Legislative Summary **LS-652E**

BILL C-35: AN ACT TO DETER TERRORISM, AND TO AMEND THE STATE IMMUNITY ACT

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LEGISLATIVE HISTORY OF BILL C-35

HOUSE OF COMMONS		SENATE	
Bill Stage	**Date**	**Bill Stage**	**Date**
First Reading:	2 June 2009	First Reading:	
Second Reading:		Second Reading:	
Committee Report:		Committee Report:	
Report Stage:		Report Stage:	
Third Reading:		Third Reading:	

Royal Assent:

Statutes of Canada

This bill did not become law before the 2nd Session of the 40th Parliament ended on 30 December 2009.

N.B. Any substantive changes in this Legislative Summary that have been made since the preceding issue are indicated in **bold print**.

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BILL C-35: AN ACT TO DETER TERRORISM, AND TO AMEND THE STATE IMMUNITY ACT*

INTRODUCTION

Bill C-35, An Act to deter terrorism, and to amend the State Immunity Act (the Justice for Victims of Terrorism Act(1) or JVTA) was introduced in the House of Commons on 2 June 2009 by the Minister of Public Safety, the Honourable Peter Van Loan. The bill creates a cause of action (i.e., grounds to sue) that allows victims of terrorism to sue individuals, organizations and terrorist entities for loss or damage suffered as a result of acts or omissions that are punishable under Part II.1 of the *Criminal Code*(2) (the part of the Code dealing with terrorism offences) and which have been committed by these individuals, organizations or entities. It also allows victims of terrorism to sue foreign states that have supported terrorist entities which have committed such acts, in certain circumstances. The victim's loss or damage can have occurred inside or outside Canada but must have occurred on or after 1 January 1985. If the loss or damage occurs outside Canada, there must be a "real and substantial" connection to this country. Bill C-35 also amends the *State Immunity Act*(3) to create a new exception to state immunity, the general rule that prevents states from being sued in Canada's domestic courts. However, the new exception serves to remove state immunity only when the state in question has been placed on a list established by Cabinet on the basis that there are reasonable grounds to believe that it has supported or currently supports terrorism.

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* Notice: For clarity of exposition, the legislative proposals set out in the bill described in this Legislative Summary are stated as if they had already been adopted or were in force. It is important to note, however, that bills may be amended during their consideration by the House of Commons and Senate, and have no force or effect unless and until they are passed by both houses of Parliament, receive Royal Assent, and come into force.

(1) See clause 1 of Bill C-35.

(2) R.S.C. 1985, c. C-46.

(3) R.S.C. 1985, c. S-18.

Bill C-35 is similar to a number of private members' bills and senators' public bills that have been introduced in Parliament since 2005.(4) The primary difference between the previous bills and Bill C-35 is that the other bills sought to include the cause of action in the *Criminal Code*, whereas Bill C-35 creates a free-standing civil cause of action.

BACKGROUND AND CONTEXT

One of the most significant features of Bill C-35 is the fact that it gives victims of terrorist acts the ability to sue foreign states that support terrorism in Canada's domestic courts.(5) Most states do not recognize sponsoring or supporting terrorism as an exception to the general state immunity principle.(6)

Customary international law historically gave states, their agents and instrumentalities complete immunity from being sued in the domestic courts of other states. This principle arose out of another international law principle – the sovereign equality of states. As stated by law professor John Currie, "[i]f all states are equal in international law, so the theory goes, no one state should be able to subject another to the process of its courts."(7)

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(4) From the 1st Session of the 38th Parliament, see bills C-367, C-394 and S-35, all entitled An Act to amend the State Immunity Act and the Criminal Code (terrorist activity); from the 1st Session of the 39th Parliament, see bills C-272 and C-346, both entitled An Act to amend the State Immunity Act and the Criminal Code (terrorist activity), and Bill S-218, An Act to amend the State Immunity Act and the Criminal Code (civil remedies for victims of terrorism); from the 2nd Session of the 39th Parliament, see bills C-272 and C-346, both entitled An Act to amend the State Immunity Act and the Criminal Code (terrorist activity), and Bill S-225, An Act to amend the State Immunity Act and the Criminal Code (deterring terrorism by providing a civil right of action against the perpetrators and sponsors of terrorism). None of these bills received Royal Assent prior to the dissolution or prorogation of the particular Parliament or parliamentary session in which they were introduced. Similar bills have been introduced in the current 2nd Session of the 40th Parliament: see bills C-408 and S-233, both 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 texts of all these bills are available on the Parliament of Canada's website at http://www2.parl.gc.ca/Sites/LOP/LEGISINFO/index.asp?Language=E&Session=22&List=search.

(5) Prior to the introduction of Bill C-35, victims of terrorist acts arguably had the capacity to sue individual terrorists, or terrorist entities or groups, for loss or damage suffered, using general Canadian civil responsibility or tort law principles. For more information on this topic, see the Commentary section of this Legislative Summary.

(6) This is perhaps because there is no clear international consensus regarding a definition of terrorism or terrorist activity.

(7) John Currie, *Public International Law*, Irwin Law Inc., Toronto, 2001, p. 318.

Subsection 3(1) of the *State Immunity Act* demonstrates Canada's acceptance of this general rule. It states: "Except as provided by this Act, a foreign state is immune from the jurisdiction of any court in Canada." A foreign state is defined, in section 2 of the *State Immunity Act*, to include sovereigns or other heads of foreign states when acting in their public capacity, as well as governments, departments or agencies of that state. It also includes heads of political subdivisions, such as provinces, when acting in their public capacity, and political subdivision governments, departments and agencies. Having said this, exceptions to the general rule of complete immunity have evolved in customary international law over time. Parliament has acknowledged this evolution by codifying the most common exceptions to the general rule of state immunity in the *State Immunity Act* as it currently stands. These exceptions include:

- proceedings where the state waives its immunity by initiating or intervening in proceedings in a Canadian court, apart from proceedings or interventions initiated by the state for the purpose of asserting its immunity (section 4);
- proceedings related to the commercial activities of the foreign state (section 5);
- proceedings related to death, personal or bodily injury, or damage to or loss of property, that occur in Canada (section 6);
- proceedings related to ships and cargo owned by a foreign state if the ship is used or intended for commercial activity (section 7); and
- proceedings related to an interest of a foreign state in property in Canada arising by way of gift or succession (section 8).

In each of these situations, Canadian courts have civil jurisdiction over foreign states, their agents and their instrumentalities. Bill C-35 seeks to add a new exception for state support of terrorism.

