



# A Legislative Proposal to deter terrorism by providing a civil right of action against the sponsors and perpetrators of terrorism

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## Executive Summary

### C-CAT - The Organization

The Canadian Coalition Against Terror (C-CAT) is a non-partisan policy, research and advocacy body. C-CAT is comprised of Canadian terror victims, counterterrorism professionals, lawyers and other individuals committed to enhancing Canada's counterterrorism policies; building bridges between the private and public sectors in the fight against terror; and assisting terror victims in rebuilding their lives. C-CAT speaks for a unique constituency of Canadians who have personally and directly experienced the horrific impact of terrorism. Some C-CAT members lost a single relative, others lost entire families, and several were injured themselves. Representatives of C-CAT have testified as witnesses before Senate and House of Commons committees. C-CAT also participated as an intervenor before the Commission of Inquiry into the Investigation of the Bombing of Air India Flight 182, and has been lauded by the leaders of all four major parties for its efforts and contributions to Canada.

### C-CAT - The Legislation

*“The fact is that most major terrorism’s financial abettors and supporter... have successfully avoided criminal prosecution... Civil liability cases... associated with terrorism may constitute the best constraints we have against their activities and our best chances to hold them accountable.”* (Victor Comras – Appointed by Kofi Annan as one of five international monitors to oversee the implementation of Security Council measures against terrorism and terror financing)

Over the last five years, C-CAT has worked closely with MPs, Senators and government officials on the introduction of federal legislation that will enable Canadian terror victims and their families to launch civil lawsuits against foreign states and local Canadian organizations and individuals that have supported terrorist entities responsible for the death or injury of such victims.

Civil suits can allow for the pursuit of terrorist sponsors that often evade the criminal justice system due to the high standards of evidence required for conviction in criminal cases. In civil proceedings, however, evidence that establishes a defendant's status as a supporter of terror, which may not be sufficient for conviction in a criminal proceeding, can be enough to establish liability and obtain a damages award. Pursuing civil actions also provides a platform for educating the public about the threat and consequences of supporting terrorism.

### Impact of the Legislation

These civil suits can (i) deter future acts of violence by bankrupting or financially impairing the terrorist infrastructure through successful court judgments; (ii) deter terrorism by causing terror sponsors to refrain from future sponsorship out of fear of the publicity and exposure that would result from a civil suit; (iii) hold wrongdoers responsible even where the criminal system has failed; (iv) compensate victims; (v) act as a catalyst for further government investigation and prosecution of terrorists and their sponsors; (vi) enable terrorist assets to be located and seized; and (vii) following judgment, prevent terror sponsors from accessing Canada's banking and financial system.

Counterterrorism experts maintain that these civil suits represent a valuable approach to combating terror financing, and will enhance counterterrorism efforts in Canada, the U.S. and the British Commonwealth.

### **History of the Legislation**

Various versions of C-CAT's bill have been introduced over the years. Most of these bills were Private Members' Bills, which are listed below:

- Bill C-367 was introduced by MP Stockwell Day in April 2005.
- Bill C-394 was introduced by MP Stockwell Day in May 2005.
- Bill S-35 was introduced by Senator David Tkachuk in May 2005.
- Bill S-218 was introduced by Senator Tkachuk in June 2006.
- Bill C-346 was introduced by MP Nina Grewal in June 2006.
- Bill S-225 was introduced by Senator Tkachuk in December 2007.
- Bill S-233 was introduced by Senator Tkachuk in April 2009.
- Bill C-408 was introduced by MPs Irwin Cotler and Bob Rae in June 2009.

Bill C-35 was the first piece of government legislation modeled on C-CAT's proposal, although it differed from C-CAT's model in several significant respects. It was introduced by then Public Safety Minister Peter Van Loan in June 2009, but died on the order paper in December 2009, when Parliament was prorogued.

The same government bill was reintroduced by Senator Tkachuk as Bill S-7 in April 2010, this time originating in the Senate rather than the House of Commons.

### **Current Status of the Legislation**

There are currently two bills on the order paper in Parliament modeled on C-CAT's proposal:

- 1) Bill S-7, a government bill introduced in the Senate, sponsored by Senator Tkachuk.
- 2) Bill C-408, a private member's bill introduced by Liberal MPs Irwin Cotler and Bob Rae in the last parliamentary session. Bill C-408 is virtually identical to Bill S-233, Senator Tkachuk's last private member's bill.

### **C-CAT's Position**

C-CAT commends the government for putting its support behind this important legislative proposal by introducing government legislation. However, C-CAT also believes that the government bill can be improved in order to ensure that it is maximally effective in deterring terrorism and that it is applicable to the greatest number of Canadian terror victims. C-CAT is seeking to amend Bill S-7 to achieve the aforementioned goals by incorporating certain provisions from Senator Tkachuk's previous private member's bill and Mr. Cotler's current private member's bill. In other words, C-CAT would like to see the government bill - rather than a private member's bill - passed in Parliament, but with appropriate amendments. C-CAT looks forward to working with members of all parties during parliamentary committee hearings to enhance the bill.

## Part I: The Terror Economy

Money is the lifeblood of terrorism. As the United States Court of Appeals for the Seventh Circuit explained, “there would not be a trigger to pull or a bomb to blow up without the resources to acquire such tools of terrorism and to bankroll the persons who actually commit the violence.”<sup>1</sup>

Counterterrorism expert and economist Loretta Napoleoni has mapped out the international economic system that provides these resources to terrorist groups the world over. In her highly acclaimed book, *Terror Incorporated*, Napoleoni concludes that the “terror economy” generates about \$1.5 trillion annually – roughly equal to the GDP of the United Kingdom.<sup>2</sup>

If money fuels the engine of global terrorism, then defeating terrorism requires pursuing its patrons, and disrupting the logistical, financial and material support they provide to terrorist bodies. Indeed, David Aufhauser, former general counsel of the U.S. Department of Treasury and chair of the National Security Council’s committee on terrorist financing, has noted that “Stopping the money trail...yields a double dividend of not only bankrupting terrorists, but also alerting us to and allowing us to pre-empt potential calamities that are being planned.” Furthermore, he stated, “If executed well, the campaign against terrorist financing will bring more peace than any army of soldiers.”<sup>3</sup>

## Part II: Terror Financing in Canada

The Financial Transactions and Reports Analysis Centre of Canada (FINTRAC) was created in 2000 to detect money laundering, terrorist activity financing and other threats to the security of Canada. In its 2006-2007 Annual Report, FINTRAC reported 33 cases suspected to pertain to terrorist financing and threats to Canada’s security, \$209 million in transactions of suspected terrorist activity financing and other threats to the security of Canada, and \$1.6 billion in transactions of suspected money laundering and terrorist financing and/or other threats to the security of Canada. In 2007-2008, FINTRAC reported to its partners 29 cases associated with terrorist activity financing and other threats to Canada’s safety, and 10 cases with associations to both money laundering and terrorist activity financing.<sup>4</sup>

Despite the enormity of the terrorist enterprise both in Canada and abroad, terror sponsorship has proven difficult to prosecute. Victor Comras, appointed by Kofi Annan as one of five international monitors to oversee the implementation of Security Council measures against terrorism and terror financing, has observed that: “Most major terrorism’s financial abettors and

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<sup>1</sup> *Boim v. Quranic Literacy Institute and Holy Land Foundation for Relief and Development*, 291 F.3d 1000 (7th Cir. 2002)

<sup>2</sup> Loretta Napoleoni. *Terror Incorporated: tracing the dollars behind the terror networks* (New York: Seven Cities Press, 2005), xviii.

<sup>3</sup> The Middle East Forum. “Shutting Down Terrorist Financing” by David Aufhauser. December 11, 2003. <http://www.meforum.org/article/588>

<sup>4</sup> <http://www.fintrac.gc.ca/publications/nr/Hi2007-10-25-eng.asp>

supporters...have successfully avoided criminal prosecution.... The record on closing down entities and institutions feeding terrorism is even more dismal.”<sup>5</sup> This statement is certainly true in Canada, where the number of criminal convictions for terror financing stands at one.

### **Part III: Enhancing the Campaign Against Terror Financing**

C-CAT contends that Canada’s existing legal framework for curtailing terrorist financing in, from and through Canada is inadequate, and that new and innovative strategies are required.

C-CAT has proposed one such strategy. Over the last five years, C-CAT has worked closely with MPs and Senators on the introduction of federal legislation that will enable Canadian terror victims and their families to launch civil lawsuits against foreign states and local Canadian organizations and individuals that have supported terrorist entities responsible for the death or injury of such victims.

These civil suits can (i) deter future acts of violence by bankrupting or financially impairing the terrorist infrastructure through successful court judgments; (ii) deter terrorism by causing terror sponsors to refrain from future sponsorship out of fear of the publicity and exposure that would result from a civil suit; (iii) hold wrongdoers responsible, even where the criminal justice system has failed; (iv) compensate victims; (v) act as a catalyst for further government investigation and prosecution of terrorists and their sponsors; (vi) enable terrorist assets to be located and seized; and (vii) following judgment, prevent terror sponsors from accessing Canada’s banking and financial system.

Counterterrorism experts maintain that civil suits against terror sponsors represent a valuable approach to combating terror financing, and will enhance counterterrorism efforts in Canada, the U.S. and the British Commonwealth.

### **Part IV: The Efficacy of the Civil Process**

Criminal prosecution should remain an important tool in stopping terrorist operatives and their financial supporters. However, by harnessing the additional possibility of civil lawsuits, the proposed legislation opens a vital avenue in interdicting and defeating terrorist funding. Terror victims will be able to pursue terrorist sponsors that often evade the criminal justice system due to the high standards of evidence required for conviction.

The burden of proof in criminal law must meet the “beyond a reasonable doubt” test: the evidence must establish the defendant's guilt to a degree of certainty in which it is beyond dispute that any reasonable alternative is possible. This standard of proof – if applied as

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<sup>5</sup> Counterterrorism Blog. “Civil Liability is Crucial in the War on Terrorism: A Response to the Wall Street Journal” by Victor Comras. October 30, 2006. [http://counterterrorismblog.org/2006/10/civil\\_liability\\_is\\_crucial\\_in.php](http://counterterrorismblog.org/2006/10/civil_liability_is_crucial_in.php)

objectively and consistently as it is meant to be – makes it particularly difficult to obtain criminal convictions against the sponsors and enablers of terrorism. The complex financial networks that fund global terrorism are comprised of state sponsors of terror, organized crime and thousands of institutions and organizations throughout the world, rendering the “beyond a reasonable doubt” standard unattainable in most cases.

In contrast, the standard of proof employed in adjudicating civil suits is on “a balance of probabilities”. This standard is met if the proposition in question (whether the defendant is liable) is more likely to be true than not true. Therefore, evidence that establishes a defendant’s status as a supporter of terror, which may not be sufficient for conviction in a criminal proceeding, can be enough to establish liability and obtain damages in a civil proceeding.

The efficacy of the civil suit approach has been noted by several experts. David Aufhauser explains that: “[P]rivate actions can be of material assistance to the government.... The bankers of terror are cowards. They have too much to lose by transparency.... They’re the weak link in the chain of violence. They are not beyond deterrence.”<sup>6</sup> Victor Comras adds that: “Civil liability cases... associated with terrorism may constitute the best constraints we have against their activities and our best chances to hold them accountable.”<sup>7</sup>

Civil suits should be harnessed to provide a meaningful alternative to a criminal law process that has proven so unequal to the challenge of prosecuting terror sponsorship. The financiers, enablers and facilitators of terrorism fear transparency and exposure, and are rendered vulnerable to both through civil suits. Moreover, in the case of state sponsors of terror, criminal prosecution will generally be impossible or impractical, making civil suits potentially the only viable remedy.

Please see Part IX, “Case Studies of the Efficacy of Civil Suits”, for a more detailed discussion of this subject.

## **Part V: History, Status and Summary of the Legislation**

### History of the Legislation

Various versions of C-CAT’s bill have been introduced over the years. Most of these bills were Private Member’s Bills, and are listed below:

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<sup>6</sup> Jennifer Senior. “A Nation Unto Himself.” The New York Times. March 14, 2004.  
<http://www.nytimes.com/2004/03/14/magazine/14MOTLEY.html?pagewanted=8&ei=5007&en=6935d90b973c1690&ex=1394600400&partner=USERLAND>

<sup>7</sup> *Supra* note 4.

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### Summary of the Legislation

The legislation is comprised of four key components summarized below. The complete texts of the government and private members' bills are included in Part XVII of this document.

#### 1) Lifting State Immunity

The *State Immunity Act* ("SIA") would be amended to permit claims in Canada against certain foreign states that provide support to any individual or group listed as a terrorist entity by the government of Canada. Currently, the SIA permits claims for breach of contract, and personal injury, death and damage to property that occur in Canada, but not for sponsoring terrorist

entities that kill Canadians abroad. As the law already recognizes that state immunity is not absolute, C-CAT posits that the special case of terrorism should be explicitly included in the exceptions to the law. Terrorism is a transnational phenomenon that presents unique challenges to the democratic world, and it requires special measures that reflect the scope and magnitude of the danger to Canadian society as a whole.

#### 2) Creating a Civil Cause of Action

A civil cause of action would be created for anyone who has suffered loss or damage as a result of a breach of the *Criminal Code*'s anti-terrorism provisions.

#### 3) Retrospectivity

The civil cause of action is retrospective to January 1, 1985, meaning that victims of terrorist attacks occurring on or after that date would be able to sue. Two of the largest acts of terrorism committed in North America occurred after this date: the bombing of Air India Flight 182 on June 23, 1985, and the coordinated attacks against the United States on September 11, 2001.

#### 4) Enforcing Foreign Judgments

A provision in the legislation confirms that foreign anti-terror judgments from similar jurisdictions and legal systems to Canada's would generally be enforceable in Canada.

## Part VI: Frequently Asked Questions

### 1. *Why should victims of terror be given special consideration under the law?*

Terrorism is more than a particularly pernicious form of organized crime. It is different in its scope, intent, method and impact.

Unlike organized criminality, it is often a function of state policies aimed at the citizens of other sovereign states. Its primary objective is not economic or personal gain in a criminal sense. Whereas the primary interest of most criminals is not to destroy themselves or society as a whole, the objective of terrorist attacks is to inflict maximum damage and horror on society for generations – for military and/or ideological purposes.

While victims of terror may be targeted as members of a particular ethnic or social group, the attacks are seldom delivered with any surgical precision. These victims are generally not targeted for who they are but as representatives of a group, society or country. And while criminals for the most part avoid large-scale massacres of uninvolved persons, the primary purpose of terrorist activity is to create victims – the more the better – because victims are the vehicle through which terrorist goals are achieved. Crime can exist without mass murder and may in fact benefit from avoiding it; terrorism cannot.

Terror victims, therefore, are not collateral damage in a conventional war between states. They are not by-products of another circumstance. They were neither caught accidentally in a drive-by shooting, nor targeted personally for the purpose of a specific gain – be it economic or otherwise.

The experience of Canadian terror victims is both personal and national in nature. Those who have been murdered or injured in terrorist attacks have often been victimized in the context of a larger conflict of global dimension involving states, sub-national groups and non-state entities. France has formally recognized this status with legal provisions that provide terror victims with the rights and advantages accorded to civilian war victims by the disabled military pension code. France has also created a fund that offers financial compensation to these victims. Similarly, the U.S. government has established a fund for victims of certain categories of state-sponsored crime.

Canadian government policy should also reflect the unique status of terror victims in this unprecedented conflict. Failing our victims is not only an injustice. It is a failure to deal with what terrorism is, and a failure to strengthen our society against terrorist success. The front-line soldiers in this new war are unarmed civilians who have little defence against other “civilians” who are the agents of terror both here and abroad, and the experience of these victims will define the contours of this battle. The extent to which we can limit the impact on these victims will dictate the impact of terrorism on our society and the confidence of our society to weather this storm. Our ability to diminish that impact must therefore be a central component in any policy deliberations regarding terrorism. In addressing this issue, C-CAT’s legislative proposal effectively provides another vehicle for undermining terrorism itself.

## ***2. Is there any international consensus emerging on the special status of terror victims?***

This very question was the subject of a symposium sponsored by the Secretary-General of the United Nations in September 2008. This was pursuant to the adoption of the UN Global Counter-Terrorism Strategy by Member States in 2006, which urged an end to the dehumanization of terrorism victims. Under the strategy, countries committed themselves to: consolidating their systems of assistance to promote the needs of victims and their families and facilitate the normalization of their lives; to promoting international solidarity in support of victims; and to protecting victims’ rights.

In a press conference prior to the symposium, UN Secretary-General Ban Ki-moon noted the key role that victims must play in the battle against terrorism:

Almost exactly two years ago, the General Assembly took a historic step forward in adopting the United Nations Global Counter-Terrorism Strategy. For the first time, Member States came together and took a common stand on the issue of terrorism. And they acknowledged that terrorism cannot be defeated without the help of those who suffer most, the victims and their families.....<sup>8</sup>

The UN Secretary-General also called for open dialogue on the issue of terror victims between governments, the UN, civil society and the victims themselves:

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<sup>8</sup> <http://www.un.org/apps/sg/offthecuff.asp?nid=1200>

...By giving a human face to the painful consequences of terrorism, you help build a global culture against it.... You deserve support and solidarity. You deserve social recognition, respect and dignity. You deserve to have your needs addressed.... Still too often there are gaps in addressing the needs of survivors and their families.... Still too often victims are registered only as numbers and not as human beings that bear witness to stories of immense injustice. Still too often we pay more attention to the voices of terrorists than those of their victims.<sup>9</sup>

Asked whether he supported the granting of a recognized international status for victims, the Secretary-General said he would certainly discuss that and all specific proposals resulting from the Symposium with his advisors and bring them to the attention of Member States.

Canada should take note of the UN's efforts on this issue. There is presently no federal structure or agency mandated with providing compensation or other assistance to Canadian victims of terror. Unlike terror victims in France, the U.S. and other European countries, Canadian victims have no government body to turn to for support.

By passing C-CAT's proposed legislation, the Canadian Parliament would be providing at least some measure of opportunity for victims to seek appropriate compensation from those responsible for the deaths of their loved ones.

### **3. *Why is this bill focused only on terrorism?***

Other types of human rights violations committed by foreign countries, such as torture and war crimes, are unequivocally deplorable. However, unlike terrorism, these phenomena generally do not present a clear and immediate danger to Canada as a country, to Canadians living in Canada, or even necessarily to Canadians living in the country of the offending state. As opposed to terrorist leaders like Osama Bin Laden, the perpetrators of other types of human rights violations have not declared "war" against Canada, its allies or its way of life. They would not necessarily embrace the destruction of the West or other nation states as a theological or ideological imperative that supersedes other priorities (including their own survival), nor have they declared the utilization of WMD against the international order as the preferred tactic and weapon of choice.

The same cannot be said of terrorism and its perpetrators. Despite some of the obvious overlap between the dynamics governing terrorism and other types of human rights violations, the scope, intent, method and impact of terrorist activity set it apart as a distinct category of transnational threat. As a result, the legal remedies and mechanisms that must be crafted to deal with terrorism will differ substantively from those used to deal with other human rights abuses. It would be inappropriate – and arguably even counter-productive – to attempt to integrate other types of violations into a bill providing civil recourse for victims of terrorism.

For those seeking to lift state immunity for torture and crimes against humanity, we respectfully suggest that an entirely separate piece of legislation be drafted and targeted specifically for those

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<sup>9</sup> <http://www.un.org/apps/news/story.asp?NewsID=27983&Cr=terror&Cr1#>

crimes. Indeed, we refer to Irwin Cotler, current Member of Parliament and former Minister of Justice, who made the following statements in the House of Commons in October 2009 during debate of Bill C-35 (an earlier version of Bill S-7):

...I think that victims of torture deserve a right of civil redress no less than do victims of terror. My only point was that from a legal point of view we could not commingle the two principles in the same bill without doing a disservice to both. Therefore, I introduced a private member's bill with respect to providing a civil remedy for victims of terror and I will be introducing shortly a private member's bill to provide a civil remedy for victims of torture. In that way we will have two distinguishable, though related, bills with respect to the matter of principle, but in the matter of process we will be able to go forward effectively to secure the rights of victims of torture and terror respectively.”

**4. *Why does the bill give special attention to the state sponsorship of terrorist organizations rather than focusing on any type of state-related terrorism?***

Only in the aftermath of 9/11 did the international community begin to acknowledge more fully that terrorism was not simply a more pernicious version of organized crime or just another version of the age-old tactic of war through proxy. The international community came to see terrorism as a different phenomenon involving non-state transnational actors with the capacity to wage war and seek the total destruction of other states. This unprecedented enemy can inflict violence at a level once reserved only for sovereign entities and pursue weapons of mass destruction to do so. Yet, unlike sovereign states, these entities are not bound by international conventions, nor are they subject to the existing mechanisms of state accountability.

Some scholars have referred to terrorist entities as “sovereignty free” and to nation states as “sovereignty bound”. Despite lacking some of the privileges and strengths of sovereign entities, terrorist groups have benefited from the freedoms of being “unbound” from the dictates and strictures of normative statehood. They challenge the traditional dominance of states and manage to “obfuscate, even elude the jurisdiction ...of the state system as a whole”.<sup>10</sup> Researchers have noted the demonstrable impact of these “sovereignty free” entities as catalysts for broader global violence that is disproportionate to the terrorist acts in and of themselves.

These non-state actors usually require some level of state involvement to flourish. They need a certain degree of territorial safety and stability from which to plan and launch attacks, acquire human and material resources, and train their personnel. Global terrorism in general simply cannot be sustained for long without the involvement of nation states. This has created a grey zone of legal, moral and diplomatic quandaries that have made it difficult for democratic societies to respond effectively. Many of the impediments related to defining and prosecuting the fight against 21<sup>st</sup> century terrorism flow directly from the non-state nature of the protagonists and the attendant ability of their state sponsors to elude censure.

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<sup>10</sup> *Transnational Crime, Concepts, Activities and Responses*. Ed. Phil Williams and Dmitri Vlassis. (Portland: Frank Cass Publishing, 2001), 67.

State sponsorship of terrorism through non-state entities must not be viewed as comparable to other illicit state acts proscribed by international law. While a given terrorist act committed by a state through the sponsorship of terrorist groups might produce the same immediate result if committed directly by that state's official agencies, the dynamics governing these two phenomena are very different. State sponsorship of terrorist groups as an instrument of state policy has global implications that go well beyond the immediate consequences of any specific attack or campaign. The severity of this threat to the international order is unlike most other conventional dangers. As a result, existing legal and political mechanisms have had only limited success in addressing the problem.

C-CAT contends that state sponsorship of terrorist groups merits special attention under the law. Due to the severity of the threat it poses to the international order, the clearly evidenced limitations of conventional statecraft in addressing that threat, and the likelihood of proliferation if left unaddressed, C-CAT has advocated for legislation that lifts state immunity for the particularly egregious violation of sponsoring listed terrorists entities.

Please see Part VIII, #5 of C-CAT's proposed amendments, for further analysis of this issue.

***5. Do terror victims and their families already have the right to sue terror sponsors in Canadian courts?***

Currently, Canadian law does not permit suits against foreign states for terror sponsorship. The proposed legislation would amend the *State Immunity Act* to allow civil suits against foreign states for this conduct.

Canadian individuals and organizations that have perpetrated or have otherwise been implicated in a terrorist attack could presently be subject to civil suits under existing tort law in a Canadian court. Nevertheless, passage of the legislation will help facilitate the execution of these suits and provide more options and flexibility for the victims. The legislation would carve out a specific cause of action for breach of the *Criminal Code* anti-terrorism laws, which refers specifically to terror sponsorship (among other types of terror-related conduct). This will undoubtedly make the process clearer for both the plaintiffs and the courts.

***6. Doesn't the State Immunity Act preclude civil suits against foreign states in all circumstances?***

No, the *State Immunity Act* does not provide unlimited protection for foreign countries. It already allows an individual to sue a foreign state in a Canadian court for breach of contract, and for personal injury, death and damage to property suffered on Canadian soil. If one can sue a state for breach of contract, surely one should be able to sue a state for its role in sponsoring those who murder or injure Canadian citizens abroad.

Furthermore, state immunity is widely understood as applying only to sovereign acts of state (*acta jure imperii*). Various rulings have recognized that the legal parameters of *acta jure imperii* are subject to change. The International Court has noted that this definition is “not fixed in stone” and “is subject to changing interpretation which varies with time reflecting the changing priorities of society.”<sup>11</sup> Similarly, in *Rahimtoola v. Nizam of Hyderabad*, [1958] AC 379, Lord Reid noted: “The principle of sovereign immunity is not founded on any technical rules of law; it is founded on broad considerations of public policy, international law and comity.” In another case, Denning M.R. of the English Court of Appeal held that, “Each country delimits for itself the bounds of sovereign immunity. Each state creates for itself the exceptions from it. It is, I think, for the courts of this country to define the rule as best they can, seeking guidance from the decisions of the courts of other countries, from the jurists who have studied the problem, from treaties and conventions and, above all, defining the rule in terms which are consonant with justice rather than adverse to it.”<sup>12</sup>

Terrorism cannot be defined as a legitimate sovereign act of state. Rather, the prohibition against terror must be seen as a peremptory norm of international law (*jus cogens*) “accepted and recognized by the international community of States as a norm from which no derogation is possible”, as defined in the Vienna Convention on the Law of Treaties, 1155 U.N.T.S. 331, Article 53. Therefore, it can be argued that a foreign state should automatically lose its immunity when it engages in terrorist conduct.

As the law already recognizes that state immunity is not absolute, C-CAT is only suggesting that the special case of terrorism be explicitly included in the exceptions to the law. Terrorism is a transnational phenomenon which presents unique challenges to the democratic world, and it requires special measures that reflect the scope and magnitude of the danger to Canadian society as a whole.

### ***7. How is this legislation consistent with an effective Canadian foreign policy?***

The government bill uses a different model than the private member’s bills (PMBs) to determine which foreign states can be sued for terror sponsorship. Please see C-CAT’s analysis of the “Listing Process” in Parts VII and VIII of this document for a fuller explanation of why the PMB model would promote a better foreign policy for Canada.

However, regardless of which model is ultimately adopted by Parliament, the following broad conclusions can be drawn regarding the impact of either version of the legislation:

#### **Responsible**

First, either version will diminish the frivolous use of the legislation and automatically protect Canada’s key allies and trading partners from being subject to the implications of this legislation, while successfully targeting egregious offenders.

