



MUSOLINO | DESSEL

May 16, 2024

Via Electronic Mail:

Ambassador Margaret Whitman
United Nations Avenue Nairobi
P. O. Box 606 Village Market
00621 Nairobi, Kenya

Re: 1998 U.S. Embassy Bombing

Dear Ambassador Whitman,

I represent hundreds of Kenyan victims of the 1998 terrorist attack on the U.S. Embassy in Nairobi. My firm has secured \$56.6 billion in judgments against Al Qaeda in U.S. federal court, and we have been lobbying Congress for budget-neutral modifications of the U.S. Victims of State Sponsored Terrorism Fund so that the Kenyan victims can be eligible in, and can participate in future distributions out of, that fund. Our U.S. legislative goals has secured the support of several U.S. legislators, as well as the support of the Kenyan Senate *Ad Hoc* Committee on the Compensation to the Kenyan Victims of the 1998 Bombing of the United States of America Embassy in Nairobi.

I heard your May 15, 2024, remarks on Jeff Koinange's *JK Live* program on Citizen TV Kenya. I am encouraged that you are looking at this issue again and take this opportunity to assure you that there are no legal impediments to the passage of legislation which will – after 25 years – finally address the human rights issue of fairness to our Kenyan friends, who have stood shoulder to shoulder with us in the fight against terrorism.

On the day of the bombing, our State Department admitted internally that “[w]ith these two posts, the Department gambled and lost....” As a proud American lawyer for my Kenyan clients and as a patriotic American, I urge you to recognize that bringing justice, even after a quarter of century, to our Kenyan allies will underscore the value of friendship with the U.S. Amid the intense competition in East Africa and throughout Africa, the U.S. commitment to fairness and justice is a strength we should reinforce, especially on a matter of such enduring, material, and symbolic importance to Kenya.

I am enclosing for your consideration a copy of my firm's July 2023 report to the *Ad Hoc* Committee, as well as copy of my firm's proposed legislation, an up-to-date summary of the actions being taken in the U.S. and Kenya, and the *Ad Hoc* Committee's May 2024 Progress Report. Please let me know if there is a time in the U.S. or in Kenya when we can speak further on the subject.

Sincerely,

Philip M. Musolino



**OPENING REPORT
FOR THE
KENYAN SENATE *AD HOC* COMMITTEE ON
THE COMPENSATION TO THE KENYAN
VICTIMS OF THE 1998 BOMBING OF THE
UNITED STATES OF AMERICA EMBASSY IN
NAIROBI**

Presented by Philip M. Musolino and Musolino & Dessel, PLLC

STATEMENT AND DISCLOSURE REGARDING REPORT:

This Opening Report for the Kenyan Senate *Ad Hoc* Committee on the Compensation to the Kenyan Victims of the 1998 Bombing of the United States of America Embassy in Nairobi (the “Report”) was prepared at the request of Senator Agnes Kavindu by the Washington, D.C. law firm of Musolino & Dessel, PLLC. The Report is linked to a database (the “Database”). Both the Report and the Database are for the use of and accessible by the members of the *Ad Hoc* Committee on the Compensation to the Kenyan Victims of the 1998 Bombing of the United States of America Embassy in Nairobi (the “Committee”) and their staff. Musolino & Dessel, PLLC is solely responsible for the content of the Report and the content of the Database.

This material is distributed by Philip M. Musolino and Musolino & Dessel, PLLC on behalf of the Designated Victims of the 1998 Embassy Bombings. Additional information is available at the U.S. Department of Justice (FARA).

TABLE OF CONTENTS

| | |
|--|-----------|
| PART ONE: REPRESENTATIVES AND TEAM MEMBERS | 2 |
| PART TWO: SUMMARY | 7 |
| PART THREE: THE 1998 ATTACK AND ITS IMPACT ON KENYANS | 9 |
| PART FOUR: THE FEDERAL LITIGATION IN WASHINGTON..... | 13 |
| PART FIVE: THE PROPOSED U.S. LEGISLATION | 16 |
| APPENDIX TO OPENING REPORT FOR THE KENYAN SENATE <i>AD HOC</i> COMMITTEE ON THE COMPENSATION TO THE KENYAN VICTIMS OF THE 1998 BOMBING OF THE UNITED STATES OF AMERICA EMBASSY IN NAIROBI | 18 |
| DATABASE – LITIGATION (Appendix A):..... | 19 |
| DATABASE – LEGISLATION (Appendix B):..... | 20 |

PART ONE: REPRESENTATIVES AND TEAM MEMBERS

A. Musolino and Dessel, PLLC:

Musolino & Dessel, PLLC (the “Firm”), the leader of the international team seeking U.S. legislative compensation for the victims of the terrorist attack on the U.S. Embassy in Nairobi in 1998, and the author of this Report, is a Washington, D.C. law firm formed in 1993.

In the international arena, the Firm has represented clients on matters in or involving the following nations:

- Kenya
- Uganda
- Tanzania
- South Africa
- Namibia
- Cameroon
- Sudan
- Iraq
- Egypt
- UAE
- Saudi Arabia
- Great Britain
- France
- Switzerland
- Bulgaria
- Serbia
- Spain
- Greece
- Germany
- Haiti
- Netherlands

The Firm has represented clients in a wide variety of human rights and commercial transactions and has also represented clients in international arbitrations in Switzerland, Paris, and New York, and has litigated and arbitrated claims under various commercial statutes and standards, as well as, among others, the following statutes:

- The Alien Tort Statute

- The American Arbitration Act
- The Federal Tort Claims Act
- The Foreign Sovereign Immunities Act
- The International Convention on Civil and Political Rights
- The International Organizations Immunities Act

The Firm first became involved in the 1998 embassy bombing at the request of a client with numerous commercial interests in East Africa. The Firm's founding member, **Philip M. Musolino**, has been responsible for all matters relating to the bombing since 1998. Mr. Musolino practices extensively in three areas: complex civil litigation in the United States, principally in the District of Columbia; international law, with a focus on Africa, Eastern Europe, and Western Europe; and domestic and international transactional work.

The Firm represents hundreds of victims of the embassy bombing, that representation has involved extensive work in two areas: Litigation in U.S. Federal Courts; and (2) Legislation in both the United States and Kenya. In May 2022, the Firm secured judgments totaling \$56.6 billion against Al Qaeda for 351 Kenyan victims, and secured landmark rulings which may be used by other victims. Since securing those judgments, the Firm has had hundreds of contacts with U.S. government officials and media in support of proposed U.S. legislation drafted by the Firm in support of the Kenyan victims. Many of the details of that work can be found in the Database at **Appendix A** ("Litigation") and at **Appendix B** ("Legislation").

The Firm has been working with the following professionals and/or organizations: **Joseph Szlavik of Scribe Strategies & Advisors, Inc.**; **Caroline Muthoka** of both **the Baraka Care Foundation, LLC**, and **the Consortium of 7th August 1998 Victims** (the "Consortium"); **Ramona Tascoe, MD, MHS, MDiv**; **Melvin Foote** of the **Constituency for Africa**; and **Daniel Ngure**.

B. The Team Working With Musolino & Dessel PLLC:

Joseph Szlavik has a diverse background in policy analysis and government affairs. He worked at the White House during the first Bush Administration, fulfilling roles as a policy analyst in the Office of Policy Development and as a liaison with the Office of Cabinet Affairs and the Office of Legislative Affairs. In 1992, he established Scribe Strategies & Advisors, Inc., a consultancy dedicated to helping both domestic and international clients achieve their legislative, regulatory, communications, business development, and technology goals. With expertise in navigating political landscapes and economic conditions, Mr. Szlavik and his team excel at lobbying, forging alliances with business groups, and devising comprehensive media and communications strategies that incorporate cutting-edge internet technology.

Caroline Muthoka is a world-renowned and award-winning gospel singer, activist, and survivor of the 1998 embassy bombing. Ms. Muthoka's song, Poleni, was written in memoriam of the August 7, 1998, attack. She has dedicated her life to promoting peace, love, and unity. Ms. Muthoka's organization – Baraka Care Foundation, LLC – works to provide "...services and training for disaster emergency preparedness...and address the suffering of the silent victims of such calamities."

Ms. Muthoka has been a leader for decades in the efforts in the United States and Kenya to achieve compensation and aid for the victims of the bombing and for their families. She is the force behind the Consortium.

Dr. Ramona Tascoe is an accomplished African American physician, ordained minister, and dedicated humanitarian with a longstanding commitment to assisting victims. Since 1998, she has been actively involved in various initiatives. In 1979, she earned a medical degree and Master of Public Administration from UC San Francisco, along with a Master of Divinity from Berkeley's

Graduate Theological Union. She was subsequently ordained under the American Baptist and Progressive National Baptist Ministry. With a focus on internal medicine, Dr. Tascoe has served as a specialist in Oakland for many years. She has also led numerous medical missions to countries including Kenya, Tanzania, the Democratic Republic of Congo, Angola, India, and Sri Lanka and has worked for the victims since 1998, individually and with Chester House Bomb Blast Recovery and the California law firm of Burris Nisenbaum Curry & Lacy.

Melvin Foote is a pioneering expert in African Affairs, with over 35 years of experience and work in over 30 African countries. Mr. Foote served as a U.S. Peace Corps Volunteer, teacher, and held significant positions with Africare. He founded the Constituency for Africa (“CFA”) in 1990, establishing a global network committed to advancing Africa's progress and empowerment. His extensive involvement in high-level missions to Africa, numerous awards, and recognition testify to his outstanding commitment and achievements in addressing African concerns.

Daniel Ngure is the lead consultant at Ngure Consulting, an international business, cultural competency, and event management company based in Atlanta, GA. He studied Economics and Marketing and has worked as a consultant both in the U.S.A. and abroad. He assists organizations and individuals in developing cultural competency and creating inclusive environments suitable both for the organization and clients globally. Mr. Ngure has contributed critical guidance and advice on matters related to Kenyan government, politics, history, and culture.

The victims of the bombing are informally represented by Ms. Muthoka and the following six women:

Catherine Bwire, on behalf of the Blinded Victims Group, is a mother of one, Jean Bahati. She was pregnant with her when the bomb blast occurred in 1998. She permanently lost her vision as a result of that terrorism. She has been struggling to bring up her daughter as a single mother. Life has never been the same again for her and her child. Her husband abandoned her after the bombing and left her for dead. She struggles to go to work, needing someone to guide her as she walks through the Nairobi City streets going to work. “I still cannot see my future, except I am seeing it will be difficult, but it will be possible.”

Lilian Mutua, on behalf of the Pregnant Victims is a survivor of the 1998 bomb blast. Lilian was 8 months pregnant and working at the Teachers Service Commission on the 12th floor when the blast occurred, causing both internal and external injuries. Since then, Lilian has undergone numerous surgeries and faced many challenges, including the premature birth of her children and the loss of her job.

Grace Nyawira Njoroge, on behalf of the Orphans Victims Group, is a survivor of the 1998 terrorist bomb attack. The loss of her father in the attack, who was the sole breadwinner of the family, and the subsequent death of her stepmother from illness and COVID-19, drastically altered her family's life trajectory and forced her to put aside her education to work and support her family.

Safula Abdi Mwili, on behalf of the Widows Victims Group, is a retired professional Community Worker and a widow of the 1998 Nairobi bombing, where she lost her husband and was left to care for their three children. Despite her own struggles, she remains committed to giving back to her community by volunteering in various community works and distributing food and clothing to those in need.

Leonore Atieno, on behalf of the Teachers Victims Group, is a survivor of the 1998 bomb blast, where she sustained multiple injuries to her face, shoulder, right hand, and legs. She lives with chronic pain and requires expensive medication.

Lilian Ngeno, on behalf of the Tana and Arthi Rivers Development Authority Survivor's Coordinator was working on the 19th floor of the adjoining building when the US Embassy was attacked. This traumatic event not only affected her physically, but also emotionally, psychologically, and financially, leaving lasting scars on her life and relationships. She has learned to focus on the present and to strive for a positive future. Her hope is that her “story can inspire others to persevere in the face of adversity and to appreciate the precious gift of life.”

PART TWO: SUMMARY

1. On August 7, 1998, hundreds of Kenyans died, and thousands suffered physical and psychological injuries when the United States Embassy in Nairobi was attacked by Al Qaeda. As the U.S. acknowledged that day, with this Embassy “we gambled and lost.”
2. The lawyers at the Washington, D.C. law firm of Musolino & Dessel, PLLC secured in May 2022 judgments in the aggregate amount of \$56.6 billion against Al Qaeda on behalf of 351 Kenyan Plaintiffs. That judgment was finalized in May 2022.
3. During decades of litigation up to the US Supreme Court, the Firm secured landmark rulings including the following: (a) the attack was directed at the United States and its Embassy and citizens, not at Kenya or its citizens; (b) Form 95’s, which were filed with the U.S. State Department by thousands of Kenyan victims within one year of the bombing, could be used as evidence by U.S. Federal Courts of injuries sustained by the victims; (c) the emotional and psychological damages, including fear and PTSD, were sustained by all victims; (d) a bellwether hearing in which representative victims and experts testified would be applicable to non-testifying plaintiffs; and (e) compensatory damages for each such victim could fairly be calculated at five million dollars (\$5,000,000.00), in addition to punitive damages of one hundred fifty million dollars (\$150,000,000.00).
4. Other Kenyans have similar claims filed over 20 years ago with, but unaddressed by, the U.S. Department of State. Now, only one month before our Ambassador to Kenya will attend the 25th Commemoration of the attack, America’s Kenyan friends, and allies – those who hold judgments and those who don’t – and their families remain uncompensated for their losses.
5. There is a Victim Compensation Fund (the “Fund”) set up by U.S. Congress which has so far distributed \$3 billion to certain victims of terrorist attacks against the U.S. But, because of the way the statute is worded, the Kenyan victims are not eligible to participate in the Fund.
6. Musolino & Dessel, PLLC as FARA Registrant for the Designated Victims of the 1998 Embassy Bombings, with Joseph Szlavik of Scribe Strategies & Advisors, Inc.; Melvin Foote of the Constituency for Africa; and Daniel Ngure, and FARA Registrant Dr. Ramona Tascoe, are lobbying Congress to pass budget-neutral legislation which, among other provisions, changes the wording of the eligibility requirements so that the victims would be included in future distributions. The U.S. team members, including survivor Caroline Muthoka, have engaged in hundreds of contacts with various officials and media in the U.S. in support of the legislation.
7. Musolino & Dessel, PLLC drafted the language of the proposed U.S. legislation, so that it includes a pathway to compensation for all victims, not just the Firm’s judgment holders.
8. President Ruto generally announced his support for the effort during the lead-up to the 2022 Kenyan Presidential Election.

