

## BETWEEN VICTIMS OF CRIME AND VICTIMS OF TERRORISM: VICTIMS' RIGHTS IN THE MILITARY COURTS IN THE WEST BANK

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*In June 2018, a new Reform came into effect in the Judea and Samaria Area (the West Bank; hereinafter “the Area”). For the first time, victims of terror activity that was adjudicated in military courts in the Area, acting under international law, were given statutory rights. These victims were awarded new procedural rights, including the right to receive information regarding the proceedings against the defendant, updates regarding plea bargains, release from prison, and pardon. The rights that crime victims are now entitled to, following the Reform, will allow them to state their opinion on and take part in the proceeding, though not entirely so.*

*The article describes the new Reform regarding victims of terrorism in the Area. It explains the legal, international, and social factors that were at the basis of the Reform. It portrays how these changes are compliant with principles of international law and of foreign legal systems relating to enhancing the protection of crime victims. The article then explores the normative changes expected as a result of the Reform and performs a preliminary evaluation of future developments resulting from its application, de facto. Simultaneously, the article poses criticism to certain aspects of the Reform, such as regarding the*

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*enforcement of compensation awarded to victims of terrorism in the Area, and offers suggestions for improvement.*

**Keywords:** *victims of crime, victims of terrorism, military courts, belligerent occupation, human rights in the West Bank*

## INTRODUCTION

In June 2018, the 58th Amendment of the Security Provisions Order came into force, granting rights, for the very first time in Judea and Samaria (the West Bank; hereinafter “the Area”),<sup>1</sup> to victims of terror activities carried out by defendants who are prosecuted in military courts (hereinafter “victims of terrorism in the Area”). This Reform was designed to bring the status of victims of terrorism in the Area, many of whom are U.S. citizens, closer to that of the victims of terrorism carried out by defendants who are prosecuted in Israeli courts. The Reform also aligns the legal status in the Area with the international law in this field. The new Order applies most of the rights stated in the Israeli Crime Victims’ Rights Act into the Area’s laws. These rights include the right to be informed on the proceedings against the defendant and the right to receive updates relating to plea bargains, release from prison, and pardon. The information that the crime victims are now entitled to, following the new legislation, will allow them to state their opinion on and take part in the proceeding, though in a limited manner.

Albeit their extensive influence on thousands of the Area’s terrorism victims and their families, the academic writing and research on military courts, their activity, and their normative influence is scarce.<sup>2</sup> Academic

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1. The correct terminology with regard to this territory is currently legally disputed. Some term the Area “occupied territories,” some call it “liberated territories.” The common term that is *prima facie* detached from a political context is “administrated territories.” In any case, in this article we will use the term “the Area,” which is the accepted term in the Israeli law and jurisprudence as well as the Mandate’s legislation.

2. See, generally, Hilly Moodrick-Even Khen, *Juvenile Justice in Belligerent Occupation Regimes: Comparing the Coalition Provisional Authority Administration in Iraq with the Israeli Military Government in the Territories Administered by Israel*, 42 DENV. J. INT’L L. & POL’Y 119 (2014); Hedi Viterbo, *Rights as a Divide-and-Rule Mechanism: Lessons from the Case of Palestinians in Israeli Custody*, 43 LAW & SOC. INQUIRY 764 (2018); ORNA BEN-NAFTALI ET AL., THE ABC OF THE OPT: A LEGAL LEXICON OF THE ISRAELI CONTROL OVER THE OCCUPIED PALESTINIAN TERRITORY (2018); Nathaniel Benisho, *Trends in Criminal Law in Judea, Samaria and Gaza Strip*, 18 T’ZAVA U’MISHPAT 293 (2005) (Isr.); Meir Shamgar,

writing in the field of crime victims in military courts in the Area is nonexistent, to the best of our knowledge. Since the establishment of military courts in the Area in 1967, tens of thousands of criminals have been adjudicated, yet the voices and various interests of thousands of crime victims were not formally heard or portrayed. This article attempts to fill the academic void in this field.

This first section of the article describes the background of the establishment of the military courts in the Area, and their role in applying the rule of law in the Area and ensuring the safety and wellbeing of its inhabitants. The second section reviews the legislation granting rights, for the first time, to terror victims in the Area, allowing them to voice their opinions and interests in criminal proceedings in the military courts. The third section examines the processes that led to the Reform, as well as investigates the developments in crime victims' rights in foreign military legal systems. The fourth section poses criticisms to the Reform in crime victims' rights in the Area and supplies possible answers to them. The fifth section proposes some anticipated future developments in the field, following the Reform. The sixth section suggests an outline for further improvement in the rights of terrorism victims in the Area. The final section concludes the article.

## I. THE MILITARY COURTS IN THE AREA

The military courts in Judea, Samaria, and the Gaza strip<sup>3</sup> were established as part of the administrative government in 1967 by the Israeli military, through its obligation and authority to ensure an effective administration and the safety of these areas.<sup>4</sup> This obligation and authority is stated in the

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*Legal Concepts and Problems of the Israeli Military Government—The Initial Stage, in MILITARY GOVERNMENT IN THE TERRITORIES ADMINISTERED BY ISRAEL, 1967–1980: THE LEGAL ASPECTS* 520 (Meir Shamgar ed., Harry Sacher Institute for Legislative Research and Comparative Law, 1982). Meir Shamgar was the chief justice of the Israeli Supreme Court and the military's advocate general in 1967, and thus responsible for all legislation in the Area.

3. The Military Administration in the Gaza Strip ended following Israel's disengagement from Gaza in 2006. See *generally*, HCJ 1611/05, *Moa'za Ezorit Hof Aza v. Ha'Knesset* (published June 9, 2005) (Isr.).

4. See MOSHE DRORI, LEGISLATION IN JUDEA AND SAMARIA 160 (1975) (Isr.); Yehuda Z. Blum, *The Missing Reversioner: Reflections on the Status of Judea and Samaria*, 3 ISR. L. REV. 279 (1968); EYAL BENVENISTI, THE INTERNATIONAL LAW OF OCCUPATION (1993).

Hague Convention (IV) respecting the Laws and Customs of War on Land 1907, and in the Geneva Convention (IV) on the Protection of Civilian Persons in Time of War 1949. Article 64 of the Geneva Convention stipulates that the occupying power may apply laws and regulations in the occupied area to ensure the effective administration and the safety of the Area and its inhabitants.<sup>5</sup> Article 66 of the Geneva Convention authorizes the occupying power to establish military courts, under the condition that these courts are apolitical and sit within the occupied territory.<sup>6</sup> Additionally, the Geneva Convention includes different instructions and principles regarding the nature of the trials, including no retroactive legislation,<sup>7</sup> the proportionality between the crime and the punishment,<sup>8</sup> deduction of the arrest period from the term of punishment,<sup>9</sup> and stipulates that verdicts will be handed out only after an orderly trial,<sup>10</sup> the obligation to present the litigant with the charges in a language he or she understands<sup>11</sup> while granting the option to appoint a defense counsel.<sup>12</sup> These instructions reflect general international principles regarding a fair trial.<sup>13</sup>

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5. Article 43 of the HAGUE CONVENTION (IV) RESPECTING THE LAWS AND CUSTOMS OF WAR ON LAND, Oct. 18, 1907, USTS 539 (hereinafter HAGUE CONVENTION); GENEVA CONVENTION (IV) RELATIVE TO THE PROTECTION OF CIVILIAN PERSONS IN TIME OF WAR, Aug. 12, 1949, 6 UST 3516 (hereinafter GENEVA CONVENTION). See also Meir Shamgar, *The observance of international law in the administered territories*, in THE PROGRESSION OF INTERNATIONAL LAW 429 (Brill Nijhoff ed., 2011).

6. See also Yael Ronen, *Blind in Their Own Cause: The Military Courts in the West Bank*, CAMBRIDGE J. OF INT'L & COMP. L., 739, 743 (2013); Yoram Dinstein, *Judicial Review of Military Government Actions in the Occupied Territories*, 3 TEL AVIV U. L. REV. 330 (1973) (Isr.). For judgments by the Israeli Supreme Court that has adopted this position see: HCJ 3969/06, *Chairman of Dir Samat village council, Muhammad Alharoub v. The commander of the IDF forces in the West Bank*, (2009) (Isr.); HCJ 2056/04, *Beit Suriq village council v. The Government of Israel* (2004) (Isr.), translated at <https://versa.cardozo.yu.edu/opinions/beit-sourik-village-council-v-government-israel>; HCJ 393/82, *Isqan v. Commander of the IDF forces in Judea and Samaria* (1983) (Isr.), translated at [http://www.hamoked.org/items/160\\_eng.pdf](http://www.hamoked.org/items/160_eng.pdf).

7. Art. 67 to the GENEVA CONVENTION.

8. *Id.*

9. *Id.*, Art. 69.

10. *Id.*, Art. 71.

11. *Id.*

12. *Id.*, Art. 72.

13. These principles are also mentioned in the additional protocol to the Geneva Convention, as well as in the Rome Statute of the International Criminal Court. See PROTOCOL ADDITIONS (I) TO THE GENEVA CONVENTIONS OF 12 AUGUST 1949 AND

It should be mentioned that the authority for establishing military courts was also derived from Part B of the 1945 Emergency Security Regulations legislated by the British Mandate, which were in force when the Israel Defense Forces (IDF) entered the Area in 1967.<sup>14</sup> This authority permits the establishment of military courts by the sovereign in a particular territory. Nonetheless, *de jure* it is claimed that the legal source of the authority to set up a military court in an occupied area is Article 66 of the Geneva Convention, as described above.