The only country with similar legislation appears to be the United States, which has enacted the *Antiterrorism and Effective Death Penalty Act of 1996* and has amended its *Foreign State Immunity Act* to provide for an exception similar to that proposed in C-35. More information on the American experience is provided below in the Commentary section of this Legislative Summary.

DESCRIPTION AND ANALYSIS

Bill C-35 contains a preamble and 11 clauses.

A. Preamble

The preamble provides some insight into the motivating factors behind Bill C-35, the objectives it is designed to serve and the context within which it is to be interpreted and applied if adopted by Parliament. In particular, the preamble:

- recognizes the nature of the threat terrorism poses to national security and to Canadians and people everywhere;
- describes a related United Nations Security Council Resolution and refers to commitments Canada has made internationally by ratifying the United Nations Convention regarding combating and suppressing terrorism;
- acknowledges the injuries and deaths experienced by victims of terrorist attacks;
- expresses the fact that terrorists need financial and material support in order to perform acts of terror;
- asserts that certain states that support terrorism should not benefit from state immunity; and
- states that the primary purposes behind allowing plaintiffs to sue terrorists and their supporters are to impair the functioning of terrorist groups and to deter and prevent terrorist conduct.

B. Title and Interpretation (Clauses 1 and 2)

Clause 1 provides the short title for the new Act introduced by Bill C-35: the Justice for Victims of Terrorism Act.

Clause 2 defines three terms that are used throughout the JVTA. All three terms are defined in relation to definitions that are contained in other statutes. Clause 2 of the JVTA defines “foreign state” as having the same meaning as in section 2 of the *State Immunity Act*. As stated above, this means that a foreign state includes sovereigns or other heads of state when acting in their public capacity, as well as governments, departments or agencies of the state, the heads of political subdivisions of the state, such as provinces, when acting in their public capacity, and political subdivision governments, departments and agencies.

Similarly, "listed entity" is defined as having the same meaning as in subsection 83.01(1) of the *Criminal Code*, which defines it as "an entity on a list established by the Governor in Council under section 83.05." Sections 83.05 to 83.07 of the *Criminal Code*[8] set out the process for listing entities and the criteria of which the Governor in Council must be satisfied before an entity can be listed.[9]

Finally, "person" is defined in clause 2 as including an organization as that term is defined in section 2 of the *Criminal Code*. Section 2 of the Code states that an "organization" means:

> (*a*) a public body, body corporate, society, company, firm, partnership, trade union or municipality, or
>
> (*b*) an association of persons that
>
> (i) is created for a common purpose,
>
> (ii) has an operational structure, and
>
> (iii) holds itself out to the public as an association of persons.

By incorporating the definitions contained in other statutes by reference, Bill C-35 defines the three terms contained in clause 2 (in particular, "foreign state" and "listed entity") in a much broader and more detailed fashion than is immediately apparent from the words themselves.

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(8) Currently, 40 entities are listed as terrorist entities under sections 83.05 to 83.07 of the *Criminal Code*. The list is available on the Public Safety Canada website at http://www.publicsafety.gc.ca/prg/ns/le/cle-en.asp.

(9) Under these provisions, the Minister of Public Safety recommends listing, based on criminal and security intelligence reports received from law enforcement and security agencies, and Cabinet decides whether or not to list. The basis for listing an entity is that there are reasonable grounds to believe that an entity, which may be an organization or an individual, has knowingly been involved in a terrorist activity or is knowingly assisting a terrorist group. The Minister of Public Safety is required to review the list of entities every two years to determine whether or not reasonable grounds to keep the entity on the list remain, and then makes a recommendation to Cabinet about whether or not the entity should be retained on the list. Entities may not challenge or make submissions with respect to the listing decision prior to its being made. They can, however, apply to the Minister to be removed from the list once they have been added to it, and, if their application is refused, apply to the Federal Court for judicial review of the Minister's decision. It is not a crime to be a listed entity in Canada. It can, however, have serious consequences, because listing means that the entity is automatically defined as a terrorist group, and those who associate with terrorist groups may be charged with terrorism-related offences under the *Criminal Code*.

C. Purpose (Clause 3)

Clause 3 states that the JVTA's purpose is to "deter terrorism by establishing a cause of action that allows victims of terrorism to sue perpetrators of terrorism and their supporters." The fact that the bill's stated purpose is to "establish a cause of action" that allows for civil lawsuits might raise the question of whether or not Parliament has the necessary constitutional jurisdiction to enact the JVTA. This issue is discussed in further detail in the Commentary section at the end of this Legislative Summary.

D. Cause of Action (Clause 4)

Clause 4 provides the parameters of the new cause of action created by Bill C-35. In many respects, the cause of action is broad in scope. For example, clause 4(1) states that any person may bring such an action, regardless of whether the loss or damage he or she suffered occurred inside or outside Canada, as long as the act or omission that caused the loss or damage "is, or had it been committed in Canada would be, punishable under Part II.1 of the *Criminal Code*." As stated previously, Part II.1 of the *Criminal Code* contains terrorism-related offences. Accordingly, in order to sue under the JVTA, the plaintiff must have suffered loss or damage as a result of a defendant's having committed one or more of the following acts or omissions (section numbers refer to the Code):

- wilfully and knowingly collecting or providing property for terrorist or certain other activities (section 83.02);
- intentionally providing or making property or services available for terrorist activities (section 83.03);
- using or possessing property for the purpose of facilitating or carrying out terrorist activities (section 83.04);
- knowingly dealing in property owned or controlled by a terrorist group, knowingly entering into or facilitating any transaction in respect of such property, or knowingly providing financial or other services in respect of such property (sections 83.08 and 83.12);
- failing to disclose the existence of property in his or her possession and control that the defendant knows is owned or controlled by or on behalf of a terrorist group to the Commissioner of the Royal Canadian Mounted Police or the Director of the Canadian Security Intelligence Service (sections 83.1 and 83.12);

- in the case of a financial institution, trust or loan company, credit association or other deposit-taking institution, or insurance company or securities dealer, failing to report that it is, or is not, in possession and control of property owned or controlled by a listed entity, and if it is in possession of such property, failing to report details regarding such property (sections 83.11 and 83.12);

- knowingly participating in the activity of a terrorist group (section 83.18);

- knowingly facilitating a terrorist activity (section 83.19);

- committing an indictable offence for the benefit of, at the direction of or in association with a terrorist group (section 83.2);

- directly or indirectly instructing a person to carry out an activity for the benefit of, at the direction of or in association with a terrorist group (section 83.21);

- directly or indirectly instructing a person to carry out a terrorist activity (section 83.22);

- knowingly harbouring a person whom he or she knows has carried out or is likely to carry out a terrorist activity, in order to enable the person or to facilitate the ability of the person to do so (section 83.23); or

- committing a hoax regarding terrorist activity (section 83.231).