9. By the time of the 25th Commemoration, the U.S. commitment to the victims should be regarded as unfinished business in support of what the U.S. characterizes as its new Africa Policy.
10. From the U.S. foreign policy position, approving the legislation will serve as a concrete example of U.S. support for its friends and allies in Kenya and in East Africa. We strongly believe that this measure will enhance throughout East Africa the U.S. reputation for fairness and trustworthiness. At a time when other nations vigorously challenge our relationships with our friends and allies in Africa, Congress should take this opportunity to affirm our commitment to that critical region and its people.
11. The Kenyan media has been very supportive of the legislation. The Kenyan Diaspora in the U.S. is expected to play an important role in support of the proposed legislation.
12. On February 23, 2023, the Law Firm wrote to the U.S. Office of the First Lady and, noting news reports of the First Lady's upcoming visit to Kenya, asked that the First Lady visit the Peace Memorial in Nairobi. On February 25, 2023, First Lady Dr. Jill Biden paid a solemn visit to the Peace Memorial.
13. On March 30, 2023, Vice President Harris visited the Memorial in Dar Es Salaam, Tanzania.
14. On April 24, 2023, U.S. Secretary of State Blinken issued a statement outlining the importance of Kenya to U.S. foreign policy in Africa.
15. On June 29, 2023, the Kenyan Senate passed by unanimous vote a bill proposing the creation of an ad hoc committee of nine Senators to
 - (i) engage the Ministry of Foreign and Diaspora Affairs to advance friendship and cooperation between the United States of America and Kenya by supporting the eligibility of Kenyan and American victims and their personal representatives, surviving spouses and next of kin in the Victim Compensation Fund pursuant to the Justice for United States Victims of State Sponsored Terrorism Act;
 - (ii) coordinate with the Ministry of Foreign and Diaspora Affairs in the engagement of victims, their personal representatives, the United States of America government, and other stakeholders at home and abroad to pursue and accomplish the compensation of victims and families of the victims of Kenyan nationals; and,
 - (iii) coordinate with the Ministry of Health to explore subsidized medical treatment for the surviving victims of the bomb blast.

PART THREE: THE 1998 ATTACK AND ITS HORRENDOUS IMPACT ON KENYANS

According to the State Department's 1999 Report of the bombing, the Embassy bombing took place as follows:

At approximately 10:30 AM on Friday, August 7, 1998, two vehicle bombs detonated nearly simultaneously at United States embassies in Dar Es Salaam, Tanzania and Nairobi, Kenya.



All photos in this section courtesy of Partners New York Times

The United States Embassy in Nairobi, Kenya was located on a half-acre site in downtown Nairobi at the busy intersection of two main thoroughfares, Moi, and Haille Selassie Avenues. Behind the embassy was the four-story Ufundı Cooperative House, with numerous offices and a secretarial school, and the 23-story high-rise Cooperative Bank building....

At the rear of the embassy was a parking lot shared with the adjacent Cooperative Bank....



[After entering the parking area], one of the terrorists began shooting at the chancery and the other tossed a flash grenade at the guard.... Approximately 10 seconds after the grenade exploded, the bomb in the vehicle detonated.... The explosion killed 213 people,

including 44 embassy employees.... Many of these fatalities were due to occupants going to the windows after the grenade exploded to see what was happening outside.

Other casualties were pedestrians and motorists in the crowded streets next to the embassy. Vehicles caught fire.... 20 persons were blinded, and 50 have severely limited sight from

lacerations incurred from flying shards of glass; the actual count of eye injuries is in the hundreds, but the severity of many will not become apparent for some time. The shock of the explosion broke glass in buildings and vehicles within at least a quarter-mile radius. The collapse of the Ufundi building confirms the extreme hazard posed by building collapse. The majority of the fatalities were persons trapped and crushed under the weight of the building after falling several stories....

Given the types of injuries most prevalent in these incidents, non-penetrating fragment

A large rectangular area of the page is completely redacted with a solid blue color, indicating that the original text has been removed or is not to be reproduced. A thin red border surrounds the blue area.

impact is probably the most appropriate injury model for severe injuries. A radius of 200 feet indicates that all people within a one-half block radius (not protected by buffering walls) were vulnerable to injury from flying debris.... For glass injuries, the radius is 1000 feet. Reports indicate that injuries due

to glass fragments extended somewhat further out than this model predicts.

That report, as further investigation revealed over the years, overlooked many of the facts and factors which led to the attack, and understated in great degree the loss, suffering and injury sustained by Kenyans and Americans.

On the day of the attack, the U.S. State Department acknowledged its “failure,” and grappled with the recognition that, with the Nairobi Embassy, the U.S. had “gambled and lost.” Again and again since the attack, U.S. and Kenyan officials express surprise that the tragic plight of the victims and their families has not been addressed. But, with very few exceptions, it has not.

In his findings, Magistrate Judge Facciola described the bombing as "...one of the most grotesque and depraved acts imaginable." The Court accepted Plaintiffs' expert testimony that "...each victim of the Embassy bombing suffered long-term or permanent psychological injury from the scenes

that they observed during the bombing and in its aftermath [and] the victims of the bombing suffered the effects of post-traumatic stress disorder [and] each victim of the Embassy bombing sustained material, significant emotional, psychological and financial injury, whether he suffered a physical injury or not."

Of the horrors inflicted on the families who lost spouses, parents and children, there is little

to choose between the gruesome searches of the wreckage, and then the overwhelmed hospitals, and finally the gruesome morgues, and the familial, emotional, and financial destruction of families who had been enjoying lives free from of international terror.

The largest group of victims were members of Kenya's Teachers Service Commission. Over 300 teachers and school administrators were attending a conference on the upper floors of the building adjoining the embassy and lost their lives or suffered serious injuries from the terrorist attack. In addition to the educators, over one hundred Kenyans were orphaned, many Kenyan

women were widowed, suffered miscarriages or other birth complications, and hundreds more Kenyans were blinded or suffered serious vision loss.

One young widow explained to the U.S. Court how the loss of her husband led to the loss of her home, her children's schooling, her career, and her ability to provide for them. She told the Court that "[i]n the morning of the Embassy bombing, their lives were "very happy. Nothing

seemed like would go wrong...." She was pregnant with their second child on the day that her husband died. A young widower told the Court that this wife could only be recognized in the morgue by a fabric from the new dress he had just bought her. He testified:

We arrived there and entered the cold rooms where the bodies are kept. And it was a scene you would not want to ever see again. It was a scene, it's something that even today makes one shiver with fear. Those bodies were aligned in rows. Others were heaped. And even in (em)bracing with your next of kin, it was (a) very, very, very hard task. So I went from one side to the other looking for her. And on the way, there were hundreds and hundreds of bodies badly mutilated. Badly, badly, badly mutilated. Some had no limbs, some had no heads, some had their stomachs opened. Some had, some were crushed to something very tiny.... And at the end, I saw where she was....

Burdened by his inexplicable ordeal, he lost his work, and eventually, his family. Thousands of Kenyans have for decades endured similar fates, worsened by the sense that they were forgotten among the great international issues that come and go.

American courts provided some awareness in 2022. Now, one month before the 25th Commemoration of the attack, the Kenyan Senate offers hope to the victims and their families that their decades-long burden will finally be lifted.

PART FOUR: THE FEDERAL LITIGATION IN WASHINGTON

Commencing in 1998, the Firm – having sought and received the approval of the Law Society of Kenya – and other American law firms assisted Kenyan victims with the filing at the U.S. Department of State (“DOS”) of administrative claims with the United States. Those written claims were made through the use of a U.S. government “Form 95.” Thousands of such forms were timely filed and have never been disposed of by DOS or by the United States Government. The administrative claims – and thus the Form 95’s – are procedural requirements for the bringing of claims against the United States under the Federal Tort Claims Act.

In 1999, the Firm filed on behalf of hundreds of individually-named Kenyans, in the United States District Court for the District of Columbia (the “District Court”), the first of several lawsuits against the United States, Osama bin Laden, Al Qaeda, Afghanistan, and Sudan. The Firm was given access by DOS to thousands of pages of its internal documents, but over years of litigation, the only claims that survived defenses of sovereign immunity were the claims against Al Qaeda and bin Laden. Those claims were initially dismissed because the district court concluded that it lacked jurisdiction over either foreign defendant.

On appeal, however, in 2005, the United States Court of Appeals for the District of Columbia Circuit reversed that ruling, finding, and concluding that, because the attack was directed at the United States, the district court had jurisdiction over the two remaining defendants. As the Court of Appeals wrote:

Those defendants engaged in unabashedly malignant actions directed at and felt in this country. Bin Laden and al Qaeda should therefore reasonably anticipate being haled into court here by those injured as a result of those actions, regardless of the plaintiffs’ nationality. (internal citations, quotation marks, and brackets omitted)

The case was thus remanded to the district court so that proceedings against Al Qaeda and Osama bin Laden could continue.

Over the succeeding years, the District Court addressed complex issues related to choice of law, service of process, personal jurisdiction, default, jury demands, and proof of damages. The District Court granted the Firm's request for a bellwether hearing – that is, a hearing with representative samples of groups of victims, accompanied by expert testimony.

In 2011, the District Court presided over an evidentiary hearing in which eight victims, and expert witnesses, testified. In 2014, Magistrate Judge Facciola issued his Findings of Fact and Conclusions of Law, and entered judgments in favor of many, but not all, of the hundreds of plaintiffs named in the lawsuit.

As noted on the preceding section, the District Court determined that each eligible personal injury plaintiff suffered long-term and likely permanent, emotional, and psychological injuries, and the Court calculated the approximate monetary value of those injuries individually at five million dollars (\$5,000,000.00). The Court also awarded punitive damages of one hundred fifty million dollars (\$150,000,000.00) per victim.

Thus, during decades of litigation up to the U.S. Supreme Court, the Firm secured landmark rulings including the following: (a) the attack was directed at the United States and its Embassy and citizens, not at Kenya or its citizens; (b) Form 95's, which were filed with the DOS by thousands of Kenyan victims within one year of the bombing, could be used as evidence by U.S. Federal Courts of injuries sustained by the victims; (c) the emotional and psychological damages, including fear and PTSD, were sustained by all victims; (d) a bellwether hearing in which representative victims and experts testified would be applicable to non-testifying plaintiffs; and (e) compensatory damages for each such victim could fairly be calculated at five million dollars (\$5,000,000.00), in addition to punitive damages of one hundred fifty million dollars (\$150,000,000.00).

In 2022, a new Magistrate Judge, after a scrupulous review of the long record, the Form 95's and accompanying evidence, and prior rulings, approved final judgments for 351 Kenyans against Al Qaeda in the total amount of fifty-six billion, six hundred thirty-seven million, seven hundred twenty-nine thousand, seven hundred dollars (\$56,637,729,700.00).

Though the ability to directly collect funds from those judgments, is extremely limited, the judgments and the rulings which led to the judgments are the fountainhead for legislative efforts in the United States brought for all victims. As the following section sets out, those judgments and the U.S. legislative efforts are the reason for and the noble goal of the creation of the *Ad Hoc Committee*.

PART FIVE: THE PROPOSED U.S. LEGISLATION

Following receipt of the final judgments, the Firm registered with the Office of the United States Department of Justice under the Foreign Agents Registration Act (“FARA”) as lobbyists for Kenyan victims of the 1998 bombing. The Firm disclosed that it would be working with Mr. Szlavik of Scribe Strategies & Advisors, Inc., and Mr. Foote of CFA. The Firm later added Mr. Ngure. Dr. Tascoe registered separately.

We are proposing to Congress simple budget-neutral amendments through the Victims of Terrorism Rights Act. Its principal purpose is to make the Kenyan victims of the 1998 attack eligible to participate in the U.S. Victims of Terrorism Compensation Fund (the “Compensation Fund” and/or the “Fund”). The proposed legislation is narrowly tailored, easily administered, and is well-suited for inclusion under the NDAA, the Department of State Authorization Act, or as part of a budget bill.

The Compensation Fund was created in 2014 as part of omnibus budget legislation. Because it derives its funding from fines and penalties secured by the Department of Justice, the Fund is structurally budget neutral. The Fund is not and has not been limited to American victims; instead, it applies to judgment-holding victims of state-sponsored terrorist attacks directed against the United States. Though the Department of Justice declines to disclose the identifying details of any distributions, the Fund appears to have received and distributed three billion dollars (\$3,000,000.00) from the Department of Justice to date.

The Firm’s proposed U.S. legislation provides several benefits to judgment holders and others, but its main provisions (1) provide a pathway for all victims to become eligible in the Fund; and (2) formalize requirements for continuing contributions to the Fund by the Department of Justice.

Section 4202 of the proposed U.S. legislation describes its purpose as: “...to strengthen the cooperation between the United States and Kenya and between the United States in the fight against terrorism by establishing the eligibility of the Kenyan victims and their personal representatives, surviving spouses, and next of kin in the Victim Compensation Fund pursuant to the Justice for United States Victims of State Sponsored Terrorism Act....”

Section 4303(a)(7) of the proposed legislation makes eligible for the Fund every “...citizen or resident of Kenya or the United States who was injured or who sustained a loss as a result of the 1998 Embassy Bombings and the personal representative or surviving spouse or next of kin of a citizen or resident of Kenya or the United States who was injured or who sustained a loss as a result of the 1998 Embassy Bombings...” and provides for a conclusive presumption that eligible claimants sustained injury and damages in the amount of the Damages Award in the Litigation.

The Firm emphasizes that the Damages Award that the Firm secured for many of its clients after decades of litigation should not be viewed by any victim as an indicator of the range of possible distributions. It is not. Just as the 9/11 victims have received only fractions of their damages so far, the proposed U.S. legislation makes possible similar fractional distributions to Kenyan victims. But the proposed legislation and the Fund finally provide a vehicle for continuing, long-overdue compensation for innocent victims who are no longer forgotten.

