation (such as those mentioned above) goes hand in hand with fixating on the symbolic boundaries of childhood (rather than on what are possibly the most pressing issues actually facing Palestinian children in Israeli custody).⁷¹³

3.(b). *The absence of rehabilitation*

According to social theorist Michel Foucault, throughout history society has created various "heterotopias" – counter-sites of sorts – which Foucault described, somewhat vaguely, as sites located outside, and different from, all other places to which they refer.⁷¹⁴

In modern times, two such heterotopias – the prison and the school – operated to discipline and normalise their occupants (criminals/children), through two intertwined processes: first, the occupants were differentiated (above all, asserted Foucault, according to their age), and a hierarchy was established between them; and second, an emphasis was put not only on punishing these individuals, but also on rehabilitation and education as means to correct and transform them, and even to win their hearts.⁷¹⁵ As we have seen, this is exactly the sort of heterotopia toward which the

⁷¹² Cf., e.g., Jason Hart, *Saving children?: What role for anthropology?*, 22 ANTHROPOLOGY TODAY 5 (2006) (emphasising the need to "challenge the seeming naturalness of a conceptual boundary between 'childhood' and 'adulthood' [...], and other assumptions of the project of saving children"). On the need for judges to attend to the uniqueness of each case, and thereby constantly suspend and reinvent the law, see Jacques Derrida, *Force of Law: The Mystical Foundations of Authority*, 11 CARDOZO LAW REVIEW 919 (1990); Goodrich, *supra* note 186, at 204-208.

⁷¹³ *Supra* text accompanying notes 627-639 and 694. Cf. Rosen, *supra* note 460, at 304 ("The humanitarian definition of *childhood* and its expression in international law [...] does not allow for varying solutions to the very real network of social problems it has identified and is trying to address. A more complex and nuanced understanding, informed by ethnographic research and anthropological insight, can offer the possibility for finding appropriate and effective solutions in different sets of circumstances.").

⁷¹⁴ Michel Foucault, *Of Other Spaces*, 16 DIACRITICS 22, 24, 27 (1986) [1967]. See also Sara McNamee, *Foucault's Heterotopia and Children's Everyday Lives*, 7 CHILDHOOD 479, 483 (2000) (explaining that for Foucault, "heterotopia is [...] like a counter-site"). On the vagueness of the concept "heterotopia" see Christian Borch, *Interview with Edward W. Soja: Thirdspace, Postmetropolis, and Social Theory*, 4 DISTINKTION: SCANDINAVIAN JOURNAL OF SOCIAL THEORY 113, 114 (2002); Marco Cenzatti, *Heterotopias of difference*, in HETEROTOPIA AND THE CITY: PUBLIC SPACE IN A POSTCIVIL SOCIETY 75 (Michiel Dehaene and Lieven De Caeter eds., Routledge, Abingdon and New York, 2008).

⁷¹⁵ FOUCAULT 1995, *supra* note 173, at 180-183, 269. Cf. Ursula Henriques, *The Rise and Decline of the Separate System of Prison Discipline*, 54 PAST AND PRESENT 61 (1972) (cited in Heather Shore, *Reforming the juvenile: Gender, justice and the child criminal in nineteenth-century England*, in YOUTH JUSTICE: CRITICAL READINGS 159, 163 (John Muncie et al eds., Sage, London and Thousand Oaks CA, 2002)); ANTHONY M. PLATT, *THE CHILD SAVERS: THE INVENTION OF DELINQUENCY* 46-74 (2nd ed., University of Chicago Press, Chicago and London, 1977).

above Israeli court rulings have striven: legal sites which would differentiate Palestinian children from their elders, and would correct these children through rehabilitation and education.⁷¹⁶

Yet – and again, this observation is sociological rather than rights-based – in practice, the sites to which Israeli law has assigned Palestinian children can be defined as “thin heterotopias”: as spaces of differentiation (between these children and their elders) but not of correction (through rehabilitative and educational mechanisms). In addition to the previously-mentioned lack of educational services,⁷¹⁷ rehabilitation is rarely an option for Palestinian inmates, adults or children. Israeli courts and HROs have posited two main reasons for this: first, the absence of rehabilitation facilities acceptable to both the Israeli military legal system and the Palestinian Authority; and second, the fact that many Palestinians do not consider children who, for example, throw stones at Israeli soldiers to require rehabilitation (unlike “regular juvenile delinquents”).⁷¹⁸

Furthermore, some Israeli judges, contrary to their colleagues quoted earlier in this chapter, have questioned the relevance – and even the plausibility – of rehabilitation for Palestinian “security offenders”. Military Court of Appeals judge Yoram Hani’el, for example, asserted in a ruling from 2004 that “in nationalistic acts, even when committed by minors, the rehabilitation consideration loses its prominence and becomes just one of many considerations, including the retribution and deterrence considerations.”⁷¹⁹ More recently, in one of the Supreme Court rulings discussed earlier, judge Edna Arbel stipulated: “I agree with [judge Rubinstein’s] statements and position about the importance of the rehabilitative process [...]. Nonetheless, [...] the question arises of whether the purposes of the rehabilitative process can indeed be achieved in ideological offences”.⁷²⁰ Thus, as counterweight to the plasticity traditionally associated with children (as illustrated by the court rulings examined earlier), Justice Arbel placed the potential incorrigibility of ideologically-motivated child offenders.

Like Israeli detention and prison facilities for Palestinian children, the recently-established military youth courts too are currently more about separation than about rehabilitation. This is illustrated by the lack of significant changes in the sentences these courts impose or in their procedures, as compared with the old system (as noted earlier).⁷²¹ A rehabilitation-oriented provision was enacted in 2009, authorising military courts to order pre-sentence reports, which can assess the likelihood of the child’s rehabilitation.⁷²² However, in practice such reports are rarely

⁷¹⁶ *Supra* text accompanying notes 640-659.

⁷¹⁷ *Supra* text accompanying notes 698 and 702.

⁷¹⁸ MilC 358/03, *supra* note 373; CrimA 1456/07, *supra* note 649; MilC 1261/09, *supra* note 423; B’TSELEM, *supra* note 96, at 58-59; NO LEGAL FRONTIERS, *supra* note 26, at 51.

⁷¹⁹ MilC 346/03 *The Military Prosecutor v. Jawadra* [2004] (Mil. Ct. App.).

⁷²⁰ CrimA 1456/07, *supra* note 649.

⁷²¹ *Supra* notes 347-348 and 532-535 and accompanying text.

⁷²² ORDER 1651, *supra* note 74, art. 148. The litigants may read this report, but may not receive copies of it unless the court orders otherwise. *Id.* The report would be written by an officer of the Civil Administration – the Israeli governing body running all non-military activities in the OPT (such as land registry, movement permits, work permits, permits to enter Israel, and so forth). This body was

requested, for a variety of institutional and social reasons which exceed present space constraints (but are detailed in HRO reports).⁷²³ The lack of substantial procedural changes in the military youth courts goes hand in hand with the lack of architectural change: their hearings still take place in “portakabins” identical and adjacent to those in which adult Palestinians are tried⁷²⁴ (as noted in Chapter 1⁷²⁵).

It remains to be seen whether there will be a shift from divide and rule (by distancing Palestinian children from their elders) to divide and discipline/correct; whether the above “thin heterotopias”, whose main function is currently spatial differentiation, will develop child-specific disciplinary mechanisms, as has generally been the case in the modern Western history of childhood.⁷²⁶ Will the plasticity attributed to the individuals occupying these legal sites, by nature of their childhood, prevail over the special gravity of their political transgressions and their alleged inflexibility as political offenders?

3.(c). *Uncovering overlooked anti-separatist voices*

As we have seen, HROs’ publications about Palestinian children in Israeli custody are governed by a separatist imagination, which cannot accommodate anti-separation arguments. However, this section will deconstruct this separatist discourse, by extracting from HROs’ own publications overlooked, counter-dominant “voices” (in the metaphorical sense of this term) which undermine the HROs’ separatist agenda. Incidentally, we witnessed another instance of intra-discursive division of this sort in the previous chapter, in the form of Israeli military judges’ competing interpretations of “minor” (and other age categories).⁷²⁷

HRO publications, upon close inspection, turn out to actually include – but effectively disregard – child ex-detainees’ positive depictions of their joint incarceration with adults.⁷²⁸ Thus, a book published in 2004 in association with *DCI – Palestine* cites the HRO’s social workers as highlighting a

range of factors that helped [Palestinian] children survive their time in [Israeli] prison. [...] Some [children] specifically mentioned adult detainees

established in 1981, now operates in the West Bank, and until 2005 also operated in the Gaza Strip. Coordination of Government Activities in the Territories, *History* (last visited: August 14, 2011), available at <http://www.cogat.idf.il/1280-en/Cogat.aspx>.

⁷²³ B’TSELEM, *supra* note 96, at 58-59; DCI – Palestine, *supra* note 43; NO LEGAL FRONTIERS, *supra* note 26, at 34-37.

⁷²⁴ Cf. DCI – PALESTINE, *supra* note 26, at 17 (“the military juvenile courts use the same facilities and court staff as the adult military courts.”).

⁷²⁵ *Supra* text below note 224.

⁷²⁶ See, e.g., Fendler, *supra* note 467; ROSE, *supra* note 1, at 142-154.

⁷²⁷ *Supra* text accompanying notes 485-489 and 499-504.

⁷²⁸ In addition, none of the common reasons for complaints by Palestinian children – as described by DCI – concern Palestinian adult prisoners. DCI – PALESTINE, *supra* note 32, at 18.

who were role models, and a critical source of care and support in a very hostile environment: 'The adult detainees helped me a lot. They developed my character and I benefited from their experience of culture and life. They made me feel comfortable. Without their support I would have been lost in prison'; 'The children lived with adults who took a lot of care of us. Support was strong and detainees discussed their problems. I am still in touch with friends I made in prison even though they are much older than me.'⁷²⁹

However, while acknowledging that some children may feel that non-separation benefited them, the authors quickly and clearly frame non-separation as a threat to "normal" childhood: "Being detained with adult prisoners could provide an enormous support structure and encouragement to study, although it *could push a child to behave more like an adult*."⁷³⁰ Remarkably, it is a certain notion of childhood – rather than the actual children – which again seems to be the centre of attention.

Similarly, Israeli HRO *B'Tselem* documented the testimony of 12-year-old Palestinian ex-detainee Muhammad Khawajah which portrays joint detention in an unequivocally positive light. Yet the HRO had nothing to remark about this. The testimony reads, among other things:

They [the Israeli soldiers] took us [Khawajah and a 14-year-old] back to Ofer Prison and put us in the tent section, Department 2, which had eighty-three detainees, *of all ages*. [...] The detainees *treated us well*. They gave us candy, chocolate and potato chips. I felt comfortable. [...] A detainee helped me ask for the doctor to treat my leg. [...] At first, I was afraid and cried sometimes, because my family was far away. [...] *The adult detainees took care of me because I was the youngest detainee in the Department*, and they decided to make me assistant to the sergeant of the Department [who was a detainee there].⁷³¹

The argument, in bringing these anti-separation voices to centre stage, is not exactly that these HROs disregard "children's voices"; as argued in Chapter 1, it is not quite *children's* voices which occupy these texts, but *mediated "echoes"* of children's verbal testimonies.⁷³² The argument, then, is that separatist texts produce (overlooked) counter-voices, and that if these texts are investigated closely enough they can be shown to already encompass their own opposition. Thus separatist discourses appear, upon careful inspection, more complex and inherently-contradictory than initially meets the eye.

⁷²⁹ COOK, HANIEH AND KAY, *supra* note 28, at 134.

⁷³⁰ *Id.*, at 134.

⁷³¹ *Testimony: 12-Year-Old Beaten and Imprisoned with Adults* (2008), available at http://www.btselem.org/english/testimonies/20080911_muhammad_khawajah_age_12_detained_by_idf.asp (emphases added).

⁷³² *Supra* notes 48-51 and accompanying text.

In 2007, the Geneva office of *DCI* published a 64-page comparative report on juvenile justice systems, which rarely – and very briefly – acknowledged the possibility that separating Palestinian child prisoners might not necessarily benefit them. The document succinctly stipulates:

There is some internal debate however as to whether child political prisoners being held in Israeli facilities are in fact safer when detained with adults in this particular context, as they may be better protected against abuses by authorities. This would still be in line with the CRC [the *UN Convention on the Rights of the Child*] in that children must be held separately from adults unless it is in their best interest not to be.⁷³³

Nonetheless, this report promptly maintains that “*children must be held separately from adults unless it is in their best interest not to be*”⁷³⁴ – thereby presenting the dominant separatist conception of childhood as the desired norm, of which the Palestinian case can at most be an exception

Another publication which unusually contemplates the non-separatist option is Israeli HRO *B’Tselem*’s comprehensive 2011 report on Israel’s treatment of Palestinian child stone-throwers, which closes a two-and-a-half-page long discussion of the joint incarceration issue with the following paragraph:

Some believe this is a good arrangement for protecting the minors. Attorneys with whom B’Tselem spoke pointed out that when the adults are not criminal detainees who are liable to endanger the minors’ wellbeing, they can help them cope with prison routine, which is beneficial for the minors. This arrangement has been implemented before. In 1996, for example, minors were separated from adults in Sharon Prison at night, but during the day, five adults stayed with them and helped them manage life in prison. The presence of adults also aided in protecting the minors’ rights. They received better treatment from the prison guards and suffered less from the treatment given them by other adult prisoners. This arrangement ended after the five adults were released.⁷³⁵

Undoubtedly, this publication pays considerable attention to reasons for joint incarceration. But the question arises: why did HROs strongly advocate separation, and only started considering the non-separation option so late (in 2011) – only two years after the military youth courts were already established and about a decade into the increased separation of Palestinian child inmates? Why did HROs continue taking for granted that segregating Palestinian children in Israeli custody is desirable, until these children were actually increasingly separated? This in itself is somewhat indicative of the limitations of HROs’ separatist imagination.

⁷³³ DCI, *FROM LEGISLATION TO ACTION?: TRENDS IN JUVENILE JUSTICE SYSTEMS ACROSS 15 COUNTRIES* 42 (2007), available at <http://www.defenceforchildren.org/files/DCI-JJ-Report-2007-FINAL-VERSION-with-cover.pdf>.

⁷³⁴ *Id.*, at 42.

⁷³⁵ B’TSELEM, *supra* note 96, at 64-65.

As a number of childhood scholars have observed, the most important feature of the modern conception of the child is, arguably, that children merit separation, exclusion, and protection from the adult world.⁷³⁶ Children have come to be configured as institutionally separate from adults, and their dependency has been prolonged, through three main historical reforms which jurist Barry Feld terms “the trinity of the legal and social construction of childhood”: the separation of home from work, the establishment of compulsory schools, and the setting up of a juvenile justice system.⁷³⁷ Thus, rather than “child” being a natural, given category, certain individuals are marked and even constituted as “children” through these processes of spatial separation,⁷³⁸ among other things.

To most modern eyes, then, the shift toward increased separation of Palestinian children in Israeli custody may seem natural and positive – as HROs’ separatist discourses which we examined earlier exemplify. The only thing that may seem extraordinary – and which may lead some to seeing Israel/Palestinian as an exceptional case⁷³⁹ – is the fact that this shift toward separation has only recently occurred.

Indeed, the Global North witnessed similar shifts much earlier. Many child-related reforms since the age of enlightenment were premised on the notion that since children are innately innocent, juvenile delinquents must be removed from external evil influences and disciplined in properly constructed environments.⁷⁴⁰ Thus, from the late 18th century through the mid-19th century, reformers in England and the US created congregate institutions – orphan asylums, houses of refuge for children, reformatories, and industrial schools – to remove children from social environments which were perceived as depraved and unhealthy.⁷⁴¹ In England, many child

⁷³⁶ ARCHARD, *supra* note 2, at 29, 191; BUCKINGHAM, *supra* note 467, at 7-8, 13-16; Angelika Engelbert, *Worlds of childhood: differentiated but different: implications for social policy*, in CHILDHOOD MATTERS: SOCIAL THEORY, PRACTICE AND POLITICS 285 (Jens Qvortrup et al eds., Avebury Press, Aldershot, 1994); JAMES, JENKS AND PROUT, *supra* note 2, at 37-38. The above use of the term “modern” is rather crude, as there is no single modernity. See, e.g., GOVERNING THE CHILD IN THE NEW MILLENNIUM ix (Kenneth Heltqvist and Gunilla Dahlberg eds., Routledge Falmer, New York and London, 2001).

⁷³⁷ FELD, *supra* note 106, at 28-29, 31, 33, 37, 41-44, 56. See also BUCKINGHAM, *supra* note 467, at 7-8, 74-75; KENNEDY, *supra* note 467, at 5, 15-17, 19-20, 63, 76-78; VALENTINE, *supra* note 467, at 3-4, 80.

⁷³⁸ On the placement of children in juvenile courts as marking them as children, see Thomas S. Popkewitz and Marianne N. Bloch, *Administering Freedom: A History of the Present – Rescuing the Parent to Rescue the Child for Society*, in GOVERNING THE CHILD IN THE NEW MILLENNIUM 85 (Kenneth Heltqvist and Gunilla Dahlberg eds., Routledge Falmer, New York and London, 2001).

⁷³⁹ For an in-depth discussion of the extent to which the phenomena examined in this study are unique see *infra* text accompanying notes 1064-1084.

⁷⁴⁰ FELD, *supra* note 106, at 38, 49-50; Rod Morgan and Tim Newburn, *Youth Justice*, in THE OXFORD HANDBOOK OF CRIMINOLOGY 1024, 1024 (Mike Maguire, Rod Morgan and Robert Reiner eds., 4th ed., Oxford University Press, Oxford and New York, 2007).

⁷⁴¹ Mintz, *supra* note 642, at 5-6; LEON RADZINOWICZ AND ROGER HOOD, A HISTORY OF ENGLISH CRIMINAL LAW AND ITS ADMINISTRATION FROM 1750 - VOL. 2, at 629-633 (Stevens and Sons, Oxford, 1986) (cited in Shore, *supra* note 715, at 159); Peter Rush, *The government of a generation: the subject*

reformers attributed the delinquency of working-class children to the delinquency and cruelty of their parents, and aimed to separate these children from their parents to prevent them from being prematurely exposed to the street and all that it contained.⁷⁴² In the US and Canada, boarding and residential schools were designed to “kill the Indian in the child”, by separating Native American children from their families and traditions and assimilating them into the dominant culture.⁷⁴³ Comparable processes took place in Australia as regard aboriginal children, from the mid-19th century through the mid-20th century.⁷⁴⁴ In mid-19th century colonial India, British colonial officials called for separate juvenile reformatories, and generally agreed that Indian child offenders required separation not only from adult convicts but also from their parents: there was, however, some ambivalence among British observers regarding the corrigibility of juvenile Indians.⁷⁴⁵ Practices and discourses of this sort culminated in the emergence of youth courts – in South Australia as early as 1895, in Illinois, US, in 1899, in England and Canada in 1908,⁷⁴⁶ and in British Mandate Palestine in 1937.⁷⁴⁷

These historical examples can help us advance beyond simply characterising Israeli law’s shift toward increased separation as anachronistic, as a 21st century reincarnation of 19th and early 20th century reforms. These examples highlight that throughout modern times, separatist reforms concerning “other(ed)” children (such as native children in colonial societies and working-class children) have been inspired not only by a growing compassion toward children, but also by fears, and sometimes even dehumanisation, of the children’s supposedly undisciplined communities.⁷⁴⁸ An important lesson to be drawn from these examples is thus that some skepticism toward recent separatist reforms in the OPT might be called for. This chapter has indeed suggested the need for such skepticism, by highlighting Israeli judges’ desire to prevent Palestinian intergenerational interactions, as well as the overlooked reasons for joint incarceration.

When returning to the present time, though international human rights law and policy of the last decades have generally emphasised that children need to be separated from adults in juvenile

of juvenile delinquency, in YOUTH JUSTICE: CRITICAL READINGS 138, 154-155 (John Muncie et al eds., Sage, London and Thousand Oaks CA, 2002).

⁷⁴² GEORGE K. BEHLMER, FRIENDS OF THE FAMILY: THE ENGLISH HOME AND ITS GUARDIANS, 1850-1940, at 233-234 (Stanford University Press, Stanford, 1998); John Clarke, *The three Rs - repression, rescue and rehabilitation: ideologies of control for working class youth*, in YOUTH JUSTICE: CRITICAL READINGS 115, 126-127 (John Muncie et al eds., Sage, London and Thousand Oaks CA, 2002); MONICA FLEGEL, CONCEPTUALIZING CRUELTY TO CHILDREN IN NINETEENTH-CENTURY ENGLAND 147-148, 155 (Ashgate, Surrey and Burlington, 2009); May, *supra* note 104, at 111; Rush, *supra* note 741, at 150-151.

⁷⁴³ Sarah de Leeuw, *‘If anything is to be done with the Indian, we must catch him very young’: colonial constructions of Aboriginal children and the geographies of Indian residential schooling in British Columbia, Canada*, 7 CHILDREN’S GEOGRAPHIES 123, 123-124 (2009); Mintz, *supra* note 642, at 6.

⁷⁴⁴ Julie Cassidy, *The Stolen Generations – Canada and Australia: The Legacy of Assimilation*, 11 DEAKIN LAW REVIEW 131, 132-134 (2006).

⁷⁴⁵ Sen, *supra* note 104, at 82-84, 89-90. There was also general agreement that these children needed to be separated from each other. *Id.*, at 82.

⁷⁴⁶ Morgan and Newburn, *supra* note 740, at 1024; Muncie and Goldson, *supra* note 103, at 197.

⁷⁴⁷ *Supra* notes 295-297 and 461 and accompanying text.

⁷⁴⁸ This is the argument made, in relation to England, by BEHLMER, *supra* note 742, at 233-234; FLEGEL, *supra* note 742, at 155; VALENTINE, *supra* note 467, at 3 and the sources mentioned there.

justice systems,⁷⁴⁹ the issue of non-separation appears to pervade the Global North. This is most marked in the US, which in the last couple of decades has seen a steady rise in the number of children who are transferred to adult criminal courts and held in adult jails and prisons.⁷⁵⁰ This trend has led some to conclude that the “laws and philosophy [of juvenile justice in the US have ...] returned to many of the practices in place prior to the invention of the juvenile court.”⁷⁵¹ Moreover, criminologist John Muncie has recently argued that this “American exceptionalism” in relation to juvenile justice is permeating Western Europe (notwithstanding significant divergence within both the US and Western Europe).⁷⁵² In some Western European countries – such as England/Wales, Germany, Ireland, the Netherlands, Austria, Portugal, Finland,⁷⁵³ and Switzerland – this manifests itself in instances of not separating children from adults in custody, or in facilitating easier movement between adult and juvenile systems.⁷⁵⁴ In Scotland, the juvenile court was abolished in 1968,⁷⁵⁵ and while two youth courts were established on a pilot basis in 2003 and 2004 (primarily for 16- and 17-year-old persistent offenders), as of late 2011 the Scottish Government does not plan to expand this relatively limited youth court system.⁷⁵⁶ Similar phenomena can be found outside Europe and the US. For example, in Japan, there has been an increase in recent years in the number of child offenders transferred to adult courts, and children are kept with adults in pretrial detention.⁷⁵⁷

The argument here is not that these phenomena represent a categorical global move away from separation; there is surely divergence between – and often within – countries,⁷⁵⁸ contrary examples exist, and more research is required to make more conclusive claims. Regardless of the extent to which the modern trend toward separation has “actually” reversed, HROs dealing with children’s rights across the world have, in the last decade, been preoccupied with what they view as

⁷⁴⁹ See, e.g., BUCKET AL., *supra* note 101, at 158; Goldson and Muncie, *supra* note 103, at 48-49.

⁷⁵⁰ Muncie and Goldson, *supra* note 103, at 200; Jeffrey J. Shook and Rosemary C. Sarri, *Trends in the Commitment of Juveniles to Adult Prisons: Toward an Increased Willingness to Treat Juveniles as Adults?*, 54 WAYNE LAW REVIEW 1725 (2009).

⁷⁵¹ ROSEMARY SARRI AND JEFFREY SHOOK, HUMAN RIGHTS AND JUVENILE JUSTICE IN THE UNITED STATES 4 (Harwood Press, forthcoming) – introduction available at http://www.aclu.org/hrc/JuvenileJustice_Sarri.pdf. See also *id.*, at 5, 13-16.

⁷⁵² Muncie, *supra* note 103. See also Muncie and Goldson, *supra* note 103, at 205.

⁷⁵³ Finland, Denmark, and the Netherlands have no specific youth courts, but minors are rarely imprisoned there due to these countries’ relatively non-punitive philosophy. HARTJEN, *supra* note 99, at 125-126; Muncie and Goldson, *supra* note 103, at 208.

⁷⁵⁴ Muncie and Goldson, *supra* note 103, at 199.

⁷⁵⁵ Goldson and Muncie, *supra* note 103, at 52; Morgan and Newburn, *supra* note 740, at 1028-1029.

⁷⁵⁶ The Scottish Parliament, *SPICe Briefing: Children and the Scottish Criminal Justice System 16-17* (July 14, 2011), available at <http://dera.ioe.ac.uk/10457/1/SB11-53.pdf>.

⁷⁵⁷ Goldson and Muncie, *supra* note 103, at 53-54.

⁷⁵⁸ Janice McGhee and Lorraine Waterhouse, *Comparative Juvenile Justice Policy: The Alliance Between Scotland and the State of Massachusetts Revisited*, 21 CHILDREN AND YOUTH SERVICES REVIEW 967, 968 (1999). See generally Nicola Lacey, *Why Globalisation Doesn’t Spell Convergence: Models of Institutional Variation and the Comparative Political Economy of Punishment*, in INTERNATIONAL AND COMPARATIVE CRIMINAL JUSTICE AND URBAN GOVERNANCE 214 (Adam Crawford ed., Cambridge University Press, Cambridge and New York, 2011).

disconcerting trends or instances of non-separation.⁷⁵⁹ To some extent, HROs' global concerns about non-separation might have influenced the HROs operating in the OPT, and might have contributed to their previously discussed disregard of justifications for non-separation. This influence is explicit in a report by the international secretariat of *DCI* from 2007 (quoted above), which referred to the OPT as one of 8 countries in which non-separation was "a serious problem".⁷⁶⁰ For other HROs, this influence might be unconscious, as it is not explicit in their reports – which admittedly renders this argument somewhat speculative.

5. THE NON-SEPARATION OF ISRAELI SETTLER CHILDREN

Before concluding our discussion of the issue of (non)-separation, let us turn to examine Israeli settler children's legal status. Unlike their Palestinian counterparts, who only in recent years have been separated from their elders more systematically, Israeli settler children have always been tried in (civil) youth courts, and held in youth-specific detention and prison facilities/wings. Thus, at first glance, the recent shift toward increased separation of Palestinian children from their elders seems to exemplify a decrease in the legal disparity between Palestinian and Israeli children in the OPT (surveyed in Chapter 2⁷⁶¹).

However, this is not the entire story: in the context of Israel's "disengagement" (pullout) from the Gaza Strip,⁷⁶² when Israeli settler child offenders were concerned, Israeli law in fact did not detain them separately from their adult counterparts – in contrast to how their Palestinian peers are treated. In February 2005, about six months before Israel's "disengagement", the Israeli Knesset (parliament) passed the *Disengagement Plan Implementation Law* (hereinafter: the *Disengagement Law*), which aimed to regulate the settlers' evacuation, resettlement, compensation, and the aid they would receive from the state.⁷⁶³ The *Disengagement Law* authorised deviation from the general legal requirement to separate child detainees from adult inmates, under the following circumstances:⁷⁶⁴ Israeli children who would illegally enter or stay in the Gaza Strip could,

⁷⁵⁹ On such reports by the *UN Committee on the Rights of the Child*, in the last decade, see Goldson and Muncie, *supra* note 103, at 52-54. Space constraints prevent us from referring to further HRO reports of this sort.

⁷⁶⁰ *DCI*, *supra* note 733, at 42 (the report examined "trends in juvenile justice systems" in 15 countries across the world).

⁷⁶¹ *Supra* text accompanying notes 409-429.

⁷⁶² On the "disengagement" see *supra* text accompanying notes 7, 63-64, 67-69, and 339-344.

⁷⁶³ THE DISENGAGEMENT PLAN IMPLEMENTATION LAW, *supra* note 274.

⁷⁶⁴ It is unclear how the police implemented this provision. Two months after its enactment, the police instituted inner guidelines stipulating that minors may only be detained with adults whom the minors know, or with adult family members. The Youth Section of the Israeli Police, *The Legal Prescriptions and the Instructions Relating to Treating Minors Involved in Acts of Resistance to the Disengagement Plan and in Acts of Resistance to the Evacuation Related to the Disengagement Plan – Updated Version to the Time of Closing the Evacuated Territories and of the Evacuation Period* (21.4.2005) (Hebrew) (I received this document from *The Israeli Policy Center*, mentioned *supra* text above note 240, which in

according to this law, be detained “with adults who are suspected of committing such offences, provided that the minors have expressed their consent and that their wellbeing is not jeopardised”.⁷⁶⁵

The formal justifications for this provision were presented in meetings of the parliamentary *Constitution, Law, and Statute Committee*. In a meeting in late 2004, prior to the enactment of this provision, a police commander from the Youth Section of the Ministry of Interior Defence remarked:

I wish to explain how this article was phrased and to place it in its right context: [...] The assumption is that we are [...] dealing with minors who, even if they commit severe offences, are not minors with a criminal record, and we do not treat them with the same tools [used for ‘regular’ criminal offenders...]. In this case there is a different and sensitive background to [the offences...], which requires special treatment. In this situation, all of the reasons underlying the [legal] separation [...] between minors and adults [...] are inapplicable.⁷⁶⁶

In another meeting of the committee, in February 2005, a legal advisor to the police commented:

The *Youth Law* requires that we separate minors from adults in detention. In the *Disengagement Law* we created an exception to this thing [sic], because our premise was that in this situation of adults and minors being arrested against the backdrop of the disengagement events, chances are slim that the adults would harm the minors. The joint detention of minors and adults in this situation would actually help the minors.⁷⁶⁷

turn had obtained it from the Attorney General in December 2006). However, later that year the parliamentary *Constitution, Law, and Statute Committee* deliberated whether minors should only be detained with adult family members, and the committee chair concluded that there is no reason to install such a limitation, and that this issue should be left to the discretion of the police. THE CONSTITUTION, LAW, AND STATUTE COMMITTEE – 16TH KNESSET, TRANSCRIPT NO. 367 (December 28, 2004) (Hebrew).

⁷⁶⁵ THE DISENGAGEMENT PLAN IMPLEMENTATION LAW, *supra* note 274, art. 27(f) (“Notwithstanding Article 13 of the Youth Law (Adjudication, Punishment, and Modes of Treatment) (1971), a police officer in the rank of commander or higher may order that minors suspected of committing offences according to this article [i.e., illegally entering or staying in the Gaza Strip], will be held in detention, or in a police station only for interrogation, with adults who are suspected of committing such offences, provided that the minors have expressed their consent and that their wellbeing is not jeopardised; the police commissioner or an officer authorised by him [sic] will set regulations for the purpose of this article, which will be communicated to the Constitution, Statute, and Law Committee of the Knesset.”) (emphasis added).

⁷⁶⁶ THE CONSTITUTION, LAW, AND STATUTE COMMITTEE – 16TH KNESSET, TRANSCRIPT NO. 366 (December 27, 2004) (Hebrew) (the origin text mistakenly reads: “The assumption is that we are not dealing with minors who [...] are not minors with a criminal record”). See similarly the remark made by the committee chair in 2007, that “the arrests of minors in acts of opposition [to the ‘disengagement’] were a unique phenomenon”. THE CONSTITUTION, LAW, AND STATUTE COMMITTEE – 17TH KNESSET, TRANSCRIPT NO. 32 (June 12, 2007) (Hebrew), available at <http://www.knesset.gov.il/protocols/data/html/yeled/2007-06-12.html>.

⁷⁶⁷ THE CONSTITUTION, LAW, AND STATUTE COMMITTEE – 16TH KNESSET, TRANSCRIPT NO. 404 (February 7, 2005) (Hebrew).

Our focus here – it is worth emphasising again – is not on whether these children benefitted from being granted the option of joint detention, or on whether Palestinian children should have been granted the same option. Instead, our interest lies in the nationality-based “blind spots” of a separatist legal imagination – that is, the fact that while the Israeli legal system, and for the most part HROs as well, have overlooked anti-separatist voices and considerations with regard to Palestinian children, some of the exact same voices and considerations were acted upon in relation to Israeli settler children.