<sup>11</sup> *Arrest Warrant Case*, International Court of Justice (14 February 2002), Concurrence of Judges Higgins, Kooijmans and Buergenthal at para. 72

<sup>12</sup> *Trendtex v Central Bank of Nigeria*, [1977] 2 W.L.R. 356 at 364 (C.A.)

### Consistent

As for those countries which may be affected, the legislation represents a rather modest addition to a whole series of measures already enacted by Canada since 9/11, which have challenged the pre-existing norms of many areas in domestic and foreign policy. Like other countries, Canada has passed tough and controversial anti-terror legislation, revisited its immigration policies, and banned terrorist organizations. All of these measures were pursued despite the potential consequences for winning elections and other foreign and domestic policy considerations.

This shift in policy reflects the recognition that terrorism represents a unique transnational threat requiring unique responses. Canadians and all those who are deemed enemies by global terrorism are now being targeted internationally – a situation that is fundamentally incompatible with the long-term policy interests of any democracy.

Moreover, Canada has enacted other principled policies in the past, despite the obvious difficulties they seemed to pose to Canada's foreign policy or economic interests. One such example was cutting off highly lucrative economic ties with South Africa in the 1970s and 1980s in order to pressure that country to end apartheid. In fact, Brian Mulroney was the first world leader to take this action despite the potential economic fallout not only from South Africa but also from other Canadian trading partners. Other countries soon followed Canada's lead, however, and apartheid was ultimately abolished. Additional examples include insisting that human rights concerns be addressed with China despite the implications for Canada's multi-billion dollar trade relationship with China; banning Hizbullah as a terrorist body despite the warnings from Raymond Baaklini, the Lebanese ambassador to Canada, regarding the consequences for Canada and the potential danger to Canadians who may be touring the Middle East; refusing to submit to U.S. demands regarding prices of softwood lumber – despite the potential for compromising relations with Canada's primary trading partner; and committing to cut down on air pollutants and greenhouse gases in order to protect the environment – despite resulting hardships to the economy. But perhaps most significantly, Canada has taken a leadership role since 2001 in the military campaign against al-Qaeda and the Taliban in Afghanistan. This deployment has not only cost the lives of Canadian soldiers, but it has also identified Canada as a prime target for retaliation. Nevertheless, Canada – under both Liberal and Conservative governments – has pursued its principled policy in this conflict.

In comparison to some of the decisions described above, the proposed legislation poses far less risk to Canada's foreign policy. Moreover, as all these cases demonstrate, the depth of Canada's standing in the international arena will not be summarily and irreparably undermined by allowing for litigation that leading Canadian lawyers have confirmed is only actionable in carefully defined cases of clear-cut and egregious state sponsorship of terror.

### Principled and Practical

Ultimately, fear of retaliation (whether through violence or reciprocal civil suits) and risk to foreign policy cannot be Canada's sole guiding principle of diplomacy. If this were so, Canada could never take a meaningful and principled human rights stand against any totalitarian regime other than those deemed inconsequential to Canadian interests.

Furthermore, this argument – that a stronger posture vis-à-vis state sponsors of terror would compromise foreign policy interests – has provided terror-sponsoring states with the ideal political and diplomatic environment to promote terror against the West, while simultaneously benefiting from relationships with the West without any real consequence. Ultimately, this policy neither deterred terrorist attacks against those states, nor did it mollify the animosity of those who sympathized with their goals. The resulting loss of thousands of lives and billions of dollars bodes ill for the long-term policy interests of any democracy, and clearly justifies the short-term implications of taking appropriate steps to eradicate the danger.

Lastly, it should be pointed out that current Canadian law already allows suits against foreign states for certain conduct such as breach of commercial contract and loss or injury to person or property committed on Canadian soil. Canadian relations with other countries have not been impaired as a result. The proposed legislation only seeks to add one more limited exception to state immunity.

#### ***8. Will the legislation compromise Canadian business interests?***

Terror experts agree that military and diplomatic initiatives against terror can only be fully effective if the international financial base of terrorist activity is destroyed. Achieving this goal may involve certain disruptions in business. But terrorism is no less a scourge than apartheid, which, unlike terrorism, did not present a clear and immediate danger to Canada. Economic sanctions proved necessary and effective in defeating that system, and they are a critical component in the overall strategy to defeat terrorism.

Furthermore, one of the single most potent threats to the economic health of Canada and the global community is international terrorism. As Loretta Napoleoni and other scholars have pointed out, the global “terror economy” has destabilized the economies of weaker states and has inflicted hundreds of billions of dollars of damage and costs on the global economy.

Even more insidiously, terrorists have deliberately chosen economic targets to commit their outrages. The two attacks on the World Trade Center, the brutal attacks on India’s business centre in Mumbai, and the thwarted plans of the Toronto 18 – which included an attack on Toronto’s business district – were not only designed to murder and maim large numbers of people. They were also meant to target countries as a whole by undermining their economies. Osama bin Laden has boasted of his success in severely damaging the Western economy for only a small investment on his part.

Terrorism must therefore be defeated even at potential short-term economic costs in order to protect the citizens and the long-term economic interests of the West, which are precariously vulnerable to terrorist attacks. As senior Pentagon analyst Marc Thiessan has pointed out, “We’re bombarded with bad news – the credit markets could freeze, millions more could lose their jobs, and today’s recession could turn into a depression. But the danger we aren’t hearing about could

outweigh them all: the increased risk of a catastrophic terrorist attack.”<sup>13</sup> Another 9/11 level attack would cripple any recovery or stimulus program, regardless of its merits.

In an era when Canada and the rest of the world are struggling to find an antidote to unstable and fragile economies, the stated intent of terrorist groups to destroy the economy must be taken with the utmost seriousness. Our weakened economy has become a security liability – a weakness that has not gone unnoticed in the terrorist world. Consider the following statements:

Osama bin Laden (undated): “Jihad against America will continue, economically and militarily. By the grace of Allah, America is in retreat and its economy is developing cracks ever-increasingly. But more attacks are required. I advise the youth to find more of America’s economic hubs. The enemy can be defeated by attacking its economic centers.”<sup>14</sup>

Osama bin Laden (December 2001): “If their economy is destroyed, they will be busy with their own affairs rather than enslaving the weak peoples. It is very important to concentrate on hitting the US economy through all possible means.”<sup>15</sup>

Ayman al-Zawahiri (Bin Laden's second in command) (September 2002): “We will also aim to continue, by the permission of Allah, the destruction of the American economy.”<sup>16</sup>

Sheikh Omar Bakri Mohammed (November 25, 2002): “In a matter of time, you will see attacks on the stock market. That is what al-Qaeda is skilful with. I would not be surprised if tomorrow I hear of a big economic collapse because of somebody attacking the main technical systems in big companies. I would advise those who doubt al-Qaeda's interest in cyber-weapons to take Osama bin Laden very seriously. The third letter from bin Laden was clearly addressing using technology in order to destroy the economy of the capitalist states.”<sup>17</sup>

### ***9. Are civil provisions against terrorist defendants consistent with international law?***

Yes. Article 5 of the 1999 International Convention for the Suppression of Terrorist Financing stipulates that “each state party shall ensure that legal entities liable in accordance with provisions of the Convention are subject to effective, proportionate and dissuasive criminal, civil, or administrative sanctions that may include monetary sanctions.”

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<sup>13</sup> Marc Thiessen. “Watch out for Al Qaeda.” *LA Times* 15 February 2009

<http://articles.latimes.com/2009/feb/15/opinion/oe-thiessen15>

<sup>14</sup> James J.F. Forest. *Homeland Security, Protecting America’s Targets, Volume III: Critical Infrastructure*. (Greenwood Publishing, 2006), 47.

<sup>15</sup> James J.F. Forest. *Homeland Security, Protecting America’s Targets, Volume II: Public Spaces and Social Institutions*. (Greenwood Publishing, 2006), 42

<sup>16</sup> *Words of Ayman al-Zawahiri, Vol. I*. (Alexandria: Tempest Publishing, 2008), 14.

<sup>17</sup> Dan Verton. “Experts: Don’t Dismiss Cyberattack Warning,” *Computerworld*, November 18, 2002  
[www.computerworld.com/.../Experts\\_Don\\_t\\_dismiss\\_cyberattack\\_warning?](http://www.computerworld.com/.../Experts_Don_t_dismiss_cyberattack_warning?)

**10. *Is there any basis in international or domestic law for providing compensation to terror victims from assets seized from terror sponsors?***

Yes. Article 8 of the International Convention for the Suppression of Terrorist Financing stipulates that each signatory shall consider establishing mechanisms whereby the funds from forfeitures are utilized to compensate the victims of offences referred to in article 2 of the Convention.

Canadian law also contains provisions that acknowledge a need for providing compensation to victims. Subsection 83.14(5.1) of Canada's *Criminal Code* stipulates that any proceeds that arise from the disposal of property related to terrorist groups or activities may be used to compensate victims of terrorist activities. Furthermore, British Columbia, Ontario, Manitoba and Alberta have all introduced legislation that gives the government the right to seize the proceeds of criminal conduct. British Columbia's legislation, for instance, authorizes the conversion of seized assets into cash that can be used to compensate the victims of the illegal activity. Michael Mulligan, a lawyer in British Columbia, told *The Lawyers Weekly* (March 25, 2005) that the legislation "has a lower burden of proof – on a balance of probabilities," and "allows for forfeiture even where a person is acquitted of the offence or never charged.... In some circumstances it places the burden on the person who owns the property to prove it was not obtained from the proceeds of unlawful activity."

**11. *Why does the legislation include an arbitration provision?***

In a case where the terrorist act occurred on the soil of a foreign state, the legislation offers the court the discretion to refuse to hear a claim if the plaintiff fails to provide that foreign state with the opportunity to arbitrate the matter prior to pursuing the claim in court. Arbitration is a potentially faster and more flexible means of adjudicating a dispute. Moreover, the provision allows a foreign state to settle the matter in a less public forum without the detrimental publicity and impact of a formal court ruling. Confidentiality regarding the proceedings would also be easier to secure in an arbitration format. This arbitration requirement is one of several mechanisms in the legislation which can limit the number and types of cases brought before the courts.

**12. *Who would Canadian terror victims sue?***

It is premature to answer this question. It is also legally and strategically unwise to suggest possible defendants before a bill is passed.

**13. *What if a terror victim is unable to collect on a judgment against a terror sponsor?***

The Canadian legal system provides individuals seeking legal redress with the option of pursuing civil actions in an effort to obtain justice, vindication, and compensation for their losses. The law

allows for a plaintiff to seek damages despite the fact that in some instances, the damages awarded may not be collectable. This is because the intent of civil suits is not only to provide a mechanism for financial redress, but also to give individuals an alternate avenue to pursue justice in the form of an officially sanctioned and public finding of liability against the perpetrator of an injustice. In this respect, civil lawsuits can effectively realize the very goals of criminal trials: they promote justice through a public finding of liability, and they act as a deterrent by highlighting the costs and consequences of certain modes of behaviour.

The O.J. Simpson case is one high-profile example of the efficacy of civil suits. Simpson's criminal trial for the murders of his ex-wife Nicole Brown Simpson and her friend Ronald Goldman culminated on October 3, 1995 in a verdict of "not guilty". There has since been significant criticism of the prosecution, the police, the jury and the defence team. In the subsequent 1997 civil action against Simpson, the jury concluded – using the preponderance of the evidence test applicable in civil cases – that he had wrongfully caused the death of the victims. The jury ruled against Simpson on each of the eight technical questions of liability it was asked to consider, and ordered the defendant to pay compensatory damages of \$8.5 million and punitive damages of \$25 million.

The civil suit provided an opportunity for the victims' families to seek a measure of justice by "punishing" Simpson through a highly publicized finding of liability. This court decision has doggedly pursued him throughout the years,<sup>18</sup> despite the fact that collecting damages from him has proven difficult.<sup>19</sup> The civil trial also provided an important public service by highlighting the issue of domestic violence, and making clear that some measure of justice can be achieved even when celebrities, armed with the best legal teams available, have managed to avoid criminal liability. In this case, like many others, successful collection was not essential to achieving many of the desired effects of the civil action.

Similarly, the successful collection of a defendant's assets is not the only motivation for bringing a civil action against a terror sponsor. Accordingly, the issue of "collectability" must not be the determining factor in the consideration of the proposed legislation. For while the collection of damages awards is an extremely important component of the bill's utility for assisting victims and deterring terrorists and their sponsors, the bill has many other benefits. Even when collection is difficult or not possible, the civil process still has immense value for the victims, the justice system and society as a whole. It provides effective deterrence and a sense of justice for victims by publicly identifying and exposing terror sponsors. It also holds terror sponsors civilly

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<sup>18</sup> For example, a New Hampshire intellectual property attorney, William B. Ritchie, challenged the validity of Simpson's trademarks under a federal statute that bars immoral, deceptive, or scandalous subject matter. Ritchie argued that because of the whole sequence of events from 1994 through 1997, Simpson's very name had become immoral and scandalous and thus could not be protected as a trademark. Ritchie convinced the Court of Appeals for the Federal Circuit that he had standing to challenge Simpson's trademarks under the Lanham Act. Simpson has since abandoned his trademarks. More recently, on March 13, 2007, a judge prevented Simpson from receiving any further compensation from a cancelled book deal and TV interview. He ordered the bundled book rights to be auctioned. It was also reported that Simpson's Heisman Trophy was seized as an asset to pay the judgment.

<sup>19</sup> California law protects pensions from being used to satisfy judgments, so Simpson was able to continue much of his lifestyle based on his NFL pension. He subsequently moved from California to Miami, Florida. In Florida, a person's residence cannot be seized to collect a debt under most circumstances.

accountable and blocks their access to Canada's financial system, utilizing the discovery process to unravel the illegal sponsorships that terror sponsors so desperately try to obscure. The civil process additionally establishes as a matter of public record the victimization of the plaintiffs by the defendants and society's revulsion for terrorist conduct.

Civil suits also provide another benefit – one that a criminal proceeding does not. Regardless of whether collection is successful, they provide a real voice for victims and their families in the legal system. Criminal proceedings are brought by the Crown, not by the victim. Victims and their families have little or no control in how criminal proceedings are managed. In contrast, victims and their families are the plaintiffs in civil suits; they are responsible for initiating the process and deciding how to proceed.

Canadian terror victims, who have suffered from some of the most heinous acts of violence, must be granted the same opportunity as other victims of crime to have their voices heard in a civil court. If the government is unwilling to create a compensation fund for victims like the U.S., France and Israel have done, and has been unwilling or unable to distribute seized terror-related assets to terror victims as suggested by the law,<sup>20</sup> then at the very least, the government should provide the victims themselves with the option of pursuing justice and compensation in a civil proceeding.

The terror victims who have been at the forefront of advocating for this legislation have been clear that the “collectability” of damages awards should not be a determining factor in Canada's adoption of the legislation. “Collectability” is not a governmental concern, but a factor that will be considered by plaintiffs and their counsel before initiating a suit – just as in any other civil suit. Each case will invariably be unique. In some cases, there will be significant assets to pursue, along with a good chance of collection. In other cases, a lack of accessible assets will preclude further action, while in yet other cases, the availability of assets will be inconsequential.

#### **14. *Why does the legislation have a "limitations" clause?***

Limitation periods establish a cut-off date for seeking legal redress for a particular event.

The limitations clause in this bill suspends the running of the limitation period while the victim is unable to commence proceedings due to a physical, mental or psychological condition or because the identity of the wrongdoer could not be determined.

This provision acknowledges that a victim may need time to recover from the loss sustained in a terrorist attack before mobilizing to seek justice. The clause also compensates for the inherent difficulties often encountered in establishing the culpability of a given terrorist body in the execution of a specific terrorist act. This will be helpful to victims of terror whose limitation period would have otherwise expired as a result of their inability to determine within the allotted time framework which entity was responsible for financing or sponsoring the terrorist act in question.

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<sup>20</sup> *Criminal Code*, section 83.14(5.1)

The limitations clause in this bill is essentially a variation of the discoverability principle, particularized to the context at issue. Section 10 of the Ontario *Limitations Act* already recognizes such a variation regarding the limitation period for claims “based on assault or sexual assault during any time in which the person with the claim is incapable of commencing the proceeding because of his or her physical, mental or psychological condition.” The Supreme Court of Canada in *M.(K.) v. M.(H.)*, [1992] 3 S.C.R. 6, determined that, “The reasonable discoverability rule, as developed in previous decisions of this Court, should be applied and the limitations period should begin to run only when the plaintiff has a substantial awareness of the harm and its likely cause.”

### **15. Why is the legislation retrospective to January 1, 1985?**

The terms “retrospectivity” and “retroactivity” are often – but incorrectly – used interchangeably. It is C-CAT’s view that the legislation is retrospective rather than retroactive because it imposes liability for past events but does not change the law as of the time that those events occurred. Even if the legislation were retroactive, however, the following arguments would still apply.

From a legal standpoint, the legislature may enact retroactive and retrospective legislation provided that its intent to do so is expressed clearly in the language of the law.<sup>21</sup> The legislation we are dealing with here contains such express language, and is therefore valid.

From a policy perspective, retrospectivity is crucial if the legislation is to achieve its intended goals. One such goal is to hold wrongdoers accountable even where the criminal justice system has failed. To allow those who have supported terrorist organizations to be protected from civil suits is to grant immunity to those responsible for the long litany of terror attacks that occurred prior to the passage of the bill. It is clearly in the public interest to ensure that those involved in the past sponsorship of terror resulting in the loss of Canadian life be subject to the provisions of this law.

Retrospectivity is also critical to fulfilling the deterrence objective of the legislation. The civil remedy must apply to past terrorist activity in order to make previous and potential wrongdoers think twice about future involvement in terrorist activity. To do otherwise would create a “deterrence vacuum”. As noted earlier, the criminal justice system has limited capacity to convict in these cases and the civil litigation process would be limited by the date of Royal Assent if the legislation were not retrospective. Therefore, neither process would be able to hold terror sponsors accountable and achieve any meaningful level of deterrence. Moreover, without retrospectivity Canada would be in the absurd position of being forced to wait for a terror attack to occur before the proposed laws, designed for deterring the very attack that has just occurred, could become effective. This would clearly undermine the intent and efficacy of the law.

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<sup>21</sup> The exception to this rule is found in section 11(g) of the Charter, which prohibits a person from being criminally charged for an act or omission that was not considered a criminal offence at that time. The proposed legislation carves out civil, not criminal, liability for terrorist conduct, and is therefore not subject to this section of the Charter.

Finally, without the retrospectivity clause it is very uncertain whether the hundreds of Canadian victims of terror attacks perpetrated prior to the enactment of the legislation could sue the perpetrators and receive financial compensation. It would be contrary to the intent of the legislation to restrict its application to future terror attacks and victims at the expense of those whose past suffering inspired its creation. In particular, it would be a mistake for Canada to enact legislation that would exclude its largest body of victims – the Air India families. Such a decision would add further hurt to a large Canadian constituency that has already endured too much additional and unnecessary pain over the last 25 years. This would be the latest chapter in a long series of traumatic events in the aftermath of the bombing, including: a general lack of adequate government response to the families of Air India victims after the attack; the failure to obtain criminal convictions against the perpetrators of the attack; the 18-year delay in listing Babbar Khalsa as a terrorist group in Canada despite its apparent involvement in the attack; and the 21-year delay in establishing a commission of inquiry to examine alleged governmental failures.

If there are still concerns about the bill's retrospectivity, then it should be decided by the courts themselves. A court ruling that the legislation cannot be utilized retrospectively is very different – and less hurtful to the affected victims – than a pre-emptive parliamentary decision to that effect.

#### ***16. How can the victims of the Air India bombing benefit from this bill?***

The Air India victims can benefit from the bill in the following ways:

- a. With the bill dating back to 1985 and the extension of the limitations period, the Air India victims' right to sue will be revived even if it has lapsed due to provincial statutes.
- b. Regardless of whether the Air India victims have grounds to launch a civil suit against a foreign state, this bill could enable them to sue local terror sponsors – individuals and organizations located in Canada. Although the perpetrators of the Air India bombings could likely be sued under existing tort law in a Canadian court without this bill, the legislation opens up greater options and flexibility for the victims. For instance, it is not clear that a lawsuit for terror sponsorship would be possible without creating a specific legal basis for doing so, as provided in this bill.
- c. C-CAT has proposed an amendment to the government bill, which would make it easier for plaintiffs to prove that a defendant indirectly caused or contributed to the plaintiff's loss or damage. This causation provision is discussed in Parts VII (#2), VIII and IX.

#### ***17. Is there precedent for creating a bill that is retroactive and extends the limitations period for commencing a civil suit?***

Yes. Consider Ontario Bill 155, *Tobacco Damages and Health Care Costs Recovery Act*, 2009:

### Limitation Periods

6. (1) No action that is commenced within two years after the coming into force of this section by,

- (a) the Crown in right of Ontario;
- (b) a person, on his or her own behalf or on behalf of a class of persons; or
- (c) a person entitled to bring an action under section 61 (right of dependants to sue in tort) of the Family Law Act,

for damages, or the cost of health care benefits, alleged to have been caused or contributed to by a tobacco related wrong, is barred under the Limitations Act, 2002 or any other Act.

(2) Any action described in subsection (1) for damages alleged to have been caused or contributed to by a tobacco related wrong is revived, if the action was dismissed before the coming into force of this section merely because it was held by a court to be barred or extinguished by the Limitations Act, 2002 or any other Act.

### Retroactive Effect

10. When brought into force under section 13, a provision of this Act has the retroactive effect necessary to give the provision full effect for all purposes including allowing an action to be brought under subsection 2 (1) arising from a tobacco related wrong, whenever the tobacco related wrong occurred.

### ***18. Have other countries enacted laws allowing for lawsuits against state and local sponsors of terror?***

Yes. Civil lawsuits have been utilized against terrorists and their sponsors in several countries, including the U.S., Britain, and Israel. However, the only existing model for allowing suits against state sponsors of terror is legislation introduced in the United States several years ago. This legislation added a new exception to sovereign immunity applicable to a case in which money damages are sought against a foreign state for its involvement – in perpetrating or supporting – a terrorist act. Thus far, U.S. courts have awarded victims of terrorism more than \$19 billion against state sponsors of terrorism and their officials.

It should be noted that C-CAT's model for the legislation – particularly the listing process regarding which foreign states can be sued – has been lauded by American experts as being far superior to the American model. This will be explicated further in Part VII.

## Part VII: Primary Differences between the Government Bill and the Private Member's Bills

Bill S-233, a private member's bill introduced in the Senate by David Tkachuk in the last parliamentary session, and Bill C-408, a private member's bill introduced by Irwin Cotler and Bob Rae, most closely resemble the legislative model proposed by C-CAT over the last number of years. Any reference below to the "C-CAT model" essentially refers to the language contained in these two bills, which are also essentially identical with one another.

Bill S-7 is the government bill, and differs in the following ways from the C-CAT model.

### **(1) Listing Process (how to determine which foreign states can be sued under the bill)**

- The C-CAT model includes a "negative list" of countries that cannot be sued under the legislation. The list includes those countries which (1) are extradition partners according to the schedule to the *Extradition Act* or (2) share a bilateral extradition treaty with Canada. These countries constitute Canada's primary allies, and would be fully protected from frivolous suits under the bill. Apart from this list, all other countries can be sued.
- The government bill models itself after the U.S. legislation by providing for a "positive list" of countries explicitly designated by the government as official state sponsors of terror. According to this model, *only* states that appear on this list can be sued. Moreover, according to the government bill, foreign judgments against states can only be enforced against states on this list.
- The government bill does not actually contain a list of designated states. It only provides the Governor in Council with the ability to create such a list if the Governor in Council so chooses. The list may be changed from time to time and could potentially include any country.
- Please see Part VIII, #1, for an explanation of the superiority of the "negative list" approach.

### **(2) Proving Causation**

- In recognition of an American judge's acknowledgement that "terrorist organizations do not maintain open books",<sup>22</sup> C-CAT's model ensures that an unduly difficult test is not imposed on the plaintiffs to prove that the local or state sponsor **caused** their loss or damage. Specifically, if a court finds that the defendant breached anti-terrorism provisions in the *Criminal Code* by helping a listed entity, and that same listed entity caused or contributed to the loss or damage to the plaintiffs, then the plaintiffs need not show that the defendant's

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<sup>22</sup> Humanitarian Law Project case, 205 F.3d 1130, 00 Cal. Daily Op. Serv. 1729, 2000 Daily Journal D.A.R. 2379

conduct actually caused or contributed to their loss or damage. Put simply, if the plaintiffs can prove that the defendant donated money to a listed entity and the same listed entity shot their loved ones, this is sufficient proof of causation. The plaintiffs do not need to prove that the defendant paid for the very bullets used in the attack.

- This causation provision is not contained in the government bill.

### **(3) Basis for Suing a Foreign State**

- The government bill only allows lawsuits against foreign states that violate certain sections of the *Criminal Code* in relation to a listed entity, such as al-Qaeda, the Tamil Tigers and Hamas. If a foreign state provides support to a terrorist group that is not a listed entity, the state cannot be sued. If a foreign state commits the attack directly (i.e. not through a listed entity proxy), it also cannot be sued. Again, only states officially designated by the Governor in Council as terror-sponsoring states can be sued at all.
- C-CAT's model allows for suits against foreign states that provide support to (i) a listed entity or (ii) a non-listed terrorist group that acts on behalf of, at the direction of, or in association with a listed entity.
- C-CAT's model also provides that if a foreign state loses its immunity for *supporting* a listed terrorist entity, then it can also lose its immunity for *engaging directly* in terrorist activity. This stems from a Senate committee's comment<sup>23</sup> that victims of a Lockerbie-type case, in which Libya was directly involved in the attack itself (rather than sponsoring a terrorist group to commit the attack), would not be able to sue the offending country, and that the bill should therefore be amended to allow such suits.

### **(4) Ministerial Assistance in Locating State Assets in a Successful Suit**

- Under C-CAT's model, the Ministers of Finance and Foreign Affairs *shall* assist a successful terror victim-plaintiff in locating the defendant-state's property and assets, to the extent reasonably practicable.
- Under the government bill, the Ministers of Finance and Foreign Affairs *may* assist in identifying and locating certain property of the foreign state, unless the Minister of Foreign Affairs believes that to do so would be injurious to Canada's international relations or either minister believes that to do so would be injurious to Canada's other interests. There are further exceptions. By making disclosure of what the government knows about a foreign state's assets *optional*, the provision is rendered virtually ineffective.