July 6, 2023

Philip M. Musolino

**APPENDIX TO OPENING REPORT
FOR THE
KENYAN SENATE *AD HOC* COMMITTEE ON
THE COMPENSATION TO THE KENYAN
VICTIMS OF THE 1998 BOMBING OF THE
UNITED STATES OF AMERICA EMBASSY IN
NAIROBI**

Presented by Philip M. Musolino and Musolino & Dessel, PLLC

DATABASE – LITIGATION:
Appendix A

1. U.S. District Court for District of Columbia – Odillia Mutaka Mwani, et al. v. Al Qaeda, et al. (No. 99-CV-00125):
 - i. *Odillia Mutaka Mwani, et al. v. Al Qaeda, et al.* (99-CV-125) Docket M&D_00001 - M&D_00043
 - ii. 99-04-30 First Amended Complaint M&D_00044 - M&D_00193
 - iii. 99-04-30 Form 95, et al. M&D_00194 - M&D_01122
 - iv. 10-01-07 Opinion and Order Regarding Choice of Law M&D_01123 - M&D_01131
 - v. 10-01-25 Plaintiffs' Brief Pursuant to Order of January 7, 2010 M&D_01132 - M&D_01216
 - vi. 13-05-29 Memorandum Opinion and Order M&D_01217 - M&D_01225
 - vii. 14-08-22 Memorandum Opinion and Order M&D_01226 - M&D_01230
 - viii. 14-09-25 Findings of Fact and Conclusions of Law M&D_01231 - M&D_01261
 - ix. 14-09-25 Judgment M&D_01262
 - x. 14-11-18 Second Findings of Fact and Conclusions of Law M&D_01263 - M&D_01275
 - xi. 14-11-18 Second Judgment M&D_01276 - M&D_01285
 - xii. 21-08-31 Plaintiffs' Motion for Relief With Respect to the Sudan Claims Resolution Act and With Respect to Assets Held by OFAC M&D_01286 - M&D_01331
 - xiii. 22-05-23 Final Judgments M&D_01332 - M&D_01342
2. U.S. Court of Appeals for District of Columbia Circuit – Merania Muringu Macharia, et al. v. United States (No. 03-562):
 - i. 03-10-09 Petition for Writ of Certiorari M&D_01343 - M&D_01483
 - ii. 04-01-20 Denial of Petition for Writ of Certiorari M&D_01484
3. U.S. Court of Appeals for District of Columbia Circuit – Odilla Mutaka Mwani, et al. v. Osama Bin Laden and Afghanistan (No. 04-5266):
 - i. 04-11-22 Appellants' Brief M&D_01485 - M&D_01529
 - ii. 05-01-05 Appellants' Reply Brief M&D_01530 - M&D_01546
 - iii. 05-08-05 Judgment M&D_01547
 - iv. 05-08-05 Opinion M&D_01548 - M&D_01575

DATABASE – LEGISLATION:
Appendix B

1. Draft U.S. Legislation:

- i. 23-01-03 United States Victims of State Sponsored Terrorism Fund Special Master's Report Regarding the Fourth Distribution
- ii. 23-06-30 1998 Embassy Bombing Litigation and Legislation Package
- iii. 23-07-03 Proposed U.S. Legislation

M&D_01576 - M&D_01589

M&D_01590 - M&D_01661

M&D_01662 - M&D_01667

2. Foreign Agents Registration Act (FARA):

- i. 22-03-21 FARA Registration, et al.
- ii. 22-10-03 FARA Supplemental, et al.
- iii. 23-04-28 FARA Supplemental, et al.

M&D_01668 - M&D_01698

M&D_01669 - M&D_01941

M&D_01942 - M&D_02006

3. Kenyan Legislation:

- i. 23-06-23 Notice of Ad Hoc Committee
- ii. 23-06-29 Kenyan Senate Proceeding

M&D_02007

4. A. Press Release:

- i. 23-02-07 M&D Press Release
- ii. 23-02-16 M&D Press Release
- iii. 23-02-23 M&D Press Release

M&D_02008 - M&D_02009

M&D_02010

M&D_02011 - M&D_02012

B. Statements of Support:

- i. 22-01-25 Hope for 1998 Blast Victims as US Law Firm Asks Them to Reach Out - The Star
- ii. 22-03-25 Victims of Nairobi Embassy Attack Register to Lobby - Politico
- iii. 22-05-30 Kenya - Raila, Ruto Seek US Compensation for 1998 Embassy Bombing Victims - The Africa Report
- iv. 22-08-04 Law Firm Representing Hundreds of Kenyan Victims of the 1998 Terrorist Bombing By Al Qaeda Writes White House Spokesman John Kirby Over Heated Exchange With Journalist Simon Ateba - Today News Africa
- v. 22-08-07 Its 24 Years Today Since Al Qaeda Bombed Two US Embassies in Kenya and Tanzania Killing 224 Americans and Africans on August 7, 1998 - Today News Africa
- vi. 22-08-07 US Firm Wants Kenyan Victims of 1998 Attack Compensated - The Nation

M&D_02013 - M&D_02014

M&D_02015 - M&D_02017

M&D_02018 - M&D_02023

M&D_02024 - M&D_02029

M&D_02030 - M&D_02036

M&D_02037 - M&D_02038

- vii. 23-02-26 US First Lady's Visit Renews Hope for Embassy Bomb Victims
- viii. 23-02-26 Joyce Omondi Statement

M&D_02039 - M&D_02041
M&D_02042

5. Correspondence:

- i. 22-04-21 PMM Ltr. to Senator Coons
- ii. 22-04-21 PMM Ltr. to Congressman Meeks
- iii. 22-04-21 PMM Ltr. to Chief of Staff Waita
- iv. 22-04-21 PMM Ltr. to Charge d'Affaires Kneedler
- v. 22-05-04 PMM Ltr. to Senator Warnock
- vi. 22-05-04 PMM Ltr. to Congresswoman McBath
- vii. 22-05-04 PMM Ltr. to Congresswoman Bourdeaux
- viii. 2-05-04 PMM Ltr. to Congressman Meeks
- ix. 22-05-04 PMM Ltr. to Charge d'Affaires Kneedler
- x. 22-08-04 PMM Ltr. to Kirby
- xi. 23-02-07 PMM Ltr. to Sen. Dir. Devermont
- xii. 23-02-07 PMM Ltr. to Sec. Blinken
- xiii. 23-02-07 PMM Ltr. to First Lady Biden
- xiv. 23-02-23 PMM Email to Office of First Lady Jill Biden
- xv. 23-03-21 PMM Ltr. to First Lady Jill Biden

M&D_02043 - M&D_02044
M&D_02045 - M&D_02046
M&D_02047 - M&D_02048
M&D_02049 - M&D_02050
M&D_02050 - M&D_02070
M&D_02071 - M&D_02090
M&D_02091 - M&D_02110
M&D_02111 - M&D_02130
M&D_02131 - M&D_02150
M&D_02151- M&D_02169
M&D_02170- M&D_02179
M&D_02180- M&D_02181
M&D_02182- M&D_02194
M&D_02195- M&D_02196
M&D_02197- M&D_02199

DIVISION D: OTHER MATTERS

TITLE III — VICTIMS OF TERRORIST ATTACKS ON U.S. FAIRNESS ACT

SEC. 4301. SHORT TITLE.

This title may be cited as the “Victims of Terrorist Attacks on U.S. Fairness Act.”

SEC. 4302. FINDINGS; PURPOSE.

(a) Findings.—Congress finds the following:

- (1) On August 7, 1998, Al Qaeda terrorists attacked the American Embassy in Nairobi, Kenya (hereafter referred to as the “Nairobi US Embassy Bombing”).
- (2) The Nairobi US Embassy Bombing on the United States caused loss of life and great injury and damage to thousands of Americans and Kenyans.
- (3) Al Qaeda and its affiliates and co-conspirators received financial and other support which facilitated the Nairobi US Embassy Bombing and continue to receive financial and other support, which endangers the United States and its allies.
- (4) In *Mwani et.al. v. Al Qaeda et.al.* Case No. 99-125, in the United States District Court for the District of Columbia (the “Federal Litigation”) the District Court correctly described the Nairobi US Embassy Bombing as “one of the most grotesque and depraved acts imaginable.” The District Court also properly awarded individual damages against Al Qaeda in favor of 351 Kenyan plaintiffs of five million dollars in compensatory damages for non-economic injuries per plaintiff, plus prejudgment interest, plus \$150 million per eligible plaintiff as punitive damages (the “Damages Award”), for a total award of USD 56.64 billion, and properly found that those damages, established during a bellwether evidentiary hearing, applied to other Kenyan plaintiffs in the Federal Litigation who were victims of the Nairobi US Embassy Bombing.

(b) Purpose.—The purpose of this Act, and the amendments made by this Act, is to strengthen the cooperation between the United States and Kenya in the fight against terrorism by establishing the eligibility of Kenyan victims and their surviving personal representatives, spouses, children and next of kin (collectively “Victim Family Member(s)”) in the Victim Compensation Fund pursuant to the Justice for United States Victims of State Sponsored Terrorism Act, codified at 42 U.S.C. § 10609 (2015), and by directing the distribution to certain Kenyans holding judgments against Al Qaeda as a result of the Nairobi US Embassy Bombings of funds of Al Qaeda held or frozen by the Office of Foreign Asset Control (“OFAC”), and by directing the disposition of certain funds of Afghanistan or its central bank, and to provide a recovery to the surviving spouses of Kenyans killed in the Nairobi US Embassy Bombings, and to provide and define a right of action in favor

of certain Kenyans and the Victim Family of certain Kenyans killed in the Nairobi US Embassy Bombings against terrorist organizations and financial institutions which provided training or support to Al Qaeda, and to amend provisions related to the Victim Compensation Fund in order to provide greater transparency and clarity.

SEC. 4303. AMENDMENT OF THE U.S. VICTIMS OF STATE SPONSORED TERRORISM ACT.

(a)

- (1) Section 34 U.S.C. § 20144(b) (1)(A)(iii) is amended by adding “and certain victims of the Nairobi US Embassy Bombing” after “victims of” state sponsor of terrorism.
- (2) Section 34 U.S.C. § 20144(c)(2)(A)(i) is amended to add “and arising out of the Nairobi US Embassy Bombing” after “state sponsor of terrorism.”
- (3) Section 34 U.S.C. § 20144(c)(2) is amended by deleting “or” at the end of 34 U.S.C. § 20144(c)(2)(A)(ii).
- (4) Section 34 U.S.C. § 20144(c)(2) is amended by replacing the period at the end of 34 U.S.C. § 20144(c)(2)(C)(ii) with “or.”
- (5) Section 34 U.S.C. § 20144(c)(2) is amended by adding: “(D) a holder of a judgment, or a Family Member of a holder of a judgment against Al Qaeda in the Federal Litigation.”
- (6) Section 34 U.S.C. § 20144(c)(2) is amended by adding: “(E)(i) a named plaintiff, or a Family Member of a named plaintiff in the Federal Litigation, provided that the named plaintiff made a claim of personal injury in a Form 95 presented to the US State Department on or before August 7, 2000 or (ii) a client of plaintiffs’ counsel of record in the Federal Litigation, pursuant to a written engagement or acknowledgment of engagement executed on or before December 31, 2011, and provided further that a person eligible under (6)(E)(ii), through counsel of record in the Federal Litigation, provides with the claim probative evidence in the form of declarations filed as Exhibit C1 in ECF 150 (the “Litigation Declaration”) establishing that such person suffered material personal injuries as a result of the Nairobi US Embassy Bombing and provided that the named plaintiff made a claim of personal injury in a Form 95 presented to the US State Department on or before August 7, 2000.
- (7) Section 34 U.S.C. § 20144(c)(2) is amended by adding: “(F) a citizen or resident of Kenya who was injured or who sustained a loss as a result of the Nairobi US Embassy Bombing and the personal representative or surviving spouse or next of kin of a citizen or resident of Kenya who was injured or who sustained a loss as a result of the Nairobi US Embassy Bombing, provided that (a) the citizen, resident, personal representative or surviving

spouse or next of kin timely filed a claim on Form 95 with the United States Department of State.

- (8) Section 34 U.S.C. § 20144(c) is amended by adding: “(G) a citizen or resident of Kenya, who sustained material non-economic injuries as a result of the Nairobi US Embassy Bombing and the personal representative or surviving spouse or next of kin of a citizen or resident of Kenya who sustained material non-economic injuries as a result of the Nairobi US Embassy Bombings, provided that the citizen, resident, personal representative or surviving spouse establishes by probative evidence material non-economic injuries caused by the Embassy Bombing, such evidence to include a declaration similar in form to the Litigation Declaration or reliable corroborative evidence.”
- (9) Section 34 U.S.C. § 20144(c)(2) is amended by adding: “(H) Notwithstanding the foregoing, distributions to Family Members of a deceased victim of the Nairobi US Embassy Bombing shall be made *pro rata* to each filing Family Member for each victim and shall not exceed in total a distribution or award to one victim of the Nairobi US Embassy Bombing.
- (10) Section 34 U.S.C. § 20144(c)(2) is amended by adding: “(I) Notwithstanding the foregoing there shall be no distributions to Family Members of a deceased victim in excess of 300 deceased victims.
- (11) Notwithstanding the forgoing, no person employed by or who was under contract with the United States or the Embassy of the United States on August 7, 1998, shall be eligible or entitled to distribution under this Act.

(b) Section 34 U.S.C. § 20144 (j)(4) is amended by adding the following: All judgments entered on May 20, 2022, ECF 164, in the Federal Litigation shall be considered final judgments for purposes of this Act.

Section 34 U.S.C. § 20144 (j)(8) is amended by adding:

“Notwithstanding the preceding provisions, for the purposes of this Act, all persons who meet the requirements of 42 U.S.C. § 10609(c)(2)(D), (E), (F), (G), or (H) are U.S. Persons.”

(c) adding Section 42 U.S.C. § 20144(k) of the U.S. Victims of State Sponsored Terrorism Act as follows:

- (1) All persons who meet the requirements of 42 U.S.C. § 10609(c)(2)(D), (E), (F), or (G) and their estates, personal representatives, surviving spouses, and next of kin have a right of action for damages against the Islamic Republic of Iran and any foreign terrorist

organization or financial institution which provided material support or resources, financial support or training to Al Qaeda prior to the Nairobi US Embassy Bombing.

- (2) Any right of action in paragraph (1) shall be brought in the United States District Court for the District of Columbia, and shall be filed no earlier than January 1, 2025, and no later than August 7, 2025, and is a related case with Case Number 1:01CV02244 (JDB) and the court's order of November 30, 2011, ECF 215, shall be deemed law of the case.
- (3) Section 1605A of Title 28, the Terrorism Exception to the Jurisdictional Immunity of a Foreign State, is amended as follows: (a)(2)(ii) is amended to add "(IV) any plaintiff in Case Number 1:99CV00125 (GMH) who asserted a claim of personal injury in that case, or any judgment holder in that case."
- (4) Section 1605A of Title 28, the Terrorism Exception to the Jurisdictional Immunity of a Foreign State, is amended as follows: (a)(2)(ii)(B)(1) is amended to add "and Case Number 1:99CV00125 (GMH)" after "Case Number 1:00CV03110 (EGS)...."

(d) adding Section 34 U.S.C. § 20144(l) of the U.S. Victims of State Sponsored Terrorism Act as follows:

(i) A claimant eligible under (c)(2)(D), (c)(2)(E), or (c)(2)(F) above shall be conclusively presumed and deemed to have sustained injury and damage as a result of the Nairobi US Embassy Bombing in the amount of the Damages Award. An eligible claimant who does not meet the requirements of (i) is entitled to compensation if the Administrator of the Fund or Special Master determines that the eligible claimant suffered material non-economic injury or damage as a result of the Nairobi US Embassy Bombing, or suffered economic injury or damage as a result of the Nairobi US Embassy Bombing and if the Administrator of the Fund or Special Master is further able to make a calculation of damages pursuant to regulations or guidelines similar to the Gulf Coast Claims Facility Protocol for Interim and Final Claims, dated November 22, 2010.