In short, Israel possesses control over the West Bank Area in the way of “belligerent occupation” arising from the military’s control over the Area.<sup>15</sup> The legal significance of this ongoing state is that the Israeli law does not directly apply in the Area. The legal regime is determined mainly according to the rules of public international law.<sup>16</sup> The main rules governing the law in the Area are enshrined in the Hague Convention and the attached regulations, all being customary international law.<sup>17</sup>

An additional regulation of the legal situation in the Area appears in the Geneva Convention; its customary rules are part of the existing law in the Area.<sup>18</sup> Another central rule regulating the legal infrastructure in the Area is

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RELATING TO THE PROTECTION OF VICTIMS OF INTERNATIONAL ARMED CONFLICTS, June 8, 1977, 1125 UNTS 3, Art. 75(4); Rome Statute of the International Criminal Court, Art. 22-33.

14. The emergency defense regulations were legislated according to part 6 of the King’s Order-in-Council (defense), 1937, legislated in England as part of the emergency laws with regard to the Second World War. For more information on the matter, see Joseph M. Wolf, *National Security v. the Rights of the Accused: The Israeli Experience*, 20 CAL. W. INT’L L.J., 115 (1989). One should not confuse the authority arising from the emergency defense regulations and the authority of a military commander to apprehend property arising from regulations 23(g) and 52 of the HAGUE CONVENTION.

15. “Occupatio bellica.” See Dinstein, *supra* note 6. For judgments by the Israeli Supreme Court who have adopted this position, see *supra* note 6.

16. For an overview of the topic, see HCJ 1661/05, Gaza Beach Regional Council et al. v. Knesset of Israel et al. 59(2) PD 481 [2005] (Isr.).

17. See also JAMES BROWN SCOTT, TEXTS OF THE PEACE CONFERENCES AT THE HAGUE 1899 AND 1907 WITH ENGLISH TRANSLATION AND APPENDIX OF RELATED DOCUMENTS (Pub. for the International School of Peace, Ginn, 1908); Moshe Drori, *The Legal System in Judea and Samaria: A Review of the Previous Decade with a Glance at the Future*, in 8 ISRAEL YEARBOOK ON HUMAN RIGHTS 144, 152–53 (Yoram Dinstein ed., 1978).

18. HCJ 3969/06, *al-Harub, Head of Deir Samit Village Council et al. v. Commander of the IDF Forces in the West Bank et al.* (2009) (Isr.), translated at [http://www.hamoked.org/files/2011/1294\\_eng.pdf](http://www.hamoked.org/files/2011/1294_eng.pdf).

the Protocol Additional to the Geneva Conventions of 12 August 1949 and relating to the Protection of Victims of International Armed Conflicts (Protocol I).<sup>19</sup>

Under the rules of international law and, more specifically, the rules on belligerent occupation, the IDF, being the sovereign in the Area, has full legislative, judicial, and executive powers, including enforcing the laws and orders and protecting public order and security.<sup>20</sup> The basic rule in belligerent occupation law is that it is meant as a temporary system and does not confer full sovereignty. Another basic rule is that the state controlling the territory must act to preserve public order and security in the territory while respecting existing laws, unless there is a relevant impediment.<sup>21</sup>

This obligation is also enshrined in Regulation 43 of the Hague Convention, stipulating the duties of the controlling State to ensure public order and security.<sup>22</sup> Regarding the preservation of original laws in the Area, Article 64 of the Geneva Convention stipulates, “The penal laws of the occupied territory shall remain in force, with the exception that they may be repealed or suspended by the Occupying Power in cases where they constitute a threat to its security or an obstacle to the application of the present Convention.”<sup>23</sup>

In compliance with the Geneva Convention, with the end of the Six Day War (1967) and the occupying of the military administration in the Area by the IDF, the proclamation regarding the enforcement of the Security Provisions Order was enacted.<sup>24</sup> The Security Provisions Order is the main penal code that regulates all branches of criminal law in the Area—rules of procedure, rules of evidence, types of offenses, and punishment.<sup>25</sup> According to this Order, military courts are authorized to

19. See HCJ 769/02, *the Public Committee Against Torture in Israel v. The Government of Israel* (2006) (Isr.), translated at <https://versa.cardozo.yu.edu/opinions/public-committee-against-torture-v-government>.

20. See also Dinstein, *supra* note 6. YORAM DINSTEIN, *THE INTERNATIONAL LAW OF BELLIGERENT OCCUPATION* (Cambridge University Press, 2019).

21. As mentioned, the correct terminology with regard to this territory is currently legally disputed.

22. Art. 14 of the HAGUE CONVENTION.

23. See Shamgar, *supra* note 2.

24. Security Provisions Order (West Bank) (no. 3) (1967). The order in effect today is the Security Provisions Order [consolidated version] (Judea and Samaria) (1651) (2009).

25. Alongside the Security Provisions Order, other orders regarding different issues are in force, as well as the legislation that was in force when the IDF assumed the administration,

adjudicate all offenses committed within the Area, as well as ones committed outside the Area if they were intended to damage, or have in fact damaged, the security of the Area.<sup>26</sup>

However, following the signing of the interim agreement between Israel and the Palestinian Authority in 1995, some of these judicial authorities were passed to the Palestinian Authority.<sup>27</sup> Article 86 of the Security Provisions Order enforces the rules of evidence that are binding in criminal proceedings in Israeli courts. The rules of procedure are quite like that of the Israeli criminal system (with the exception of arrest periods). The substantive law has been made more similar, as well, with the enforcement of the 39th Amendment of the Penal Code (1977) in the Area.<sup>28</sup>

Since their establishment in 1967, the military courts have mainly been occupied with terrorism cases,<sup>29</sup> though the courts also deal with various criminal offenses to some extent (such as sex crimes, domestic violence, property offenses).<sup>30</sup> The military court system operates a series of judicial committees that act as an appeal tribunal on the decisions of the administrative authorities in the Area, which are under their authority.<sup>31</sup>

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such as Jordanian legislation and Defense (Emergency) Regulations. Dinstein, *supra* note 6; DINSTEN, *supra* note 20.

26. Article 10 to the Security Provisions Order.

27. Military Proclamation No. 7 Concerning the Application of the Interim Agreement (West Bank) (1995), published in COLLECTION OF PROCLAMATIONS, ORDERS AND APPOINTMENTS OF THE MILITARY COMMANDER IN THE WEST BANK AREA, No. 164, p. 1923, <https://www.knesset.gov.il/process/docs/heskemb1.htm> (Isr.).

28. Amendment no. 45 to the Security Provision Order. For a critical stance on this issue, see Smadar Ben-Natan, *The Application of Israeli Law in the Military Courts of the Occupied Palestinian Territories*, 43 THEORY & CRITICISM 45 (2014).

29. See LISA HAJJAR, *COURTING CONFLICT: THE ISRAELI MILITARY COURT SYSTEM IN THE WEST BANK AND GAZA* (2005). For a critical stance on this book, see Ron Dudal's review, 10 J. CONFLICT & SECURITY L. 279–83 (2005), <https://www.jstor.org/stable/26294386>.

30. Regarding preventative arrests for security reasons (“administrative detention”), see e. g., Dvir Saar and Ben Wahlhaus, *Preventive Detention for National Security Purposes in Israel*, 9 J. NAT'L SEC. L. & POL'Y 413 (2018); MASOUD ZAMANI, *DETENTION WITHOUT TRIAL: HISTORICAL EVOLUTION, STATES' AUTHORITY AND INTERNATIONAL LAW* at 20–75 (Ph.D. Thesis, University of Nottingham, 2015), <http://eprints.nottingham.ac.uk/28202/1/zamani%20thesis.pdf>; AMIT PRIZE AND EYAL NUN, *ADMINISTRATIVE DETENTION IN ISRAEL AND JUDEA AND SAMARIA AREA: THEORETICAL BASIS, ORDER OF JUDGEMENT, ESSENCE AND ADDITIONAL ISSUES* (2019).

31. These committees apply judicial review to administrative decisions made by governmental authorities in the Area regarding its inhabitants (Palestinians or Israelis).

Additionally, in late 2009, Juvenile Military Courts were established in the Area, dealing mainly with terror activities carried out by minors.<sup>32</sup> Generally, the law applied in the military courts is rooted in Israeli law. For instance, the military judges studied in Israeli law schools, and undergo the same training and qualification process as other Israeli judges; the “new” legislation (enacted after 1967), is strongly based on the Israeli legislation, for example, in that the court proceedings are adversarial.<sup>33</sup>

Accordingly, principles from the Israeli law have been implemented by the military courts, with the required changes. The Security Provisions Order has enforced major parts of the Israeli criminal law in the Area, and military courts have enforced different principles from the Israeli criminal law through caselaw, thus improving the position of suspects and defendants in the Area.<sup>34</sup> However, until recently, the Area’s laws did not provide any rights to victims of crimes—meaning, prior to the enactment of the Amendment to the Order, that crime victims did not have any stance in the legal proceeding.

