

**ANALYSIS AND CONCERNS ON THE TRUTH JUSTICE RECONCILIATION COMMISSION  
(TJRC) BILL 2008 ADOPTED BY THE NATIONAL ASSEMBLY ON 23 OCTOBER 2008**

**4<sup>TH</sup> NOVEMBER 2008**

**TOWARDS CREATING A CREDIBLE AND EFFECTIVE TRUTH JUSTICE AND  
RECONCILIATION COMMISSION IN KENYA**

**Background**

Back in 2003, the then newly-elected National Rainbow Coalition (NARC) government expressed support for a Truth, Justice and Reconciliation Commission (TJRC) to inquire into historical injustices, massive or systemic human rights violations, economic crimes and the illegal or irregular acquisition of land occasioned by the previous ruling party Kenya African National Union (KANU). It appointed a Task Force on the Establishment of a TJRC, chaired by Professor Makau Mutua. The Task Force's mandate was to find out if a truth commission was necessary for Kenya, and, if so, to make recommendations on the type of truth commission that needed to be established. The Task Force reported a 90% public support for one and recommended the immediate establishment of a TJRC before June 2004, with specific mandate, powers and functions. However, its recommendations were never implemented.

The calls for a TJRC re-emerged after the violence triggered by the 2007 disputed presidential elections. The Kenya National Dialogue and Reconciliation Committee (KNDRC), led by former United Nations (UN) Secretary-General Kofi Annan and the Panel of Eminent African Personalities, noted that the post-elections violence exposed decades-old divisions over power and resources. The KNDRC agreed on a number of reforms – key among them being the creation of a truth, justice and reconciliation commission (TJRC) to promote national reconciliation, justice and unity.

Subsequently, the government drafted a Bill to facilitate the establishment of a TJRC. The Commission is expected to inquire into human rights violations, including those committed by the state, groups, or individuals and major economic crimes, in particular grand corruption, historical land injustices, and the illegal or irregular acquisition of land, and other historical injustices. On May 9<sup>th</sup>, 2008, the Government of Kenya published the Truth Justice and Reconciliation Commission Bill, 2008 (in a special supplement *Gazette notice*, no 23), to establish and define the mandate, objectives and processes of the Commission and begin the journey to truth, justice and reconciliation for Kenyans. The Bill was adopted and passed Parliament on October 23, 2008.

**About Multi-Sectoral Task Force on Truth, Justice and Reconciliation Commission**

The Multi-Sectoral Task Force on the Truth, Justice and Reconciliation Commission (TJRC) process is a Kenyan umbrella body of civil society organizations (including community-based organizations, women organizations, youth groups, faith-based groups and networks of survivors of human rights violations) and public (statutory) bodies. Its mission is to push for a people-centered, effective and credible Truth, Justice and Reconciliation Commission for Kenya. The Task Force has established Transitional Justice Network

to advance transitional justice agenda for Kenya. The Task Force has undertaken various events, including technical workshops and public fora, to draw out concerns regarding a TJRC, an operational framework for a TJRC and review the draft TJRC legislation.

The Multi-Sectoral Taskforce has been collaborating to ensure that the truth, justice and reconciliation process is carried out in a manner beneficial to Kenyans and the posterity of the Country. The Taskforce is also working to ensure that the process does not succumb to political interference and interests and that Kenyans are well informed about and are able to meaningfully engage in the process. These efforts are focussed on ensuring a people-centred, effective and credible Truth, Justice and Reconciliation process for Kenya. It has undertaken various events, including technical workshops, public forums and an editor's luncheon, to draw out concerns regarding a TJRC, an operational framework for a TJRC and to review the draft legislation, which culminated in the production of a revised TJRC Bill. The Task Force maintains that there can be no peace without political, economic and social justice for all Kenyans. The dictates of justice require that we face the truth of our history and of the 2007 election, and seriously address the deep schisms and inequities in Kenyan society.

Civil Society working under the reference group, MultiSectoral Task Force on Truth Justice and Reconciliation, stands by its position that the TJRC Bill passed by Parliament on Thursday October 23, 2008 is grossly flawed in respect of amnesty, victims's rights, reparations, gender parity and its constitutionality. The TJRC has a critical role to play in the shaping of a future Kenyan society but that the Bill is seriously flawed in several respects to facilitate attainment of this noble objective. If the flaws are not addressed it would render the TJRC process meaningless, unconstitutional and inconsistent with Kenya's own Constitution and international law obligations.