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<sup>23</sup> The Senate Legal and Constitutional Affairs Committee made this comment in June 2008, when an earlier version of Senator Tkachuk's private member's bill was being reviewed.

### **(5) State Instrumentalities**

- C-CAT's bill explicitly provides that in the event of a successful suit against a foreign state, the property of the foreign state, its agencies and instrumentalities can be identified and located. In this context, "instrumentality" is defined as a legal entity (a) that is separate from the foreign state, and (b) in which the foreign state has a direct or indirect controlling or majority ownership interest.
- The government bill does not explicitly mention agencies or instrumentalities of the foreign state. Since states often carry on business through instrumentalities, that term should be included.

### **(6) Jurisdiction**

- Both the government bill and the C-CAT model explicitly require the case to have a real and substantial connection to Canada in order for it to be heard in a Canadian court.
- However, C-CAT's model states that this requirement is automatically satisfied if the plaintiff is a citizen or permanent resident of Canada. This ensures that a Canadian is guaranteed access to a Canadian court. The government bill does not provide this assurance.

### **(7) Enforcement of Foreign Judgments**

- C-CAT's model provides that a Canadian court shall "give full faith and credit" to a judgment of a foreign court in favour of a victim-plaintiff who has suffered loss or damage as a result of conduct that would be contrary to the anti-terrorism sections of the *Criminal Code*.
- The government bill requires a Canadian court to "recognize" a judgment of a foreign court in favour of a victim-plaintiff that (a) meets the criteria under Canadian law for being recognized in Canada and (b) is against a foreign state designated by the Governor in Council as a terror-sponsoring state.

### **(8) Structure**

- C-CAT's model consists of amendments to two existing statutes – the *State Immunity Act* and the *Criminal Code*.
- The government bill consists of the creation of a new standalone act, and amendments to the *State Immunity Act*. The *Criminal Code* is referenced but not affected by this bill.

## Part VIII: C-CAT's Proposed Amendments to the Government Bill

C-CAT believes that the government bill should be improved in order to ensure that it is maximally effective in deterring terrorism and applicable to the greatest number of Canadian terror victims. Based on the differences highlighted above between the government bill and the C-CAT model, C-CAT proposes the following amendments to the government bill.

- (1) Change the listing process that determines which foreign states can be sued under the bill. Allow suits against any foreign state that does not have an extradition relationship with Canada (i.e. use a “negative list” rather than a “positive list”).**

As discussed above, C-CAT's bill includes a “negative list” of countries that cannot be sued under the legislation. The list includes those countries which (1) are extradition partners according to the schedule to the *Extradition Act* or (2) share a bilateral extradition treaty with Canada. These countries constitute Canada's primary allies, and would be fully protected from frivolous suits under the bill. Apart from this list, all other countries can be sued.

The government legislation, similar to the U.S. legislation, includes a “positive list” of countries explicitly designated by the government as official state sponsors of terror. According to this model, *only* states that appear on this list can be sued.

The “negative list” approach proposed by C-CAT is superior for the following reasons:

- a. It offers a consistent and principled approach
  - (i) Placing a country on a “positive” list exposes Canada to ongoing political and diplomatic pressures. The U.S. experience shows that factors unrelated to whether a country sponsors terrorism sometimes become determinative. This makes the process unprincipled, undermining the credibility of the government, the listing process and the bill itself.
  - (ii) By not listing countries which objectively should be listed, Canada would effectively declare them non-sponsors of terror – which would undermine the deterrence objectives of the bill.
  
- b. It protects, rather than harms, Canadian victims
  - (i) Under the “positive list” approach in the U.S., certain apparent state sponsors of terror were not listed and therefore remained immune from civil liability. Subsequently, the victims of these state sponsors were unable to utilize the American statutes to sue those responsible for the murder of their loved ones. There is a strong possibility that a Canadian “positive list” would have similar

results, leaving any number of apparent state sponsors of terror off the list. As a result, many Canadian victims, including those who have been the driving force behind this legislation, would be precluded from utilizing the legislation. In contrast, the C-CAT “negative list” approach would greatly expand the number of Canadian terror victims who could pursue justice through civil suits.

- (ii) Victims precluded as a result of a “positive list” approach could only pursue equal standing before the law by lobbying the Canadian government to add alleged state sponsors to the “positive list”. Foreign states have vast resources to devote to staying off such a list, while victims lack the resources (and are often afraid) to oppose them. A “negative list” approach removes this onus from victims and helps ensure a more level playing field.

c. It creates uncertainty and a disincentive to sue

- (i) Under the government bill, a state designated as a terror sponsor can apply to remove itself from the list. If a state were to be removed from the “positive list” in the midst of a civil suit, the case would be barred from proceeding. Not only would this be unfair, but the looming risk would deter victims from utilizing the legislation and pursuing civil action. Victims would be unwilling to expend the time and funds to launch a suit that could be dismissed at any time as a result of a delisting. So rather than being a deterrent for terror sponsors, a “positive list” approach would become a deterrent for terror victims and undermine the core objectives of the legislation.

d. It de-politicizes the process and helps ensure the rule of law

- (i) The Canadian government would be in a stronger position to take a stand on the terror sponsorship by a particular foreign state if courts were making such a determination. A finding of state sponsorship of terror would be based on an open and independent judicial process, which is more transparent and credible than a governmental process. Furthermore, a state which is sued would be free to present its position in court just as it does against claims regarding commercial activity. This is preferable to a backroom listing process that will also be subject to a foreign state’s lobbying efforts behind closed doors.
- (ii) As a formal government declaration of whether a foreign state is a terror sponsor, a “positive list” creates a negative dynamic and possible tensions with states placed on the list – whether or not a lawsuit is commenced. In contrast, the “negative list” approach does not entail the same diplomatic consequences; it is the judicial system that makes the findings rather than the government. This is evidenced in Canada’s experience with civil suits against foreign states for breach of contract, which are already permitted under the law. Indeed, Canadian

relations with other countries have not been impaired as a result of this exception to state immunity. Furthermore, the “negative list” approach allows for a situation where a lawsuit against a foreign state would not prevent the Canadian government or businesses unrelated to that proceeding from interacting with that state.

- e. It is consistent with Canadian values and norms
  - (i) Allowing the courts rather than the government to make these determinations will be consistent with Canada’s position as an honest broker and defender of human rights and the rule of law. As a uniquely Canadian formulation that has been endorsed by American experts as superior to its American counterpart, the “negative list” is principled and fair to foreign states and victims, and is best suited to serve as a model that could be adopted by Commonwealth countries, the Francophonie and other states with which Canada shares common historical and legal traditions.

**(2) Even if the “positive” list model is used, add amendments to strengthen it.**

Even if the “positive” list model were to be used, there are a number of ways in which it could be strengthened to ensure that the bill is not rendered toothless and ineffective.

First, a number of stipulations can be added to tighten the language:

- (a) Use mandatory language (“shall”) rather than optional language (“may”) in subsection 6.1(2) of the *State Immunity Act* to ensure that the Governor in Council will initiate the process for creating a list of state sponsors of terror.
- (b) Require that a first list of designated states be established within six months of the bill’s passage to ensure that terror victims do not have to wait for years in order to utilize the bill (in addition to the years spent waiting for this bill to be passed).
- (c) Add a provision stating that once a state is listed and a civil suit against that state is initiated, the suit must be allowed to proceed to its completion – including collection of damages awards – even if in the middle of the process, the foreign state is delisted. This will assure a plaintiff that he/she will not waste vast amounts of time and resources launching a suit that could be derailed at any time by a delisting.

Second, C-CAT proposes that an additional mechanism be created to address the fundamental concern regarding the exclusion of large numbers of Canadian terror victims from utilizing the legislation as currently drafted with the “positive” list model. Specifically, C-CAT suggests the following process:

- (a) Countries that are already listed by the Governor in Council as state sponsors of terror can be sued under the rules set out currently in the government bill.

For countries that are not listed, C-CAT proposes a framework to ensure that Canadian terror victims have at least a minimal opportunity to seek civil redress in a Canadian court.

- (b) The victim/plaintiff would make an application to Federal Court for a designation that the unlisted state in fact supported terrorism as defined in the bill (i.e. supported a listed terrorist group). This would need to satisfy the “serious issue to be tried” test applied to interlocutory injunctions.
- (c) If the plaintiff is successful in that application, he/she would then be permitted to continue the civil action against the named state.
- (d) In order to ensure that key allies are protected within this initial phase, an amendment would provide that only states (i) with which Canada does not share a bilateral extradition treaty or (ii) is not listed as an extradition partner in the schedule to the *Extradition Act* can be named in this process. Cases against all other state defendants would be automatically stayed.
- (e) Even if a court were to find in favour of the plaintiff, the government would not be compelled to list the country as an official state sponsor under the JVTA.
- (f) The government would have standing before the court should it choose to move to stay the proceedings on the basis of substantive and material evidence that a final judgment against the state defendant would be harmful to Canadian national security (a “harm to the person” test as opposed to an “economic harm” test).
- (g) The judge of first instance would be required to make parallel findings with regard to the allegations of both the plaintiff and the government so that they could be addressed if needed by an appellate court.

This proposed mechanism would provide some basic access to justice for those victims excluded under the government’s original framework. Even in cases in which the court ultimately accepts the government’s position (of rejecting a suit against a foreign state), this additional track will achieve the legislation’s intent of “inclusiveness” (allowing it to be accessible to as many victims as possible) while also addressing legitimate concerns with regard to protecting vital Canadian security interests.

### **(3) Insert a clause making it easier to prove the necessary element of “causation”.**

Terrorist organizations do not keep open and transparent financial records. Therefore, in order to ensure that a terror victim is not saddled with the unduly difficult and unreasonable burden of proving that the alleged sponsor of the terrorist entity was directly responsible for the victim’s loss or damage inflicted by the terrorist entity, C-CAT proposes using the C-CAT/Tkachuk/Cotler causation provision. That clause deems the defendant’s conduct to have caused the plaintiff’s loss or damage when a court finds that a listed entity caused harm to the plaintiff, and that the defendant breached *Criminal Code* laws in relation to that listed entity (such as providing monetary funds to that listed entity).

Specifically, C-CAT suggests that this amendment be a new subsection of section 4 of the JVTA. It would state:

In any action under subsection (1), the defendant's conduct is deemed to have caused or contributed to the loss or damage to the plaintiff if the court finds that

(a) a listed entity caused or contributed to the loss or damage by engaging in conduct that is contrary to any provision of this Part, whether the conduct occurred in or outside Canada; and

(b) the defendant engaged in conduct that is contrary to any of sections 83.02 to 83.04, 83.08, 83.1, 83.11 or 83.18 to 83.231 for the benefit of or otherwise in relation to that listed entity.

In Canada, there is precedent for C-CAT's causation provision. Somewhat analogous provisions have been added to the *Securities Act*. Where a person buys or sells securities after there has been a misrepresentation by the issuer (and before the misrepresentation has been corrected), he or she has a right of action for damages – regardless of whether the person or company actually relied on the misrepresentation (in other words, regardless of whether the misrepresentation caused any loss).

**(4) Allow a foreign state to be sued for providing support to non-listed terrorist entities that act in relation to listed entities.**

The government bill currently allows for a foreign state to be sued only if it provides support to a listed terrorist entity. C-CAT is in agreement about the rationale behind using the sponsorship of a listed entity, rather than any terrorist group, as the threshold for allowing the immunity of a foreign state to be lifted. The threshold of “listed entities” is far less open to interpretation than other categories, and targets a grouping of entities already designated in Canadian law for the most egregious of terrorist violations. Using “listed entities” thereby sets a particularly high standard for evaluating conduct of an offending terror sponsor.

However, the government bill is currently too limited with regard to the type of conduct that would create liability for a foreign state. This point was in fact raised during committee hearings in June 2008, when the Senate Committee on Legal and Constitutional Affairs examined a previous version of Senator Tkachuk's private member's bill. C-CAT and Senator Tkachuk concurred with the committee and amended C-CAT's proposed legislation to address this point.

C-CAT therefore seeks to amend the government bill to allow a foreign state to be sued for providing support to a terrorist group that is not a listed entity – provided that the listed entity is acting at the direction of or in association with a listed entity. The rationale for such a change is that terrorist organizations often function under other names. While one name of the organization may be listed as a terrorist entity by Canada, other aliases may not be listed yet. Similarly, listed terrorist organizations often work with or through newly formed groups that are not yet banned

in Canada. Thus, C-CAT proposes that the bill permit a foreign state to be sued if it sponsors unlisted terrorist groups that are functionally connected to terrorist entities presently listed by Canada, but not if the foreign state sponsors terrorist groups that are unlisted and unaffiliated with those already on Canada's list.

By expanding the definitional parameters of which entities can trigger liability for terror sponsorship, this amendment more fully enables the bill to meet its stated objectives. The alleged sponsor is being held liable for supporting terrorist entities that are satellites of already listed entities, thereby closing a gap in the law that would allow listed entities to escape liability through use of an alias or through “outsourcing” terrorism to other terrorist bodies. This amendment does not alter the nature of the conduct for which the terror sponsor is being held accountable nor does it open the door to civil liability for unlisted entities that are totally independent of listed ones. It simply removes a ruse commonly used by terrorists and their supporters.

Furthermore, most unlisted entities, if they have committed a significant terrorist act, are likely in any case to be listed by Canada eventually. Therefore, this proposed amendment, while effectively spreading a wider net in the pursuit of justice, also effectuates the basic intent of the bill by allowing suits to be launched in a more timely way rather than having victims wait for a prolonged listing process to run its course before being able to seek redress.

C-CAT’s suggested amendment to paragraph 4(1)(b) of S-7 expands the purview of the bill while ensuring the language is not too broad. The clause could provide:

4.(1)(b) a foreign state or listed entity or other person that – for the benefit of or otherwise in relation to the listed entity referred to in paragraph (a) or a terrorist group acting at the direction of or in association with the listed entity referred to in paragraph (a) – committed an act or omission that is, or had it been committed in Canada would be, punishable....

**(5) Allow a foreign state to be sued for engaging in terrorist activities directly.**

The government bill presently allows civil suits only against foreign states that have *sponsored* a listed terrorist entity, but not for directly *committing* a terrorist act. This means that in its present form, the legislation would not allow Canadian victims to sue countries for terrorist actions committed directly by state agencies like Iran’s intelligence service (MOIS) or the Iranian Revolutionary Guards Corp (IRGC), which is primarily responsible for managing and implementing Iran’s terrorist exploits. Moreover, the legislation would likely not permit lawsuits in a case like Libya’s direct involvement in the 1988 Lockerbie bombing.

C-CAT therefore recommends that the government bill be amended to allow for suits against a foreign state that has committed a terrorist attack directly (i.e. not through a listed entity proxy). However, such a suit would only be permitted when the state in question has already had its immunity lifted for sponsoring a listed terrorist entity.

C-CAT contends that a foreign state which utilizes non-state actors as state instruments for terrorist purposes has compromised its character as a state. It has redefined itself as a category of state that has made the sponsorship of terrorist entities part of its essential character, structure and mandate. In other words, being defined as a state sponsor of terror should not only refer to the state's proscribed actions of terror sponsorship, but should also describe the type of state it has become as a result of these actions.

Once recast as a "state sponsor of terror", there is no longer a reason to give immunity to such a state's other agencies as ordinary vehicles of governance, and there is no reason to assume there is any difference for this state between utilizing non-state actors and conventional government agencies as an instrument of terror. Once a foreign state no longer makes distinctions between its use of legitimate and illegitimate agencies for the execution of its policies, there is no reason for the international community to do so either. Once redefined as a state sponsor of terror, it follows that this state should no longer enjoy the normative protections for any violations related to terrorism.

C-CAT's amendment is not creating an additional exception to state immunity, but only extending the implications of the legislation within the original framework of the bill. The bill is designed to target those countries that sponsor terrorist entities that have so far proven difficult to deter and hold accountable. C-CAT's amendment complements that objective and is fully consistent with the original intent of the legislation to deter terrorism in general and the sponsorship of terrorism in particular. It does not add a new category of liability but rather enhances the liability for the sponsorship of terrorist entities to include other related terrorist conduct. In other words, the terrorist actions committed directly by the terror-sponsoring state are not a new trigger for lifting immunity, but are essentially extensions of the initial trigger (the sponsorship of terror).

C-CAT's suggestion would require amendments to section 4(1)(a) of the JVTA and to the JVTA's proposed section 6.1 of the *State Immunity Act*.

Suggested language for the former is:

4(1)(a) any listed entity, foreign state, or other person that committed the act or omission that resulted in the loss or damage....

Suggested language for the latter is:

6.1(8) A foreign state that is not immune from the jurisdiction of a court in proceedings against it for its support of terrorism on or after January 1, 1985 is also not immune from the jurisdiction of a court in any proceedings against it that relate to terrorist activity, as defined in subsection 83.01(1) of the *Criminal Code*, on or after January 1, 1985.

Minor changes would also need to be made to the government bill's proposed amendments to sections 11(3), 12(1)(b), 12(1)(d) and 13(2) of the *State Immunity Act* in order to cover direct terrorist activity.

**(6) Broaden the scope of the cause of action for non-state entities.**

The scope of the cause of action in the JVTAs excludes causes of action that should be there. Currently, paragraph 4(1)(b) of the JVTAs creates a cause of action against “a foreign state or listed entity or other person that - for the benefit of or otherwise in relation to the listed entity referred to in paragraph (a) - committed an act or omission that is, or had it been committed in Canada would be, punishable under sections 83.02 to 83.04 or 83.18 to 83.23 of the *Criminal Code*.”

C-CAT suggests broadening the applicable *Criminal Code* provisions to include sections 83.08, 83.1(1) and 83.11(1)(2) – for non-state entities.

Specifically:

(a) Section 83.08 prohibits dealing in any property that is owned or controlled by or on behalf of a terrorist group; entering into or facilitating such a transaction; or providing any financial or other related services in respect of property for the benefit of or at the direction of a terrorist group. This language is restricted to a “person in Canada” and a “Canadian outside of Canada” and would therefore likely preclude applicability to a foreign state. However, other entities should be bound by these provisions, and should be subject to civil liability if a plaintiff suffers loss or damage.

(b) Section 83.1(1) requires the disclosure to the RCMP and CSIS of the existence of property in one's control or possession that belongs to a terrorist group and information about any transactions regarding that property. The same arguments with respect to s. 83.08 apply here as well.

(c) Finally, subsections 83.11(1) and (2) require specific entities (such as banks, foreign companies, trust companies and loan companies) to determine – and then report – whether they are in possession or control of property owned or controlled by a listed entity.

**(7) Tighten the language to require ministerial assistance in identifying a foreign state's property known to the government, in the event of a successful suit against the foreign state.**

By making the government's disclosure of information regarding a foreign state's assets only optional, the provision is rendered virtually ineffective. The government bill should therefore employ the word “shall” rather than “may”, to increase the likelihood of ministerial assistance. The additional words “to the extent that is reasonably practicable”, which are already found in both the government bill and the C-CAT/Tkachuk/Cotler bills, ensure that ministers will not be compelled to provide information in unreasonable or inappropriate circumstances.

**(8) Explicitly include the property of a foreign state’s instrumentalities as being subject to the bill.**

Frequently, foreign states do not hold businesses or other assets in their own names. They do so through corporations, trusts or nominees. It is therefore important to include the category of “instrumentalities” in the legislation. This will provide victims collecting a damages award with wider access to the assets of terror sponsors. The government bill should therefore provide that in the event of a successful suit against a foreign state, the property of the state’s instrumentalities (in addition to any property belonging explicitly to the state or its agencies) should be identified and located.<sup>24</sup> It does not make sense to permit states to be sued on the one hand, and to provide an avenue for the possible shielding of their assets on the other hand. Thus, C-CAT recommends that proposed section 12.1 of the *State Immunity Act* include reference to the instrumentalities of a foreign state.

The C-CAT/Tkachuk/Cotler model defines “instrumentality” as a legal entity (a) that is separate from the foreign state; and (b) in which the foreign state has a direct or indirect controlling or majority ownership interest.

**(9) Ensure that Canadian victims have access to Canadian courts in these types of lawsuits.**

In order to sue in a Canadian court, a plaintiff must establish a real and substantial connection to the jurisdiction in which he/she is launching the suit. According to a recent Ontario Court of Appeal case (*Van Breda v. Village Resorts Limited*, 2010 ONCA 84), there is presently no presumption that living in the particular jurisdiction is a sufficient connection for this purpose. It is therefore essential that the legislation explicitly state that a person’s Canadian citizenship or permanent resident status is enough to establish a real and sufficient connection to a Canadian jurisdiction. Otherwise, the bill could allow for an unacceptable situation in which Canadian victims will be unable to seek justice in Canadian courts. Indeed, it is C-CAT’s view that without an express provision stating that the plaintiff’s Canadian citizenship or permanent residency is a sufficient connection to Canada, it is possible that the vast majority of actions will be stopped, undermining the intention of the legislation.

Most, if not all, of the cases which will be brought against foreign states under the JVTA will involve damage outside Canada (due in part to the fact a foreign state already has no immunity under the *State Immunity Act* for damages it causes to someone in Canada). Therefore, the cases adjudicated under the JVTA will likely involve a foreign state funding a terrorist group which causes loss or damage to a Canadian abroad. There will likely be no connection to Canada other than the Canadian nationality of the victim.

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<sup>24</sup> Additional sections of the *State Immunity Act* may also need to be amended to ensure that the property of a state’s instrumentalities can also be seized.

As a result, the government bill should be amended to provide the same assurance as the C-CAT/Tkachuk/Cotler bills that a plaintiff's Canadian citizenship or permanent resident status is enough to gain access to a Canadian court in order to launch a civil suit against a terror sponsor or perpetrator.

C-CAT's recommendation would see a provision added after subsection 4(2) of the JVTA, clarifying that "it is sufficient to establish that the plaintiff is a Canadian citizen or a permanent resident within the meaning of subsection 2(1) of the *Immigration and Refugee Protection Act* in order to establish the existence of a real and substantial connection between the cause of action and Canada."

**(10) Strengthen the language for enforcing the judgments of foreign courts.**

The government bill restricts recognition of foreign judgments to those against countries already designated as terror-sponsoring states, and only when the judgments meet "the criteria under Canadian law for being recognized in Canada". However, there is real uncertainty as to what is meant by the reference to "Canadian law for being recognized in Canada". The language refers to "Canadian law", suggesting a unified standard, but the rules regarding foreign judgments vary from province to province. This provision is imprecise and arguably establishes a non-existent standard.

Moreover, the provision is not clear as to who has the onus to establish the "criteria under Canadian law". Under the Supreme Court of Canada case of *Beals v. Saldanha*, 2003 SCC 72, [2003] 3 S.C.R. 416, the plaintiff must establish certain claims (such as the real and substantial connection of the jurisdiction to the action or parties) and then the onus shifts to the defendant to justify why one of the listed exceptions to enforceability applies and the foreign judgment should not be enforced. The wording in the government bill should specify that these rules regarding onus remain the same.

C-CAT therefore recommends the adoption of the C-CAT/Tkachuk/Cotler language for this comity clause. That formulation allows a court to "give full faith and credit" to foreign judgments, provided that the conduct of the defendant would be contrary to the *Criminal Code* anti-terrorism laws had it occurred in Canada. This phrase, used by the Supreme Court of Canada, does not require a Canadian court to enforce automatically the judgment of a foreign court. Rather, Canadian case law dictates that enforcement is only permitted if certain conditions are met. The enforcing court must first determine whether the foreign court had a real and substantial connection to the action or the parties. If a foreign court did not properly take jurisdiction, a Canadian court will not enforce the judgment. Even if the real and substantial connection is established, the defendant is still entitled to rely on common law defences such as fraud, lack of natural justice, and public policy.

The term "full faith and credit" has been applied repeatedly by Canadian courts and is materially better than the current language in the JVTA.

The amendment would affect subsection 4(5) of the JVTA. That provision would state:

(5) A court of competent jurisdiction shall give full faith and credit to a judgment or order of a foreign court that is in favour of a person that has suffered loss or damage referred to in subsection (1). (This would be qualified by whichever listing mechanism is decided by Parliament – either the “positive list” as is currently in the bill, or the “negative list” as recommended by C-CAT. As it stands now, the government bill will not allow the enforcement of a foreign judgment against a foreign state that does not appear on the “positive list”.)

**(11) Remedy the imbalance between the listing and de-listing process.**

It must first be noted that this recommendation only applies to the government bill as drafted with its “positive list”. If Parliament adopts C-CAT’s recommendation to employ the “negative list”, this section would not be relevant.

Currently, there is a noticeable discrepancy and imbalance in the government’s amendments to the *State Immunity Act* between the language used to describe the listing process on the one hand (using the word “may” throughout) and the de-listing process on the other hand (using the word “must”).

Compare the following two provisions in Bill S-7:

6.1 (2) The Governor in Council **may**, by order, establish a list on which the Governor in Council may set out the name of a foreign state if, on the recommendation of the Minister of Foreign Affairs made after consulting with the Minister of Public Safety and Emergency Preparedness, the Governor in Council is satisfied that there are reasonable grounds to believe that the foreign state supported or supports terrorism.

6.1 (3) On application in writing by a foreign state, the Minister of Foreign Affairs **must**, after consulting with the Minister of Public Safety and Emergency Preparedness, decide whether there are reasonable grounds to recommend to the Governor in Council that the applicant no longer be set out on the list.

Moreover, while there is a requirement for regular and diligent review of whether a foreign state ought to be delisted there is nothing to ensure an ongoing and structured listing process. In other words, there is no comparable language to ensure that in the aftermath of the creation of the first list of state sponsors, there will be a regular and diligent review so that foreign states appear on subsequent versions of the list if they are involved in terror sponsorship. Consider, for example, the following provisions in the JVTA:

[Delisting procedure #1:]

(3) On application in writing by a foreign state, the Minister of Foreign Affairs must, after consulting with the Minister of Public Safety and Emergency Preparedness, decide whether there are reasonable grounds to recommend to the Governor in Council that the applicant no longer be set out on the list.

(4) The Minister must without delay give notice to the applicant of the Minister's decision respecting the application.

(5) A foreign state set out on the list may not make another application under subsection (3), unless there has been a material change in its circumstances since the foreign state made its last application or the Minister has completed the review under subsection (6).