In conclusion, before the Reform, victims of terrorism whose offenders were prosecuted in the Israeli criminal courts were entitled to the full scope of rights granted to them in the Israeli Crime Victims’ Rights Act. In contrast, before 2018, terrorism victims of the Area were not entitled to any of these rights.

## II. THE NEW REFORM REGARDING VICTIMS OF TERROR

In June 2018, a new Order was enacted in the Area,<sup>35</sup> relating to victims of terrorism and other issues regarding the military courts. Article 186(2), the principle article of the Order, states: “The crime victim will receive his rights with his needs, his dignity, and privacy

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32. Khen, *supra* note 2.

33. Tzvi Lekah, *Protecting Human Rights in Military Courts During Times of Counter-Terrorism*, in MORDECHAI KREMNITZER BOOK 641–74 (2017) (Isr.).

34. Several changes in the criminal law, to the benefit of suspects and defendants, were conducted by the military courts: the right to compensation upon acquittal, enhancing minors’ rights, evidence confidentiality, among others. *See generally*, Benisho, *supra* note 2.

35. Security Provisions Order (am. no. 58) (1799) (2018).



taken into account, and in a timely manner, all while maintaining the rights of suspects, defendants, and litigants, and subject to security considerations.” Article 186(4), labeled “ensuring rights” stipulates: “The Military Court and the authorities, each in its own field, will take the necessary measures to ensure the rights of the crime victims as per this Order.”

Similar to the Israeli Crime Victims’ Rights Act, with the required changes tailored to the Area, the new order grants the victims of crimes committed in the Area a series of rights, including:

- restrictions regarding the providing of the victim’s personal information
- the right to receive information regarding the criminal proceedings
- the right to be informed of the indictment
- the right to be informed on imprisonment
- the right to receive information regarding assistance
- procedures conducted in a timely manner
- restrictions regarding the inquiry into a crime victim’s sexual history
- the right to have an escort present during an interrogation
- a sex crime’s victim’s right to choose the gender of the interrogator
- the right to attend a trial being conducted behind closed doors
- the right to voice an opinion regarding process delays
- the right to voice an opinion regarding plea bargains
- the right to give a victim’s impact statement<sup>36</sup>
- the right to voice an opinion regarding a pardon.<sup>37</sup>

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36. *Id.*, Art. 186. For a discussion on the status of a victim’s impact statement, see Dana Pugach, *Revolution of the Victims—The Day After: Approaching a Model that Recognizes Private Punishment Considerations?*, 4 KIRYAT HA’MISHPAT 229 (2014) (Isr.). For an approach against victim impact statements, see GEORGE P. FLETCHER, WITH JUSTICE FOR SOME: VICTIMS’ RIGHT IN CRIMINAL TRIALS 198 (1995). For example, Kilpatrick and Ott argued that the victim’s impact statement can help expand the court’s knowledge of the effects of crimes on the victims and help them understand the intricacy of the process and its effects, thus promoting the revelation of the truth and the victim’s feelings. See Dean G. Kilpatrick & Randy K. Otto, *Constitutionally Guaranteed Participation in Criminal Proceedings for Victims: Potential Effects on Psychological Functioning*, 34 WAYNE L. REV. 7 (1987).

37. Security Provisions Order, Art. 186(19).

The Order additionally instructs the establishment of Assistance Units in the West Bank (Judea and Samaria) military prosecution, which will ensure the realization of these rights, such as ensuring the passage of information from the Prosecution to the crime victim.<sup>38</sup> Yet, unlike the Israeli Crime Victims' Rights Act, the new legislation also includes a new article, "denial of rights," which allows the Area's Prosecutor to negate these rights, due to security considerations or other special circumstances that are specified in writing.<sup>39</sup>

Another important matter in the Reform is the commencement of the different rights. As will be described below, a great deal of the rights came into effect only three years after its enactment, meaning not until January 1, 2021. Among the rights that came into effect at this belated time is the crime victim's right to protection from the suspect or defendant, and the right to receive notice of the proceedings and the imprisonment of the defendant.<sup>40</sup>

Similarly, the Order also delayed the commencement of the crime victim's right to voice an opinion regarding plea bargains and pardons, and to give a victim's impact statement. What are the factors that led to this Reform? What is the background to the enhancement of terrorism victims' rights in the military courts? The following sections will suggest a possible answer to these questions. First, we will portray the historical background, and then we will analyze the processes at the basis of this Reform.

### III. THE FACTORS AT THE BASIS OF THE REFORM

In the previous sections we have seen that new legislation regarding crime victims' rights in the Area was recently enacted. We now ask, what are the legal and intellectual factors that led to this Reform? What are the processes at its basis? The Reform did not appear out of thin air. It is a result of two in-depth processes relating to the betterment of crime victims' status in

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38. The Judea and Samaria Prosecution is part of the military prosecution and is subject to the military prosecutor. Many of the offenses under its care are offenses of direct or indirect involvement in terror activities, participation in the disruption of the peace, the incitement to harm Israeli citizens, serious violence offenses, and more.

39. Art. 186(22) to the Security Provisions Order (am. no. 58) (1799) (2018).

40. *Id.*, Art. 186(5).

Israel and in the Western World in recent years. In this section, we will briefly describe these trends.

### A. The Strengthening of Crime Victims' Rights in the Western World

First and foremost, the Reform in crime victims' rights in the Area is linked to, and in many ways derives from, trends that improved crime victims' rights in Israel and in the Western World.<sup>41</sup> The Reform in crime victims' rights in the Area seems to be influenced by global trends relating to the enhancement of crime victims' rights in various ways around the world in the past three decades (and, to some extent, even earlier).<sup>42</sup> Due to different processes (historical, intellectual, social, and cultural), in the past, crime victims' status had been reduced to technical—filing a complaint and testifying—while their needs and interests were overlooked. Philosophers, criminologists, and jurists have voiced their dissatisfaction with the exclusion of crime victims from the criminal process. Their frustration, alongside the development of the modern social state, have contributed to the betterment of crime victims' status and have led to the enactment of legislations, gradually regulating, in various manners, the rights of crime victims.<sup>43</sup>

The factors that contributed to the growing awareness to the status of crime victims include the reduced belief in the effectiveness of traditional punishment, the variety of alternative criminal processes and punishment, and the strengthening of crime victims' organizations.<sup>44</sup> At the turn of the century (and in some cases even earlier), a series of laws, regulating different areas relating to crime victims, were enacted around the world: in countries

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41. Sarah Ben-David, *Needed: Victim's Victimology*, in *VICTIMOLOGY AT THE TRANSITION FROM 20TH TO THE 21TH CENTURY* (Paul C. Friday & Greg Ferdinand Kirchhoff eds., 2000); SANDRA WALKLATE, *UNDERSTANDING CRIMINOLOGY: CURRENT THEORETICAL DEBATES* (2003); Sandra Walklate, *Criminology: the Basics* (2016).

42. Ben-David, *supra* note 41 WALKLATE (2003), *supra* note 41.

43. Hadar Dancig-Rosenberg & Tali Gal, *Restorative Criminal Justice*, 34 *CARDOZO L. REV.* 2313 (2013); Judith Karp, *Restitution of Victims by the Offenders*, 30 *ISR. L. REV.* 331, 334 (1996).

44. See Erin A. O'Hara, *Victim Participation in the Criminal Process*, 13 *J.L. & POL'Y* 229 (2005), for a historic-comparative study showing the political factors relating to crime victims in the U.S.

of the European Union (England, Wales, Ireland, Scotland, Spain, France, and Germany),<sup>45</sup> as well as in Canada,<sup>46</sup> and in the U.S.<sup>47</sup>

The U.N.'s "Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power," dated November 29, 1985, is especially worth mentioning. The declaration recognized that crime victims and their families, or any other assisting persons, often unjustly suffer from loss, damage, or bodily harm, and may additionally experience difficulty when assisting with the prosecution of their offender. The declaration further acknowledges the need to set national and international criteria to ensure the recognition of crime victims' rights. It adopted the basic principles of justice for crime victims, designed to ensure justice and assistance for crime victims. The declaration enumerates the basic rights to which crime victims are entitled, including the right to be treated with respect for their dignity and to be treated with compassion, compensation for their incurred damage, including physical and mental injury, as well as the right to be informed of their rights to prompt redress. The declaration further enumerates the establishing of judicial and administrative mechanisms to fit the victims' needs—informing them of their role in the proceedings, allowing their views and concerns to be expressed and considered at appropriate stages of the proceedings; ensuring the protection of their privacy and their safety; and providing medical, psychological,

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45. See, e.g., MATTI JOUTSEN, *THE ROLE OF THE VICTIM OF CRIME IN EUROPEAN CRIMINAL JUSTICE SYSTEMS: A CROSS-NATIONAL STUDY OF THE ROLE OF THE VICTIM* (1987); Ezzat A. Fattah, *The United Nations Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power: A Constructive Critique*, in *TOWARDS A CRITICAL VICTIMOLOGY* 401 (Ezzat A. Fattah ed., 1992).

46. Victims Bill of Rights (2015) (Can.); Marie Maniki, *Imagining the Future of Victims' Rights in Canada: A Comparative Perspective*, 13 OHIO ST. J. CRIM. L. 163 (2015). The 2015 Victims Bill of Rights grants crime victims several rights. The Canadian legislation highlights, alongside the classic, primary goals of the criminal process, some goals relating to the crime victim—enhancing the offender's sense of responsibility for the harm caused to the victim, and a timely and just restoration.