While civil society expected that the Waki report recommendations would provide a solid basis for establishing a credible and effective Truth Justice and Reconciliation Commission, Parliament ignored the Waki report and the civil society proposals/adjustments to the TJRC Bill. As such the TJRC Bill passed by Parliament failed the litmus test of establishing a credible and effective TJRC that meets international standards and best practices and instead ended up creating a whitewash/amnesty commission.

Civil society does not want the Truth Justice and Reconciliation Commission (TJRC) to be yet another empty commission. Kenya had seen several commissions of inquiry over the years. None of these commissions resulted in any meaningful changes or reforms. Their recommendations were largely ignored by government. To avoid this, civil society pushed for TJRC with substantial teeth just like Waki Commission or even more. TJRC should not rely heavily on discredited and emasculated institutions to achieve all its objectives. The Commission must be placed in a position in which it will be able to have a real impact on Kenyan society. Regrettably, the TJRC Bill passed by parliament would not achieve this object neither promote genuine national healing, reconciliation, justice, accountability and sustainable peace. Instead politicians want to use it for cover-up and self laundering.

### SUMMARY OF CONCERNS

1. Most of the original concerns expressed by the Civil Society under MultiSectoral Task Force (MSTF) in earlier commentaries of the Truth Justice and Reconciliation Commission (TJRC) Bill 2008 still apply to the version of the Bill adopted by the National Assembly on 23 October 2008.
2. The centrepiece of the Bill adopted by the National Assembly provides for a highly inappropriate and unnecessary amnesty mechanism for human rights violations, economic crimes and even international law violations. The amnesty provisions are largely unworkable in the context of Kenya and they are inconsistent with the Constitution of Kenya.
3. The TJRC Bill passed by Parliament, if assent into law by the President, would create an irredeemably white wash process. The best practices and international standards that civil society was all seeking are not there, in particular the **necessity of a strong independent Commission, adherence to certain values and principles; detailed methods for conducting investigations and hearings and steps that comply with procedural fairness.**
4. The Bill fails to establish the values and principles that the Commission ought to promote and abide by; nor does it impose a code of conduct that the Commissioners and staff members must comply with at all times.
5. Apart from requiring that the chairperson or vice-chairperson must be a woman, the Bill does not require the Commission to take any steps to promote gender parity throughout the Commission.
6. While the Bill provides the general power for the creation of committees and structures it does not require the establishment of specific committees to serve and promote the objectives of the Commission.
7. The reparations scheme proposed by the Bill, which requires individual applications, will prove to be cumbersome and it will effectively exclude the vast majority of victims in marginalised sectors from the benefits of reparations.
8. Victim rights are only protected in relation to their appearance at hearings.<sup>1</sup>
9. The sections providing for procedural fairness are thin on detail and likely to result in protracted litigation.
10. The provisions requiring government to establish an implementation mechanism (as recommended by the Commission) and to implement all the Commission's recommendations are unconstitutional.

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<sup>1</sup> Section 25(5)

## **DETAILED EXPLANATIONS**

### **CONFUSING AND MISSING DEFINITIONS**

1. It is not clear why certain definitions have been included and others omitted.
  - 1.1. Crimes against humanity and genocide are defined but other international crimes are not.
  - 1.2. ‘Gross human rights violations’ are defined but ‘violations’ and “human rights violations” are not even though they are referred to throughout the Bill.
  - 1.3. Gross human rights violations now include crimes against humanity but inexplicably it does not include other international crimes?
  - 1.4. The Bill provides for the granting of amnesty for ‘economic crimes’ but such crimes are not defined.
  - 1.5. Grand corruption referred to in the new s 6(n) is not defined.
  - 1.6. Victims are defined but perpetrators are not. Are perpetrators those responsible for all violations or just gross human rights violations and economic crimes?