"Any award or distribution from the Fund arising out of a claim based on the Nairobi Embassy Bombing shall (i) be deemed a recovery pursuant to any contingency fee agreement between the claimant and claimant's counsel, and (ii) any claim based on, or in which a claimant held a judgment in the Federal Litigation shall be deemed a recovery and shall entitle counsel of record in the Federal Litigation to the lesser of the fee in the contingency agreement or 25% (ii)I in the event that claimant had not entered into a written fee agreement for the claim, recovery, award or distribution prior to December 31, 2011, such claimant's claim, and any resulting distribution, shall be reduced by 25%

(e) DEFINITIONS. — Section 34 U.S.C. § 20144 is amended by adding:

“(m) Foreign terrorist organization” means foreign organizations that are designated as such by the Secretary of State in accordance with section 219 of the Immigration and Nationality Act (INA), as amended.

“Financial institution” means any domestic or foreign public or private bank or its subsidiary or parent.

SEC. 4304. AMENDMENT OF 22 U.S. Code § 8772.

(a) add to the Title “and Al Qaeda”

SEC. 4304. AMENDMENT OF 22 U.S. Code § 8772.

(a) add to the Title “and Al Qaeda”

(b) add to Section 8772(a)(1):

“(D) a blocked asset of Al Qaeda (whether or not subsequently unblocked), or an asset that would be blocked if the asset were located in the United States.”

(c) add to Section 8772(a)(2):

All blocked assets of Al Qaeda shall be turned over, released, and paid to the counsel of record for the named plaintiffs in the Federal Litigation for distribution to the named plaintiffs in the Federal Litigation following payment of fees, costs and expenses and shall have no effect on any claims or distributions under this Act. Prior to an award turning over, releasing, or paying blocked assets of Al Qaeda, the district judge or magistrate judge assigned to the Federal Litigation shall determine the extent that which unsatisfied judgments against Al Qaeda entered, in that case, exceed the amount of the blocked assets to be turned over, released and paid, and such turnover, release, and payment shall not exceed the amount by which the unsatisfied judgments against Al Qaeda exceed the amount of the blocked assets to be turned over, released and paid.

SEC. 4305. OTHER LITIGATION AND OTHER FUNDS.

(a) Any distribution to any claimant under this Act other than to claimants as described in (c)(2)(D) or (c)(2)(E) shall be reduced dollar-for-dollar by any recoveries, payments, funds, distributions, proceeds or amounts received by that claimant as a result of or related to any litigation or administrative proceeding or settlement thereof, or any statutory awards or grants related to the Nairobi US Embassy Bombing or Sudan, other than the Federal Litigation.

(b) The United States Federal Reserve Bank, and the United States and its departments and agencies shall cause to be deposited in the Victim Compensation Fund any and all funds or proceeds blocked, frozen by, in the possession of, or under the control United States Federal Reserve Bank, or the United States and its departments or agencies, where such funds or proceeds were, at the time that the United States Federal Reserve Bank, or the United States and its departments or agencies blocked,, froze or obtained possession or control over those funds or proceeds, owned, possessed or claimed by Afghanistan, the central bank of Afghanistan or Da Afghanistan Bank. No funds or proceeds obtained by the Victim Compensation Fund pursuant to this paragraph (b) shall be distributed out of the Victim Compensation Fund until all timely applications of claimants as described in Section 4303 subsections (5) and (6) have been finally determined. The deposit shall be made so that 50% of such deposits are distributed to eligible claimants whose claims are based on the September 11, 2001, attack on the World Trade Center, and 50% is distributed to all other eligible claimants.

LAWS. — The laws described in this subparagraph are:

- (i) The US Victims of State Sponsored Terrorism Act, 34 U.S.C. § 20144 *et. seq.*
- (ii) 22 U.S. Code § 8772

TECHNICAL AND CONFORMING AMENDMENTS:



MUSOLINO | DESSEL

A SUMMARY: WHY THE KENYAN VICTIMS OF THE 1998 EMBASSY BOMBING SHOULD BE INCLUDED IN THE US VICTIMS OF TERRORISM COMPENSATION FUND

1. On August 7, 1998, hundreds of Kenyans died, and thousands suffered physical and psychological injuries when the United States Embassy in Nairobi was attacked by Al Qaeda. As the U.S. acknowledged that day, with this Embassy “we gambled and lost.”
2. The lawyers at the Washington, D.C. law firm of Musolino & Dessel, PLLC secured in May 2022 judgments in the aggregate amount of \$56.6 billion against Al Qaeda on behalf of 351 Kenyan Plaintiffs. That judgment was finalized in May 2022.
3. During decades of litigation up to the US Supreme Court, the Firm secured landmark rulings including the following: (a) the attack was directed at the United States and its Embassy and citizens, not at Kenya or its citizens; (b) Form 95’s, which were filed with the U.S. State Department by thousands of Kenyan victims within one year of the bombing, could be used as evidence by U.S. Federal Courts of injuries sustained by the victims; (c) the emotional and psychological damages, including fear and PTSD, were sustained by all victims; (d) a bellwether hearing in which representative victims and experts testified would be applicable to non-testifying plaintiffs; and (e) compensatory damages for each such victim could fairly be calculated at five million dollars (\$5,000,000.00), in addition to punitive damages of one hundred fifty million dollars (\$150,000,000.00).
4. Other Kenyans have similar claims filed over 20 years ago with, but unaddressed by, the U.S. Department of State. America’s Kenyan friends, and allies – those who hold judgments and those who don’t – and their families remain uncompensated for their losses.
5. There is a Victim Compensation Fund (the “Fund”) set up by U.S. Congress which has so far distributed \$3 billion to certain victims of terrorist attacks against the U.S. But, because of the way the statute is worded, most Kenyan victims are not eligible to participate in the Fund.
6. Musolino & Dessel, PLLC as FARA Registrant for the Designated Victims of the 1998 Embassy Bombings, with Joseph Szlavik of Scribe Strategies & Advisors, Inc.; Melvin Foote of the Constituency for Africa; and Daniel Ngure are lobbying Congress to pass budget-neutral legislation which, among other provisions, changes the wording of the eligibility requirements so that the victims would be included in future distributions.
7. Musolino & Dessel, PLLC drafted the language of the proposed U.S. legislation, so that it includes a pathway to compensation for all victims, not just the Firm’s judgment holders.
8. President Ruto generally announced his support for the effort during the lead-up to the 2022 Kenyan Presidential Election.

9. On February 23, 2023, the Law Firm wrote to the U.S. Office of the First Lady and, noting news reports of the First Lady's upcoming visit to Kenya, asked that the First Lady visit the Peace Memorial in Nairobi. On February 25, 2023, First Lady Dr. Jill Biden paid a solemn visit to the Peace Memorial.
10. On March 30, 2023, Vice President Harris visited the Memorial in Dar Es Salaam, Tanzania.
11. On April 24, 2023, U.S. Secretary of State Blinken issued a statement outlining the importance of Kenya to U.S. foreign policy in Africa.
12. On June 29, 2023, the Kenyan Senate passed by unanimous vote a bill proposing the creation of an ad hoc committee of nine Senators to
 - (i) engage the Ministry of Foreign and Diaspora Affairs to advance friendship and cooperation between the United States of America and Kenya by supporting the eligibility of Kenyan and American victims and their personal representatives, surviving spouses and next of kin in the Victim Compensation Fund pursuant to the Justice for United States Victims of State Sponsored Terrorism Act;
 - (ii) coordinate with the Ministry of Foreign and Diaspora Affairs in the engagement of victims, their personal representatives, the United States of America government, and other stakeholders at home and abroad to pursue and accomplish the compensation of victims and families of the victims of Kenyan nationals; and,
 - (iii) coordinate with the Ministry of Health to explore subsidized medical treatment for the surviving victims of the bomb blast.
13. On July 6, 2023, the Law Firm submitted a comprehensive Initial Report detailing both the Law Firm's litigation in U.S. federal courts and the Law Firm's proposed U.S. legislation. That report is available upon request.
14. Following the August 7, 2023, 25th Commemoration, the *Ad Hoc* Committee conducted a number of hearings. Kenyan media coverage was extremely positive and supportive. [Click here](#).
15. On January 30, 2024, Mr. Musolino and Mr. Szlavik met with Prime Cabinet Secretary of Foreign & Diaspora Affairs, Musalia Mudavadi, at the Kenyan Embassy in Washington. The Prime Cabinet Secretary publicly expressed his strong support for the victims and for the work being done in the U.S. by Mr. Musolino and Mr. Szlavik.
16. On March 7, 2024, Mr. Musolino and Mr. Szlavik met with Senator Chris Coons. Over the course of an hour, Mr. Musolino and Mr. Szlavik were able to present the history and the legislation in support of the Kenyan victims. The Senator was supportive. Mr. Musolino and Mr. Szlavik will continue to work with Senator Coons and his office.
17. On May 2, 2024, the Kenyan Senate *Ad Hoc* Committee issued its Progress Report which included, among other things, at pages 22-23 support for the firm's proposed budget-neutral U.S. legislation. This month, President Ruto will be traveling to the U.S. to discuss a number of important U.S.-

This material is distributed by Philip M. Musolino and Musolino & Dessel, PLLC on behalf of the Designated Victims of the 1998 Embassy Bombings. Additional information is available at the U.S. Department of Justice (FARA).

Kenyan issues. The firm is working to schedule meetings with the President and his team in Atlanta and Washington from May 19, 2024 through May 23, 2024.

18. There are three (3) important points to be made: (1) the proposed U.S. legislation is budget-neutral; (2) contrary to the beliefs of many, the Kenyan victims have – with very few exceptions – never received compensation for their losses; and (3) from the U.S. foreign policy position, approving the legislation will serve as a concrete example of U.S. support for its friends and allies in Kenya and in East Africa. We strongly believe that this measure will enhance throughout East Africa the U.S. reputation for fairness and trustworthiness. At a time when other nations vigorously challenge our relationships with our friends and allies in Africa, Congress should take this opportunity to affirm our commitment to that critical region and its people.

May 8, 2024

REPUBLIC OF KENYA

RT. HON. Speaker

Recommended for
approval for tabling -



02/05/24

APPROVED
RT. HON. SEN
AMAZON J. KINGI

E

02/05/2024

THE SENATE

THIRTEENTH PARLIAMENT | THIRD SESSION

SPECIAL COMMITTEE

PROGRESS REPORT OF THE AD HOC
COMMITTEE ON THE COMPENSATION TO THE
KENYAN VICTIMS OF THE 1998 BOMBING OF
THE UNITED STATES OF AMERICA EMBASSY IN
NAIROBI

*Clerk's Chambers,
The Senate,
Parliament Buildings,
NAIROBI.*

| PAPERS LAID | |
|--------------------|-----------------|
| DATE | 02. 05. 2024 |
| TABLED BY | MAJORITY LEADER |
| COMMITTEE | Ad-hoc Ctee |
| CLERK AT THE TABLE | J. Mbaya |

APRIL, 2024

TABLE CONTENTS

| | |
|--|-----------|
| TABLE CONTENTS | 2 |
| ABBREVIATIONS AND ACRONYMS..... | 3 |
| PRELIMINARIES..... | 5 |
| A. ESTABLISHMENT AND MANDATE OF THE COMMITTEE | 5 |
| B. MEMBERSHIP OF THE COMMITTEE | 5 |
| CHAIRPERSON'S FOREWORD | 6 |
| CHAPTER 1: INTRODUCTION – 1998 BOMBING OF THE USA EMBASSY IN NAIROBI..... | 9 |
| 1.1 BACKGROUND..... | 9 |
| 1.2 ESTABLISHMENT AND MANDATE OF THE AD HOC COMMITTEE ON COMPENSATION TO THE KENYAN VICTIMS:..... | 10 |
| CHAPTER 2: LEGAL FRAMEWORK..... | 12 |
| 2.1 COMPENSATION OF VICTIMS OF TERROR IN KENYA..... | 12 |
| 2.2 RIGHT TO COMMENCE ACTION..... | 12 |
| 2.2.1 DIPLOMATIC IMMUNITY | 13 |
| 2.2.1.2 <i>Kenyan and US positions on diplomatic immunity</i>..... | 13 |
| 2.2.2 SOVEREIGN IMMUNITY | 13 |
| 2.2.2.1 <i>Kenya's position on Sovereign Immunity</i> | 14 |
| 2.2.2.2 <i>United States' position on Sovereign Immunity</i>..... | 15 |
| 2.2.2.2.1 1996 Amendments to the FSIA | 15 |
| 2.2.2.2.2 2000 Amendments..... | 16 |
| 2.2.2.2.3 ADDITIONAL US LEGISLATION ON COMPENSATION OF VICTIMS OF TERROR..... | 17 |
| (a) US Sudan Claims Agreement and the Sudan Claims Resolution Act..... | 17 |
| (b) The Justice for United States Victims of State Sponsored Terrorism Act (USVSST) (34 U.S.C.11 20144)..... | 18 |
| CHAPTER 3: CONDUCT AND PROCEEDINGS OF THE COMMITTEE..... | 20 |
| 3.1 COMMITTEE RESEARCH FROM RECORDS | 20 |
| 3.3 COMMITTEE SITTINGS | 21 |
| 3.3.1 <i>Meeting with the Victims</i> | 21 |
| 3.3.2 <i>Attending the Victims Prayer Day and the Commemoration of the August 7th bombing of the US Embassy in Nairobi</i> | 21 |
| 3.3.3 <i>Meeting with the lawyers and representatives of the victims</i> | 22 |
| 3.3.4 <i>Meeting with the Cabinet Secretary in charge of Health</i> | 23 |
| 3.3.5 <i>Meeting with the Cabinet Secretary, Ministry of Foreign and Diaspora Affairs</i> | 23 |
| 3.3.6 <i>Meeting with the National Council for Persons with Disabilities</i> | 24 |
| 3.3.7 <i>Public Hearing</i> | 24 |
| 3.3.8 <i>Meeting with the Cabinet Secretary, Ministry of Interior and National Administration.....</i> | 25 |
| 3.3.9 <i>Meeting with the USA Ambassador to Kenya.....</i> | 25 |
| 3.3.10 <i>Meeting with the Attorney General</i> | 25 |
| 3.4 <i>Call for Written Submissions.....</i> | 25 |
| CHAPTER 4: COMMITTEE'S ENGAGEMENTS WITH THE US CONGRESS AND HOUSE OF REPRESENTATIVES | 26 |

| | | |
|--|---|-----------|
| 4.0 | <i>Introduction</i> | 26 |
| 4.1 | <i>Pre-briefing Meeting of the Kenyan Delegation</i> | 26 |
| 4.2 | <i>African Prayer Gathering Meetings</i> | 27 |
| 4.3 | <i>Meeting with Mr. Sam Owen, the Head Coordinator of the Kenyan Chapter of the National Prayer Breakfast</i> | 27 |
| CHAPTER 5: EMERGING THEMES FROM THE SUBMISSIONS | | 32 |
| 5.1 | AVAILABILITY AND ACCESSIBILITY OF RECORDS ON THE ATTACK | 32 |
| 5.2 | US EMBASSY FAILURE TO DEMONSTRATE DUTY OF CARE | 32 |
| 5.3 | REPORT OF THE ACCOUNTABILITY REVIEW BOARD | 33 |
| 5.4 | COMPENSATION PROCESS OUTLINE AND STATUS: | 33 |
| 5.5 | COURT RULING AND RELATED LEGAL JUDGEMENTS: | 34 |
| CHAPTER 6: COMMITTEE OBSERVATIONS AND RECOMMENDATIONS | | 35 |
| 6.1 | COMMITTEE INTENDED OUTCOMES | 35 |
| 6.1.1 | <i>Compensation for the victims</i> | 35 |
| 6.1.2 | <i>Medical Assistance for the survivors</i> | 35 |
| 6.1.3 | <i>Inclusion of the victims in social assistance programs</i> | 36 |
| 6.2 | COMMITTEE OBSERVATIONS AND FINDINGS | 36 |
| 6.3 | COMMITTEE'S ONGOING ACTIVITIES | 37 |
| 6.3 | COMMITTEE RECOMMENDATION | 38 |