47. The rising awareness of crime victims' status in the U.S. is linked to the activity of crime victims' organizations. These organizations act in the community and in the media, and their political lobby in Congress had contributed to the enactment of the Crime Victims' Rights Act. See 18 U.S.C. § 3771 (2004), which granted crime victims many rights. See, e.g., The Justice for United States Victims of State Sponsored Terrorism Act, 34 U.S.C. § 20144; The U.S. Victims of State Sponsored Terrorism Fund, www.usvsst.com; see also, Erin C. Blondel, *Victims' Rights in an Adversary System*, 58 DUKE L.J. 237 (2008).

legal, and financial assistance through governmental, voluntary, and community-based establishments.<sup>48</sup>

In compliance with this declaration, many countries regulated these principles, in various manners. The EU instructed its members to enact laws relating to crime victims (such as a regulation that ensures the compensation of a crime victim in the event that the offender is not caught).<sup>49</sup> As mentioned, at the turn of the century and even prior, several laws were enacted regarding crime victims. In France, for instance, there was an increase in the ensuring of crime victims' rights, and they received growing attention from the legislature. In this framework, statutory provisions were set to enhance the treatment of crime victims in units of the police, the Ministry of Justice, and the Ministry of Interior. Each of these units has departments designed to assist victims. The victims are directed to public social workers and psychologists.<sup>50</sup> In England, there are governmental authorities that conduct programs for the treatment and compensation

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48. UNITED NATIONS, DECLARATION OF BASIC PRINCIPLES OF JUSTICE FOR VICTIMS OF CRIME AND ABUSE OF POWER, A/RES/40/34 (Nov. 29, 1985). Art. 4 of the declaration stipulates: "Victims should be treated with compassion and respect for their dignity. They are entitled to access to the mechanisms of justice and to prompt redress, as provided for by national legislation, for the harm that they have suffered." However, some doubt the ability of the U.N.'s declarations to drive political and social changes. In addition, some have argued that the declaration has no operative validity or direct applicability, hence have little influence. See, e.g., JOUTSEN, *supra* note 45; Fattah, *supra* note 45.

49. Directive 2004/80/EC relating to compensation to crime victims; The Regulation on Jurisdiction and Recognition Enforcement of Judgments allows crime victims to sue for compensation in other countries in the EU. Studies conducted after this directive have shown that most of the EU members have applied it, with the required changes. In some of the EU countries, crime victims receive their rights through voluntary organizations, financed by the state. See *Report from the Commission to the Council, the European parliament and the European Economic and Social Committee on the application of council Directive 2004/80/Ec relating to compensation to crime victims* [SEC (2009) 495], COM/2009/0170 final, April 20th, 2009, Criminal.

50. In France, the crime victim has an independent and central role in the criminal proceedings, as a *partie civile*. He or she can initiate the proceedings, has a right to be informed of the progression of the interrogation, and is a party with broad rights, including the right to testify, interrogate witnesses, and voice arguments. See Code de procedure penale, Art. 85 et seq.; Les droits de la partie civile dans le proces penal, [https://e-justice.europa.eu/171/FR/victims\\_\\_rights\\_\\_by\\_country?FRANCE&action=maximizeMS&clang=fr&idSubpage=6&member=1](https://e-justice.europa.eu/171/FR/victims__rights__by_country?FRANCE&action=maximizeMS&clang=fr&idSubpage=6&member=1) (Fr.) (last visited Oct. 2021).

of victims of violence or other serious offenses.<sup>51</sup> Similar provisions, granting redress and other rights to crime victims (or their inheritors, by the statutory mechanisms), exist in Wales, Scotland, and other European states.<sup>52</sup>

The Victims Bill of Rights in Canada (2015) awards crime victims a series of rights.<sup>53</sup> The Canadian legislation highlights, alongside the classic, primary goals of the criminal process, some goals relating to the crime victim—enhancing the offender's sense of responsibility for the harm caused to the victim, and fair and prompt restoration.<sup>54</sup> In most states in the U.S., crime victims' rights were being regulated, mainly since the 1980s, as constitutional rights.<sup>55</sup> The rising awareness to crime victims' status in the U.S. is linked to the activity of crime victims' organizations.<sup>56</sup> These organizations act in the community and in the media, and their lobbies in Congress had contributed to the enactment of the Crime Victims' Rights Act. The Act entitles crime victims to many rights, including: the right to protection from the offender; the right to be informed; the right to exclude oneself from the proceedings; the right to voice an opinion in the proceedings; the right to consult with the Prosecutor; the right to prompt process; the right to fair treatment; and the protection of privacy.<sup>57</sup>

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51. On the importance of redress as part of the victim's rehabilitation, see David Miers, *Offender and State Compensation for Victims of Crime: Two Decades of Development and Change*, 20 INT'L REV. VICTIMOLOGY 145, 148 (2014).

52. Sharona Aharoni-Goldenberg & Yael Wilchek-Aviad, *Punishing Property Offenders: Does Moral Correction Work?*, 32 TOURO L. REV. 407 (2016), <https://www.tourolaw.edu/Academics/1325>.

53. Canadian Victims Bill of Rights 2015. See also Maniki, *supra* note 46. The provincial and district Canadian laws also grant rights to crime victims. These may vary, depending on the district, but are generally based on the declaration.

54. Criminal Code, R.S.C. 1985.

55. Shirley Abramson, *Redefining Rules: The Victim's Rights Movement*, UTAH L. REV. (1985); Heather Strang & Lawrence Sherman, *Repairing the harm: Victims and restorative justice*, 15 UTAH L. REV. 521 (2003) (showing that the criminal procedure lacks the mechanisms to enable the recognition of the victim's loss); Blondel, *supra* note 47.

56. In addition, the public was feeling uneasy due to high crime rates and lack of sense of safety. See, e.g., Christopher Goddu, *Victims' Rights or a Fair Trial Wronged*, 41 BUFF. L. REV. 245, 248 (1993).

57. JOANNA SHAPLAND ET AL., VICTIMS IN THE CRIMINAL JUSTICE SYSTEM (1985); O'Hara, *supra* note 44. Blondel argued that despite the reform in criminal law and the moderating of its adversarial aspects, the criminal process still is not tailored to fit the needs of the victims; see *supra* note 47.

Several studies conducted in recent years have shown the importance of including the crime victim in their cases.<sup>58</sup> Various studies have concluded that crime victims are harmed by the exclusion of their voice in the proceedings.<sup>59</sup> For example, Erez and colleagues conducted an empirical study that showed the harm caused to crime victims who learned of a plea bargain only at a late stage of the proceedings that did not allow the expression of their opinion on the matter.<sup>60</sup> Another study conducted by Erez showed that the participation of the crime victim in the proceedings has therapeutic significance.<sup>61</sup> Morrison showed the negative impact of poorly managed proceedings on victims of sex crimes.<sup>62</sup> Similarly, Amick-McMullan and colleagues showed the importance of the full inclusion of the families of homicide victims in the proceedings.<sup>63</sup> Additional empirical studies have shown that crime victims from low socio-economic backgrounds are systematically harmed by the judicial system.<sup>64</sup> Some of these studies' conclusions led to the search for ways to make the courts a place better suited for crime victims, an institution which better expresses their interests.

## B. The Strengthening of Crime Victims' Rights in Israel

Besides the above-mentioned global influences, the Reform in the Area is greatly influenced by local trends, as well. The Israeli Crime Victims'

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58. Nils Christie, *Conflicts as Property*, 17 BRIT. J. CRIM. I (1977); Kerstin Svensson, *Victim Support in a Changing Welfare State*, SOC. WORK & SOC'Y (2007); Jo-Anne Wemmers, *The Meaning of Justice for Victims*, in INTERNATIONAL HANDBOOK OF VICTIMOLOGY 27 (Shlomo Giora Shoham et al. eds., 2010).

59. Christie, *supra* note 58.

60. Edna Erez et al., *Victim Welfare and Participation Reforms in the United States: A Therapeutic Jurisprudence Perspective*, in THERAPEUTIC JURISPRUDENCE AND VICTIM PARTICIPATION IN JUSTICE: INTERNATIONAL PERSPECTIVES 15 (Edna Erez et al. eds., 2011). See also Antony Pemberton & Sandra Reynaers, *The Controversial Nature of Victim Participation: Therapeutic Benefits in Victim Impact Statements*, in *supra*, at 229.

61. Edna Erez, *Who's Afraid of the Big Bad Victim? Victim Impact Statements as Victim Empowerment and Enhancement of Justice*, CRIM. L. REV. 545 (1999).

62. Torrey Morrison, *When Will We Be Believed? Rape Myths and the Idea of a Fair Trial in Rape Prosecutions*, 24 U.C. DAVIS L. REV. 1013 (1991).

63. Angelynne Amick-McMullan et al., *Family Survivors of Homicide Victims: Theoretical Perspectives and an Exploratory Study*, 2 J. TRAUMATIC STRESS 21 (1989).

64. Douglas E. Beloof, *The Third Wave of Crime Victims' Rights: Standing, Remedy and Review*, BRIGHAM BYU L. REV. 255, 352 (2005); Mary M. Giannini, *Redeeming an Empty Promise: Procedural Justice, The Victims' Rights Act, and the Victim's Right to be Reasonably Protected from the Accused*, 78 TENN. L. REV. 47, 85-103 (2010).