### **CONTRADICTORY FUNCTIONS AND POWERS**

2. No reference is made under the functions of the Commission to its functions in relation to amnesty. The powers contained in sections 7 and 8 are also curiously silent on what the Commission's powers are in relation to amnesty. Part III of the Bill dealing with amnesty is ambiguous as to what the Commission's actual powers and functions are with regard to amnesty.
3. The adjustment to section 6(a) introduces a serious inconsistency into the new version of the Bill.
  - 3.1. The former version provided for the investigation of “human rights violations...” The new version now restricts the Commission to investigating “gross human rights violations...”
    - 3.1.1. It follows that the violations referred to in the subsequent subsections of section 6 are not any violations, but the matters referred to in subsection 6(a), namely gross human rights violations committed between 12 December 1963 and 28 February 2008.
    - 3.1.2. The only additions are in respect of economic crimes and investigations for the purposes of promoting reconciliation and the making of recommendations. The latest amendments also add discrete inquiries into missing persons, misuse of power and state repression.
  - 3.2. The new s 34(1) states that any person may apply for amnesty in respect of an act that constitutes a matter for investigation in terms of the Act. Amnesty may then only be

applied for in respect of acts or omissions set out in section 6. Strictly speaking however such matters can only be “violations”. This is made specifically clear in s 38(1) which states that amnesty may be recommended for violations committed within the mandate period.

- 3.3. The inconsistency arises because the new s 34(3) of the Bill also makes it clear that amnesty may no longer be recommended for “gross human rights violations”. This means that amnesty may only be considered for actual violations that are not gross human rights violations.
- 3.4. Yet the latest amendments expressly remove the power of the Commission to investigate human rights violations unless such violations are gross human rights violations. In order to recommend the granting of amnesty in respect of violations that are not gross human rights violations the Commission must investigate such violations. However, under the new Bill the Commission has no such power.
4. Several subsections of section 5 have been deleted but section 5(m) remains unaltered. Section 5(m) provides for the “*facilitating the granting of conditional amnesty to persons who make full disclosure of all the relevant facts relating to acts associated with gross human rights violations and economic crimes...*” This section is entirely inconsistent with the new s 34(3) which states explicitly that no amnesty may be recommended for gross human rights violations.
5. Section 5(m) requires the making of “*full disclosure of all the relevant facts relating to acts associated with gross human rights violations and economic crimes...*” However, there is no mention of the requirement of full disclosure anywhere in Part III of the Bill which deals with the amnesty procedures and mechanisms. It is not listed as one of the criteria that have to be met for amnesty under s 38(3).

#### **INTERNATIONAL LAW IMPLICATIONS**

6. While gross human rights violations, which now include crimes against humanity, are excluded from the amnesty process, the new s 34(2) permits the recommending of amnesty to those who are “*liable to a penalty under any international treaty to which Kenya is a party*”. This potentially means that, with the exception of crimes against humanity, amnesty could be recommended for acts or omissions outlawed under treaties ratified by Kenya.<sup>2</sup> It is submitted that such a provision would be in direct breach of Kenya’s international law obligations.

#### **AMNESTY FOR CRIMES OF GREED**

7. The second category of crimes that may be amnestied in terms of s 5(m) is economic crimes. While the investigation of economic crimes is a legitimate function of the Commission there is no apparent rationale for the granting of amnesty for such crimes.

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<sup>2</sup> Kenya signed the Rome Statute on 11 August 1999, and ratified on 15 March 2005, becoming the 98th State Party.

8. Economic crimes are not defined anywhere in the Bill. The Bill makes no attempt to distinguish between economic crimes, economic abuses or violations of economic rights referred to in ss 6(f) and (g).
9. An economic crime, which is a crime of greed, is a crime committed in the pursuit of personal gain.
  - 9.1.1. The changes to the new s 38(3) has removed the provisions that excluded acts committed for personal gain (and acts committed out of malice)<sup>3</sup> from consideration for amnesty (which previously applied but only in respect of gross human rights violations).
  - 9.1.2. This means that crimes of greed and malicious acts may now indeed be considered for amnesty. This adjustment was made to remove the striking anomaly of having the “personal gain” criterion applying to violations generally, but not to economic crimes.
  - 9.1.3. This makes the intentions of the framers of the Bill abundantly clear. Those who stole from the people and who committed crimes of greed may benefit from amnesty under the truth and reconciliation process.
10. While the s 38(3) criteria now do apply to economic crimes, unlike the South African amnesty regime, none of the criteria are peremptory. In South Africa the peremptory or compulsory criteria were the showing of a political objective and full disclosure. Full disclosure<sup>4</sup> is not even mentioned in s 38(3). While there is a criterion dealing with political objective there is no compulsory requirement to show this. It is merely one of a basket of factors for the consideration of the Commission. This omission appears to be no coincidence or oversight.
  - 10.1. This means that those responsible for economic crimes do not have to show that the crime was committed in pursuance of a political objective. It would be practically impossible for those committing crimes of greed to show a political purpose, but the Bill as currently formulated, relieves them of this burden.
  - 10.2. The effect is to create a special and generous dispensation for those who have committed crimes of greed in Kenya. There can be no justification for including this in a truth and reconciliation process.
  - 10.3. Such provisions will serve to condone, perpetuate and promote corruption. While indemnities from prosecution and plea bargains may be granted to those who cooperate with prosecutors, crimes of greed should never be amnestied in terms of a truth and reconciliation process.

