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Chairperson: Ms. Majodina

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The meeting was called to order at 10 a.m.

Consideration of reports submitted by States parties under article 40 of the Covenant
(continued)

Third periodic report of Kenya (continued) (CCPR/C/KEN/3; CCPR/C/KEN/Q/3; CCPR/C/KEN/Q/3/Add.1)

1. *At the invitation of the Chairperson, the delegation of Kenya took places at the Committee table.*
2. **The Chairperson** invited the delegation to continue with its replies to the questions raised by the members during the previous meeting.
3. **Mr. Kiraithe** (Kenya) said that all deaths in which police officers were implicated were investigated. Between 2006 and 2011, five investigations had led to the conviction of three police officers and the acquittal of two others. With regard to the incidents that had taken place in the region of Mount Elgon, more than 3,000 people had been arrested and interrogated, but most of them had been released after less than 12 hours. Legal proceedings had been initiated in about a thousand cases, but the delegation did not have detailed information on their outcome because of difficulties in maintaining and retrieving data from the courts, the office of the public prosecutor and the police. Those problems would be addressed as part of the ongoing reform of the police and the office of the public prosecutor. The Government had established a special committee tasked with investigating human rights violations allegedly committed during the incidents mentioned. The members of the investigating committee were police officers selected on the basis of their competence, their service record and the particular needs of the case. However, their impartiality had been questioned given that the alleged perpetrators of the violations were also law enforcement officers. Nonetheless, the Government considered that the investigators were capable of carrying out their task professionally, as had been the case in the past, in torture and corruption cases which had resulted in the indictment of police officers. The Government hoped that the new Independent Police Oversight Authority (IPOA) would deal with the case once it was fully operational. The Truth, Justice and Reconciliation Commission would be responsible for the composition of the Oversight Authority.
4. The “Chunga Mpaka” (“Guard the Border”) operation conducted in 2008 had aimed to put a stop to cross-border arms trafficking and related crime by means of army patrols along the border and police raids. All complaints of human rights violations had been investigated, and again, questions of impartiality would have to be examined by the IPOA.
5. In response to questions on the killing of human rights defenders Oscar Kamau King’ara and John Paul Oulu on the campus of the University of Nairobi, he said that the investigation was still ongoing but that no conclusive evidence had been found to help identify and prosecute the perpetrators. One of the main problems in that case was that the crime scenes had been significantly disturbed after students on the scene had moved the bodies and the car in which they had been found.
6. As for the allegations of acts of torture, the Kenyan Government did not tolerate torture and had taken measures to prevent and punish such acts committed by the police, in accordance with the Constitution and the Bill of Rights. Between 2006 and 2011, 44 police officers had been prosecuted for acts of violence which would have been classified as torture if that crime was included in the Penal Code. Measures had been adopted to introduce a definition of the crime of torture into legislation and, in the future, it would be possible to institute proceedings on that basis. With regard to measures taken to prevent the police from carrying out illegal or arbitrary arrests, particularly with a view to extorting bribes, police officers against whom serious accusations of corruption were made were

brought before the courts. Between 2008 and 2011, 60 police officers had been prosecuted for such offences.

7. In response to the question raised by Mr. Kälin at the previous meeting, he said that on the basis of article 6, paragraph 3 of the Constitution, State organs had to ensure that their services were accessible throughout the national territory. Accordingly, a judge was always on duty during court vacations, and the magistrates' courts therefore functioned continuously. With regard to the transfer of Mohammed Abdulmalik, the latter had been arrested for having used false travel documents, questioned by the police, and released on 28 February 2007. The Government had no additional information concerning his presence on Kenyan territory.

8. **Mr. Wamalwa** (Kenya), referring to the measures taken to prosecute the main perpetrators of post-election violence in 2007, said that Kenya was a party to the Rome Statute of the International Criminal Court (ICC), and had incorporated the Statute in the 2008 International Crimes Act. Kenya had been cooperating with the Court since the initiation of the pretrial proceedings, and hearings had been scheduled to take place on 10 and 11 April 2013.