Given that clause 4 creates a civil cause of action, presumably the standard of proof that would be used to determine that the defendant committed one or more of the acts or omissions outlined above, as well as the standard that would be used to demonstrate that the act or omission in question caused harm to the plaintiff, would be the "balance of probabilities" standard. That standard is generally used in civil litigation, rather than the higher, "beyond a reasonable doubt" standard used in criminal law. The lower standard of proof would serve to broaden the scope of the cause of action outlined in the JVTA, by increasing the likelihood of a successful claim.

The time limit applicable to bringing this cause of action also appears to be quite broad. Clause 4(1) is retrospective in scope: it allows victims who have suffered loss or damage as a result of terrorist acts or omissions to bring an action against the perpetrators of such acts or omissions as long as they were committed on or after 1 January 1985 (it is more common for legislation to apply only to actions committed on or after the date when it is enacted). The JVTA is likely designed to operate retrospectively so that families of the victims of the bombing of Air India Flight 182, which occurred on 23 June 1985, can potentially benefit from this new cause of action.

In addition, clause 4(3) of the JVTA states that any "limitation or prescription period" for bringing an action described in clause 4(1) does not start running until clause 4 comes into force. Clause 4(3) also suspends the running of the limitation or prescription period during such time as the person who suffered the loss or damage is incapable of commencing an action because of a physical, mental or psychological condition, or is unable to determine the identity of the person, listed entity or foreign state that engaged in the conduct resulting in the damage to him or her. Finally, clause 4(1) specifies that the cause of action may be brought in "any court of competent jurisdiction," which appears to give the victim a choice of forum, as long as the court in question has jurisdiction over the forum and subject matter in question, as well as the authority to make the order sought.(10)

Although the cause of action itself, the time limit for bringing such an action and the forum for bringing the action all serve to broaden the scope of this new cause of action, other parts of clause 4 impose restrictions or limits on how this cause of action may be used, particularly in relation to foreign states. For example, although clause 4(1)(*a*) allows victims of terrorist acts to sue persons, organizations and listed entities who have caused them loss or damage by committing any act or omission punishable under Part II.1 of the *Criminal Code*,

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(10) See *Mills* v. *The Queen*, [1986] 1 S.C.R. 863, para. 99. Presumably, all superior courts would have the necessary jurisdiction to render judgments in actions initiated under clause 4 of the JVTA on the basis of their inherent jurisdiction to hear any matter that comes before them, unless a statute or rule limits that authority or grants exclusive jurisdiction to some other court or tribunal, in accordance with the doctrine of inherent jurisdiction (see *College Housing Co-operative Ltd.* v. *Baxter Student Housing Ltd.*, [1976] 2 S.C.R. 475). Statutory courts, such as provincial courts or the Federal Court, may also have the necessary jurisdiction to render judgment in such actions in circumstances where they have been granted such jurisdiction by statute. For example, paragraph 3(1)(a) of the *Small Claims Act*, R.S.B.C. 1996, c. 430, gives the Provincial Court of British Columbia jurisdiction in a claim for debt or damages as long as "the amount claimed or the value of the personal property or services is equal to or less than an amount that is prescribed by regulation, excluding interest and costs," with the maximum currently at $25,000 under section 1 of the *Small Claims Court Monetary Limit Regulation*, B.C. Reg. 179/2005. Accordingly, a victim whose claim for damages was no more than $25,000 could potentially initiate a civil action pursuant to clause 4 of the JVTA in that court. In the case of the Federal Court, section 22(1) of the *Federal Courts Act*, R.S.C. 1985, c. F-7, gives the Federal Court "concurrent original jurisdiction, between subject and subject as well as otherwise, in all cases in which a claim for relief is made or a remedy is sought under or by virtue of Canadian maritime law or any other law of Canada relating to any matter coming within the class of subject of navigation and shipping, except to the extent that jurisdiction has been otherwise specially assigned." Accordingly, if an act of terrorism occurred aboard a ship, for example, and the victim suffered loss or damage as a result of that action, he or she could potentially initiate a civil action pursuant to clause 4 of the JVTA in the Federal Court.

foreign states may be sued only if they did something to benefit the person, organization, or listed entity that actually caused the harm in question. As such, it appears that the cause of action does not cover situations where a state was involved directly.

Clause 4(1)(*b*) provides that if foreign states, persons, organizations or listed entities did not themselves commit the act that caused the harm, but merely did something to benefit the listed entity which committed that act, they will be found liable only if they committed one or more of the following acts (section numbers refer to the *Criminal Code*):

- wilfully and knowingly collecting or providing property for terrorist or certain other activities (section 83.02);
- intentionally providing or making property or services available for terrorist activities (section 83.03);
- using or possessing property for the purpose of facilitating or carrying out terrorist activities (section 83.04);
- knowingly participating in the activity of a terrorist group (section 83.18);
- knowingly facilitating a terrorist activity (section 83.19);
- committing an indictable offence for the benefit of, at the direction of or in association with a terrorist group (section 83.2);
- directly or indirectly instructing a person to carry out an activity for the benefit of, at the direction of or in association with a terrorist group (section 83.21);
- directly or indirectly instructing a person to carry out a terrorist activity (section 83.22);
- knowingly harbouring a person whom he or she knows has carried out or is likely to carry out a terrorist activity, in order to enable the person or to facilitate the ability of the person to do so (section 83.23).

In addition, clause 4(2) of the JVTA provides that courts may hear and determine the cause of action referred to in clause 4(1) only if the action "has a real and substantial connection to Canada" (i.e., the victim is Canadian, the defendant is Canadian, the harm

occurred in Canada or on a vessel or aircraft in Canada, and so forth).[11] In addition, clause 4(4) of the JVTA says that courts may refuse to hear a claim made under clause 4(1) in cases where the claim has been made against a foreign state, the loss or damage to the plaintiff occurred in that state, and the plaintiff did not give the foreign state "a reasonable opportunity to submit the dispute to arbitration in accordance with accepted international rules of arbitration."[12]

Finally, while clause 4(5) of the JVTA states that courts of competent jurisdiction in Canada must recognize judgments of foreign courts made in favour of plaintiffs who have suffered loss or damage of the type described in clause 4(1), courts will do so only if the foreign judgment meets the requisite criteria under Canadian law for the recognition of such judgments.[13] In the case of a suit launched by a plaintiff against a foreign state, recognition of a foreign judgment made against the state in question is further restricted. Clause 4(5) specifies that, for a foreign judgment made against a foreign state to be recognized in Canada, the foreign state must be on the list established by Cabinet under subsection 6.1(2) of the *State Immunity Act*. (That subsection is added by clause 7 of the JVTA; see below.)