Rights Act is a significant steppingstone in the status of crime victims in Israel, and it has influenced, and continues to influence, the caselaw in this field in the Area. As mentioned, the Israeli Crime Victims' Rights Act grants crime victims a series of rights, including: the right to physical protection from the offender, confidentiality of the crime victim's personal information, the right to be informed of the indictment, the right to a timely process regarding violence and sex crimes, the right to receive information on the criminal proceedings, and the right to voice an opinion on the proceedings.<sup>65</sup>

In other words, the current popular opinion does not perceive crime victims as merely a functional and efficient player in the criminal process, meant only to file a complaint and testify.<sup>66</sup> The popular opinion is that the criminal process is not reduced to the relationship between the offender and society, but it directly affects the crime victim. Just as the criminal process protects the defendant's rights, it also protects the crime victim's rights.<sup>67</sup> A series of laws and caselaw bettering the status of crime victims in Israel have been enacted in recent years, in addition to the Crime Victims' Rights Act.<sup>68</sup>

For example, the opinion that the criminal process has a direct effect on crime victims has gradually developed. Thus, the acknowledgement of the crime victims' needs and interests has increased on several levels—legal, financial, and therapeutic.<sup>69</sup> Several of the organizations active in the advocacy of terrorism victims pointed to different ways in which the criminal process is harmful to victims of terrorism.<sup>70</sup> Accordingly, the conclusion that steps were needed to to lessen the harmful aspects of the criminal

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65. Pugach, *supra* note 36; Emanuel Gross, *The Victim's Constitutional Rights: A Comparative Study*, 17 BAR ILAN U. L. REV. 419 (2002) (Isr.); Lesly Seba & Tali Gal, *Crime Victims' Rights in Israel*, in *MILITARY GOVERNMENT* (Shamgar ed.), *supra* note 2, at 157. For a review of the legislation process, see Uri Yanay & Tali Gal, *Lobbying for Rights: Crime Victims in Israel*, in *INTERNATIONAL HANDBOOK OF VICTIMOLOGY* 373 (Shlomo Giora Shoham et al. eds., 2010).

66. *See, e.g.*, HCJ 2976/02, *Movement for Quality Government in Israel v. Parliament*, at para. 35 (2002) (Isr.).

67. *See, e.g.*, 2976/01 *Assaf v. State of Israel*, at para. 30 (2002) (Isr.).

68. Pugach, *supra* note 36.

69. Pamela Tontodonato & Edna Erez, *Crime Punishment and Victim Distress*, 3 INT'L REV. VICTIMOLOGY 33, 34 (1994).

70. *E.g.*, Christie, *supra* note 58, for a study that shows the harm resulting from the under-expression of crime victims in the criminal process.



process, give the terrorism victims a more significant role in the courts, and thereby help them recover, was reached.<sup>71</sup>

### 1. The Crime Victims' Status in Israeli Military Courts

Another significant factor that led to the Reform in crime victims' rights in the Area is the Amendment in the Military Adjudication Act (1955) relating to the rights of crime victims who are soldiers, in military tribunals.<sup>72</sup> In June 2018, the Amendment to the Military Adjudication Act came into effect, officially applying the Crime Victims' Rights Act in legal processes taking place in the IDF, with the required changes.<sup>73</sup> Article 513(3) to the new legislation, "the principles" article, stipulates: "The crime victim will receive his rights, with his needs, his dignity, and his privacy, taken into account, and in a timely matter, subject to considerations of national security." The "ensuring the rights" article states that "the military tribunals and the authorities, each in its own field, will take measures in order to ensure the crime victim's rights according to this section."

The Amendment of the Military Adjudication Act grants a series of rights to crime victims: the right to receive the indictment, the right to receive information regarding Assistance Units, the right to a prompt process, restrictions regarding the interrogation of the victim's sexual history, the right to have an escort present during the interrogation, the right to

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71. "Secondary victimization" refers to unfit behavior of society toward crime victims. For a description of the effects of "secondary victimization" on crime victims, see Jo-Anne Wemmers, *Victims' Experiences in the Criminal Justice System and Their Recovery from Crime*, 19 INT'L REV. VICTIMOLOGY 221 (2013); Judith L. Herman, *The Mental Health of Crime Victims: Impact of Legal Intervention*, 16 J. TRAUMATIC STRESS 159 (2003). For example, Beloof showed that crime victims a social group that is constantly being hurt by courts; Beloof, *supra* note 64.

72. The IDF's judicial authority is comprised of two branches: the military courts in the Area, authorized to adjudicate offenses executed in the Area or that have harmed or were meant to harm the Area's safety (Art. 10(i) and (j) to the Security Provisions Order); and the military tribunals, authorized to adjudicate soldiers or reserves and citizens in relation to their work in the IDF (Art. 6 to the Military Adjudication Act).

73. On the special status of crime victims and the importance of their voice in military criminal proceedings, see 41,42/17 *Sergeant Teva v. Military Prosecutor*, at para. 15-24 (published in Nevo Israeli Database, Dec. 23, 2017) (Isr.); 44/16 *Corporal Tapash v. Military Prosecutor* (published in Nevo Israeli Database, July 28, 2016) (Isr.); 51/16 *Sergeant Elmaliach v. Military Prosecutor* (regarding the right to give a victim's impact statement in a military tribunal) (published in Nevo Israeli Database, Sept. 1, 2016) (Isr.).

choose the interrogator's gender, the right to attend a trial being held in closed doors, and more.<sup>74</sup> Even before that Act's passage, the Military Prosecution had been ordered to apply these provisions, "due to the Military Prosecution's duty to ensure the Public's interest, which includes the interests of the crime victim." See Guideline of the Chief Military Prosecution 1.13, "Rights of Victims of Crime in the Criminal Procedure in the Army" (Dec. 2017) (Isr.).

As mentioned, the Military Adjudication Act is not in effect in the Area. However, this Amendment highlights the Military's aspiration to regulate the rights of crime victims throughout the various branches of the Israeli judicial authorities. To summarize this point, there is reason to believe that the Reform in the rights of crime victims who are soldiers influenced the status of crime victims in the Area. *Ergo*, both branches of the military judicial authority have applied the Israeli Crime Victims' Rights Act, with the required changes.

### C. The Strengthening of Crime Victims' Rights in Foreign Military Justice Systems

In the framework of describing the background to the Reform in the Area, we should also review the development of crime victims' rights in other military justice systems. In this subsection, we will survey the existing regulations regarding crime victims in the U.S. Army and in the Canadian Armed Forces. Although the regulations on this matter in the military courts in the Area are different than that of the U.S. and Canadian armies, as it mainly applies to citizens and not soldiers, a comparative observation can help us examine the Reform in the Area.

#### 1. The U.S. Army

The U.S. was a pioneering country with regard to granting rights to crime victims. The beginning of this trend dates back to the early 1980s, with the enactment of the Federal Victim and Witness Protection Act in 1982.

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74. Art. 513(9)–513(16). Even before that Act's passage, the Military Prosecution had been ordered to apply these provisions, "due to the Military Prosecution's duty to ensure the Public's interest, which includes the interests of the crime victim." See Guideline of the Chief Military Prosecution 1.13, "Rights of Victims of Crime in the Criminal Procedure in the Army" (Dec. 2017) (Isr.).

Within a decade, all fifty states had passed legislation granting rights to crime victims, to varying extents. In 1998, the U.S. Department of Justice published an opinion that crime victims' rights should be protected in U.S. military law.<sup>75</sup> Today, several rules and provisions regulate the rights of crime victims in the U.S. Army, enumerating their rights and specifying the authorities responsible for applying them. Generally, these rights include aid, support, and compensations, as well as legal representation for crime victims. The regulations also instruct the establishment of mechanisms designed to ensure the realization of said rights.

Most of these rights are stipulated in the U.S. Army Regulation 27-10.<sup>76</sup> Chapter 17 of AR 27-10 regulates the crime victim and witness assistance mechanisms, implementing directives of the Department of Defense and establishing policy for the assistance and treatment of persons who are victims of crime and those who may be witnesses in criminal proceedings.<sup>77</sup> Chapter 17 also establishes the link between serving in the Army and the obligation to ensure and protect the rights of crime victims and witnesses. It stipulates that "the military justice system is designed to ensure good order and discipline within the Army and also to protect the lives and property of the members of the military community." In order to uphold these responsibilities, it requires the cooperation of crime victims and witnesses, so to ensure the effectiveness of the system.<sup>78</sup>

According to these regulations, a victim is a person who has suffered direct physical, emotional, or pecuniary harm as a result of the commission of a crime committed in violation of the Uniform Code of Military Justice. The regulations do not apply solely to victims who are serving in the U.S. Army, but also apply to other victims, including a soldier's family members, contractors and employees of the U.S. Department of Defense working abroad, minors, and even institutional entities.<sup>79</sup> The regulations establish an obligation on all relevant authorities (persons working within and in support of the system) to ensure that crime victims are treated considerately and with respect for their privacy, to minimize further

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75. U.S. Department of Justice, Office for Justice Programs, Office for Victims of Crime, 1998, 31.

76. U.S. Army Regulation 27-10, <https://armypubs.army.mil/ProductMaps/PubForm/AR.aspx> (last visited July 10, 2020).

77. AR 27 10, Ch. 17, Sec. 17-1.

78. *Id.*, Sec. 17-2.