6. CONCLUSION

Sociologists Allison James, Chris Jenks, and Alan Prout observe:

children either occupy designated spaces, that is they are placed as in nurseries or schools, or they are conspicuous by their inappropriate or precocious invasion of adult territory: the parental bedroom, Daddy’s chair, the public house, or even crossing the busy road. Childhood, we might venture, is that status of personhood which is by definition often in the wrong place.⁷⁶⁸

This chapter has examined how Israeli law and its HRO critics envision and treat children whom they hold to be out of their proper place. After briefly describing the increased separation of Palestinian children from their adult counterparts in Israeli courts, detention facilities, and prisons, we identified two interesting coalitions of sorts. First, we have a “coalition” of two seemingly opposing “camps” which came to advocate a shared separatist goal: on the one hand HROs, which have advocated the separation between Palestinian children and adults from a developmentalist perspective, emphasising the need to protect children’s (presupposed) particularity. On the other hand we have Israeli judges, who have warned that non-separation would result in the ideological indoctrination of Palestinian children by their elders. Another, more conceptual “coalition”, has been formed between the occupied Palestinians, who have long termed Israeli prison a “university”, and the occupier’s judiciary, which has used this image to problematise intergenerational Palestinian interactions in prison.

After mapping the justifications given for age-based separation, we contextualised this mode of separation as located within a broader project of governance and identity-construction through separation in the OPT. We discussed two additional aspects of this separatist project – nationality-based and gender-based separation – and used a ruling of the Israeli Supreme Court to demonstrate their interrelationship.

⁷⁶⁸ JAMES, JENKS AND PROUT, *supra* note 2, at 37.

We then proceeded to examine some of the tensions and limitations characterising the dominant separatist approach toward Palestinian children in Israeli custody. Contrary to Israeli statements, the increased separation has not in any substantive way had to do with what Israel portrays as these children's "rights" or "interests", since court procedures and sentences concerning them have not changed significantly, and rehabilitation and education are not generally provided to them in detention or prison. Instead, the shift toward increased separation has focused primarily on symbolically normalising the boundaries of childhood, by means of spatial differentiation (between Palestinian children and their elders). Furthermore, we saw that the growing consensus among HROs and the Israeli legal system that Palestinian children require separation has "blind spots" – noteworthy anti-separation considerations which it has tended to overlook. As we have shown, some of these overlooked anti-separation voices reside in a surprising source: HROs' own publications – which attests to the inherently contradictory nature of separatist discourses. Only in very recent years, after Israel had already established military youth courts and had started separating most Palestinian child detainees and prisoners from their elders, have HROs voiced different, anti-separation considerations – but the late timing of this development is in itself evidence of the limitations of their separatist imagination.

We contemplated the meaning of the issue of (non)-separation of Palestinian children, by juxtaposing it to historical and contemporary examples of (non)-separation beyond Israel-Palestine. At first glance, recent developments in the OPT seem anachronistic and contrary to the state of affairs elsewhere. But upon closer inspection, the separatist reform in the OPT was shown to resemble other separatist reforms, which have similarly been motivated by anxieties about the children's dangerous and undisciplined communities. Additionally, it was argued that some HROs advocating the separation of Palestinian children might have seen the non-separation of these particular children as part of a global issue of non-separation.

Lastly, this chapter provided another comparative perspective, by examining legal debates and policy concerning Israeli settler children against the backdrop of Israel's "disengagement" from the Gaza Strip. We have seen that, unlike their Palestinian counterparts, the law prescribed for some Israeli settler children joint detention with adults. This different treatment, of Israeli child settlers who were suspected of "ideologically-motivated" offences, calls into question Israeli depictions of the increased separation of Palestinian children as simply making their legal status more similar to that of Israeli children. Contrary to these Israeli statements, decisions on the separation of child offenders appear to be yet another issue informed by notions and constructions of national disparities.

RE-PRESENTED WITH CHILDHOOD TRAUMA

1. INTRODUCTION: REPRESENTING TRAUMA

In this chapter, we will examine how the Israeli legal system and its HRO critics have represented⁷⁶⁹ (or rather, re-presented⁷⁷⁰) psychological trauma,⁷⁷¹ in relation to children in the OPT. We will centre on two modes of representing this trauma: (a) “psycho-legal”⁷⁷² representation – which consists of discourses that draw upon an amalgamation of psychological and legal conceptions and imagination.⁷⁷³ We will focus on the recourse to psychological “expertise” and vocabulary, and especially to the psycho-legal terms “trauma” and “loss”;⁷⁷⁴ and (b) visual representation – which operates through, and is embodied in, photos, drawings, and video clips.

⁷⁶⁹ For our purposes, the term “representation” will denote the creation and/or operation of something which is meant to stand for another thing, and which at the same time is also meant to be, in some sense, equivalent or similar to that other thing. BUCHANAN, *supra* note 111, at 405–406.

⁷⁷⁰ The hyphenated term “re-presentation” emphasises that images do “not simply [...] evoke the violence and trauma of the event, but [...] re-present it, [...] make it present again (and in some cases, consciously make it present for the first time).” Frances Guerin and Roger Hallas, *Introduction*, in THE IMAGE AND THE WITNESS: TRAUMA, MEMORY AND VISUAL CULTURE 1, 9 (Frances Guerin and Roger Hallas eds., Wallflower Press, London and New York, 2007).

⁷⁷¹ In psychoanalysis and psychiatry, the term “trauma” designates an emotional injury, individual or collective, which results from terrifying experiences – usually violent events or the prolonged exposure to such events – and which leaves lasting damage in the psyche. SHOSHANA FELMAN, THE JURIDICAL UNCONSCIOUS: TRIALS AND TRAUMAS IN THE TWENTIETH CENTURY 171 (Harvard University Press, Cambridge MA and London, 2002).

⁷⁷² Examples of articles using the term “psycho-legal” to denote conjunctions of law and psychology are: Wallace D. Loh, *Psycho-legal Research: Past and Present*, 79 MICHIGAN LAW REVIEW 659 (1981); Douglas Mossman, *Conceptualizing and Characterizing Accuracy in Assessments of Competence to Stand Trial*, 36 JOURNAL OF THE AMERICAN ACADEMY OF PSYCHIATRY AND THE LAW 340 (2008); Allan M. Tepper and Amiram Elwork, *Competence to Consent to Treatment As a Psycho-legal Construct*, 8 LAW AND BEHAVIOR 205 (1984). Cf. Susan White, *Interdiscursivity and child welfare: the ascent and durability of psycho-legalism*, 46 SOCIOLOGICAL REVIEW 264 (1998) (using the term “psycho-legalism” to describe the predominance of forms of thought associated with developmental psychology in contemporary legal discourses concerning child protection).

⁷⁷³ I myself do not consider law, or psychology, or any other discipline for that matter, to be a separate or separable field. Rather, each is innately intertwined with other disciplines. On the indistinguishability of the “legal” from the “extra-legal” see, e.g., Nikolas Rose and Mariana Valverde, *Governed by Law?*, 7 SOCIAL & LEGAL STUDIES 541, 545–546 (1998); Pierre Schlag, *The Dedifferentiation Problem*, 42 CONTINENTAL PHILOSOPHY REVIEW 35 (2009). The above reference to “an amalgamation of psychological and legal conceptions and imagination” is meant only to highlight this point, not to imply that law and psychology are otherwise separable from each other.

⁷⁷⁴ In psychological discourses, “loss” designates a reduction of resources in which one is emotionally invested – ranging from relatively insignificant possessions, to one’s parents, home, body parts, or personal identity; it is believed that trauma involves a major loss, whereas not all losses are traumas. Bonnie L. Green, *Traumatic Loss: Conceptual and Empirical Links Between Trauma and Bereavement*, 5 JOURNAL OF LOSS AND TRAUMA 1, 2–4 (2000); JOHN H. HARVEY, PERSPECTIVES ON LOSS AND TRAUMA: ASSAULTS ON THE SELF 5–6 (Sage, Thousand Oaks CA and London, 2002); John H. Harvey and Eric D. Miller, *Preface*, in LOSS AND TRAUMA: GENERAL AND CLOSE RELATIONSHIP PERSPECTIVES

There are two primary reasons for focusing on these two modes of representing child-related trauma. First, state agents, HROs, and individuals in Israel/Palestine increasingly use these modes of representation: public claims are increasingly made through the language of “trauma”,⁷⁷⁵ and there is growing use of photography and videography, including abundant images of “suffering”.⁷⁷⁶ Therefore, exploring these modes of representation in relation to childhood can advance understanding of the Israeli-Palestinian conflict in general. Second, psychology and visual imagery have each played a central role in shaping modern thinking on, and constructions of, childhood.⁷⁷⁷ Notwithstanding the uniqueness of the Israeli-Palestinian context, it can hence serve as a test case for the broader utilisation of psycho-legal and visual representation with regard to childhood.

The recourse to these two modes to represent psychological trauma is not coincidental. Unlike physical trauma,⁷⁷⁸ which leaves visible bodily traces,⁷⁷⁹ psychological trauma poses a unique challenge to law and representation alike, in that its traces are believed to reside first and foremost in the traumatised person’s inner world.⁷⁸⁰ As we shall see, in an attempt to overcome this challenge, the Israeli legal system and its HRO critics often turn to psycho-legal and visual representations: mental health practitioners are referred to, since they are regarded as “experts”

xiii, xiii (John H. Harvey and Eric D. Miller eds., Routledge, New York and Abingdon, 2000). For the prevalent psychological definition of trauma see *supra* note 771.

⁷⁷⁵ Didier Fassin, *The Humanitarian Politics of Testimony: Subjectification through Trauma in the Israeli-Palestinian Conflict*, 23 CULTURAL ANTHROPOLOGY 531, 554 (2008); Edna Lomsky-Feder and Eyal Ben-Ari, *Trauma, Therapy and Responsibility: Psychology and War in Contemporary Israel*, THE PRACTICE OF WAR: PRODUCTION, REPRODUCTION AND COMMUNICATION OF ARMED VIOLENCE 111, 117-119, 122-123 (Aparna Rao et al eds., Berghahn Books, New York and Oxford, 2007).

⁷⁷⁶ See, e.g., Allen, *supra* note 19, at 162-163, 166, 170-171 (discussing HROs’ frequent use of images of “suffering” Palestinians – including Palestinian children). See also Ruthie Ginsburg, *Taking Pictures over Soldiers’ Shoulders: Reporting on Human Rights Abuse from the Israeli Occupied Territories*, 10 JOURNAL OF HUMAN RIGHTS 17 (2011).

⁷⁷⁷ On childhood as a product of visual images see, e.g., ANNE HIGONNET, PICTURES OF INNOCENCE: THE HISTORY AND CRISIS OF IDEAL CHILDHOOD (Thames & Hudson, New York, 1998); HOLLAND, *supra* note 598; I SPY: REPRESENTATIONS OF CHILDHOOD (Catherine Felily et al eds., I.B. Tauris, London and New York, 2000). On the influence of psychology and related disciplines on the legal construction and conceptualisation of childhood see KING AND PIPER, *supra* note 110, at 68-72; White, *supra* note 772, at 279-287. On the influence of psychology on shaping the meaning of childhood in general see, e.g., CHUDACOFF, *supra* note 469, at 66-69, 159-167; Hart, *supra* note 712, at 6; JAMES, JENKS AND PROUT, *supra* note 2, at 20-24, 38, 132; KENNEDY, *supra* note 467, at 4-5, 7-9, 15, 63-66, 69, 76-78, 98-99. See also Emberley, *supra* note 149, at 379 (arguing that the figure of the child and the meaning of childhood are, to a great extent, products of representational mechanisms and practices).

⁷⁷⁸ In its physical sense, “trauma” denotes (in medical discourses) a wound, especially one produced by sudden physical injury. FELMAN, *supra* note 771, at 171.

⁷⁷⁹ On Palestinians’ and HROs’ “use” of these bodily traces to demonstrate suffering to governing authorities and international observers see, e.g., Allen, *supra* note 19, at 163, 167-168, 170-171; Fassin, *supra* note 775, at 553; Peteet, *supra* note 19, at 109. On Israeli law’s use of Palestinian child defendants’ bodies as evidence see *supra* text accompanying notes 547-564.

⁷⁸⁰ Cf. FELMAN, *supra* note 771, at 171. This fascinating challenge is one of the reasons for the focus here on psychological rather than physical trauma. Notwithstanding this, children in the OPT are frequently represented as suffering from physical trauma (bodily injuries), and their psychological trauma is sometimes linked to a physical trauma.

capable of tracing and interpreting psychological trauma;⁷⁸¹ psychological vocabulary is utilised to make sense of that trauma; and visual artefacts – a photo, for example, or a drawing by a traumatised child – are used to “capture” allegedly traumatic events.

Our interest lies not in whether the “reality” of children’s trauma in the OPT can be “captured” and “represented”.⁷⁸² Instead, we will investigate how this “reality” has been constructed, framed, and rendered legible through the above modes of representation,⁷⁸³ and we will discuss the implications – symbolic and practical – of this representational dynamic.

Section 2 of this chapter will examine *psycho-legal representations* of childhood (which make use of the terms “trauma” and “loss”), in three contexts: (a) HRO publications which depict Palestinian children as traumatised and deprived of their childhood, in Israeli custody and generally; (b) Transcripts of Israeli parliamentary meetings, in which the suffering of children in the OPT, Israeli and Palestinian, is characterised as “trauma” or “loss” (and represented through visual images); and (c) Court rulings concerning Israeli soldiers who abused Palestinian children, which portray these soldiers as traumatised children. These three “sites of representation” will be shown to revolve around a central theme of the previous chapters: the spatiotemporal boundaries of childhood.

Section 3 will focus on HROs’ use of *visual representations* of Palestinian children’s abuse in Israeli custody. The main theme of this section will be the *representational* boundaries of childhood/trauma – namely, the boundaries of what can be seen and known about Palestinian children’s “trauma”. Images HROs use of abused Palestinian children, it will be suggested, can be envisioned as problematising these boundaries by rendering them a conspicuous “part of the story”.

As in previous chapters, Section 4 will discuss how themes of this chapter have manifested themselves beyond Israel/Palestine, and what this suggests about the socio-legal construction of childhood, in the OPT and generally.

⁷⁸¹ See also Bruce J. Ennis and Thomas R. Litwack, *Psychiatry and the Presumption of Expertise: Flipping Coins in the Courtroom*, 62 CALIFORNIA LAW REVIEW 693 (1974) (critically discussing the assumption of many judges and juries that psychiatrists are “experts”); Lomsky-Feder and Ben-Ari, *supra* note 775, at 118-119 (describing the growing place psychologists routinely occupy in Israeli public discourses).

⁷⁸² Cf. Jessica Catherine Lieberman, *Traumatic Images*, 1 PHOTOGRAPHIES 87 (2008) (arguing that neither photos nor psychic trauma represent “reality”).

⁷⁸³ Cf. JUDITH BUTLER, *FRAMES OF WAR: WHEN IS LIFE GRIEVABLE?* 69-70, 79, 81, 83-84 (Verso, London and New York, 2009) (arguing that photos interpret, and establish the truth of, the events they present, to the extent that they become crucial to the very status of these events as reality). See also Fassin, *supra* note 775, at 533.

Palestinian children's psychological distress,⁷⁸⁴ and (to a lesser degree) Israeli children's psychological distress,⁷⁸⁵ have drawn substantial attention from mental health practitioners in and beyond Israel/Palestine. During and following Israel's "disengagement" from the Gaza Strip,⁷⁸⁶ Israeli mental health practitioners were particularly preoccupied with how this event might psychologically affect the evicted Israeli settler children.⁷⁸⁷ As in other child-related contexts,⁷⁸⁸ these psychological discourses have featured two terms – "trauma" and "loss" – whose functioning we shall now explore.

⁷⁸⁴ There are abundant publications on this topic. See, e.g., Ahmad Baker and Nadera Shalhoub-Kevorkian, *Effects of Political and Military Traumas on Children: The Palestinian Case*, 19 CLINICAL PSYCHOLOGY REVIEW 935 (1999); Thomas Miller et al., *Emotional and Behavioural Problems and Trauma Exposure of School-age Palestinian Children in Gaza: Some Preliminary Findings*, 15 MEDICINE, CONFLICT AND SURVIVAL 368 (1999); Raija-Lenna Punamäki et al., *The deterioration and mobilization effects of trauma on social support: Childhood maltreatment and adulthood military violence in a Palestinian community sample*, 29 CHILD ABUSE & NEGLECT 351 (2005); Samir Quota et al., *Prevalence and determinants of PTSD among Palestinian children exposed to military violence*, 12 EUROPEAN CHILD & ADOLESCENT PSYCHIATRY 265 (2003); Roney W. Srouf, *Children Living Under a Multi-traumatic Environment: The Palestinian Case*, 42 ISRAELI JOURNAL OF PSYCHIATRY 88 (2005).

⁷⁸⁵ See, e.g., Avigdor Klingman, *Stress Responses and Adaptation of Israeli School-age Children Evacuated From Homes During Massive Missile Attacks*, 14 ANXIETY, STRESS, AND COPING 149 (2001). Examples of studies of both Palestinian and Israeli children's psychological well-being are: Alean Al-Krenawi, John R. Graham and Yaniv Kanat-Maymon, *Analysis of trauma exposure, symptomatology and functioning in Jewish Israeli and Palestinian Adolescents*, 195 BRITISH JOURNAL OF PSYCHIATRY 427 (2009); Zahava Solomon and Tamara Lavi, *The Psychological Toll of the Intifada: PTSD, Distress and Future Orientation of Israeli and Palestinian Youth*, in PROTECTION OF CHILDREN DURING ARMED POLITICAL CONFLICT: A MULTIDISCIPLINARY PERSPECTIVE 155 (Charles W. Greenbaum et al. eds., Hart, Oxford, 2006).

⁷⁸⁶ On the "disengagement" see *supra* text accompanying notes 7, 63-64, 67-69, and 339-344.

⁷⁸⁷ For a collection of studies on this topic see WHEN THE ROAD CONTINUES: EDUCATIONAL THERAPEUTIC INTERVENTIONS IN RELATION TO THE DISENGAGEMENT PROGRAMME (Shai Hen-Gal and Yochi Siman-Tov eds., Israeli Ministry of Education, Jerusalem, 2009) (Hebrew). On the impact of the "disengagement" on the evicted settlers in general see Hall et al., *supra* note 154. On how some Israeli mental health practitioners framed the "disengagement" as traumatic see GALIA PLOTKIN-AMRAMI, *THE NATIONAL CONFLICT AND MENTAL TRAUMA: CONSTRUCTION OF NATIONAL TRAUMATIC NARRATIVE THROUGH THE KNOWLEDGE AND PRACTICE OF MENTAL HEALTH PRACTITIONERS FROM DIFFERENT EPISTEMIC CULTURES* (PhD dissertation, Tel Aviv University Faculty of Humanities, 2010) (Hebrew).

⁷⁸⁸ See, e.g., José Brunner, *Trauma and Justice: The Moral Grammar of Trauma Discourse from Wilhelmine Germany to Post-Apartheid South Africa*, in TRAUMA AND MEMORY: READING, HEALING, AND MAKING LAW 97, 111 (Austin Sarat, Nadav Davidovitch and Michal Alberstein eds., Stanford University Press, Stanford, 2007) (describing the special attention which the South African Truth and Reconciliation Commission report gave to children's trauma); Emberley, *supra* note 149, at 378-379 ("The testimony of children who experience the trauma of military violence is constitutive of the contemporary politicization of the child and [...] the meaning and memorialization of childhood.").

2.(a). Palestinian childhood – traumatised and lost

Several HRO reports have cited psychological studies pointing to the prevalence of PTSD (Post-Traumatic Stress Disorder) among Palestinian children,⁷⁸⁹ and some reports have gone as far as describing all Palestinian children as collectively traumatised.⁷⁹⁰

The explicit term “trauma” has played a significant role specifically in HRO reports on Palestinian children in Israeli custody.⁷⁹¹ For instance, a book on Israel’s detention of Palestinian children which was published in collaboration with *DCI – Palestine* extensively uses the terms “trauma” and “PTSD”.⁷⁹² The book specifically characterises Israel’s arrest, transport to detention, actual detention, and imprisonment of Palestinian children as psychologically “traumatic” for these children.⁷⁹³ In this book – as in other HRO publications on Palestinian children⁷⁹⁴ – “trauma” functions as diagnosis not only of Palestinian children’s psychological state, but also of their legal and political condition.⁷⁹⁵ For example, the book reads:

imprisonment is not the sole trauma that Palestinian children will sustain during their childhoods. The very poor child rights situation in the [...] OPT [...] is a function of a political situation that results in simultaneous violations of children’s rights on a daily basis.⁷⁹⁶

⁷⁸⁹ COOK, HANIEH AND KAY, *supra* note 28, at 130-131; THE PALESTINIAN CENTRE FOR HUMAN RIGHTS, BLOOD ON THEIR HANDS: CHILD KILLINGS BY THE ISRAELI OCCUPATION FORCES (IOF) IN THE GAZA STRIP, JUNE 2007 – JUNE 2008, at 36-38 (2008); The Palestinian Centre for Human Rights, *Violations of Children’s Rights* (2007), available at http://www.pclrgaza.org/portal/en/index.php?option=com_content&view=article&id=3024:violations-of-childrens-rights-&catid=52:theme-packages; The Palestinian Human Rights Monitoring Group, *Children in Conflict and in the Media* (2003), available at http://www.phrmg.org/articles/Children_in_Conflict_and_Media.htm.

⁷⁹⁰ PALESTINIAN CENTRE FOR HUMAN RIGHTS, *supra* note 789, at 36-38 (using the sub-title “Collective trauma: the psychological impact of IOF [Israeli Occupation Forces] killings on children in Gaza”; citing a Palestinian psychologist as explicitly saying that “[c]hildren in the Gaza Strip are suffering from collective trauma”; and describing a “collective exposure [of Palestinians] to psychological trauma”). Another, more implicit example is COOK, HANIEH AND KAY, *supra* note 28, at 130-131 (arguing that Palestinian children’s “daily exposure to traumatic events [...] can become ‘normalised’”).

⁷⁹¹ See, e.g., DCI – ISRAEL AND DCI – PALESTINE, *supra* note 493, at 24-25; DCI – PALESTINE, *supra* note 32, at 6 (both these documents identically assert: “Children are [...] mistreated during the transfer process and arrive at the interrogation and detention centres traumatised”).

⁷⁹² COOK, HANIEH AND KAY, *supra* note 28, at ix, xvi, 7, 27, 54, 66, 83, 102, 112, 124-131, 133, 135, 137, 139, 141.

⁷⁹³ *Id.*, at ix, 54, 66, 83, 102, 112, 124-127, 129, 131, 135, 137, 139, 141.

⁷⁹⁴ See, e.g., DCI – PALESTINE, BEARING THE BRUNT AGAIN: CHILD RIGHTS VIOLATIONS DURING OPERATION CAST LEAD 3 (2009) (“This report is dedicated to [...] the [Palestinian] survivors living with memories of trauma and loss and hoping that the perpetrators will someday be held accountable for their actions.”); The Palestinian Human Rights Monitoring Group, *supra* note 789 (“Palestinian children are the most tragic victims of the ongoing occupation and [...] are daily subjected to traumatic physical and mental incidents of violence.”).

⁷⁹⁵ On the use of “trauma” for socio-political judgments in other contexts see Brunner, *supra* note 788, at 99; Fassin, *supra* note 775, at 532-533, 544-546. I consider “apolitical psychology” to be nonexistent; see *supra* note 773.

⁷⁹⁶ COOK, HANIEH AND KAY, *supra* note 28, at ix.

The title of this book, *Stolen Youth: The Politics of Israel's Detention of Palestinian Children*, formulates Palestinian children's traumatic experiences in Israeli custody in terms of a significant loss – that of their childhood. The book further warns, in a developmentalist fashion,⁷⁹⁷ that Palestinian child prisoners' "age, level of emotional maturity, physical stature, and other factors leave them [...] less prepared [than adults] for the trauma of prison. [...] The experience may constitute the end of childhood and the beginning of their lives as adults."⁷⁹⁸ In a similar vein, a DCI – Palestine social worker is quoted in this book as saying:

Every arrested child is traumatised because he is a child, is immature and not an adult, even if he has an adult's physique. The [Palestinian] community doesn't allow child prisoners to be dealt with as children as they are considered heroes and political prisoners.⁷⁹⁹

This image of Palestinian childhood as something which has been lost or stolen is salient in other HRO publications on the abuse of Palestinian children in Israeli custody. Thus, a 2005 report by Palestinian HRO Addameer on Palestinian child prisoners includes a segment entitled *Early Adulthood, Stolen Childhood*.⁸⁰⁰ Interestingly, this image also appears in non-HRO texts on this topic – including an Israeli military court ruling⁸⁰¹ and an academic study.⁸⁰²

Moreover, HROs also portray Palestinian childhood as lost or disappearing in circumstances beyond being in Israeli custody. Across various HRO publications, phrases can be found such as: "It is impossible to assess the long-term psychological harm caused to [Palestinian] children [...]. Many have simply lost their childhood",⁸⁰³ "Palestinian children are losing their childhood in circumstances widely known to the authorities that have the primary responsibility to protect their rights",⁸⁰⁴ "Witnessing lost childhoods [... Palestinian] Children are losing their childhood. As one parent put it: '[...] our children behave like grown-ups.'",⁸⁰⁵ "Palestinian children are the most tragic victims of the Israeli occupation policy: Their collective childhood is stolen as they are subjected to traumatic incidents which leave mental as well as physical wounds they will

⁷⁹⁷ On developmentalist conceptions of childhood see *supra* notes 467-471 and accompanying text.

⁷⁹⁸ COOK, HANIEH AND KAY, *supra* note 28, at 83 (emphasis added).

⁷⁹⁹ *Id.*, at 135 (emphasis added). See also *id.*, at 129 ("Adolescents are especially vulnerable to torture for a number of reasons – their specific stage in development places them at especially high risk.").

⁸⁰⁰ Addameer, *supra* note 483.

⁸⁰¹ MilC 6041/98 *The Military prosecutor v. Jazal* [2001] (Samaria Mil. Ct.) (noting that according to the appellant, a Palestinian girl, "her prison term deprived her of her childhood").

⁸⁰² HAJJAR, *supra* note 21, at 191 ("In the West Bank and Gaza, an idealized notion of the 'innocence of youth' finds no resonance in carceral government, and youthfulness provides neither sanctuary nor protection from the grip of law enforcement."). This is a less explicit portrayal of childhood as lost.

⁸⁰³ 2002 REPORT OF THE SPECIAL RAPPORTEUR OF THE COMMISSION ON HUMAN RIGHTS, MR. JOHN DUGARD ON THE SITUATION OF HUMAN RIGHTS IN THE PALESTINIAN TERRITORIES OCCUPIED BY ISRAEL SINCE 1967, E/CN. 4/ 2002/ 32 (6.3.2002), available at <http://unispal.un.org/UNISPAL.NSF/0/48B2A380133D484085256B87005E1081> (emphasis added).

⁸⁰⁴ SAVE THE CHILDREN – SWEDEN AND SAVE THE CHILDREN – UK, GROWING UP UNDER CURFEW: SAFEGUARDING THE BASIC RIGHTS OF PALESTINIAN CHILDREN 4 (2003), available at http://www.savethechildren.org.uk/en/docs/growing_up_under_curfew.pdf (emphasis added).

⁸⁰⁵ *Id.*, at 10 (emphases added).

carry for the rest of their lives”;⁸⁰⁶ “these conditions [of living under Israeli occupation] *prematurely force children into adult roles and rob them of their childhood*”;⁸⁰⁷ “helplessness Palestinian parents are feeling towards protecting their children is just a part of the mounting pressure these *stolen childhoods* are under”;⁸⁰⁸ and a Palestinian mother described as complaining “about how her oldest daughter has been *robbed of her childhood*”.⁸⁰⁹

Usually, it is not the loss of childhood *per se* that is socially considered traumatic, since – as philosopher David Archard observes – childhood is not generally considered useful for adult life.⁸¹⁰ Rather, what the above HRO texts characterise as traumatic largely concerns the particular *time* and *place* in which childhood is supposedly lost: prematurely, and in the “childhood-depriving” spaces of Israeli law and occupation. The image of Palestinian childhood as lost or stolen thus further illustrates HROs’ fixation on, and their desire to fix, the spatiotemporal boundaries of childhood (which we discussed in Chapters 3-4).

Additionally, in depicting Palestinian childhood as lost, stolen, and therefore as non-childhood, HROs take active part in rendering the boundaries of childhood elusive (an elusiveness we discussed in Chapter 3⁸¹¹). Thus, HROs symbolically reproduce that for which they heavily criticise Israeli law: the dissolving of Palestinian childhood.⁸¹² This can be seen as yet another convergence between the Israeli system and its HRO critics, alongside the points of convergence discussed in the previous chapter (namely, the use of the image of Israeli prison as a university, and the pro-separation unanimity).⁸¹³

It is worth clarifying that, in line with the non-rights-based approach of this study,⁸¹⁴ the point here is not that Palestinian children should be granted a “right to childhood”. This “right” – an invention of the Romantic era – reproduces a particular notion of childhood as a sacred space, as the happiest time of life, whose innocence should be protected and prolonged.⁸¹⁵ Alongside an

⁸⁰⁶ The Palestinian Centre for Human Rights, *supra* note 789 (emphases added).

⁸⁰⁷ Catherine Cook, *Palestinian Children and the Second Intifada* (2004), available at <http://www.dci-pal.org/english/PrinterF.cfm?DocId=189&CategoryId=3> and at <http://www.miftah.org/display.cfm?DocId=3451&CategoryId=5>.

⁸⁰⁸ Miftah – The Palestinian Initiative for the Promotion of Global Dialogue and Democracy, *Accusation Follows Occupation for Palestinian Children* (June 14, 2004), available at <http://www.miftah.org/Display.cfm?DocId=3999&CategoryId=3> (emphasis added).

⁸⁰⁹ SAVE THE CHILDREN SWEDEN, *supra* note 262, at 15 (emphasis added).

⁸¹⁰ ARCHARD, *supra* note 2, at 30. At the same time, as already mentioned, it is commonly believed that childhood continues to exist, latently, throughout adult life. *Supra* notes 596-598 and accompanying text.

⁸¹¹ *Supra* text accompanying notes 587-601.

⁸¹² Needless to say, the effects of the legal treatment of Palestinian children differ fundamentally from those of HROs’ criticism.

⁸¹³ *Supra* text accompanying notes 655-665.

⁸¹⁴ *Supra* text accompanying notes 52-54.

⁸¹⁵ Hugh Cunningham, *A Right to Childhood?* (paper presented to the University of Kent Department of Education, October 27, 2011), available at http://www.historyandpolicy.org/docs/cunningham_childhood1.pdf; Hart, *supra* note 712, at 6-7.

increased emphasis in recent international child law and policy on child participation,⁸¹⁶ the “right to childhood” is still usually understood narrowly as a right to be protected, rather than as a right to actively participate in adult life.⁸¹⁷ Indeed, in the previous chapter we saw the questionable implications of the increased removal of Palestinian children from adult Palestinian space.⁸¹⁸

The image of Palestinian childhood as lost also illustrates a more fundamental limitation of the “right to childhood”: its disregard of the context-specificity, rather than universality, of childhood.⁸¹⁹ The taken-for-granted universality of childhood serves as a means for HROs to “internationalise”⁸²⁰ Palestinian children’s plight: if “childhood” means the same to all readers across the world, then the “loss of childhood” can effectively transcend Palestinian children’s complex – and context-specific – issues. This is part of a broader phenomenon discussed in previous chapters: HROs’ desire to globalise childhood – to impose a single, supposedly universal model of childhood.⁸²¹ Through this supposedly universal model, HROs produce, perhaps unwittingly, very specific social scripts for children. These scripts, in turn, allow for certain discourses about who really constitutes a “child”, while repressing other discourses and possibilities.⁸²² Hence, Palestinians whose lives deviate from this supposedly universal script are readily marked as having no childhood.⁸²³ This illustrates the importance of critical development psychologist Erica Burman’s argument, that

Rather than subscribing to a western-defined polarization between ‘normal’ childhood and ‘stolen’ childhood, we should explore, first, what childhood means [...] within particular moral and political economies, and, second, what these assumptions about children structured into theories and practices pass over and fail to help us address.⁸²⁴

2.(b). *Jointly lost: childhood and the homeland*

In a 1988 article, Israeli-Palestinian writer Anton Shammas linked two supposed losses – the loss of childhood and that of the homeland: “The State of Israel hasn’t only confiscated the land from

⁸¹⁶ See, e.g., BUCK ET AL., *supra* note 101, at 129-130; Lewis, *supra* note 48, at 14.

⁸¹⁷ Jefferess, *supra* note 435, at 81-82, 90-91; DIMITRA HARTAS, *THE RIGHT TO CHILDHOODS: CRITICAL PERSPECTIVES ON RIGHTS, DIFFERENCE AND KNOWLEDGE IN A TRANSIENT WORLD* vii-viii (Continuum, London and New York, 2008).