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(11) See *Morguard Investments Ltd.* v. *De Savoye*, [1990] 3 S.C.R. 416. It is important to note, however, that clause 4(2) of the JVTA is permissive and not mandatory. It merely states that a Canadian court may hear and determine the cause of action described in clause 4(1) if there is a real and substantial connection to Canada. A court may still choose to decline jurisdiction on the basis of the doctrine of *forum non conveniens*. This term is used to describe the court's discretionary power to decline jurisdiction over a proceeding that may be more properly tried elsewhere (see *Amchem Products Incorporated* v. *British Columbia (Workers' Compensation Board)*, [1993] 1 S.C.R. 897). Factors that a court may consider in deciding whether or not to decline jurisdiction over a proceeding include: the location of the majority of the parties; the location of key witnesses and evidence; contractual provisions that specify applicable law or accord jurisdiction; the avoidance of a multiplicity of proceedings; the applicable law and its weight in comparison to the factual questions to be decided; geographical factors suggesting the natural forum; and whether declining jurisdiction would deprive the plaintiff of a legitimate juridical advantage available in the domestic court (see *Muscutt* v. *Courcelles* (2002), 213 D.L.R. (4th) 577 (Ont. C.A.), para. 41).

(12) Clause 4(4) does not specify which set of "accepted international rules of arbitration" would apply. Some examples of commonly used international rules of arbitration include: the Rules of Arbitration of the International Chamber of Commerce (ICC Arbitration Rules), available on the International Chamber of Commerce's website at http://www.iccwbo.org/uploadedFiles/Court/Arbitration/other/rules_arb_english.pdf; the Rules of Arbitration of the United Nations Commission on International Trade Law (UNCITRAL), available on the UNCITRAL's website at http://www.uncitral.org/pdf/english/texts/arbitration/arb-rules/arb-rules.pdf; and the Permanent Court of Arbitration's Optional Rules for Arbitrating Disputes between Two Parties of Which Only One Is a State, available on the Permanent Court of Arbitration's website at http://www.pca-cpa.org/upload/files/1STATENG.pdf.

(13) Before a Canadian court will recognize a judgment made by a foreign court, it must determine that the foreign court had a real and substantial connection to the action or the parties. Other factors that the court may consider before recognizing a foreign judgment are attornment (agreement by the parties to transfer a right), agreement by the parties to submit to the jurisdiction of the foreign court, and residence and presence of the parties in the foreign jurisdiction (see *Beals* v. *Saldanha*, [2003] 3 S.C.R. 416, para. 37).

Although the JVTA itself does not explicitly state that only foreign states on the list established by Cabinet under new subsection 6.1(2) of the *State Immunity Act* may be sued using the cause of action described in clause 4(1) of the JVTA, the practical effect of the amendments introduced to the *State Immunity Act* is that only listed foreign states may be sued. This is because the amendments to the *State Immunity Act* create an exception to state immunity only for listed states that support terrorism. Further details on the listing process will be provided below.

E. Circumstances in Which a Foreign State Will Be Considered a Supporter of Terrorism and May Be Sued Under the Proposed Act (Clauses 6 to 8)

Clauses 5 to 11 of Bill C-35 amend the *State Immunity Act* to create another exception to the general rule that immunizes foreign states from suits in Canada's domestic courts, as that rule is expressed in subsection 3(1) of the Act.[(14)] These amendments are necessary in order to make the right of action described in clause 4(1) of the JVTA meaningful. Clause 5 is a housekeeping amendment that introduces a new heading, "Definitions and Interpretation," before section 2 of the *State Immunity Act*.

Clause 6 of Bill C-35 adds a new section 2.1 to the *State Immunity Act*. The new section 2.1 indicates that a foreign state supports terrorism if it commits an act described in clause 4(1)(*b*) of the JVTA. In other words, foreign states are considered to support terrorism, and can be sued for supporting terrorism, only if they engage in conduct that supports the activities of listed entities as outlined in sections 83.02 to 83.04 or 83.18 to 83.23 of the *Criminal Code*.

Clause 7 of Bill C-35 adds a new section 6.1 to the *State Immunity Act*. New section 6.1 provides that, for a foreign state to be sued under clause 4(1) of the JVTA, the act that the state committed in support of terrorism must have been committed on or after 1 January 1985 (new subsection 6.1(1) of the Act). The date chosen mirrors the date found in clause 4(1) of the JVTA. As noted above, this date was likely chosen to allow families of victims of the Air India bombing to sue foreign states (provided that the victims' families can demonstrate that a foreign state committed an act on or after 1 January 1985 in support of the listed entity which committed that bombing).[(15)]

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(14) See the explanation of the general principle of state immunity and its exceptions as codified in the *State Immunity Act* in the "Background and Context" section of this Legislative Summary.

(15) It has been alleged that the perpetrators of the Air India bombing are or were members of Babbar Khalsa, which is on the list of terrorist entities established under sections 83.05 to 83.07 of the *Criminal Code*.

In addition, before a foreign state can be sued using clause 4(1) of the JVTA, the state in question must have been listed by Cabinet (new subsection 6.1(1)). New subsections 6.1(2) to 6.1(7) of the *State Immunity Act* set out the procedure for listing foreign states. The process is very similar to that described in sections 83.05 to 83.07 of the *Criminal Code* for the listing of terrorist entities. The Minister of Foreign Affairs recommends listing, after consulting the Minister of Public Safety, and Cabinet decides whether or not to list. The basis for listing a foreign state is that there are reasonable grounds to believe that the state in question supported or supports terrorism, as defined in the new section 2.1 of the Act (new subsection 6.1(2)).

The Minister of Foreign Affairs, in consultation with the Minister of Public Safety, is required to review the list of foreign states every two years to determine whether or not reasonable grounds to keep the state on the list remain, and then makes a recommendation to Cabinet about whether or not the entity should be retained on the list (new subsection 6.1(6)). He or she must complete this review as soon as feasible, but in no more than 120 days after commencing it, and must publish a notice in the *Canada Gazette* without delay once the review has been completed (new subsection 6.1(7)).