[Delisting procedure #2:]

(6) Two years after the establishment of the list, and every two years after that, the Minister of Foreign Affairs must review the list in consultation with the Minister of Public Safety and Emergency Preparedness to determine whether there are still reasonable grounds, as set out in subsection (2), for a foreign state to be set out on the list and make a recommendation to the Governor in Council as to whether the foreign state should remain set out on the list. The review does not affect the validity of the list.

(7) The Minister must complete the review as soon as feasible, but in any case within 120 days, after its commencement. After completing the review, the Minister must without delay cause a notice to be published in the Canada Gazette that it has been completed.

C-CAT suggests that the language be balanced by amending subsection (6) to require that the ministers review the list to determine whether there are reasonable grounds to add any additional foreign states to the list and to make the appropriate recommendation to the Governor in Council. Subsection 7 would then apply to this revised provision, requiring the completion of the review within 120 days and the publishing of this completion in the Canada Gazette.

C-CAT also recommends that if a state applies for removal from the list or if the Canadian government is engaged in a process of considering delisting a country, notice should be given in the Canada Gazette. It is not in the public interest, nor in keeping with the objectives of the legislation, to keep this process entirely behind closed doors. The process affects Canadians and their rights before the courts, who should be entitled to make submissions in this regard to the Department of Foreign Affairs or the Ministry of Public Safety. C-CAT's proposed amendment will allow victims to be part of the decision-making process without unduly compromising other sensitive aspects of the listing procedure.

(12) **Insert into the preamble a reference to the importance of large damages awards for the purpose of deterrence.**

The government bill should include a “whereas” clause in its preamble similar to the one found in the C-CAT/Tkachuk/Cotler bill, which states: “Whereas it is in the public interest that judicial awards against persons who engage in terrorist activities are sufficiently large to deter future such conduct.”

The role of a preamble is to assist a court in determining the purpose and context of a statute. As such, a court may use the proposed clause in applying the legislation to a particular case.

It is important for a court to understand that a central purpose of the legislation is to deter terror sponsorship and terrorist attacks. Large damages awards are a potent weapon against terror sponsors that can prevent future terrorist attacks by (i) more effectively diminishing the financial resources available to terrorists to launch attacks, and (ii) causing other potential terror sponsors to reconsider their actions in light of the severity of the possible consequences.

## **Part IX: Questions on C-CAT’s Proposed Amendments Regarding the Listing Process**

### ***1. Why does C-CAT recommend utilizing Canada’s extradition framework for its “negative list” model?***

The extradition framework provides the most comprehensive and appropriate formulation for ensuring the prevention of frivolous suits against foreign states, as well as the protection of Canada’s foreign policy and the overall goals of the proposed legislation.

Employing specific extradition relationships as the marker for determining which states can be sued provides the additional benefit of simplicity, as it constitutes a pre-existing formula for evaluating Canada’s relationships with other countries. Utilizing pre-existing extradition lists avoids the pitfalls of creating a new list of state sponsors of terror, which could involve intense politicization of the process.

There are two types of extradition relationships that immunize a foreign state from a suit under C-CAT’s model: a bilateral extradition treaty and the designated extradition partner status set out in the schedule to the *Extradition Act*.

A bilateral extradition treaty is one mode of inter-state relationship that reflects confidence in the legal system of the other state. As demonstrated by the extradition treaties signed since World War II,<sup>25</sup> Canada does not enter into such treaties with regimes that openly violate the rights of

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<sup>25</sup> Several of the bilateral extradition treaties currently binding on Canada were entered into by the United Kingdom between 1870 and the Second World War, at a time when Canada as a member of the British Empire was subject to such Imperial treaties. The remaining extradition treaties now binding on Canada were entered into by the Canadian government following World War II.

the accused and the rule of law. Entering an extradition treaty with a foreign state signifies a certain affinity with that state – a sharing of fundamental values, such as an independent judiciary, governmental accountability, and a fair judicial process. In a leading Supreme Court of Canada case,<sup>26</sup> Justice La Forest for a majority of the Court indicated that a primary objective of extradition is “bringing fugitives to justice for the proper determination of their guilt or innocence”. The term “proper determination” connotes that a person’s innocence or guilt is decided fairly and justly. Therefore, by signing an extradition treaty with a foreign state, Canada has arguably concluded that the other country possesses a legal system that meets basic international standards.

As a member of the Commonwealth, Canada historically has had a duty incumbent upon all Commonwealth countries: to return alleged criminals to other Commonwealth countries for trial (under specific circumstances). Extradition was not made under a bilateral treaty obligation but rather as a matter of reciprocal consideration to countries with the Queen as Head of State. The *Extradition Act* designates most of these states as extradition partners in the Act’s schedule, and Canada’s obligations to them are thus continued. These countries, in sharing the same Head of State, also share a common identity, common values, and similar political institutions, education systems, administrative, and legal structures.<sup>27</sup> In other words, the same argument can be made about states designated as extradition partners and those which share bilateral extradition treaties with Canada: all of the countries meet Canada’s basic standards for a fair legal system.

Two conclusions may be drawn from Canada’s willingness to allow extradition to these states. First, this type of state respects the rule of law and, as such, it would take appropriate measures to ensure that it does not provide assistance to terrorist entities or engage in terror sponsorship. Second, even if some injustice befell an individual as a result of this type of state’s wrongdoing, the victim could generally sue in that state’s courts and be granted or denied redress fairly. Insofar as Canada trusts that a victim would be able to sue in that state’s court and be granted a fair legal process, the opportunity to bring the same charges against that state in a Canadian court is unnecessary and redundant.

It should be noted that there is a certain measure of congruity between the underlying principles of C-CAT’s proposed legislation and the concept of extradition, adding further credence to the utilization of the extradition relationship as the appropriate mechanism by which to exempt states from lawsuits:

a. First, they share fundamental objectives. Extradition law is designed to enhance the investigation, prosecution and suppression of crime, and to afford greater protection to the Canadian public. According to La Forest J. of the Supreme Court of Canada, “[T]he pursuit of that goal cannot realistically be confined within national boundaries. That has long been the case, but it is increasingly evident today. Modern communications have shrunk the world and made

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<sup>26</sup> *United States v. Cotroni* (1989), 48 C.C.C. (3d) 193 (S.C.C.) at p. 217.

<sup>27</sup> This notion is discussed on the website of the Commonwealth Secretariat:  
[http://www.thecommonwealth.org/document/34293/35178/152033/152041/38766/the\\_commonwealth\\_partnership\\_of\\_nations.html](http://www.thecommonwealth.org/document/34293/35178/152033/152041/38766/the_commonwealth_partnership_of_nations.html)

McLuhan's global village a reality...."<sup>28</sup> Similarly, the proposed legislation seeks to suppress terrorism, which takes place across international boundaries and poses a threat to Canadians.

b. Second, extradition is an area of law in which individual rights and freedoms, state responsibilities and Canada's relationships with other countries intersect. Insofar as the civil remedy touches on these concepts, it is appropriate that the two should be interwoven in this way.

## **2. Will C-CAT's "negative" list approach compromise Canadian business interests?**

As discussed above, C-CAT does not believe the government bill should emulate the American approach in creating a "positive list" that designates specific states as sponsors of terror. In addition to the reasons mentioned previously, C-CAT's "negative list" model goes further in protecting Canadian business interests. The government is relieved of having to make state by state determinations, which can be a much politicized process, and victims are offered a possibility of redress through the transparency of a court decision. Moreover, this arrangement serves to preserve business relationships with all countries. Even if a state were sued under the legislation and lost in court, the judicial decision would not prevent Canadian businesses unrelated to that proceeding from doing business with the defendant.

It should be noted that under current Canadian law, foreign states do not have immunity from suit for breach of commercial contract and death or injury on Canadian soil, yet Canadian business interests have not suffered.

## **Part X: In Depth - The Efficacy of Civil Suits: Going Beyond the Symbolism**

It would be a mistake to believe that the contribution of this legislation would only be symbolic.

Civil suits against terrorists and their sponsors will contribute to the broader efforts against terrorism by:

- (i) Financially impairing terrorist infrastructure through successful judgments, thereby preventing future attacks. C-CAT believes that successful judgments *will* take place in Canada. This has already occurred in countries like the U.S. and Britain. C-CAT also believes that successful victim-plaintiffs will be able to collect on these judgments. However, even if a single judgment is not collected upon, civil suits can still serve to deter terror sponsorship and terrorist attacks for the reasons listed below. It should be noted once again that the terror victims who have been at the forefront of

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<sup>28</sup> *United States v. Cotroni* (1989), 48 C.C.C. (3d) 193 (S.C.C.) at pp. 215-216

advocating for this legislation have been clear that the issue of “collectability” should not determine whether this legislation is adopted by Canada.

- (ii) Exposing terror sponsors to public scrutiny. Unlike terrorists, the financiers and enablers of terrorism fear transparency and exposure, and are rendered vulnerable to both through civil suits.
- (iii) Impairing the ability of terror sponsors to do business in Canada, including accessing Canada’s banking system, investing in Canada, and acquiring lines of credit in Canada.
- (iv) Acting as a catalyst for further government investigation and prosecution of terrorists and their sponsors.
- (v) Acting as a vehicle for a wider public-relations campaign to target the culture that sustains terrorism.
- (vi) Acting as a foil and counterforce to public relations and media efforts that are sympathetic to terrorists.
- (vii) Encouraging relevant witnesses, who may not come forward in a criminal proceeding, to participate in a civil action. This could lead to a finding of liability of the defendant in a civil court, even when a criminal court has been unable to hold the wrongdoer responsible.
- (viii) Leading to the seizing and confiscating of the assets of terror sponsors.
- (ix) Affecting how other countries combat terrorism and terror financing, and by extension affecting the ability of terror sponsors to do business in other parts of the world. Countries like Iran have been forced, as a result of civil suits by terror victims, to withdraw their holdings from investments in the US and Europe. Nitzana Darshan Leitner, one of leading litigators representing victims in these suits, describes the benefits as follows:

Now there's not much Iran can do with that money at home. And its inability to have money in European banks limits its trade in euros. It can't give a letter of credit to companies from which it wants to purchase goods. Nor can it trade in dollars, because of US sanctions. All that remains for it to do is use either its own currency or currency that is not considered "hard" and universally accepted, such as that of Thailand or Singapore. This makes it difficult for Iran in many respects, among them in its ability to develop its nuclear program. It also makes it difficult to transfer funds to the Palestinian Authority.<sup>29</sup>

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<sup>29</sup> <http://www.israellawcenter.org/One-on-One-Serving-justice-and-just-deserts-Interview-with-Att.-Nitsana-Darshan-Leitner.html>

Counterterrorism experts from across the globe are supporting C-CAT's campaign and believe that the legislation will enhance counterterrorism efforts in the U.S., the British Commonwealth and many other countries. The Canadian legislation will allow for the enforcement of U.S. judgments against terror sponsors in Canadian courts, greatly enhancing the overall deterrence impact of existing legislation. It will also serve as a model for the passage of similar legislation in other countries. C-CAT has already been approached by representatives of other governments in relation to the proposed bill, and Canadian senators have expressly stated in committee hearings<sup>30</sup> that Canada should take the lead in “exporting” this approach to other states.

Consider the following case studies of the efficacy of civil suits:

### **1. Case Study: Iran – The Fear of Civil Suits**

For over two decades, Iran's involvement in international terrorism has been unmatched by any other state. Unlike some state sponsors of terror that provide peripheral, relatively passive or episodic support to surrogate practitioners of terror, Iran's involvement is active, direct, and meticulously orchestrated at both the strategic and tactical levels.<sup>31</sup>

One of the regime's highest profile sponsorships of a terrorist act occurred on November 4, 1979, when 52 U.S. diplomats were taken hostage during a takeover of the American embassy in Tehran. 444 days later, the hostages were released after the signing of the Algiers Accord by the governments of Iran and the United States.

The 1981 Algiers Accord specified in its General Principles and in paragraph 11 that all existing litigation by the United States and its nationals against Iran would be terminated, and future litigation would not be permitted. Iran's insistence that this agreement specifically preclude any civil litigation arising from the event suggests that Iran considered civil suits to be a significant threat that had to be neutralized in advance of any resolution to the crisis. Civil suits may therefore prove to be an effective deterrence against Iranian terrorist sponsorship, and should be utilized more aggressively against Iran and other countries that sponsor terrorism.

### **2. Case Study: The Bankrupting of the Ku Klux Klan**

Civil suits have proven devastatingly effective against Ku Klux Klan leaders and other white supremacists who had remained largely undeterred by the possibility of criminal charges. The first suit against the Klan was launched in the aftermath of a 1979 march in Decatur, Alabama, during which Klan members attacked civil rights activists. Curtis Robinson, a black man, shot a Klansman in self-defence. When Robinson was convicted of assault with intent to murder by an all-white jury, the Southern Poverty Law Center (SPLC) appealed his conviction and brought its first civil suit against the Klan. During the suit, SPLC investigators discovered evidence suggesting a resurgence of Klan activity and other violence that authorities largely ignored.

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<sup>30</sup> In June 2008, Bill S-225 (a previous version of C-CAT's bill introduced by Senator David Tkachuk) was examined in hearings before the Senate Legal and Constitutional Affairs Committee.

<sup>31</sup> The Islamic Revolutionary Guard Corps (IRGC)” by Dr. Peter Leitner, Higgins Foundation publication

SPLC suits have brought down more than 40 individual white supremacists and nine major white supremacist organizations. One of the most significant of these cases was the Michael Donald lynching case in 1981. Michael Donald was 19-years-old when he was abducted, murdered, and hung from a tree in Mobile, Alabama. The SPLC's Intelligence Project investigators gathered evidence against the Klan killers, which led to murder convictions and to a civil suit that destroyed the United Klans of America.

In a 1988 case, the Southern White Knights and the Invisible Empire Knights of the KKK (two Klan groups) and 11 individuals were found liable for an attack on civil rights 16 activists in Georgia. They were ordered to pay nearly \$1 million in damages. The Invisible Empire, once the largest and most violent Klan group, was forced to dismantle and surrender all of its assets, including its name.

In the same year, a group of teenagers murdered Mulugeta Seraw, an Ethiopian man, in Portland, Oregon. The teenagers pleaded guilty and were sentenced to prison. However, Intelligence Project investigators believed the Skinhead attackers were organized and influenced by Tom Metzger. Metzger was the leader of White Aryan Resistance, a neo-Nazi Skinhead group that recruited young people to found and join violent gangs. Using information and evidence gathered by the Intelligence Project, the SPLC sued Metzger and won a judgment of \$12.5 million. This damages award significantly weakened the White Aryan Resistance, and provided for the education of Seraw's son, Henok.

Ten years later, a jury ordered the Christian Knights of the Ku Klux Klan, its state leader and four other Klansmen to pay \$37.8 million (later reduced by a judge to \$21.5 million) for their roles in a conspiracy to burn a black church. Reporter Wendy Bricker wrote at the time that, "The Christian Knights and King don't have millions of dollars. But the verdict will likely put the Klan out of business – or severely diminish its influence – and deter others from hate-inspired actions." In another article, she added "This verdict may also serve as a deterrent to those unfortunate people who may have a propensity for the Klan and violence, but will stop short at the thought of losing their material wealth for their beliefs."<sup>32</sup>

### **3. Case Study: The Arab Bank Case Leads to New Bank Regulations and Policies**

In the last few years, lawsuits seeking hundreds of millions of dollars in damages have been filed in New York against the Jordan-based Arab Bank. These claims allege that the Bank has knowingly aided and assisted Hamas and other terror organizations by distributing compensation money to the families of suicide bombers. Plaintiffs argue that the terrorists, secure in the knowledge that their families would financially benefit from their deaths, were thereby induced and encouraged to commit these horrific acts.

Judge Nina Gershon found that the Arab Bank did provide a conduit for money laundering and financial assistance to relatives of suicide bombers, and ruled that it amounted to providing an incentive for terrorism. The Arab Bank will now have to defend itself against nearly 1,600

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<sup>32</sup> <http://www.seedshow.com/macedonia.html>

lawsuits that have been filed. Though based in Jordan, the Bank operates locations in several countries and has a branch in New York City.

The allegations, along with U.S. pressure, influenced a stream of new laws in Jordan that aim to tighten laundering and enforce harsh penalties, including a comprehensive anti-trafficking bill. The suits also triggered a probe by U.S. bank regulators and a Justice Department criminal investigation. FINCEN and the Office of the Comptroller of the Currency announced on August 17, 2005 that they would fine the New York Branch of the Arab Bank \$24 million for violating the Bank Secrecy Act. The Bank was charged with not implementing an adequate anti-money laundering program and only fulfilling the requirement for reporting suspicious activities after the OCC began to review its funds transfer activity in July 2004. According to reports from individuals familiar with the Bank's operations, only a few suspicious transactions from among hundreds of terror-related bank transactions were reported by the Bank to the U.S. government, even though a federal law requires such reports. U.S. regulators only noticed these transactions when they were exposed in the civil suit launched by the victims.

#### **4. Case Study: Civil Suits Lead to Libya's Acceptance of Responsibility for the Lockerbie Bombing and Subsequent Abandonment of Terror Sponsorship**

On December 21, 1988, Pan Am flight 103 was flying from London to New York. It was carrying 243 passengers and 17 crew members. As the plane flew over Lockerbie, Scotland, a bomb in one of the suitcases exploded. There were no survivors.

In 1991, the murder charges against Megrahi, a senior Libyan intelligence agent, and Fhimah, the former manager of the Libyan Arab Airlines, represented an important turning point in the families' pursuit of justice. It had taken three years and an expensive criminal investigation to pinpoint Libya as the perpetrator of the bombing. Libyan leader Muammar Kaddafi, however, refused to turn over Fhimah and Megrahi.

A year after the indictments, Kaddafi began to pay the price for this refusal. UN Security Council sanctions shut down Libya's air traffic with the rest of the world, froze its deposits in foreign banks, and choked off its imports of weapons and airplane parts. The U.S. Treasury Department enforced America's own sanctions, including an almost total ban on travel to Libya by Americans.

The families of the victims were partly responsible for this and other actions taken by the U.S. government against Libya. The families convinced President Bush to create a commission to investigate the disaster; they helped pass the Aviation Security Act of 1990; they added millions of dollars to the reward program to capture terrorists; they helped win mandatory Security Council sanctions on Libya; they proved Pan Am's "wilful misconduct" in letting the bomb on board the plane; they erected a memorial cairn in Arlington; and they helped pass the Iran-Libya Sanctions Act.

Perhaps most significantly, the families successfully fought for amendments to the Foreign Sovereign Immunities Act that would allow suits for civil damages against state sponsors of terrorism. The family members then launched civil suits against Libya.

On May 29, 2002, in response to the sanctions and the lawsuits, Libya agreed to pay each family up to \$10 million per victim, and to acknowledge its responsibility for the bombing. In return, Libya called for the U.N. and the U.S. to normalize their relations with Libya by lifting their respective sanctions against it. The terms of the settlement were as follows: If the U.N. dropped its sanctions against Libya, the families would receive \$4 million per victim. If the U.S. dropped its sanctions, the families would receive an additional \$4 million. If the U.S. removed Libya from its list of designated terror-sponsoring states, the families would receive a final \$2 million. If the U.S. did not do anything, the families would still get an additional \$1 million in addition to the \$4 million they would have received when the U.N. dropped its sanctions.

On August 15, 2003, Libya's Ambassador to the United Nations submitted a letter to the United Nations Security Council formally accepting "responsibility for the action of its officials" in relation to the Lockerbie bombing. On September 12, 2003, the United Nations lifted sanctions against Libya, following which the victims' families were paid \$4,000,000 per victim. On September 24, 2004, the United States lifted most economic sanctions against Libya, and the families received an additional payment of \$4,000,000 per victim. On May 15, 2006, Secretary of State Condoleezza Rice announced the decision of President George W. Bush to remove Libya from the list of state sponsors of terrorism.<sup>33</sup>

### **5. Case Study: Civil Suits Turn the Tables on the Real IRA (RIRA)**

On August 15, 1998, a terrorist organization called the Real IRA (RIRA) took the lives of 29 men, women and children and two unborn babies when a 500-pound bomb hidden in a stolen car detonated in Omagh, Northern Ireland. The police ascertained from intelligence sources who was responsible but they lacked admissible evidence with which to charge the culprits who continued to live comfortably in the community they had all but destroyed. But the bereaved and injured families, as well as the community in which the terrorists lived, were not content to sit back. They commenced a unique civil law suit in 2001 against five individuals and the RIRA as an organization. In June 2009, four of the five defendants named in the civil suit were held liable by Mr Justice Morgan, and ordered to pay the plaintiffs £1.6m in compensatory damages. Jason McCue, a lawyer for the Omagh families, said: "This verdict sends a clear message to those contemplating acts of terrorism in Britain: 'You may not end up in jail but you could still end up paying a massive debt which could cripple you for the rest of your life.'"

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<sup>33</sup> More recently, on June 13, 2010, The Sunday Times reported that: "The Libyan leader Muammar Gaddafi is to pay up to £2 billion to victims of Irish terrorism for his role in supplying shiploads of explosives to the IRA.... About £800m will go directly to victims of the violence. First in line will be the 147 families of those caught in atrocities in which Semtex, the plastic explosive supplied by Libya, was used.... Libya's insistence that it will not acknowledge specific liability means the thousands of others affected by the Troubles will come forward for a share of the cash.... A trade deal between Britain and Libya is also expected to be part of the historic settlement. Gaddafi is seeking to present the payment as a goodwill gesture and is not expected to admit liability."

"Gadafi to pay £2bn to victims of IRA bombs" by Liam Clarke, June 13, 2010.

<http://www.timesonline.co.uk/tol/news/uk/crime/article7149108.ece>

## Part XI: Quote Unquote - In Support of C-CAT and Its Campaign

### **Prime Minister Stephen Harper, April 2009:**

“I commend the C-CAT for encouraging a substantive dialogue on terrorism. You have provided a strong voice to victims of terror and galvanized divergent groups across the country to unite against those that seek to undermine the cohesiveness of Canadian society.”

### **Liberal Leader Michael Ignatieff, April 2009:**

“I salute the strong work that C-CAT has undertaken.... Your idea of allowing sponsors of terror to be sued in civil court would add another piece in the arsenal of combating terrorism everywhere.”

### **NDP Leader Jack Layton, April, 2009:**

“The importance of your work is unquestioned.... The advice and input of the Canadian Coalition Against Terror on issues of Canadian policy towards terrorism have proven invaluable to the work of New Democrats in Parliament. But your contribution has not been limited to your role in policy. Your support and advocacy for the victims of terrorism and their families continues to be indispensable to those Canadians rebuilding their lives in the wake of terror.”

### **BQ Leader Gilles Duceppe, April 2009:**

“I should like to emphasize the rich contribution made by organizations such as the Canadian Coalition Against Terror (C-CAT).... The participation of victims in the discussion promotes initiatives to make Quebec and Canada safer places.”

### **Green Party Leader Elizabeth May, April 2009:**

“The Green Party of Canada applauds the efforts of the Canadian Coalition Against Terrorism in their efforts to protect Canadians. We fully support the Coalition’s efforts to create legal avenues for victims to pursue perpetrators of terror via civil lawsuits. This initiative not only enables victims to hold terrorists responsible, but also creates a means to locate and seize terrorist assets, compensate victims, and deter future acts of violence. The Green Party supports C-CAT’s goal to empower victims with tools to combat the very forces that undermined their agency- turning victims into victors over terror....”

### **Victor Comras, Former UN Diplomat and Terror Financing Expert, April 2008:**

“C-CAT stands out as one of the most useful and effective private citizen organizations contributing to the international counter-terrorism effort. It has built an effective alliance linking families of the victims of terrorism with the legal community and other public and private institutions and sectors interested in having an input on Canada’s counter-terrorism policies. This has included the formulation and promotion of keystone measures to reform Canada’s anti-terrorism program and legislation. C-CAT’s well crafted legislation should serve also as a positive reference and model for other democracies searching for ways to enhance their own counter-terrorism and counter-terrorism financing efforts.”

### **Senator David Tkachuk, April 2010:**

“[S-7] is a validation of the efforts of the victims of terrorism and their allies, most specifically the Canadian Coalition Against Terror, who...have been pushing for this legislation tirelessly and relentlessly. For them it has been a long journey.... My private member's bill went through four versions and several sessions of Parliament.... I urge all ... senators to give passage to Bill S-7....”

### **Minister of Foreign Affairs (the Americas) Peter Kent, October 2009:**

“C-35... is a result of victims' initiatives championed by an organization called the Canadian Coalition Against Terror, known by its acronym C-CAT, which represents Canadian terror victims. C-CAT has

played a critical role in driving this bill forward. I would like to personally credit Danny Eisen and Sheryl Saperia...who put heart and soul into C-CAT.... The legislation...would provide the Government of Canada with another important tool to protect Canadians from acts of terrorism.”

**NDP MP Judy Wasylycia-Leis, October 2009:**

“...I would like to also acknowledge the work of other groups and individuals who have been trying to find ways to stem terrorism in our society today. I would mention the work of the Canadian Coalition Against Terror and the work of Danny Eisen, Sheryl Saperia and Maureen Basnicki who, as all of us know, have been active on this Hill advancing other ideas with respect to terrorism and trying very hard to develop ways to combat terror financing and, by extension, terrorism itself. There is another initiative on that front coming from the Senate that we also should look at very seriously and ensure its hasty progress.”

**Minister of Public Safety Peter Van Loan, June 2009:**

“I would like to highlight the efforts of the Canadian Coalition Against Terror. The Coalition has worked tirelessly on behalf of Canadian victims of terror ensuring that their voices are heard in Ottawa and throughout Canada. This organization has been one of the main driving forces behind this initiative. The bill tabled here today has benefited immensely from the Coalition’s advocacy. Thank you all for your hard work.”

**Conservative MP Rick Dykstra, April 2009:**

“Mr. Speaker, I would like to acknowledge the presence of Canadian Victims of Terror that are here today.... I would also like to thank C-CAT for its tireless work representing Canadians who have personally and directly experienced the horrific impact of terrorism. C-CAT is an invaluable organization, ensuring that terror victims are heard and helping our government devise policies to protect Canadians from terror and provide necessary support to all of the victims. Our government looks forward to continuing to work with C-CAT, working towards a future where no Canadian is a victim of terrorism.”

**NDP MP Peter Stoffer, April 2009:**

“Those who commit or sponsor terrorist acts should be hunted down and brought to justice. C-CAT's legislative initiative to bring civil suits in Canadian courts against sponsors of terror will help achieve this objective. C-CAT has not only made an extraordinary contribution to Canada – but to the world. If other countries see that it can be done in Canada – they may well follow suit.”

