



MUSOLINO | DESSEL

February 16, 2024

Via Electronic Mail:

Congressman Jennifer McClellan
2417 Rayburn House Office Building
Washington, D.C. 20515

Re: Fiscal Year 2025 National Defense Authorization Act Requests

Dear Sir or Madam,

This office represents hundreds of Kenyan victims of the 1998 bombing of the U.S. Embassy in Nairobi, Kenya. In May 2022, we obtained judgments in the United States District Court for the District of Columbia in the aggregate amount of \$56.6 billion against Al Qaeda on behalf of 351 Kenyan victims, including individual compensatory damages awards of \$5,000,000.00 per judgment-holding plaintiff.

As a registered lobbyist for Kenyan victims of the 1998 U.S. Embassy bombing, I have proposed budget-neutral legislation which: (1) makes certain Kenyan victims eligible for the U.S. Victims of State Sponsored Terrorism Fund set out in the Justice for United States Victims of State Sponsored Terrorism Act, 34 U.S.C. § 20144; (2) provides a cause of action for Kenyan victims similar to causes of action available to other victims of terrorist attacks; and (3) contains provisions with respect to OFAC funds and funds of the Afghan Central Bank.

As you may know, the National Defense Authorization Act for Fiscal Year 2008 amended the Foreign Sovereign Immunities Act (“FSIA”) to permit foreign national employees of the United States government killer or injured while acting within the scope of their employment and their family members to sue a state sponsor of terrorism for injuries and damages resulting from an act of terrorism. *See* Section 1083 of the National Defense Authorization Act for Fiscal Year 2007, Pub. L. No. 110-181, § 1083, 122 Stat. 341 (2008) (codified at 28 U.S.C. § 1605A (2009)). My clients and other victims are not presently covered by that amendment.

I’ve attached here a draft of my proposed budget-neutral legislation, as well as a brief Executive Summary of pertinent matters, which in turn contains links to proceedings before the Kenyan Senate and to Kenyan media coverage on the issue. I’ve also prepared a more targeted bill which I can make available to you at your convenience.

As you know, on May 23, 2024, President William Ruto and First Lady Rachel Ruto are visiting President Joe Biden and First Lady Jill Biden here in Washington. President Ruto expressed his support for compensation during his successful presidential campaign, and his

administration has conveyed its support for U.S. compensation legislation before the Senate *Ad Hoc* Committee, and as recently as January 29, 2024, at the Kenyan Embassy in Washington.

In 2010, then Vice-President Joe Biden and Dr. Jill Biden visited the victim's memorial in Nairobi. First Lady Jill Biden again honored the victims and the Kenyan people in February 2023 when she visited the victim's memorial in Nairobi.

We urge you to consider in advance of President Ruto's visit our proposed legislation as a part of the FY25 NDAA, just as the NDAA served as a vehicle for justice for victims of terrorism in 2008.

Sincerely,



Philip M. Musolino

This letter and the attached material is being distributed to you and other Members of Congress 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). Both versions of the proposed legislation are solely the product of this law firm, and neither the Kenyan Senate Ad Hoc Committee nor any other law firm, nor any other organization participated in the drafting of the legislation.

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 foregoing, 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”

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(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:

FEBRUARY 16, 2024

Statement from Press Secretary Karine Jean-Pierre on the State Visit of President William Ruto and First Lady Rachel Ruto of Kenya

President Joe Biden and First Lady Jill Biden will host President William Ruto and First Lady Rachel Ruto of the Republic of Kenya for a State Visit to the United States on May 23, 2024. The upcoming visit will mark the 60th anniversary of U.S.-Kenya diplomatic relations and will celebrate a partnership that is delivering for the people of the United States and Kenya. The visit will strengthen our shared commitment to advance peace and security, expand our economic ties, and stand together in defense of democratic values. The leaders will discuss ways to bolster our cooperation in areas including people-to-people ties, trade and investment, technological innovation, climate and clean energy, health, and security. The visit will affirm our strategic partnership with Kenya and further the vision set forth at the U.S.-Africa Leaders Summit: African leadership is essential to addressing global priorities.

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