Foreign states may not challenge or make submissions with respect to the listing decision prior to its being made. They can, however, apply in writing to the Minister of Foreign Affairs to be removed from the list once they have been added to it. In such cases, the Minister of Foreign Affairs must, after consulting the Minister of Public Safety, decide whether there are reasonable grounds to recommend to Cabinet that the state in question be removed from the list (new subsection 6.1(3)). Once the Minister of Foreign Affairs has made a decision regarding the foreign state's application for removal, he or she must notify the state without delay (new subsection 6.1(4)). A foreign state may not make another application to be removed from the list unless there has been a material change in its circumstances since the last time it applied for removal, or until the Minister has completed his or her most recent two-year review of the decision to recommend listing (new subsection 6.1(5)).

The most significant difference between the process for listing foreign states contained in new subsections 6.1(2) to 6.1(7) of the *State Immunity Act* and the process for listing terrorist entities contained in sections 83.05 to 83.07 of the *Criminal Code* is that subsections 6.1(2) to 6.1(7) of the *State Immunity Act* do not grant states an explicit statutory right to apply for judicial review of the Minister's decision to recommend listing the state in question, or to recommend retaining the state in question on the list established by Cabinet. Under subsection 83.05(5) of the *Criminal Code*, terrorist entities are explicitly granted this right.

Clause 8 of Bill C-35 repeals the existing subsection 11(3) of the *State Immunity Act* and replaces it with a new subsection 11(3). Subsection 11(1) of that Act restricts the type of relief (i.e., what a plaintiff may request as a result of his or her suit) that is available when an action is brought against a foreign state. The existing subsection 11(3) makes section 11(1) inapplicable to the *agencies* of a foreign state, meaning that all regular forms of relief are available to plaintiffs when they sue such agencies, but not if they sue the actual state. The new subsection 11(3) makes all forms of relief available to plaintiffs in an action against agencies of a foreign state, and also in an action against the foreign state itself.

F. Attachment, Execution, Arrest, Detention, Seizure and Forfeiture of Foreign States' Property in Canada (Clauses 9 and 10)

Clauses 9 and 10 of Bill C-35 amend the *State Immunity Act* to allow for attachment, execution, arrest, detention, seizure and forfeiture of property belonging to foreign states that is located in Canada, in certain circumstances. Clause 9 amends the existing paragraph 12(1)(*b*) of the *State Immunity Act* to allow for the attachment, execution, arrest, detention and seizure of property belonging to foreign states and located in Canada when the state in question is on the list established by Cabinet under new subsection 6.1(2) of the Act, and the property in question "is used or intended to be used … to support terrorism." It also adds a new paragraph 12(1)(*d*) to the Act. This paragraph allows for the attachment, execution, arrest, detention and seizure of the property of a foreign state located in Canada if the foreign state is listed under new subsection 6.1(2) of the Act, and the attachment or execution is for the purposes of satisfying a court judgment rendered against that state in an action brought against it for supporting terrorism. Having said this, if the property of that state in Canada has cultural or historical value, then it cannot be attached or executed upon to satisfy such a judgment.

Clause 10 of the bill adds a new section 12.1 to the *State Immunity Act*. Subsection 12.1(1) provides that, in the event that a judgment is rendered against a listed foreign state for supporting terrorism, the Minister of Finance and the Minister of Foreign Affairs may, within the confines of their mandates, assist a judgment creditor in identifying and locating the property of the foreign state in Canada. With respect to the Minister of Finance, he or she may assist in locating and identifying the financial assets of the foreign state held within Canadian jurisdiction (new paragraph 12.1(1)(*a*)), and with respect to the Minister of Foreign Affairs, he or she may assist in locating the property of the foreign state within Canada (new paragraph 12.1(1)(*b*)).

However, it is important to note that this provision is permissive, rather than mandatory. The ministers may assist in identifying and locating the property of the listed foreign state, "to the extent that is reasonably practical," 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" (new subsection 12.1(1)). In addition, if the information regarding the identity and location of such property was produced in or for a government institution, or was initially received by a government institution and obtained from that institution, the ministers must obtain the consent of the relevant government institution before releasing the information to judgment creditors (new subsection 12.1(2)). "Government institution" is defined in the new subsection 12.1(3) of the *State Immunity Act* as "any department, branch, office, board, agency, commission, corporation or other body for the administration or affairs of which a minister is accountable to Parliament."

G. Penalties Against Foreign States for Failure to Produce Information Relating to a Charge of Supporting Terrorism (Clause 11)

In addition to Bill C-35's other amendments to the *State Immunity Act*, clause 11 amends subsection 13(2) of that Act to allow Canadian courts to levy fines or penalties against listed foreign states for failure or refusal to produce documents or information in respect of actions brought against them for supporting terrorism. Provision of such documentation and information would assist Canadian courts in rendering judgments in lawsuits initiated against foreign states pursuant to clause 4(1) of the JVTA.

COMMENTARY

Victims of terrorist attacks have been pushing for legislation similar to Bill C-35 for a number of years. The Canadian Coalition Against Terror (C-CAT), which is a coalition of victims and others interested in counterterrorism, has been particularly influential in the proposal of similar bills over the past four years.(16) The first proposed bills were introduced in 2005 by Senator David Tkachuk in the Senate, and by Stockwell Day, MP, who was in opposition at the time, in the House of Commons.

(16) For a full listing of previous bills, see footnote 4 above.

C-CAT argues that such legislation is necessary to fight terrorism financing effectively, as criminal provisions against terrorism financing have not resulted in any convictions.(17) Public exposure of such activities through court proceedings is also seen as an important deterrent.(18) Finally, it has been argued that the opportunity to sue would be empowering for victims, providing compensation and, even if they are unable to recover the amounts granted by the courts, at least providing official recognition of their experiences and suffering.(19)

One point of clarification is important at the outset, as a number of articles discussing the new bill have said that it is not currently possible to sue an individual or a non-state organization without this bill.(20) However, as noted by Edward Belobaba, the lawyer who assisted in drafting a private member's bill on this topic for Senator Tkachuk, victims can theoretically already seek damages from non-state actors for their support of terrorist activities or organizations. The benefit of the proposed bill, according to Mr. Belobaba, is to make the law clearer and easier to understand, by introducing a specific cause of action, rather than requiring victims to rely on the general law of civil responsibility or tort law in each province.(21)

Though rare, there appear to have been some such suits in the past. A suit by Air India bombing victims' families against the federal government, airlines and airport security was settled out of court.(22) However, that suit does not appear to have gone after the bombers or any supporting organizations. In July 2008, the Lebanese Canadian Bank was sued by

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(17) Canadian Coalition Against Terror, *A Proposal by C-CAT: 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)*, January 2008, http://www.c-cat.ca/C-CAT-Legislative-Proposal-3-January-2008.pdf.

(18) Ibid.