**Public Safety Minister Stockwell Day, March 2008:**

“Eventually it will become more obvious to Canadians... what a debt of thanks we owe you.”

**University of Toronto Law Professor Ed Morgan, September 2009:**

“C-CAT has opened up a new chapter in Canadian advocacy that is successfully bridging the public and private sector in the battle against terrorism. Its unique legislative initiative represents the type of legal innovation which is truly needed to address the juridical challenges that terrorism has created for western democracies like Canada. It is a superb example of a Canadian multicultural success.”

## Part XII: Quote Unquote - In Support of Legislation to Sue Terror Sponsors

### **Terry Davies: Secretary General of the Council for Europe**

“Terrorists seldom kill for money but they always need money to kill.”

### **Boim v. Quranic Literacy Institute**, (291 F.d 1000, 1021 (7th circ. 2002))

“The only way to imperil the flow of money and discourage the financing of terrorist attacks is to impose liability on those who knowingly and intentionally supply the funds to the persons that commit the violent acts.”

### **Fairfield University Law Professor Debra M. Strauss:**

“... [T]he time has come for private citizens to enter the battle on civil grounds through lawsuits aimed at crippling terrorist organizations at their foundation – their assets, funding, and financial backing. ... The national approach that has been used to dismantle the infrastructure of hate groups can be extended to the international realm and used against terrorist groups. The foundation of this approach is a private right to a cause of action rather than, or in addition to, relying upon military or diplomatic efforts by the government. ... When other countries then enforce these foreign civil judgments, the problem of terrorism is removed from a political forum to the world of private international law where reciprocity and consistency are in those nations’ best interests.”

### **Dr. Peter M. Leitner, Counterterrorism Expert:**

“There is something fundamentally absurd with the current legal arrangement in Canada that allows lawsuits against Iran for selling you rotten pistachios, but bars legal action against them for sponsoring terrorist acts which kill Canadian citizens abroad... The effectiveness of civil suits is unmistakable in the case of Libya and the Lockerbie bombing. The exposure of Libyan complicity in the bombing of the Pan Am passenger airliner, in part, caused Libya to back away from its ‘rogue state’ bravado and publicly renounce the use of terrorism.”

### **Price v. Socialist People's Libyan Arab Jamahiriya**, 294 F.3d 82, 96, 99 (D.C. Cir. 2002):

In support of its judgment against the terrorist state, the court concluded that:

“[A]s the witnesses often recognized, no amount of monetary or other relief can ever bring back those who were killed or restore the past twenty years of the lives of those who have been injured and have suffered. But as those same witnesses frequently observed, perhaps it is only through the financial impact of damage awards in cases such as this that the governments (and their agents) responsible for terrorist conduct... will be dissuaded from similar conduct in the future.”

### **Anderson v. Islamic Republic of Iran**, 90 F. Supp. 2d 107, 114 (D.D.C. 2000):

As asserted by the court in Anderson v. Islamic Republic of Iran, the purpose of punitive damages:

“[i]s to punish wrongful conduct to prevent its repetition by the offender and to deter others who might choose to emulate it... The victim to whom the award is made thus stands as a surrogate for civilized society in general; the victim is made more than whole in that others may be spared similar injury.”

**Public Safety Minister Vic Toews, April 2010:**

“This government is responding to calls from victims who seek justice, and demonstrating leadership in the global fight against terrorism.... Perpetrators and supporters of terrorism must be held accountable for their actions.... It is a very practical tool people can use.”

**Prime Minister Stephen Harper, June 2009:**

“Today marks a tragic anniversary for our country. On June 23, 1985, it was dramatically demonstrated that Canada is not immune from terrorist acts. A bomb on Air India Flight 182 killed all three hundred and twenty nine people aboard, most of them Canadians.... Our Government has no greater responsibility than protecting the safety and well-being of Canadians. That is why we introduced legislation to modernize Canada’s laws, to give our police and intelligence agencies more tools to keep Canadian families safe.... Even more recently, our Government introduced legislation to allow victims of terrorism to seek redress from the perpetrators, patrons and supporters of terrorism....”

**Conservative Party Platform, October 2008:**

“A re-elected Conservative Government... will introduce legislation to allow Canadians who have been affected by terrorism to sue the sponsors of terrorist organizations, including to recover funds from states that are designated as sponsors of terrorism.”

**Victor Comras – Former UN Diplomat and Terror Financing Expert, June 2008:**

“This important legislation ... is a major step forward in holding the perpetrators of terrorism...including state actors, accountable in Canada.... The evidence gathered in material support for terrorism cases often does not lend itself to effective courtroom use. ... Experience has shown that civil ... judgments obtained in such cases can also be so overwhelming as to bankrupt or otherwise put out of business those held accountable....”

**Liberal Foreign Affairs Critic and MP Bob Rae, June 2008:**

“I support the legislation.... Without citizens doing this ... I do think a lot of information and evidence will be swept under the carpet. ...We will then not know what happened and ... how things were allowed to happen.... If you do not give the citizens some right to invoke the jurisdiction of the courts to trace the financing, I do not think we will get to the bottom of the matter with respect to how certain activities have and are being financed today.”

**Liberal MP and former Justice Minister Irwin Cotler, May 2010:**

“...When a state engages in the sponsorship of terrorism, it deserves no protection from federal law, such as the State Immunity Act. When a state supports a terrorist group that targets Canadians, our Canadian tax dollars should not be spent on defending that state's immunity from liability. Ironically, there is an exception in the State Immunity Act for commercial activity, but there is no exception for terrorist activity. We have a situation where, simply put, our State Immunity Act unconscionably favours foreign states that aid and abet terrorists over Canadians who are harmed by that terror. It removes impunity with respect to commercial transactions, but it retains immunity with respect to terrorist actions. It is in this context that I introduced a private member's bill to rectify this inversion of rights and remedy this inversion of law and morality....”

**Liberal MP Joseph Volpe, April 2008:**

“Mr. Speaker, thanks to ... the Canadian Coalition Against Terror, all parties in this House are ready to support legislation to permit attacking the financial resources of terrorist movements. ...We can fight the Babbar Khalsa, al-Qaeda, Hezbollah and Hamas by going after the financial resources of their backers.... Bill S-225 proposes financial remedies for families of victims. What is the Conservative government waiting for? It should bring the bill into this House and let us get it passed.”

**NDP MP Ed Broadbent, April 2005:**

“I strongly support the [C-CAT] bill. It will enable victims to take action against states and organizations that perpetrate these vicious cruel and inhumane acts. We need a law like this in Canada.... [I]t’s going to be an important contribution that we can make.”

**Conservative MP Stockwell Day, April 2005:**

“Mr. Speaker, I am pleased to introduce today the victims of terror compensation bill. This would amend the State Immunity Act and it would allow claims in Canada against foreign states which sponsor any of the groups that are listed as terrorist entities. By permitting this, it would allow those who have been hurt, injured or damaged in any way by acts of terrorism or suffered damages to actually pursue and take civil action for compensation. The bill has been developed cooperatively with the Canadian Coalition Against Terror, an organization that is made up of Canadian terror victims and also community activists.”

**Fraser Institute Senior Fellow and Former Ambassador Martin Collacott, May 2007:**

“I wish to record my support for legislation currently being proposed that will permit Canadians who have been killed or injured in acts of terrorism or members of their families to launch civil suits against foreign governments as well as organizations and individuals in Canada who have provided support to the terrorists involved.... I believe, however, that the passage of such legislation is important not only as a means of making justice available to the victims of terrorism and their families but also to send a clear signal both to potential terrorists and to the international community at large that we are serious about combating terrorism.”

**Financial Crime Consultant Ken Rijock, December 2006:**

“Since the best way to reduce, and eventually even eliminate, terrorism is to take away its operating funds, this legislation could go a long way towards curbing terrorist activity in North America.”

**Renowned Economist Dr. Jack Mintz, May 2006:**

“The increased violence perpetrated against innocents in recent years has made it necessary to develop new rules of the international relations game, in order to forestall terrorist acts here. One is a proposed parliamentary amendment to the State Immunity Act that would allow Canadian citizens who have been injured by state-sponsored terrorism to sue for compensation. That would apply to Canadian lives lost anywhere in the world, not just Canada. It is a bill worth passing.”

**Senator David Tkachuk, April 2008:**

“[The legislation] is the result of a concerted effort of a number of people both in and outside government, including, most importantly, past Canadian victims of terrorist attacks, who have worked hard and with extreme dedication and patience to create a carefully and ingeniously crafted tool to place in the hands of victims to deter and combat terrorist acts.... It is worth remembering that in the Second World War entire societies were mobilized in the fight against the enemy. Citizens were pressed into service in defence of the homeland.... [The legislation] proposes nothing other than to mobilize the civilian victims of terror in a very 21<sup>st</sup> century war against terrorism.”

**Contributor to the Toronto Star, Rhona Bennett, March 2008:**

“Amazingly, this legislation that promises to put bite in Canada’s anti-terrorism policy, unites parties. It does not involve detaining people. It does not involve the army or money. It does not affect anyone’s civil rights.... New strategies are necessary for Canada, indeed for all democracies, to survive. This small piece of legislation is one very doable example. Lots more creative action is needed, but let’s start here.... “

**Talk Show Host and Writer Christine Williams, May 2010:**

“Canada is adopting a new bill (Bill S-7) that will allow victims of terrorism to sue for terrorist acts in Canadian court, putting an onus of responsibility and accountability on terrorist states and/or organizations. Albeit a complicated task, it is a step in the right direction.... [S]uch legal suits are still promising beyond the compensatory factor. They serve as one critical part of a multifaceted strategy in the War on Terror: to isolate, marginalize, embarrass and hopefully shed light on the heinous crimes of terrorists and their impact on innocent victims. Forcing terrorist organizations and States into a position of public accountability before the international community is a welcome strategy that Canada has wisely endorsed through Bill S-7. Hopefully we will see more of this in the West.”

**Part XIII: The Canadian Terror Victim Experience - Excerpts from Published Articles Written by Terror Victims**

“...By giving a human face to the painful consequences of terrorism, you help build a global culture against it.... You deserve support and solidarity. You deserve social recognition, respect and dignity. You deserve to have your needs addressed.... Still too often there are gaps in addressing the needs of survivors and their families.... Still too often victims are registered only as numbers and not as human beings that bear witness to stories of immense injustice. Still too often we pay more attention to the voices of terrorists than those of their victims.”

- UN Secretary-General Ban Ki-moon

**Dave Hayer**

Dave Hayer is a B.C. MLA for Surrey–Tynehead and the son of Indo-Canadian Times publisher Tara Singh Hayer, who was assassinated for his strong views against terrorism.

“I have always said that I will support any bill or legislation that will allow victims to seek compensation and redress from terrorist and other criminal organizations, whether they be in Canada, Third World countries, or anywhere else for that matter.... The only way we can diminish the power of these groups is to attack and cut off their money supply, and to do that we need legislation not only in this country, but everywhere else in the world, allowing victims to sue the organizations and their sponsors. If victims can cripple their financial resources, we will eventually see terrorism disappear.” (April, 2005)

**Sarah Phillips**

Sarah Phillips is a member of C-CAT. She was shot and injured in the LA Airport terrorist attack in 2002.

“Last month’s events in Mumbai have so many layers of horror. Those murdered – = those held hostage – those lying still in a dark room praying that the murderers who have entered their hotel room will not notice they are there. The stories are now being told -- but so many will be forever lost.

...The face of this type of evil is one that I have seen before. Six years ago, on July 4, 2002, I was standing in line at the El Al counter in Los Angeles airport when a terrorist opened fire, killing the young woman behind the counter who had been helping me, and the man standing behind me. After the second burst of gunfire I felt an explosion of pain in my leg. I had been shot, and I fell into a kneeling position like a condemned prisoner. I sat there immobilized staring down the barrel of a gun and into the eyes of a

merciless face, waiting for the next bullet to end my life and praying that it would be quick. The gunfire continued around me until a security guard shot and killed the terrorist.

...While the security of hotels, hospitals and other public places will have to be given more thought by those responsible for such things, it will not be possible to secure every potential target – and it will not be possible to identify every budding terrorist. But it is possible to do much more to deprive the terrorist infrastructure as a whole of its lifeblood – which is money. Somebody or some country is paying to make these things happen – to train men like these in the art of mass murder; to hire ships, rent rooms and move arms. Somebody is paying for these atrocities and not enough is being done in Canada and other countries to stop the flow of money....” (December, 2008)

### **Maureen Basnicki**

Maureen Basnicki is a founding director of C-CAT. Maureen’s husband, Ken, was murdered on 9/11.

“Indians are calling the co-ordinated attacks in Mumbai last week their 9/11. And as I watched the flames and people coming out of the windows of the hotels in India’s financial capital, it reminded me of my 9/11. My husband Ken was on the 106<sup>th</sup> floor of the World Trade Center on Sept. 11, 2001. I watched the towers collapse on television, knowing that my husband was there. He was one of 24 Canadians who lost their lives that day.

...If we are going to be successful in the fight against terrorism, we must stop the people who pay for the bullets and bombs that kill people in places like Mumbai, New York, London and Baghdad.

...How can we continue to allow money to flow from Canada to terrorists as we watch the blood continue to flow in places such as Mumbai? Those who have perpetrated the horrors in Mumbai and New York City have shown a keen understanding of the interplay between our physical security and economic prosperity. We should show no less conviction, cunning and creativity in protecting both.” (December, 2008)

### **This C-CAT Member Lost her Husband on 9/11 and Wishes Not to be Identified**

“It has now been almost five years since I received the news that my husband... had perished in the World Trade Center on the morning of Sept. 11. The rubble has all but been removed from that site and the smoke which covered the New York landscape has cleared, but for some of us who lost our loved ones on that day, the wreckage of 9/11 is still a daily obstacle to be navigated.

...I guess that like most Canadians, I had lived with the assumption that terror was essentially a foreign problem – a problem that occasionally and only inadvertently seeped into our lives over here. I also believed that living in Canada or the U.S., we were safe from terrorism. This perception, which I believe is still commonplace in Canada, must be changed. It impedes our capacity to develop appropriate policies and strategies for protecting ourselves and our society from those whose total focus and life ambition is to destroy us and our way of life...

I am therefore relieved that the federal government has decided to go ahead with a full inquiry into the Air India bombings, and I have joined forces with other terror victims to lobby for support of a new legislative initiative – a bill that will provide victims of terror the right to sue foreign governments and other sponsors of terror in Canadian courts. This bill is a victims' initiative put together by the Canadian Coalition Against Terror (C-CAT)... I hope Canadians will stand with us in this endeavour, because it's

about all the Canadians out there who still don't want to believe that it could happen to them.” (June 2006)

### **Ruth Goldberg**

Ruth Goldberg is the mother of Scott Goldberg, a Canadian and father of seven who was murdered in a suicide bus bombing in Jerusalem on January 29, 2004. Ruth Goldberg is a member of C-CAT.

“On Thursday January 29, 2004, Scotty was murdered in a Palestinian suicide bombing in Jerusalem.... Scotty was not an Israeli soldier; he was a 41-year-old civilian - a son, a brother, a husband and a father to seven children aged 18 months to 16 years of age. Unlike the terrorists who had boarded that bus with explosives determined to destroy and defile life, my son had dedicated himself to rebuilding lives. He had become a lifeline to an entire sub-community of disenfranchised and troubled teens who appeared at his funeral that night in Jerusalem.

...Although I am now, like my son, a casualty of that war, I write today in his voice to all people of all faiths to stop deluding ourselves. Terrorism does not respect borders, cultures, race or religion. It recognizes neither the sanctity of churches, synagogues or mosques. Its determination to inflict generations of horror on families and societies must be met by an even more dogged intent on our part to fight it.

As the primary targets of terror we civilians must also be part of the solution. It is for that reason that I have supported a new legislative initiative by the Canadian Coalition Against Terror (C-CAT), which has successfully lobbied for the introduction of federal bills that would enable terror victims to pursue civil suits against state and local sponsors of terror. This initiative is the product of the efforts of Canadian terror victims from many diverse cultural and religious backgrounds who believe that we can help prevent others from joining our ranks.... This bill would allow Canadian citizens to use the tools of democracy to fight those that would destroy it, and allows those victimized by terror to become warriors in the battle to defeat it. While I know that neither this legislation by itself, nor terror victims by themselves, will defeat terrorism, I do believe that this bill can play a significant role in this war. I believe this is something that my son would have wanted me to support and, as a grandmother of seven orphans, I know it is something that I have to support. In a sentence from one of Scotty's articles on the emotional numbness of societies battered by terrorism, quoted in papers around the world after his murder, my son asked, ‘If you don't cry, who will?’ And so I say to myself, and to all of you reading this article today, If you don't try, who will? We citizens must at least try to step up to the plate, and this legislation is a good place to begin. I hope you will all join us in this effort.” (June 2006)

### **Erica Basnicki**

Erica Basnicki's father, Ken, was one of 24 Canadians who perished on 9/11. She is a member of C-CAT.

“...[L]egislation has been introduced that would allow the families of victims of terrorism to sue sponsors, including foreign governments, of terrorist organizations. This initiative is especially important. If passed, it would give those families something they desperately need; an opportunity for justice. It's an elusive thing, especially since the majority of terrorists take their own lives along with their victims', but it's so critical to rebuilding your life after such a devastating blow.

This bill won't hurt or kill or otherwise harm anyone, but its potential for reducing the threat of terrorism in this country - globally, even - is significant. It won't bring my father back, it won't erase the pain of 9/11 from my memory. But it might prevent others from having to go through what I have already been

through, which is why I hope Canadians will stand with victims who initiated the bill, and lend it their full support.

And that's all I'm asking from Canadians: just a little support. Facing our terrorism problem doesn't mean suiting up in desert camouflage and joining our troops in Afghanistan. It doesn't mean constantly looking over your shoulder for suicide bombers. It doesn't mean doing anything it all; just acknowledging that there is a problem to face is key.

To put it more bluntly, Canadians have been killed by terrorists, and Canadians have been trained as terrorists. If you don't think that makes terrorism an issue of concern for Canadians, then you must be dreaming.” (June 2006)

### **Lata Pada**

Ms. Pada's husband and two daughters were murdered in the 1985 Air India bombings. Lata was appointed to the Order of Canada in 2009. She is a member of C-CAT.

“On June 23, 1985, an Air India flight carrying 329 passengers, including my family, was blown out of the sky by a terrorist bomb. My husband, Vishnu Pada, and my two teenaged daughters, Brinda and Arti, boarded that ill-fated flight at Toronto Pearson International Airport, as they were travelling to India to spend the summer with our families and loved ones....

On the morning of June 23<sup>rd</sup>, as I prepared to receive them at the airport in Bombay, I made a routine phone call to the airline to check about the estimated time of the flight's arrival. Nothing in life prepared me for the trembling voice of the airline employee: “We are deeply saddened to inform you that the Air India flight has disappeared from the radar, there has been a terrible tragedy... it is believed there are no survivors.”

The Air India bombing was a Canadian tragedy, perpetrated by Canadians in Canada, and killing over 180 Canadians. However, it took too long to recognize this event as a Canadian event. Even more unpardonable was the pervasive and apathetic view that, until the devastating attacks of September 11, 2001, the Air India bombing was not even acknowledged as an act of terrorism. Imagine that it was only after the events of 9/11 that Canada's first anti-terrorism act was passed in our Parliament.

As a victim of terrorism, I have committed myself to adding my voice to those seeking more effective ways of preventing such unmitigated horror. If I do not add my voice, I will have failed my family, the victims of the Air India bombing, and the countless innocent individuals who are caught in the crossfire of terrorism. This conviction has led me to join C-CAT, the Canadian Coalition Against Terror. C-CAT has been at the forefront of a series of legislative and policy initiatives that can help save lives. But most recently, C-CAT's campaign to enact legislation that allows the pursuit of state and local terror sponsors through civil suits resulted in the government's introduction of Bill S-7. This bill has been lauded by counterterrorism experts across the globe as an invaluable tool in fighting terror.

As we approach the 25<sup>th</sup> anniversary of the terrorist attack that took the lives of my husband and daughters and hundreds of others, the time has come to pass this bill into law. I can think of no more appropriate measure to mark this most tragic Canadian anniversary....” (May, 2010)

## Part XIV: Excerpts from Articles in Support of Civil Suits Against Terror Sponsors

**A Bulwark Against Terror**  
**by Victor D. Comras**  
**National Post**  
**September 1, 2009**

Mr. Comras is a retired U.S. diplomat who also served under appointment by Secretary General Kofi Annan as one of five international monitors to oversee the implementation of Security Council measures against terrorism and terrorism financing. He is the recipient of 10 Superior and Meritorious Honor Awards from the U.S. State Department.

...Six years ago, together with other Canadian terror victims, lawyers and counterterrorism professionals, these families established C-CAT -- the Canadian Coalition Against Terror. From its inception, this organization has engaged in a difficult and ambitious campaign to convince Canada's Parliament to pass legislation that would allow Canadian terror victims to hold accountable those who sponsor and provide material support for terrorism. ...

Last year I was invited by the Senate Committee on Legal and Constitutional Affairs to testify as an expert witness on this bill. I strongly supported this initiative, which, in my view, was superior to American victims of terrorism legislation enacted by the U.S. Congress several years ago. ...In many cases the interdiction of even small sums of money as a result of civil forfeiture can prevent a deadly terrorist incident. And even if collection by the plaintiffs proves impossible in any given case, the deterrence objectives of the bill would still be fulfilled by exposing terror sponsors to public scrutiny....

While the government's version of the bill is quite similar to the Senate measure promoted by C-CAT, it differs in a few key respects. Unlike the Senate version, immunity from suit would only be lifted after the government had designated the particular country as a state sponsor of terrorism. This was the route chosen by the United States back in 1996. But, that legislation failed to adequately evaluate the difficulties, and international economic and political constraints, that would be associated with officially designating countries that support terrorism. The result was a truncated list of terrorism-supporting countries which now includes only Iran, Syria, Sudan and Cuba. And, last year's premature removal of North Korea from that list underscored the law's diplomatic and political frailties. While international diplomatic and political realities make such designations highly unrealistic, that is no reason to give these countries, and their support for terrorist groups, a free ride, or to bar the victims of such terrorism from holding them accountable.

The House of Commons committee that will be charged with reviewing the bill would do well to revisit the Senate's "made in Canada" version, which seeks to avoid the pitfalls of the American model. Rather than designating terrorist-supporting countries it would establish a list of countries where democracy and the rule of law prevails. Such countries would continue to benefit from traditional sovereign immunity with regard to official government functions. In such cases one might fairly presume that the courts in these countries would be open to appropriate legal solutions, alleviating the need for such action in Canada. But, this is certainly not the case for most non-democratic countries and terrorism-supporting countries, where there is no legal recourse for action against those who sponsor terrorism.

...Canada is now poised also to take a leading role in using its democratic legal framework as an effective bulwark against terrorism. Let us hope that broad multi-partisan support for this new counterterrorism legislation will push it through to speedy passage.

**Hold Sponsors of Terror to Account**  
**by Irwin Cotler**  
**Ottawa Citizen, Regina Leaderpost, The Province, The Windsor Star**  
**May 11, 2010**

Irwin Cotler is the MP for Mount Royal and is Opposition Special Counsel on human rights and international justice. He is a former minister of justice and attorney general of Canada and is a professor of law (on leave) at McGill University.

...When a state engages in the sponsorship of terrorism, it deserves no protection from federal law, such as the State Immunity Act. When a state supports a terrorist group that targets Canadians, our Canadian tax dollars should not be spent on defending that state's immunity from liability. Ironically, there is an exception in the State Immunity Act for commercial activity, but there is no exception for terrorist activity. We have a situation where, simply put, our State Immunity Act unconscionably favours foreign states that aid and abet terrorists over Canadians who are harmed by that terror. It removes impunity with respect to commercial transactions, but it retains immunity with respect to terrorist actions. It is in this context that I introduced a private member's bill to rectify this inversion of rights and remedy this inversion of law and morality.

...[T]he objective of removing the shield behind which state sponsors of terror hide is a common objective. Accordingly, the government recently introduced S-7 in the Senate, amending the State Immunity Act, while I have also introduced a private member's bill in this regard, C-408, before the House. Where the government's legislation and my own diverge dramatically relates to the crucial issue of listing. ...Simply put, the Conservative bill takes as its basic premise that state immunity should still operate, such that victims...will only be able to sue a state if the Canadian government has listed it as a terrorist country. Whether a foreign state is listed will always be the subject of political negotiations.... It will always be an issue of executive discretion. It will always have an element of arbitrariness...it will effectively take away the...right of civil remedy from the victims....

...I understand the government's desire to prevent frivolous or vexatious lawsuits against our democratic allies. While my bill removes immunity from perpetrators of terrorism and its state sponsors, it seeks to address this concern by providing a limited carve-out for countries with whom Canada has an extradition treaty – that is, those democracies that respect the rule of law, that have an independent judiciary and that provide due process. Accordingly, victims of terrorism could seek redress in those countries precisely because of their democratic character and provision for due process. Given that such recourses would be available to victims with respect to these countries, it is not imperative to remove state immunity entirely.

Victor Comras, a former senior official in the U.S. state department who testified before a Senate standing committee for legal and constitutional affairs, explained how maintaining a list of designated terrorist countries ended up undermining similar U.S. legislation. In his testimony, Comras advised Canadian parliamentarians "don't go there, don't enact that legislation." His exact words were, "If we had to do it over again, I have no doubt we would have done it without a list." He concluded his testimony with the words "Please learn from our lesson...do not make the same mistake. "...I would hope, therefore, that the government will reconsider its "listing" premise and either adopt the solution proposed by my bill or suggest an alternative in line with Comras's admonition. This need not be a partisan issue. There is consensus to provide victims of terror with a civil remedy that will effectively deter terrorism...and secure justice for victims of terror so they can have their day in court. We should give effect to that consensus.

**State Immunity and Terror Financing**  
**by Tom Quiggin and Sheryl Saperia**  
**Global Brief**  
**March 19, 2010**

Tom Quiggin has worked in an intelligence capacity for a number of government organizations such as the Canadian Armed Forces, the RCMP and the Department of Justice, and spent time with the International War Crimes Tribunal for the former Yugoslavia. He is also qualified as a court expert on jihadist terrorism and his work for the government has been focused on terrorism financing.