⁸¹⁸ *Supra* text accompanying notes 640-659, 682-713, and 727-735..

⁸¹⁹ *Supra* notes 497 and 629 and accompanying text.

⁸²⁰ On HROs’ desire to “internationalise” local issues in other contexts see Sam Gregory, *Transnational Storytelling: Human Rights, WITNESS, and video advocacy*, 108 *AMERICAN ANTHROPOLOGIST* 195, 201-202 (2006); Meg McLagan, *Making Human Rights Claims Public*, 108 *AMERICAN ANTHROPOLOGIST* 191, 191 (2006).

⁸²¹ *Supra* notes 627-639, 694, and 713 and accompanying text.

⁸²² Dussel, *supra* note 289, at 193 and the sources mentioned there.

⁸²³ For a critique of the conception of Western standards of childhood as “proper” and of the stereotyping of Third World children see, e.g., JAMES, JENKS AND PROUT, *supra* note 2, at 140-141 and the sources mentioned there.

⁸²⁴ Burman, *supra* note 435, at 61.

under the feet of the Palestinians in the occupied territories; it has also taken away their childhood.”⁸²⁵

This linkage has political and cultural resonance in Palestinian discourses generally,⁸²⁶ and can be found in at least two HRO publications:⁸²⁷ a 2008 report by *DCI – Palestine*⁸²⁸ and a 2001 report by *The Council for Arab-British Understanding*.⁸²⁹ Both these reports are also relevant to our broader discussion: they use the vocabulary of “trauma” and “PTSD”, and comment on Palestinian children in Israeli custody.

The *Council for Arab-British Understanding* report stipulates:

Children represent the dreams of the Palestinian community, their aspirations and their hopes for the future. But [...] Palestinians [...] have been unable to prevent the steady erosion of childhood. [...] The nakba⁸³⁰ [...] had a devastating effect on all Palestinians, including children. [...] Palestinian children’s dreams reveal [...] the desperate desire to liberate their people and regain their homeland. But their day-to-day reality fails to live up to the world of fantasy.⁸³¹

The *DCI – Palestine* report provides a more hopeful version of this story.⁸³² This report contains interviews with three Palestinians, whom it describes as “representing three generations”⁸³³ of a family living in a refugee camp in the West Bank: 16-year-old Sh’aban, his father, and grandmother.⁸³⁴ Among other things, Sh’aban’s father is said to blame Israel “for robbing him of his childhood”,⁸³⁵ and Sh’aban is quoted as saying that “Palestinian children do not lead normal lives. We are forced to grow up while we are still children”.⁸³⁶

⁸²⁵ Anton Shammas, *A Stone’s Throw*, 35 NEW YORK REVIEW OF BOOKS (March 31, 1988), available at <http://www.nybooks.com/articles/4482>.

⁸²⁶ For two additional examples of this linkage in Palestinian discourses see Peteet, *supra* note 260, at 166.

⁸²⁷ For another publication similarly reproducing this link see DCI – PALESTINE, TWENTY YEARS OF BUILDING A PALESTINIAN COMMUNITY FIT FOR CHILDREN – 1991-2011, at 46 (2011), available at <http://www.dci-palestine.org/sites/default/files/20yearsenn.pdf>.

⁸²⁸ DCI PALESTINE, *supra* note 704. See also DCI – Palestine, *61 Years after the Nakba: the Israeli army is still enacting the catastrophe* (2009), available at <http://www.dci-pal.org/english/display.cfm?DocId=1152&CategoryId=1> (a statement published a year later, advocating the Palestinian right of return).

⁸²⁹ Maria Holt, *The Right of the Child Denied: Palestinian Children Under Occupation 1* (a briefing of CAABU – The Council for Arab-British Understanding, 2001), available at <http://www.naba.org.uk/CONTENT/articles/FromArabia/CHILDREN.pdf> (emphasis added).

⁸³⁰ The term Nakba (Arabic for “catastrophe”) has come to designate, in Palestinian and pro-Palestinian discourses, the displacement of Palestinians that followed the Israeli Declaration of Independence in 1948. ENCYCLOPEDIA OF THE ISRAELI-PALESTINIAN CONFLICT, *supra* note 7, at 1557-1569.

⁸³¹ Holt, *supra* note 829, at 1-2, 17 (emphases added).

⁸³² We shall refrain from speculating about this disparity between the two reports.

⁸³³ On the significance of the concept of generation for the cultural production of Palestinian nationhood see COLLINS, *supra* note 19, at 10, 14-16.

⁸³⁴ DCI – PALESTINE, *supra* note 704, at 2.

⁸³⁵ *Id.*, at 7 (emphasis added).

⁸³⁶ *Id.*, at 2, 9-10 (emphasis added). See also *id.*, at 9-10 (“[Sh’aban’s] advice to Palestinian children [is]: ‘[...] Protect your lives because the occupation makes no distinction between young and old.’”).

The two following extracts from this report illustrate its tying together of this purported demise of childhood with the loss of the Palestinian homeland:

Because of the ever-increasing restrictions on movement within the [... OPT] and the construction of the [Separation] Wall, many [... Palestinian] children have never set foot on what was once their family's land. Nonetheless, a shared narrative and collective desire to return home binds each successive generation of Palestinians⁸³⁷

[...] the interviews [presented in the report] clearly revealed [...] common themes such as *stolen childhood, innocence lost, a longing to return home, and an undying hope for a better future.* [...] Palestinian boys hope to survive through young adulthood and live life free from the arbitrary arrest and detention that cruelly *steals the youth of thousands of Palestinians.* Having *lost their own childhood to forced displacement* [...], the *Nakba*⁸³⁸ generation has witnessed *the innocence of their children's youth lost to the occupation and the first Intifada*,⁸³⁹ and that of their grandchildren to the second *Intifada.* [...] After decades of waiting for their *right to return* to come to fruition, the *Nakba* generation now *hopes that their grandchildren will return and bury their remains on what was once their land.*⁸⁴⁰

The loss of childhood and the loss of the homeland, which the last extract partly links to arrest and detention by Israel, are thus characterised as intergenerational experiences collectively shared by Palestinians. These collective losses are depicted as almost causally interconnected: each consists of the other, and as long as the homeland remains out of reach – so will childhood. Palestinian children are said to hold the promise of returning to the stolen homeland. The Palestinian right of return – a cornerstone of the Palestinian political-legal struggle⁸⁴¹ – is presented as a right to return not only to the homeland but also to childhood. In this sense, the child and the homeland become metonymic: on the one hand national displacement leads to the demise of childhood, and on the other hand children embody the homeland through their potentiality.

The linkage between the supposed loss of childhood and a certain place (the Palestinian homeland), as well as a certain moment in history (in which this place was lost), sheds further light on the cultural politics of childhood – the socio-political practices and forces through which

⁸³⁷ *Id.*, at 1 (emphasis added).

⁸³⁸ On the Nakba see *supra* note 830.

⁸³⁹ On the Intifada see *supra* note 27.

⁸⁴⁰ DCI – PALESTINE, *supra* note 704, at 10 (emphases added – except for the emphases of the words “Nakba” and “Intifada” which are in original).

⁸⁴¹ On Palestinian refugees and the “right of return” see, e.g., ENCYCLOPEDIA OF THE ISRAELI-PALESTINIAN CONFLICT, *supra* note 7, at 1233-1249; Rashid I. Khalidi, *Observations on the Right of Return*, 21 JOURNAL OF PALESTINE STUDIES 29 (1992). For an international law perspective see, e.g., John Quigley, *Displaced Palestinians and a Right of Return*, 39 HARVARD INTERNATIONAL LAW JOURNAL 171 (1998). On the place the “right of return” occupies in Zionist and Palestinian discourses see Peteet, *supra* note 260, at 162, 165-167.

childhood is constructed.⁸⁴² In this case, the loss of the homeland, to which the loss of childhood is tied, is a basic starting point for Palestinian national narratives.⁸⁴³

This linkage to local, national, narratives coexists alongside HROs' previously discussed desire to globalise childhood.⁸⁴⁴ Palestinian childhood is thus "glocalised" – jointly informed by local and "global" factors.⁸⁴⁵ In the previous chapter, we saw another example of the glocalisation of Palestinian childhood: Palestinian children's joint detention with their elders is conceptualised through a mixture of "global" (developmentalist) perceptions and local narratives (the image of Israeli prison as a "political university" for Palestinians).⁸⁴⁶ These examples of the glocalised nature of childhood in the OPT illustrate that, rather than (or in addition to) asking to what extent the OPT are an exceptional case, it is important to pay due attention to the intersection of local and "global" factors in this setting.⁸⁴⁷

These two HRO reports construct unified intergenerational narratives, of Palestinians being continuously "exiled" from their homeland and childhood. Interestingly, in neither of the reports (that of *DCI – Palestine* and that of *The Council for Arab-British Understanding*), and in fact in none of the HRO documents quoted in this chapter (including those in which children are interviewed), are children's testimonies (as they are presented by the authors) referring to childhood as stolen. It is always individuals identified as "adults" – be it the adult authors⁸⁴⁸ or adult interviewees⁸⁴⁹ – who use this terminology. Of course, Palestinian children might elsewhere depict their childhood as "lost" or "stolen",⁸⁵⁰ but the fact that this is not the case in any of the above

⁸⁴² On the "cultural politics of childhood" see *supra* note 460 and accompanying text.

⁸⁴³ ROBERT BOWKER, *PALESTINIAN REFUGEES: MYTHOLOGY, IDENTITY, AND THE SEARCH FOR PEACE* 87–88, 95 (Lynne Rienner, London, 2003).

⁸⁴⁴ *Supra* notes 627–639, 694, and 819–823 and accompanying text. Indeed, Westerners have been the main audience for the two HRO reports (written in English), as well as for Shamma's previously mentioned article (published in the *New York Review of Books*). On Palestinian refugees' use of an imagery of themselves as dependent upon external assistance, during the 1990s, as a means to raise donations from external parties, see generally BOWKER, *supra* note 843, at 54.

⁸⁴⁵ On glocalisation see, e.g., Gregory, *supra* note 820, at 201–202; Roland Robertson, *Glocalization: Time-Space and Homogeneity-Heterogeneity*, in *GLOBAL MODERNITIES* 25 (Mike Featherstone et al. eds., Sage, London, 1995). On the glocal nature of childhood see Hulqvist and Dahlberg, *supra* note 629, at 9–10; JAMES, JENKS AND PROUT, *supra* note 2, at 34, 144.

⁸⁴⁶ *Supra* text accompanying notes 628–639 and 655–663. On developmentalist conceptions of childhood see *supra* notes 467–471 and accompanying text.

⁸⁴⁷ Cf. Louise Holt and Sarah L. Holloway, *Editorial: Theorising Other Childhoods in a Globalised World*, 4 *CHILDREN'S GEOGRAPHIES* 135, 137–138 (2006) (arguing that instead of dichotomising the world into the Global North and South, children's geographers should explore the "glocalised" interconnections between the North and South).

⁸⁴⁸ *Supra* text accompanying notes 797–798, 800, 803–808, 830–831, and 838–840. I assume that the anonymous authors of *DCI's* report are adults. Nashif contends that under Israeli occupation, a practice of not naming Palestinian authors and publishers achieves two purposes: firstly, it creates a space out of reach of Israeli government's surveillance practices; and secondly, it reproduces the myth of a Palestinian collective which needs not be named. NASHIF, *supra* note 26, at 106–08.

⁸⁴⁹ *Supra* text accompanying notes 799, 805, 809, and 835.

⁸⁵⁰ See *SAVE THE CHILDREN – SWEDEN AND SAVE THE CHILDREN – UK, LIVING BEHIND BARRIERS: PALESTINIAN CHILDREN SPEAK OUT* 10 (2004), available at <http://sca.savethechildren.se/Documents/Resources/Living%20Behind%20Barriers%20-%20Palestinian%20children%20speak%20out%20%28ENGLISH%29.pdf> (quoting a Palestinian child

documents may indicate the limited extent to which children's testimonies actually inform the supposedly "shared narrative"⁸⁵¹ that HROs construct. Later in this chapter we will examine another aspect of this marginality of children's testimonies in HRO publications, and discuss this issue at greater length.⁸⁵²

2.(c). Psychological vocabulary meets the visual image: Israeli and Palestinian children

Similarly to its salience in HRO publications on Palestinian children, the language of "trauma" has also occupied a major place in Israeli legal discourses on the eviction of Israeli children from their settlements in the Gaza Strip.

Very few depictions of the evicted children's experiences as "trauma" can be found in court judgments concerning these children.⁸⁵³ In one case, three settler girls⁸⁵⁴ sued the police for non-pecuniary damages, for treating them violently and illegally when arresting them during a protest against the "disengagement". The court accepted their suit in part, awarded them compensation,⁸⁵⁵ and described the police actions as "undoubtedly *traumatic* for the claimants."⁸⁵⁶

In contrast, frequent references to the evicted children as "traumatised" children were made in the *Knesset* (Israeli parliament).⁸⁵⁷ Since 2004, the issue of the evicted children has been discussed repeatedly in public meetings of the parliamentary *Child's Rights Committee*,⁸⁵⁸ the *Constitution, Law, and Statute Committee*,⁸⁵⁹ and another (subsidiary) committee.⁸⁶⁰ Speakers in

as saying that the separation wall "prevents us from the most beautiful thing we own which is our childhood").

⁸⁵¹ *Supra* note 837 and accompanying text. See also BOWKER, *supra* note 843, at 17 ("A key goal of the organizations and individuals promoting particular imagery [...] is the use of collective memory to construct a distinct national identity and culture.")

⁸⁵² *Infra* text accompanying notes 982-993.

⁸⁵³ Here, I am referring only to non-youth court cases. Civil youth court cases are held behind closed doors, as explained *supra* text above note 309.

⁸⁵⁴ On the salience of settler girls against the backdrop of the "disengagement" see *supra* note 253 and accompanying text.

⁸⁵⁵ CivC 4501/06 *Marzel v. Bar* [2007] (Jerusalem Magistrate Ct.).

⁸⁵⁶ *Id.*, art. 35 (emphasis added).

⁸⁵⁷ According to information provided by the Knesset, parliamentary committees dedicated 137 public meetings to the "disengagement", in addition to dozens of deliberations on this topic in the Knesset assembly. The Knesset's reply to petition HCJ 1213/10 *Nir v. The Knesset Chairperson* [2011] (Sup. Ct.), available at <http://www.news1.co.il/ShowCurrentFile.aspx?FileID=3879>.

⁸⁵⁸ THE CHILD'S RIGHTS COMMITTEE 2005, *supra* note 47; THE CHILD'S RIGHTS COMMITTEE – THE 16TH KNESSET, TRANSCRIPT NO. 142 (November 8, 2005) (Hebrew), available at <http://www.knesset.gov.il/protocols/data/rtf/yeled/2005-11-08.rtf>; THE CHILD'S RIGHTS COMMITTEE – THE 17TH KNESSET, TRANSCRIPT NO. 25 (March 13, 2007) (Hebrew); THE CHILD'S RIGHTS COMMITTEE – THE 18TH KNESSET, TRANSCRIPT NO. 6 (June 23, 2009) (Hebrew), available at <http://www.knesset.gov.il/protocols/data/rtf/yeled/2009-06-23.rtf>; THE CHILD'S RIGHTS COMMITTEE – THE 18TH KNESSET, TRANSCRIPT NO. 23 (November 17, 2009) (Hebrew), available at <http://www.knesset.gov.il/protocols/data/rtf/yeled/2009-11-17.rtf>.

⁸⁵⁹ THE CONSTITUTION, LAW, AND STATUTE COMMITTEE 2004, *supra* note 766; THE CONSTITUTION, LAW, AND STATUTE COMMITTEE, *supra* note 767; THE CONSTITUTION, LAW, AND STATUTE COMMITTEE –

these committees often termed the “disengagement” a “traumatic event”,⁸⁶¹ particularly for the evicted children.⁸⁶²

Of special relevance to our discussion is a meeting of the *Child’s Rights Committee*, which took place in June 2009, and was dedicated to reviewing the evicted children’s wellbeing. In preparation for this meeting, the committee chair, MP Dani Danon, arranged for child evacuees’ drawings to be displayed in the *Knesset*.⁸⁶³ The children’s drawings soon turned out to possess great political and legal potency: as soon as the exhibition was installed, the *Knesset* Officer ordered its removal. After MP Danon intervened, the exhibition was put back in place. Danon told the Israeli press that the *Knesset* management opposed the exhibition because it contained “harsh political messages” (for example, one of the drawings included the text “we will not forget or forgive”).⁸⁶⁴

The meeting of the *Child’s Rights Committee* commenced with MP Danon referring to the drawings, saying among other things that “most of us have watched the exhibition of children’s drawings, an exhibition which *speaks for itself*.”⁸⁶⁵ A representative from the Ministry of Education thanked the committee chair for “the opportunity to *make the children’s voices heard through the drawings*.”⁸⁶⁶ This depiction of the drawings, as speaking for themselves and for the children, reproduced the belief (which is popular among child psychologists and others) that drawings can illuminate children’s inner world, often more meaningfully than words.⁸⁶⁷

16TH KNESSET, TRANSCRIPT NO. 499 (June 8, 2005) (Hebrew); THE CONSTITUTION, LAW, AND STATUTE COMMITTEE, *supra* note 340; THE CONSTITUTION, LAW, AND STATUTE COMMITTEE – 16TH KNESSET, TRANSCRIPT NO. 648 (December 21, 2005) (Hebrew), available at <http://www.knesset.gov.il/protocols/data/rtf/huka/2005-12-21.rtf>. The issue was also discussed in passing in THE CONSTITUTION, LAW, AND STATUTE COMMITTEE – 16TH KNESSET, TRANSCRIPT NO. 360 (December 26, 2004) (Hebrew); THE CONSTITUTION, LAW, AND STATUTE COMMITTEE, *supra* note 764; THE CONSTITUTION, LAW, AND STATUTE COMMITTEE – 16TH KNESSET, TRANSCRIPT NO. 565 (August 7, 2005) (Hebrew); THE CONSTITUTION, LAW, AND STATUTE COMMITTEE – 18TH KNESSET, TRANSCRIPT NO. 143 (January 19, 2010) (Hebrew).

⁸⁶⁰ THE SUBSIDIARY COMMITTEE ON THE STATE COMPTROLLER’S REPORT ON THE DISENGAGEMENT – THE 17TH KNESSET, TRANSCRIPT NO. 3 (July 4, 2006) (Hebrew), available at <http://www.knesset.gov.il/protocols/data/rtf/bikoret/2006-07-04.rtf>.

⁸⁶¹ For example, MP Yuri Stern said that “the trauma has just begun”, and the legal advisor to the government referred to the “disengagement” as “this traumatic event”. THE CONSTITUTION, LAW, AND STATUTE COMMITTEE, *supra* note 340.

⁸⁶² See, e.g., THE CHILD’S RIGHTS COMMITTEE 2005, *supra* note 47 (in which the committee chair emphasised the need to ensure that “the children, even if this process entails trauma, [...] be harmed as minimally as possible.”); THE CHILD’S RIGHTS COMMITTEE 2005, *supra* note 858 (in which MP Gila Finkelstein described the evicted children as being “in a state of post-trauma”).

⁸⁶³ Further information (in Hebrew) on the exhibition is available at <http://www.hebpsy.net/calendar.asp?id=1770> (posted by the exhibition curator and by the therapist who worked with the children).

⁸⁶⁴ Arik Bendar, *Danon Threatened – and the Drawings of the Gush Katif Children Would be Displayed in the Corridor*, NRG (June 22, 2009), available at <http://www.nrg.co.il/online/1/ART1/907/087.html> (Hebrew).

⁸⁶⁵ THE CHILD’S RIGHTS COMMITTEE, TRANSCRIPT NO. 6 (June 23, 2009), *supra* note 858 (emphasis added).

⁸⁶⁶ *Id.* (emphasis added).

⁸⁶⁷ Elbedour et al., *supra* note 149, at 221 and the sources cited there; Claire Golomb, *Drawing as Representation: The Child’s Acquisition of a Meaningful Graphic Language*, 20 VISUAL ARTS RESEARCH 14 (1994).

At the same time, the drawings were seen as incapable of speaking (for themselves and for the children) without a mental health professional who would “translate” what they were “saying”. To this end, the committee invited the therapist who had worked with the children. The therapist’s participation in the meeting brought into convergence the two modes of representation examined in this chapter: visual representations and a psychological conceptual framework.



*The therapist interpreting the children’s drawing for the committee,
As seen on the Israeli Parliament television channel.*

The therapist noted that she had examined the drawings with the help of a developmental psychologist and two other therapists, and then characterised one of the children’s drawings as “a drawing by a girl who underwent trauma”.⁸⁵⁸ Another drawing was described by the therapist as demonstrating that the child who made it “contains the trauma, he contains the eviction [...]”.⁸⁵⁹ Thus, visual imagery was presented as necessary for obtaining access to the children’s suffering, while psychological vocabulary was seen as necessary for deciphering this visual image.

⁸⁵⁸ THE CHILD’S RIGHTS COMMITTEE, TRANSCRIPT NO. 6 (June 23, 2009), *supra* note 858.
⁸⁵⁹ *Id.*

Like the HRO publications analysed earlier,⁸⁷⁰ here too children's trauma was linked to the loss of the homeland. The therapist presented a drawing showing two palm trees (a trademark of the evacuated settlements) on which a big "X" was drawn, and above which appeared the words: "this is absent":



A slide of the child's drawing. As seen on the Parliament channel.

"The absence is very visible",⁸⁷¹ commented the therapist, "[w]hat they are missing. And that is mainly home." The settler children's trauma was similarly linked to the loss of their home in an earlier meeting of that committee (by the director-general of the *Israeli National Council for the Child*),⁸⁷² and also in a High Court of Justice ruling which confirmed the legality of the evacuation.⁸⁷³

⁸⁷⁰ *Supra* notes 827-851 and accompanying text.

⁸⁷¹ Later in this chapter we will explore in depth this idea, that absence can be rendered visible. *Infra* text accompanying notes 939-982.

⁸⁷² THE CHILD'S RIGHTS COMMITTEE 2005, *supra* note 858 ("These children have undergone trauma. [They ...] left home, the place where they lived. [...] They had [...] to leave their destroyed home.").

⁸⁷³ HCJ 1661/05 *Coast of Gaza Regional Council v. The Israeli Knesset* [2005] (Sup. Ct.), art. 239 of the majority opinion ("the psychological effect of the evacuation on minors is not less than its effect on adults: [...] the minors too are required to leave their place of residence, [...] and to move to a new, unfamiliar place"). See also *id.*, arts. 238-239 of the majority opinion.

Also similarly to HRO representations of Palestinian children, in the *Child's Rights Committee* too, the term "loss" was used alongside "trauma". But here, a dispute broke out about the psychological terms applicable to the evicted children: the committee chair compared the children's situation to "a situation of mourning", whereas MP Avi Dichter opposed the term "mourning" and contended: "There are other applicable [...] concepts in psychology instead". To this, other MPs responded that "mourning" is "a term used by professionals. [...] This is psychotherapists' terminology [...] and] even if we do not like this term, [...] it [...] is] a psychological term."⁸⁷⁴ A 19-year-old speaker, who had been evicted from the Gaza Strip four years earlier, added his own perspective on the matter, by distinguishing "mourning" from "loss": "This term ['mourning'] has been explained to me [...]. [The eviction] is much harder than loss."⁸⁷⁵

The deliberations of the parliamentary committees thus further illustrate the widespread reference to psychological thinking and expertise. The substantial role psycho-legal language has played, in these debates and in HRO publications alike, attests to the widespread, appealing image of psychology as an "objective" and "scientific" knowledge; additionally, it attests to the assimilation of psychological vocabulary into popular discourses.⁸⁷⁶ Interestingly, the above debate about the "true" meaning of mourning demonstrates the tensions brought forth by this dual status of psychology, as both scientific and popular.

The *Child's Rights Committee* has dedicated far fewer meetings to Palestinian children than it has to Israeli settler children.⁸⁷⁷ In these few meetings, only a single reference was made to Palestinian children's trauma – by a child psychiatrist who worked in collaboration with HRO *Physicians for Human Rights – Israel*. The psychiatrist was invited by the committee, to talk about his interviews with Palestinian children who had been harassed by Israeli settlers. Similarly to the HRO publications we discussed earlier,⁸⁷⁸ the psychiatrist too used "trauma" as a mixture of diagnosis and admonition:

As a psychiatrist, I know there are traumatised children on both sides, Israelis and Palestinians [...]. After we examined these [Palestinian] children for an hour, let them play and draw, we found that they suffered trauma [...]. [...] in all the regions we work [in the OPT], we find the same issues with the [Palestinian] children. They suffer, and [...] they grow up with hatred [...].⁸⁷⁹

⁸⁷⁴ THE CHILD'S RIGHTS COMMITTEE, TRANSCRIPT NO. 6 (June 23, 2009), *supra* note 858. These two MPs were Uri Orbach and Orli Levi-Abeksis.

⁸⁷⁵ *Id.*

⁸⁷⁶ On these characteristics of psychology in contemporary (Western) society see Lomsky-Feder and Ben-Ari, *supra* note 775, at 124-125.

⁸⁷⁷ The committee dedicated 8 meetings (since 2005) to Israeli settler children, as compared with 3 meetings (since 2004) dedicated to Palestinian children.

⁸⁷⁸ *Supra* notes 794-796 and accompanying text.

⁸⁷⁹ THE CHILD'S RIGHTS COMMITTEE – 16TH KNESSET, TRANSCRIPT NO. 88 (November 2, 2004) (Hebrew), available at <http://www.knesset.gov.il/protocols/data/html/yeled/2004-11-02.html> (emphasis added).

The psychiatrist's reliance on children's drawings, and his use of psychological concepts to enable these drawings to "speak" (for themselves and for the children), are yet another illustration of the interrelationship and interdependency between psycho-legal and visual representations in constructing children's plight.

2.(d). *The Israeli child-soldier*

So far, we have examined psycho-legal representations of children's trauma, in HRO publications and in Israeli parliamentary committee meetings. This section will demonstrate that, on the one hand, in Israeli parliamentary committee meetings, Israeli childhood was militarised, by referring to the evicted settler children as soldiers in the making; on the other hand, courts trying Israeli soldiers for abusing Palestinian children have sometimes infantilised these soldiers, by characterising them as children or childish.⁸⁸⁰ Thus, in these legal sites, the vocabulary of "trauma" and "loss" has constructed the figure of "the traumatised child" as mutually tied to another category: "soldier".

2.(d).1. Militarised children

In parliamentary committee meetings, before and during the "disengagement", some noted to the Israeli settler youths' credit their future military service. A government worker involved in assisting the evicted settlers said, in a meeting of the *Child's Rights Committee*: "These youths are essentially wonderful youths, these are youths who are *supposed to go on into serving in the military*."⁸⁸¹ In a later meeting of the committee, MP Gila Finkelstein similarly remarked: "These are the best youths in the State of Israel [...]. *They are in the finest [military] units and are the [sic] excellent soldiers*".⁸⁸² In a meeting of the *Constitution, Law, and Statute Committee*, the committee chair MP Michael Eitan argued against trying settler youth who had participated in violent anti-evacuation protests, "as some of them are still minors, *are going to the most combative units we have*, and should be allowed to do so".⁸⁸³ In the same meeting, a mother of a settler minor who was held in

⁸⁸⁰ Israeli courts-martial have infantilised soldiers beyond the particular context of the abuse of Palestinian children. For instance, soldiers who stole military weapons were portrayed as childish in the following cases: MilC 33/01 *Nufdat v. The Military Prosecutor* [2001] (Appeals Ct.-Martial); MilC 128/01 *The Military Prosecutor v. Gal* [2002] (Ground Forces Dist. Ct.-Martial); MilC 134/02 *The Military Prosecutor v. Dinal* [2002] (Ground Forces Dist. Ct.-Martial); MilC 329/03 *The Military Prosecutor v. Rami* [2003] (Ground Forces Dist. Ct.-Martial). Recently, a civil court held that Border Police soldiers should be treated leniently due to their young age and lack of experience: CrimC 21962-02-10 *The State of Israel v. Ofir* [2011] (Beersheba Dist. Ct.).

⁸⁸¹ THE CHILD'S RIGHTS COMMITTEE 2005, *supra* note 47 (emphasis added).

⁸⁸² THE CHILD'S RIGHTS COMMITTEE 2005, *supra* note 858 (emphasis added).

⁸⁸³ THE CONSTITUTION, LAW, AND STATUTE COMMITTEE, *supra* note 340 (emphasis added).

detention warned: "our children [...] are *not interested in serving in the military*. [...] In the name of the parents I turn to you [the MPs ...], to [...] ask for general pardon [of the settler protesters ...]."⁸⁸⁴

These depictions of the evicted children as soldiers-to-be, whose enlistment might be hindered by criminal proceedings or reduced motivation, exemplifies the prominence of militarism in (Zionist) Israeli society,⁸⁸⁵ and the role of military service as a primary rite of passage to adulthood and full citizenship (especially for men).⁸⁸⁶

In later meetings of the parliamentary committees, similar concerns were sometimes interwoven with claims about the settler youth's trauma and loss.⁸⁸⁷ For example, in a meeting of the *Constitution, Law, and Statute Committee*, several months after the evacuation of the settlements, MP Sha'ul Yahalom described the "disengagement" as an unprecedented "traumatising" event, and added:

filing charges [against minors] can stain them for life. [The State Attorney's Office is ...] now going to destroy the lives of hundreds of young guys, the salt of the earth, who protested against a terrible trauma [...]. [...] some of these minors *are also not conscripted*. [The military says ...]: before you enlist, go to the military Mental Health Officer [a psychiatrist/psychologist authorised to assess suitability for military service.]. So they [the military] *destroy any motivation to serve in the military* [...].⁸⁸⁸

MP Yahalom proposed, on this basis, that charges against all settler youth be withdrawn, except when there is evidence of physical violence (a proposition that eventually became a reality, as described in Chapter 2⁸⁸⁹). Yahalom further suggested that, in any case, "no measures should be taken against [settler] minors *prior to their recruitment*".⁸⁹⁰ Other speakers in that meeting

⁸⁸⁴ *Id.* (emphasis added).

⁸⁸⁵ Henriette Dahan-Kalev, *Officers as Educators: The Ex-Military in the Israeli School System*, 12 ISRAEL AFFAIRS 268 (2006); KIMMERLING, *supra* note 65; MILITARISM AND ISRAELI SOCIETY (Gabriel Sheffer and Oren Barak eds., Indiana University Press, Bloomington IN, 2010); MILITARISM IN EDUCATION (Hagit Gur ed., Bavel Publishing, Tel Aviv, 2005) (Hebrew); THE MILITARY AND MILITARISM IN ISRAELI SOCIETY (Edna Lomsky-Feder and Eyal Ben-Ari eds., State University of New York Press, Albany NY, 1999).

⁸⁸⁶ Danny Kaplan, *The Military as a Second Bar Mitzvah: Combat Service as Initiation to Zionist Masculinity*, in IMAGINED MASCULINITIES: MALE IDENTITY AND CULTURE IN THE MIDDLE EAST 127, 127-128, 130, 135-136, 139-140 (Mai Ghoussoub and Emma Sinclair-Webb eds., Saqi Books, 2000). Normally, Israeli soldiers are conscripted at the age of 18 years; men serve three years, and women serve two years.

⁸⁸⁷ Anxieties about the settler youth's motivation to serve in the military were also publicly expressed elsewhere. See, e.g., Amos Harel, *Influenced by the Disengagement: Less Religious Jewish Soldiers Volunteer for Command Courses*, HAARETZ (July 19, 2005) (Hebrew), available at <http://news.walla.co.il/?w=/21/748958>; Amos Harel, *High-Ranking Military Officers: The Disengagement Caused Youth to Evade Conscripton*, HAARETZ (January 9, 2007) (Hebrew), available at <http://www.haaretz.co.il/misc/1.1377306>.

⁸⁸⁸ THE CONSTITUTION, LAW, AND STATUTE COMMITTEE, TRANSCRIPT NO. 648 (December 21, 2005), *supra* note 859 (emphases added).

⁸⁸⁹ *Supra* text accompanying notes 340-344.

⁸⁹⁰ THE CONSTITUTION, LAW, AND STATUTE COMMITTEE, TRANSCRIPT NO. 648 (December 21, 2005), *supra* note 859 (emphasis added).

expressed similar sentiments.⁸⁹¹ The language of militarism and that of trauma thus intertwined in constructing the interrelationship between the categories “child” and “soldier”.