(19) Prasanna Ranganathan, "Survivors of Torture, Victims of Law: Reforming State Immunity in Canada by Developing Exceptions for Terrorism and Torture," *Saskatchewan Law Review*, Vol. 71, 2008, pp. 343–389; Emily Senger, "Giving terror victims right to sue lauded: State Immunity Act; Craft law to avoid diplomatic spats, expert says," *National Post*, 2 June 2009, p. A5.

(20) See, for example, Bruce Campion-Smith, "Make terrorists pay up, PM says," *The Toronto Star*, 1 June 2009, p. A01; Don Martin, "Great, now we can sue bin Laden, we just have to find him," *Ottawa Citizen*, 3 June 2009, p. A17; Senger (2009).

(21) "Target: terror cash: Families to ask Ottawa for right to sue terrorist backers" (originally from the *National Post*, 15 April 2005, but currently found on Senator David Tkachuk's website, http://sen.parl.gc.ca/dtkachuk/media-news-terrorist-backers.html. Note that the terms "tortious" or "tort law" are common law terms. In the civil law in Quebec, the same concept is generally referred to as the law of civil responsibility and the requirements to prove such a case are slightly different.

(22) Robert Matas, "Air-India: Shock, outrage and more questions," *The Globe and Mail*, 27 March 2009, http://www.theglobeandmail.com/news/national/article755686.ece.

four Canadian-Israeli dual citizens who were in Israel during the 2006 hostilities between Israel and Hezbollah. They alleged that the Bank provided banking and financing services to Hezbollah. That lawsuit appears to be ongoing.(23)

There appear to have been no final judgments for terrorism-related civil suits in Canada to date. Victims of terrorist acts have won such lawsuits in other common law jurisdictions by relying on torts such as battery and intentional infliction of harm. For a recent example, see *Breslin and others* v. *Seamus McKenna and others*, [2009] NIQB 50, in which Morgan J., of Northern Ireland's High Court of Justice, found several individual defendants, as well as the Real IRA (a paramilitary organization that split from the Provisional Irish Republican Army in 1997), liable for loss and damages suffered by victims of the 1998 Omagh bombing and their relatives. That judgment awarded more than £1.6 million to 12 individuals.

A number of concerns with the JVTA have been raised by members of Parliament, lawyers and civil society members; these will be discussed in further detail below.

A. Constitutionality

Generally, civil lawsuits that allow victims to recover damages for harm suffered or loss inflicted as a result of someone else's tortious conduct are considered matters of provincial jurisdiction under subsection 92(13) of the *Constitution Act, 1867*,(24) which gives provincial legislatures the power to legislate regarding "property and civil rights in the province." As stated by Canadian legal expert Peter Hogg:

> The federal Parliament has no independent power to create civil remedies akin to its power over criminal law. This means that if the pith and substance of federal law is the creation of a new civil cause of action, the law will be invalid as coming within the provincial head of power "property and civil rights in the province" (section 92(13)).(25)

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(23) Stewart Bell, "Lebanese Canadian Bank sued for alleged Hezbollah connections," *National Post*, 7 July 2008, http://network.nationalpost.com/np/blogs/posted/archive/2008/07/07/lebanese-canadian-bank-sued-for-alleged-hezbollah-connections.aspx; Sean Gordon, "Lebanese Canadian Bank faces lawsuit," *The Toronto Star*, 8 July 2008, http://www.thestar.com/News/Canada/article/456062.

(24) (UK), 30 & 31 Vict., c. 3.

(25) Peter W. Hogg, *Constitutional Law of Canada*, Looseleaf, 5th ed., Vol. 1, Thomson Carswell, Scarborough, 2007, p. 18–13.

Having said this, it has been argued successfully in the past that Parliament can establish provisions related to civil redress if they are established within the context of a broader regulatory or administrative scheme which is itself within Parliament's legislative jurisdiction under section 91 of the *Constitution Act, 1867*.

The case cited in support of this argument is *General Motors of Canada Ltd.* v. *City National Leasing*, [1989] 1 S.C.R. 641. That case involved the establishment by Parliament of a private right of action within the now repealed and replaced *Combines Investigation Act* allowing for the recovery of losses suffered as a result of activities in violation of that Act. The Court found that the legislation being addressed in the case, with its administrative, regulatory, and criminal law components, fell within Parliament's legislative jurisdiction over trade and commerce under subsection 91(2) of the *Constitution Act, 1867*. The provision for civil redress was a part of this broader regulatory and administrative approach to dealing with anti-competitive business practices.(26)

A similar provision can now be found in section 36 of the *Competition Act*.(27) The regulatory and administrative scheme set out in that legislation also involves criminal offences and functions to be carried out by a Bureau, a Commissioner, and a Tribunal. If the issue were to arise under the current *Competition Act*, the Supreme Court of Canada ruling in the *General Motors of Canada* case would likely still apply.

Following the reasoning of the Supreme Court of Canada in *General Motors of Canada*, it is possible that the civil right of action set out in the JVTA could be viewed as having been enacted in the broader legislative context of the amendments to the *State Immunity Act*, which comprise the second part of Bill C-35 and which appear to be within Parliament's jurisdiction under its power to legislate with respect to foreign affairs and international trade.(28)

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(26) Generally, see: Hogg (2007), pp. 15-39–15-44, 18-16, 18-17 and 18-23–18-27.

(27) R.S.C. 1985, c. C-34.

(28) The source of Parliament's power in the arena of foreign affairs and international relations is constitutionally complex. This is because when the *Constitution Act, 1867*, was enacted, Canada was a colony of the British Empire and Great Britain handled Canada's foreign affairs and international relations. However, according to constitutional scholars, Canada's power to make treaties and declare war is vested in the Queen by virtue of section 9 of the *Constitution Act, 1867* (the Royal Prerogative Power). In 1947, Great Britain delegated prerogative power over foreign affairs to the Governor General of Canada, who would exercise this power upon the advice of the Government of Canada (see Hogg (2007), p. 11-2, and *Letters Patent Constituting the Governor General of Canada, 1947*, R.S.C. 1985, Appendix II, No. 31). The *Statute of Westminster, 1931* (UK), 22 Geo. 5, c. 4, s. 3, also conferred on Canada the authority to make laws having extraterritorial operation.

This argument would have greater force, however, if the JVTA were creating a right of action against foreign states only, rather than against foreign states, individual persons, organizations and listed entities. As stated previously in this Legislative Summary, victims already have the ability to sue persons, organizations and listed entities for tortious conduct that has caused them injury or harm under ordinary provincial tort law or civil responsibility principles.