Money is the lifeblood of any operation, and a terrorist operation is no exception. Terrorists require funds for a whole range of activities including recruiting, training and paying operatives; traveling; document forgery; bribing corrupt officials; and purchasing weapons.

Simply put, innocent civilians cannot be killed by bullets or bombs that terrorists cannot afford to purchase. Thus, an effective campaign against terrorism must consist of multiple approaches, including direct and indirect attacks on the flow of money. Enforcement and intelligence actions are necessary, but they can only address the problem at the tactical and operational level. ...[I]n order to maximize our ability to deter terrorist activity, action must also take place at the financial level.

There are two main approaches to disrupting the financial aspects of terrorism. The first approach is to intercept money flows - in other words, to track and attack money transfers from sponsor to attacker. The second, and the most effective one, is to remove the financial benefactors, facilitators and service providers from the equation. These are the individuals, organizations and even foreign states that silently and inconspicuously sponsor terrorism through their financial and logistical support. There should be no confusion about the significance of even small amount of money and logistical support for terrorist operations. Nor should there be any doubt about the effectiveness of any financial and logistical disruptions, even minor ones, on terrorist activity.

In the aftermath of ... September 11, 2001, Canada strengthened its criminal laws related to the financing of terrorism. However, despite the magnitude of the terrorist economy - supported by both legitimate sources (such as donations from businesses and charitable organizations) and criminal sources (such as fraud, kidnapping and the drug trade) - the criminal prosecution of terror sponsorship has proven very difficult. Victor Comras, who was appointed by former UN Secretary General Kofi Annan as one of five international monitors to oversee the implementation of Security Council measures against terrorism and terror financing, has noted that: "Most major terrorism's financial abettors and supporters...have successfully avoided criminal prosecution.... The record on closing down entities and institutions feeding terrorism is even more dismal."

It is not at all clear that Canada's existing legal framework provides adequate constraints on terrorist financing in, from or through this country. What is clear, however, is that in order to combat terrorism effectively, new and innovative strategies are required. One example of such innovative effort is reflected in the work of the Canadian Coalition Against Terror (C-CAT).

Over the last five years, C-CAT has worked on an important piece of federal legislation that would enable Canadian terror victims and their families to launch civil lawsuits against foreign states and local Canadian organizations and individuals that have supported terrorist entities responsible for the death or injury of these victims.

Criminal prosecution is certainly an important tool in stopping terrorist operatives and their financial supporters. However, by harnessing the possibility of civil lawsuits against the sponsors of terror, the proposed legislation opens a vital avenue in interdicting and defeating terrorist funding. The proposed legislation would have many important benefits, four of which will be addressed here.

First, successful civil suits can deter future acts of violence by bankrupting or financially impairing the terrorist infrastructure through successful judgments.

Second, even the threat of a civil suit may cause terror sponsors to refrain from future sponsorship out of fear of the publicity and exposure that would result from being named in a civil suit. It is true that terrorists themselves are unlikely to be deterred by the threat of an arrest, a criminal trial, or a civil suit. Such measures will be particularly ineffective against suicide bombers of groups such as the LTTE or al-Qaeda. But the direct and indirect supporters of terrorism have no desire to be brought to court. They have businesses to run, families to support and reputations to protect. In other words, they have much to lose if they can be identified or held accountable for terrorist support.

Third, civil suits have the ability to hold the wrongdoers responsible even where the criminal system has failed. The burden of proof in criminal law must meet the “beyond a reasonable doubt” test, a standard of proof that is extremely high. Unfortunately, the complex financial networks that fund global terrorism have rendered the “beyond a reasonable doubt” standard unattainable in most cases. In contrast, the standard of proof in civil cases is on “a balance of probabilities”. This standard is met if the proposition in question is more likely to be true than not true. Thus, evidence that establishes a defendant’s status as a supporter of terror, which may not be sufficient for conviction in a criminal proceeding, can be enough to establish liability and obtain damages in a civil proceeding.

Fourth, this ... proposal by C-CAT would correct a glaring deficiency in Canadian law that allows a foreign state to be sued in Canadian courts for a breach of commercial contract but not for sponsoring terrorist groups that kill Canadians abroad. As Dr. Peter M. Leitner of George Mason University has pointed out: “There is something fundamentally absurd with the current legal arrangement in Canada that allows lawsuits against Iran for selling you rotten pistachios, but bars legal action against them for sponsoring terrorist acts which kill Canadian citizens abroad....” C-CAT’s legislation would create a new exception to state immunity: a foreign state would be held accountable in a Canadian court for deliberate terror sponsorship that leads to Canadian deaths or injuries.

The Government of Canada has committed to seeing this type of legislation passed in Parliament, and we urge them to do so without any further delay. This is an important – and as yet ignored – piece of the puzzle in combating terror financing, and by extension, terrorism itself.

**Anti Terrorism Fight Requires a Multi-Faceted Approach**  
**by Senator David Tkachuk**  
**The Hill Times**  
**April 28, 2008**

...This, in a nutshell, sums up the dilemma of democratic societies in responding to terrorist threats: How do you defeat an enemy -- which will use any means to destroy you – while remaining true to democratic principles; in other words, without resorting to any means at your disposal.... [W]hile not every

eventuality can be planned for ... we can be creative about how we respond to the terrorist threat, searching out every legal means to make terrorists' and their sponsor's lives more difficult.

That is the kind of thinking behind my Senate public bill, S-225.... S-225 is the result of a concerted effort of a number of people both in and outside government, including, most importantly, past Canadian victims of terrorist attacks, who have worked hard and with extreme dedication and patience to create a carefully and ingeniously crafted tool to place in the hands of victims to deter and combat terrorist acts.... I first introduced a version of the Bill in May 2005.... Bill S-225, which is a modified and improved version of those earlier bills, has passed second reading in the Senate and has been referred to the Committee on Legal and Constitutional Affairs, where it should receive its first hearing in June. The main elements of the Bill have remained unchanged. The amendment to the *State Immunity Act* would permit claims in Canada against foreign states that sponsor any of the groups listed as terrorist entities by the government of Canada....

The important point of this legislation for me – and I consider it very important – is the contribution it makes to deterring terrorist acts and the blow it strikes for all victims of terror.

When it comes to this particular war, civilians are not collateral damage but the primary targets. It is also civilians who plan and perpetrate terrorist acts, whether they are toting backpacks or commandeering aircraft. We need to give the victims a means to fight back and make some measure of progress in the fight against terrorism. Canadian law needs to reflect the unique status of victims in this unprecedented war.

It is worth remembering that in the Second World War entire societies were mobilized in the fight against the enemy. Citizens were pressed into service in defence of the homeland. This was known in the UK as civil defence and included air raid wardens, fire auxiliary services, first aid parties, rescues services and women voluntary services, the latter of which included a housewife section.

Bill S-225 proposes nothing other than to mobilize the civilian victims of terror in a very 21<sup>st</sup> century war against terrorism.

**Make Them Pay**  
**by Jack Mintz**  
**Canadian Business**  
**May 22, 2006**

Dr. Mintz is former President and CEO of the C.D. Howe Institute, and current Chair of Public Policy at the University of Calgary.

Many Canadians believe terrorism will not affect their lives.... We should not be complacent. The increased violence perpetrated against innocents in recent years has made it necessary to develop new rules of the international relations game, in order to forestall terrorist acts here. One is a proposed parliamentary amendment to the State Immunity Act that would allow Canadian citizens who have been injured by state-sponsored terrorism to sue for compensation. That would apply to Canadian lives lost anywhere in the world, not just Canada. It is a bill worth passing....

When my family lived in Ottawa during the 1980s, a cardinal rule was to avoid having an accident with a car bearing red license plates. Why? Those cars belonged to diplomats, and a long-standing international convention protected them from prosecution by citizens of other countries. Rules have evolved. A 2001 incident in Ottawa involving a drunk-driving diplomat, who killed a Canadian in an accident, made it clear that state immunity should have bounds. Canadians have the right to sue foreign states in a Canadian court for breach of contract, or for bodily or personal injury suffered on Canadian soil. But such protection does not extend to Canadians injured on foreign soil.

Why is redress important when Canadians are injured abroad? Clearly, a case can be made that a Canadian passport guarantees some protection by Canada for its citizens. When harm is done, the parties involved – even if they are state governments that sponsor terrorism – should be made responsible for damages. It is not just a matter of fairness; it is also a matter of deterrence. It is hard to stop terrorism, after all – those who are determined to terrorist acts are probably unlikely to be dissuaded. But to the extent that costs can be imposed on those who sponsor terrorism – those who have to devote resources to litigation and penalties – Canadians are better protected. It is a matter of making sure that the perceived benefits of promoting terrorism are swamped by the costs.

The amendment that Parliament is considering to the State Immunity Act in Bill C-394 would permit Canadians to sue states that sponsor terrorism resulting in injury or death on foreign soil. In this day and age, it makes sense to extend protection for Canadians. Governments that wilfully fund terrorists should be liable for injury, just like that diplomat who hurts a Canadian by running her over in a car.

... As Danny Eisen, representing the Canadian Coalition Against Terror, eloquently put it, terrorism has become a war on civilians and citizens need some opportunities to fight back.

None of this will mean terrorism will go away. It is fair to say, however, that Canada should do its utmost to help victims recoup some losses resulting from actions taken by terrorists. To extend war to innocents is unfair, and governments should do their utmost not only to provide security and support, but also to ensure that terrorists and states who sponsor them bear some of the costs.

## **Part XV: Selected Victims' Testimony from Committee Hearings for Bill S-225 before the Senate Standing Committee on Legal and Constitutional Affairs (June 2008)**

### **Dr. Bal Gupta, Chairman of the Air India 182 Victims Families Association**

... I am chair of Air India 182 Victims Families Association and also one of the victims.

I do not speak as a legal expert or an intelligence expert or terrorism expert. I speak as a victim of terrorism with 330 other families in one incident.

Thank you very much for giving us an opportunity to testify. From the perspective of the victims impacted most directly by the terrorist bombing of Air India Flight 182 on June 23, 1985, Air India 182 Victims Families Association strongly supports Bill S-225, entitled, An Act to amend the State Immunity Act and the Criminal Code (deterring terrorism by providing a civil right of action against perpetrators and sponsors of terrorism).

The bill lifts state immunity for providing support to terrorist entities and provides a civil cause of action to those who were harmed, like me, by acts of terrorism occurring on or after January 1, 1985.

The Air India 182 tragedy was as a result of a terrorist conspiracy conceived and executed on Canadian soil. A single, one-terrorist act killed 329 persons. Most of the victims were Canadians, from all provinces except P.E.I. – Newfoundland, Nova Scotia, New Brunswick, Quebec, Ontario, Manitoba, Saskatchewan, Alberta and British Columbia. They came almost from all religions, Buddhist, Hindu, Christians, everyone included.

Eighty-six victims were children travelling to meet their grandparents on holiday; 29 families, husband, wife and all children, were wiped out; and 32 persons were left alone – that is, lost their spouse and all children. Two children, around 10 years of age, lost both their parents in that tragedy.

This was the largest act of terrorism conceived and executed in Canada against Canadians, and it will continue to cause incalculable suffering and pain to thousands of friends and families for decades to come. In the Air India 182 bombing, I lost my wife, Ramwati Gupta, to whom I was married for over 20 years. In a flash, in a tragic moment, I was left as a single parent with two young sons aged 12 and 18 at that time. Even today, our family cannot enjoy the best of the occasions, be it myself getting a fellowship or being elected a fellow of the Institute of Electronics and Electrical Engineers; or my son receiving, from the Deputy Minister of Justice, an award for humanitarian service for work with the underprivileged; or my elder son who, up to that time, was getting only Cs and Ds, getting third position in his school. He just finished Grade 13 at that time. We cannot enjoy any moment. There is an underlying inner grief and pain even in the best of occasions. But we were not alone.

On the same day, June 23, 1985, in a related act of terrorism involving a Canadian Pacific Air flight, a bomb explosion killed two luggage handlers in Narita airport in Japan. This bomb also originated in Canada. In later years followed the murders of two important and prominent potential witnesses who were supposed to be very key first-hand witnesses to the pending Air India trial: Mr. Tara Singh Hayer, in British Columbia, Canada; and Mr. Tarsem Purewal, in the U.K.

As we all know, the intelligence agencies could not prevent the Air India 182 bombing. The eventual criminal trial in Canada, which took over 15 years to commence, failed to convict and punish any culprits. The alleged culprits, whoever was responsible or were responsible for this conspiracy, are still roaming free in Canada.

The Air India 182 bombing, the largest act of terrorism in Canada, was not even recognized as a Canadian tragedy for a long time. The Anti-terrorism Act was passed, and some terrorist entities – and, the Chair said it was about 40 – were banned only after 9/11 took place in Canada, about 18 years ago. They were banned in 2003, after Canada experienced the Air India 182 bombing.

As families of the victims of the terrorist bombing of Air India 182, we have suffered and continue to suffer incalculable pain and grief. We do not want such pain and grief to befall on any other Canadian in the future. The Air India 182 victims were mostly Canadians of East Indian origin, but the victims of the next terrorist act, God forbid, could be anyone. Terrorism cares little about its victims' colour, creed, gender or age.

Today terrorism is an international phenomenon, and the terrorists in most cases may and do have worldwide connections. Well-known examples include the train bombing in Spain, the Bali bombing in Indonesia, 7/7 transit bombing in U.K., the school bombing in Russia in 2004, blasts in Delhi in 2005, the blast in Jordan in 2005 and many, many more. Courts all around the world have several prominent

ongoing cases of suspected terrorists, but the criminal justice system, with its appropriately high burden of proof, has its limits in actually achieving justice when it comes to terrorism.

Of course, the intelligence agencies, criminal investigation agencies and the criminal justice system should continue to play their respective vital roles, but the Canadian government must take all possible steps to deter terrorism and civil suits can fill an important gap in our lives. Moreover, it is important that Bill S-225 focus on civil suits against the financial patrons of terror because this fits into one of the Air India Commission's terms of reference, namely, whether Canada's existing legal framework provides adequate constraints on terrorism financing. In our opinion, Canada's present tools have not been effective in curtailing the flow of funds that are so essential to terrorist enterprise.

We believe that the passage of Bill S-225 will provide a new and vital avenue for defeating terrorist funding by harnessing the possibility of civil suits that will deprive terror sponsors and perpetrators of their funds and their anonymity.

It is imperative that the provisions of Bill S-225 be applicable to acts of terrorism on or after January 1, 1985. First, this will provide recourse to the Air India 182 victims against the sponsors of terrorism. Moreover, by choosing 1985 as the starting point, the bill will more readily recognize that the Air India 182 bombing was a Canadian tragedy, the largest and most heinous act of terrorism in Canadian history. It will send a strong message of warning to potential wrongdoers that the victims they create will not be powerless. It will also send a clear signal that terrorism is not acceptable in Canada and Canada is ready to take any and all steps against terrorism.

Importantly, the bill represents a mechanism by which Canadian terror victims cannot only seek justice for themselves but can also do their part in protecting other Canadians. Thank you, madam chair, and honourable senators.

#### **Dr. Sherri Wise**

Good afternoon, honourable senators. Thank you for the opportunity to tell my story and for your consideration of Bill S-225, which I strongly endorse.

I am a survivor of a triple suicide bombing that occurred on September 4, 1997, in Jerusalem. Appearing here today before this committee, I cannot help but think of all the others around me who perished that day and the families that they might have brought into being, had they had my good fortune to survive. I am here to tell their story, as well as mine.

That summer in 1997, I was thrilled to be traveling to Israel for the first time. I was going to volunteer as a dentist, providing free dentistry to underprivileged children, both Arabs and Jews. On my last day of volunteering on the dental clinic, I decided to have lunch at an outdoor cafe on Ben Yehuda Street. Ben Yehuda is a pedestrian-only walkway in central Jerusalem that is always teeming with hundreds of people – young and old, locals and tourists.

As I was enjoying my lunch with friends, I remember thinking what a glorious day it was. I was excited to be starting the vacation part of my trip. I thought about what a wonderful experience I was having and I could not have been happier. As I was sitting having lunch, I saw an oddly large man dressed in women's clothing carrying two very large bags. It seemed a little strange to me, but I ignored it and continued speaking with my friends. Little did I know that he was about to set off the first of three separate explosions.

This suicide bomber was strapped with nail-studded bombs and detonated himself several steps from where I was sitting. At first, I had no idea what had just occurred. It seemed like it was all happening in slow motion. The first blast had thrown me from my seat. One minute I was sitting in a chair, and the next I was on the ground with bodies on top of me. I saw people screaming but I could not hear anything. The explosions were so loud that I temporarily lost all my hearing. As I looked over my shoulder, I saw a second terrorist pull the detonator to the bomb attached to his chest and I watched him explode. Many people were killed and dismembered, and I remember being struck in the head with a dismembered foot of the bomber.

My first instinct that day was of survival and I kept saying to myself over and over that I did not want to die and that I would do whatever it took to stay conscious. I then realized I had lost my purse in all the commotion and that my passport was inside. I began to panic as I did not want anyone to find my purse and think I had died. If I were going to die, I wanted people to be able to identify me.

After searching through bodies, body parts and debris, I was able to find my purse. I grabbed it and waited for help to arrive. The blood-soaked street was utter chaos with people screaming, sirens blaring, people wailing, and limp bodies scattered everywhere. Over 20 people were murdered on that day and 196 were wounded, including me. I suffered second and third degree burns to 40 percent of my body and my hair was burnt off. I had over 100 nails lodged in my arms and legs and a bolt embedded in my foot, and I lost most of the hearing in my right ear. I was in the hospital in Israel for two weeks and then transferred back to Canada to my parents' home, where I remained for almost five months. I required over six months of continuous medical care before I could go back to Vancouver and live on my own.

After returning to Vancouver, I was able to resume my life and return to work. Time has healed some of the physical wounds, but there are things, many them intangible, that the terrorists have taken from me that I will never be able to regain. I am not the same person I was that day. I still, to this day, suffer with tremendous survivor guilt and, in some form or another, post-traumatic stress disorder. To this day I still have many fears associated with loud noises, crowds and fireworks because of the loud, booming explosions.

However, I did not come here today to simply recount a personal tale of tragedy and survival. Rather, I believe my story is important to your deliberations because, in one form or another, it is the story of hundreds of other Canadian families that have lost loved ones to terrorism, and it could be the story of many others in this country who become victims of terrorism.

Passing Bill S-225 into law will hinder the efforts of those who fund, enable and support terrorist acts like the one I survived. In my opinion, by exposing terror sponsors in civil suits and holding them responsible, this bill will not only help to protect our own children from becoming victims of terrorism but will also deter the sponsors of terror from turning the children in their own community into perpetrators of terrorism.

I hope my story has helped you understand why this bill is so important. Honourable senators and madam chair, please help pass Bill S-225 into law. Thank you for your time today.

**Maureen Basnicki**

Thank you. It is difficult following these stories. It makes me very emotional. Most of you know the story of 9/11.... My husband Ken was on the 106<sup>th</sup> floor of the North Tower of the World Trade Centre on the morning of September 11, 2001.

I watched that tower and my life, as I had known it, collapse on TV while sitting in a hotel room in Mainz. I was there on a layover in my capacity as a flight attendant for Air Canada. My husband, Ken, was one of 24 Canadians who perished that day.

In most of my appearances before Parliament committees and the Air India Commission of Inquiry, I have testified on behalf of myself and other victims on issues related to counterterrorism and the rights of terror victims. Today I speak not only on behalf of the existing victims of terror but on behalf of those Canadians who are not yet victims of terror. I am here to speak about the basic and fundamental right of every Canadian, and in fact every human being – the right not to be a victim of a terrorist attack.

I fully concur with British Minister of State Ian Pearson who in the aftermath of the 2005 London bombings who said as follows: "...[t]here is no human right more sacred than the right to be alive. Without this human right all others are impossible."

In my opinion, Bill S-225 speaks precisely to this right, and I believe that if this bill is effective, even once, in deterring a terrorist attack, it will have been worth the thousands of hours of effort that the Canadian terror victims and C-CAT, the Canadian Coalition Against Terror, have invested in its passage over the last four years.

Senators, I believe that Bill S-225 is worthy of your support, not only because it is an effective deterrent, but also for how it seeks to achieve deterrence by utilizing the victims themselves to pursue terror sponsors in court.

This bill transforms every victim of terror into a potential liability for those who sponsor terror and, in doing so, takes aim at the core of terrorists' intent and method, which seeks to create as many powerless victims as possible as a weapon against society as a whole. By turning these victims of terror into victims over terror, Bill S-225 removes this weapon from the hands of terrorists and, in fact, turns it against them.

To conclude, senators, I believe that as a society we have had difficulty looking terror in the eye, even when terror is standing right back at us from close range. We must recognize that terrorism is not another form of organized criminality. Crime can exist without mass murder, and usually benefits from avoiding it. Terrorism cannot. It is different in its scope, intent, method and consequence and is often a function of state policies aimed at the citizens of other sovereign states.

Terrorism, therefore, cannot be treated as a social ill in any conventional sense. After all, it is the Canadian military that is fighting terrorism in Afghanistan, not the Canadian police force.

Clearly, new policies and legal structures are needed to protect the front-line soldiers – meaning you and me – in this new conflict. I have no illusions. This bill will not provide justice for every victim, nor is it the complete solution to the problem of terrorism, but I believe that Bill S-225 will make an invaluable contribution to that end.

As a Canadian terror victim representing other Canadians who have suffered similar tragedies, I ask that you support Bill S-225 as a very Canadian solution for a brutal threat that has yet to claim its last victim – a solution that does not infringe on anyone's basic rights and is soundly based on the rule of law.

The terrorists have deprived us of so much. All we are asking is that our government provide us with a basic legal tool to ensure that others do not share our fate. Thank you.

## Part XVI: Selected Expert Testimony from Committee Hearings for Bill S-225 before the Senate Standing Committee on Legal and Constitutional Affairs (June 2008)

**Victor D. Comras** is special counsel to The Eren Law Firm. Mr. Comras joined the firm from the United Nations, where he served, under appointment by Secretary General Kofi Annan, as one of five international monitors to oversee the implementation of Security Council measures against terrorism and terrorism financing. Prior to entering private law practice and serving at the United Nations, Mr. Comras served at the U.S. State Department in numerous senior positions including Director for Canadian Affairs. He is a recipient of 10 Superior and Meritorious Honor Awards from the Department of State and the President's Medal from the Council of Europe.

### 1. *How effective are existing measures for combating terror financing?*

**Victor Comras:** ...[W]e are falling short in this task. It is true that there are many rules in place, almost everywhere, to block transactions and to freeze al-Qaeda and Taliban assets. Numerous individuals and entities, including charities and non-profits, have actually been identified and designated by the United Nations... as supporting terrorism. Yet, in actual fact, few steps have been taken to put these entities out of business.... [M]any continue today to run their businesses, lead their charities and carry out their financial transactions.

### 2. *Has the criminal justice system been effective in prosecuting terror financing crimes?*

**Victor Comras:** ...Let me cite a few examples from the U.S. experience. Since 9/11, the U.S. government has opened more than 108 material support prosecutions. We obtained jury convictions in only nine cases. We look pleas on lesser charges in another 42. We had to drop 46 cases for lack of sufficient evidence. Why? Because much of the evidence involved in these cases was highly classified and unusable in court. Eight defendants were acquitted and four cases were dismissed.... I do not cite these statistics as criticism but, rather, as an indication of the sheer difficulty... in establishing beyond a reasonable doubt the knowledge and subjective intent of those shielding their terrorism financing activities under the guise of charitable giving.... The message to the terrorists and to their funders is clear: The road is open and the risks are few.

### 3. *But can civil suits really make a difference in stopping the funding of terror?*

**Victor Comras:** ...If I can, let me read something to you... I was really taken by this statement that comes from Jeffrey Breinholt, who heads the U.S. Department of Justice's office that deals with terrorism cases...

...for a time after 9/11, I looked askance at the efforts by the American plaintiffs bar in bringing their own cases against people we were investigating, because I thought that they would get in the way of our prosecution and what we were doing in enforcing the material support statutes.... I am now convinced that I was wrong.

I now believe these cases reflect American law at its best, and that we should do everything we can to encourage them. ....The conclusion emerges when these lawyers work on behalf of victims of atrocities... the findings go... into the case books. Remember, American judges have to find factual support for the allegations, even if the foreign defendants never show up, which means there will always be facts developed and publicized.

This means that the U.S. right now is simultaneously taking it upon itself – through its private lawyers – to run not one but several Truth Commissions.... I can even envision of criminal-civil pincer movement, where we carve up the case, and a protocol to share government-developed information with private lawyers who demonstrate a particular capacity. We might be able to strike a major blow at people overseas who deserve it – to prosecute them criminally and, win or lose, to bankrupt them through civil litigation where the standards of proof are not so exacting.

*4. How good a case can be made against terror sponsors in civil suits?*

**Victor Comras:** ...As to the resources that you develop, the experience in the United States, where we have had a lot of litigation against those who fund terrorism, is that in non-frivolous cases there are committed public groups willing to get involved and that includes a broad spectrum of experts – even beyond what often is available for the governments – from think tanks in the United States and overseas, and from academic institutions. Such cases bring together some of the best expertise, and some of the most valuable insights we have today on terrorism – particularly on financing of terrorism – this comes from the briefs that have been filed in these cases, some of which are phenomenal and the information incredibly detailed and valuable.

*5. In Bill S-225, we are open-ended about the states that may receive a civil action, whereas... the State Department produces a list of states that can be sued. ...Some people here have talked about the bill being amended to include a list. I would like to have a discussion about them here, at the table, if we could.*

**Victor Comras:** ...[W]hat we did on this was a mistake. It was a putting-our-toe-in-the-water kind of thing with sovereign immunity. We were the first to go as far as we did with respect to sovereign immunity. We put our little toe in the water to see what would happen. We said we would try to limit it to those states which were specifically designated as state sponsors of terrorism by the Department of State. What did we end up with? Initially six countries: Iran, Iraq, Sudan, Syria, North Korea and Cuba. It was as much a political statement as anything else.

It became extremely difficult for the administration to start thinking about how it would designate additional countries. That did not mean that these countries should get a free ride and that they should be protected from lawsuits. It meant that we were initially too cautious. We put our toe in the water and ended up with a system that was dissatisfying for everyone, including the Executive. ... If we had to do it over again, I have no doubt we would have done it without a list. The list has put us in a box. It has put our legal system and our courts in a box, and they recognize that....