79. *Id.*, Sec. 17-5.

traumatization to victims of violence, and to treat victims with compassion and sensitivity.<sup>80</sup> The victims' rights include the right to be reasonably protected from the offender and the right to receive notice on verdicts, sentencing, detention, and release from custody of the accused offender. The victim is also entitled to a timely notice regarding different stages of the criminal proceedings, including the status of the investigation, the decision to prefer or dismiss charges, and the corrections process. The regulations also stipulate that the victim will be consulted concerning decisions not to prefer charges, pretrial restraint or release, and negotiations of pretrial agreements. The regulations establish mechanisms to assist the victims, including social, legal, and financial support, and the referral of victims who are not entitled to support from the Army to the relevant civil authorities.<sup>81</sup>

The Prosecution is required to establish policy and protocols that will ensure the realization of crime victims' rights, and is required to refer the victim to various assistance services, including medical, welfare, and legal aid.<sup>82</sup> The Prosecution is also obligated to make an effort to minimize the victim's contact with the offender, and to inform the victim on the status of the proceedings and other details, such as court hearings. The Prosecution is also responsible for explaining to the victim that he or she may be required to testify.<sup>83</sup>

To summarize, it seems that the trend in U.S. law has seeped into U.S. military law. The U.S. Army's legal system entitles victims to a series of quite extensive rights, including the right to redress, assistance, and legal representation. These rights are also applicable to victims who are not serving in the Army, if they were harmed by the commission of a crime committed in violation of the Uniform Code of Military Justice. The regulations further establish responsibilities to ensure their implementation and establish mechanisms for the treatment of crime victims.

## 2. The Canadian Armed Forces

The Canadian Armed Forces has several programs for the treatment of crime victims and directives establishing policies in the various

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80. *Id.*, Sec. 17 2.

81. *Id.*, Ch. 17.

82. *Id.*, Sec. 17 6, 17 10, 17 12.

83. *Id.*, Sec. 8 5.

departments operating in this field. For example, the Canadian Military Police operates an assistance program designed to help crime victims cope with the trauma and impact of the crime. The crime victims' rights include respectful and sensitive conduct toward the victim, notice of assistance services, contact with the Canadian Military Police, notice of the status of the proceedings, and protection from the accused offender.<sup>84</sup> In addition, there are obligating directives in place on various areas relating to crime victims. For example, Directive 004/2000, relating to sex crimes, requires the enforcement authorities to treat victims with sensitivity, inform them of the proceedings, be considerate of their status, and maximize their safety and comfort.<sup>85</sup>

The Canadian Military Prosecutions' Directive 7/1999, "Responding to Victims' Needs," defines the rights of crime victims. According to the Directive, a victim of crime is a person who has suffered harm, or physical or psychological injury, as a result of the committing of a crime. The Directive stipulates that victims of crimes will be afforded a meaningful role in the criminal proceedings, protected, treated with respect, and informed of their rights.<sup>86</sup> A central principle in the Directive relates to the broader inclusion of the victim in the proceedings, stating that they should be given a more significant role. The Directive also gives a special status to victims of sex crimes and violent crimes, stating that they should be treated with the utmost sensitivity.

The regulation of crime victims' rights in the Canadian Armed Forces originated, similarly to the U.S., in the extensive regulations on the matter in the Canadian justice system (as described in the previous subsection). The military justice systems in the U.S. and Canada, and the accompanying rules and provisions, show that the crime victim has a significant role in the military criminal proceedings. The crime victims' status in the military justice systems seems to derive from their status in the general justice systems of the respective countries.

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84. Department of National Defence and the Canadian Armed Forces, Report on Plans and Priorities 2015–16, <https://www.canada.ca/en/department-national-defence/corporate/reports-publications/plans-priorities/2015-16.html>.

85. Director of Military Prosecutions Policy Directive 004/00 (2000).

86. Director of Military Prosecutions Policy Directive 007/99 (1999).

In conclusion, the Reform in crime victims' rights in the Area did not happen in a void. It was influenced by both local processes and global trends relating to the improving of crime victims' rights, in the general justice system and in the military justice system. On this important matter of crime victims, the law in the Area did not remain indifferent to national and international processes that occurred in recent years. The Reform brought the status of crime victims of the Area closer to that of crime victims of Israel, which is a step in the right direction. However, there are some critiques to be made regarding the Amendment, its timing, validity, and scope. In the next section, we present these criticisms.

#### **IV. CRITICISM OF THE REFORM IN CRIME VICTIMS' RIGHTS IN THE AREA**

##### **1. Timing.**

The first possible criticism on the Reform in crime victims' rights in the Area is its delayed timing in comparison to the Israeli legislation, specifically the Crime Victims' Rights Act of 2001 and the accompanying regulations. It took the authorities over eighteen years after the enactment of the Israeli Crime Victims' Rights Act to apply the rights to crime victims of the Area. During this period of time, thousands of offenders were adjudicated, many of them during highly insecure times (such as the Second Intifada), and thousands of crime victims did not have the right to express their voice.

A possible answer to this criticism is the argument that there have been prior attempts to award status to victims of terrorism in the military courts in the Area. However, these attempts were not successful for assorted reasons. Moreover, the Reform would have been difficult to implement, even if it had been enacted earlier, due to several highly insecure times, during which hundreds of trials—relating to tens of terror attacks, some involving tens of injured and casualties—were being conducted. In some years, applying the Reform and being in contact with hundreds of crime victims would have been nearly impossible for the Military Prosecution and the other relevant authorities.<sup>87</sup>

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87. It should be stated that this answer, in itself, raises questions as to the ability of the authorities to implement the Reform in periods of unstable security, which may occur again in the Area.

## 2. Parts of the Amendment came into effect at a delayed time.

The first criticism is amplified since significant parts of the regulation commenced were delayed until January 1, 2021. The new legislation stipulates that many of the provisions will come into force only three years after its enactment (and nearly twenty years after the reform in crime victims' rights in Israel). The rights that were set to commence at a delayed time include the victim's right to protection from the offender, the right to be informed of the criminal proceedings, the right of a victim of sex or violent crimes to receive notice on the detention of the offender, the right to voice an opinion on processes delays, the right to voice an opinion on plea bargains, among others.<sup>88</sup> According to this criticism, the reform is "too little, too late." Furthermore, the legislation focuses on crime victims' rights within the criminal justice process, and does not address additional social rights, possibly due to budgetary constraints.

A possible answer to this criticism would be that the authorities entrusted with implementing the Reform require time and resources to do so fully and effectively. Thus, the Amendment establishes the gradual manner in which the Reform will come into effect. In our opinion, this answer is not satisfying. It may be correct relating to the rights that consist of establishing new mechanisms. Yet, this does not explain why some rights that do not require significant additional resources, such as consulting the crime victim on plea bargains or delay of processes, were delayed.<sup>89</sup> Another answer could be that the Israeli Crime Victims' Rights Act also included a delayed commencement of rights, in order to enable a gradual implementation of the provisions. The Israeli Act similarly consisted of a three-year delay, at the end of which the legislation was fully in force. Yet, one could argue that the two cannot be compared: in 2001, the Israeli Act was precedential and indeed required much resources and time to study the new area, whereas in the Area's case, the state authorities have already acquired nearly twenty years' worth of experience in this field. It seems as though the delay of some rights was unjustified.

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88. Art. 186 to the Security Provisions Order.

89. This argument is supported by the fact that *de facto* the military prosecution already tends to inform victims of serious crimes on plea bargains, and the precedent of the Military Court of Appeals' policy is to make sure the crime victim is aware of the plea bargain before giving the sentence.

### 3. The new legislation is unclear.

Another criticism on the Amendment relates to its ambiguity. The main difficulty is with its validity. The Order is unclear as to whether it applies to Palestinian crime victims as well, or solely to Israelis who are victims of a crime committed by a defendant who is being prosecuted in the Area. Our opinion is that, although the Order is ambiguous, it applies to all crime victims in the Area, both Israelis and Palestinians. However, it is unclear whether the provisions are implementable relating to Palestinian crime victims. For instance, we are unsure that Palestinians would want to take part, as crime victims, in the proceedings in a military court. Moreover, it is unclear whether the relevant authorities, such as the Military Prosecution, will be able to uphold their responsibilities (e.g., making contact with the victim) toward a victim who lives in areas that are fully controlled by the Palestinian Authority.

## V. FUTURE DEVELOPMENTS IN CRIME VICTIMS' RIGHTS IN THE AREA

In the previous sections we described the reform in crime victims' rights in the Area. We portrayed the historical and intellectual background to the Reform. We then introduced several possible criticisms on the Reform and potential answers to these criticisms. In this section, we wish to present future developments relating to crime victims' rights in the Area. We believe that the reform in crime victims' rights in the Area is significant and important—also, that it should have been enacted sooner. Either way, it enables the expression of victims of terrorism in the Area and is based on the recognition of the victims' right to express their voice as part of their rights in the criminal process.<sup>90</sup> In light of the Reform, we wish to focus on several possible developments in crime victims' rights in the military courts in the Area. We will first describe the Reform's influence on the crime victims' status and their ability to present their interests to law enforcement authorities and the courts. We will then describe the increasing recognition

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90. Leroy Lamborn, *Victim Participation in the Criminal Justice Process: The Proposals for a Constitutional Amendment*, 34 WAYNE L. REV. 125, 147 (1987/1988). Jonathan Doak, *Victims' Rights in Criminal Trials: Prospects for Participation*, 32 J.L. & SOC. 294 (2005).



of crime victims' rights through one of the central issues in the Area's caselaw—the compensation of crime victims in the Area.