2.(d).2. Infantilised soldiers

As explained in Chapter 1, I obtained court files in 12 cases of Israeli soldiers who were convicted of abusing Palestinian children.⁸⁹² The vocabulary of “trauma” and “loss” occupies a substantial place in these documents. Thus, claims were repeatedly made in the courtroom – and usually backed by psychological assessments – that the abusers suffered from PTSD or “harsh psychological fatigue” as a result of their military service, or had experienced “loss” after the death of fellow soldiers. In at least four cases, the courts accepted these claims as a basis for mitigation⁸⁹³ – which illustrates the mitigating potential that the image of the soldier as traumatised holds.⁸⁹⁴ At the same time, two other courts did not consider it to be a mitigating factor;⁸⁹⁵ another court concluded that the soldier’s PTSD resulted from his offences and trial rather than his military service⁸⁹⁶ (but these courts too described military service in the OPT as potentially traumatizing).

In three of these cases, the courts not only described the soldiers as traumatised, but also infantilised them, by underlining their childhood or childishness. Thus, in 2003, a court-martial convicted two military police soldiers of physically assaulting two Palestinian children while transferring them to a detention facility.⁸⁹⁷ The court, and the Appeals Court-Martial which later

⁸⁹¹ The committee chair, MP Michael Eitan, described as “a disaster” the scenario in which charges against a 13-year-old settler would later limit his military service options. And MP Yitzhak Levi asked the Deputy Attorney General to expedite the conclusion of charges against youth settlers who are awaiting military service. THE CONSTITUTION, LAW, AND STATUTE COMMITTEE, TRANSCRIPT NO. 648 (December 21, 2005), *supra* note 859.

⁸⁹² *Supra* text accompanying notes 232-235. Six of these cases do not raise issues of relevance to our discussion, and are therefore not analysed in this chapter: MilC 240/02 *The Military Prosecutor v. Saban* [2002] (Central Dist. Ct.-Martial); MilC 291/02 *The Military Prosecutor v. Uzeri* [2002] (Central Dist. Ct.-Martial); MilC 84/04 *The Military Prosecutor v. Elbaz* [2005] (Appeals Ct.-Martial); CivC 6326/04 *Al-Shuahin v. Barazani* [2006] (Jerusalem Magistrate Ct.); CivC 6545/05 *Jabari v. Albilal* [2008] (Jerusalem Dist. Ct.); MilC 145/08 *The Military Prosecutor v. Shmeor* [2008] (Appeals Ct.-Martial). See also THE CRIMINAL LAW OF THE IDF, *supra* note 236, at 506 (mentioning a conviction by a court-martial of a reserve soldier who raped and assaulted two Palestinian children while their heads were covered and hands were tied, in the early 1990s).

⁸⁹³ MilC 272/02 *The Military Prosecutor v. Cohen* [2002] (Central Dist. Ct.-Martial); MilC 291/02, *supra* note 892; MilC 222/03 *The Military Prosecutor v. Lieberman* [2003] (Centre Dist. Ct.-Martial); CrimC 2420-05-11 *The State of Israel v. Uzeri* [2011] (Jerusalem Dist. Ct.).

⁸⁹⁴ See, e.g., Lomsky-Feder and Ben-Ari, *supra* note 775, at 121-122 (arguing that emphasising violent perpetrators’ traumatic military service absolves them of moral responsibility).

⁸⁹⁵ MilC 146/03 *The Military Prosecutor v. Rozner* [2003] (App. Ct.-Martial); CrimC 390/04 *The State of Israel v. Brier* [2005] (Jerusalem Dist. Ct.).

⁸⁹⁶ CrimC 157/03 *The State of Israel v. Butvika* [2008] (Jerusalem Dist. Ct.).

⁸⁹⁷ MilC 222/03, *supra* note 893; MilC 222a/03 *The Military Prosecutor v. Rozner* [2003] (Centre Dist. Ct.-Martial).

increased the soldiers' sentences,⁸⁹⁸ both described one soldier's childhood as difficult, and considered this to be a mitigating circumstance.⁸⁹⁹ The appellate court remarked that the defendant's

integration into the Israeli military and society, despite his difficult childhood [...] is to his credit. [...] Although it is not the court's custom to do so, we allow ourselves to address Li'or [the defendant] with words exceeding the bounds of law. Although our verdict is substantially harsh, we are deeply impressed by his past and by his ability to overcome the pain of his childhood.⁹⁰⁰

In another case, in 2002, four Border Police soldiers entered the Palestinian city of Hebron with a military jeep, took onto the jeep a 17-year-old Palestinian, assaulted him, shoved him outside the jeep while it was moving – which resulted in his death – and left the site without checking his condition. They were brought to trial, convicted of manslaughter (some as perpetrators and others as accomplices) and kidnapping for the purpose of battery (alongside other charges⁹⁰¹), and were sentenced to prison sentences of 4.5 to 8.5 years, in addition to probation sentences.⁹⁰²

Here, it was a defendant's alleged childishness (rather than his past childhood) which emerged in the hearings. The defendant's attorney submitted as evidence, in his plea for leniency, a psycho-diagnostic evaluation which (according to the eventual court ruling) described him as "childish, of immature personality". On the basis of this evaluation, the court found that "the defendant's involvement in committing the offences can be attributed to his weak personality, which made him feel helpless and passive." Further to this infantilisation of the defendant, the court ruling also termed him a victim:

the acts of violence to which he was part can be seen as a venting of cumulative frustration by being inferior and *a victim himself*. Out of 'identification with the aggressor', the defendant was drawn to experience control and strength vis-à-vis an inferior and helpless object.⁹⁰³

⁸⁹⁸ The appellate court increased one soldier's prison sentence from five months to ten months, and the other soldier's sentence from five months on probation to seven months in prison in addition to a probation sentence and demotion. MilC 128/03 *The Military Prosecutor v. Lieberman* [2003] (App. Ct.-Martial) (joint ruling concerning both appellees); MilC 146/03, *supra* note 895.

⁸⁹⁹ MilC 128/03, *supra* note 898; MilC 222/03, *supra* note 893.

⁹⁰⁰ MilC 128/03, *supra* note 898.

⁹⁰¹ Some defendants were convicted of obstruction of justice, for reasons described below. *Infra* text accompanying note 929. Two defendants were also charged with harassing a witness. There were additional charges concerning adult victims.

⁹⁰² This is a necessary simplification of their hearings, which were quite elaborate in two main respects. First, they were tried separately due to their different roles in the abuse. For the separate court decisions see CrimC 157/03, *supra* note 896; CrimC 907/05 *The State of Israel v. Wahabi* [2005] (Jerusalem Dist. Ct.); CrimC 3172/07 *The State of Israel v. Lanza* [2008] (Jerusalem Dist. Ct.). Second, the State and two of the defendants appealed to the Supreme Court. For the judgements see CrimC 10594/05 *Bassem v. The State of Israel* [2006] (Sup. Ct.); CrimC 5136/08 *The State of Israel v. Lanza* [2009] (Sup. Ct.).

⁹⁰³ CrimC 907/05, *supra* note 902 (emphasis added).

Interestingly, the defendants in this case were further infantilised after the completion of their trial. When their sentences were published, Israeli right-wing MP Michael Ben-Ari told the Israeli press: "I feel that our *soldiers and children* have been betrayed. Even if they failed, *they are still our children*."⁹⁰⁴

In 2011, an Israeli Border Police soldier was convicted of abusing and threatening a Palestinian child detainee, and was sentenced to three months in prison, three months of community service, and nine months on probation.⁹⁰⁵ The soldier's attorney advocated a lenient sentence on the basis of her being just "a 20 year old girl"⁹⁰⁶ who served in the Border Police in difficult locations". Judge Amnon Cohen accepted this portrayal of the defendant, and in his ruling stipulated: "I am taking into consideration the defendant's [...] young age. [...] if it was not for the Probation Service's recommendation, I would have imposed on the defendant a long prison sentence."⁹⁰⁷

Thus, alongside the Palestinian children – the abuse victims – the soldiers' trials in various ways revolved around other children: these soldier-children. The soldiers' childhood, or childishness, affected their sentences and the court rhetoric generally. In this respect, further to our discussion of the elusiveness of childhood in the contexts of age (Chapter 3) and the "loss of childhood" discourse (this chapter), the child appears, again, to be a more ambiguous legal figure than formal statutory definitions of childhood suggest.

As the above cases illustrate, the instability of the adult/child divide can be accompanied by the instability of another distinction: that between victim and perpetrator. The affinity between these two concepts – "child" and "victim"⁹⁰⁸ – is perhaps unsurprising, as both of them are paradigmatic categories for innocence and passivity.⁹⁰⁹

Evidently, the courts' description of defendants as trauma victims and as children/childish is not exclusive to such circumstances. Yet, in cases such as the above, this psycho-legal discourse

⁹⁰⁴ Avi'ad Glikman, *8.5 Year Sentence to the Policeman Who Killed A Palestinian by Throwing Him from a Jeep*, YNET NEWS (April 27, 2009) (Hebrew), available at <http://www.ynet.co.il/articles/0,7340,L-3707499,00.html>.

⁹⁰⁵ CrimC 2420-05-11, *supra* note 893. The soldier was also convicted of recklessness, for lighting her match near detonating caps which she had found in the child's possession.

⁹⁰⁶ The attorney used the Hebrew word "yakda", which refers exclusively to female children.

⁹⁰⁷ CrimC 2420-05-11, *supra* note 893.

⁹⁰⁸ On the relation between childhood and victimhood see, e.g., Morgan Genevieve Blue, *Accidental Deaths: the Violence of Representing Childhood in Law & Order*; Special Victims Unit, RED FEATHER 1, 5 (2012) ("childhood is inextricable from victimhood"); HOLLAND, *supra* note 598, at 159 ("Childhood is about impotence and weakness. Acceptable victimization is part of the visual repertoire [...] of childhood").

⁹⁰⁹ On this conception of the victim see, e.g., Arthur Kleinman and Joan Kleinman, *The Appeal of Experience; The Dismay of Images: Cultural Appropriations of Suffering in Our Times*, 125 DAEDALUS 1, 9-10 (1996). On this conception of the child see, e.g., Pia Haudrup Christense, *Childhood and the Cultural Constitution of Vulnerable Bodies*, in THE BODY, CHILDHOOD AND SOCIETY 38 (Alan Prout ed., Palgrave MacMillan, London and New York, 2000); JAMES AND JAMES, *supra* note 115, at 50; JAMES, JENKS AND PROUT, *supra* note 2, at 13-15; ROSEN, *supra* note 19, at 1, 7, 122, 124-26, 129-31, 133.

has particular significance: it grants Israeli soldiers access to the symbolic position of child/childish victims of the Israeli-Palestinian conflict.⁹¹⁰

Additionally, the courts' depiction of the abusive soldiers as children/childish and/or as victims, may well exemplify a general shift in the dominant imagery of soldiers in Israel. While in the past the image of the soldier in Israeli public discourses was mainly of a responsible adult, now a prevalent image is that of the soldier as a vulnerable and dependent child.⁹¹¹ The widespread imagery of soldiers as children may coincide with two social changes in Israel, which have been argued to increase the focus on soldiers' emotional health. First, the growing place psychology and therapeutic models occupy in Israeli public discourses about the military, and their growing importance in how the military itself deals with situations of pressure and crisis. And second, the growing involvement of soldiers' parents in the military, including, for example, the influential ad hoc political movements run by soldiers' parents; an increase in the complaints submitted by parents to the Military Ombudsman; and the introduction of regular parental visits to military bases.⁹¹²

Interestingly, a similar dissolving of the boundaries between the soldier-perpetrator and the child-victim – appeared in a meeting of the parliamentary *Constitution, Statute, and Law Committee*, a year prior to the “disengagement”. During this meeting, the potential effect of the legislation concerning the evacuation on settler children was discussed, and the Deputy Legal Advisor of the Ministry of Justice commented that sending soldiers and police to evacuate the settlements is a precarious matter. In response, MP Yitzhak Levi noted: “we are talking about children now” (as opposed to talking about soldiers and police) – to which MP Reshef Hen immediately responded: “Yes. This soldier too, who only yesterday was a child.”⁹¹³

Israeli legal discourses about child victims – be they offence victims or “victims” of the “disengagement” – thus appear to be “haunted” by other children (and victims): the children that Israeli soldiers are imagined to have been.

⁹¹⁰ Cf. Brunner, *supra* note 788, at 106-107 (“Until the inception of PTSD, the moral grammar of trauma discourse drew strict boundaries between victims and perpetrators. [...] The notion of PTSD [...] transformed this dichotomist moral grammar, [allowing ...] soldiers who had committed war crimes [...] to enter into the role of traumatized [war] victims”).

⁹¹¹ Lomsky-Feder and Ben-Ari, *supra* note 775, at 120, 123. See also Duschinsky, *supra* note 149, at 41 (describing how formerly-captured Israeli soldier Gilad Shalit was recently depicted as a child in Israeli public discourse).

⁹¹² Yoram Bilu and Eliezer Witztum, *War-Related Loss and Suffering in Israeli Society: An Historical Perspective*, 5 ISRAEL STUDIES 1, 24 (2000); Hanna Herzog, *Family-Military Relations in Israel as a Genderizing Social Mechanism*, 31 ARMED FORCES & SOCIETY 5, 9 (2004); Lomsky-Feder and Ben-Ari, *supra* note 775, at 114-115, 120-122.

⁹¹³ THE CONSTITUTION, LAW, AND STATUTE COMMITTEE, TRANSCRIPT NO. 360 (December 26, 2004), *supra* note 859.

3. VISUAL REPRESENTATION OF PALESTINIAN CHILDREN'S ABUSE

After examining psycho-legal representations of childhood and trauma in several contexts, let us now turn to visual representations. We will focus on various factors which hinder the visual representation of Palestinian children's (alleged) traumatising during their arrest and interrogation. Again, we will examine these factors, among other things, through trials of Israeli soldiers who abused Palestinian children. Then, we will analyse some of the images which, despite these obstacles to visual representation, HROs produce to represent Palestinian children's trauma in Israeli custody. These images, it will be argued, can be read (interpreted) not only as limited by representational obstacles of sorts, but also as rendering these obstacles conspicuous – and in this sense rendering the invisibility of Palestinian children's trauma visible.

3.(a). Palestinian children's invisible traumatising

According to HRO reports, Palestinian child ex-detainees frequently report having been abused during their arrest and interrogation. For example, *DCI – Palestine* recently reported that of 311 Palestinian children it had interviewed, 234 (75 percent) complained they had been subjected to physical violence, 178 (57 percent) complained about having been verbally threatened, and 169 (54 percent) reported having been verbally abused or humiliated.⁹¹⁴ Similar HRO reports abound.⁹¹⁵ HROs argue that the main – and sometimes only – source of evidence against Palestinian children is the confession Israeli interrogators obtain from them.⁹¹⁶ This is one of the reasons why Palestinians who were interviewed after being tried in the military courts tended to view the interrogation, rather than the courtroom trial, as their “real” trial.⁹¹⁷

The story of Palestinian child detainees' purported abuse – especially during their interrogations – is largely determined by important invisibilities of different sorts. First, as explained in Chapter 2, interrogations of Palestinians (children and adults) are almost never

⁹¹⁴ *DCI – PALESTINE*, *supra* note 26, at 67.

⁹¹⁵ See, e.g., B'TSELEM, *supra* note 59, at 23-25; B'TSELEM, *supra* note 96, at 38; *DCI – PALESTINE*, *supra* note 32, at 25-46. For further information on Israel's arrest and interrogation of Palestinian children see *supra* notes 383-397 and accompanying text.

⁹¹⁶ *DCI – PALESTINE*, *supra* note 249, at 2 (of 140 Palestinian child ex-detainees, 81% of those detained in 2009 and 50% of those detained in 2010 reported to have confessed during their interrogation); UN COMMITTEE AGAINST TORTURE, *supra* note 492 (expressing its concern regarding allegations that 95% of convictions of Palestinian children had relied on confession).

⁹¹⁷ *HAIJAR*, *supra* note 21, at 188-190. Prior to the interrogation, a preliminary questioning takes place – on which see B'TSELEM, *supra* note 96, at 29-30. Another sense in which Palestinian children's trial could be said to largely take place outside the courtroom concerns the prevalence of plea bargains in military court trials. See *supra* note 97 and accompanying text.

recorded audio-visually⁹¹⁸ – unlike interrogations of Israelis. Israeli law also does not grant Palestinian children the right to have an attorney or a family member present in the interrogation.⁹¹⁹ These interrogations are therefore invisible to anyone but the Israeli interrogators and the interrogated Palestinian child.⁹²⁰

This invisibility is further intensified by the tendency of Israeli authorities to deny accusations that abuse takes place during their interrogations.⁹²¹ According to information provided by the Israeli Ministry of Justice, over 750 complaints about the abuse or torture of Palestinian by the Israeli Security Agency interrogators were submitted to the Israeli State Attorney's Office between 2001 and 2010 – but in none of them was a criminal investigation ordered.⁹²²

⁹¹⁸ *Supra* note 428 and accompanying text. Recently, the police inexplicably made audio-visual records of two Palestinian children's interrogations. While these recordings do not show physical abuse, in one of these cases the defence used the recording to argue that the child's confession was inadmissible, but the court rejected this claim. MilC 1367/11 *The Military Prosecution v. Ayyoub* [2012] (Judea Mil. Youth Ct.). For HRO reports on this case see ACRI – Association for Civil Rights in Israel, 'Minor A.' from *Nabi Saleh: The Rights of Minors in Criminal Proceedings in the West Bank* (2012), available at <http://www.acri.org.il/en/wp-content/uploads/2012/02/Minors.pdf>; B'Tselem, *Judge holds confession of Palestinian minor admissible, although it was obtained through breach of his rights* (January 15, 2012), available at http://www.btselem.org/torture/20120115_flawed_confession_of_minor_held_admissible. For media reports see, e.g., Isabel Kershner, *Palestinian's Trial Shines Light on Military Justice*, THE NEW YORK TIMES (February 18, 2012), available at http://www.nytimes.com/2012/02/19/world/middleeast/palestinians-trial-shines-light-on-justice-system.html?_r=2&ref=middleeast; Harriet Sherwood, *The Palestinian children – alone and bewildered – in Israel's Al Jalame Jail*, THE GUARDIAN (January 22, 2012), available at <http://www.guardian.co.uk/world/2012/jan/22/palestinian-children-detained-jail-israel>; Catrina Stewart, *How Israel takes its revenge on boys who throw stones*, THE INDEPENDENT (August 26, 2011), available at <http://www.independent.co.uk/news/world/middle-east/how-israel-takes-its-revenge-on-boys-who-throw-stones-2344037.html>.

⁹¹⁹ *Supra* notes 395–397.

⁹²⁰ In fact, the interrogees themselves often do not fully see their interrogation, if they are blindfolded. This issue and its significance will be below. *Infra* notes 961–962 and 965 and accompanying text.

⁹²¹ There are few notable exceptions to this tendency, such as the 1987 Landau Commission report, which was commissioned by the Israeli government. For a critical discussion of that report see, e.g., HAJJAR, *supra* note 21, at 70–72. Another exceptional example is the Israeli High Court of Justice ruling in HCJ 5100/94 *The Public Committee Against Torture in Israel v. The Israeli Government* [1999] (Sup. Ct.) (Hebrew), available at <http://www.stoptorture.org.il/files/torture%20bagatz%20psak%20din.pdf>. For critical discussion see HAJJAR, *supra* note 21, at 75; Inseis, *supra* note 83; Bana Shoughry-Badame, *A Decade after the High Court of Justice "Torture" Ruling. What's Changed?*, in THREAT: PALESTINIAN POLITICAL PRISONERS IN ISRAEL 114 (Abeer Baker and Anat Matar eds., Pluto Press, New York, 2011). See also Cohen, *supra* note 34, at 71–72 (contending that the Israeli military tends to hold accountable soldiers who individually violate its orders, rather than soldiers who implement policies decided on by the higher levels of military command).

⁹²² The Public Committee Against Torture in Israel, *International Human Rights Day: Press Release* (2011) (Hebrew), available at <http://www.stoptorture.org.il/he/node/1778>. Lisa Hajjar adds that only two Israeli General Secret Service interrogators have ever been sentenced to prison (to six months, for kicking to death a Palestinian). HAJJAR, *supra* note 21, at 73. For claims that Israel superficially and unsatisfactorily investigates allegations of violent treatment during interrogations, and allegations of deaths of Palestinians as a result of Israeli military actions see, respectively, B'TSELEM, *supra* note 96, at 41–43; Cohen, *supra* note 34, at 72. For further information see, e.g., Catherine M. Grosso, *International Law in the Domestic Arena: The Case of Torture in Israel*, 86 IOWA LAW REVIEW 305 (2000).

The Palestinian children's trials render their alleged abuse invisible in yet another, metaphorical sense: the numerous military court transcripts examined for this study rarely record claims by the defence that the child's confession had been coerced. On the rare occasions that such allegations are recorded, the courts tend not to investigate them.⁹²³ Indeed, none of the military court judges sociologist of law Lisa Hajjar interviewed recalled ever having excluded a confession, and the attorneys she interviewed considered challenging a confession ineffective and even potentially harmful in terms of the eventual sentence.⁹²⁴

Thus, four main representational invisibilities surround the alleged abuse of Palestinian child interrogees: the absence of audio-visual record, the absence of other witnesses (the child's attorney or family member), the interrogators' *de facto* immunity, and the military courts' tendency to disregard abuse allegations in children's hearings.

Since Israeli interrogators have not been brought to trial for such allegations, we are left with no court transcripts to analyse. However, the 12 court cases I obtained involving Israeli soldiers who were convicted of abusing Palestinian children (in circumstances other than interrogation)⁹²⁵ are valuable to our broader discussion, as they exemplify another form of potential invisibility: the concealment of the abuse by the abusers.⁹²⁶

Spoliation of evidence (i.e., the withholding, hiding, altering, or destroying of evidence), while exclusive neither to cases involving children nor to the OPT, has particular importance in this context.⁹²⁷ Two of the court cases examined earlier in this chapter⁹²⁸ illustrate this: in one case, the defendants videotaped their abuse of the Palestinian child, but later destroyed the potentially-incriminating tape, and disposed of the (dead) child's coat. They also coordinated their stories to

⁹²³ See, e.g., MilC 1270/09 *The Military Prosecution v. Sweitt* [2009] (Mil. Ct. App.) (refraining from recommending an investigation of a child's complaints about being beaten during his interrogation and denied sleep); MilC 2763/09 *Alam v. The Military Prosecution* [2009] (Mil. Ct. App.) (briefly mentioning, but effectively ignoring, the defence attorney's claim that the child was beaten during his interrogation).

⁹²⁴ HAJJAR, *supra* note 21, at 109. Furthermore, these judges and prosecutors sometimes inferred that torture was not common, often argued that Palestinians confessed to "show off" to the interrogators or to appear heroic in their community, or contended that Palestinian defendants alleged to having been tortured so as to no appear as cowardly. *Id.* For an exceptional case, in which a military court excluded a confession on the grounds that it had been coerced, see B'Tselem, *supra* note 96.

⁹²⁵ On the cases involving abusive soldiers which this study examines see *infra* text accompanying notes 232-239.

⁹²⁶ On the other hand, recently – especially with the rise of online social network (such as Facebook) – a growing number of photos (taken by Israeli soldiers) depicting their abuse of Palestinian detainees has been brought to light, and has evoked public debate in Israel. On this issue see, e.g., B'TSELEM, *supra* note 96, at 28-29. Another aspect of this invisibility might be the minimal attention paid to the torture of Palestinian child detainees in debates about Israel's practice of torture, according to COOK, HANIEH AND KAY, *supra* note 28, at 157-158.

⁹²⁷ In order for us not to impose preconceptions on the subject matter, we should not downplay any phenomenon simply because it resonates with contexts beyond the OPT, or because it puts children in a similar position as adults.

⁹²⁸ *Supra* notes 901-907 and accompanying text.

avoid suspicion, and altered the journey records of the jeep in which they had abused the child. When a police investigation was opened, the defendants initially denied all accusations, and two of them even harassed and threatened a colleague who had testified against them.⁹²⁹ In the other previously mentioned case, a soldier who witnessed the abuse of the Palestinian child, rather than stopping or reporting it, made certain nobody would see it.⁹³⁰

Two similar cases further illustrate this form of invisibility. In one case, in 2000, a Border Police soldier was convicted of assaulting three Palestinian children during their transfer to a detention facility, and was sentenced to 14 months in prison and 15 months on probation;⁹³¹ soon afterward, the Israeli Supreme Court increased his prison sentence to three years.⁹³² In this case, when an investigation was initially opened (following a complaint by Israeli HRO *Hamoked*), two Border Police officers who had witnessed these offences denied the allegations, and only confessed after being told of the existence of corroborating evidence.⁹³³ The abuser himself denied most of the accusations throughout his hearings. Also during the trial, the abused children testified that he had presented himself to them under a false name, and that his two colleagues who had been present had also referred to him by that name.⁹³⁴ The defendant confirmed this accusation, and admitted that there had been an accepted practice within his military company of using false names in front of Palestinians to avoid prosecution in the event of a complaint.⁹³⁵

On another occasion, in 2005, three Border Police soldiers were convicted of aggravated assault and abuse of two Palestinian children (and of obstruction of justice); their prison sentences ranged from six to ten months, and their probation sentences ranged from eight to 12 months.⁹³⁶ In this case, after abusing the children, the soldiers attempted to conceal their actions, by avoiding filling out any report or record of the event, and by deciding to disavow the event completely if asked about it.

Silencing and covering up by abusive soldiers and their colleagues might thus be a significant cause for the potential invisibility of Palestinian children's abuse.⁹³⁷ To borrow literary scholar Shoshana Felman's words, the above four cases can be seen as "dramatizing [...] a [...]"

⁹²⁹ CrimC 157/03, CrimC 5136/08, and CrimC 10594/05, *supra* note 896. Two of the defendants were also convicted of harassing a witness.

⁹³⁰ According to Amended indictment in CrimC 2420-05-11 *The State of Israel v. Sivlita* [July 4, 2011].

⁹³¹ CrimC 204/99 *The State of Israel v. Nakash* [2000] (Jerusalem Dist. Ct.).

⁹³² CrimC 1752/00 *The State of Israel v. Nakash* [2000] (Sup. Ct.).

⁹³³ No charges were pressed against these two witnesses.

⁹³⁴ CrimC 204/99, *supra* note 931, arts. 4, 30, 34, 36-37.

⁹³⁵ *Id.*, arts. 42, 47. *Cf. id.*, art. 44.

⁹³⁶ CrimC 390/04, *supra* note 895.

⁹³⁷ HROs have additionally reported of Israeli soldiers fabricating evidence to incriminate Palestinian children. See, e.g., B'TSELEM, *supra* note 96, at 57-58.

relation between [...] a violence that harms or that seeks to hurt or kill and a violence that blinds or seeks to prohibit sight.”⁹³⁸

We have so far seen that whatever can be seen, known, or said about Palestinian children’s trauma is largely determined by various forms of invisibility. In this regard, childhood can be understood as delimited not only within spatiotemporal boundaries (as discussed thus far), but also within certain representational boundaries – the boundaries of what can and cannot be re-presented and witnessed.

Representational invisibilities such as those described above tend to confine discussions about that trauma to a seemingly inescapable cycle of allegations, denial, counter-allegations, counter-denial, and so forth. Notwithstanding the immense importance of addressing such grave allegations, can there be another way of thinking about Palestinian children’s abuse – a way of thinking beyond invisibility and beyond this deadlock of allegations and denial?

This section will outline such an alternative path: Invisibilities such as those described above deserve close attention not only as problems or obstacles (although they may indeed be both), but also as factors that significantly inform the meaning of childhood and trauma in the OPT. According to social theorist Susan Sontag, visual representations always hide more than they disclose.⁹³⁹ Contrary to Sontag’s claim, hiding – rather than simply being the opposite of disclosing – can in itself be as a form of disclosure.⁹⁴⁰ Indeed, since absences and invisibilities can have just as potent effects as explicit naming and visibility, discourse analysis includes reading for what is not said or seen.⁹⁴¹

⁹³⁸ FELMAN, *supra* note 771, at 85. See also Robert Cover, *Violence and the Word*, 95 YALE LAW JOURNAL 1601, 1601 (1986) (arguing that legal interpretation signals and occasions the imposition of violence, and constitutes justifications for violence); Teresa de Lauretis, *The violence of rhetoric: Considerations on representation and gender*, in THE VIOLENCE OF REPRESENTATION: LITERATURE AND THE HISTORY OF VIOLENCE 239 (Nancy Armstrong and Leonard Tennenhouse eds., Routledge, London and New York, 1989) (discussing the violence of representation more generally); Austin Sarat, *Violence, Representation, and Responsibility in Capital Trials: The View from the Jury*, 70 INDIANA LAW JOURNAL 1103, 1109–1110 (1995) (arguing that law is violent, among other things, in the ways it uses language, in its representational practices, in its silencing and denial mechanisms). In reaction to these related forms of violence, Israeli veteran combatants who had served in the OPT established HRO *Breaking the Silence*, to collect and publish soldiers’ testimonies about instances of abuse towards Palestinians; for a similar end, Israeli HRO *B’Tselem* distributes video cameras to Palestinians in the OPT, to enable them to document infringements of their rights. On these “anti-silencing” enterprises see *Breaking the Silence – Israeli Soldiers Talk About the Occupied Territories, About us – Organization* (last visited on December 16, 2011), available at <http://www.breakingthesilence.org.il/about/organization>; *B’Tselem, B’Tselem’s camera project* (last visited on December 17, 2011), available at http://www.btselem.org/video/cdp_background.

⁹³⁹ SUSAN SONTAG, *ON PHOTOGRAPHY* 23 (Penguin Books, London and New York, 1979).

⁹⁴⁰ Cf. Fassin, *supra* note 775, at 535–536 (arguing that testimony is of value fundamentally by virtue of what is absent from it, by bearing witness to what cannot be witnessed). Fassin’s argument draws on GIORGIO AGAMBEN, *REMNANTS OF AUSCHWITZ: THE WITNESS AND THE ARCHIVE* (Zone Books, New York, 1999).

⁹⁴¹ ROSE, *supra* note 12, at 165.

Thus, rather than asking only what it is that we are *prevented* from seeing, we will explore what we *do* see – particularly through visual representations that HROs produce of Palestinian children’s abuse – and contemplate the ways in which these representations are affected and “haunted” by invisibility.

Poststructuralist theorist Judith Butler suggests that visual images possess the critical potential of not only failing to capture their referents, but also displaying this very failure.⁹⁴² Insofar as this is the case, visual representations can be interpreted as inviting us to consider the potential invisibility of the abuse of Palestinian children.⁹⁴³ We shall thus see that HROs’ visual images of Palestinian children’s abuse, while presenting two elements as invisible – the abuse itself and the face of the abused child – can be interpreted as also rendering the invisibility of these elements *visible*. More accurately, it will be argued that these elements are constituted as neither invisible nor entirely visible, but rather as representational borderlands, oscillating between invisibility and visibility.⁹⁴⁴

3.(b). *The visible invisibility of the abuse*

A report by HRO *Save the Children – Sweden*, dealing with Israel’s detention of Palestinian children, quotes 16-year-old Palestinian Sawsan Abu Turki’s claims that she was abused during her interrogation. Among other things, she is quoted as alleging to have suffered body position abuse during her detention:

seven or eight guards pushed me down on my back onto a hard iron [bed] frame. They stretched out my arms and legs and chained them to the four corners of the bed. I had to lie there like that from the evening till the next morning.⁹⁴⁵

Accompanying this verbal account is a visual testimony – a drawing Abu Turki made of this abuse position.⁹⁴⁶

⁹⁴² JUDITH BUTLER, *PRECARIOUS LIFE: THE POWERS OF MOURNING AND VIOLENCE* 146 (Verso, London and New York, 2004). See also *id.*, at 144.

⁹⁴³ On visual studies concerning the potential of images to invite certain kinds of seeing see generally ROSE, *supra* note 12, at 11-12.

⁹⁴⁴ Cf. Hans Belting, *Image, Medium, Body: A New Approach to Iconography*, 31 *CRITICAL INQUIRY* 302, 312 (2005) (describing images of the dead as images which maintain the body’s absence and turn it into “visible absence”); Guering and Hallas, *supra* note 770, at 9-10 (“images do not merely *return* that which has become absent. [...] images replace absence with a different kind of presence”).

⁹⁴⁵ SAVE THE CHILDREN SWEDEN, *supra* note 262, at 18.

⁹⁴⁶ *Id.*, at 19.



The drawing not only attempts to visually represent Abu Turki's abuse; since it is a drawing (as opposed to a photo), and especially one characterised by naivety and childlike simplicity, it also draws attention to one of the previously discussed obstacles to witnessing Palestinian children's abuse: the absence of an audio-visual record of the interrogation.

The absence of this record is rendered all the more manifest by another image, which accompanies Abu Turki's drawing – a photo showing her holding a notebook with her drawings of the prison abuse positions.⁹⁴⁷



⁹⁴⁷ *Id.*, at 21.