...You add five and say, “Listen, I put five on there.” What you did not really mean to say is, “I kept 168 off.” ...Right now the legislation appears to indicate that if the defendant country is not one of the five, they have sovereign immunity.... I do not believe that we meant to give every country a defense for their support of terrorism. We did not mean to do that.... Please learn from our lesson... do not make the same mistake.

**Bob Rae, MP for Toronto Centre, Liberal Foreign Affairs Critic**

*1. Should Bill S-225 be supported?*

**Bob Rae:** I support the legislation and, as I see it, the legislation basically says this: If you are a Canadian businessman doing business in Columbia and you are kidnapped and then killed by FARC guerrillas, you have a right of action against whatever government you think is actually funding the guerrillas. If the families can find out who is funding them, can trace it and can take that activity through and prove in a court of law that it was, in fact, supported by a state, I do not know why we would not bring that state to justice. I do not know why we would not do it through our civil courts.

...The victims are any one of us and any one of our fellow citizens going about their daily business. Those are the victims of terrorism. They have done nothing. They are not soldiers. They are not participants in a battle. They are going to work in the morning. They are getting on a plane to see their families. They are carrying on their daily business in a marketplace. They are living their lives. They are regular people. This legislation, it seems to me, is saying that regular people have rights. If they get into a car accident, they have a right. If something else terrible happens to them, they have rights. Just because terrorism is a complicated, politically motivated event does not mean they lose their rights to a civil action. They have rights. If we can prove that we know who did it and we know who funded them, then we should be able to take them to court and hold them responsible.

*2. But shouldn't the pursuit of terror sponsors be left to the government?*

**Bob Rae:** There is a diplomatic argument that is made, and I am certainly familiar with it. It says: "Mr. Rae, that is all very well and well meaning in its own way. However, that should be left to governments and states. We really cannot interfere with the Congress of Vienna rules. We have to play the game the way it is supposed to be played." I think that, in the 21st century, we cannot restrict the rule of law in that way. We must give it the full force of real life. In that real life, citizens had their life taken away unjustly. If we can trace how that was done and discover who was responsible for doing it, then we should do it and pursue it.

*3. Should Bill S-225 be amended to resemble its American predecessor?*

**Bob Rae:** The suggestion has been made that this legislation should follow the American legislation and should do the same thing. I take issue with that. Ironically, I want to take issue with it because I think it is not very smart, diplomatically. It seems we should not get into the business of necessarily naming, off the top, the governments and the countries which we believe have a record of funding terrorist activity. It seems we should follow the outline which is set out in the legislation, which is to say countries with which we do not have any extradition treaties and so on; essentially, countries which are not allied to us and which do not share our system of law.

It is inconceivable that other governments that are friendly to us would be doing this. There are a limited number of governments which would be doing this. I do not believe we should artificially restrict the naming of the governments doing this. The legislation proposed will do a better job of that than would otherwise be the case.

*4. One of the difficulties I have is that states do not stay the same; they change.... Do you hold accountable the government of the day, which has some of the trappings of the government but already shows some positive movement? In other words, does the government of the day carry forward the legacies of those past? (Senator Andreychuk)*

**Bob Rae:** ...[S]uccessor governments are responsible. If a corporation that pollutes is succeeded by a new administration of the corporation, the corporation is responsible. The Government of Canada, under Mr. Harper, yesterday apologized for activities that it had nothing to do with and took responsibility for them. Ultimately, that is the way it is. Insofar as you are looking where the legal responsibility lies, I do not think you can avoid it. Would a legal successor to a bad regime have responsibility? Yes. The post-1945 government of Germany paid reparations to the Government of Israel. Were there people in their government who committed bad things? No. They were taking a collective responsibility for what had taken place. I do not have any problem with that.

*5. Can these suits make a real contribution in stopping terror financing?*

**Bob Rae:** [W]ithout citizens doing this, and without courts getting into the game, which I think needs to happen, then I do think a lot of information and evidence will be swept under the carpet. I think we will then not know what happened and how things happened and how things were allowed to happen. I do believe that one of the principles of public policy is not only that we are against terrorism but also that we believe that the financing of terrorism must be stopped and the financing of terrorism must be traced. If you do not give the citizens some right to invoke the jurisdiction of the courts to trace the financing, I do not think we will get to the bottom of the matter with respect to how certain activities have and are being financed today.

*6. Would it be possible to apply similar reasoning and take the principle of this bill to another level so it not only binds Canada but other countries that are signatory to international conventions for the suppression of terrorism and they could join Canada in these efforts? (Senator Joyal)*

**Bob Rae:** Is this a principle that has broader application ultimately for our international public policy and should we be encouraging other governments to go in this direction? Yes. I think this is an example where Canada can be a leader, where we can say that people have to take this seriously. The one great trend in Canadian public policy that I think we can all be proud of is that we are a country that is profoundly committed to the rule of law, not only nationally but internationally. That is who we are as Canadians. As we try to extend this, I think we are doing a good thing.

*7. Would there be, in your opinion, short-term negative impact for Canada's diplomatic service abroad if such a bill were adopted? (Senator Joyal)*

**Bob Rae:** I do not think so. I think some people would say this bill makes our lives more complicated. My answer to that would be, that is life. The world is complicated, and this happens to be a reality for our fellow citizens. I am trying to give you practical examples.

If Canadians doing business in the Middle East lose their lives because of where they were, or are the target of kidnapping or something else, I do not believe those governments should feel they can carry on that activity with impunity. I do not believe that we should leave it entirely up to governments, because it is not only the governments that have suffered the consequences of this action. Individuals and families have suffered. It does make consular work more difficult, but that is not a reason not to do it.

*8. Would Bill S-225 trigger a flurry of suits?*

**Bob Rae:** ...Frankly, that is an outlandish proposition. This is a law that would, one hopes, be used incredibly rarely and only in circumstances where there was a clear and undeniable line of proof that went from line A to line B to line C in terms of which government was responsible. It will be very difficult to

prove. The hurdles are high, which is arguably appropriate. Due to cost and because of the difficulties of moving it through, it will not lend itself to that kind of activity.

## **Part XVII: Text of Bills S-7 and C-408**

**S-7**

Third Session, Fortieth Parliament,  
59 Elizabeth II, 2010

**SENATE OF CANADA**

## **BILL S-7**

An Act to deter terrorism and to amend the State Immunity Act

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FIRST READING, APRIL 21, 2010

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LEADER OF THE GOVERNMENT IN THE SENATE

**S-7**

Troisième session, quarantième législature,  
59 Elizabeth II, 2010

**SÉNAT DU CANADA**

## **PROJET DE LOI S-7**

Loi visant à décourager le terrorisme et modifiant la Loi sur  
l'immunité des États

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PREMIÈRE LECTURE LE 21 AVRIL 2010

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LEADER DU GOUVERNEMENT AU SÉNAT

## SUMMARY

This enactment creates, in order to deter terrorism, a cause of action that allows victims of terrorism to sue perpetrators of terrorism and their supporters. The enactment also amends the *State Immunity Act* to prevent a foreign state from claiming immunity from the jurisdiction of Canadian courts in respect of actions that relate to its support of terrorism.

## SOMMAIRE

Le texte établit, en vue de décourager le terrorisme, une cause d'action permettant aux victimes d'actes de terrorisme d'engager des poursuites contre leurs auteurs et ceux qui les soutiennent. Il modifie également la *Loi sur l'immunité des États* afin d'empêcher un État étranger d'invoquer, devant les tribunaux canadiens, l'immunité de juridiction dans les actions judiciaires portant sur son soutien du terrorisme.

SENATE OF CANADA

SÉNAT DU CANADA

## BILL S-7

## PROJET DE LOI S-7

An Act to deter terrorism and to amend the State  
Immunity Act

Loi visant à décourager le terrorisme et  
modifiant la Loi sur l'immunité des États

Preamble

Whereas Canadians and people everywhere  
are entitled to live their lives in peace, freedom  
and security;

Whereas Parliament recognizes that terrorism  
is a matter of national concern that affects the  
security of the nation and considers it a priority  
to deter and prevent acts of terrorism against  
Canada and Canadians;

Whereas acts of terrorism threaten Canada's  
political institutions, the stability of the econo-  
my and the general welfare of the nation;

Whereas the challenge of eradicating terror-  
ism, with its sophisticated and trans-border  
nature, requires enhanced international coopera-  
tion and a strengthening of Canada's capacity to  
suppress and incapacitate acts of terrorism;

Whereas United Nations Security Council  
Resolution 1373 (2001) reaffirms that acts of  
international terrorism constitute a threat to  
international peace and security, and reaffirms  
the need to combat by all means, in accordance  
with the Charter of the United Nations, threats  
to international peace and security caused by  
acts of terrorism;

Whereas Canada ratified the 1999 Interna-  
tional Convention for the Suppression of the  
Financing of Terrorism on February 15, 2002;

Whereas hundreds of Canadians have been  
murdered or injured in terrorist attacks;

Attendu :

que les Canadiens et les citoyens des autres  
pays ont droit à la paix, à la liberté et à la  
sécurité;

que le Parlement reconnaît que le terrorisme  
est une question d'intérêt national qui touche  
la sécurité de la nation et considère comme  
une priorité le fait de prévenir et de  
décourager les actes de terrorisme contre le  
Canada et les Canadiens;

que les actes de terrorisme menacent les  
institutions politiques du Canada, la stabilité  
de son économie et le bien-être de la nation;

que le terrorisme déborde les frontières et  
dispose de moyens perfectionnés, de sorte  
que son éradication pose un défi et suppose  
une collaboration accrue entre les États et  
l'accroissement de la capacité du Canada de  
réprimer et de désamorcer les actes de  
terrorisme;

que la résolution 1373 (2001) du Conseil de  
sécurité des Nations Unies réaffirme que les  
actes de terrorisme international constituent  
une menace à la paix et à la sécurité  
internationales et qu'il est nécessaire de lutter  
par tous les moyens, conformément à la  
Charte des Nations Unies, contre ces menaces  
à la paix et à la sécurité internationales que  
font peser les actes de terrorisme;

Préambule

Whereas terrorism is dependent on financial and material support;

Whereas certain states that support terrorism should not benefit from state immunity in this regard;

And whereas Parliament considers that it is in the public interest to enable plaintiffs to bring lawsuits against terrorists and their supporters, which will have the effect of impairing the functioning of terrorist groups in order to deter and prevent acts of terrorism against Canada and Canadians;

Now, therefore, Her Majesty, by and with the advice and consent of the Senate and House of Commons of Canada, enacts as follows:

que, le 15 février 2002, le Canada a ratifié la Convention internationale pour la répression du financement du terrorisme de 1999;

que des centaines de Canadiens ont été tués ou blessés lors d'attaques terroristes;

que le terrorisme s'appuie sur le soutien financier et matériel qui lui est fourni;

que certains États qui soutiennent le terrorisme ne devraient pas bénéficier de l'immunité des États à cet égard;

que le Parlement considère qu'il est dans l'intérêt public de permettre aux demandeurs d'intenter des poursuites contre les terroristes et ceux qui les soutiennent, ce qui aura pour effet d'entraver le fonctionnement des groupes terroristes et, par conséquent, de prévenir et de décourager les actes de terrorisme contre le Canada et les Canadiens,

Sa Majesté, sur l'avis et avec le consentement du Sénat et de la Chambre des communes du Canada, édicte :

#### SHORT TITLE

Short title **1.** This Act may be cited as the *Justice for Victims of Terrorism Act*.

#### TITRE ABRÉGÉ

**1.** *Loi sur la justice pour les victimes d'actes de terrorisme.* Titre abrégé

#### INTERPRETATION

Definitions **2.** The following definitions apply in this Act.

#### DÉFINITIONS

**2.** Les définitions qui suivent s'appliquent à la présente loi. Définitions 25

"foreign state"  
« État étranger » "foreign state" has the same meaning as in section 2 of the *State Immunity Act*.

« entité inscrite » S'entend au sens du paragraphe 83.01(1) du *Code criminel*. « entité inscrite » "listed entity"

"listed entity"  
« entité inscrite » "listed entity" has the same meaning as in subsection 83.01(1) of the *Criminal Code*.

« État étranger » S'entend au sens de l'article 2 de la *Loi sur l'immunité des États*. « État étranger » "foreign state"

"person"  
« personne » "person" includes an organization as defined in section 2 of the *Criminal Code*.

« personne » Sont notamment visées les organisations au sens de l'article 2 du *Code criminel*. « personne » "person" 30

#### PURPOSE

Purpose **3.** The purpose of this Act is to deter terrorism by establishing a cause of action that allows victims of terrorism to sue perpetrators of terrorism and their supporters.

#### OBJET

**3.** La présente loi a pour objet de décourager le terrorisme en établissant une cause d'action permettant aux victimes d'actes de terrorisme d'engager des poursuites contre leurs auteurs et 35 ceux qui les soutiennent. Objet

## CAUSE OF ACTION

## CAUSE D'ACTION

Action

4. (1) Any person that has suffered loss or damage in or outside Canada on or after January 1, 1985 as a result of an act or omission that is, or had it been committed in Canada would be, punishable under Part II.1 of the *Criminal Code*, may, in any court of competent jurisdiction, bring an action to recover an amount equal to the loss or damage proved to have been suffered by the person and obtain any additional amount that the court may allow, from any of the following:

(a) any listed entity or other person that committed the act or omission that resulted in the loss or damage; or

(b) a foreign state or listed entity or other person that — for the benefit of or otherwise in relation to the listed entity referred to in paragraph (a) — committed an act or omission that is, or had it been committed in Canada would be, punishable under sections 83.02 to 83.04 or 83.18 to 83.23 of the *Criminal Code*.

Real and substantial connection to Canada

(2) A court may hear and determine the action referred to in subsection (1) only if the action has a real and substantial connection to Canada.

Suspension of limitation or prescription period

(3) A limitation or prescription period in respect of an action brought under subsection (1) does not begin before the day on which this section comes into force and is suspended during any period in which the person that suffered the loss or damage

(a) is incapable of beginning the action because of any physical, mental or psychological condition; or

(b) is unable to ascertain the identity of the listed entity, person or foreign state referred to in paragraph (1)(a) or (b).

Refusal to hear claim

(4) The court may refuse to hear a claim against a foreign state under subsection (1) if the loss or damage to the plaintiff occurred in the foreign state and the plaintiff has not given the foreign state a reasonable opportunity to submit the dispute to arbitration in accordance with accepted international rules of arbitration.

Action

4. (1) Toute personne qui, le 1<sup>er</sup> janvier 1985 ou après cette date, a subi au Canada ou à l'étranger des pertes ou des dommages par suite de tout acte ou omission qui est sanctionné par la partie II.1 du *Code criminel* ou le serait s'il avait été commis au Canada peut, devant tout tribunal compétent, intenter une action contre les personnes ou États étrangers ci-après en vue du recouvrement d'une somme égale au montant des pertes ou des dommages constatés ainsi que de l'attribution de toute somme supplémentaire que le tribunal peut fixer :

a) toute entité inscrite ou autre personne ayant commis l'acte ou l'omission en cause;

b) l'État étranger ou toute entité inscrite ou autre personne qui, au profit ou au regard de l'entité inscrite ayant commis l'acte ou l'omission en cause, a commis tout acte ou omission qui est sanctionné par l'un des articles 83.02 à 83.04 et 83.18 à 83.23 du *Code criminel* ou le serait s'il avait été commis au Canada.

(2) Le tribunal n'est toutefois compétent que si l'affaire a un lien réel et substantiel avec le Canada.

Lien réel et substantiel avec le Canada

(3) La prescription relative à l'action intentée en vertu du paragraphe (1) ne court pas avant l'entrée en vigueur du présent article ni pendant la période où la personne qui a subi les pertes ou les dommages :

a) soit est incapable d'intenter une action en raison de son état physique, mental ou psychologique;

b) soit est incapable d'établir l'identité de l'entité inscrite, de la personne ou de l'État étranger visés aux alinéas (1)a) ou b).

Suspension de la prescription

(4) Le tribunal peut refuser d'entendre une demande déposée à l'encontre d'un État étranger en application du paragraphe (1) si le demandeur a subi les pertes ou les dommages dans l'État étranger et qu'il n'a pas accordé à cet État la possibilité raisonnable de soumettre le différend à l'arbitrage conformément aux règles d'arbitrage internationales reconnues.

Refus d'entendre la demande

Judgments of foreign courts

(5) A court of competent jurisdiction must recognize a judgment of a foreign court that, in addition to meeting the criteria under Canadian law for being recognized in Canada, is in favour of a person that has suffered loss or damage referred to in subsection (1). However, if the judgment is against a foreign state, that state must be set out on the list referred to in subsection 6.1(2) of the *State Immunity Act* for the judgment to be recognized.

(5) Tout tribunal compétent doit reconnaître tout jugement d'un tribunal étranger qui, en plus de satisfaire aux critères applicables en droit canadien pour être reconnu au Canada, est rendu en faveur de la personne ayant subi des pertes ou des dommages visée au paragraphe (1); toutefois, si le jugement est rendu contre un État étranger, il ne le reconnaît que si l'État est inscrit sur la liste visée au paragraphe 6.1(2) de la *Loi sur l'immunité des États*.

Jugement d'un tribunal étranger

R.S., c. S-18

#### AMENDMENTS TO THE STATE IMMUNITY ACT

**5. The heading before section 2 of the French version of the *State Immunity Act* is replaced by the following:**

##### DÉFINITIONS ET INTERPRÉTATION

**6. The Act is amended by adding the following after section 2:**

**2.1** For the purposes of this Act, a foreign state supports terrorism if it commits, for the benefit of or otherwise in relation to a listed entity as defined in subsection 83.01(1) of the *Criminal Code*, an act or omission that is, or had it been committed in Canada would be, punishable under sections 83.02 to 83.04 or 83.18 to 83.23 of the *Criminal Code*.

**7. The Act is amended by adding the following after section 6:**

**6.1** (1) A foreign state that is set out on the list referred to in subsection (2) is not immune from the jurisdiction of a court in proceedings against it for its support of terrorism on or after January 1, 1985.

(2) The Governor in Council may, by order, establish a list on which the Governor in Council may set out the name of a foreign state if, on the recommendation of the Minister of Foreign Affairs made after consulting with the Minister of Public Safety and Emergency Preparedness, the Governor in Council is satisfied that there are reasonable grounds to believe that the foreign state supported or supports terrorism.

Meaning of supports terrorism

Support of terrorism

List of foreign states

#### MODIFICATION DE LA LOI SUR L'IMMUNITÉ DES ÉTATS

**5. L'intertitre précédant l'article 2 de la version française de la *Loi sur l'immunité des États* est remplacé par ce qui suit :**

##### DÉFINITIONS ET INTERPRÉTATION

**6. La même loi est modifiée par adjonction, après l'article 2, de ce qui suit :**

**2.1** Pour l'application de la présente loi, un État étranger soutient le terrorisme s'il commet, au profit ou au regard de toute entité inscrite au sens du paragraphe 83.01(1) du *Code criminel*, tout acte ou omission qui est sanctionné par l'un des articles 83.02 à 83.04 et 83.18 à 83.23 de cette loi ou le serait s'il avait été commis au Canada.

**7. La même loi est modifiée par adjonction, après l'article 6, de ce qui suit :**

**6.1** (1) L'État étranger inscrit sur la liste visée au paragraphe (2) ne bénéficie pas de l'immunité de juridiction dans les actions intentées contre lui pour avoir soutenu le terrorisme le 1<sup>er</sup> janvier 1985 ou après cette date.

(2) Le gouverneur en conseil peut, par décret, établir une liste sur laquelle il peut inscrire tout État étranger s'il est convaincu, sur la recommandation du ministre des Affaires étrangères faite après consultation du ministre de la Sécurité publique et de la Protection civile, qu'il existe des motifs raisonnables de croire que cet État soutient ou a soutenu le terrorisme.

L.R., ch. S-18

Soutien du terrorisme — sens

Soutien du terrorisme

Liste d'États étrangers

Application to be removed from list	(3) On application in writing by a foreign state, the Minister of Foreign Affairs must, after consulting with the Minister of Public Safety and Emergency Preparedness, decide whether there are reasonable grounds to recommend to the Governor in Council that the applicant no longer be set out on the list.	(3) Le ministre des Affaires étrangères, saisi d'une demande écrite présentée par un État étranger, décide, après consultation du ministre de la Sécurité publique et de la Protection civile, s'il existe des motifs raisonnables de recommander ou non au gouverneur en conseil de radier cet État de la liste.	Demande de radiation
Notice of decision to applicant	(4) The Minister must without delay give notice to the applicant of the Minister's decision respecting the application.	(4) Il donne sans délai au demandeur un avis de la décision qu'il a rendue relativement à la demande.	Avis de la décision au demandeur
New application	(5) A foreign state set out on the list may not make another application under subsection (3), unless there has been a material change in its circumstances since the foreign state made its last application or the Minister has completed the review under subsection (6).	(5) L'État étranger ne peut présenter une nouvelle demande de radiation en vertu du paragraphe (3) que si sa situation a évolué d'une manière importante depuis la présentation de sa dernière demande ou que si le ministre a terminé l'examen mentionné au paragraphe (6).	Nouvelle demande de radiation
Review of list	(6) Two years after the establishment of the list, and every two years after that, the Minister of Foreign Affairs must review the list in consultation with the Minister of Public Safety and Emergency Preparedness to determine whether there are still reasonable grounds, as set out in subsection (2), for a foreign state to be set out on the list and make a recommendation to the Governor in Council as to whether the foreign state should remain set out on the list. The review does not affect the validity of the list.	(6) Deux ans après l'établissement de la liste et tous les deux ans par la suite, le ministre des Affaires étrangères examine celle-ci, en consultation avec le ministre de la Sécurité publique et de la Protection civile, pour savoir si les motifs visés au paragraphe (2) justifiant l'inscription d'un État étranger sur la liste existent toujours et recommande au gouverneur en conseil de radier ou non cet État de la liste. L'examen est sans effet sur la validité de la liste.	Examen périodique de la liste
Completion of review	(7) The Minister must complete the review as soon as feasible, but in any case within 120 days, after its commencement. After completing the review, the Minister must without delay cause a notice to be published in the <i>Canada Gazette</i> that it has been completed.	(7) Le ministre termine son examen dans les meilleurs délais mais au plus tard cent vingt jours après l'avoir commencé. Une fois l'examen terminé, il fait publier sans délai un avis à cet effet dans la <i>Gazette du Canada</i> .	Fin de l'examen
Exception	<b>8. Subsection 11(3) of the Act is replaced by the following:</b>	<b>8. Le paragraphe 11(3) de la même loi est remplacé par ce qui suit :</b>	
	(3) This section does not apply either to an agency of a foreign state or to a foreign state that is set out on the list referred to in subsection 6.1(2) in respect of an action brought against that foreign state for its support of terrorism.	(3) Le présent article ne s'applique pas aux organismes d'un État étranger ni à un État étranger inscrit sur la liste visée au paragraphe 6.1(2) dans le cadre de toute action intentée contre lui pour avoir soutenu le terrorisme.	Exception
	<b>9. (1) Paragraph 12(1)(b) of the Act is replaced by the following:</b>	<b>9. (1) L'alinéa 12(1)(b) de la même loi est remplacé par ce qui suit :</b>	

(b) the property is used or is intended to be used for a commercial activity or, if the foreign state is set out on the list referred to in subsection 6.1(2), is used or intended to be used by it to support terrorism;

**(2) Subsection 12(1) of the Act is amended by adding “or” at the end of paragraph (c) and by adding the following after that paragraph:**

(d) the foreign state is set out on the list referred to in subsection 6.1(2) and the attachment or execution relates to a judgment rendered in an action brought against it for its support of terrorism and to property other than property that has cultural or historical value.

**10. The Act is amended by adding the following after section 12:**

**12.1** (1) At the request of any party in whose favour a judgment is rendered against a foreign state in proceedings referred to in section 6.1, the Minister of Finance or the Minister of Foreign Affairs may, within the confines of his or her mandate, assist, to the extent that is reasonably practical, any judgment creditor in identifying and locating the following property, unless the Minister of Foreign Affairs believes that to do so would be injurious to Canada’s international relations or either Minister believes that to do so would be injurious to Canada’s other interests:

(a) in the case of the Minister of Finance, the financial assets of the foreign state that are held within Canadian jurisdiction; and

(b) in the case of the Minister of Foreign Affairs, the property of the foreign state that is situated in Canada.

(2) In exercising the power referred to in subsection (1), the Minister of Finance or the Minister of Foreign Affairs, as the case may be, may not disclose

(a) information that was produced in or for a government institution, without the authorization of the government institution; and

b) les biens sont utilisés ou destinés à être utilisés soit dans le cadre d’une activité commerciale, soit par l’État au soutien du terrorisme si celui-ci est inscrit sur la liste visée au paragraphe 6.1(2);

**(2) Le paragraphe 12(1) de la même loi est modifié par adjonction, après l’alinéa c), de ce qui suit :**

d) la saisie ou l’exécution a trait à un bien autre qu’un bien ayant une valeur culturelle ou historique et à un jugement rendu dans le cadre d’une action intentée contre l’État pour avoir soutenu le terrorisme, si celui-ci est inscrit sur la liste visée au paragraphe 6.1(2).

**10. La même loi est modifiée par adjonction, après l’article 12, de ce qui suit :**

**12.1** (1) À la demande d’une partie ayant obtenu gain de cause à l’encontre d’un État étranger dans le cadre d’une action visée à l’article 6.1, le ministre des Finances ou le ministre des Affaires étrangères peut, dans le cadre de son mandat et dans la mesure du possible, aider le créancier bénéficiaire du jugement à identifier et localiser les biens ci-après, sauf si, de l’avis du ministre des Affaires étrangères, cela est préjudiciable aux intérêts du Canada sur le plan des relations internationales ou, de l’avis de l’un ou l’autre des ministres, cela est préjudiciable aux autres intérêts du Canada :

a) s’agissant du ministre des Finances, les actifs financiers de l’État étranger ressortissant à la compétence du Canada;

b) s’agissant du ministre des Affaires étrangères, les biens de l’État étranger situés au Canada.

(2) Dans le cadre de l’exercice de ce pouvoir, le ministre ne peut communiquer aucun renseignement produit par ou pour une institution fédérale sans l’autorisation de celle-ci, ni aucun renseignement qui n’a pas été ainsi produit sans l’autorisation de la première institution fédérale à l’avoir reçu.