LIST OF APPENDICES

Appendix 1: Copy of the motion establishing the Ad hoc Committee

Appendix 2: Copy of the minutes of the meetings

Appendix 3: Submissions from stakeholders

- a) Submissions from Advocate Phil Musolino;
- b) Submissions from the Ministry of Health;
- c) Submissions from Ministry of Labour and Social Protection;
- d) Submissions from Ministry of Interior and National Administration;
- e) Submissions from the National Council for Persons with Disabilities;
- f) Submissions from the Attorney General

Appendix 4: Submissions from Victims

Appendix 5: List of victims

Appendix 6: List of staff who were dismissed

ABBREVIATIONS AND ACRONYMS

ADRK - Adventist Development Relief Agency Kenya

AHK - Amref Health Africa

CEO - Chief Executive Officer

CS - Cabinet Secretary
DLM - Dr. Linda Musumba Advocates
KCS - Kituo Cha Sheria
KRS - Kenya Red Cross Society
KSB - Kenya Society for the Blind
NCPWD - National Council of People Living with Disabilities

PRELIMINARIES

a. Establishment and Mandate of the Committee

The Senate Ad Hoc Committee on the Compensation of the Kenyan Victims of the 1998 Bombing of the United States Embassy in Nairobi was established through a resolution of the Senate at its sitting held on Thursday, 29th June 2023 with the mandate to-

- i) Engage with the Ministry of Foreign and Diaspora Affairs to advance friendship and Co-operation between the United States of America and Kenya by supporting the eligibility of Kenyan and American Victims and their personal representatives, surviving spouses and the next of kin in the Victim Compensation Fund pursuant to the Justice for United States Victims of State Sponsored Terrorism Act;
- ii) Coordinate with the Ministry of Foreign and Diaspora Affairs in the engagement of victims, their personal representatives, the United States of America government and other stakeholders at home and abroad to pursue and accomplish the compensation of victims and families of the victims of Kenyan nationals; and
- iii) Coordinate with the Ministry of Health to explore subsidised medical treatment for the surviving victims of the bomb blast.

b. Membership of the Committee

The Committee constitutes of the following members –

| | | |
|----|---------------------------------|-------------------|
| 1. | Sen. Agnes Kavindu Muthama, MP; | -Chairperson |
| 2. | Sen. Jackson Mandago, MP; | -Vice-Chairperson |
| 3. | Sen. Johnes Mwaruma, MP | -Member |
| 4. | Sen. Daniel Maanzo, MP; | -Member |
| 5. | Sen. William Cheptumo, MP; | -Member |
| 6. | Sen. Alexander Mundigi, MP; | -Member |
| 7. | Sen. Mohamed Said Chute, MP; | -Member |
| 8. | Sen. Peris Tobiko, MP; and | -Member |
| 9. | Sen. Beatrice Ogolla, MP | -Member |

CHAIRPERSON'S FOREWORD

Mr. Speaker Sir,

The Senate Ad Hoc Committee on the Compensation of the Kenyan Victims of the 1998 Bombing of the United States Embassy in Nairobi, was established on 29th June, 2023 but held its first sitting on 18th July, 2023.

The Committee was able to meet the victims, their lawyers, the next of kins of the deceased victims and groups representing various victims attended the meeting, where it received both Oral and written submissions from the victims.

The Committee also attended both the Victims Prayer on 5th August, 2023 and the 25th Commemoration of the bomb Blast on 7th August, 2023, at the August 7th Memorial Park.

Honourable Speaker Sir, the Committee met with cabinet secretaries of the Ministry of Health, Ministry of Labour and Social Protection, the Ministry of Foreign and Diaspora Affairs and the Ministry of Interior and National Administration. The Committee was also able to meet with the National Council for Persons with Disabilities.

Mr. Speaker Sir, from the interactions with the above, the Committee gave the following directions to the Ministries -

- i. that the Ministry of Health conducts medical assessment of the surviving victims of the 1998 USA bombing of the US Embassy in Nairobi, and submit the report of the assessments to the Committee in order to assist the Committee build its case on compensation of the said victims;
- ii. that the Ministry of Labour and Social Protection and the National Council for Persons with Disabilities undertake registration for survivors with disabilities;
- iii. that the Cabinet Secretary in charge of Foreign affairs push the matter of compensation at Cabinet level; and
- iv. that the Cabinet Secretary, Ministry of Interior and National Administration develops regulations to operationalize the Compensation of the Victims of Terrorism Fund.

Mr Speaker Sir, though the Committee was unable to secure appointments with the US Ambassador to Kenya and with the US Congress, Sen. Daniel Maanzo and I were able to attend the National Prayer breakfast at Washington DC where we were able to meet various Senators and Congressmen and put forward our case on the compensation of Kenyan Victims of the 1998 Bombing of the US Embassy in Kenya. Chairperson of the Committee.

Specifically, we were able to meet Sen. Christopher Coons, the Chairperson of the US Senate Foreign Relations Subcommittee on African Affairs and he agreed to the meeting of the two committees to discuss compensation of the Kenyan victims.

Honourable Speaker Sir, Sen. Coons as the Chairperson of this very important Committee of the US Senate is very instrumental in the proposal of the Ad Hoc Committee in amending the Justice for United States Victims of State Sponsored Terrorism Act (34 U.S.C.11 20144), which provides for the establishment and administration of the US Victims of State Sponsored Terrorism Fund (the USVSST Fund) to provide compensation to certain U.S. persons who were injured in acts of international state-sponsored terrorism, to include Kenyan Victims of the 1998 Bombing of USA Embassy in Nairobi.

Mr. Speaker Sir, within the 100 days that the Senate has given us, the Committee intends to follow up with the following institutions in order to assist the Kenyan victims of the 1998 bombing of the USA Embassy in Nairobi who have not been compensated to date –

- i. The Ministry of Health on the provision of subsidised medical care for survivors injured during the 1998 Bombing of the US Embassy in Nairobi;
- ii. The Ministry of Labour and Social Protection on the assessment and registration of survivors with disabilities of the 1998 bomb blast with the National Council of Persons with Disabilities; and
- iii. The Ministry of Interior and National Administration on the formulation of regulations to implement section 49 of the Prevention of Terrorism Act, 2012 which operationalises the Compensation of Victims of Terrorism Fund.

Appropriate recommendations shall be made by the Committee on this matter in its final report.

Mr. Speaker Sir, the Committee now recommends that the Cabinet Secretary in charge of Foreign and Diaspora Affairs secures appointments for the Committee to meet the Members of the United States of America Senate Foreign Relations Sub Committee on African Affairs to discuss the Committee's proposal of amending the Justice for United States Victims of State Sponsored Terrorism Act which provides for the establishment and administration of the United States Victims of State Sponsored Terrorism Fund (USVSST Fund) to include Kenyan Victims of the 1998 Bombing of the United States Embassy in Nairobi. The Cabinet Secretary is to provide bimonthly updates on the progress made in securing the appointments.

The Committee extends its appreciation to parties who volunteered submissions and contributions to the resolution of this matter. I also wish to express my appreciation to my fellow Senators for their contributions on this matter.

The Committee thanks the Office of the Speaker of the Senate and the Clerk of the Senate for the support extended to the committee in the execution of its mandate.

It is now my pleasant duty pursuant to Standing Order 223 (6) to table this progress report of the Ad Hoc Committee on the Compensation of the Kenyan Victims of the 1998 Bombing of the United States Embassy in Nairobi.

Signature.....  Date..... 24/04/24

CHAIRPERSON: SEN. AGNES KAVINDU MUTHAMA, MP.
THE AD HOC COMMITTEE ON THE COMPENSATION OF THE KENYAN
VICTIMS OF THE 1998 BOMBING OF THE UNITED STATES EMBASSY IN
NAIROBI

CHAPTER 1: INTRODUCTION – 1998 BOMBING OF THE USA EMBASSY IN NAIROBI

1.1 Background

1. On 7th August, 1998, the American Embassies in Nairobi, Kenya, and Dar-es-Salaam, Tanzania, were bombed simultaneously by suspected Al-Qaeda operatives, resulting in the death of more than 224 people, and injuries to more than 5000 persons. These included people working in the embassy, people in the adjacent buildings, and people going about their daily business in the vicinity. The attack at the Nairobi embassy, which was located in a busy downtown area, caused great devastation and loss of life. A truck loaded with 2,000 pounds of explosives forced its way to the back entrance of the embassy and was detonated, shattering the embassy, demolishing the nearby Ufundi Cooperative House, and gutting the 17-story Cooperative Bank.¹
2. In Nairobi, the number of fatalities were 213 people, including 12 Americans, and 5,000 people were wounded. The attack against the U.S. embassy in Dar es Salaam killed 11 and injured 85 people. The American embassy suffered 50% casualties. The attack was attributed to members of the al-Qaeda terrorist network.
3. According to the US Department of State, the US Government established the Office of Casualty Assistance in 1999 to provide focused and co-ordinated assistance to the victims of the bombing. Consequently, all of the families of the American victims of the bombings in Nairobi and Dar-es-Salaam (as well as all of those injured) received the benefits for which they were eligible under existing law. The Department of Justice's Office for Victims of Crime provided for many out-of-pocket expenses. A scholarship fund for tertiary education was established for those with children.²
4. Additionally, all of the Locally Employed Staff victims received all of the benefits to which they were entitled under the law. In addition, many out-of-pocket expenses were covered by other sources, such as the Department's Foreign Service National Fund, allocations from the Department of Justice's Office for Victims of Crime, and an allotment from the U.S. Agency for International Development that was used to offset the cost of mental health counselling.
5. Further, the US Department of State indicated the families of the 173 Kenyan citizens killed or injured who were not affiliated with the US Government received

¹ <https://www.ojp.gov/about>

² <https://www.state.gov/about/>

a five-year package of assistance provided by the United States through USAID from 1998-2003, totaling approximately \$42.3 million. The projects disbursing these funds were allegedly worked through contractors, NGOs, and the Kenyan Government to ensure that critical needs of Kenyans were met in six areas: Search and Rescue Operations; Medical Follow-up; Socio-economic support for victims; Rehabilitation and Reconstruction; Assistance to Businesses and Disaster Preparedness.³

6. As a result of the US government efforts above, all the embassy staff, both American and Kenyan and other American victims were compensated, whereas Kenyan victims have to date, not been compensated.
7. The victims' efforts to obtain compensation have been greatly curtailed by the legal and policy environment both in Kenya and in the United States of America. Issues of sovereign immunity have affected the victims' ability to claim for compensation particularly within Kenya, whereas in the US, some victims have successfully obtained favourable judgements, but are unable to execute the same.
⁴
8. The Kenyan Government, through Parliament, and specifically the Senate, has made a concerted effort to intervene on this matter through the establishment of a Committee to work directly with the United States Congress and other key stakeholders in the push for justice for the affected victims.

1.2 Establishment and Mandate of the Ad Hoc Committee on Compensation to the Kenyan Victims:

9. The Senate Ad Hoc Committee to investigate the compensation to the Kenyan Victims of the 1998 Bombing of the U.S Embassy in Nairobi was established on 29th June, 2023. The primary mandate of the Committee was to engage with key stakeholders including the Ministry of Foreign and Diaspora Affairs, the U.S. Government, the legal team representing the victims in the U.S. and the victims' representatives.
⁵
10. The Committee was also mandated to advance friendship and co-operation between the United States of America and Kenya by supporting the eligibility of

³ US Department of State Archives, <<https://2001-2009.state.gov/r/pa/prs/ps/2008/aug/107989.htm>> accessed 13th October 2023.

⁴ <https://clinton.presidentiallibraries.us/embassy-bombings>

⁵ Hansard 29th June 2023

Kenyan and American victims, surviving spouses and next of kin in the Victim Compensation Fund, pursuant to the Justice for United States Victims of State Sponsored Terrorism Act;

11. The Committee was further mandated to coordinate with the Ministry of Health, Ministry of Interior and Ministry of Labour and Social Welfare to explore subsidised medical treatment, psychosocial support and government welfare schemes for the surviving victims of the bomb blast.
12. A copy of the Hansard extract containing the Motion establishing the Committee is attached as Appendix 1 of this report.

CHAPTER 2: LEGAL FRAMEWORK

13. This chapter discusses the legal and policy environment in Kenya and the United States at the time of the bombing and presently, particularly as relates to the right to commence action, as well as compensation of victims in both jurisdictions. In doing so, the chapter discusses the concepts of diplomatic immunity and sovereign immunity vis-a-vis application of the same in Kenya and in the United States, and additionally, the developments in the law on compensation of victims of terrorism in both states.

2.1 Compensation of victims of terror in Kenya

14. Until 2012, Kenya did not have a legal framework for compensation of victims. The Prevention of Terrorism Act, No. 30 of 2012 was enacted to not only aid the fight against terrorism by implementing United Nations Security Council resolutions on terrorism, but it also sought to create a fund out of which victims would be compensated.
15. Section 49(1) of the Act provides as follows—
 - (1) *There is established a fund to be known as the Compensation of Victims of Terrorism Fund.*
 - (2) *There shall be paid into the Fund—*
 - (a) *such moneys as may be realised from any property forfeited to the State under this Act;*
 - (b) *grants, gifts, donations or bequests received by the Fund with the approval of the Cabinet Secretary; and*
 - (c) *such other moneys as may be payable to, or vested in, the Fund by virtue of any other written law.*
16. However, to date, the Cabinet Secretary in charge of the Ministry of Interior has not enacted regulations to operationalise this fund, which is disadvantageous to victims who would have otherwise sought to benefit from the fund.
17. Additionally, as the Act was enacted in 2012, the 1998 Bomblast victims are not eligible to claim from the fund as the Act does not provide for retrospective application.