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<sup>3</sup> These exclusions were part of the South African TRC amnesty scheme. This meant that corruption and crimes of greed were effectively excluded from consideration by the Amnesty Committee, unless it could be shown that such criteria were absent.

<sup>4</sup> Note in earlier commentaries that the “truth for amnesty” (or *carrot and stick*) formula employed in South Africa did not yield substantial truth. This was because there was no real threat of prosecution.

11. The new s 34(4)(b) which requires a perpetrator of economic crime to make restitution before he or she may benefit from amnesty simply means that such perpetrators are likely to wait until there is a good prospect of prosecution before making restitution. Since there is little prospect of effective prosecutions taking place few, if any, corrupt persons will come forward,
  - 11.1. This clause is also entirely silent on what “restitution” means. It seems to be left entirely in the hands of the Commission to interpret this. It could mean anything from partial, to some, to substantial or to full restitution.
  - 11.2. The Commission will be ill equipped to determine whether full and proper restitution has been made. It simply will not have the expertise or time to make such determinations in relation to complex financial crime.

### **WIDE AMNESTY CRITERIA**

12. The listed criteria in s 38(3) upon which amnesty recommendations may be made are impermissibly wide.
  - 12.1. They include factors such as “*motive*” in s 38(3)(a), “*context*” in s 38(3)(b) and “*legal and factual nature*” in s 38(3)(c). No attempt is made to state what kind of motive or context the law intends to cover. Accordingly, any motive or context may conceivably form the basis of a decision to recommend amnesty.
  - 12.2. Section 38(3)(d) refers to “*the objective*” of the offence. Although the objective includes whether an offence was directed at a political opponent, it does not confine the object to a political end or motive. So almost any other objective may potentially be contemplated.
13. While there are similar criteria contained in section 20(3) of the South African law they are premised by certain qualifications which are absent in the TJRC Bill. The section 20(3) criteria are qualified by the statement in section 20(1) that only offences associated with a political objective and committed in the course of the conflicts may be considered for amnesty.<sup>5</sup>

### **AMNESTY RECOMMENDATION TO THE ATTORNEY GENERAL**

14. The new s 38A attempts to cure the defect of the earlier version which failed to disclose where an amnesty recommendation should be directed to. Section 38A provides that an amnesty recommendation should be directed to the office of the Attorney General in relation to the “institution” and “continuance” of a prosecution of a matter that is the subject of the recommendation. This inclusion makes little sense for the following reasons:

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<sup>5</sup> The scenarios set out in section 20(2) served to provide specific circumstances when the s 20(1) requirement would be met. The factors contained in s 20(3) (which are largely the same as the criteria in s 38(3) of the Bill) merely provided the general criteria for the Amnesty Committee to consider when making a decision in terms of s 20(1). The Bill does not provide an overall limitation on what acts or omissions may qualify for amnesty (as is done in s 20(1) of the SA TRC Act); nor does it set out the different scenarios in which the amnesty provisions are intended to cover (as is done in s 20(2) of the SA TRC Act). The Bill simply drops South Africa’s section 20(3) general criteria into section 38 without attempting to limit its reach or to guide its implementation.