Alternatively, it might be possible to view the JVTA as functionally connected to Parliament's power to legislate in relation to criminal law (subsection 91(27) of the *Constitution Act, 1867*) because the civil remedy is available only if plaintiffs can show that they have suffered loss or damage 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*" (clause 4 of the JVTA). Whether or not the courts would uphold the statute on this basis is, however, open to question, given that it does not appear that securing a criminal conviction under Part II.1 of the Code is a precondition to initiating a civil action under the JVTA.(29) Many civil suits relate to *Criminal Code* offences, such as assault, but that is not sufficient to justify federal jurisdiction and those suits are governed by provincial laws.

The national concern branch of the federal government's power to legislate on matters involving peace, order and good government provides another possible head of power under which Parliament might be authorized to enact the JVTA.(30) The preamble of the JVTA states that "terrorism is a matter of national concern," which could be an indication that this power is being relied upon.

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(29) See *R.* v. *Zelensky*, [1978] 2 S.C.R. 940, where the Supreme Court of Canada upheld a *Criminal Code* provision that authorized a court, upon convicting an accused of an indictable offence, to order the accused to pay compensation to the victim for loss or damage suffered as a result of the commission of the offence. In that case, the order for compensation was made as part of the sentencing process, not as the result of a separate civil action.

(30) Section 91 of the *Constitution Act, 1867*, gives Parliament the power to "make laws for the peace, order, and good government of Canada, in relation to all matters not coming within the classes of subjects by this Act assigned exclusively to the legislatures of the provinces … ." This power is commonly referred to as the POGG power. There are three branches to the POGG power recognized in case law: the gap branch (the power to make laws on matters that are not enumerated in either section 91 (federal government power to legislate) or 92 (provincial government power to legislate)); the national concern branch (the power to make laws in relation to matters that go beyond local or provincial concerns or interests, and are, due to their inherent nature, concerns of the Dominion of Canada as a whole); and the emergency branch (the temporary and extraordinary need for national regulation of a particular subject matter). For further details regarding the POGG power, see Hogg (2007), pp. 17-1–17-32. Given the interprovincial, and indeed international, dimensions of terrorism, and the need for a unified national response to terrorist acts, it could be argued that Parliament has the necessary authority to create a statutory right of civil action against terrorists and those who support them under the national concern branch of the POGG power.

B. Terrorism but not Torture

One of the most common criticisms of the bill is that it includes terrorism offences but not torture. Some lawyers and commentators, such as the Canadian Centre for International Justice (CCIJ), find that there is no justification or rational basis to allow suits for one but not the other.(31) CCIJ and Amnesty International are promoting the inclusion of torture, genocide, war crimes and crimes against humanity in C-35, along with terrorism.(32)

In support of the argument that a right to sue for torture should be included, lawyer Prasanna Ranganathan, in a 2008 academic journal article, refers to the United Nations Committee Against Torture's recommendations. In 2005, the Committee challenged Canada's interpretation of Article 14 of the Convention Against Torture.(33) In the 2004 case of *Bouzari*, the Ontario Court of Appeal had concluded that Article 14 applied only to torture inflicted in Canada, whereas the Committee recommended that civil suits should be allowed regardless of where the torture occurred.(34) The Committee also concluded that there was no impediment in international law to creating an exception from state immunity for acts of torture, an interpretation that was challenged by Canada.(35)

The United States' legislation lifts immunity for "an act of torture, extrajudicial killing, aircraft sabotage, hostage taking, or the provision of material support or resources," thus including both terrorist acts and torture.(36) Some countries in Europe are also lifting immunity for torture, such as Italy, which has permitted suits against Germany for its actions during World War II.(37) Private members' bills addressing torture, but not terrorism, are currently before the House of Lords and the House of Commons in the United Kingdom.(38)

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(31) Stewart Bell, "Seeking Justice: Canadian victim of Hamas bombers may soon be able to sue rogue states," *National Post*, 20 June 2009, p. A8; Canadian Centre for International Justice, "Justice for One, Justice for All: Victims of Torture Should be Entitled to the Same Justice as Victims of Terrorism," News release, Ottawa, 2 June 2009; Ranganathan (2008).

(32) Canadian Centre for International Justice, "Civil Litigation and the State Immunity Act," n.d., http://www.ccij.ca/programs/policy-work/index.php?WEBYEP_DI=5.

(33) Committee Against Torture, *Conclusions and Recommendations of the Committee Against Torture: Canada*, 7 July 2005, CAT/C/CR/34/CAN, para. 5(f).

(34) Ibid.; Ranganathan (2008). Note: the Supreme Court refused to hear the appeal.

(35) Committee Against Torture, *Thirty-fourth session: Summary Record of the Second Part (Public) of the 646th Meeting*, 13 May 2005, CAT/C/SR.646/Add.1, para. 67.

(36) 28 U.S.C. 1605(a)(7), *Foreign State Immunity Act*, http://www.law.cornell.edu/uscode/html/uscode28/usc_sup_01_28_10_IV_20_97.html.

(37) Canadian Centre for International Justice, "Canada's State Immunity Act," Backgrounder, 2 June 2009, http://www.ccij.ca/programs/policy-work/ccij-backgrounder-sia.pdf.

(38) See http://services.parliament.uk/bills/2008-09/torturedamages.html for the House of Lords and http://services.parliament.uk/bills/2008-09/torturedamagesno2.html for the House of Commons.

However, in December 2008, in response to Italy's lifting of immunity, Germany brought a suit before the International Court of Justice against Italy for failing to respect its immunity.(39) In Canada, C-CAT has been reported as saying that torture raises different issues and is not well suited to inclusion in C-35.(40)

C. Diplomatic Relations

Various diplomatic challenges may be created by Bill C-35, according to commentators. One article described the proposed legislation as a "diplomatic minefield."(41) Listing countries may be problematic for Canada's foreign relations. Similarly, the ministers of Finance and Foreign Affairs' proposed role in enforcing judgments through such actions as identifying and locating assets for seizure may negatively affect diplomatic efforts. For example, Afghanistan and Pakistan are commonly seen as "incubators" of terrorism but their listing could be problematic from a diplomatic perspective as the Canadian government seeks to support the governments of those countries.(42) Others question whether courts are equipped to deal with the foreign policy and international relations considerations that will inevitably be attached to such cases.(43)

At the same time, others, such as lawyer Prasanna Ranganathan, argue that having the courts involved is exactly what is needed to avoid political influences. The politicians will be able to distance themselves from specific decisions and explain the responsibility of the courts, which are beyond their control, when speaking with their counterparts from other countries.(44)

Concern about retaliation has also been raised. The above-mentioned situation between Italy and Germany provides an example of the potential reaction to creating a new exception to state immunity.(45)

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(39) International Court of Justice, "Germany institutes proceedings against Italy for failing to respect its jurisdictional immunity as a sovereign State," News release, *The Hague*, 23 December 2008.