Abu Turki's presence in this photo not only authenticates the drawing; it also underscores the disparity between her "real" self and the drawn representation of herself. By highlighting this gap between the drawing and the "reality" to which it refers, the photo further reminds that it is in the absence of an audio-visual recording that a child amateurly and retroactively created this drawing. It is thus a child who provides verbal and pictorial testimonies about her abuse, but whose appearance simultaneously renders patent the invisibilities which "haunt" these testimonies.

Some might argue that "convincing evidence" is evidence which appears to be an unmediated record of events.⁹⁴⁸ Yet, precisely by emphasising their *mediated* nature, Abu Turki's drawing and photo could be said to gain particular evidentiary potential: the potential of testifying not only to Palestinian children's abuse, but also to the invisibility surrounding that abuse.

As Judith Butler observes, images can only be conducted within certain kinds of frames, unless the mandatory framing somehow becomes part of the story, part of what is seen. While this might only rarely occur, when it does the mechanisms of restriction, regulation, and censorship are exposed and open up to critical scrutiny.⁹⁴⁹ Images which render Palestinian children's interrogation visibly invisible may do precisely this: expose the "representational economy" of Palestinian children's abuse – the forces and practices that determine what can be represented in relation to that trauma, what representations can gain prominence, and on the other hand what representations will be (or will at least seem to be) marginalised or excluded.⁹⁵⁰

In rendering visible the invisibility of Palestinian children's abuse, the above visual images can be said not only to potentially remind their viewers of the existence of various forms of invisibility such as those discussed earlier. These images may also be interpreted as bringing to centre stage the fundamental impact invisibility has on their viewers, on what the viewers "know" about Palestinian children's (allegedly) traumatic abuse.

Furthermore, in a sense, these images allude to broader "crises of representation"⁹⁵¹ far exceeding Palestinian children's particular circumstances – "crises" with which existing literature has associated each of the main themes of this chapter: psychological trauma, childhood, and the visual image. Thus, in trauma studies, a claim has often been made that traumatic events, while demanding urgent representation, defy representation;⁹⁵² attempts at representing such events, it has

⁹⁴⁸ See, e.g., Nick Lee, *Faith in the Body? Childhood, Subjecthood and Sociological Enquiry*, in *THE BODY, CHILDHOOD AND SOCIETY* 149, 152 (Alan Prout ed., Palgrave MacMillan, London and New York, 2000).

⁹⁴⁹ BUTLER, *supra* note 783, at 71-72. See also *id.*, at 73.

⁹⁵⁰ "Representational economy" is a widely used term in academic writing, with various meanings assigned to it. See, e.g., Abigail Bray and Claire Colebrook, *The Haunted Flesh: Corporeal Feminism and the Politics of (Dis)Embodiment*, 24 *SIGNS* 35 (1998); Webb Keane, *Semiotics and the social analysis of material things*, 23 *LANGUAGE & COMMUNICATION* 409 (2003).

⁹⁵¹ On the term "crisis of representation" and its uses in cultural, philosophical, and semiotic theory see, e.g., Winfried Nöth, *Crisis of representation?*, 143 *SEMIOTICA* 9 (2003).

⁹⁵² FELMAN, *supra* note 771, at 83; Guering and Hallas, *supra* note 770, at 2-3. But see Isabelle Wallace, *Trauma as Representation: A Mediation on Manet and Johns*, in *TRAUMA AND VISUALITY IN*

therefore been argued, do little more than point to their own limitations⁹⁵³ and evoke pronounced scepticism.⁹⁵⁴ Similarly, some writers have argued that attempts to represent childhood sometimes reveal that the child/adult divide is unstable⁹⁵⁵ (which resonates with our discussion of the fluidity of childhood⁹⁵⁶), and that in this and other senses childhood is troublesome for representation.⁹⁵⁷ Similarly, in visual studies, pictures – despite their popularity and their privileged authority and presence – have been said to evoke skepticism about their possible manipulation or bias.⁹⁵⁸

Before advancing further, three complementary clarifications (which are almost a given in much of contemporary visual studies) are worth making, about what our “reading” of the HROs’ images does *not* profess to do. First, it does not aim to uncover the “true” meaning of these images, since no image has a single and/or true meaning. Second, it does not profess to describe what actual viewers are likely to see in these pictures; indeed, the interpretation offered by this chapter differs from how some viewers would be able or willing to respond to these images. And third, our interest lies not in the intentions of those who produced these images, but in the images themselves, in the “stories” they can tell, and in the conceptual possibilities they can open.⁹⁵⁹ Thus, rather than capturing any “true” meaning or reaction, our reading of these images has a twofold aim: first, to illuminate the significance and effects of the invisibilities we have discussed; and second, to (modestly) expand debates about children’s abuse in the OPT, beyond the existing deadlock of allegations and denial. In other words, the reading set forward here does not claim to be “true”, but helpful and relevant.

3.(c). *Looking invisibility in the face*

Alongside the visible invisibility of the abuse, some pictures in HRO publication evince an invisibility of another element: the abused children’s faces. For example, at least two *DCI – Palestine* publications on Palestinian children in Israeli custody include the following drawing, which depicts five figures in what HROs term “position abuse” (prolonged tying up):⁹⁶⁰

MODERNITY 3, 3 (Lisa Saltzman and Eric Rosenberg eds., Dartmouth College Press, Lebanon NH, 2006) (describing a view of representation as “a way of remembering an event whose traumatic nature mandates renewed attention”).

⁹⁵³ Wallace, *supra* note 952, at 3.

⁹⁵⁴ Guering and Hallas, *supra* note 770, at 2-3.

⁹⁵⁵ HOLLAND, *supra* note 598, at 15-16 (arguing that although behind many pictures of children lies a desire to secure the boundaries between childhood and adulthood, ultimately these boundaries “will not hold”).

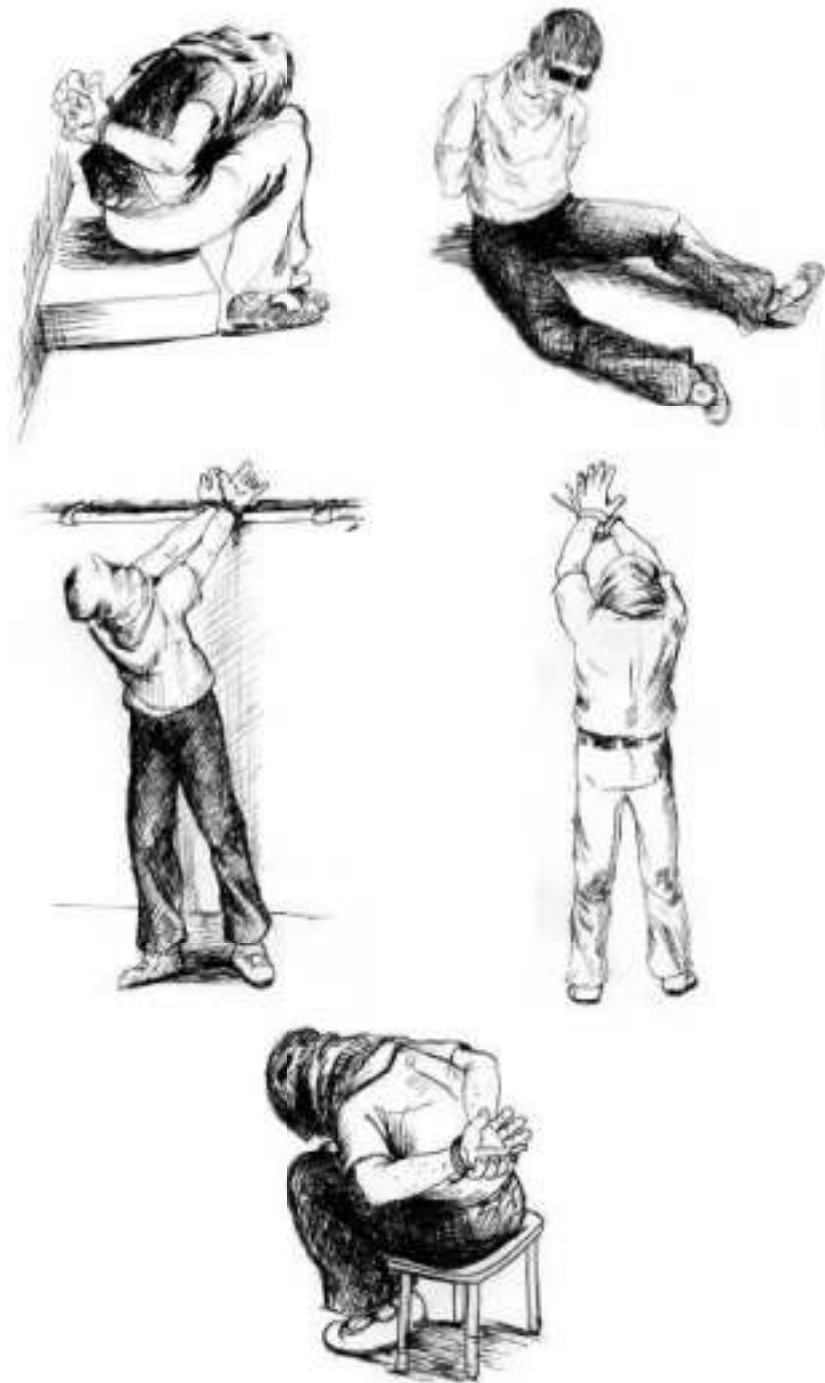
⁹⁵⁶ *Supra* text accompanying notes 587-601.

⁹⁵⁷ Robson, *supra* note 149, at 64, 66-67 (arguing that “childhood is always a matter of imagination [and a] fantasy”; that it is “troublesome for representation”; and that “Characteristically in the discourse around the representation of children, the threat is seen to lie in the image itself”).

⁹⁵⁸ Guering and Hallas, *supra* note 770, at 1-3.

⁹⁵⁹ On these three complementary interpretative approaches see, e.g., ROSE, *supra* note 12, at xiv, 11, 19.

⁹⁶⁰ COOK, HANIEH AND KAY, *supra* note 28, at 79; *DCI – PALESTINE*, *supra* note 542, at 3, 4, 7, 13, 43.



Again, the use of a drawing (as opposed to a photo) can be interpreted as a reminder of the invisibility of the abuse which is alleged to have taken place during interrogation. Additionally, the heads of four of the figures are covered, and the fifth figure is blindfolded.

We have seen that, due to the absence of audio-visual evidence and the spoliation of evidence, the abuse of Palestinian children might become invisible in retrospect. But here, the patently covered or blindfolded faces bring to mind that to the detainee himself/herself, the abuse might be invisible as it happens. According to a recent report by *DCI – Palestine*, of 311 Palestinian children interviewed about their detention, 281 (90 percent) complained that they had been

blindfolded during their arrest or detention.⁹⁶¹ Images presenting detainees' faces as covered or blindfolded thus create some affinity between their viewer and the abused interrogee: both of them are rendered "visually impaired", are prevented from seeing the actual abuse.

Like the above visual images of interrogated children, some images of arrested children also present the children's faces as fully or partly invisible. For example, a *DCI – Palestine* report on child prisoners includes a drawing depicting a blindfolded Palestinian child arrestee, two photos presenting Palestinian child arrestees whose faces are invisible (or only partly visible) to the viewer, and a photograph depicting a Palestinian child whose back faces the viewer.⁹⁶²



⁹⁶¹ DCI – PALESTINE, *supra* note 26, at 67. An example of this is Amended indictment in CrimC 2420-05-11, *supra* note 930 (there, the soldier covered the minor's head with his coat in the Israeli police station to which the minor was taken following his arrest. The soldier temporarily took the coat off the minor's face – to show him she was putting his detonating caps in his pocket – and then covered his face again and turned her lighter on to make him think she was going to light the caps).

⁹⁶² DCI – PALESTINE, *supra* notes 542, at 20, 32, 35, 46–47. A similar drawing – also depicting a child from the back – appeared in a *DCI – Palestine* report on another context: Palestinian refugees: DCI – PALESTINE, *supra* note 704, at 11. The latter image is also used by the BDS movement (campaigning Boycott, Divestment and Sanctions on Israel) as its logo: <http://www.bdsmovement.net>.

In contrast to interrogations of Palestinians, which are publicly invisible, there are photos – such as the above ones – documenting arrests of Palestinians. But what happens when a Palestinian child’s arrest too has not been photographed? One reaction by HROs might be to depict the arrest through a drawing, such as the above one. Another representational technique, which *DCI – Palestine* has employed in at least two of its publications, is to photograph Palestinian children re-enacting their arrest.⁹⁶³



This visual representation of what appears to be a “mere simulation” of “real” events can be interpreted as reminding the viewer of the invisibility of the actual arrest, an invisibility resulting from the absence of a camera in real time. Furthermore, like another photo we examined earlier – of 16-year-old Abu Turki holding her drawing⁹⁶⁴ – these pictures are meta-representational: they represent a representation (in this case, a re-enactment), and can therefore be located simultaneously within and beyond representation, during and after it.

⁹⁶³ DCI – ISRAEL AND DCI – PALESTINE, *supra* note 493, at 47, 49, 51; DCI – PALESTINE, *supra* note 794, at 53-54, 101, 105 (these two publications share two identical images); DCI – PALESTINE, *supra* note 32, at 88.

⁹⁶⁴ *Supra* notes 947-950 and accompanying text.

In addition, like previous pictures, here too the child's face is often visibly invisible, as some of the children appear to be blindfolded, or have their backs facing the viewer, or have their eyes hidden by a black stripe⁹⁶⁵ – which further emphasises the interrelationship of abuse and invisibility in this context.⁹⁶⁶

To a great extent, this invisibility of the children's faces is surprising. Images of suffering and traumatised children are part and parcel of the dominant conception of childhood;⁹⁶⁷ and the child's face – which is seen as an almost transparent mirror of the child's soul⁹⁶⁸ – is often a central component of such images. In particular, images of crying children have been prevalent in modern times. Such images, which reproduce the dominant association of tears with children,⁹⁶⁹ can signal that the spectator is expected to respond emotionally,⁹⁷⁰ and can also mark the gravity of broader social issues.⁹⁷¹ Indeed, in their attempts to appeal emotionally and morally to global and local audiences,⁹⁷² HROs have often used photos of weeping Palestinian children.⁹⁷³

Moreover, the Israeli-Palestinian case demonstrates an additional potency of the child's face. In at least two cases, Palestinians charged with attempting to carry out terrorist attacks in Israeli cities testified that they had decided to abort the attacks at the sight of Israeli children's faces. In 2002, a military court sentenced Palestinian Murad Ahmad bin Muhammad Tawalbe to 11 years in prison and five years on probation,⁹⁷⁴ for attempted voluntary manslaughter and other offences.⁹⁷⁵ According to the court documents, by the time Tawalbe was arrested, he had already deactivated his explosive device and disposed of it safely; in his interrogation, he mentioned among the reasons for his change of mind his mercy towards the Israeli children and women he had seen

⁹⁶⁵ Interestingly, some of the children's whose faces are not covered appear to be smiling. This might be understood not (only) as a "failure" to represent the traumatic arrest, but also – as was suggested earlier – as exposing the representational economy of Palestinian children's suffering. *Supra* text accompanying notes 949-950.

⁹⁶⁶ See also BUTLER, *supra* note 783, at 94-95 (arguing that the obscuring of the face can function as the visual trace of suffering).

⁹⁶⁷ On the extent to which the Israeli-Palestinian case resonates with other contexts see also *infra* text accompanying notes 1064-1084.

⁹⁶⁸ This is yet another indication of the significance of the child's body, which was discussed *supra* notes 547-564 and 779 and accompanying text.

⁹⁶⁹ On this association see HOLLAND, *supra* note 598, at 160.

⁹⁷⁰ HOLLAND, *supra* note 598, at 15; KAREN WELLS, CHILDHOOD IN A GLOBAL PERSPECTIVE 35 (Polity Press, Cambridge and Malden MA, 2009).

⁹⁷¹ WELLS, *supra* note 970, at 42.

⁹⁷² Allen, *supra* note 19, at 169 (2009); Kleinman and Kleinman, *supra* note 909, at 1.

⁹⁷³ See, e.g., DCI – PALESTINE, *supra* note 794, at 46; THE PALESTINIAN CENTRE FOR HUMAN RIGHTS, *supra* note 280, at 10-11, 22-23, 27-29.

⁹⁷⁴ Tawalbe was initially sentenced to 13.5 years in prison and 5 years on probation. MilC 6169/01 *The Military Prosecutor v. Tawalbe* [2002] (Samaria Mil. Ct.). However, the Court of Appeals shortened the prison sentence. MilC 225/02 *Tawalbe v. The Military Prosecutor* [2002] (Mil. Ct. App.). The ruling of the first instance court is not publicly available, and I am therefore relying on the ruling of the Court of Appeals.

⁹⁷⁵ The other offences were membership in an illegal association, aiding a criminal, participating in unpermitted military training, and carrying a bomb without permission.

nearby, who had reminded him of his siblings and mother.⁹⁷⁶ In a similar case, in 2004, a military court convicted Palestinian Arin Ahmad of attempted voluntary manslaughter, and sentenced her to three years in prison and two years on probation.⁹⁷⁷ During her trial, Ahmad explained the reason for her change of mind:

the thing that increasingly made me think about this was seeing small [Israeli] children, I saw young people. I started thinking that the people among whom I was walking, I do not have the right to [...] terminate their lives [...].⁹⁷⁸

Later, in an interview on Israeli television, she would recount (in English): “at that moment I looked at a woman have a baby [sic]. That baby smiled and look [sic] at me. [...] this thing, I think, that smile from that baby [...] served/saved [unclear pronunciation] me.”⁹⁷⁹

An immense affective potency is thus attributed to the child’s face: HROs harness this face to generate greater empathy for Palestinians’ plight, and defendants in military courts describe this face as capable of preventing terrorist attacks. In light of this potency, the invisibility of the child’s face in the above visual images is all the more conspicuous.

What sense can be made of this conspicuous covering of Palestinian children’s faces? One possible interpretation may be that the visible invisibility of these faces represents not only the actual interrogation techniques described above, but also as allegorical of the invisibility of the child-witness. Alongside the previously discussed hurdles to representing these children’s trauma (the absence of an audio-visual recording, the absence of an attorney or family member in the interrogation, and spoliation of evidence), children are also subject to a representational invisibility of another sort: in addition to the doubts which generally tend to arise around testimonies,⁹⁸⁰ and around Palestinian testimonies in Israel in particular,⁹⁸¹ a Palestinian child’s testimony (be it verbal,

⁹⁷⁶ MilC 225/02, *supra* note 974. In the Court of Appeals ruling in the matter of Ahmad, the description was slightly different – of the defendant seeing a woman holding a baby. MilC 2746/04 *The Military Prosecutor v. Ahmad* [2004] (Mil. Ct. App.).

⁹⁷⁷ MilC 1914/02 *The Military Prosecutor v. Ahmad* [2004] (Judea Mil. Ct.). Both Ahmad and the military prosecution appealed this ruling. The Military Court of Appeals rejected the prosecution’s appeal, and based this decision (among other things) on Ahmad’s explanation of her change of mind to the first instance court. However, Ahmad’s appeal was also rejected. MilC 2746/04, *supra* note 976.

⁹⁷⁸ MilC 1914/02, *supra* note 977.

⁹⁷⁹ Henrike Zimmerman, *The Story of Abir Ahmad – The Suicide Bomber Who Became a Peace Activist*, CHANNEL 2 NEWS (December 25, 2009) (Hebrew), available at <http://www.mako.co.il/news-military/security/Article-a0049cc2027c521004.htm> (English mistakes in original).

⁹⁸⁰ On doubts about succeeding to tell “truth” as inherent to legal discourses see, e.g., BUTLER, *supra* note 783, at 81; Shoshana Felman, *In an Era of Testimony: Claude Lantzman’s Shoah*, 79 YALE FRENCH STUDIES 39, 39 (1991); ELAINE SCARRY, *THE BODY IN PAIN: THE MAKING AND UNMAKING OF THE WORLD* 10 (Oxford University Press, Oxford and New York, 1985).

⁹⁸¹ On these doubts see, e.g., Allen, *supra* note 19, at 173 (describing the mistrust – prevalent especially in the Israeli and US press – towards the Palestinian word and image); HAJJAR, *supra* note 21, at 67, 69 (describing how Israeli officials have occasionally depicted Palestinians as immoral terrorists who would easily fabricate stories about being abused). In one of the abuse cases discussed above, the defendant suggested: “Perhaps they [the Palestinian children whom he was charged with abusing]

pictorial, or other) might evoke especially heightened doubts. These doubts concern children's ability to distinguish fact from fantasy, to accurately recollect past events, and to clearly communicate that record.⁹⁸²

HROs often reproduce such doubts about Palestinian children's testimonies, in various ways. For example, a recent report by HRO *B'Tselem* on Israeli arrests of Palestinian children in East Jerusalem, which makes use of children's testimonies, remarks:

Since these are comments *made by children*, often with no other material to corroborate them, we relate to them *cautiously*. However, some of the *parents* reported that they saw *bruises* on the body of their children and some of the children were examined by a *physician*.⁹⁸³

Thus, the adult (parent, physician) and the child's body are treated, yet again,⁹⁸⁴ as more reliable evidence than the child's own verbal testimony.⁹⁸⁵ Similarly, HROs' cries to change Israeli law to require that adults – a family member and an attorney – be present in Palestinian children's interrogation⁹⁸⁶ implicitly reproduce the premise that a child's testimony alone does not do.

Another context in which HROs have cast doubt on the weight that should be accorded to Palestinian children's testimonies is the conviction of Palestinians (adults and children) solely on the basis of a child's confession.⁹⁸⁷ For example, Israeli HROs *Physicians for Human Rights – Israel* and *Adalah*, together with Palestinian HRO *Al-Mezan Center for Human Rights*, have recently published a position paper on Palestinian children's coerced false confessions. Among other things, this paper quotes a general comment by the *UN Committee on the Rights of the Child*, according to which “[t]he age of the child, the child's development, [...] the child's lack of understanding, [...] may lead him/her to a confession that is not true.”⁹⁸⁸ The report presents itself

coordinated their testimonies. Arabs tend to exaggerate. And if they get a chance to knock over [i.e., to frame] anybody – they would do so in a big way.” *CrimC* 204/99, *supra* note 931, art. 42.

⁹⁸² For further discussion of these doubts see KING AND PIPER, *supra* note 110, at 66-72; Nick Lee, *Childhood and Self-Representation: the view from technology*, 5 *ANTHROPOLOGY IN ACTION* 13, 16-17 (1998); Lee, *supra* note 507, at 462-465.

⁹⁸³ B'TSELEM, *supra* note 59, at 23. See also B'TSELEM, *supra* note 96, at 45 (“it is hard to justify the almost exclusive reliance on information that the [Palestinian] minors provide [in their interrogations] as a basis for arresting other youths.”).

⁹⁸⁴ See *supra* text accompanying notes 547-564.

⁹⁸⁵ On the prevalent preference of children's bodies over children's spoken testimonies as evidence see Lee, *supra* note 948, at 149.

⁹⁸⁶ ADALAH, THE PUBLIC COMMITTEE AGAINST TORTURE IN ISRAEL AND DCI – PALESTINE, LETTER TO PRIME MINISTER BENJAMIN NETANYAHU (September 2nd, 2010), available at <http://www.stoptorture.org.il/files/Adalah-DCI-PCATI%20letter.pdf>; DCI – PALESTINE, *supra* note 350, at 30; DCI – PALESTINE, *supra* note 26, at 19; UN HUMAN RIGHTS COMMITTEE, CONSIDERATIONS OF REPORTS SUBMITTED BY STATES PARTIES UNDER ARTICLE 40 OF THE COVENANT: CONCLUDING OBSERVATIONS – ISRAEL (CCPR/C/ISR/CO/3) para. 22 (2010), available at <http://unispal.un.org/UNISPAL.NSF/0/51410EBD25FCE78F85257770007194A8>.

⁹⁸⁷ *Supra* note 916 and accompanying text.

⁹⁸⁸ UN COMMITTEE ON THE RIGHTS OF THE CHILD, GENERAL COMMENT NO. 10 – CHILDREN'S RIGHTS IN JUVENILE JUSTICE at art. 57 (CRC/C/GC/10) (2007), available at

as based on a detailed opinion by an Israeli psychiatrist, which unsurprisingly is pervaded by a developmentalist conception of childhood: the psychiatric opinion lists “developmental” factors, biological and psychological, that supposedly make children more susceptible to coercive interrogation techniques and more likely to suffer from PTSD following their interrogation;⁹⁸⁹ in conclusion, the psychiatric opinion asserts that “every child has the right to be a child”.⁹⁹⁰ These are yet further examples of the prevalence of developmentality (a term discussed earlier in the dissertation⁹⁹¹), which we have already seen in this chapter with regard to the psycho-legal discourse of “trauma” and “loss”,⁹⁹² and in previous chapters with regard to debates surrounding children’s age and placement.⁹⁹³

At the same time, HROs not only cast doubts about the child-witness, but also repeatedly base their claims about the abuse of Palestinian child suspects on children’s testimonies⁹⁹⁴ – thereby treating children as reliable witnesses. Thus, in addition to its other ambiguities,⁹⁹⁵ the figure of the child is constructed as ambiguous in its oscillation between the status of a reliable (and, in this sense, “visible”) witness and that of an untrustworthy (and in this sense, “invisible”) source of evidence. This bears some similarity to the tension discussed earlier, in relation to the photo of 16-year-old Abu Turki: there too, a child simultaneously provided evidence and reminded of the limitations of that evidence.⁹⁹⁶ The representational economy of Palestinian children’s traumatic experience in Israeli custody, it seems, is replete not only with potentially visible invisibilities, but also with ambiguity.

4. “TRAUMATISED”/“LOST” CHILDHOOD BEYOND ISRAEL/PALESTINE

The representational “landscape” of childhood and trauma, explored thus far, resonates with global “currents” in the representation of childhood. Visual images of harmed, suffering, or traumatised

⁹⁸⁹ <http://www1.umn.edu/humanrts/crc/comment10.html>. Cited in PHYSICIANS FOR HUMAN RIGHTS – ISRAEL, ADALAH AND AL-MEZAN CENTER FOR HUMAN RIGHTS, *supra* note 428, at 5.

⁹⁹⁰ GRACIELLA CARMON (FOR PHYSICIANS FOR HUMAN RIGHTS – ISRAEL), COERCED FALSE CONFESSIONS – THE STATE OF PALESTINIAN CHILDREN: A PSYCHIATRIC OPINION 2-5 (2011) (Hebrew), *available at* <http://phr.org.il/uploaded/%D7%97%D7%95%D7%95%D7%AA%20%D7%93%D7%A2%D7%AA%20%D7%A2%D7%A7%D7%A8%D7%95%D7%A0%D7%99%D7%AA%20%D7%94%D7%95%D7%93%D7%90%D7%95%D7%AA%20%D7%A9%D7%95%D7%95%D7%90%20%D7%A2%D7%91%D7%A8%D7%99%D7%AA%20%D7%9C%D7%A4%D7%A8%D7%A1%D7%95%D7%9D.doc>.

⁹⁹¹ *Id.*, at 6.

⁹⁹² See *supra* notes 467-471 and accompanying text.

⁹⁹³ *Supra* notes 777, 797-799, and 846 and accompanying text.

⁹⁹⁴ *Supra* notes 467-471, 554-564, 579-580, and 627-639 and accompanying text.

⁹⁹⁵ Examples abound. See, e.g., B’TSELEM, TORTURE OF PALESTINIAN MINORS IN THE GUSH ETZION POLICE STATION (2001) *available at* http://www.btselem.org/sites/default/files2/publication/200107_torture_of_minors_eng.doc; DCI – PALESTINE, *supra* note 26 (based on 311 testimonies of Palestinian children); SAVE THE CHILDREN SWEDEN, *supra* note 262, at 15.

⁹⁹⁶ *Supra* text accompanying notes 587-601, 811-812, 908-909, 955.

⁹⁹⁷ *Supra* text accompanying notes 948-949.

children have a long history in armed conflicts – including iconic photos such as that of Kim Phuc (the so-called Napalm Girl) from the Vietnam War,⁹⁹⁷ or that of the Jewish boy driven from the Warsaw Ghetto with his hands up during World War II.⁹⁹⁸

Yet, far from being exclusive to armed conflicts, such images are illustrative of an increasing global visibility/representation of circumstances that are deemed potentially traumatic.⁹⁹⁹ Furthermore, such images (of harmed or traumatised children) are also integral to the broader modern and late/post-modern conception of childhood.¹⁰⁰⁰ Images of this sort reflect and reproduce the socially dominant view of children as vulnerable, passive, and dependent,¹⁰⁰¹ and – largely for this reason – are believed to engender relatively widespread empathy.¹⁰⁰²

A major theme we have extracted from representations of childhood and trauma in the OPT – the portrayal of Palestinian childhood as lost or stolen – bears a particularly significant resemblance to representations of childhood across modernity. An incredibly wide range of populations have been described as having had their childhood stolen or robbed from them – including, among many others, the children among whom British child rescuers worked in the late 19th century¹⁰⁰³ (as mentioned in the previous chapter¹⁰⁰⁴); displaced indigenous populations in Australia, Canada, and the US¹⁰⁰⁵ (also mentioned in the previous chapter¹⁰⁰⁶); slave youth in 19th-

⁹⁹⁷ For discussion of this photo see, e.g., Nancy K. Miller, *The Girl in the Photograph: The Vietnam War and the Making of National Memory*, 24 JAC - A JOURNAL OF COMPOSITION THEORY 261 (2004).

⁹⁹⁸ For discussion of this photo see, e.g., RICHARD RASKIN, A CHILD AT GUNPOINT: A CASE STUDY IN THE LIFE OF A PHOTO (Aarhus University Press, Aarhus Denmark, 2004).

⁹⁹⁹ See, e.g., FELMAN, *supra* note 771, at 171 (describing the 20th century as “the century of trauma”); Gregory, *supra* note 820, at 194-195 (discussing HROs’ growing use of video in the advocacy strategies, and the technological and social developments which account for this trend); Lomsky-Feder and Ben-Ari, *supra* note 775, at 112, 117 (claiming there to be a global rise of a trauma discourse in relation to war and large-scale collective violence); McLagan, *supra* note 820, at 191 (describing the deployment of visual images as foremost among the strategies HROs use to communicate “local” issues to international audiences); Noel Whitty, *Soldier Photography of Detainee Abuse in Iraq: Digital Technology, Human Rights and the Death of Baha Mousa*, 10 HUMAN RIGHTS LAW REVIEW 689, 689-690, 701 (2010) (discussing the expansion of visual record of military conflict by militaries and media organisations, and the reasons for this expansion).

¹⁰⁰⁰ See, e.g., Margaret Hagan, *The human rights repertoire: its strategic logic, expectations and tactics*, 14 INTERNATIONAL JOURNAL OF HUMAN RIGHTS 559, 564, 572, 580 (2010); HOLLAND, *supra* note 598, at 143; WELLS, *supra* note 970, at 33-44.

¹⁰⁰¹ HOLLAND, *supra* note 598, at 19, 143. On the view of children as vulnerable and dependent in general see, e.g., Christense, *supra* note 909, at 38-42; Stevi Jackson and Sue Scott, *Risk anxiety and the social construction of childhood*, in RISK AND SOCIOCULTURAL THEORY: NEW DIRECTIONS AND PERSPECTIVES 86 (Cambridge University Press, Cambridge and New York, 1999).

¹⁰⁰² Cf. Fassin, *supra* note 775, at 543 (“The discourse of mental health [...] reveals] a reality that seems more familiar to the Western reader of humanitarian testimony: a vulnerable teenager engenders a more consensual empathy than a provocative or violent adolescent.”).

¹⁰⁰³ Shurlee Swain, *Sweet Childhood Lost: Idealized Images of Childhood in the British Child Rescue Literature*, 2 JOURNAL OF THE HISTORY OF CHILDHOOD AND YOUTH 200 (2009).

¹⁰⁰⁴ *Supra* notes 740-742 and accompanying text.