- 14.1. The Attorney General is not authorised under any law to grant amnesty or act in pursuance of an amnesty recommendation.
- 14.2. An amnesty, or for that matter an indemnity from prosecution, is not the same as a decision not to prosecute. A decision not to prosecute can be reversed at any time. It is also not binding on successive Attorneys General.
- 14.3. A recommendation of amnesty in relation to convicted persons cannot be referred to the Attorney General who has no power to overturn a conviction or sentence.

#### **THE AMNESTY PROVISIONS ARE LIKELY TO FACE CONSTITUTIONAL CHALLENGE**

15. The most significant point of departure between the TJRC Bill and the South African TRC law is the constitutional context.
  - 15.1. The amnesty provisions of the South African TRC law were rooted in the erstwhile 1993 Interim Constitution. The postscript to the *Constitution of the Republic of South Africa Act 200 of 1993* (“the Interim Constitution”) authorised an amnesty process through the establishment of mechanisms, criteria and procedures, all regulated by law, in order to achieve the objectives of national unity and reconciliation. The suspension of the rule of law and the rights of victims to justice were accordingly authorised by the Interim Constitution.
  - 15.2. The South African TRC Act was challenged on the basis that it infringed the rights of victims as enshrined in the Bill of Rights. While the Constitutional Court accepted that such rights would be “obliterated” it upheld the amnesty provisions of the law only because they were specifically authorised by Interim Constitution.<sup>6</sup>

#### **NO CONSTITUTIONAL AUTHORITY**

16. The *Constitution of Kenya, 1963* as amended in 1999, provides no specific authority for the suspension of the rule of law or the denial of the rights to justice of victims in peace time. Part III of the Bill, should it become law, will accordingly enjoy no constitutional authority. Article 3 of the Kenyan Constitution stipulates that any law or provision inconsistent with the Constitution is void. Part III of the Bill, which facilitates the denial of justice to victims, is inconsistent with several provisions of Chapter V of the Kenyan Constitution which enshrines fundamental rights and freedoms.

#### **VIOLATION OF CONSTITUTIONAL RIGHTS, FREEDOMS AND PRINCIPLES**

17. The Bill is substantively unconstitutional and invalid in that the amnesty provisions infringe the principle of the rule of law by facilitating impunity for those responsible for human rights abuses, economic crimes and corruption.

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<sup>6</sup> *Azanian Peoples Organisation (AZAPO) and Others v President of the Republic of South Africa and Others*, CCT17/96

18. The amnesty provisions are directly inconsistent with the Constitution in that they violate, amongst other rights:
- 18.1. The right to life since they potentially facilitate an amnesty for perpetrators who committed murder, attempted murder and culpable homicide.<sup>7</sup>
  - 18.2. The right to the security of the person since they facilitate an amnesty for perpetrators who have violated the freedom and security of people by committing acts of assault and other cruel and inhuman treatment.<sup>8</sup>
  - 18.3. The right to protection of property since the amnesty provisions facilitate an amnesty to perpetrators who have violated this right through acts of looting and arson.
  - 18.4. The right to equal treatment, including equal protection before the law, by discriminating against victims who were victims of crimes which are the subject matter of the Bill's amnesty provisions.
19. In the absence of specific constitutional authority for such far-reaching violations of human rights it is unlikely that the public interest exception contained in article 70 of the Kenyan Constitution will serve to justify such infringements. Such a ruling would have very serious implications for the administration of justice in Kenya. The amnesty provisions as presently formulated are likely to invite protracted legal challenges. For this reason alone, the amnesty provisions of the Bill ought to be removed.

### **THE ATTORNEY-GENERAL MAY NOT ACT OUTSIDE HIS CONSTITUTIONAL AND STATUTORY POWERS**

20. Section 38A of the version of the Bill approved by the National Assembly provides for the referral of amnesty recommendations to the Attorney General.
- 20.1. This provision is offensive to the doctrine of separation of powers as upheld by the *Constitution of Kenya, 1963*.
    - 20.1.1. The Attorney General has no constitutional or statutory authority to decide on questions of amnesty. He may not issue amnesty, manage any amnesty process or act in terms of amnesty recommendations.
    - 20.1.2. Only those authorised by law to issue amnesty or to act in furtherance of amnesty recommendations may do so. No such law is in existence in Kenya.