(40) Cristin Schmitz, "Should judges decide which states sponsor terror?" *Lawyers Weekly*, 19 June 2009, http://www.lawyersweekly.ca/index.php?section=article&articleid=944.

(41) Bell (2009).

(42) Senger (2009).

(43) Ranganathan (2008).

(44) Ibid.

(45) Concerns about retaliation have been raised by NDP Justice Critic Joe Comartin and Professor René Provost at McGill's Faculty of Law, according to an article in *The Globe and Mail*: Gloria Galloway, "Lawsuits: Terror-victim law would only apply to listed countries. Victims would be allowed to sue countries Canada designated as terrorist supporters," *The Globe and Mail*, 3 June 2009, p. A4. See also Lee Berthiaume, "Terror State List will Hurt Foreign Policy Goals: Experts," *Embassy* [Ottawa], 10 June 2009, http://www.embassymag.ca/page/view/terror_state_list-6-10-2009.

D. Complexity

Aaron Blumenfeld, a Toronto lawyer who works with C-CAT, admits that this type of litigation will be quite complex. Classified information may be involved, and links between terrorist entities and the states in question will have to be proven, which could be difficult.(46) Showing causation will also be challenging as, for example, governments may provide funds to an organization involved in numerous activities, from health care to terrorism. Tracking where specific funds go could be time-consuming, costly and even impossible.

E. Listing of Countries

Previous bills did not include a government list of countries for which state immunity may be lifted, and C-CAT would prefer not to have such a list.(47) The Honourable Irwin Cotler's proposed bill, Bill C-408, which was introduced two days after C-35, suggests eliminating the list and, instead, allowing any country with which Canada does not have an extradition treaty to be sued. According to the proponents of this proposal, including Mr. Cotler and law professor François Larocque of the University of Ottawa, this would make the process less politicized than requiring government listing of a country in order to be able to sue while still preventing baseless claims.(48) Countries with which Canada has extradition treaties are presumed to respect the rule of law and be democratic, and as such, it is assumed that claims could be made directly in those countries, rather than in the Canadian courts.(49)

Mark Arnold, a lawyer who represented Houshang Bouzari in his attempt to sue the Iranian government in a Canadian court for torture conducted in Iran, notes that the issue should be the activity in which a state is involved, not which state is involved. He finds that listing is too political. However, Ed Morgan, law professor at the University of Toronto, suggests that listing is a good compromise given the potentially negative foreign relations implications of such suits. Listing allows the government to retain some control of Canada's relations with other nations.(50)

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(46) Campion-Smith (2009); Ranganathan (2008).

(47) Galloway (2009); Berthiaume (2009).

(48) Andy Levy-Ajzenkopf, "Govt., opposition craft competing bills for terror victims," *The Canadian Jewish News* [North York], 11 June 2009, http://www.cjc.ca/template.php?action=itn&Story=2677; Hugo De Grandpré, "Ottawa veut permettre de poursuivre les terroristes," *La Presse* [Montréal], 3 June 2009, p. A12.

(49) Berthiaume (2009).

(50) Schmitz (2009).

F. The US Experience

In the United States, similar legislation has been in place for more than a decade. Only listed countries can be sued, with currently listed countries being Cuba, Iran, Syria, Sudan and North Korea. Iraq and Libya were originally listed but have since been delisted.

A common problem identified by the Congressional Research Service (CRS) has been the refusal of defendants to recognize the jurisdiction of the American courts. As such, defendants do not appear and default judgments are rendered, which the debtor countries then ignore and refuse to pay.(51)

Recovery has been a major problem, given the limited assets of listed countries being held in the United States and the executive branch's resistance to allowing frozen assets to be used for this purpose. As Congress attempted to create avenues for recovery, the executive would resist such efforts over concerns about retaliatory measures, losing leverage over the countries concerned, and potentially violating international law on state immunity. For example, the 1981 Algiers Accord that resulted in the release of American embassy staff who were held hostage by Iran barred the hostages from initiating civil suits. However, Congress sought to provide a right of action to those hostages through various proposed laws, which the executive resisted, because of the international implications if such an Accord were to be violated.(52)

Changing circumstances in Iraq also created a difficult situation for the Bush Administration. Under Saddam Hussein, Iraq was a listed state that could be sued. A number of such suits were successful and the plaintiffs sought recovery by seizing certain Iraqi assets. However, after the invasion of Iraq, according to the CRS, the American government no longer had an interest in allowing such assets to be taken, as they wanted them to be used for the benefit of the Iraqi people in rebuilding the country. As such, Iraq was retroactively delisted and many plaintiffs were unable to recover the money granted to them in judgments.(53)

With limited seizable assets in Canada, victims will find themselves competing for the few, if any, assets available for recovery. Furthermore, the concerns outlined above with respect to retaliation appear to have come true in the American situation as equivalent measures have been introduced in Cuba and Iran in response.

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(51) Jennifer K. Elsea, *CRS Report for Congress: Suits Against Terrorist States by Victims of Terrorism*, Order Code RL31258, Congressional Research Service, Washington, DC, updated 8 August 2008.

(52) Ibid., pp. 27–32.

(53) Ibid., pp. 32–44.

G. Effectiveness

The US experience demonstrates the many challenges in making such a legislative scheme effective in meeting the needs of victims and acting as a deterrent. Some question whether the risk of a future lawsuit will have any impact on terrorists' behaviour when they are willing to kill to meet their objectives.(54) The refusal of defendants to engage in the process is also a significant barrier. Finally, with likely fewer assets available for seizure in Canada than in the United States, recovery will be even more challenging in this country.(55)

Some commentators such as C-CAT do think such an initiative will be effective. Libya, for example, was facing suits for its support of terrorism when it reached a settlement to pay victims and stopped such support. The suits, in combination with promises to lift economic sanctions, had a positive impact in that case.(56)

The example of Libya shows what can be done with such legislation when the victims' objectives and the government's foreign relations objectives are mutually supportive. However, the examples of Iraq and Iran noted above show the challenges that result when those objectives diverge.

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(54) Senger (2009); "Ottawa introduces bill allowing victims of terrorism to sue," CBC, 2 June 2009, http://www.cbc.ca/canada/story/2009/06/02/terrorism-victims-sue002.html.

(55) Lloyd Brown-John, "How to sue a terrorist," *The Windsor Star*, 19 June 2009, p. A8; Bell (2009).

(56) CBC (2009); Canadian Coalition Against Terror (2008).