¹⁰⁰⁵ Cassidy, *supra* note 744, at 132-134; Victoria Haskins and Margaret D. Jacobs, *Stolen Generations and Vanishing Indians: The Removal of Indigenous Children as a Weapon of War in the United States and Australia, 1870-1940*, in CHILDREN AND WAR: A HISTORICAL ANTHOLOGY 227 (James Marten ed., New York University Press, New York and London, 2002); Robert van Krieken, *The ‘Stolen Generation’ and Cultural Genocide: The Forced Removal of Australian Indigenous Children from Their Families and its Implications for the Sociology of Childhood*, 6 CHILDHOOD 297 (1999); PETER PIERCE, THE COUNTRY

century US;¹⁰⁰⁷ Argentinian children in the 1970s;¹⁰⁰⁸ street children;¹⁰⁰⁹ child soldiers;¹⁰¹⁰ children amid political violence generally;¹⁰¹¹ "Third World" children;¹⁰¹² child victims of sexual abuse;¹⁰¹³ "underachieving" (mostly non-white, male) pupils in the UK;¹⁰¹⁴ and poor or working-class youth in urban centres.¹⁰¹⁵

Yet, the image of childhood as lost or stolen emerges not only in relation to such populations, whom some might (mis)characterise as "exceptions" to "normal" childhood. Quite the contrary: as education scholar David Buckingham and others have observed, the disappearance or loss of childhood is one of the most popular laments of modernity and late modernity, including discourses relating to "ordinary" (read: Western and well-situated) children.¹⁰¹⁶ Contemporary thinking about childhood evinces a growing sense of anxiety about changes in the way society treats children, about changes in children's behaviour, and about the changing power relations between children and adults. Critics offer a range of "evidence" that children are deprived of "childhood", and that the distinction between children and adults is disappearing. These include, among other things, children's increased access to sights and knowledge which used to be concealed from them; the erotic use of children in commercials and films; the homogenisation of children's and adults' language, eating habits, and leisure pursuits; and the supposed rise of sexual activity, drug taking,

OF LOST CHILDREN: AN AUSTRALIAN ANXIETY (Cambridge University Press, Cambridge, New York and Melbourne, 1999).

¹⁰⁰⁶ *Supra* notes 743-744 and accompanying text.

¹⁰⁰⁷ WILMA KING, *STOLEN CHILDHOOD: SLAVE YOUTH IN NINETEENTH-CENTURY AMERICA* (2nd ed., Indiana University Press, Bloomington IN, 2011).

¹⁰⁰⁸ Dussel, *supra* note 289.

¹⁰⁰⁹ See, e.g., in relation to Brazil, Mary Lorena Kenny, *Orators and Outcasts. Wanderers and Workers: Street Children in Brazil*, in *SYMBOLIC CHILDHOOD* 37, 54, 57 (Daniel Thomas Cook ed., Peter Lang Publishing, New York and Oxford, 2002).

¹⁰¹⁰ See, e.g., JIMMIE BRIGGS, *INNOCENTS LOST: WHEN CHILD SOLDIERS GO TO WAR* (Basic Books, New York, 2005); Thomas Humphreys, *Child Soldiers: Rescuing the Lost Childhood*, 13 *AUSTRALIAN JOURNAL OF HUMAN RIGHTS* 113 (2007); Mayr, *supra* note 99.

¹⁰¹¹ LUCIAN KROLIKOWSKI, *STOLEN CHILDHOOD: A SAGA OF POLISH WAR CHILDREN* (Kazimierz J. Rozniatowski trans., Authors Choice Press, San Jose and New York, 2000); Jason Hart, *Introduction*, in *YEARS OF CONFLICT: ADOLESCENCE, POLITICAL VIOLENCE AND DISPLACEMENT* 1, 11-12 (Jason Hart ed., Berghahn Books, New York and Oxford, 2008); NICOLA TYRER, *STOLEN CHILDHOODS: THE UNTOLD STORY OF THE CHILDREN INTERNED BY THE JAPANESE IN THE SECOND WORLD WAR* (Orion, London, 2011).

¹⁰¹² Burman, *supra* note 571, at 242.

¹⁰¹³ Elizabeth A. Wilson, *Suing for Lost Childhood: Child Sexual Abuse, the Delayed Discovery Rule, and the Problem of Finding Justice for Adult Survivors of Child Abuse*, 12 *UCLA WOMEN'S LAW JOURNAL* 145 (2003).

¹⁰¹⁴ Christine Griffin, *Discourses of Crisis and Loss: Analysing the 'Boys' Underachievement' Debate*, 3 *JOURNAL OF YOUTH STUDIES* 167 (2000).

¹⁰¹⁵ JO-ANNE DILLABOUGH AND JACQUELINE KENNELLY, *LOST YOUTH IN THE GLOBAL CITY: CLASS, CULTURE AND THE URBAN IMAGINARY* (Routledge, New York and Abingdon, 2010).

¹⁰¹⁶ BUCKINGHAM, *supra* note 467, at 3, 21-40. See also Stuart C. Aitken, *Global crises of childhood: rights, justice and the unchildlike child*, 33 *AREA* 119 (2001); Howard Davis and Marc Bourhill, 'Crisis': *The Demonization of Children and Young People*, in 'CHILDHOOD' IN 'CRISIS'? 28 (Phil Scraton ed., UCL Press, London and Bristol Pennsylvania, 1997); JAMES AND JAMES, *supra* note 115, at 23, 50, 135-136; JENKS, *supra* note 3, at 117-118, 130-131; KENNEDY, *supra* note 467, at 75, 104, 135; PIERCE, *supra* note 1005; VALENTINE, *supra* note 467, at 91.

and crime among the young.¹⁰¹⁷ Thus, disappearing or being lost has become an almost intrinsic characteristic of childhood.

Hence, the image of Palestinian childhood as stolen carries a twofold effect: it positions Palestinian children as exceptions to “ordinary” childhood, while at the same time framing their childhood in terms that are all too ordinary (i.e., are integral to childhood in its modern form). In a sense, then, the image of Palestinian childhood as “stolen” points less to Palestinian children’s particular circumstances than to some general, context insensitive,¹⁰¹⁸ anxiety that childhood has been “tainted”.

5. CONCLUSION

This chapter has investigated how the “reality” of children’s psychological trauma in the OPT is framed and rendered legible through psycho-legal and visual representation – two modes of representation which have dominated both OPT-related discourses and the modern conception of childhood.

As we have seen, HRO publications construe and envision Palestinian children’s trauma as amounting to the loss of Palestinian childhood. This loss is constructed through an amalgamation of global and local conceptual frameworks: on the one hand, HROs’ portrayal of Palestinian children as children without childhood reproduces a supposedly global, yet very specific model of childhood, through which the particularities of the Palestinian case are believed to be made comprehensible cross-globally. On the other hand, this supposed loss is sometimes mutually linked to the loss of the Palestinian homeland, which is a cornerstone of Palestinian national narratives. This “glocalisation” of Palestinian childhood is reminiscent of the framing of Palestinian children’s joint incarceration with adults through both global (developmentalist) conceptions and local imagery (of prison as a university), as discussed in the previous chapter.

With regard to visual representation, Palestinian children’s trauma is related to various invisibilities: the allegedly abusive interrogations of Palestinian children are not recorded audio-visually, and the child’s family member or attorney are not present during them; Israeli interrogators are granted *de facto* immunity from abuse allegations; the military courts tend to disregard such allegations; and even when Israeli soldiers are brought to trial (in circumstances unrelated to interrogations), spoliation of evidence is common. However, visual depictions of Palestinian children’s abuse are not only impeded by invisibility, but also render invisibility visible.

¹⁰¹⁷ BUCKINGHAM, *supra* note 467, at 21, 25-32, 35.

¹⁰¹⁸ Cf. JAMES AND JAMES, *supra* note 115, at 50 (arguing that describing children in difficult circumstances, such as war zones, as “children without childhood” – is insensitive to the cultural context of these children’s lives and to the possibility that “rescuing” these children from these circumstances might not be the best way to assist them).

Thus, some pictures, by rendering the invisibility of the abuse conspicuous, bear witness to that invisibility, and highlight that in this context invisibility and abuse are inextricable. Other pictures, which underscore the invisibility of the abused child's face (despite the tendency to attribute immense affective potency to that face), allude to the "invisibility" of the child-witness, whose testimony evokes increased doubts.

These two modes of representation – psycho-legal and visual – sometimes mutually build upon each other in their construction of the meaning of children's trauma. Thus, in meetings of Israeli parliamentary committees, mental health practitioners depended on children's drawings to obtain access to the children's traumatised souls, while the drawings needed these "experts" to enable them to speak for the children.

Further to previous chapters, a thread interwoven throughout this chapter is the revolving of legal and HRO representations of trauma around the boundaries of childhood. Thus, the "loss of childhood" discourse primarily manifests anxieties about the dissolving of the "normal" spatiotemporal boundaries of Palestinian childhood. Additionally, the distinction between the categories "child" and "soldier" is permeable: on the one hand, Israeli settler children were presented, in the Israeli parliament, as soldiers-in-the-making – which reflected and reproduced the militarism prevalent in Israeli society. On the other hand, in line with changes in the image of soldiers in Israel, soldiers convicted of abusing Palestinian children were conceptualised as children and victims, which often led the court to take a more forgiving position. Furthermore, child-related trauma revolves not only around spatiotemporal boundaries, that is on the question of when and where childhood disappears; this trauma is also delimited within, and affected by, certain representational boundaries – the boundaries of what can be seen, witnessed, and known. This chapter aimed to tease out these representational boundaries and their implications, by deconstructing the visual images which, despite these boundaries, HROs produce.

Also repeatedly emerging throughout this chapter is the question of the status of Palestinian children's testimonies in HRO publications. As we have seen, HROs appear to marginalise such testimonies in two senses: first, they produce and disseminate a "loss of childhood" narrative, whereas none of "their" testimonies of children actually refers to childhood as lost. And second, while often presenting themselves as relying on children's testimonies, HRO publications often cast doubt on Palestinian children's reliability, constituting child witnesses as oscillating between visibility and invisibility. This issue too resonates with the previous chapter, in which HROs' dominant separatist discourse was shown to overlook children's anti-separatist testimonies.

CONCLUSION

1. SUMMARY

This dissertation has aimed to provide an empirically-rooted and theoretically-informed examination of the relationship between law and childhood in the OPT. The first two chapters provided general foundations for this exploration: **Chapter 1** presented the key research questions; explained the framework and importance of this study; provided basic background information; analysed the existing literature and explained the contribution of this study to that literature; discussed the research methodology and sources; and clarified terminological issues.

Chapter 2 described the basic legal contours for this study: the Israeli statutory law relative to child offenders in the OPT, including both domestic Israeli criminal law applicable to Israeli settler children, and Israeli military criminal law applicable to Palestinian children. The main provisions of each of these systems of statutory law were described, under three categories: “the trial”, “sentencing”, and “outside the courtroom” (with the latter category encompassing children’s arrest, interrogation, detention, and incarceration). The collective pardoning of Israeli child opponents of Israel’s “disengagement” from the Gaza Strip was also discussed. Necessary context was provided – such as conviction rates, common charges, and bail rates – on the basis (among other things) of my sample of military court cases. The chapter concluded with some remarks about the disparity between the two Israeli legal systems concerning child offenders in the OPT, and with a comparative table summarising this disparity. Additional legal information (not directly relevant to the discourses and practices examined in the dissertation) can be found in Appendices 3 and 4, which deal (respectively) with additional legal provisions in Israeli juvenile law, and with the pertinent international law.

Chapter 3 focused on legal issues pertaining to the age of child defendants. Nationality-based differentiations, as well as developmentalist conceptions, were explained to inform the age demarcations through which Israeli law constructs childhood. At the same time, we examined four ways in which Israeli military law also undermines its own demarcations, and thus renders childhood and age ambiguous, equivocal, and elusive: (a) while Israeli military statutory law requires the military courts to consider children’s young age when determining their sentence, in practice the courts have been inconsistent regarding the youth consideration, with some judges even regarding youth as aggravating (and thereby challenging its culturally dominant association with vulnerability and innocence); (b) the military courts have interpreted the age categories in use by the military legislation (such as “minor” and “tender adult”) in competing ways, often at odds with

the letter of that law; (c) the military statutory law attaches two different ages to many defendants – their age at the time of the offences (which the court is supposed to consider when determining their sentencing), and their age at the time of the sentencing (which determines their eligibility for maximum-sentence limitations). This simultaneous application of different ages was argued to both destabilise and intensify age and time; and (d) when determining children’s sentences, the military courts have sometimes given precedence to their apparent age over their chronological age. After discussing these four interrelated phenomena, we examined the legal system’s anxious reaction to its Palestinian and Israeli subjects’ supposed obscuring of their “real” age. The law’s need to retain the power to ascertain children’s age was thus illustrated, in addition to its previously discussed complication, and even undermining, of that age.

Beyond demonstrating the law’s fascination with age and its construction of childhood as elusive, it was also argued that the above phenomena illustrate the institutional incoherence and unpredictability of Israeli military law, which we have described as part of the Israeli occupation’s “control through uncertainty” or “effective ineffectiveness”. HROs, due to their ignorance of the disparity between Israeli military statutory law and military court practice, were shown to have overlooked this important aspect; consequently, their approach to the issue of Palestinian children in Israeli custody has been significantly misinformed. It was also explained that Israel’s recent raising of the age of criminal majority for Palestinian children has not had the consequences that either official Israeli statements or some HROs have attributed to it.

From this discussion of age-based boundaries, **Chapter 4** turned to exploring the spatio-legal demarcation of childhood – and particularly the recent shift toward increased separation of Palestinian children from their adult counterparts during their trial, detention, and imprisonment. A separatist coalition of sorts has been created between the two “camps” traditionally considered opponents – the Israeli legal system and its HRO critics. We discussed the different ways in which each “camp” has problematised the non-separation of Palestinian children, with Israeli judges dreading intergenerational Palestinian nationalistic indoctrination, and HROs stressing children’s supposedly distinct stage of development. Two points of convergence between the Israeli legal system and its critics were identified: first, an HRO was shown to have adopted the Israeli judiciary’s reasoning that Palestinian adults are a negative nationalistic influence; second, the image of Israeli prison as a “university”, which Israeli judges have used to problematise intergenerational interactions in prison, has been shown to have originated from the Palestinian inmates themselves.

The separation of Palestinian children from their elders was argued to be part of a broader project of governance and identity-construction through separation in the OPT. In addition to being separated from their adult counterparts, Palestinian children rarely see their parents, and this separation too prevents, perhaps unwittingly, Palestinian intergenerational interactions. The project of separation in the OPT also takes place along lines of nationality (by separating Palestinians from Israeli settlers) and gender (since almost all Palestinians in Israeli custody are male).

Additionally, we examined tensions in, and limitations of, the separatist discourses regarding Palestinian children. First, contrary to Israeli statements, Palestinian children's increased separation has not significantly changed the way the Israeli legal system treats them, and has instead been chiefly a symbolic means to normalise the boundaries of childhood. Second, we unveiled the contradictory nature of HROs' separatist discourse – a discourse which on the one hand is blind to noteworthy justifications of joint incarceration, but on the other hand contains such (overlooked) justifications (including in Palestinian children's testimonies). Moreover, HROs' delayed engagement with anti-separation considerations (i.e., only after the shift to increased separation occurred) attests to their limited separatist imagination – their inability to problematise the separation option in a timely manner.

The chapter closed by turning to Israeli settler children in the context of Israel's "disengagement" from the Gaza Strip. In contrast to the increased separation of Palestinian children, the Israeli legal system prescribed joint detention with adults to some settler children who would be detained against the backdrop of the "disengagement". Beyond further exemplifying the legal disparity between Israeli and Palestinian children in the OPT, this particular issue was explained to also challenge Israeli statements, which portrayed the increased separation of Palestinian children as bringing their legal status closer to that of their Israeli equivalents.

Chapter 5 examined visual and "psycho-legal" representations of child-related trauma in the OPT. "The loss of childhood" was shown to be a prevalent theme in HROs' psycho-legal representations of Palestinian children's trauma. This image was explained to be glocal – it merges, on the one hand, a (supposedly) *global* developmentalist model, which prescribes a limited social script for what counts as childhood, with, on the other hand, *local* Palestinian narratives concerning the loss of the homeland.

Also discussed were several "invisibilities" – obstacles to representing children's trauma: the lack of recording of Israel's interrogations of Palestinian children, the absence of children's family member or attorney during their interrogation, the *de facto* immunity of Israeli interrogators, and spoliation of evidence (which emerged as a common practice in trials of abusive soldiers). We then turned to images of Palestinian children's trauma, in HRO publications. These images, while limited by such "invisibilities", can also be interpreted as rendering conspicuous and visible at least two invisible elements: the abuse itself and the face of the abused child. Pictures which render conspicuous the invisibility of the abuse (especially in the context of interrogations) can be envisioned as bearing witness to that invisibility and foregrounding its inextricability from the abuse; and pictures which highlight the invisibility of the abused child's face can be interpreted as allegorical of the invisibility (i.e., the doubts) surrounding the child-witness.

We also analysed the intertwining of the two modes of representing children's trauma – visual and psycho-legal – in Israeli parliamentary committee meetings. These meetings exemplified

mental health practitioners' reliance on images as a gateway to children's trauma, as well as the counter-"reliance" of the images on these practitioners to enable them to "voice" that trauma.

We further discussed the revolving of these two modes of representing children's trauma around the boundaries of childhood – the central theme of the previous chapters: the portrayal of Palestinian childhood as lost primarily evinces anxieties about the dissolving of the spatio-temporal boundaries of childhood; Israeli legal texts render permeable the boundaries between "child" and "soldier"; and the above (conspicuous) invisibilities concern the representational boundaries of childhood – the boundaries of what can be seen (and known) about childhood. Also resonating with previous chapters is HROs' marginalisation of children's testimonies, by producing the "lost childhood" narrative which is alien to these testimonies, and by frequently casting doubts on children's reliability.

2. META-THEMES

As explained in Chapter 1, this study is generally influenced by poststructuralist literature.¹⁰¹⁹ Indeed, in line with poststructuralist thinking, our analysis has acknowledged multiple meanings and indeterminacies, rather than attempting to distill them into some unequivocal "truth".¹⁰²⁰

Upon concluding this dissertation, Jean-François Lyotard's (and others') skepticism toward totalising grand-narratives, or meta-narratives,¹⁰²¹ seems particularly relevant. Rather than attempting to condense this dissertation into a unified "conclusion" or "argument", the above summary comprises a plurality of nuanced micro-narratives, which hopefully convey some of the richness of the examined phenomena.¹⁰²² As anthropologist and sociologist Didier Fassin has commented, "the situation in Palestine is the subject of discourses that are not only politically contradictory but profoundly heterogeneous. It is this 'discursive field' in which concurrent interpretations meet, particularly those related to children".¹⁰²³

Still, important recurrent themes have emerged, explicitly or implicitly, in the dissertation. Let us now discuss four such meta-themes and their interrelations: (a) "spatiotemporality"; (b) boundaries; (c) adulthood; and (d) the child as a source of evidence.

¹⁰¹⁹ *Supra* note 49.

¹⁰²⁰ Cf. Banakar and Travers, *supra* note 184, at 17 (mentioning "writing that celebrates multiple meanings" as one of the forms of research which have developed following the poststructuralist challenge to positivism.).

¹⁰²¹ JEAN-FRANÇOIS LYOTARD, *THE POSTMODERN CONDITION: A REPORT ON KNOWLEDGE* (Manchester University Press, Manchester, 1984).

¹⁰²² On the importance of studying discursive complexities and contradictions, and of being attentive to different voices and texts, see ROSE, *supra* note 12, at 164-165, 168.

¹⁰²³ Fassin, *supra* note 775, at 543.

2.(a). Spatiotemporality

Throughout the dissertation, Israeli law and its HRO critics have been shown to construct and conceptualise childhood in the OPT through, and in relation to, spatiotemporality – a term used here to denote the interrelations of space and time.¹⁰²⁴

In child-centred discourses worldwide, the child is often conceptualised as a multi-temporal figure – as embodying and invoking the past and the future. Childhood is often used as a platform for thinking about where society comes from, and about how to secure a desired future.¹⁰²⁵ Literary scholar Karen Sánchez-Eppler ascribes this conception of childhood to the temporariness which is at the heart of the category “child” – the childhood that is every adult’s past, and the adulthood that is every child’s future.¹⁰²⁶

Indeed, in this dissertation, in addition to the child’s age (Chapter 3), two other temporal themes are the retrospectivity and prospectivity of many child-related legal and HRO texts – their preoccupation with the past and the future. We encountered an example of such retrospectivity in Chapter 3: a military court ruling which justified regarding youth as an aggravating factor by bringing up events of a decade earlier (Palestinian adults allegedly sending children to commit offences). Somewhat similarly, Chapter 5 examined HROs’ preoccupation with the “loss” of the Palestinian homeland in 1948.

Prospective texts include the Israeli court rulings which portray the separation of Palestinian children from their elders as a battle over the Palestinian child’s future (Chapter 4). For Israeli judges, winning this battle required producing a future Palestinian generation, “cured” of the nationalism and terrorism of its predecessors. Another future-oriented “battle” is undertaken by Palestinian children’s attorneys: the battle to have their clients sentenced before their birthday (Chapter 3).¹⁰²⁷ Also prospective are HROs’ depiction of Palestinian children as the future redeemers of the homeland, and the depiction of Israeli settler children as soldiers-to-be in the Israeli parliament (Chapter 5).

The spatiality of law and childhood was broached explicitly in the context of spatial separation (Chapter 4), but has also emerged elsewhere in the dissertation. It appeared in the form of (the loss of) national territories – with HROs linking the loss of the homeland to that of

¹⁰²⁴ On these interrelations see generally Mike Crang, *Time/Space, in SPACES OF GEOGRAPHICAL THOUGHT: DECONSTRUCTING HUMAN GEOGRAPHY’S BINARIES* 199 (Paul Cloke and Ron Johnstone eds., Sage, London, 2005).

¹⁰²⁵ JAMES AND JAMES, *supra* note 115, at 63-64; JENKS, *supra* note 3, at 10, 105; KENNEDY, *supra* note 467, at xii, 4; LESKO, *supra* note 467, at 107-139.

¹⁰²⁶ SÁNCHEZ-EPPLER, *supra* note 289, at xxvi. See also LESKO, *supra* note 467, at 107-139.

¹⁰²⁷ As explained there, it is children’s age at the time of their sentencing, rather than at the time of the offences, which determines whether certain maximum sentence restrictions apply. *Supra* notes 537-546 and accompanying text.

childhood, and with judges, as well as speakers in the parliament, tying (Israeli) children's trauma to the loss (evacuation) of their settlements. Legal spaces – such as the detention or prison facility, the interrogation room, the courtroom, the vehicles transferring children to detention – have also occupied a central place in this study, both as material spaces and as discursive constructs.

These various temporal and spatial dimensions intertwine.¹⁰²⁸ For example, Chapter 5 demonstrated that anxieties about the “loss” of childhood largely revolve around issues that are both temporal (the concern that children mature prematurely) and spatial (the worry that children are placed in childhood-depriving sites). Specifically, as noted above, the linkage between the loss of childhood and that of the homeland is both temporal (it concerns the collective past and future) and spatial (it concerns the national territory).

Worthy of particular attention is the separation of child offenders, which is not only spatial but also temporal: age-based (since offenders are separated according to their age) and, as explained above, prospective (i.e., seen as a battle over the child's future). Interestingly, recent spatial changes – the increased separation of Palestinian children – coincided with temporal (age-related) changes. Thus, the transfer of responsibility over Palestinian prisoners, from the Israeli military to the Israeli Prison Services, raised the age up to which Palestinian child inmates are separated from their elders from 16 to 18 years (Chapter 4).¹⁰²⁹ Similarly, the establishment of the military youth courts (a legal space) changed the *de facto* age of criminal majority (a temporal demarcation) from 16 to 18 years, as these courts assumed jurisdiction over all Palestinians under that age.¹⁰³⁰

This concurrence of spatial and temporal changes in the demarcation of childhood might not be coincidental.¹⁰³¹ Chapter 4 characterised the sites Israeli law recently established for Palestinian children – namely, the military youth courtrooms and the child-specific detention/prison facilities/wings – as “heterotopias”, counter-sites of sorts, which spatially differentiate Palestinian children from their elders.¹⁰³² Cultural scholar Ariella Azoulay suggests that heterotopias should be understood as merging two spaces: the physical space where things are placed, and the linguistic or conceptual space of words.¹⁰³³ Following Azoulay, the emergence of legal heterotopias for Palestinian children can be understood as consisting of a simultaneous transformation of both the

¹⁰²⁸ Another example of the intertwining of temporality and spatiality, not discussed in the text, is the effect of children's age (temporality) on their mobility (spatiality). Thus, young Palestinian children are often the only ones to whom Israeli authorities grant access to Palestinian prisoners. *Supra* note 668 and accompanying text. Similarly, in some cases, only Palestinians of certain ages are granted permission to pass Israeli barriers. See, e.g., Lea Nirgad, *Is a Sleeping Baby a Humanitarian Case?*, in BIMKOM – PLANNERS FOR PLANNING RIGHTS, WHERE PLANNING MEETS GENDER: PLANNING POLICY FROM A GENDER PERSPECTIVE 136, 136 (2006) (Hebrew), available at http://www.bimkom.org/dynContent/articles/gender_web_heb.pdf.

¹⁰²⁹ *Supra* notes 610–613 and accompanying text.

¹⁰³⁰ *Supra* text accompanying notes 621–623.

¹⁰³¹ On the regulation of childhood as both spatial and temporal see JAMES, JENKS AND PROUT, *supra* note 2, at 55–57; JENKS, *supra* note 3, at 76–77.

¹⁰³² *Supra* notes 714–718 and accompanying text.

¹⁰³³ Azoulay, *supra* note 268, at 108 (emphases added).

physical space (the sites in which Palestinian children are placed) and linguistic space (the terms, such as “minor”, through which the temporal boundaries of childhood are configured).

Also concerning the intertwining of spatiality and temporality is HROs’ preoccupation with “normalising” the spatiotemporal boundaries between childhood and adulthood, in the contexts of the age of majority (Chapter 3)¹⁰³⁴ and the separation of children from adults (Chapter 4).¹⁰³⁵ Additionally, the boundaries between childhood and a social category normally associated with adults – “soldier” – have been shown to occupy a significant place in Israeli legal discourses (Chapter 5).¹⁰³⁶

2.(b). *Boundaries*

We have explored, in this dissertation, three main types of boundaries:

- (a) The spatiotemporal boundaries of childhood (Chapters 3-5);
- (b) Representational boundaries – the boundaries of visibility and knowledge (Chapter 5);
- (c) National boundaries (physical and conceptual) and their intersection with the boundaries of childhood (a topic explicit in Chapter 4,¹⁰³⁷ but present throughout the dissertation).

Interestingly, these different boundaries share a common characteristic: a duality of stability and instability, of rigidity and fluidity. Thus, the age-based legal boundaries of childhood, while generating potent distinctions between different age groups, are at the same time elusive, elastic, even potentially extinguishable (Chapters 3-4). This sort of duality seems salient well beyond Israel/Palestine, as education scholar David Buckingham argues:

The boundaries [between adults and children] have [...] become blurred [in recent years]; yet in several respects, they have also been reinforced and extended. Thus, on the one hand, children have increasingly gained access to aspects of ‘adult’ life, and [...] on the other hand – and particularly in response to this – children have been increasingly segregated and excluded. [...] One fairly obvious way of interpreting these developments is through notions of risk and security [...]. Thus, it could be argued that children are increasingly under threat from dangers of various kind [...]. The boundaries, in other words, have to be perpetually drawn and redrawn; and they are subject to a constant process of negotiation.¹⁰³⁸

¹⁰³⁴ *Supra* notes 497-498 and accompanying text.

¹⁰³⁵ *Supra* text accompanying notes 627-639, 694, and 713.

¹⁰³⁶ *Supra* text accompanying notes 880-913.

¹⁰³⁷ *Supra* notes 669-676 and accompanying text.

¹⁰³⁸ BUCKINGHAM, *supra* note 467, at 74-77. See also *id.*, at 5-6; FLEXIBLE CHILDHOOD? EXPLORING CHILDREN’S WELFARE IN TIME AND SPACE 14, 49-51, 54 (Helga Zeiher et al eds., University Press of Southern Denmark, Odense, 2007).

While Buckingham depicts the blurring of boundaries as engendering a social desire to reinforce these boundaries, this study has demonstrated that the reaction to blurring can be not only reinforcement, but also further blurring. HROs, alongside their calls to reinforce the “normal” spatiotemporal boundaries of Palestinian childhood (Chapters 3-5), also symbolically blur these boundaries, by disseminating an image of Palestinian childhood as lost (Chapter 5). Israeli law, too, has been shown to simultaneously “fix” and render elusive these boundaries (Chapters 3 and 5).

Buckingham also claims, above, that the blurring of boundaries stems from risks to children, and that the social reinforcement of these boundaries aims at (re-)securing childhood. But this study suggests that these risk-related processes, too, are more complex. Often, what socially constitutes certain phenomena as “risks to children”, in the first place, is their blurring of the conventional boundaries – spatiotemporal, moral, or other – of childhood. In other words, it is not simply that there are pre-existing risks which blur boundaries, but rather that boundaries often inform what would be socially considered a risk. HROs’ concerns about the risk non-separation supposedly poses to Palestinian children clearly illustrates this, since they seem to be based on the assumption that non-separation violates the “normal” spatiotemporal boundaries of childhood (as explained in Chapter 4).

Risk is a valuable lens through which to examine the relationship of law and childhood in the OPT. In the eyes of the Israeli legal system, children in the OPT are not only at risk and threatened, but also risky and threatening.¹⁰³⁹ Revisiting briefly our above discussion of temporality, legal conceptions of children as risky can be retrospective (e.g., concern the child’s offences) or prospective (e.g., concern the adult into whom the child might turn, as discussed in Chapter 4). Like threats to children, what often makes the law regard certain behaviours of children as threatening in the first place is their transgression of the supposedly normal boundaries of childhood.¹⁰⁴⁰

The Israeli legal discourse(s) we have examined generally constitute Palestinian children as transgressive in two senses. First, as child offenders, they challenge the traditional adult/child binarism, according to which innocence, dependence, and helplessness are the hallmarks of children, while corruption, independence, and agency those of adults.¹⁰⁴¹ Second, as “security offenders”, they occupy a category of active, ideologically motivated, political actors, which is

¹⁰³⁹ Cf. Kenny, *supra* note 1009 (discussing the dual image of Brazilian street children as risky and at risk, and the way this image fuels and funds political and legal campaigns). See also BUCKINGHAM, *supra* note 467, at 3-4 (discussing social perceptions of children as both threatened and threatening). On how perceptions of children as a threat to public security inform their treatment by the law see HARTJEN, *supra* note 99, at 52; Muncie and Goldson, *supra* note 103, at 205, 207.

¹⁰⁴⁰ Cf. JAMES AND JAMES, *supra* note 115, at 135 (discussing anthropologist Roy Gigengack’s claim, that the image of street children, either as a “problem” to be dealt with by the State or as a “cause” to be taken by HROs, is revealing of the implicit transgressive comparison with “normal” childhood that these children engender). On childhood and transgression see generally BUCKINGHAM, *supra* note 467, at 14; JENKS, *supra* note 3, at 145, 150.

¹⁰⁴¹ FLEGEL, *supra* note 742, at 147-148; JENKS, *supra* note 3, at 128-131.

traditionally reserved for adults. As such, these children pose a special challenge to the adult/child divide, to the Israeli occupation, and also to power relations in Palestinian society.¹⁰⁴²

Thus, Israeli law constructs Palestinian childhood in the OPT within a matrix of two mutually constitutive dualities: that of in/stability and that of risk. The duality of stability and instability revolves not only around spatiotemporal boundaries, but also around representational and national boundaries. As regards representational boundaries, Chapter 5 discussed at length how, on the one hand, Israeli law and practices produce such boundaries by restricting visibility and knowledge about the abuse of Palestinian children; and how, on the other hand, HROs use visual images which can be interpreted as destabilising these representational boundaries, by rendering certain invisibilities visible. Chapter 5 thus deconstructed the representational boundaries of childhood, by highlighting their in/stability. Similarly, national boundaries – be they boundaries between territories (Israel and the OPT) or populations (Palestinians and Israeli settlers in the OPT) – are not entirely clear-cut, but rather ambiguous, conceptually and practically (as noted in Chapter 1).¹⁰⁴³ This ambiguity too can be used, socially and politically, as a basis on which to contrive possibilities beyond dominant national boundaries.

As jurist Andreas Philippopoulos-Mihalopoulos suggests, “space” can be defined, broadly, as the sphere of possibilities in which the violence of boundary-drawing, of dividing, and of partitioning takes place.¹⁰⁴⁴ According to this definition, the legal construction of childhood in the OPT constitutes a fertile context through which to explore and rethink the workings and interrelations of various “spaces”, symbolic and physical, territorial, social, verbal, and visual. If, as jurist Sarah Blandy and geographer David Sibley have argued, a main concern of the law is boundaries of various kinds – boundaries which represent something to be both desired and feared¹⁰⁴⁵ – then these various spaces, and the boundaries they produce, are of great jurisprudential import.

2.(c). Adulthood

As education scholar David Kennedy explains, the modern “invention” of childhood can in fact be better understood as the invention of adulthood (in its modern form) – from which childhood could

¹⁰⁴² On the challenge Palestinian children who actively participate in the bi-national conflict pose to Israeli and Palestinian social orders see JACQUELINE ROSE, *THE QUESTION OF ZION* 129 (Princeton University Press, Princeton NJ, 2005); ROSEN, *supra* note 19, at 112-113, 116, 118-121; Gad Yair and Nabil Khatab, *Changing the Guards: Teacher-Student Interaction in the Intifada*, 68 *SOCIOLOGY OF EDUCATION* 99 (1995).