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<sup>7</sup> Gross human rights violations may not be amnestied in terms of the latest amendments. While gross human rights violations are defined in the Bill, violations of human rights are not. This leaves it open to the Commission to provide its own interpretation. Although killings are listed under gross human rights violations it does not mean that such all such acts are necessarily excluded from violations of human rights. It is entirely possible that the Commission may view single killings or killings in mitigating circumstances and/ or negligent killings as violations of human rights rather than gross human rights violations.

<sup>8</sup> Since violations of human rights are not defined it will be up to the Commission to provide its own definition. While torture is listed under gross human rights violations there will always be a thin line between torture and serious assault.

- 20.1.3. Where the Attorney General purports to act in pursuance of an amnesty recommendation he or she does so without any legal authority.
- 20.2. Since the Attorney General is required to act in compliance with his duties as prescribed by law his discretion may not be interfered with. The discretion of the Attorney General must be exercised in terms of the law and a prosecution policy authorised by law.<sup>9</sup>
- 20.3. A decision not to prosecute may not stand or be recognised as an amnesty. A decision not to prosecute may be changed at any time.<sup>10</sup>
- 20.4. While the President is empowered in terms of the Constitution to issue pardons the Bill provides no authority to the Commission to make such recommendations.
21. Since the Attorney General is not authorised to act in terms of amnesty recommendations, section 38A is substantially invalid and unconstitutional and falls to be struck down by the courts.

### **VICTIMS ARE LARGELY EXCLUDED**

22. The original version of the Bill essentially excluded victims from the amnesty process. An attempt has been made to cure this defect with the insertion of the new s 34(4)(a). This subsection requires the Commission to “consider any reasonable objection” from a victim before making a recommendation of amnesty.
23. The problem with this amendment is that it only requires the Commission to make an attempt to solicit the views of a victim towards the end of the amnesty process. In reality the legislative scheme permits the Commission to delay involving victims in the amnesty process, unless a specific hearing is held, until a decision in principle has been made to recommend amnesty. Only at this point is the Commission required to secure and consider the views of victims before it makes its final decision.
24. The framers of the amendments chose not to amend the actual process leading to an amnesty recommendation. Section 36 which set out the process for the actual consideration and recommendation of amnesty remains largely unaltered.
- 24.1. Section 36(4) authorises the Commission to recommend amnesty (on the basis of the amnesty application alone) and inform the applicant accordingly, if it is satisfied that there is no need for a hearing or investigation. Section 36 makes no provision or requirement for the representations of victims to be made or heard. The South African TRC Act also made no provision for the representations of victims to be made at this stage. The Bill rather than rectifying this deficiency has retained the same shortcoming.

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<sup>9</sup> The Bill speaks only of a referral of a recommendation to the Attorney General it does not speak of his power or authority to act in terms of such recommendation.

<sup>10</sup> An amnesty also involves the extinguishing of convictions and/ or the release of convicted persons. It hardly needs to be stated that an Attorney General has no authority to overturn convictions which is exclusively within the powers of the courts.

- 24.2. In terms of s 36(9) all documentation and evidence pertaining to an amnesty application are kept confidential until a hearing actually commences or when the Commission decides to release such information.<sup>11</sup> It is entirely possible that victims and their representatives will be kept in the dark until a hearing commences in terms of s 36(5).<sup>12</sup> This will place victims at a significant disadvantage.
- 24.3. Section 36(9) implies that where there is an investigation but no hearing, it is entirely possible that the documentation and evidence pertaining to an amnesty application will not be released at all. Victims will accordingly not be able to make any meaningful representations.
25. Section 38(4) obliges the Commission to “*inform..., if possible, any victim of the decision ...to grant amnesty*”. Section 38(5) requires the Commission to gazette the names of persons to whom amnesty has been recommended and to supply sufficient detail so as to enable people (including victims) to identify the offence for which amnesty has been recommended. This section is of no use to victims as the recommendation of amnesty will have already been made. The amendments adopted by the National Assembly do not specifically require the Commission to notify victims of an intention to recommend amnesty. However, the new s 34(4)(a) implies that the Commission will have to notify victims before the final recommendation is made in order to hear any objections.
26. It is fair to say that the Bill as it stands marginalizes victims from the amnesty consideration procedures. It appears that victims only get to play a meaningful role if a specific hearing is held, or once a decision in principle has already been taken to recommend amnesty. If the latter, it is then up to the victim to try and persuade the Commission not to pursue with such a decision. This is a heavy onus for victims to carry. The effective exclusion of victims from making meaningful input into the amnesty process implicates several of their fundamental rights and freedoms as enshrined in Chapter V of the Constitution of Kenya, 1963.