In the past few years, there has been a growing involvement of crime victims in the military court proceedings in the Area. Crime victims, who in the past were nearly completely absent from the trials of their offenders or their loved ones' offenders, started attending the courts on a regular basis. We believe that this practice will continue to expand, due to three main factors (besides the Amendment). The first factor is the directives of the Military Prosecution, which obligate the Prosecution to notify the family of the victim when an accused is charged with manslaughter.<sup>91</sup> This Directive enables the crime victim's family to realize their rights as per the Order, including those rights that have yet to come into force. In practice, the Military Prosecution increased the types of cases in which it will inform the victim to cases of offenses that caused serious injuries (such as some terrorism, violent crimes, and sex crimes). As a result, many crime victims are informed of indictments and proceedings against their offenders, and choose to realize their right to appear in court, as well as express their opinion to the Prosecution and the Court.

The second factor expected to lead to an increase in the realization of crime victims' rights is the commencement of the provision awarding crime victims the right to be notified of the criminal process, starting January 2021.<sup>92</sup> This provision is expected to lead to the informing of many more crime victims about their cases. We assume that, as a result, more crime victims will choose to realize their rights in the criminal process.

The third factor has to do with lawyers specializing in representing crime victims in the military courts. There are a number of existing private legal organizations<sup>93</sup> active in this field, as well as several lawyers who provide representation services to victims of terrorism in military courts. These organizations contribute to crime victims' awareness of their rights, and decrease the reluctance of some crime victims to appear in court. The growing involvement of crime victims in the proceedings is reflected not

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91. Military Prosecution Directives, Judea and Samaria Prosecution Directive 6.0108 on crime victims' rights in proceedings handled by the Military Prosecution.

92. Art. 186(7) to the Security Provisions Order.

93. The most prominent one being Honenu, [www.honenu.org.il](http://www.honenu.org.il) (last visited July 23, 2020).

only in their appearance in court, but also in their active participation in the proceedings.

Indeed, today, unlike in the past, it is not uncommon for victims of serious violent crimes to realize their right to express their opinion prior to the sentencing. The information passed on from the Prosecution, namely informing the victim of serious offenses on plea bargains, as well as the Court's policy to ensure that victims of serious violent or sex crimes have been notified of the plea bargain, have contributed to this phenomenon.<sup>94</sup> It is common that damage statements are submitted to court and serve as a central piece of evidence in the Court's decision on whether to award compensation to the crime victim, and to what extent.<sup>95</sup> This also reflects the active participation of the crime victim in the proceedings.

The Military Courts' practice to award compensation to crime victims in cases of property damage or bodily harm is another development in crime victims' rights. Lately, there is an increasing tendency to impose on defendants the compensation of the crime victim and his or her family.<sup>96</sup> It is safe to say that, following the enactment of the Reform, this trend will become even more common. An analysis of the judgements given in the Area in recent years points to an increase in the awarding of compensation, larger restitutions awarded to terrorism victims, and a growing acknowledgement in the crime victims' right to fair redress.<sup>97</sup>

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94. Similar to the provision in Art. 17(4) and 17(5) to the Crime Victims' Rights Act, stipulating that in an indictment hearing regarding sex crimes or serious violence, involving a plea bargain, the court will make sure that the crime victims' rights have been protected, such as informing the victim of the details of the plea bargain. *See, e.g.*, Case (Judea) 5309/15 (Isr.); Case (Judea) 4753/16 (Isr.); Case (Judea) 6811/16 (Isr.); Case (Judea) 9364/16 (Isr.); Case (Judea) 5814/17 (Isr.); Case (Judea) 6752/16 (Isr.); Case (Judea) 7313/1 (Isr.) (unpublished; on file with authors).

95. *See, e.g.*, the sentence in Case (Judea) 10224/18 *Military Prosecution v. H.G. (minor)* (July 21, 2020, unpublished) (Isr.).

96. *See, e.g.*, 1109/13 *Plony v. Military Prosecution* (published in Nevo Israeli Database) (Isr.); 4123/17 *Military Prosecution v. Saadi Ali Saadi Abu Hamed* (published in Nevo Israeli Database, Oct. 2, 2019) (Isr.); 1549/17 *Military Prosecution v. Muhammad Hassin Muhammad Ataya* (published in Nevo Israeli Database, Oct. 29, 2017) (Isr.).

97. This relates to the trend in the High Justice Court strengthening the status of crime victims in the criminal process. The High Justice Court has accentuated the need to award compensation to crime victims as part of the sentence, as part of the Court's obligation to aid the crime victims and ease their rehabilitation. *See, e.g.*, 105/17 *Zitoni v. the State of Israel* (published in Nevo Israeli Database, Dec. 26, 2017) (Isr.).

One of the legal factors contributing to the increasing use of compensation in the Area is the Military Court of Appeals' interpretation of the difference between the law of the Area and the Israeli law relating to the maximum sum of compensation that can be awarded in criminal proceedings. On this matter, Article 182 in the Security Provisions Order (authorizing the awarding of compensation) differs from Article 77 in the Israeli Penal Code.<sup>98</sup> While Article 77 stipulates a maximum compensation of 258,000 NIS (approximately US \$80,000), Article 182 leaves this matter to the Court's discretion with no such limitation. Article 182 authorizes the Court to award compensation for the crime victim's damages in whole or in part. The Military Court of Appeals addressed the question of whether the difference in legislation stems from a *non liquet* or is the intent of the legislature. In the *Abu Aliya* case,<sup>99</sup> the Court decided on the latter. Thus, military courts are authorized to impose defendants with compensation in amounts that exceed the maximum stipulated by Israeli law.<sup>100</sup>

There are three main approaches to the purpose of the compensation, and thus to the sum of the compensation that should be awarded in the criminal process. According to the first approach, the compensation is meant to restore the victims' status as it was prior to the offense, eliminating the need to sue the offender in a civil suit. In accordance with this approach, restitution should be awarded as per the full extent of the damage. Consequently, there is no justification for limiting the sum awarded *ex*

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98. Art. 182 to the Security Provisions Order (consolidated version) (Judea and Samaria) (no. 1615) (2009).

99. Appeal 1137/13 *Abu Aliya v. Military Prosecution* (published in Nevo Israeli Database, Nov. 28, 2018) (Isr.). The Military Court of Appeals reasoned its conclusion via its interpretation of the difference in law, as stated above, as well as due to the requirement in the Area's law to allow the defendant and the victim to bring evidence regarding the damages before awarding compensation. In Appeal 1009+1005/19 *Military Prosecution v. A.Z. (minor)* (Isr.) (unpublished, on file with authors), the Court expanded on the different historic-legislative background of the Area, relative to the Israeli law, considering the maximum amount of compensation that can be awarded. The Court reasoned that a purposive interpretation of the underlying principles of awarding compensation to crime victims justifies the awarding of redress suited to the victim's damages. The Court also argued that the unique security and legal situation in the Area supports the conclusion that the legislator had intentionally authorized the military courts to award unlimited compensation.

100. *Abu Aliya*, *supra* note 99.

*ante*, as the sum is in the amount of the damage caused to the crime victim, no matter how high.<sup>101</sup>

According to the second approach, the compensation is meant not only to restore the damage caused to the victim, but also to deter the offender, help him or her realize the consequences of their actions, and steer them onto the right path. Accordingly, the restitution supports the rehabilitation of both the victim and the offender. Thus, the amount awarded need not suit the actual damages.<sup>102</sup> In fact, awarding too high a compensation might reduce the offender's willingness to acknowledge the victim's suffering, interfere with his ability to sustain the restitution payments, and interfere with his rehabilitation.<sup>103</sup>

The Military Court of Appeals took a third approach, an intermediate model designed to balance the need for an effective judicial process with the need to compensate the victim. It is designed to award the crime victim a prompt redress, without attempting to account for the full extent of his or her damages, as so not to overly extend the criminal process, as well as to spare the need for an ongoing civil suit. The Court summarized this approach:

First, the military courts are authorized to charge the defendant with the payment of compensation in excess of the maximum stipulated by Israeli law. Second, it is the Legislator's order that the courts will do so if the damages are proven to exceed said maximum amount. Third, in light of the nature of the compensation, being a primary and partial one, due to the limited ways to prove it within the criminal process, and due to the practice of awarding redress through estimation, the compensation should be limited to the damages that have been proven to the Court through the existing evidence and without the need to conduct a complementary evidentiary hearing, even if this will not allow for the compensation of the victim's damages in full.<sup>104</sup>

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101. Regarding the harm crime victims suffer, see Joanna Shapland & Matthew Hall, *What Do We Know About the Effects of Crime on Victims?*, 14 INT'L REV. VICTIMOLOGY 175, 178 (2007).

102. For a study on the importance of restitution to the rehabilitation of crime victims, see Miers, *supra* note 51.

103. See also Lucia Zender, *Reparation and Retribution: Are they Reconcilable?*, 57 MOD. L. REV. 229, 230 (1994); Andrew Ashworth, *Punishment and compensation: Victims, offenders and the state*, 6 OXFORD J. LEGAL STUD. 86 (1986); M. Ogden, *Compensation Orders in Cases of Violence*, CRIM. L. REV. 500 (1985).