¹⁰⁴³ *Supra* note 268 and accompanying text.

¹⁰⁴⁴ Andreas Philippopoulos-Mihalopoulos, *Law's Spatial Turn: Geography, Justice and a Certain Fear of Space*, 7 *LAW, CULTURE, AND THE HUMANITIES* 187, 189-196 (2011).

¹⁰⁴⁵ Sarah Blandy and David Sibley, *Law, Boundaries and the Production of Space*, 19 *SOCIAL & LEGAL STUDIES* 275, 277-278 (2010).

be separated and to which childhood could be compared.¹⁰⁴⁶ Similarly, the discourses and practices this study has examined can be interpreted as discourses/practices of adulthood.

Thus, among other things, seemingly child-centred legal discourses are often primarily preoccupied with adults. As demonstrated in Chapter 3, some military courts have presented their consideration of youth as aggravating as aimed primarily to deter Palestinian adults (who allegedly sent children to commit violent offences). Israeli legal anxieties about the non-separation of Palestinian children have also been shown, in Chapter 4, to revolve around adults: not only the adults into whom those children might turn (as mentioned above), but also the allegedly nationalistic/terroristic adults to whom the children might be exposed.

Moreover, as we have seen, the Israeli legal system explicitly classifies some “children” as “adults”: Israeli military law applies the developmentalist term “tender adults” to 14- and 15-year-old Palestinian defendants (Chapter 3), and Israeli parliamentary committees have depicted Israeli settler children as soldiers- (and hence as adults-) in-the-making (Chapter 5). Conversely, the law has been shown to apply the category “childhood” to “adults” (specifically, to abusive soldiers; Chapter 5).

Additionally, the practices we have examined implicitly regulate adulthood through the category of “the child”.¹⁰⁴⁷ As jurist Martha Minow has noted, “both sides of a boundary are regulated, even if the line was supposed to distinguish the regulated from the unregulated.”¹⁰⁴⁸ The increased separation of Palestinian children in Israeli custody (Chapter 4) illustrates how adulthood can be regulated through childhood: establishing military youth courts and youth-specific detention/prison facilities/wings means that the “regular” (i.e., non-youth) courts, detention centres, and prisons have been increasingly devoid of children;¹⁰⁴⁹ these “regular” legal spaces are, in this respect, not really regular, but rather adult-specific. This may affect the power relations, discourses, and penal regimes surrounding these places. For example, the more these sites are “purged” of children, the less they would be expected to meet “children’s rights” standards; indeed, child-specific HROs (e.g., *DCI – Palestine* and *Save the Children*) and human rights bodies (e.g., the *UN Committee on the Rights of the Child*) now direct significantly less attention to these increasingly adult-specific sites. Hence, with these legal sites now subject to less scrutiny and expected to meet different standards, the law’s treatment and conceptualisation of the Palestinian adults occupying them could quite possibly change.

¹⁰⁴⁶ KENNEDY, *supra* note 467, at 5, 63, 76–78.

¹⁰⁴⁷ On the construction of adults through, and in relation to, childhood see BUCKINGHAM, *supra* note 467, at 10–11, 34–35; HOLLAND, *supra* note 598, at 15–17, 126; KENNEDY, *supra* note 467, at 18–19; Sue Ruddick, *Commentary: Imagining Bodies, in* CONTESTED BODIES OF CHILDHOOD AND YOUTH 97, 100 (Kathrin Hörschelmann and Rachel Colls eds., Palgrave Macmillan, Basingstoke and New York, 2010).

¹⁰⁴⁸ MARTHA MINOW, *MAKING ALL THE DIFFERENCE: INCLUSION, EXCLUSION, AND AMERICAN LAW* 277 (Cornell University Press, Ithaca NY, 1990).

¹⁰⁴⁹ On the constitution of adult spaces as “purified” of children see, generally, SIBLEY, *supra* note 600, at 36–39; VALENTINE, *supra* note 467, at 80, 95–97.

2.(d). *The child as a source of evidence*

Israeli law and its HRO critics use children as a source of evidence, and base some of their truth-claims on this evidence. This study has paid special attention to three types of evidence which the law and HROs call on children to present. First, in Chapter 3, we discussed the desire of the law and HROs to ascertain children's "real" age, and their recourse to "childhood bodies"¹⁰⁵⁰ for this end, as "bodies of evidence". We examined cases in which judges gave precedence to children's apparent age over their chronological age. Additionally, we explored anxieties of those who could not infer defendants' "real" age by looking at them: HROs' anxieties about their inability to know whether certain Palestinian defendants were children, and concerns within the Israeli legal system about the inability to know Israeli settler girls' age. We also discussed the judicial anxieties which arose when a Palestinian who had appeared to be a child turned to be (chronologically) adult.¹⁰⁵¹

Another type of evidence, whose use by HROs was discussed in Chapters 4 and 5, is children's verbal¹⁰⁵² testimonies. Chapter 4 demonstrated that some quotations from Palestinian children's testimonies, in HRO publications, challenge the HROs' assumption that non-separation from adult inmates harms Palestinian children. The HRO publications quote these testimonies but ignore their implications – an indication that separatist discourses about Palestinian children are more complex and self-contradictory than might first meet the eye. Chapter 5 pointed out that, in none of the HRO texts characterising Palestinian childhood as lost or stolen, is that image used by children (even when children's testimonies are included). We also discussed HROs' twofold approach to Palestinian child witnesses: on the one hand, repeatedly making claims on the basis of children's testimonies, and on the other hand, often casting doubt on the reliability of such testimonies. It was suggested that images in HRO publications, which simultaneously present Palestinian children and hide their faces, can be interpreted as allegorical of this ambiguous status of the Palestinian child witness – a witness whose testimony is, in this sense, both "visible" and "invisible".

Lastly, Chapter 5 also examined the use of another type of evidence: children's drawings. Such drawings were presented, utilised, and/or referred to in parliamentary committee meetings, as a gateway to children's invisible psychological trauma. Mental health practitioners functioned as expert "decipherers" of this type of evidence – which demonstrates the interrelations between visual and psycho-legal representations of children's trauma. HRO publications also used a Palestinian child's drawing, in an attempt to represent the child's interrogation (which was not audio-visually

¹⁰⁵⁰ This term was used to convey the complexity of the child-body relationship. *Supra* note 557 and accompanying text.

¹⁰⁵¹ Interestingly, in the latter case, the defendant's chronological age was eventually concluded through his body (fingerprints). *Supra* note 568 and accompanying text.

¹⁰⁵² On the importance of non-verbal materials and actions as part of children's testimonies *see supra* note 51.

recorded). In this context, it was suggested that the drawing can be interpreted as possessing the potential of rendering conspicuous the invisibility of the child's interrogation; according to this interpretation, this evidence "bears witness" to the limitations placed on its "testimony".

3. THE CONTRIBUTION OF THIS STUDY

Chapter 1 outlined the general contribution this study aims to make to existing academic and public discourses.¹⁰⁵³ Let us now discuss, more concretely, how this study contributes to discourses on law, childhood, and related issues, in the Israeli-Palestinian context and generally.

3.(a). *Israel/Palestine: law, childhood, and more*

The Israeli occupation has often been described as legalistic,¹⁰⁵⁴ yet the existing legal literature has neglected the actual Israeli law on which this occupation is based, despite the immense importance and influence of that law.¹⁰⁵⁵ This has to do with the practical obstacles to obtaining Israeli military documents, and with the difficulty of producing knowledge almost *ex nihilo* about this understudied legal system.¹⁰⁵⁶ Having overcome these challenges, this pioneering study of Israeli military legal texts and practices should significantly advance, and hopefully invigorate, research and public discussions on Israeli military law. It moves beyond merely recognising the legalism of the Israeli occupation, to exploring what this legalism entails and how it operates.

Thus, key findings of this study are the significant points of divergence between the military legislation and military court practice, as well as the inconsistency in military court rulings (Chapter 3).¹⁰⁵⁷ Two important implications of these previously unreported phenomena are noteworthy at this stage. First, these phenomena illustrate that Israeli military law functions as an apparatus of control through unpredictability and ambiguity. Israeli military law thus conforms to sociologists Yehuda Shenhav and Yael Berda's characterisation of "colonial bureaucracy" as a hybrid of legalities and decisionism.¹⁰⁵⁸ In fact, Chapters 2-4 showed Israeli military law to also be part of what Shenhav and Berda describe as another feature of colonial bureaucracy: the application of separate laws and regulations on the basis of ethnic hierarchy.¹⁰⁵⁹ Second, Israeli state authorities

¹⁰⁵³ *Supra* text accompanying notes 109-171.

¹⁰⁵⁴ *Supra* notes 21-23 and accompanying text.

¹⁰⁵⁵ *Supra* notes 24-32 and accompanying text.

¹⁰⁵⁶ *Supra* text accompanying notes 159-163..

¹⁰⁵⁷ *Supra* notes 482-490, 499-516 and 519 and accompanying text.

¹⁰⁵⁸ Shenhav and Berda, *supra* note 512, at 363. See also *id.*, at 347, 355-361.

¹⁰⁵⁹ *Id.*, at 340. Cf. HAJJAR, *supra* note 21, at 4 (describing the Israeli military occupation as a combination of colonial rule and a state of emergency).

should be analysed not as uniform institutions, but as replete with internal inconsistencies – although this apparently does not diminish their potency and impact. Critical writing on the Israeli occupation ought to bear this latter point in mind, if it aims to be attentive to the complexity of this situation.

Due to the limited existing knowledge on the Israeli military legal system, even when certain issues in the Israeli military law have received attention, important aspects of these issues have been overlooked. The recent changes in the military law – the raising of the age of criminal majority (Chapter 3) and the increased separation of children from adults (Chapter 4) – clearly illustrate this. As we have seen, HROs extensively advocated these changes, and have subsequently observed their implementation – but have been unaware, for example, of the above consequential disparity between the letter of the military law and military court practice. They have similarly not considered the desire, within the Israeli legal system, to separate Palestinian children from their elders in order to discontinue intergenerational Palestinian interactions (Chapter 4).

Further to their unawareness of such important aspects, we have also shown HROs to hold essentialist, developmentalist, and separatist preconceptions about childhood. These preconceptions take for granted a supposedly universal social script for what counts as “normal” childhood and what is best for children. Weighty socio-political considerations which challenge these preconceptions are, as we have seen, often neglected.

Moreover, as explained in Chapter 4, constituting Palestinian childhood as an increasingly separate space can be seen as a divide-and-rule mechanism. And, as argued earlier in this chapter, this mechanism is aimed at Palestinian adults no less than at Palestinian children. In this sense, the increased separation – which HROs diligently advocated – might have enabled an expansion of Israeli state power over OPT Palestinians. This illustrates Sánchez-Eppler’s claim, that “ideas about children’s [...] separateness coincide with the growth of governmental power [...]. Such an account sees children less as the object of control than as a rationale for it.”¹⁰⁶⁰

As reiterated throughout the dissertation, our aim is not to offer specific alternatives to either Israeli law’s or HROs’ agendas or practices regarding children in the OPT, as this study is not policy-oriented. Instead, the contribution of this study lies, in part at least, in its bringing to centre stage overlooked issues such as the above, and thereby deconstructing taken-for-granted “truths” about childhood and law.

This study has nonetheless treated existing discourses not only as limited or problematic, but also as a resource through which to rethink law and childhood in the OPT. For example, in Chapter 5, images in HRO publications were used as a basis on which to problematise existing limitations on representing Palestinian children’s suffering. In Chapters 4 and 5, HROs were argued not only to disregard children’s testimonies, but also to rely extensively on these testimonies. In this

¹⁰⁶⁰ SÁNCHEZ-EPPLER, *supra* note 289, at xix.

sense, like Israeli law, HROs' conceptualisation and construction of childhood in the OPT has been shown to be replete with internal tensions and dualities.

The contribution of this study also concerns the relationship between HROs and the Israeli legal system they criticise. Rather than being viewed simply as "opposing camps", Israeli law and its HRO critics have been shown to have some conceptual convergence (Chapter 4). In a similar vein, since similarities are as important as differences, we have discussed some corresponding aspects in the construction and conceptualisation of Israeli and Palestinian children (e.g., the centrality of "trauma" and "loss" – Chapter 5).

The contribution of this study, as it has thus far been described, concerns both the Israeli law in the OPT generally, and the legal treatment of children in the OPT specifically. Since children are the majority of the OPT population, and have played a substantial role in the Israeli-Palestinian conflict,¹⁰⁶¹ studies of this topic are conspicuous in their absence. This research project has endeavoured at providing a comprehensive and nuanced analysis of this topic and of various issues it entails, such as identity construction and negotiation, or national narratives. The contribution of this study lies not only in the scope of issues it addresses, but also in its broad, interdisciplinary, theoretical basis, which hopefully facilitates a richer understanding of these multifaceted issues.

Additionally, by discussing issues concerning the legal treatment of Israeli settler children, this study opens a window into another under-studied topic: the broader relationship between law and Israeli settlers in the OPT. Among other things, this study provides a unique comparative analysis of the legal treatment of Palestinians and Israeli settlers in the OPT, although – as explained in Chapter 2 – this comparison is not aimed to be exhaustive.¹⁰⁶²

3.(b). Law and childhood beyond Israel/Palestine

Chapter 1 pointed to six characteristics of the existing literature on law and childhood:

- (a) Comprehensive socio-legal studies of childhood are scarce;
- (b) Most socio-legal child-centred scholarship takes for granted essentialist (including developmentalist and separatist) assumptions about childhood;
- (c) The existing literature neglects theoretical questions that are not easily translatable into policy terms;
- (d) The few studies with a rich theoretical basis often make broad generalisations about law and childhood, and insufficiently heed cross-contextual disparity;

¹⁰⁶¹ *Supra* notes 15-19 and accompanying text.

¹⁰⁶² *Supra* paragraph above note 409.

- (e) Legal scholarship has neglected important child-related themes – including age, space, and representation (in its non-legal sense);
- (f) The existing literature tends to equate childhood with children: it neglects the legal construction of adults through, or in relation to, the category of “the child”.¹⁰⁶³

This study aims to challenge the preconceptions of the existing literature, broaden the scope of issues it explores, infuse it with relevant insights from “extra-legal” scholarship, and, with a broad empirical basis, remain attentive to contextual specificity. Thus, alongside its above “findings”, this study aims to generally contribute to legal scholarship by putting forward new avenues for studying childhood – conceptual, methodological, and thematic (including the themes and sub-themes of the previous chapters, as well as the above meta-themes). Future legal academic discussions of “children’s rights”, “the best interests of the child”, and similar topics will hopefully pursue and develop these avenues, and by so doing provide a richer understanding of these topics.

Additionally, some jurists may wish to use Israel/Palestine as a test case for specific child-related issues which resonate with other contexts. Notwithstanding the uniqueness of the Israeli-Palestinian case – for example, the Israeli occupation is the longest military occupation in modern history¹⁰⁶⁴ – it indeed bears significant similarities to other contexts, as several scholars have suggested.¹⁰⁶⁵ The Israeli-Palestinian case – an amalgam of legal systems, of various (often competing) conceptions and constituents of childhood – can thus be read as a “super-experiment” for law and childhood.

Various issues discussed in this dissertation are, indeed, not unique to Israel/Palestine. Here are four random examples: US military law,¹⁰⁶⁶ and some US states,¹⁰⁶⁷ set the age of criminal majority at 16 years – as Israeli military law did until very recently (Chapter 3¹⁰⁶⁸); the criminal laws of Germany, Switzerland, Finland, Hong Kong, and other countries employ “fragmentary” models of age classification,¹⁰⁶⁹ reminiscent of the model used by Israeli military law (Chapter

¹⁰⁶³ *Supra* text accompanying notes 140-144.

¹⁰⁶⁴ HAJJAR, *supra* note 21, at 96; Inseis, *supra* note 70, at 67.

¹⁰⁶⁵ Allen, *supra* note 19, at 162 (“the political mobilization of [...] Palestinians” suffering shares much in common with numerous other cases.”); Fassin, *supra* note 775, at 535-539 (“the Israeli-Palestinian conflict [...] enlightens many of the issues humanitarian workers are confronted to [sic] when they want to transform their witnessing into advocacy and make themselves spokespersons for the supposed voiceless. [...] The Palestinian case is thus both exceptional and exemplary.”); HAJJAR, *supra* note 21, at 6-7 (“Many aspects of the [Israeli] military court system lend themselves to or evoke comparison with other legal systems, and much about the uses of law in Israel/Palestine resembles other contexts in which people are embroiled in conflict.”) and at 243-246 (comparing the legalistic nature of the Israeli occupation to that of the US during the post-9/11 Bush administration).

¹⁰⁶⁶ Melissa A. Jamison, *Detention of Juvenile Enemy Combatants at Guantanamo Bay: The Special Concerns of the Children*, 9 UC DAVIS JOURNAL OF JUVENILE LAW & POLICY 127, 136, 139, 151-153 (2005).

¹⁰⁶⁷ HARTJEN, *supra* note 99, at 6-8; JAMES AND JAMES, *supra* note 115, at 44.

¹⁰⁶⁸ *Supra* note 490 and accompanying text.

¹⁰⁶⁹ 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). JUVENILE JUSTICE SYSTEMS, *supra* note 99, at 171-205. See also INTERNATIONAL HANDBOOK ON JUVENILE JUSTICE, *supra* note 99, at 127-128. On the fragmentary

3¹⁰⁷⁰); the image of prison as a university (Chapter 4¹⁰⁷¹) can be found beyond Israeli-Palestinian discourses,¹⁰⁷² and the notion that children can somewhat influence society's perception of their age (Chapter 3¹⁰⁷³) appears in other settings.¹⁰⁷⁴

Another globally relevant theme, recurrent throughout this dissertation, is the intertwining of childhood with other social categories.¹⁰⁷⁵ Across the globe, legal systems have long differentiated between children, *de jure* or *de facto*, on the basis of their race, gender, nationality, socioeconomic class, ethnicity, and so forth.¹⁰⁷⁶ The differences we have examined between the legal treatment of Palestinian and Israeli children particularly resonate with the discrimination against, and overrepresentation of, ethnic minority children (such as non-white children or migrant children seeking asylum) across Global North juvenile justice systems.¹⁰⁷⁷ Another aspect of the interrelations of childhood and other social categories, which we discussed in Chapter 4,¹⁰⁷⁸ is the dual separation of children in the OPT – both as children (who are separated from adults) and as belonging to a certain nationality (and therefore separated from the other national population). This aspect too is not exclusive to the OPT. For example, in Belfast, many children were kept within homogenous religious and socio-economic groups, and only met adult and child members of the other group in violent clashes.¹⁰⁷⁹

Three additional specific global issues which are manifest in the Israeli-Palestinian case were discussed explicitly (though non-exhaustively) in this dissertation. First, in Chapter 3, it was argued that the elusiveness of age is far from exclusive to Israeli military law, and is in fact part of a

models of age classification used in Switzerland, Finland, Hong Kong, the Cayman Islands, the Philippines, and Nigeria see DELINQUENCY AND JUVENILE JUSTICE SYSTEMS IN THE NON-WESTERN WORLD 56, 90 (Paul C. Friday and Xin Ren eds., Criminal Justice Press, Monsey NY, 2006); HARTJEN, *supra* note 99, at 5-6; JUVENILE JUSTICE SYSTEMS, *supra* note 99, at xii-xiii, 219.

¹⁰⁷⁰ *Supra* notes 461-477 and accompanying text.

¹⁰⁷¹ *Supra* notes 648-662 and accompanying text.

¹⁰⁷² See, e.g., STANCIU STROIA, MY SECOND UNIVERSITY: MEMORIES FROM ROMANIAN COMMUNIST PRISONS (Dan L. Duşleag trans., iUniverse, New York, 2005).

¹⁰⁷³ *Supra* text accompanying notes 573-583.

¹⁰⁷⁴ For sociological writing on children's ability, under certain circumstances, to make their social age older or younger, see LESKO, *supra* note 467, at 144-145; Anne Solberg, *Negotiated Childhood: Changing Constructions of Age for Norwegian Children*, in CONSTRUCTING AND RECONSTRUCTING CHILDHOOD: CONTEMPORARY ISSUES IN THE SOCIOLOGICAL STUDY OF CHILDHOOD 126 (Allison James and Alan Prout eds., 2nd ed., Routledge, London, 1997). See also Valentine, *supra* note 48, at 38. On children's ability to destabilise social demarcations of the category "child" see Ian Barron and Liz Jones, *Performing Child(hood)*, CHILDREN & SOCIETY (forthcoming in 2012), available at <http://onlinelibrary.wiley.com/doi/10.1111/j.1099-0860.2012.00453.x/abstract>.

¹⁰⁷⁵ See, e.g., JAMES, JENKS AND PROUT, *supra* note 2, at 46, 53, 56, 164. On the interrelationship between childhood and other social marginalisations see, e.g., Taefi, *supra* note 105, at 347-348.

¹⁰⁷⁶ See generally HARTJEN, *supra* note 99, at 51-55. On the different legal treatment of male and female juvenile delinquents see Gelsthorpe and Worrall, *supra* note 105; Taefi, *supra* note 105, at 358.

¹⁰⁷⁷ See, e.g., Morgan and Newburn, *supra* note 740, at 1052-1053; Muncie, *supra* note 103, at 112-113; Muncie and Goldson, *supra* note 103, at 205-207. With regard to black youth specifically see, e.g., Bridges and Steen, *supra* note 106; FELD, *supra* note 106, at 79-108; SARRI AND SHOOK, *supra* note 751, at 17-22.

¹⁰⁷⁸ *Supra* notes 669-676 and accompanying text.

¹⁰⁷⁹ Laura Gilliam, *Restricted Experiences in a Conflict Society: The Local Lives of Belfast Children*, in CHILDREN'S PLACES: CROSS-CULTURAL PERSPECTIVES 39, 45-46 (Karen Fog Olwig and Eva Gullov eds., Routledge, London and New York, 2003).

fundamental, innate fluidity of childhood.¹⁰⁸⁰ Second, in Chapter 4, we juxtaposed the recent shift toward increased separation of Palestinian children to comparable processes in other settings. Israeli judges' desire to distance these children from the supposedly harmful influence of their elders was argued to be reminiscent of the sort of sentiments which, throughout modern history, have inspired the separation of "other(ed)" children – such as native children in colonial societies and working-class children elsewhere. This inter-contextual similarity, it was suggested, calls for some skepticism toward this recent reform in the OPT. We then turned to discussing the possible effect of global child-centred discourses on the local situation in the OPT: HROs' preoccupation with cross-global deviations from the separation of child offenders, it was argued, may have influenced their approach to the particular case of non-separation in the OPT.¹⁰⁸¹ Lastly, Chapter 5 explained that although children's circumstances in the OPT are often envisioned as exceptional, images of traumatised children – and specifically of childhood as lost or stolen – are exclusive neither to the OPT nor to armed conflicts generally, but are rather integral to the modern conception of childhood. In this regard, portraying Palestinian childhood as lost may illustrate a cross-global sentiment about childhood, rather than reflecting Palestinian children's particular circumstances.¹⁰⁸²

Additionally, HROs' tendency to promote an image of childhood that is sharply contrasted to adulthood is not unique to the Israeli/Palestinian case.¹⁰⁸³ Neither is HROs' engagement with a project of "saving children" as a distinct age category.¹⁰⁸⁴ This study can therefore be of value to examining HROs' approaches to children globally. Moreover, HROs' operation in the OPT cannot be detached from global trends and discourses, as argued in Chapters 4-5; in this regard, Israel/Palestine is already global (or rather, glocal).

4. AVENUES FOR FURTHER STUDY

This study hopefully opens more doors than it closes. The following are four of these doors – four avenues for further study – which I myself aim to pursue.

First, as argued in Chapter 1, there is urgent need for more comprehensive, theoretically informed, innovative research of law and childhood, and this dissertation can serve as a starting point from which to develop such broader research.

Second, this dissertation has theoretical and thematic potential and relevance beyond Israel/Palestine. The non-exhaustive comparative discussion this dissertation provides can benefit from being developed into a more comprehensive comparative examination of youth justice issues.

¹⁰⁸⁰ *Supra* text accompanying notes 587-601.

¹⁰⁸¹ *Supra* text accompanying notes 759-760.

¹⁰⁸² *Supra* two paragraph below note 1015.

¹⁰⁸³ See, e.g., Dahlbeck, *supra* note 631.

¹⁰⁸⁴ See, e.g., Hart, *supra* note 712, at 6-7.

Third, writing on the under-studied Israeli law in the OPT – beyond the particular context of childhood – would be highly valuable, to lawyers and non-lawyers alike. The relationship between this legal system and its HRO critics also deserves further examination.

Lastly and conversely, childhood is highly important in Israel/Palestine, practically and symbolically, and should therefore be further studied beyond the scope of the law.

APPENDIX 1

ACRONYMS AND ABBREVIATIONS

The following acronyms and abbreviations are used in the dissertation:

Acronyms

- ACRI – Association for Civil Rights in Israel
- CRC – Convention on the Rights of the Child
- DCI – Defence for Children International
- HCJ – (Israeli) High Court of Justice
- HRO – human rights organisation
- IDF – Israeli Defence Forces (an acronym most Israelis use to refer to the Israeli military).
- IOF – Israeli Occupation Forces (an acronym some critics of Israel use in reference to the Israeli military).
- IPS – Israeli Prison Service
- NGO – non-governmental organisation
- OPT – Occupied Palestinian Territories
- PTSD – Post-Traumatic Stress Disorder

Abbreviations

- App. – Appeals
- CivC – Civil case
- MilC – Military case
- Mil. Ct. – Military court
- CrimA – Criminal Appeal
- CrimC – Criminal case

DETAILS OF HROS

Below are concise descriptions of the HROs mentioned in the dissertation – NGOs and international human rights bodies. The description draws on the HROs' websites, unless indicated otherwise.

NGOs:

- **ACRI – the Association for Civil Rights in Israel:** One of Israel's leading NGOs, founded in 1972. It works with policymakers, advancing legislation and encouraging them to change policy, and seeks legal precedents through the Israeli Supreme Court.¹⁰⁸⁵
- **Adalah – The Legal Center for Arab Minority Rights in Israel:** An Israeli NGO established in 1996. Works to protect the human rights (individual and collective) of Palestinian citizens of Israel.¹⁰⁸⁶
- **Addameer – The Palestinian Counselling Center:** Established in 1992, this NGO offers support for Palestinian prisoners, advocates political prisoners' rights, and works to end torture.¹⁰⁸⁷
- **Breaking the Silence – Israeli Soldiers Talk About the Occupied Territories:** An organisation of veteran Israeli combatants, founded in 2000. These veterans aim to expose the Israeli public to the routine violations of Palestinians' rights in the OPT, to which they have been witness.
- **B'Tselem – The Israeli Information Center for Human Rights in the Occupied Territories:** The foremost Israeli NGO that concerns itself, almost exclusively, with human rights violations in the OPT. It has published scores of reports, many of which are comprehensive in scope, on various kinds of human rights abuses.¹⁰⁸⁸
- **CAABU – The Council for Arab-British Understanding:** a London-based lobbying group aimed at improving relations between the UK and the Arab world.
- **The Concord Research Center for Integration of International Law in Israel:** A legal clinic at the Israeli College of Management. Founded in 2004, this clinic aims to raise awareness in Israel of developments in international human rights and humanitarian law,

¹⁰⁸⁵ ENCYCLOPEDIA OF THE ISRAELI-PALESTINIAN CONFLICT, *supra* note 7, at 133.

¹⁰⁸⁶ *Id.*, at 10.

¹⁰⁸⁷ *Id.*, at 10.

¹⁰⁸⁸ *Id.*, at 217.

and to promote their acceptance and integration into Israeli legal discourse and decision-making.

- **DCI – Defence for Children International:** Founded in 1979, this HRO works to protect, advocate, and promote the rights of children and young adults in conflict with the law, on a global and local level. DCI researches and monitors this issue, works with government bodies, and many of its national sections represent children in conflict with the law. DCI currently has 40 national sections and associated members worldwide – including Israel and the OPT (see below) – and an international secretariat in Geneva.
 - DCI – Israel: The Israeli branch of DCI was founded in 1987, and works to promote and protect the rights of all children in Israel, mainly through reports on relevant issues.
 - DCI – Palestine: The Palestinian section of DCI was founded in 1991, and aims to promote and protect Palestinian children’s rights in accordance with the UN Convention on the Rights of the Child. In addition to disseminating reports on violations of Palestinian children’s rights, *DCI – Palestine* is the biggest provider of legal counsel to Palestinian children in conflict with Israeli law, and is also involved in lobbying, documenting and monitoring, training, and networking activities.¹⁰⁸⁹
- **Hamoked – Center for the Defence of the Individual:** An Israeli NGO established in 1988. Its main work is to assist Palestinians in the OPT whose rights violated by the Israeli authorities or as a result of Israeli policies. It petitions Israeli state authorities on behalf of Palestinians, and when necessary files legal claims and submits petitions to the Israeli Supreme Court. Often collaborates with NGO B’Tselem.¹⁰⁹⁰
- **Human Rights Watch:** one of the world’s leading HROs, established in 1978 (originally named Helsinki Watch). This HRO broadly works to focus international attention where human rights are violated.
- **Machsom Watch:** Established in 2001, this is a movement of Israeli women who observe and document, on a daily basis, Israeli military checkpoints, the offices of the Israeli Civil Administration,¹⁰⁹¹ and Israeli military court hearings.
- **Miftah – The Palestinian Initiative for the Promotion of Global Dialogue and Democracy:** This NGO, founded in 1998, seeks to promote the principles of democracy and good governance within Palestinian society, by disseminating Palestinian narratives globally, and influencing local policy and legislation.

¹⁰⁸⁹ *Supra* notes 42-46 and accompanying text.

¹⁰⁹⁰ ENCYCLOPEDIA OF THE ISRAELI-PALESTINIAN CONFLICT, *supra* note 7, at 493.

¹⁰⁹¹ On the Civil Administration see *supra* note 722.

- **The National Council for the Child:** Established in 1980, this is the oldest and largest NGO specialising in children's rights in Israel. This organisation provides legal counsel for children, conducts research and provides education on children's rights, and runs grass roots programmes.
- **New Profile – The Movement for the Civil-ization of Israeli Society:** A group of Israeli feminists, disseminating information in support of the de-militarisation of Israeli society.
- **No Legal Frontiers:** Founded in late 2009, this Israeli organisation aims at raising awareness, among the Israeli public and policy makers, of the discrimination existing in the Israeli military court system, and has thus far published one report on this topic.
- **The Palestinian Centre for Human Rights:** Established in 1995 and based in Gaza, this NGO documents and investigates human rights violations, provides legal aid and counselling to individuals and groups, and prepares research articles on the human rights situation and the rule of law in the OPT.¹⁰⁹²
- **The Palestinian Human Rights Monitoring Group:** Founded in 1996, this NGO monitors human rights violations in the OPT, mostly by the Palestinian Authority.¹⁰⁹³
- **The Palestinian Prisoner Club:** This HRO publishes information on the violation of Palestinian prisoners' rights in Israeli prisons, and provides legal counsel and other forms of support to these prisoners.
- **Physicians for Human Rights – Israel:** Established in 1988, this NGOs deals with health issues of various groups, such as Palestinians in the OPT, prisoners (Israeli and Palestinians), and migrants. The organisation provides medical treatment through its volunteer physicians, works on bringing about changes in Israeli policy on health issues, and often utilises legal means, such as appeals to the Israeli Supreme Court.¹⁰⁹⁴
- **The Public Committee Against Torture in Israel:** Founded in 1990, this organisation focuses on an information campaign aimed at raising public awareness of torture in Israel, and also uses legal means, including appeals to the Israeli Supreme Court; support of relevant legislation; provision of legal counsel; and advice and assistance to attorneys representing torture victims.¹⁰⁹⁵
- **Save the Children:** Founded in 1919, this HRO now works in 120 countries to protect children and their rights, by running education programmes, providing life-saving essentials, and publishing reports. The organisation defines its work as based on the UN

¹⁰⁹² ENCYCLOPEDIA OF THE ISRAELI-PALESTINIAN CONFLICT, *supra* note 7, at 1083.

¹⁰⁹³ *Id.*, at 1095.

¹⁰⁹⁴ *Id.*, at 1163-1164.

¹⁰⁹⁵ *Id.*, at 1193.

Convention on the Rights of the Child, and two of its biggest branches (which are mentioned in this dissertation) are the Swedish and UK Branches.