### **REPARATIONS AND REHABILITATION**

27. Section 41 of the Bill remains unaltered in the version approved by Parliament. It requires each victim to apply for reparations within 2 years. Victims who don't are barred from receiving reparations regardless of how harsh their suffering. This requirement will hit the most marginalised in Kenyan society. These include the illiterate, the impoverished and those in isolated rural locations, particularly women and children.
28. The Commission is then required to verify each claim and make recommendations in respect of each victim. This will prove to be a cumbersome process. Rather than requiring individual

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<sup>11</sup> In terms of s 19(4) of the SA TRC Act the Commission was required to notify the victim of the place where and the time when the application will be heard and considered. The Commission was also required to inform victims of their right to be present at the hearing and to testify, adduce evidence and submit any article to be taken into consideration.

<sup>12</sup> Section 25 which deals with hearings is silent on what information must be disclosed to victims. However s 25(5)(ii) stipulates that “procedures dealing with victims” must be “fair”. Fairness demands disclosure to the victims of all relevant information and evidence pertaining to an amnesty application. However, given that victims are not included in the amnesty procedure it may be possible to raise the argument that the amnesty procedures are procedures dealing with offenders; and as such they are not “procedures dealing with victims”.

applications and the making of recommendations per individual as the only means of securing reparations, the Bill should empower the Commission to investigate the needs of victims in order to recommend to government, civil society and the international community how best to respond to such needs at individual, community and national levels.

### **IMPLEMENTATION OF THE COMMISSION'S REPORT**

29. In terms of the new section 47(2)(g) the Commission may recommend the “mechanism and framework” for the implementation of its recommendations. The new section 48 requires the Government to establish whatever body has been recommended by the Commission in terms of s 47(2)(g) “to monitor the implementation of the recommendations *and to facilitate their implementation*”.
30. Both the original formulation (which provided for the establishment of an implementation committee) and the amendments adopted by the National are manifestly unconstitutional.
  - 30.1. Section 48 as read with section 47(2)(g) is unconstitutional as it requires the government to establish whatever body is recommended by the Commission, regardless of the views of government and regardless of the feasibility of such a body.
  - 30.2. Section 48 is also unconstitutional insofar as it purports to empower the s47(2)(g) body (or implementation committee) to implement or facilitate the implementation of the Commission’s recommendations.
  - 30.3. Such requirements are offensive to the separation and allocation of executive powers as established by the Constitution. Section 48 is not saved by article 23 of the Constitution since Parliament is required to apply its mind and specifically identify a person or authority when conferring executive power, which it cannot do so in this instance.
31. Section 49(2) which stipulates that “*all recommendations shall be implemented*” is manifestly inconsistent with the separation and allocation of executive powers by the Constitution. It amounts to an unconstitutional interference with the discretion of government to devise and implement policy.
32. There is no requirement for the National Assembly to consider and debate the Commission’s findings and recommendations; nor is there any requirement for the Government to present its strategy for the implementation of the recommendations to the National Assembly.

### **CONCLUSION**

33. The TJRC Bill in its current form will not serve the ends of truth, justice and reconciliation in Kenya.
  - 33.1. It includes inconsistent powers and functions. The amnesty provisions are unworkable. They are ultimately meaningless since the Bill provides nobody with the legal authority to implement the amnesty recommendations.

- 33.2. Victims are placed at a significant disadvantage in the amnesty recommending process.
- 33.3. There is no justification for providing the powerful and the corrupt with an escape clause through the TJRC process just in case they happen to be prosecuted with economic crimes.
- 33.4. Major obstacles are placed in the path of the marginalised and the poor from securing reparations.
- 33.5. The Bill does not provide for the necessary structures to realize the objectives of the Commission, nor does it contain practical guidelines or procedures for the purpose of delivering truth and accountability.
- 33.6. Many of its provisions are unconstitutional and some may be in direct violation of international law.