2.2 Right to commence action

18. Where compensation is not automatically provided in law, victims of terrorism attacks often have to seek recourse in court so as to obtain compensations for

injuries suffered as well as for the death of loved ones, or property lost due to the terrorism attack. In this particular instance, the right of victims to obtain legal recourse, particularly where they feel that a certain state is responsible for the injuries may be constrained by the principles of diplomatic immunity as well as sovereign immunity, as discussed below.

2.2.1 Diplomatic Immunity

19. The Vienna Convention on Diplomatic Relations, adopted on 18th April 1961, prescribes the law as regards the privileges and immunities enjoyed by foreign missions and foreign diplomats within a state. Article 31 of this Convention provides that foreign diplomats (and missions by extension) are immune from the civil and administrative jurisdiction of a state. The receiving state is expected to protect the sending state's property, and it cannot be subjected to execution proceedings or attachment by an order of court.

2.2.1.2 Kenyan and US positions on diplomatic immunity

20. Kenya enacted the Privileges and Immunities Act, Cap 179 of the Laws of Kenya, to domesticate the provisions of this convention.
21. Both Kenya and the US are party to this Vienna Convention and as such, the state practice, even where diplomatic relations are not normalised, is to accord diplomatic immunity to such assets of a foreign country which are part of the diplomatic mission. This has particularly affected instances where victims of terror got judgements in US courts against certain states but cannot execute them due to the only available assets being diplomatic assets.

2.2.2 Sovereign Immunity

22. Under customary international law, a state is immune from the jurisdiction of the courts of another state. This immunity not only bars filing of suits against the state, but also protects the property of that state from attachment by a successful litigant. This immunity is referred to as the sovereign immunity of a state, and it arises out of the principle that all states are equal.
23. It is however noteworthy, that there is no international convention or treaty on this immunity of states that is currently in force. The extent of the immunity is therefore dependent on state practice, and it is widely accepted that immunity is not absolute, as it extends to only the states' exercise of governmental authority,

and not to commercial matters. This is referred to as the restrictive theory of sovereign immunity.

24. Other exceptions cover cases of waiver (express and implied), expropriation in violation of international law, estate and succession matters, and disputes over rights in real property and estates located in the particular state.
25. There have been efforts to codify the international law position on the sovereign immunity afforded to a state and its property in foreign courts –
 - (a) in 1991 the International Law Commission formulated the Draft Articles on Jurisdictional Immunities of States and their Property, and these were widely held to reflect the position of customary international law on the matter; and
 - (b) the above culminated in the adoption of the United States Convention on the Jurisdictional Immunities of States and their Property, which was adopted in 2004. The Convention is however not yet in force, as only 23 states have ratified it, against the required threshold of ratification by 30 states as provided for in article 30 of the Convention.

2.2.2.1 Kenya's position on Sovereign Immunity

26. Kenya has not enacted any statute on sovereign immunity. However, Kenyan Courts have been consistent in upholding this principle and demarcating its limits in various judgments on cases filed before the courts.
27. In *Ministry of Defence of the Government of the United Kingdom v Joel Ndegwa* (1983) eKLR, the court held as follows—

"The principle that a foreign government or sovereign cannot be impleaded, that is to say sued or prosecuted in the courts of another country, was clearly stated in 1938 by Lord Atkin in Compania Naviera Vasiongada v Cristina, The Christina [1938] 1 All ER 719 at 721 as follows:

"The first is that the courts of a country will not implead a foreign sovereign. That is, they will not by their process make him against his will a party to legal proceedings, whether the proceedings involve process against his person or seek to recover from him specific property or damages. The second is that they will not seize or detain property which is his, or of which he is in possession or control.....

28. Additionally, this court upheld the theory of restrictive sovereign immunity when it held that—

“...We, too, agree that the doctrine of absolute immunity would be anachronistic, and has been for some time now. What immunity there is must be restricted or qualified so that private or commercial activities cannot be immunized.”

29. The implication of this is that Kenyan courts often dismiss suits filed against foreign states unless the claimant proves that the suit concerns the commercial activities of the state.

2.2.2.2 United States' position on Sovereign Immunity

30. In 1976, the US Congress enacted the Foreign Sovereign Immunities Act (FSIA), to restate the US position on sovereign immunity. The Act provided for immunity of foreign states against suits filed in US Courts, with a few exceptions made, such as the exception for suits concerning commercial activities of the state. The law has been amended severally to allow for victims of terrorist acts to have a course for action and to obtain compensation.

2.2.2.2.1 1996 Amendments to the FSIA

31. This was the position of law until 1996, when Congress enacted the Antiterrorism and Effective Death Penalty Act. This Act amended the Foreign Sovereign Immunities Act, thus removing sovereign immunity in actions in which *“money damages are sought against a foreign state for personal injury or death that was caused by an act of torture, extrajudicial killing, aircraft sabotage, hostage taking or the provision of material support or resources is engaged in by an official, employee or agent of such foreign state while acting within the scope of his or her office, employment or agency”*. (section 1605(a)(7)).
32. The amendment applies to countries of the State Department's list of state sponsors of terrorism, which as at 1996, included Cuba, Iran, Iraq, Libya, North Korea, Syria and Sudan. The amendment was also only applied to claimants or victims who were US nationals.
33. Additionally, the amendment removed immunity in respect of commercial property belonging to such a state for claims filed under section 1605(a)(7), regardless of whether the property was involved with the act upon which the claim was based. Diplomatic property however, remained immune from attachment or

execution due to the US obligations under the Vienna Convention on Diplomatic Relations.

2.2.2.2.2 2000 Amendments

34. In the year 2000, Congress enacted the Justice for Victims of Terrorism Act, 2000. This was to allow use of assets blocked by the US government under various economic sanctions imposed upon the foreign state. This act made blocked assets of Cuba available to pay certain outstanding judgments against that country. It also provided that certain plaintiffs with judgments against Iran could be paid out of funds from the U.S. Treasury, which were supplemented by a small portion of blocked Iranian funds.
35. As a result of the above amendments, although many victims of terrorist attacks were able to sue states such as Sudan, Iran and Cuba for their complicity in the attacks, they were not able to execute the judgements and obtain compensation because -
 - a) in most cases, in fact, the defendant states have not even appeared in the suits, nor do these states typically have very many assets in the United States against which a judgement may be executed. Some only had diplomatic assets in the US, which assets were protected under the Vienna Convention on Diplomatic Relations;
 - b) where the foreign state had other assets in the US, they were frequently blocked and often subject to competing claims of ownership and subject of other suits eg. between the US and Iran; and
 - c) most importantly, the executive hoped to use the funds or assets available as foreign policy tools or leverage, for instance as was done in 1981 in the negotiations for the release of American hostages held by Iran.
36. Moreover, while Congress sought to create a judicial forum for the compensation of victims and the punishment of terrorist states through various amendments, it proceeded with caution, in part due to the concern that other nations would respond by subjecting the American government to suits in foreign nations.
37. The US Treasury also had to come up with the compensation amounts themselves instead of liquidating the state's assets, like in instances involving Iranian assets, hence burdening American taxpayers. As such, the US Government had to come up with innovative solutions towards compensating the victims of terror.

2.2.2.2.3 Additional US legislation on compensation of victims of terror

(a) **US Sudan Claims Agreement and the Sudan Claims Resolution Act**

- 38. The Claims Settlement Agreement between the US Government and the Government of Sudan was signed on 30th October 2020, and it entered into force on 9th February 2021. The Transitional Government of Sudan had sought for restoration of normal relations with the US and for delisting Sudan from the State Department's list of state sponsors of terrorism where it had been listed since 1993.
- 39. The agreement dealt with restoration of Sudan's sovereign and diplomatic immunities, and it also sought to bar any suits against Sudan that had not yet been concluded, as well as bar the filing of any new suits under the state sponsor of terrorism exception to the Foreign Services Immunity Act.
- 40. In consideration for the above, the Government of Sudan was to pay US\$ 335,000,000, which would be deposited in an interest bearing account at the US Treasury. The amount would be used to compensate victims of terror who held final judgements in certain cases identified in the annex to the Agreement. Some of the cases related to compensation of the victims of the 1998 bombing, including, among others -
 - a) Wamai v. Republic of Sudan – DDC 08-CV-1349 (JDB);
 - b) Amduso v. Republic of Sudan – DDC 08-CV-1361 (JDB);
 - c) Onsongo v. Republic of Sudan – DDC 08-CV-1380 (JDB); and
 - d) Opati v. Republic of Sudan – DDC 08-CV-1224 (JDB).
- 41. The eligible parties included not only persons who were US nationals at the time of the attack, but also persons who were contractors or employees of the United States and who got citizenship after the attack and were still citizens at the time the Agreement came into force. A commission would be formed by Sudan, with the concurrence of the US, to deal with compensation of foreign nationals, who are defined in the Agreement as "*persons who were not US citizens at the time their claims arose but became citizens afterwards.*"
- 42. In order to implement this agreement, the US Congress enacted the Sudan Claims Resolution Act on 27th December, 2020. The enactment was necessary so as to enable access to the funds paid by Sudan under the Claims Agreement, and it also, in section 5, extended the life of the US Victims of State Sponsored Terrorism Fund from the year 2030 to 2039.
- 43. The Act however, only facilitated compensation for persons who were US nationals at the time of the attack, and where the family filed a claim, the family

members were still US nationals at the time the Act came into force. Foreign nationals would only receive any amount under the Act if they reached a private settlement on compensation with the Government of Sudan, otherwise the amount payable to them would be redistributed to the claimants who were US nationals. It is not clear if they reached any settlement with the Government of Sudan.

44. According to the US Government Accountability Office, 78 persons were found to be eligible, and as at December 2022, they had all been compensated.⁶

(b) **The Justice for United States Victims of State Sponsored Terrorism Act (USVSST) (34 U.S.C.11 20144)**

45. The Justice for United States Victims of State Sponsored Terrorism Act, as amended, provides for the establishment and administration of the US Victims of State Sponsored Terrorism Fund (the USVSST Fund) to provide compensation to certain U.S. persons who were injured in acts of international state-sponsored terrorism.

46. The USVSST Fund, established in 2015, is meant for compensation of eligible United States persons who –

- a) hold a final judgement issued by a United States district court awarding the applicant compensatory damages arising from acts of international terrorism for which a foreign state sponsor of terrorism was found not immune from the jurisdiction of the courts of the United States under the Foreign Sovereign Immunities Act;
- b) were taken and held hostage from the United States Embassy in Tehran, Iran, during the period beginning November 4, 1979, and ending January 20, 1981, and certain of their spouses and children; or
- c) are the personal representative of a deceased individual in those categories.

47. The Act defines a United States person as a natural person who has suffered an injury arising from the actions of a foreign state for which the foreign state was found not immune from the jurisdiction of the courts of the United States under the Foreign Sovereign Immunities Act as regards state sponsors of terrorism.

48. The Fund draws its monies from proceeds obtained from civil and criminal violations under the International Emergency Economic Powers Act and Trading

⁶ United States Government Accountability Office, "Report to Congressional Committees: Sudan Claims Resolution Act - State Verified Eligibility, Determined Compensation, and Distributed Payments" (2022) <<https://www.gao.gov/assets/gao-23-105782.pdf>> accessed 11th October 2023.

with the Enemy Act, as well as certain assigned assets of Iran. It does not draw any funds from the US Treasury.

49. The Fund was expected to be operational until the year 2030, and the Sudan Claims Resolution Act extended its life to the year 2039. The deadline for submitting applications was 90 days from the date when the Special Master publishes the regulations, thus appearing to lock out persons who did not submit their claims within the timeline.

CHAPTER 3: CONDUCT AND PROCEEDINGS OF THE COMMITTEE

50. This Chapter gives summaries of the undertakings of the Committee with the victims and different stakeholders. An exhaustive record of the minutes of the deliberations are attached as Appendix 2 of this report. The Committee also conducted research on past records and media records on the matter, and further wrote to institutions and individuals that were involved during and after the tragedy.

3.1 Committee research from records

51. This section outlines the documentation and records that the Committee interacted with on the matter. The Committee interacted with various materials including:

- (i) Newspaper articles published in The East African Standard and The Daily Nation.
- (ii) Publication by the former US Ambassador to Kenya , Ms. Prudence Bushnell, titled “Terrorism, Betrayal and Resilience: My Story of the 1998 US Embassy Bombings”
- (iii) Online research: www.justice.gov/criminals-about/division, etc.

52. From the above analysis, the Committee found it evident that security concerns had been expressed about the safety of the US Embassy in Kenya. Several concerted efforts were made by the then US Ambassador, Prudence Bushnell to the State Department, and later, directly to the Secretary of State. Intelligence reports that had been shared to the U.S. further show that terrorist plans to explode the embassies had been in formulation from one year earlier.

53. While the US may not have been responsible for the attacks, failure to action intelligence reports may directly be attributed to the huge loss of lives that was witnessed. The above brief demonstrates a collective failure by several administrations and Congress over decades to invest adequate efforts and resources to reduce vulnerability of US missions around the world to terrorist attacks.

54. Amb. Prudence Bushnell's book shows that the revised US security standards that were set following the embassy bombing in Beirut were not applied to the Nairobi and Dar es Salaam embassies despite recommendations to do so. Once more, implementation of these recommendations may have moderated the effects of the bomb blasts.

55. The publications examined also indicate that the decision by the US not to treat Embassies in Africa as a priority in the embassies security upgrade strategy at the time was also a contributing factor to the options by Al Qaida in narrowing down on the embassies in East Africa as soft targets. The failure by the US Government to take necessary steps to prevent such tragedies through unwillingness to give sustained priority and funding to security improvements is evident.

3.3 Committee Sittings

56. Upon establishment, the Committee held sittings with the victims, their representatives, their lawyers and various institutions that were of strategic importance to the accomplishment of the mandate of the Committee.

3.3.1 Meeting with the Victims

57. The Committee met the victims and their representatives on Friday, 28th July, 2023. The delegation of the victims included Mr. John Mwariri, an advocate with Kituo Cha Sheria who was representing the victims at the High Court of Kenya through a case on compensation filed in June, 2021. Others included Mr. Douglas Sidialo who lost his sight due to the attack, Mr. George Ngige, Ms. Caroline Muthoka, Ms. Leonora Atieno and Ms. Redempta Kadenge, former Teachers Service Commission employees, Ms. Grace Njoroge representing orphans, Ms. Jane Njeri Njunira representing victims in the diaspora and Mr. Ali Mwadama.
58. The Committee asked Kituo Cha Sheria to urgently prepare and submit a detailed and authenticated documentation of the victims who are due for compensation.