104. Appeal 1009+1005/19, *supra* note 117. In England, for example, there is no limit to the amount of compensation awarded. See, e.g., Powers of Criminal Courts (Sentencing) Act 2000, c. 6, § 130(4) (Eng). This is also true in New Zealand, see Sentencing Act 2002,

This approach results in the awarding of restitution in higher sums than in Israel, but not in a way that fully compensated the victims of terrorism for their damages. We believe that this practice of awarding compensation will increase and strengthen following the reform in crime victims' rights in the Area.

One possible reservation of the effect of this practice on crime victims' rights in the Area relates to the unique limitations in the Area relative to the enforcement of the compensation. There are restrictions, unique to the Area, regarding crime victims' ability to realize the awarded restitutions.<sup>105</sup> In Israel, there are authorities dedicated to the implementation of judgments and the collection of compensation awarded to crime victims, but there are no such institutions in the Area.<sup>106</sup> In addition, the Israeli Execution Authorities lack jurisdiction in the Area, rendering the compensation unenforceable. Therefore, the unique legal reality in the Area also supports the ruling that a compensation exceeding the maximum sum stipulated in Israeli law can be awarded in the Area.<sup>107</sup>

To conclude this point, a central development that can impact the crime victims' status in the Area (other than the Reform) is the compensations awarded to them, considering the unique characteristics of the Area. Based on an analysis of the caselaw in this field, we think that the reform in crime

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§§ 32–38A (N.Z.). See also, NEW ZEALAND LAW, COMMISSION, COMPENSATING CRIME VICTIMS (2010); ANDREW ASHWORTH, SENTENCING AND CRIMINAL JUSTICE, 341 (2015). In Canada, the compensation in a criminal process is awarded when the damages can be clarified. In some cases, compensation was awarded in the sum of hundreds of thousands of dollars, and more. See, e.g., *R. v. Deen*, (1998) 120 C.C.C. (3d) 482 (Can); *R. v. Gaudet*, (1998) 125 C.C.C. (3d) 17 (Can.).

105. In addition to the limitations on receiving compensation through a civil suit, as there is no practical manner in which tort claims can be filed in the Area.

106. Article 1(6) to the Center for Collection of Fines, Fees and Expenses Act (1995).

107. We should state that, unlike in Israeli courts, the ways to prove damages in the military courts are not set in legislation. The Area's caselaw allows the submission of victim impact statements (similar to the Crime Victims' Rights Act), the victim's testimony in the argumentation of punishment, and the request of compensation as per the court's discretion. In addition, the Military Court of Appeals ruled that the payment to the victim can be encouraged by charging the defendant with a fine accompanied by a lengthy imprisonment, while Article 182(4) to the Security Provisions Order stipulates that any payment by the defendant will be prioritized to the compensation awarded to the victim. The Court's reason for this decision was the unique situation in the Area, making it extremely difficult to enforce the payment of compensation. See *Abu Aliya*, *supra* note 99.

victims' rights in the Area will strengthen this practice and make it even more common.

## **VI. SUGGESTIONS FOR IMPROVING CRIME VICTIMS' RIGHTS IN THE AREA**

In the previous section, we discussed the future developments in terrorism victims' rights in the Area. We described a dominant trend in the Area, consisting of the increasing use of awarding compensation, enlarging the sum of restitution awarded to victims of terrorism, and the growing acknowledgement in the rights of crime victims to a fair redress. However, there are still some legal and operative difficulties regarding victims of terrorism in the Area. In this section, we wish to make some suggestions that can further enhance the status of crime victims in the Area. These are preliminary suggestions and in no way exhaustive. These suggestions are not the only actions that are needed and should be taken to better the status of crime victims in the Area.

### **1. Establish a Center for Collection of Compensation for victims of terrorism in the Area.**

As mentioned, a central development in the rights of crime victims in the Area has to do with the compensation they are awarded. In recent years, it has become more common for military courts to award restitution to crime victims, and in higher amounts. This is induced by the strengthening of crime victims' rights in Israel and in the Western World, and due to the growing acknowledgement of the crime victims' right to fair redress. In some cases, victims were awarded very high restitutions. Yet, without effective enforcement mechanisms in the Area, these restitutions are often unrealized.

The main reason is the difficulty in implementing judgements relating to offenders (mainly terrorists) for security reasons. The current situation, in which crime victims are awarded redress that they cannot claim, undermines the purpose of imposing the payment of compensation on defendants. The fact that, in many cases, the Court's judgement is not implementable is damaging both to the crime victim as well as to the public's perception of the weight and importance of the Court's rulings.

Considering this reality, we believe that an institution designated to collect compensations and fees should be established in the Area. This institution should be authorized to take certain actions in order to collect the fees, including foreclosures and the seizure of property. This institution should also be authorized to request that the Military Court appoint a receiver for the debtor's property, as well as to submit additional requests to the court. In this manner, the mechanism for collecting compensation as stipulated by Israeli law would equally apply to crime victims of the Area.

## **2. Establish a designated compensation trust for victims of terrorism in the Area.**

Due to the practical difficulty in collecting restitution from offenders who live in areas where the military rule is restricted, and the danger it may encompass, a possible alternative way to improve the status of crime victims in the Area is to establish a designated trust that would directly compensate the crime victim if it was impossible to collect from the offender.<sup>108</sup> This trust would have a separate budgetary source from the State Treasury. The trust could even be funded by the "terrorism money" often foreclosed in the Area. The trust would be authorized to take certain actions relating to the relevant authorities in order to compensate victims of terrorism. For example, the Trust would pay terrorism victims the compensation awarded to them and attempt to collect reimbursement from the debtors.

## **3. Authorize centers to provide legal aid to crime victims in the Area.**

An additional suggestion that can help better crime victims' rights in the Area, unrelated to the issue of compensation, is the establishment of Legal Aid Centers for crime victims. The Legal Aid Center would also be allowed to perform other roles relating to crime victims' rights, for example: pointing out deficiencies and suggesting solutions; increasing the awareness of crime victims to their rights; providing professional counsel and guidance to various institutions regarding crime victims and their needs; distributing handouts and pamphlets to the relevant authorities; improving the flow of information from the Prosecution to the crime victim; and more.

Some of the crime victims who participate in the military criminal proceedings are represented by private lawyers or private organizations. A

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108. Similar to the U.S Victims of State Sponsored Terrorism Fund; *see supra* note 47.

Legal Aid Center is already operating in the Area and was established specifically for victims of serious violent offenses (mainly manslaughter). The aid provided by the Center includes escorting the victim to court hearings and explaining proceedings as needed; aiding the victim with his or her impact statement; helping the victim form an opinion on plea bargains, and providing “representation” for the victim before the Prosecution; and notifying the victim’s family of the process, explaining how to access the online system in order to see the progression of the criminal process, information on inmate release, pardons, etc. Giving the Legal Aid Center more authority in the Area will be beneficial to the crime victims, both financially and by ensuring that they are represented by someone who has expertise in this field.

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To summarize, the status of crime victims in the Area is different than that of the crime victims in Israel—the difficulty in enforcing the payment of compensation, the fear for human life in implementing the judgements, and more. Our suggestions are not perfect. Indeed, they raise some difficulties and concerns. Yet, we believe that they are necessary considering the reality in the Area. As a society, we are obligated to attempt to improve crime victims’ rights as much as possible, in Israel and in the Area. Needless to say, in an ideal judicial system, the rulings and judgements are implemented without fail. However, we cannot overlook the unique characteristics and environment in which the military courts operate.

## SUMMARY

In 2018, a new Reform came into effect, granting, for the first time in the Area, statutory rights to victims of terrorism whose offenders are being prosecuted in the military courts. The new Order applied an extensive part of the Israeli Crime Victims’ Rights Act (2001) in the Area. The Reform allows thousands of crime victims whose offenders are prosecuted in military courts in the Area (often regarding very serious offenses) to voice their opinions and present their interests.

This article described the expansive historical background that led to the reform in crime victims’ rights in the Area. This Reform was preceded by attempts of the Judiciary, Legislative, and Executive branches—all of



which have failed. However, it seems that these processes induced and prompted the new legislation. This article also portrayed the Reform's normative framework—both global processes (a general trend of strengthening the rights of crime victims in the Western World, as well as in foreign militaries), and local processes (bringing the law of the Area closer to the Israeli law regarding victims of terrorism and crime victims who are soldiers).

The Reform is not without flaws. It has several deficiencies: it was enacted very late, relative to the Israeli legislation; it lacks several rights that it should have included (such as mental and psychological support for terror victims); parts of it came into effect at a delayed time; it is ambiguous and unclear as to whether it applies solely to Israeli crime victims whose offender is prosecuted in the Area or to Palestinians as well. The Reform is definitely a step in the right direction, but it is far from being sufficient. Additional actions must be taken to better the status of terror victims in the Area, such as establishing a Center for Collection of Compensation in the Area, which will help implement rulings awarding compensation to crime victims. In addition, Legal Aid Centers should be established, providing social and legal aid to crime victims. In light of the increase in terrorism in recent years, we believe that, as a society, we are obligated to try and improve the rights of victims of terrorism.