Assistance for judgment creditors

Aide aux créanciers bénéficiaires du jugement

Disclosure of information

Communication des renseignements

Definition of "government institution"	<p>(b) information produced in circumstances other than those referred to in paragraph (a), without the authorization of the government institution that first received the information.</p> <p>(3) In subsection (2), "government institution" means any department, branch, office, board, agency, commission, corporation or other body for the administration or affairs of which a minister is accountable to Parliament.</p>	5	<p>(3) Au paragraphe (2), « institution fédérale » s'entend des ministères, directions, bureaux, conseils, commissions, offices, services, personnes morales ou autres organismes dont un ministre est responsable devant le Parlement.</p>	5	Définition de « institution fédérale »
Exception	<p><b>11. Subsection 13(2) of the Act is replaced by the following:</b></p> <p>(2) Subsection (1) does not apply either to an agency of a foreign state or to a foreign state that is set out on the list referred to in subsection 6.1(2) in respect of an action brought against that foreign state for its support of terrorism.</p>	10	<p><b>11. Le paragraphe 13(2) de la même loi est remplacé par ce qui suit :</b></p> <p>(2) Le paragraphe (1) ne s'applique pas aux organismes d'un État étranger ni à un État étranger inscrit sur la liste visée au paragraphe 6.1(2) dans le cadre de toute action intentée contre lui pour avoir soutenu le terrorisme.</p>	10	Exception



## EXPLANATORY NOTES

## NOTES EXPLICATIVES

*State Immunity Act**Loi sur l'immunité des États*

*Clause 5:* Existing text of the heading:

*Article 5:* Texte de l'intertitre :

## INTERPRETATION

## DÉFINITIONS

*Clause 6:* New.

*Article 6:* Nouveau.

*Clause 7:* New.

*Article 7:* Nouveau.

*Clause 8:* Existing text of subsection 11(3):

*Article 8:* Texte du paragraphe 11(3):

(3) This section does not apply to an agency of a foreign state.

(3) Le présent article ne s'applique pas à un organisme d'un État étranger.

*Clause 9:* (1) and (2) Relevant portion of subsection 12(1):

*Article 9:* (1) et (2) Texte du passage visé du paragraphe 12(1):

**12.** (1) Subject to subsections (2) and (3), property of a foreign state that is located in Canada is immune from attachment and execution and, in the case of an action *in rem*, from arrest, detention, seizure and forfeiture except where

**12.** (1) Sous réserve des paragraphes (2) et (3), les biens de l'État étranger situés au Canada sont insaisissables et ne peuvent, dans le cadre d'une action réelle, faire l'objet de saisie, rétention, mise sous séquestre ou confiscation, sauf dans les cas suivants :

...

(b) the property is used or is intended for a commercial activity; or

[...]

b) les biens sont utilisés ou destinés à être utilisés dans le cadre d'une activité commerciale;

*Clause 10:* New.

*Article 10:* Nouveau.

*Clause 11:* Existing text of subsection 13(2):

*Article 11:* Texte du paragraphe 13(2):

(2) Subsection (1) does not apply to an agency of a foreign state.

(2) Le paragraphe (1) ne s'applique pas aux organismes des États étrangers.

**C-408**

Second Session, Fortieth Parliament,  
57-58 Elizabeth II, 2009

**HOUSE OF COMMONS OF CANADA**

## **BILL C-408**

An Act to amend the State Immunity Act and the Criminal Code (deterring terrorism by providing a civil right of action against perpetrators and sponsors of terrorism)

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FIRST READING, JUNE 4, 2009

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**NOTE**

3rd Session, 40th Parliament

This bill was introduced during the Second Session of the 40th Parliament. Pursuant to the Standing Orders of the House of Commons, it is deemed to have been considered and approved at all stages completed at the time of prorogation of the Second Session. The number of the bill remains unchanged.

MR. COTLER

**C-408**

Deuxième session, quarantième législature,  
57-58 Elizabeth II, 2009

**CHAMBRE DES COMMUNES DU CANADA**

## **PROJET DE LOI C-408**

Loi modifiant la Loi sur l'immunité des États et le Code criminel (mesure dissuasive: droit de recours civil contre les auteurs et les parrains d'actes de terrorisme)

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PREMIÈRE LECTURE LE 4 JUIN 2009

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**NOTE**

3<sup>e</sup> session, 40<sup>e</sup> législature

Le présent projet de loi a été présenté lors de la deuxième session de la 40<sup>e</sup> législature. Conformément aux dispositions du Règlement de la Chambre des communes, il est réputé avoir été examiné et approuvé à toutes les étapes franchies avant la prorogation de la deuxième session. Le numéro du projet de loi demeure le même.

M. COTLER

## SUMMARY

This enactment amends the *State Immunity Act* to prevent a foreign state from claiming immunity from the jurisdiction of Canadian courts in respect of legal proceedings that relate to the support of terrorism or terrorist activity engaged in by the foreign state.

It also amends the *Criminal Code* to provide victims who suffer loss or damage as a result of conduct that is contrary to Part II.1 of the *Criminal Code* (Terrorism) with a civil remedy against the person who engaged in the terrorist-related conduct.

## SOMMAIRE

Le texte modifie la *Loi sur l'immunité des États* afin d'empêcher un État étranger d'invoquer, devant les tribunaux canadiens, l'immunité de juridiction dans les actions judiciaires portant sur le soutien du terrorisme ou l'exercice d'activités terroristes par cet État.

Il modifie également le *Code criminel* afin que les victimes ayant subi une perte ou des dommages par suite d'un comportement qui contrevient à la partie II.1 du *Code criminel* (Terrorisme) disposent d'un recours civil à l'encontre de la personne ayant eu un comportement lié à des activités terroristes.

HOUSE OF COMMONS OF CANADA

CHAMBRE DES COMMUNES DU CANADA

## BILL C-408

## PROJET DE LOI C-408

An Act to amend the State Immunity Act and the Criminal Code (deterring terrorism by providing a civil right of action against perpetrators and sponsors of terrorism)

Loi modifiant la Loi sur l'immunité des États et le Code criminel (mesure dissuasive : droit de recours civil contre les auteurs et les parrains d'actes de terrorisme)

Preamble

Whereas United Nations Security Council Resolution 1373 (2001) reaffirms that acts of international terrorism constitute a threat to international peace and security, and reaffirms the need to combat by all means, in accordance with the Charter of the United Nations, threats to international peace and security caused by terrorist acts;

Whereas Canada ratified the 1999 International Convention for the Suppression of the Financing of Terrorism (the "Convention") on February 15, 2002;

Whereas article 4 of the Convention requires Canada as a signatory to take the necessary measures against any person that by any means, directly or indirectly, unlawfully and wilfully, provides or collects funds with the intention that they should be used or in the knowledge that they are to be used, in full or in part, in order to carry out offences under the Convention;

Whereas article 5 of the Convention states that each State Party shall ensure that legal entities liable in accordance with provisions of the Convention are subject to effective, proportionate and dissuasive criminal, civil or administrative sanctions that may include monetary sanctions;

Whereas the prohibition against terrorism, as well as the prevention, repression and elimination of terrorism, are peremptory norms of

Préambule

Attendu :

que la résolution 1373 de 2001 du Conseil de sécurité des Nations Unies réaffirme que les actes de terrorisme international constituent une menace à la paix et à la sécurité internationales et qu'il est nécessaire de lutter par tous les moyens, conformément à la Charte des Nations Unies, contre ces menaces à la paix et à la sécurité internationales que font peser les actes de terrorisme;

que, le 15 février 2002, le Canada a ratifié la Convention internationale pour la répression du financement du terrorisme de 1999 (ci-après la « Convention »);

que l'article 4 de la Convention exige que le Canada, en tant que signataire, prenne les mesures nécessaires à l'encontre de toute personne qui, par quelque moyen que ce soit, directement ou indirectement, illicitement et délibérément, fournit ou réunit des fonds dans l'intention de les voir utiliser — ou en sachant qu'ils seront utilisés — en tout ou en partie, en vue de commettre des infractions au sens de la Convention;

que l'article 5 de la Convention prévoit que chaque État Partie doit prendre les mesures nécessaires pour que les personnes morales dont la responsabilité est engagée aux termes des dispositions de la Convention fassent

international law (*jus cogens*) accepted and recognized by the international community of States as a whole as norms from which no derogation is possible;

Whereas state immunity is generally accepted as being restrictive or relative, applying only to sovereign acts of state (*acta jure imperii*);

Whereas the support and financing of terrorism, which are criminal acts under international law, are not sovereign acts for which a state is entitled to immunity;

Whereas the Convention and the United Nations Declaration on Measures to Eliminate International Terrorism encourage states to review urgently the scope of existing international legal provisions on the prevention, repression and elimination of terrorism with the aim of ensuring that there is a comprehensive legal framework covering all aspects of the matter;

Whereas the victims of terrorist acts include the individuals who are physically, emotionally or psychologically injured by the terrorist acts, as well as their family members;

Whereas hundreds of Canadians have been murdered or injured in terrorist attacks;

Whereas the Government of Canada reported to the Security Council that fighting terrorism is of the highest priority for the Government of Canada;

Whereas it is a policy priority of the Government of Canada to deter and prevent terrorist attacks against Canada and Canadians;

Whereas terrorism is dependent on financial and material support;

Whereas it is in the public interest to enable plaintiffs to bring civil lawsuits against terrorists and their sponsors, which will have the effect of impairing the functioning of terrorist groups, thereby deterring and preventing future terrorist attacks;

And whereas it is in the public interest that judicial awards against persons who engage in terrorist activities are sufficiently large to deter future such conduct;

l'objet de sanctions pénales, civiles ou administratives efficaces, proportionnées et dissuasives, notamment d'ordre pécuniaire;

que l'interdiction du terrorisme et la prévention, la répression et l'élimination du terrorisme font partie des normes impératives du droit international (*jus cogens*) que l'ensemble de la communauté internationale des États accepte et reconnaît comme des normes auxquelles il est impossible de déroger;

que l'immunité des États est un concept généralement reconnu comme étant restrictif ou relatif, ne s'appliquant qu'aux actes de gouvernement souverain (*acta jure imperii*);

que le soutien et le financement du terrorisme, qui constituent des actes criminels sous le régime du droit international, ne sont pas des actes de gouvernement souverain pouvant bénéficier de cette immunité;

que la Convention et la Déclaration sur les mesures visant à éliminer le terrorisme international, émanant des Nations Unies, encouragent les États à revoir de toute urgence la portée des dispositions actuelles du droit international sur la prévention, la répression et l'élimination du terrorisme afin de prévoir un cadre juridique exhaustif englobant tous les aspects de cette question;

que les victimes d'actes de terrorisme comprennent tant les particuliers qui ont été blessés physiquement, émotionnellement ou psychologiquement par ces actes que les membres de leur famille;

que des centaines de Canadiens ont été tués ou blessés lors d'attaques terroristes;

que le gouvernement du Canada a indiqué au Conseil de sécurité que la lutte contre le terrorisme est de la plus grande priorité pour le gouvernement du Canada;

que le gouvernement du Canada considère comme une priorité stratégique le fait de prévenir et de décourager les attaques terroristes contre le Canada et les Canadiens;

que le terrorisme s'appuie sur le soutien financier et matériel qui lui est fourni;

qu'il est dans l'intérêt public de permettre aux demandeurs d'intenter des poursuites civiles contre les terroristes et leurs parrains, ce qui aura pour effet d'entraver le fonctionnement des groupes terroristes et, par conséquent, de décourager et de prévenir de futures attaques terroristes;

qu'il est dans l'intérêt public que les décisions judiciaires prononcées à l'encontre des personnes qui se livrent à des activités 10 terroristes imposent des peines suffisamment sévères pour décourager de tels comportements à l'avenir,

Now, therefore, Her Majesty, by and with the advice and consent of the Senate and House of Commons of Canada, enacts as follows:

Sa Majesté, sur l'avis et avec le consentement du Sénat et de la Chambre des communes du Canada, édicte :

R.S., c. S-18

**STATE IMMUNITY ACT**

**LOI SUR L'IMMUNITÉ DES ÉTATS**

L.R., ch. S-18

**1. The *State Immunity Act* is amended by adding the following after section 2:**

**1. La *Loi sur l'immunité des États* est 5 modifiée par adjonction, après l'article 2, de ce qui suit :**

Meaning of engaging in the support of terrorism

**2.1** (1) For the purposes of this Act, a foreign state engages in the support of terrorism if the foreign state knowingly or recklessly provides, directly or indirectly, material support to a listed entity as defined in subsection 83.01(1) of the *Criminal Code*, or to a terrorist group as defined in subsection 83.01(1) of the *Criminal Code* that acts on behalf of, at the direction of or in association with a listed entity.

**2.1** (1) Pour l'application de la présente loi, 20 un État étranger soutient le terrorisme s'il fournit directement ou indirectement, sciemment ou sans se soucier des conséquences, un soutien matériel à une entité inscrite au sens du paragraphe 83.01(1) du *Code criminel* ou à un 25 groupe terroriste, au sens du même paragraphe, qui agit au nom d'une entité inscrite, sous sa direction ou en collaboration avec elle.

Soutien du terrorisme — sens

Definition of "material support"

(2) In this section, "material support" means 15 currency or monetary instruments, financial securities, financial services, lodging, training, expert advice or assistance, safehouses, false documentation or identification, communications equipment, facilities, weapons, lethal 20 substances, explosives, personnel, transportation, and other physical assets, but does not include medicine or religious materials.

(2) Dans le présent article, «soutien matériel» s'entend des espèces ou effets, des 30 garanties financières, des services financiers, de l'hébergement, de la formation, des conseils ou de l'aide d'experts, des maisons de passeurs, des faux documents, des fausses identités, des équipements de communication, des installa- 35 tions, des armes, des substances létales, des explosifs, du personnel, du transport et de tout autre bien matériel. La présente définition exclut les médicaments et le matériel religieux.

Définition de «soutien matériel»

**2. The Act is amended by adding the following after section 6:**

**2. La même loi est modifiée par adjonc- 40 tion, après l'article 6, de ce qui suit :**

Support of terrorism

**6.1** (1) A foreign state is not immune from the jurisdiction of a court in any proceedings that relate to the support of terrorism engaged in by the foreign state on or after January 1, 1985.

**6.1** (1) L'État étranger ne bénéficie pas de l'immunité de juridiction dans les actions portant sur le soutien du terrorisme fourni par lui le 1<sup>er</sup> janvier 1985 ou après cette date. 45

Soutien du terrorisme

Engagement in terrorist activity	(2) A foreign state that, on or after January 1, 1985, engaged or engages in the support of terrorism is not immune from the jurisdiction of a court in any proceedings that relate to terrorist activity as defined in subsection 83.01(1) of the <i>Criminal Code</i> engaged in by the foreign state on or after January 1, 1985.	(2) L'État étranger qui, le 1 <sup>er</sup> janvier 1985 ou après cette date, a soutenu ou soutient le terrorisme ne bénéficie pas de l'immunité de juridiction dans les actions portant sur une activité terroriste, au sens du paragraphe 83.01(1) du <i>Code criminel</i> , à laquelle il s'est livré le 1 <sup>er</sup> janvier 1985 ou après cette date.	Exercice d'une activité terroriste
Exception	(3) Subsections (1) and (2) do not apply in respect of a foreign state that is  (a) designated as an extradition partner in the schedule to the <i>Extradition Act</i> ; or  (b) bound by a bilateral extradition treaty with Canada.	(3) Les paragraphes (1) et (2) ne s'appliquent pas à l'État étranger qui est :  a) soit un partenaire désigné à l'annexe de la <i>Loi sur l'extradition</i> ;  b) soit lié par un traité d'extradition bilatéral conclu avec le Canada.	Exception
	<b>3. Subsection 11(3) of the Act is replaced by the following:</b>	<b>3. Le paragraphe 11(3) de la même loi est remplacé par ce qui suit :</b>	
Application of section	(3) This section does not apply to an agency of a foreign state <u>or in respect of proceedings that relate to terrorist activity or the support of terrorism engaged in by a foreign state.</u>  4. (1) Paragraph 12(1)(b) of the Act is replaced by the following:  (b) the property is used or is intended for a commercial activity, <u>terrorist activity or the support of terrorism;</u>  (2) Subsection 12(1) of the Act is amended by adding "or" at the end of paragraph (c) and by adding the following after that paragraph:  (d) the attachment or execution relates to a judgment rendered in any proceedings that relate to terrorist activity or the support of terrorism.	(3) Le présent article ne s'applique pas <u>aux organismes</u> d'un État étranger <u>ni aux actions</u> portant sur l'exercice d'activités terroristes ou le soutien du terrorisme par un État étranger.  4. (1) L'alinéa 12(1)(b) de la même loi est remplacé par ce qui suit :  b) les biens sont utilisés ou destinés à être utilisés dans le cadre d'une activité commerciale ou d'une activité terroriste ou au soutien du terrorisme;  25  2 (2) Le paragraphe 12(1) de la même loi est modifié par adjonction, après l'alinéa c), de ce qui suit :  d) la saisie ou l'exécution a trait à un jugement rendu dans le cadre d'une action portant sur l'exercice d'activités terroristes ou le soutien du terrorisme.	Restriction
	<b>5. The Act is amended by adding the following after section 12:</b>	<b>5. La même loi est modifiée par adjonction, après l'article 12, de ce qui suit :</b>	
Assistance for judgment creditors	12.1 (1) At the request of any party in whose favour a judgment is rendered against a foreign state in proceedings referred to in section 6.1, the Minister of Finance and the Minister of Foreign Affairs shall, within the scope of their powers and to the extent that is reasonably practicable, assist any judgment creditor or the court that has rendered the	12.1 (1) À la demande d'une partie ayant obtenu gain de cause à l'encontre d'un État étranger dans le cadre d'une action visée à l'article 6.1, le ministre des Finances et le ministre des Affaires étrangères doivent, dans les limites de leurs pouvoirs et dans la mesure du possible, aider le créancier bénéficiaire du jugement ou le tribunal ayant rendu le jugement	Aide aux créanciers bénéficiaires du jugement

Definition of "instrumentality"

judgment in identifying and locating the property of that foreign state or any agency or instrumentality of the foreign state.

(2) In this section, "instrumentality", in respect of a foreign state, means a legal entity

(a) that is separate from the foreign state; and

(b) in which the foreign state has a direct or indirect controlling or majority ownership interest.

à identifier et à localiser les biens de cet État ou d'un organisme ou d'une personne morale de droit public de celui-ci.

(2) Dans le présent article, « personne morale de droit public » s'entend, à l'égard d'un État étranger, d'une personne morale qui remplit les conditions suivantes :

a) elle est distincte de cet État;

b) cet État en détient, directement ou indirectement, le contrôle ou la majorité des titres de participation.

Définition de « personne morale de droit public »

**6. Subsection 13(2) of the Act is replaced by the following:**

(2) Subsection (1) does not apply to an agency of a foreign state or in respect of proceedings that relate to terrorist activity or the support of terrorism engaged in by a foreign state.

**6. Le paragraphe 13(2) de la même loi est remplacé par ce qui suit :**

(2) Le paragraphe (1) ne s'applique pas aux organismes d'un État étranger ni aux actions portant sur l'exercice d'activités terroristes ou le soutien du terrorisme par un État étranger.

Application of subsection (1)

Exception

R.S., c. C-46

**CRIMINAL CODE**

**CODE CRIMINEL**

L.R., ch. C-46

**7. The Criminal Code is amended by adding the following after section 83.33:**

**7. Le Code criminel est modifié par adjonction, après l'article 83.33, de ce qui suit :**

**ACTION FOR LOSS OR DAMAGE**

**ACTION POUR PERTE OU DOMMAGES**

Definition of "person"

**83.34** (1) In this section, unless otherwise indicated, "person" includes a foreign state as defined in the *State Immunity Act*.

**83.34** (1) Dans le présent article, sauf indication contraire, est assimilé à une personne un État étranger au sens de la *Loi sur l'immunité des États*.

Définition de « personne »

Action

(2) Any person, other than a foreign state, who has suffered loss or damage on or after January 1, 1985 as a result of conduct by any person that is contrary to any provision of this Part, whether the conduct occurred in or outside Canada, may, in any court of competent jurisdiction, sue for and recover from the person who engaged in the conduct an amount equal to the loss or damage proved to have been suffered by the person, together with any additional amount that the court may allow.

(2) Toute personne — autre qu'un État étranger — qui, le 1<sup>er</sup> janvier 1985 ou après cette date, a subi une perte ou des dommages par suite d'un comportement — au Canada ou à l'étranger — allant à l'encontre d'une disposition de la présente partie peut, devant tout tribunal compétent, réclamer et recouvrer de la personne qui a eu un tel comportement une somme égale au montant de la perte ou des dommages qu'elle est reconnue avoir subis, ainsi que toute somme supplémentaire que peut fixer le tribunal.

Action

Deeming

(3) In any action under subsection (2), the defendant's conduct is deemed to have caused or contributed to the loss or damage to the plaintiff if the court finds that

(3) Dans toute action intentée en vertu du paragraphe (2), le comportement du défendeur est réputé avoir causé la perte ou les dommages subis par le demandeur, ou y avoir contribué, si le tribunal conclut, à la fois :

Présomption

Suspension of limitation period	<p>(a) a listed entity caused or contributed to the loss or damage to the plaintiff by engaging in conduct that is contrary to any provision of this Part, whether the conduct occurred in or outside Canada; and 5</p> <p>(b) the defendant engaged in conduct that is contrary to any of sections 83.02 to 83.04, 83.08, 83.1, 83.11 or 83.18 to 83.231 for the benefit of or otherwise in relation to that listed entity. 10</p> <p>(4) The running of any limitation period in respect of an action brought under subsection (2) is suspended during any period in which the person, other than a foreign state, who suffered the loss or damage 15</p>	<p>a) qu'une entité inscrite a causé la perte ou les dommages, ou y a contribué, parce qu'elle a eu un comportement—au Canada ou à l'étranger—allant à l'encontre d'une disposition de la présente partie; 5</p> <p>b) que le défendeur a eu un comportement allant à l'encontre de l'un des articles 83.02 à 83.04, 83.08, 83.1, 83.11 et 83.18 à 83.231 au profit de l'entité inscrite ou autrement par rapport à celle-ci. 10</p> <p>(4) La prescription relative à l'action intentée en vertu du paragraphe (2) ne court pas pendant la période où la personne — autre qu'un État étranger — qui a subi la perte ou les dommages : 15</p>	Suspension de la prescription
Refusal to hear claim	<p>(a) is incapable of commencing a proceeding by reason of any physical, mental or psychological condition; or</p> <p>(b) is unable to ascertain the identity of the person who engaged in the conduct that 20 resulted in the loss or damage.</p> <p>(5) The court may refuse to hear a claim against a foreign state under subsection (2) if the loss or damage to the plaintiff occurred in the foreign state against which the action has been 25 brought and the plaintiff has not afforded the foreign state a reasonable opportunity to arbitrate the dispute in accordance with accepted international rules of arbitration.</p>	<p>a) soit est incapable d'intenter une procédure en raison de son état physique, mental ou psychologique;</p> <p>b) soit est incapable d'établir l'identité de la personne ayant eu le comportement qui a 20 entraîné la perte ou les dommages.</p> <p>(5) Le tribunal peut refuser d'entendre une demande déposée à l'encontre d'un État étranger en application du paragraphe (2) si la perte ou les dommages ont été subis par le demandeur 25 dans l'État étranger contre lequel l'action a été intentée et que le demandeur n'a pas accordé à cet État l'occasion de soumettre le différend à l'arbitrage conformément aux règles d'arbitrage internationales reconnues. 30</p>	Refus d'entendre la demande
Judgments of foreign courts	<p>(6) Any court of competent jurisdiction shall 30 give full faith and credit to a judgment or order of any foreign court in favour of a person, other than a foreign state, who has suffered loss or damage as a result of conduct that is or, had it occurred in Canada, would be contrary to any 35 provision of this Part.</p>	<p>(6) Tout tribunal compétent doit accorder pleine foi et crédit au jugement ou à l'ordonnance d'un tribunal étranger rendu en faveur d'une personne—autre qu'un État étranger—ayant subi une perte ou des dommages par 35 suite d'un comportement qui va à l'encontre d'une disposition de la présente partie ou qui irait à l'encontre de celle-ci s'il avait eu lieu au Canada.</p>	Jugement d'un tribunal étranger
Extradition partners	<p>(7) For greater certainty, no proceedings may be brought under this section against a foreign state referred to in subsection 6.1(3) of the <i>State Immunity Act</i>. 40</p>	<p>(7) Il demeure entendu qu'aucune action ne 40 peut être intentée au titre du présent article contre un État étranger visé au paragraphe 6.1(3) de la <i>Loi sur l'immunité des États</i>.</p>	Partenaires
Liability and burden of proof	<p>(8) For greater certainty,</p>	<p>(8) Il demeure entendu que :</p>	Responsabilité et charge de la preuve

	(a) criminal liability under this Part is not required to establish civil liability under this section; and	a) l'établissement de la responsabilité civile en application du présent article n'est pas assujéti à l'établissement de la responsabilité criminelle dans le cadre de la présente partie;	
	(b) the burden of proof in proceedings under this section shall be the balance of probabilities.	b) dans toute action intentée en vertu du présent article, la charge de la preuve repose sur la prépondérance des probabilités.	
Jurisdiction	(9) For greater certainty,	(9) Il demeure entendu :	Compétence
	(a) universal jurisdiction is not created in respect of the cause of action referred to in this section;	a) qu'une compétence universelle n'est pas créée à l'égard de la cause d'action visée au présent article;	
	(b) this section does not affect the common law requirement that a real and substantial connection exist between the cause of action and Canada; and	b) que le présent article ne porte pas atteinte au principe de la common law selon lequel il doit exister un lien réel et substantiel entre la cause d'action et le Canada;	15
	(c) it is sufficient to establish that the plaintiff is a Canadian citizen or a permanent resident within the meaning of subsection 2(1) of the <i>Immigration and Refugee Protection Act</i> in order to establish the existence of a real and substantial connection between the cause of action and Canada.	c) qu'il suffit d'établir que le demandeur est un citoyen canadien ou un résident permanent au sens du paragraphe 2(1) de la <i>Loi sur l'immigration et la protection des réfugiés</i> pour établir l'existence d'un lien réel et substantiel entre la cause d'action et le Canada.	20

#### COMING INTO FORCE

Coming into force

**8. This Act comes into force 30 days after the day on which this Act receives royal assent.**

#### ENTRÉE EN VIGUEUR

Entrée en vigueur

**8. La présente loi entre en vigueur trente jours après la date de sa sanction.**