3.3.2 Attending the Victims Prayer Day and the Commemoration of the August 7th bombing of the US Embassy in Nairobi

59. The Victims prayer day took place on Saturday, 5th August, 2023 while the August 7th commemoration took place on Monday, 7th August, 2023. Both events took place at the August 7th Memorial Park and a majority of the members of the Committee attended.
60. The two occasions presented the Committee with an opportunity to listen to a greater number of victims and their representatives. The Committee also got to hear of other issues that were affecting their victims in their day-to-day lives.

61. The Committee committed to ensure that all the victims were granted justice and also resolved to look into the cases of those victims whose employment was terminated by their employers on medical grounds because of the injuries that they suffered.

3.3.3 Meeting with the lawyers and representatives of the victims

62. The Committee met with Mr. Philip Musolino and his team on Friday, 11th August, 2023. Mr. Musolino is a lawyer a lawyer by profession and a partner with the Musolino & Dessel PLLC, an international law firm based in the USA which has been involved in the litigation of the 1998 USA embassy bombing at the request of a client with commercial interests East Africa in the year 1999, and has since been representing hundreds of victims of the bomb blast.
63. He reported that the firm has jointly been closely working with other professional organisations mainly Scribe strategies & Advisors, Ms. Caroline Muthoka of both Baraka Care and the Consortium of the August 7th Victims, and Ms. Ramona Tascoe an accomplished physician, ordained minister and a dedicated humanitarian with long standing commitment of assisting victims.
64. He briefed the Committee that the law firm secured in May 2023 judgements in the aggregate amount of \$56.6 billion against Al Qaeda on behalf of 351 Kenyan plaintiffs, but these amounts have not been paid out due to lack of a law that includes Kenyans.
65. There is a Victim Compensation Fund set up by the US Congress which has so far distributed \$3 billion to certain victims of terrorist attacks against the USA but because of how the statute is worded, the Kenyan victims are not eligible to participate in the Fund. He added that they are currently lobbying the US Congress to pass budget-neutral legislation which, among other provisions, changes the wording of the eligibility so that the Kenyan victims are included in future distribution.
66. To this end, the law firm, Musolino & Dessel, PLLC has drafted the language of the proposed US legislation so that it includes a pathway to compensation for all victims and not the firm's judgement holders.
67. Mr Musolino was accompanied by Dr. Ramona Tascoe, a US based Physician and humanitarian activist for victims, Ms. Caroline Muthoka Ms. Caroline Muthoka, Mr. Douglas Sidialo and Mr. Daniel Ngure, all bomb blast victims.

68. The other Committee members expressed their appreciation to the advocates and all the stakeholders who have been involved in the litigation of the matter and informed them that the Committee will robustly engage with all of them to ensure the necessary amendment to the Victim of State Sponsored Act is amended to have the Kenyan Victims eligible for compensation from the Victims Compensation Fund.

3.3.4 Meeting with the Cabinet Secretary in charge of Health

69. The Committee met the Cabinet Secretary for Health on Friday, 25th August, 2023, to deliberate on subsidisation of medical treatment to the victims of the 1998 Bomb blast. The Ministry of Health is key in the formulation of policies, programmes and laws aimed at improving provision of healthcare services in the Country.
70. The meeting agreed that was needed to assess vulnerability status of the survivors by the State Department of Social Protection. This will identify the vulnerable groups with limited ability to pay for their health care, who can be included into the NHIF subsidised health insurance under the National Scheme through counties.
71. The Committee resolved that the Ministry of Health conducts medical assessment of the surviving victims of the 1998 USA bombing of the US Embassy in Nairobi, and submits the report of the assessments to the Committee in order to assist the Committee build its case on compensation of the said victims.

3.3.5 Meeting with the Cabinet Secretary, Ministry of Foreign and Diaspora Affairs

72. The Committee met with the Cabinet Secretary, Ministry of Foreign and Diaspora Affairs on Wednesday, 30th August, 2023, to deliberate on Kenya's Foreign Policy and ways of advancing friendship and cooperation with the United State of America in securing compensation for the Kenyan Victims of the 1998 Bombing of the US Embassy in Nairobi.
73. The Committee requested the CS to accord the Committee support in as far as engagement with the government of the US was concerned and to bring the matter of the Compensation of the victims to the attention of the President and the work of the Committee.

74. The victims requested the Cabinet Secretary to inform them of the steps the Kenyan Government has made to have them compensated in the last 25 years after the Bomb blast.
75. The Cabinet Secretary for the Ministry Foreign and Diaspora Affairs informed the Committee that the United States of America is a great friend and ally of Kenya with close partnership in many sectors and as such, all engagements with the US government should take cognizance of the shared friendship and cooperation between the two countries.
76. He also committed that his office will immediately set up a special team at the Ministry specifically assigned to develop an advisory detailing the roadmap that the Kenyan Government shall use in engaging the US Government on the compensation of the Kenyan victims, and present a brief to the Cabinet on the Compensation of the victims of the Bomb blast.

3.3.6 Meeting with the National Council for Persons with Disabilities

77. The Committee met the National Council for Persons with Disabilities (NCPWD) team led by the Chief Executive Officer on Friday, 7th September, 2023 to enable the Committee understand the role of the Council in registering Persons with Disabilities and any of their services accorded to the Kenyan Victims of the 1998 Bombing of the US Embassy in Nairobi.
78. The Committee noted that the NCPWD is the state agency mandated to champion and protect the rights of persons with disabilities in Kenya, with a presence in all the forty-seven counties.
79. The Committee noted that the Council was established in 2014 while the attack took place in 1998.
80. The Chief Executive Officer of the Council committed to have a meeting with the representatives of the victims so as to assess and determine what type of support and assistance the victims need and put them in the programs of the Council. and also pledged other forms of assistance to the victims.

3.3.7 Public Hearing

81. The public hearing held in Machakos Social Hall in Machakos County on 8th September, 2023, accorded the public in Machakos and its environs an opportunity

to meet the Committee and air their views on the tragedy. The Committee got to listen to members of the public who could not travel to Nairobi, including children of deceased victims.

3.3.8 Meeting with the Cabinet Secretary, Ministry of Interior and National Administration

82. The Committee met with the Cabinet Secretary, Ministry of Interior and National Administration on Thursday, 12th October, 2023 and committed to the operationalization of section 49 of the Prevention of Terrorism Act, 2012 which provides for the establishment of the Compensation Fund for Victims of terrorism to support the victims.

3.3.9 Meeting with the USA Ambassador to Kenya

83. The Committee was not able to secure an appointment with the US Ambassador to Kenya.

3.3.10 Meeting with the Attorney General

84. The Committee was unable to meet with the Attorney General of Kenya. However, he sent an advisory (attached as Appendix 3 (f) of this report) to the Committee on the matter.

3.4 Call for Written Submissions

85. In its quest for information and documentation on the 1998 bombing of the US Embassy in Kenya, the Committee wrote to the following individuals and Institutions who were involved in the emergency and recovery efforts; and also those that provided humanitarian assistance to the victims. The Committee wrote to Kituo Cha Sheria, the Kenya Red Cross Society, Amref Health Africa, Adventist Development Relief Agency Kenya, Kenya Society for the Blind, Ernst and Young and Dr. Linda Musumba of DLM Advocates.

- a) Dr. Linda Musumba wrote back to the Committee submitting a list of the victims;
- b) Kituo Cha Sheria also submitted a list to the Committee;
- c) Amref, Ernst & Young and Kenya Red Cross Society informed the Committee that they no longer have the records of the victims; and
- d) The August 7th Memorial Park submitted a list of the persons who died during the attack.

CHAPTER 4: COMMITTEE'S ENGAGEMENTS WITH THE US CONGRESS AND HOUSE OF REPRESENTATIVES

4.0 Introduction

86. Though the Committee was unable to secure appointments for it to meet the members of Congress of the United States of America (USA), the Chairperson and Sen. Maanzo were able to travel to the USA as part of the Kenyan delegation to the US National Prayer breakfast meeting from 31st January to 1st February, 2024.
87. The Prayer breakfast provided an opportunity for the Members of the Ad Hoc Committee on compensation to meet US Senators and Congressmen and Women and put forward Kenya's case for compensation.
88. This meeting was preceded by the African Gathering from 27th to 30th January, 2024, which also presented the members with a chance to brief other African countries on the compensation case for the Kenyan victims.

4.1 Pre-briefing Meeting of the Kenyan Delegation

89. This meeting took place on Saturday, 27th January, 2024 in Winchester, Virginia and among those present were Hon. Ambassador Lazarus Amayo, Sen. Agnes Kavindu, MP, Sen. Daniel Maanzo, MP, Sen. Veronica Maina, MP, Hon. John Kaguchia, MP, Hon. Beatrice Elachi, MP, Hon John Chege Kiragu, Ms. Serah Kioko the Senior Deputy Clerk of the National Assembly, Hon. Sen. Samuel Poghisio, Hon. Alfred Edakasi from Uganda and other Kenyans.
90. The Ambassador welcomed all to the United States and then invited Sen. Kavindu who briefed the National Prayer Breakfast delegation on the Senate Ad Hoc Committee on the Compensation of the Kenyan Victims of the 1998 Bombing of the US Embassy in Kenya whose main mandate was to seek compensation for the Kenyan Victims through an amendment of the American Law, the Justice for United States Victims of State Sponsored Terrorism Act (34 U.S.C.11 20144), which provides for the establishment and administration of the US Victims of State Sponsored Terrorism Fund (the USVSST Fund) to provide compensation to certain U.S. persons who were injured in acts of international state-sponsored terrorism, to include Kenyan Victims of the 1998 Bombing of USA Embassy in Nairobi.
91. She apprised the meeting on what the Committee has done in Kenya and concluded by stating that the purpose of her visit was to lobby for the compensation of the Kenyan Victims of the 1998 Bombing of the US Embassy in Nairobi, adding that

there were some victims who had already secured a judgement for an award, in the American Courts but there was no legal framework to implement the Rulings.

92. The Ambassador thanked the delegation for honouring the invite and informed the meeting that he was part of the now defunct Njonjo Commission that was tasked to distribute relief and contributions made by Kenyans to the victims of the Attack. He added that the Commission provided about Kshs. 30,000 to aide in burials among other relief items.
93. He advised the Members that the Prayer breakfast will provide a good platform for the Members to lobby for the inclusion of Kenya to the schedule that would enable Kenyan Victims to get compensation.
94. He further advised that Members also use the opportunity to get Sen. Coons agree to sponsor the amendment and also to host Sen. Cory Booker, the Senator for New Jersey and also the Chair on the African Sub-committee on African Relations, who will be visiting Kenya in the near future.
95. After intensive deliberations, it was agreed that the secretariat prepares a two-page case summary for the delegation to enable the delegation to acquaint themselves with the details of the matter for the purposes of lobbying.

4.2 African Prayer Gathering Meetings

96. These meetings were held on Sunday 28th and Monday 29th January, 2024, In Winchester Virginia, with the guest speaker being Dr. Sheena from the British Isles whose main theme was reconciliation. Ms. Caroline Muthoka, a victim of the Bomb Blast was present during the meetings and briefed the meeting on what took place on that day.

4.3 Meeting with Mr. Sam Owen, the Head Coordinator of the Kenyan Chapter of the National Prayer Breakfast.

97. This meeting took place on Monday, 29th January, 2024 at 6.30 pm in Winchester, and was attended by the whole Kenyan delegation as outlined above. Mr. Owen was briefed on the issue of compensation for the Kenyan victims and further requested to arrange for the Senators to meet their counterparts to discuss the matter.

98. The meeting discussed the approach to take on the matter and resolved to diplomatically pursue the issue of compensation to the Kenyan victims.

4.4 Meeting with Hon. Musalia Mudavadi, the Prime Cabinet Secretary and Minister in charge of Foreign and Diaspora Affairs

99. This meeting took place on Tuesday, 30th January, 2024 at 4.00 pm in the Kenyan Embassy in Washington DC. Present in the meeting was the Prime Cabinet Secretary (PCS) and his team, the Ambassador and his team, the Kenyan delegation as indicated earlier and the lawyers of the victims who included Mr. Phillip Musolino and Mr. Joe Burris.

100. The Ambassador welcomed everyone to the Embassy and briefed the PCS about the Embassy outlining the strategic areas that Kenya has bilateral relationships with the United States. These areas include regional cooperation, health cooperation, defense cooperation, climate change and environment cooperation.

101. He further briefed the PCS on the Ad Hoc Committee on the 1998 bomb blast, their mandate and the objective of their visit.

102. The Chairperson and Sen. Maanzo when introducing themselves also apprised the PCS on the undertakings of the Committee and outlined the objective of their visit. They requested the PCS to advance the cause of compensation of the Kenyan victims in his meetings with the US Executive and the Senators. Ms. Caroline Muthoka, who was present in the meeting also shared her testimony and pleaded with the PCS to seek compensation for Kenyans.

103. The Prime Cabinet Secretary thanked everyone for honouring his invitation, noting that Kenya had very strong partnerships with the United States of America that Kenya would want to continue. He mentioned that the African Growth and Opportunity Act (AGOA), which Kenya is benefiting from, is coming to an end in 2025 and that Kenya was pursuing its renewal.

104. He requested for the Legislators' support in the country's engagements and noted that prayers play an important role in countering the volatile situation across the globe. He added that Kenya, though stable, is likely to be affected by instability anywhere else across the globe.

105. He concluded by cautioning the meeting that the wise win before the fight, while the ignorant fight to win.

4.5 Meeting between Members of the Kenyan Parliament and US Representatives

106. This meeting took place on Tuesday, 30th January, 2024 at the C Street where the Chairperson, Sen. Daniel Maanzo and the Prime Cabinet Secretary were able to meet Congressman John Moolenaar and Senator for Kansas, Jerry Moran and brief them about the Ad hoc Committee. They also presented the two with a legislative brief on the proposed amendments.

4.6 International Women's Coffee Meeting

107. This meeting took place on Wednesday, 31st January, 2024 at the Washington Hilton Hotel, and was being hosted by the wives of the congressmen led by Ms. Susan Walberg, wife of Congressman Tim Walberg from Michigan and Ms. Audrey Mann, wife of Senator Tracy Mann.

108. The meeting was an interactive session where the Chairperson got an opportunity to meet with the spouses of several representatives and brief them on the operations of the Ad Hoc Committee on compensation of the 1998 Bombing of the USA Embassy, informing them of the objective of her visit to the United States and requesting them for their support in pursuing the compensation for Kenyan victims.

4.7 Meeting with Mr. Phil Musolino and Mr. John Burris, US-based Lawyers representing some of the victims

109. This meeting took place in Mr. Phil Musolino's office on Wednesday, 31st January, 2024 in Washington DC from 1.00 pm. Sen. Agnes Kavindu, Sen. Dan Maanzo and Sen. Veronica Maina were present during the meeting. Ms. Caroline Muthoka was also present.