- **UAT – The United Against Torture Coalition:** A coalition of 14 Israeli and Palestinian NGOs, that collaboratively aim to combat abuse and torture in Israel and the OPT, through documentation and reporting of incidents of ill-treatment and torture.
- **Yesh Din – Volunteers for Human Rights:** An Israeli NGO established in 2005. This NGO documents and disseminates information about systematic human rights violations in the OPT, and applies public and legal pressures on Israeli government agencies to end such violations.¹⁰⁹⁶

International human rights bodies:

- **UN Commission on Human Rights** (now replaced by the UN Human Rights Council¹⁰⁹⁷): Established in 1946, and composed of 53 States members, this UN organ acts as a forum for countries and NGOs to voice their concerns about human rights issues, and aims to respond to such issues.
- **UN Committee on the Rights of the Child:** The committee defines itself as a body of independent experts that monitor the implementation of the UN Convention on the Rights of the Child and its optional protocols. All State parties (including Israel) are obliged to submit regular reports to the Committee on their implementation of the rights anchored in the Convention.
- **UN Committee Against Torture:** The committee defines itself as a body of independent experts that monitor the implementation of the UN Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment by its State parties. All State parties (including Israel) are obliged to submit regular reports to the Committee on their implementation of the rights anchored in the Convention.
- **UN Human Rights Committee:** The committee defines itself as a body of independent experts that monitor the implementation of the International Covenant on Civil and Political Rights by its State parties. All State parties (including Israel) are obliged to submit regular reports to the Committee on their implementation of the rights anchored in the Covenant.

¹⁰⁹⁶ *Id.*, at 1649.

¹⁰⁹⁷ Reference here is to the Commission rather than to the Council, since it is the former and not the latter which is mentioned in the dissertation.

ADDITIONAL PROVISIONS IN ISRAELI LAW RELATING TO CHILD OFFENDERS

In Chapter 2, we looked at on certain aspects of Israeli law's treatment of child offenders, which are most relevant to the issues examined in Chapters 3-5. The following is a concise description of other important provisions in Israeli law relative to child offenders, which were not covered by Chapter 2. These additional provisions are grouped under the same categories used in Chapter 2: "the trial", "sentencing", and "outside the courtroom".

1. DOMESTIC ISRAELI LAW APPLICABLE TO ISRAELI CHILD OFFENDERS

1.(a). The trial

According to Israeli law, minors under the age of 13 years may not be brought to trial unless a probation officer has been consulted.¹⁰⁹⁸ The court is authorised to order that the minor not be present at any stage of the trial (excluding the verdict or other decisions concerning the minor), if it deems this to be necessary for the minor's best interests, and provided that the minor is represented by an attorney.¹⁰⁹⁹

Although for most purposes Israeli legislation defines a "minor" as anyone under the age of 18 years,¹¹⁰⁰ the criminal legislation marks soldiers as an exception to this definition. Thus, court-martials are authorised to try soldiers under the age of 18 years,¹¹⁰¹ and for certain criminal procedure purposes a "minor" is defined as "anyone under the age of 18 years except for a soldier".¹¹⁰²

¹⁰⁹⁸ YOUTH LAW, *supra* note 300, art. 12(b). *See also id.*, art. 15. On the development of the juvenile probation legislation and services in Israel, *see* Hassin and Horovitz, *supra* note 107, at 315.

¹⁰⁹⁹ YOUTH LAW, *supra* note 300, art. 17. *See also id.*, art. 17b.

¹¹⁰⁰ *See, e.g.*, THE LAW OF LEGAL COMPETENCE AND GUARDIANSHIP (1962), art. 3 ("A person under the age of 18 years is a minor; a person who has turned 18 years old is an adult.").

¹¹⁰¹ YOUTH LAW, *supra* note 300, art. 46.

¹¹⁰² THE PENAL PROCEDURE LAW – BODY SEARCH, *supra* note 479, art. 1.

1.(b). Sentencing

According to the law, when a minor is found guilty a probation report on his or her personal circumstances is submitted to the youth court, to guide the court in determining the sentence. The litigants may read this report, but may not receive copies of it unless the court orders otherwise.¹¹⁰³

1.(c). Outside the courtroom (arrest, interrogation, detention, and imprisonment)

In addition to limitations which the law places on the shackling of detainees in general,¹¹⁰⁴ it specifically requires that minor detainees not be shackled if a less harmful means can achieve the purpose of the shackling. The law also requires that the shackling of minors – when indeed employed – be as short as necessary. When deciding whether to shackle a minor, the police are required to take into consideration the minor's age and the effect of the measure on his or her wellbeing.¹¹⁰⁵

Whenever arresting or indicting minors, the police are required to inform probation officers (who work for the Welfare Ministry). In addition, the police are authorised to press charges against minors under the age of 13 years only after consulting their probation officers.¹¹⁰⁶

Detainees under the age of 14 years should generally be brought before a judge within 12 hours of their arrest¹¹⁰⁷ (as compared with 24 hours for older detainees¹¹⁰⁸). At this stage, the court can either order that the minor remain in detention or, if it deems it necessary for the minor's wellbeing, pursue a number of alternatives to ordinary criminal proceedings, including among others supervision by a social worker or rehabilitative treatment.¹¹⁰⁹

As regards indictments, the law requires that indictments mention the minor's date of birth, as much as possible.¹¹¹⁰ Charges may not be pressed against minors a year after the date of the offence without the approval of the Government's Attorney.¹¹¹¹ Once the charges are pressed, a

¹¹⁰³ YOUTH LAW, *supra* note 300, arts. 22-23, combined with THE PENAL CODE (1977), art. 37.

¹¹⁰⁴ THE CRIMINAL PROCEDURE LAW – ARRESTS, *supra* note 276, art. 9a.

¹¹⁰⁵ YOUTH LAW, *supra* note 300, art. 10b.

¹¹⁰⁶ *Id.*, art. 12.

¹¹⁰⁷ *Id.*, art. 10c(2)(a). See also *id.*, arts. 10c(2)(b), 10d.

¹¹⁰⁸ THE CRIMINAL PROCEDURE LAW – ARRESTS, *supra* note 276, art. 29.

¹¹⁰⁹ YOUTH LAW, *supra* note 300, arts. 10(e).

¹¹¹⁰ *Id.*, art. 16.

¹¹¹¹ *Id.*, art. 14. This authority has been delegated to the Government's Attorney and her/his deputies. The Legal Advisor to the Government, *Instructions on the Duration of the Prosecution's Proceedings Until Pressing Charges* (August 2010) (Hebrew), available at <http://www.justice.gov.il/NR/rdonlyres/D7515786-BE74-4319-B1DA-87338B14B419/22309/41202.doc>. For another relevant restriction on bringing minors to trial see *id.*, art. 15.

youth court may order the minor's placement under a probation officer's supervision, and the officer would periodically submit reports to the court.¹¹¹² The court can further order that the minor be placed in a protection centre, usually subject to the minor's consent and to his or her receiving legal representation.¹¹¹³

2. THE ISRAELI MILITARY LAW APPLICABLE TO PALESTINIAN CHILDREN

2.(a). Sentencing

Military courts are not authorised to sentence to death defendants whose age at the time of the offences is under 18 years of age.¹¹¹⁴

When fining a defendant younger than 18 years, the military court can mandate the defendant's parents or guardian – after hearing their opinion on the matter¹¹¹⁵ – to either pay the fine¹¹¹⁶ or provide bond that the defendant would not offend again. If such a bond is indeed provided and the defendant eventually reoffends, the court may either turn the bond to a fine or impose a sentence of up to six months.¹¹¹⁷

2.(b). Outside the courtroom (arrest, interrogation, detention, and imprisonment)

Military commanders are authorised to order Palestinians whose 12-17-year-old child has been arrested on suspicion of breaking the law to deposit a bond, in order to prevent their child from

¹¹¹² YOUTH LAW, *supra* note 300, art. 20.

¹¹¹³ *Id.*, arts. 20a-20c.

¹¹¹⁴ ORDER 1651, *supra* note 74, art. 165(b). Until 2007, the military courts deduced from the military legislation another restriction: Palestinians under the age of 18 years could not be sentenced to more than 10 years in prison for any attempted crime. However, pursuant to the military court judges' criticism of this restriction as being too lenient, it was recently removed from the military legislation. *Id.*, art. 204. See also, e.g., MilC 128/02, *supra* note 447; MilC 30/04, *supra* note 458; MilC 2891/06, *supra* note 443; MilC 1553/07, *supra* note 447 (Judge Benischou's concurring opinion). It should be noted that the Israeli military courts have rarely sentenced (adult) Palestinians to death, and none of these death sentences has been carried out. Ofer Ben Hayim, *Death Penalty in the Ruling of the Military Courts in Israel and in the Administered Territories*, 10 MISHPAT VE-TSAVA [LAW & MILITARY] 35 (1989) (Hebrew); Boaz Sanjero, *Death Penalty in General and Particularly Death Penalty in Terrorist Acts*, 2 ALEI MISHPAT [ON LAW] 127, 184-187 (2002) (Hebrew).

¹¹¹⁵ ORDER 1651, *supra* note 74, art. 178.

¹¹¹⁶ *Id.*, art. 176. If the fine is not paid, it will be converted into a prison sentence which the parent or guardian might be ordered to carry out. *Id.* For statistical information of the fines the military courts imposed in 2005-2010 on Palestinian minors who were convicted of stone throwing see B'TSELEM, *supra* note 96, at 22.

¹¹¹⁷ ORDER 1651, *supra* note 74, art. 177. The wording of this article is unclear in relation to whether it is the defendant or the guarantor on whom this sentence can be imposed.

reoffending.¹¹¹⁸ Not depositing the bond could lead to the parent's imprisonment for a year. If a bond is deposited and the child commits another offence, a military court can order his or her parents to pay the bond as a fine.¹¹¹⁹ Originally, the military enacted these provisions during the first Intifada,¹¹²⁰ in an attempt to eradicate the then-widespread phenomenon of stone throwing by young Palestinian children.¹¹²¹ At the time, these provisions applied to parents of children under the age of criminal responsibility (i.e., under 12 years of age).¹¹²² An appeal against this order was quickly made to the Israeli High Court of Justice, which rejected it and stipulated, among other things, that the order actually protected Palestinian children by holding their parents accountable instead of punishing the children themselves.¹¹²³

With regard to charges, the military legislation requires indictments against minors to mention their date of birth, when possible.¹¹²⁴ If two years or more have passed since the offences were committed and the offender was a minor at the time of committing these offences, the military prosecution's approval is required to press charges.¹¹²⁵

¹¹¹⁸ I have found no information on the frequency in which this measure is used.

¹¹¹⁹ ORDER 1651, *supra* note 74, art. 181.

¹¹²⁰ On the first Intifada *see supra* note 27.

¹¹²¹ ORDER 1235, *supra* note 482. For Israeli accounts of the purpose of this order *see* STRASHNOV, *supra* note 76, at 32-34; MilC 173/91 *Habash v. The Military Prosecutor* [1991] (Ramallah Mil. Ct.), in MILITARY ATTORNEY GENERAL'S OFFICE, SELECTED RULINGS OF THE MILITARY COURTS IN THE ADMINISTERED TERRITORIES – VOL. 7, at 271, 275-276 (1993); HCJ 591/88 *Taha v. the Minister of Defence* [1991] (Sup. Ct.), arts. 1, 17, 20.

¹¹²² Accordingly, in this context the term "minor" initially denoted defendants under 12 years, and was later changed to denote defendants aged 12-17.

¹¹²³ HCJ 591/88, *supra* note 1121.

¹¹²⁴ ORDER 1651, *supra* note 74, art. 145.

¹¹²⁵ *Id.*, art. 144 (amended in 2011 by ORDER 1676, *supra* note 346, arts. 5, 7). In a number of specific offences – such as impersonating a public servant or insulting a person – the period for requiring the prosecution's approval is a year rather than two years. *Id.*

THE PERTINENT INTERNATIONAL LAW: SOURCES AND APPLICATION

Lawyers, HROs, Israeli State authorities and others have deployed or referred to international law to legitimise, or contest, Israel's use of force and the Israeli governance of the OPT.¹¹²⁶ Even Israeli military courts have made occasional references to international law.¹¹²⁷

The domestic Israeli law applicable to Israeli child offenders is generally considered to be in line with international child's rights legislation – all the more so since its extensive revision in 2008,¹¹²⁸ which implemented many of the recommendations of an expert commission which the Israeli government had appointed to review the statutory law's conformity to the *UN Convention on the Rights of the Child* (hereinafter: *CRC*).¹¹²⁹ In addition, Israel's ratification of the *CRC* seems to have been one of the major developments increasing (non-military) Israeli courts' incorporation of "children's rights".¹¹³⁰

On the other hand, Israeli military law – which as explained above grants Palestinian child suspects and defendants significantly less protections and entitlements than those given to their Israeli peers – has been repeatedly criticised by NGOs¹¹³¹ and inter-governmental bodies,¹¹³² as well as by some scholars¹¹³³ for contravening international law, and particularly international child's rights law.

Surveying the broad body of pertinent international law far exceeds the present space restrictions. Unlike the relevant Israeli law, this body of international law has been the subject of methodical scholarship – to which references are made throughout this appendix. Furthermore, since it is Israeli law on which this study concentrates, and considering the socio-legal rather than rights-based approach of this project, this appendix does not aim to assess the extent to which Israeli law or practices meet international legal standards.¹¹³⁴

¹¹²⁶ Guy Davidov and Amnon Reichman, *Prolonged Armed Conflict and Diminished Deference to the Military: Lessons from Israel*, 35 *LAW & SOCIAL INQUIRY* 919, 926-927, 929 (2010); HAJJAR, *supra* note 21, at 248. On the legalistic character of the Israeli occupation in general see *supra* notes 21-23 and accompanying text.

¹¹²⁷ *Infra* notes 1158-1162 and accompanying text. See also Hadar, *supra* note 76, at 178-179.

¹¹²⁸ *Supra* notes 300-301 and accompanying text.

¹¹²⁹ Morag 2010, *supra* note 100, at 69. The report of the sub-committee on minors in the criminal procedure is available (in Hebrew) at <http://www.justice.gov.il/NR/rdonlyres/C4D53B4C-AB90-4EDD-B0AE-49FEAC61F563/0/DOCHPLILY.pdf>.

¹¹³⁰ Morag 2006, *supra* note 100. As Morag notes elsewhere, her analysis does not include the Israeli youth courts, since their records are inaccessible. Morag 2010, *supra* note 100, at 74.

¹¹³¹ See, e.g., B'TSELEM, *supra* note 96, at 6-8; DCI – PALESTINE, *supra* note 350, at 6-8; NO LEGAL FRONTIERS, *supra* note 26, at 15-16; YESH DIN, *supra* note 26, at 154-155.

¹¹³² See, e.g., UN COMMITTEE ON THE RIGHTS OF THE CHILD, *supra* note 159.

¹¹³³ Cavanaugh, *supra* note 67; Weill, *supra* note 26.

¹¹³⁴ There is an abundance of relevant right-based literature. See, e.g., INTERNATIONAL LAW AND THE ISRAELI-PALESTINIAN CONFLICT: A RIGHTS-BASED APPROACH TO MIDDLE EAST PEACE (Susan M.

For these reasons, this appendix will not discuss some sources of international law¹¹³⁵ which, notwithstanding their potential relevance to the situation at hand, are not usually referred to by HROs or Israeli authorities in this context.¹¹³⁶ Instead, the main sources of international law to which HROs and Israeli authorities often refer in this context will be mentioned. Then, we will proceed to discussing questions surrounding Israel's application of these sources in the OPT.

1. RELEVANT SOURCES

The relevant sources of international law can crudely (and somewhat artificially) be grouped into three categories: the first is international children's rights law, under which the most prominent treaty is the CRC,¹¹³⁷ and alongside it are numerous relevant UN resolutions and declarations, including some focusing on the treatment of young offenders.¹¹³⁸

A second category is the law of belligerent occupation, in which the most central treaty is arguably the *Fourth Geneva Convention of 1949*,¹¹³⁹ which grants various protections to the civilian

Akram et al eds., Routledge, Abingdon and New York, 2011); KRETZMER, *supra* note 83; THE PALESTINE QUESTION IN INTERNATIONAL LAW (Victor Kattan ed., British Institute of International and Comparative Law, London, 2008).

¹¹³⁵ For discussion of some of these additional sources see BUCK ET. AL., *supra* note 101, at 23, 89-90, 289-290, 292, 295, 299-301; Clark, *supra* note 98, at 311, 312-313, 317-318; Carolyn Hamilton, *Child Protection in Complex Emergencies*, in PROTECTION OF CHILDREN DURING ARMED POLITICAL CONFLICT: A MULTIDISCIPLINARY PERSPECTIVE 269, 269, 273-275 (Charles W. Greenbaum et al. eds., Hart, Oxford, 2006); KUPER, *supra* note 101, at 8, 20, 23, 25, 27, 31, 40-45, 49, 51-55, 69, 72, 108-109, 125, 130, 134, 141-142, 147-148, 155-156, 177-178, 182, 191-192, 196-200, 202-206, 210, 212-214, 225, 236-237.

¹¹³⁶ Nevertheless, the sources which will be discussed in this appendix do mention what lawyers generally consider the main legal framework for protecting juveniles during armed conflict. See, e.g., Jamison, *supra* note 1066, at 145-151.

¹¹³⁷ CRC, *supra* note 431. Literature on the CRC is abundant – see, e.g., BUCK ET. AL., *supra* note 101, at 88-164; REVISITING CHILDREN'S RIGHTS, *supra* note 101. For discussion of the CRC in relation to armed conflicts see BUCK ET. AL., *supra* note 101, at 292-299; Clark, *supra* note 98, at 313-318; Hamilton, *supra* note 1135, at 272-274 (Buck et. al. and Hamilton also discuss the *Optional Protocol to the CRC on the Involvement of Children in Armed Conflict*, which came into force on February 12, 2002); KUPER, *supra* note 101, at 44-51.

¹¹³⁸ UNITED NATIONS GENERAL ASSEMBLY RESOLUTION 40/33: STANDARD MINIMUM RULES FOR THE ADMINISTRATION OF JUVENILE JUSTICE (adopted: November 29 1985), available at <http://www2.ohchr.org/english/law/pdf/beijingrules.pdf>; UN RULES FOR THE PROTECTION OF JUVENILES DEPRIVED OF THEIR LIBERTY, *supra* note 431; UNITED NATIONS GENERAL ASSEMBLY RESOLUTION 45/112: GUIDELINES FOR THE PREVENTION OF JUVENILE DELINQUENCY (adopted: December 14, 1990), available at <http://www2.ohchr.org/english/law/juvenile.htm>. See also Clark, *supra* note 98, at 315-317; KUPER, *supra* note 101, at 51-52.

¹¹³⁹ FOURTH GENEVA CONVENTION RELATIVE TO THE PROTECTION OF CIVILIAN PERSONS IN TIME OF WAR (12.8.1949), available at <http://www.icrc.org/ihl.nsf/385ec082b509e76c41256739003e636d/6756482d86146898c125641e004aa3c5>. For discussion of the convention (and its two optional protocols from 1977) in relation to children see BUCK ET. AL., *supra* note 101, at 286-289; Hamilton, *supra* note 1135, at 270-272; KUPER, *supra* note 101, at 61-68, 71, 73, 77-97, 111, 156-158. Israel is a party to the *Fourth Geneva Convention*, but not to its two additional protocols.

population in a war zone. Also of significance are the *Hague Regulations of 1907*,¹¹⁴⁰ which among other things define the occupying power's responsibilities.¹¹⁴¹

The last category is international treaty law not exclusively concerning children and/or armed conflict. The *International Covenant on Civil and Political Rights*¹¹⁴² and the *Convention against Torture*¹¹⁴³ are the two "general" treaties which appear to be most often cited in relation to children in the OPT.

These three categories are in fact interconnected. Thus, among other things, the CRC requires its state parties to respect the applicable rules of international humanitarian law which are of relevance to children.¹¹⁴⁴ Inversely, the *Geneva Convention* and its optional protocols award special protections to children in armed conflicts.¹¹⁴⁵ Additionally, the *Covenant on Civil and Political Rights* deals, among other things, with children's rights and interests in court proceedings and elsewhere.¹¹⁴⁶

As noted above, rather than elaborating on the provisions of these sources of international law, we will now discuss how Israeli state authorities have used this legal framework in relation to the OPT.

2. APPLICATION

Israel has ratified all the human rights treaties mentioned above – the CRC (and its *Optional Protocol on Children in Armed Conflicts*¹¹⁴⁷), the *International Covenant on Civil and Political Rights*, and the *Convention against Torture*¹¹⁴⁸ – and it is also party to the *Fourth Geneva*

¹¹⁴⁰ CONVENTION (IV) RESPECTING THE LAWS AND CUSTOMS OF WAR ON LAND (signed: October 18, 1907), available at <http://www.icrc.org/ihl.nsf/FULL/195>. For discussion see KUPER, *supra* note 101, at 60.

¹¹⁴¹ For information on the relevant customary international humanitarian law, including Rules 87, 90, 100, and 135 of the *Hague Regulations*, see, e.g., JEAN-MARIE HENCKAERTS AND LOUISE DOSWALD-BECK, *CUSTOMARY INTERNATIONAL HUMANITARIAN LAW* (ICRC and Cambridge University Press, Cambridge and New York, 2005).

¹¹⁴² INTERNATIONAL COVENANT ON CIVIL AND POLITICAL RIGHTS (adopted: December 16, 1966; entered into force: March 23, 1976), available at <http://www2.ohchr.org/english/law/ccpr.htm>.

¹¹⁴³ CONVENTION AGAINST TORTURE AND OTHER CRUEL, INHUMAN OR DEGRADING TREATMENT OR PUNISHMENT (adopted: December 10, 1984; entered into force: June 26, 1987), available at <http://www2.ohchr.org/english/law/cat.htm>.

¹¹⁴⁴ CRC, *supra* note 431, art. 38(1). For discussion see BUCK ET. AL., *supra* note 101, at 292-294; KUPER, *supra* note 101, at 98-107; Veerman and Gross, *supra* note 147, at 324-325.

¹¹⁴⁵ *Supra* note 1139.

¹¹⁴⁶ INTERNATIONAL COVENANT ON CIVIL AND POLITICAL RIGHTS, *supra* note 1142, arts. 14, 18, 23-24. For discussion of these articles of the Covenant see KUPER, *supra* note 101, at 20, 27-29, 150-152, 198, 206, 208, 214, 238. In comparison, the *Convention against Torture* (also mentioned above) makes no reference specifically to children.

¹¹⁴⁷ On this protocol see *supra* note 1137.

¹¹⁴⁸ Ben-Naftali and Shany, *supra* note 155, at 25-26.

Convention.¹¹⁴⁹ Accordingly, Israel has submitted reports to the relevant treaty monitoring bodies of the UN.¹¹⁵⁰

However, the position of Israeli governments¹¹⁵¹ (on the basis of arguments exceeding the scope of this appendix¹¹⁵²) has been that these treaties do not apply to the OPT.¹¹⁵³ This position has been rejected by the UN treaty monitoring bodies,¹¹⁵⁴ and it has been highly criticised by various scholars.¹¹⁵⁵

In particular, while considering the *Geneva Convention* inapplicable to the OPT *de jure*, Israeli governments have declared that they would *de facto* act in the OPT in accordance with the humanitarian principles of the Convention, as much as possible.¹¹⁵⁶ Furthermore Israeli military officials have described the *Geneva Convention* as a basis for Israel's establishment and operation of its military court system.¹¹⁵⁷

¹¹⁴⁹ However, Israel is not party to the two 1977 *Additional Protocols* of the convention. On these protocols see *supra* note 1139. On Israel's reservations to the treaties to which it is a party see Geneva Academy of International Humanitarian Law and Human Rights – Rule of Law in Armed Conflicts Project, *Israel – International treaty adherence* (last visited: August 5, 2011), available at http://www.adh-geneva.ch/RULAC/international_treaties.php?id_state=113.

¹¹⁵⁰ See, e.g., COMMITTEE AGAINST TORTURE, *supra* note 492.

¹¹⁵¹ The Israeli Supreme Court has taken a somewhat more nuanced position, but for methodological and practical reasons I concentrate on the position expressed by the Israeli governments. For a similar approach see Ben-Naftali and Shany, *supra* note 155, at 24.

¹¹⁵² On these arguments see Ben-Naftali, Gross and Michaeli, *supra* note 21, at 567-570; Ben-Naftali and Shany, *supra* note 155, at 26-40; Benvenisti, *supra* note 155 at 27 note 17, 34-35; Cohen, *supra* note 34, at 36-40, 45-79; Shamgar, *supra* note 158.

¹¹⁵³ In fact, when the Israeli army first entered the West Bank, it published an ordinance decreeing that its court system would comply with the *Geneva Convention*, but this ordinance was soon rescinded. KRETZMER, *supra* note 83, at 27, 32-33; ZERTAL AND ELDAR, *supra* note 23, at 333-334. Early Israeli military court rulings similarly considered the Geneva Convention applicable to the OPT. See, e.g., MilC 331/68, *supra* note 449. It should be noted that according to Israeli law (like other common systems of law), ratification of international treaties by the government is not sufficient to make them into law of the land, and they must be implemented through specific legislation to become effective domestically. Benvenisti, *supra* note 155, at 26; Eyal Benvenisti, *The Influence of International Human Rights Law on the Israeli Legal System: Present and Future*, 28 ISRAEL LAW REVIEW 136, 138-141 (1994); Veerman and Gross, *supra* note 147, at 295-299.

¹¹⁵⁴ Ben-Naftali and Shany, *supra* note 155, at 18-21. Recent examples are COMMITTEE AGAINST TORTURE, *supra* note 492, at para. 11; UN COMMITTEE ON THE RIGHTS OF THE CHILD, *supra* note 159, at para. 4.

¹¹⁵⁵ See, e.g., Ben-Naftali, Gross and Michaeli, *supra* note 21, at 567; Ben-Naftali and Shany, *supra* note 155, at 40-58; HAJJAR, *supra* note 21, at 53-56; Inseis, *supra* note 70, at 65, 92-101; KRETZMER, *supra* note 83, at 31-35; Roberts, *supra* note 155, at 62-66; ZERTAL AND ELDAR, *supra* note 23, at 336-338.

¹¹⁵⁶ *Supra* note 1152. See also STRASHNOV, *supra* note 76, at 37-38. For HCJ rulings reiterating this position see, e.g., HCJ 591/88, *supra* note 1121, at 53; HCJ 1661/05, *supra* note 873, art. 4. Israel's position in relation to the *Hague Regulations* has been different: the HCJ has affirmed their applicability and enforceability to the OPT, and Israeli governments have not rejected this position. Inseis, *supra* note 70, at 99; KRETZMER, *supra* note 83, at 34-40.

¹¹⁵⁷ See, e.g., Benichou, *supra* note 26, at 295; STRASHNOV, *supra* note 76, at 37. See also Hadar, *supra* note 76, at 173-175.

References to provisions of international humanitarian law specifically applicable to Palestinian children, accompanied by clarifications that the military is not bound by these provisions, can be found in rulings of the Israeli military courts¹¹⁵⁸ and courts-martial.¹¹⁵⁹

In a somewhat similar manner, Israel's formal position (mentioned above) that the CRC does not apply to the OPT has not prevented Israeli military courts from referring to this treaty (albeit rarely and sporadically). One can thus find references in military court rulings to the prohibition of the CRC on sentencing minors to life,¹¹⁶⁰ a reference to the CRC's influence on the 2008 revision of the domestic youth legislation,¹¹⁶¹ and even a remark that "the spirit of the Convention [...] require[s] [...] giving] substantial weight to the age of the minor at the time the offense was committed, and at the time of sentencing."¹¹⁶²

Israeli rhetoric and practice with regard to international law in this context demonstrated the legalistic nature of the Israeli occupation – as discussed in Chapter 1.¹¹⁶³

¹¹⁵⁸ See, e.g., MilC (unnumbered) *The Military Prosecutor v. Salem* [2003] (Judea Mil. Ct.); MilC 41867/01 *The Military Prosecutor v. Abu Ish-Shabab* [2003] (Beit-El Mil. Ct.); MilC 1/07 *Meshbaan v. The Military Prosecutor* [2006] (Mil. Ct. App.); MilC 3335/07 *Dar-Halil v. The Military Prosecution* [2008] (Mil. Ct. App.). See also DRORI, *supra* note 158, at 171 (the author served in the Israeli Military Prosecution at the time of publishing this book).

¹¹⁵⁹ CrimC 400/04 *The Military Prosecutor v. Captain R.* [2005] (South District Court-Martial) (concerning an Israeli soldier who killed a Palestinian child).

¹¹⁶⁰ MilC 128/02, *supra* note 447 (clarifying that this reference is made "without going into the question of the applicability" of the CRC); MilC 346/03, *supra* note 719.

¹¹⁶¹ MilC 2912/09, *supra* note 502. On the 2008 revision see *supra* text above notes 300-301.

¹¹⁶² MilC 4941/08 *The Military Prosecutor v. K.D.* [2009] (Judea Mil. Ct.). Cited in B'TSELEM, *supra* note 96, at 25.

¹¹⁶³ *Supra* notes 21-23 and accompanying text.

Map of interrogation centres and prisons in Israel and the Occupied Palestinian Territory

Military Courts

- Ofer Military Court
- Salem Military Court

Interrogation and Detention Centres

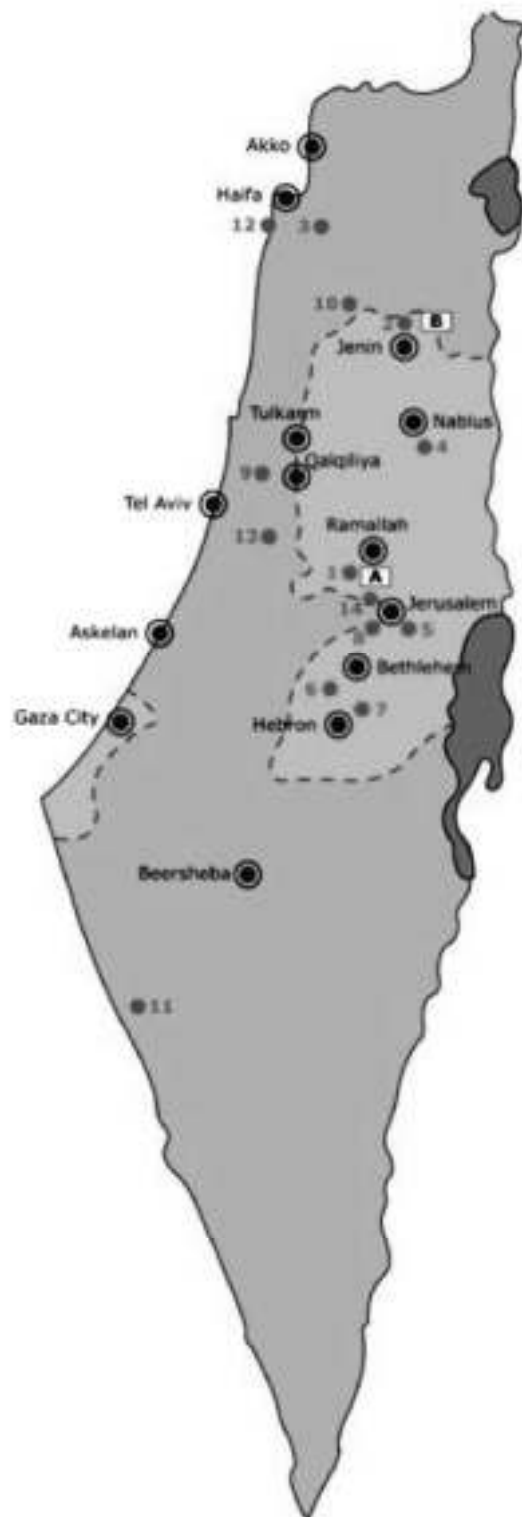
1. Ofer
2. Salem
3. Al Jalame (Israel)
4. Huwwara
5. Ma'ale Adumim (police station)
6. Etzion
7. Kiryat Arba (police station)
8. Al Mascobiyya (Jerusalem)

Prisons

1. Ofer
9. Telmond Compound (Israel)¹
10. Megiddo (Israel)
11. Ketziot (Israel)
12. Damoun (Israel)

Hospitals

13. Ramle Prison Hospital
14. Hadasa Ein Karem Hospital



¹¹⁶⁴ Reproduced from DCI – PALESTINE, *supra* note 32, at 12.

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5. ISRAELI LEGISLATION

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5.(b). Military legislation

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- CrimC 157/03 *The State of Israel v. Butvika* [2008] (Jerusalem Dist. Ct.).
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- CivC 6326/04 *Al-Shuahin v. Barazani* [2006] (Jerusalem Magistrate Ct.).
- CrimC 907/05 *The State of Israel v. Wahabi* [2005] (Jerusalem Dist. Ct.).
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7. TRANSCRIPTS OF ISRAELI PARLIAMENTARY COMMITTEE MEETINGS

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