110. Mr. Musolino briefed the Senators on what his firm had done so far and noted the following – That,

- the proposed legislation was budget neutral;
- Kenyan victims had not received any compensation and that the 40 Billion that Congress transferred did not go to the victims but to the insurance companies that lost buildings; and
- compensating Kenya would be a huge victory to the United States in promoting and enhancing its image as a country that stands with its allies.

111. He added that there is already a way of making sure that only legitimate claims get processed in terms of personal injury and loss of life.

112. He concluded by advising the Ad hoc Committee that the National Defence Authorisation Authority (NDAA) that authorises military expenditure annually is able to address special defense legislation through the House Arms Services Committee and the Senate Arms Services Committee.

4.8 Meeting with Congressman Robert Aderholt, Alabama and Congressman John Moolenaar, Michigan

113. This meeting took place in Congressman Robert Aderholt's office in Cannon House, Capitol Hill on Thursday, 1st February, 2024 at 11.00 am. Deputy Ambassador Gicheru was the leader of the delegation. He thanked them for the invitation and briefed the meeting on the matter of compensation for the Kenyan victims of the 1998 Bombing of the US Embassy in Nairobi.

114. The Chairperson also added on what the Ad Hoc Committee had done so far and requested for the Congressmen support in amending the legislation that would enable the Kenyan victims get compensation, and presented a written submission on the matter.

4.9 Meeting with Senator Christopher Coons and Senator Mike Rounds

115. The Kenyan delegation met with two US Senators on Thursday, 1st February, 2024 at 4.00 pm in the African Suite Room at the Washington Hilton.

116. The meeting provided an opportunity for Kenyans to discuss issues that were affecting them. These included challenges that Kenyans face when getting the US Visa and access to business opportunities including support in the growth of online and digital platforms that enhance service delivery.

117. The participants also discussed the matter of markets for the Kenyan tea and coffee in the USA, and African Growth and Opportunity Act (AGOA) of the US and noted that it is expiring in the year 2025, which will leave the Kenyan Export Processing Zones (EPZs) and would amount to huge job losses to the Kenyan youthful population which has been engaged in textile and apparel industries, that have been the flagship of AGOA, amidst other trading opportunities. The team was informed that negotiations were underway for the drafting of the necessary framework to bring in new and better terms of trade agreement under AGOA.

118. The meeting also provided an opportunity for the Ad Hoc Committee to present their case and seek for appointments to present their case to propose for an amendment that would enable Kenyan victims of the 1998 bombing access compensation.
119. Sen. Chris Coons is the chair of the US Senate Ethics Committee. His other committee assignments include Appropriations, Foreign Relations, Judiciary, and Small Business and Entrepreneurship. He is also the Chair of the US Senate Foreign Relations Subcommittee on African Affairs, and therefore very instrumental on the Ad Hoc Committee's quest for compensation of the Kenyan Victims of the 1998 Bomb Blast at the US Embassy in Nairobi.
120. It was agreed that the Senate Ad Hoc Committee on Compensation of the Kenyan Victims of the 1998 Bombing of the United States Embassy in Nairobi, seek an appointment with the Senate Foreign Relations Subcommittee on African Affairs (or sub-committees thereof), to discuss the Justice for United States Victims of State Sponsored Terrorism Act (34 U.S.C.11 20144), which provides for the establishment and administration of the US Victims of State Sponsored Terrorism Fund (the USVSST Fund) to provide compensation to certain U.S. persons who were injured in acts of international state-sponsored terrorism, to include Kenyan Victims of the 1998 Bombing of USA Embassy in Nairobi.

CHAPTER 5: EMERGING THEMES FROM THE SUBMISSIONS

121. This chapter synthesizes the submissions relating to the matter. While the Committee focuses on the issue of compensation of the 1998 victims of US Embassy bombing in Nairobi, the issues encompass other related themes as described in this section.

5.1 Availability and Accessibility of records on the attack

122. Since the attack occurred over twenty-five years ago, the Committee has had challenges in obtaining information from Institutions that were involved in rescue and recovery of Victims. Red Cross, Ernst and Young and other organisations all cited the seven-year period that the law allows for records and documents to be kept.

123. It was also not possible to obtain information e.g. treatment received and termination of employment from the former employers of the victims since the attack took place more than 25 years ago.

124. Section 317 of the Companies Act, no. 17 of 2015, requires companies to keep the records for at least ten years from the date of the relevant resolution, meeting or decision, whereas section 630 of the Act requires that a company should preserve its accounting records for not less than seven years from the date of the transaction. As regards employment information, section 10(6) of the Employment Act, no. 11 of 2007, requires employers to preserve employment records for a period of five years after the termination of employment.

125. Additionally, the law does not prescribe how long health related information is to be kept, and organisations are generally guided by their own internal records retention policies on how long to preserve health related information. They are also guided by section 4 of the Limitations of Actions Act, cap 22, which provides timelines within which a party can commence action against another party, i.e. three years for tort matters, and six years for contract and other matters. For the above reason, most entities keep records for an average of six to ten years before disposal.

5.2 US Embassy failure to demonstrate duty of care

126. By 1997, American intelligence officers are reported to have known that bin Laden operatives were active in East Africa but were unable to break up the terrorist cell

before the embassies were attacked. They had even heard of a possible plot to bomb the U.S. embassy in Nairobi but failed to recommend an increase in security before the attack.

127. Prudence Bushnell, the then U.S. ambassador to Kenya, in her book claims to have independently asked the State Department to move the Nairobi embassy because of its exposed location, but the request was not granted. She had previously described her misgivings about the embassy's security posture, and the warnings she communicated about threats and poor building setback. Unfortunately, her alarm was unable to overcome bureaucratic obstacles to produce measures that would have prevented the attack.

5.3 Report of the Accountability Review Board

128. The Accountability Review Board formed to investigate the twin bombings concluded that in the review of systems and procedures required by the law, the Board found that systemic and institutional failures in Washington were responsible for –
 - i. a flawed process for assessing threat levels worldwide which underestimated the threat of terrorism in Nairobi, notwithstanding the Ambassador's repeated pleas;
 - ii. a chronic major lack of funds for building new, safer embassies, to replace buildings like the Nairobi chancery, which, even had there been no terrorist threat, was in a dangerous location and extremely vulnerable to crime and mob violence; and
 - iii. failing to prepare for vehicle bombs by providing guidance in Emergency Action Plans to deal with such attacks, and the warning alarm signals and systems to alert personnel to imminent bomb attacks.

5.4 Compensation Process Outline and Status:

129. The victims and their families had pursued compensation through multiple channels, including lawsuits against foreign governments and financial institutions that were suspected of providing support to the terrorists involved. Additionally, there have been efforts to secure compensation from frozen assets linked to terrorists and their sponsors.

130. Furthermore, the US government had established funds and programs to provide financial assistance, medical care, and other support to the victims and their families.

131. There has been lobbying for US lawmakers to amend a congressionally established terrorism compensation fund to make Kenyan victims eligible. If the proposed changes go through, somewhere between 1,000 and 3,000 Kenyan victims could be eligible for \$5m each, a total payout of \$5bn to \$15bn.

5.5 Court Ruling and Related Legal Judgements:

132. In November 2011 the courts entered a final judgement on liability in favour of plaintiffs and against defendants. The Court found that the government of Iran aided, abetted and conspired with Hezbollah, Osama Bin Laden and al Qaeda to launch large-scale bombing attacks against the United States. Iranian defendants, through Hezbollah, provided explosives training to Bin Laden and al Qaeda and rendered direct assistance to al Qaeda operatives.

133. Sudan also provided critical financial, military, and intelligence services that facilitated and enabled al Qaeda to strengthen its terrorist network and infiltrate nearby countries. With the support of Sudan and Iran, al Qaeda killed and attempted to kill thousands of individuals on site in the 1998 U.S. embassy attacks in Nairobi, Kenya and Dar es Salaam.

134. Lawyers for the victims have been lobbying US lawmakers to amend a congressionally established terrorism compensation fund to make Kenyan victims eligible for the Victim Compensation Fund pursuant to the Justice for United States Victims of State Sponsored Terrorism Act. If these amendments are approved, it will allow the Kenyan victims to be eligible to participate in a United States Congressional Fund providing compensation to the victims of terrorist attached to the United States. A legislative change is being floated to the eligibility requirement for the United States Victims of State Sponsored Terrorism Fund, which Congress created in 2016.

CHAPTER 6: COMMITTEE OBSERVATIONS AND RECOMMENDATIONS

6.1 Committee Intended Outcomes

135. The intended outcomes of the Senate Ad Hoc Committee on the Compensation of the Kenyan Victims of the 1998 Bombing of the United States Embassy are derived from its mandate which is to-
 - i. Engage with the Ministry of Foreign and Diaspora Affairs to advance friendship and Co-operation between the United States of America and Kenya by supporting the eligibility of Kenyan and American Victims and their personal representatives, surviving spouses and the next of kin in the Victim Compensation Fund pursuant to the Justice for United States Victims of State Sponsored Terrorism Act;
 - ii. Coordinate with the Ministry of Foreign and Diaspora Affairs in the engagement of victims, their personal representatives, the United States of America government and other stakeholders at home and abroad to pursue and accomplish the compensation of victims and families of the victims of Kenyan nationals; and
 - iii. Coordinate with the Ministry of Health to explore subsidised medical treatment for the surviving victims of the bomb blast.
136. From the above, the Committee was able to follow up on the outcomes as explained below.

6.1.1 Compensation for the victims

137. The key intended outcome of the Committee is to secure compensation for the victims by facilitating the eligibility of Kenyan victims, surviving spouses and next of kin in the Victim Compensation Fund, pursuant to the Justice for United States Victims of State Sponsored Terrorism Act.

6.1.2 Medical Assistance for the survivors

138. The Committee's other intended outcome is the provision of subsidised medical care for survivors injured during the attack. This is to be done through the Ministry of Health.

6.1.3 Inclusion of the victims in social assistance programs

139. The survivors who got disabilities as a result of the bomb blast are to be assessed and registered with the National Council of Persons with Disabilities. This is to ensure that these victims receive Government support on Social Welfare.

6.1.4 Compensation due to loss of livelihoods

140. There are survivors whose jobs and livelihoods were negatively affected due to injuries sustained.

6.2 Committee Observations and Findings

141. From the foregoing, the Committee observed the following –

- i) that although section 49 of the Prevention of Terrorism Act establishes the Compensation of Victims of Terrorism Fund, the fund has not been operationalised to date as the Cabinet Secretary has not enacted the necessary regulations, and additionally, since the Act was enacted in 2012, the victims of the 1998 US Embassy bombing would not be eligible for compensation for the Act. The Committee further noted that amending the Act to have retrospective application would not necessarily guarantee compensation to these victims, as it would make it possible for victims of any terror attacks that have taken place since 1998 eligible for compensation, which would put an additional budgetary and administrative strain in the compensation process;
- ii) that through various amendments to the US law, victims of terror have been able to file cases against various state sponsors of terrorism as well as the terrorist organisations and obtain favourable judgements;
- iii) that there have been various barriers that have prevented victims of the 1998 American embassy bombing who have obtained favourable judgements in US courts from obtaining compensation;
- iv) that Kenyans who were injured or who lost their family members were not able to access the funds paid by the Sudan for compensation of the victims of the 1998 embassy bombing on account of their nationality, and they were expected to enter into separate private agreements with the Sudan in order to access the funds;
- v) that the two compensation schemes discussed above not only appear to benefit persons of US nationality, but they also recognise, for eligibility purposes, persons who hold judgements against state sponsors of terrorism. As such, even if the two schemes did not restrict persons who

are not US nationals from receiving compensation for death or injuries suffered in the 1998 US embassy bombing, a good number of such persons hold judgements against al-qaeda as opposed to judgements against state sponsors of terrorism, hence they would still remain excluded from receiving compensation;

- vi) that to benefit from the current fund (USSVT Fund) amendments to the Justice for United States Victims of State Sponsored Terrorism Act would need to be enacted so as to not only open a new application window for victims of the bombing, but also to remove any nationality requirements, express or implied that may hamper their access to the fund, as well as any requirements to hold a final judgement against a state sponsor of terrorism;
- vii) that any amendments to US legislation are sovereign matters fully within the legislative mandate of the US Congress and enacting any amendments is subject to the goodwill of the US Congress, and that the Committee can only leverage on the good bilateral relations between the two nations to have the changes in the US law enacted;
- viii) That although the Committee is cognizant of the fact that some of the victims of the bombing may have lost their jobs due to their inability to continue working as a result of injuries sustained during the attack, due to the long passage of time, the Committee is not able to ascertain if due process was followed to terminate the employment of such persons as there are no available records on the same. Additionally, persons who may have been unfairly dismissed ought to have reported the dismissal within 28 days as was required under the Trade Disputes Act (Cap 234) (now repealed), and thereafter pursued a claim at the Industrial Court as it then was;
- ix) That the ascertained lists of victims available to the Committee obtained from various sources should be used for reference and compensation. However, it is worth noting that these lists may not be exhaustive.

6.3 Committee's ongoing activities

142. The Committee, in a bid to assist the Kenyan victims of the 1998 bombing of the USA Embassy in Nairobi, intends to continue engaging with the following ministries in order to for the Cabinet Secretaries to actualise the commitments made to the Committee during the various engagements held, including –

- i. the Ministry of Health on the provision of subsidised medical care for survivors injured during the 1998 Bombing of the US Embassy in Nairobi;

- ii. the Ministry of Labour and Social Protection on the assessment and registration of survivors with disabilities of the 1998 bomb blast with the National Council of Persons with Disabilities; and
- iii. the Ministry of Interior and National Administration on the formulation of regulations to implement section 49 of the Prevention of Terrorism Act, 2012 which operationalises the Compensation of Victims of Terrorism Fund.

143. The Committee shall make the appropriate recommendations on this in its final report.

6.3 Committee Recommendation

144. The Committee recommends that in order to assist the Kenyan victims of the 1998 bombing of the USA Embassy in Nairobi-

- a) the Cabinet Secretary in charge of Foreign and Diaspora Affairs secures appointments for the Committee to meet with the Members of the United States of America Senate Foreign Relations Sub Committee on African Affairs to consider the Committee's proposal requesting the USA Congress to amend the Justice for United States Victims of State Sponsored Terrorism Act, which provides for the establishment and administration of the United States Victims of State Sponsored Terrorism Fund (USVSST Fund), to include Kenyan Victims of the 1998 Bombing of the United States Embassy in Nairobi; and
- b) The Cabinet Secretary in charge of Foreign and Diaspora Affairs provides bimonthly updates to the Committee on the progress made in securing the said appointments.