9. **Ms. Chweya** (Kenya) said that 445 trials had been conducted and 41 cases were still before the courts. The charges included arson, burglary, murder, possession of stolen goods, incitement to violence and rape. Twenty-two cases had been dismissed because of a lack of evidence or the complainants' failure to appear. Twenty-six accused persons had received prison sentences, fines or suspended sentences. Many victims had also brought civil actions, and a special team dealing with sexual offences committed during the post-election violence had referred the victims of those offences to psychological assistance services. As to whether the Government helped victims to attend hearings of the ICC, she said that that responsibility lay with the ICC, in accordance with article 79 of the Rome Statute, which provided for the establishment of a fund for victims.

10. With regard to proceedings initiated in the wake of the post-election violence, the Government had put together an interministerial team to review all cases still under investigation or before the courts and to draw up recommendations aimed at ensuring that they were settled fairly and promptly. The team was also to issue opinions on the introduction of alternative dispute resolution mechanisms, such as reconciliation, mediation, arbitration and traditional conflict resolution methods. The recommendations of the interministerial team would contribute to the establishment of a special section of the High Court to deal with international crimes committed in Kenya, in accordance with the 2008 International Crimes Act. With regard to cooperation with the ICC, the Government continued to respond to all of the Court's requests, in compliance with its international obligations and with national legislation. The Government had also responded to the Court's concerns with regard to the protection of witnesses and was cooperating with the Court in fixing trial dates.

11. **Ms. Sinyo** (Kenya) said that the adoption of the law prohibiting female genital mutilation in 2011 had strengthened efforts to eradicate the practice. The law criminalized the practice itself as well as all forms of support for it, by act or omission, in Kenya and abroad. Insults against women who had not been excised or against their partners were also punished. Furthermore, articles 2, 4, 28, 29 and 43.3 of the Constitution indirectly prohibited the practice, while the law on children prohibited it expressly. The national policy on school health drawn up by the Government aimed to eradicate female genital mutilation and forced early marriages. The Government was also working with religious organizations to introduce alternative rites of passage. The 2011 law provided for the establishment of an anti-female genital mutilation committee to conduct public awareness-raising programmes, which had not yet been set up because of administrative difficulties. In addition, the Ministry of Gender, Children and Social Development organized public

forums and promoted dialogue on the issue in the five pilot districts where the practice was widespread. The national policy on the abandonment of female genital mutilation dated only from 2008, the law on the subject had been adopted in 2011 and a national plan of action had been drafted very recently, in June 2012. The necessary mechanisms and procedures had therefore not yet all been put in place and no data were as yet available on prosecutions and convictions. The members of the communities that practised female genital mutilation must first come to consider those acts as crimes and report them to the authorities. Bearing in mind how entrenched the practice was, it would take time for the actions of the Government, which was committed to eradicating the practice, to yield results.

12. With regard to conditions of detention, the Government had drafted a bill aimed at ensuring the respectful treatment of persons deprived of their liberty. In order to address prison overcrowding, alternatives to imprisonment, such as community service, were applied, and there was recourse to presidential pardons, which were issued on the advice of the Advisory Committee established under the 2011 Power of Mercy Act.

13. As to juvenile justice (issue 17 in the list of issues), a bill amending the 2001 Children's Act had been drafted, which provided, *inter alia*, that the minimum age of criminal responsibility would be raised from 8 to 12, in accordance with international standards. Consideration of the bill had been delayed pending the adoption of constitutional laws, which was scheduled to take place before the end of August 2012. The establishment of specially adapted children's courts throughout the country had served to strengthen the juvenile justice system. Far-reaching reforms were under way, but it was true that in the past, children had been imprisoned with adults and subjected to deplorable conditions of detention. In partnership with civil society organizations, the Government had set up minors units in all police stations in order to facilitate the separation of minors and adults. The reform schools and children's homes were currently being renovated. The Government had also drafted a juvenile justice bill, in collaboration with civil society, which would be submitted to Parliament in the autumn.

14. **Ms. Lichuma** (Kenya) said that a number of bills on the subject of marriage had not yet been adopted. The bill on the protection of the family prohibited all forms of domestic violence and defined the remedies and protection available to victims. For instance, a court could order that victims of domestic violence and their children be placed under protection, even if other aspects of the case were pending before the courts. The bill on matrimonial assets provided for the inclusion of unremunerated activities such as domestic tasks and childcare as part of the contribution to matrimonial assets. Spouses would be granted equal status and would be able to acquire assets separately. In the case of polygamous couples, each spouse would have the same rights. The bill on marriage aimed to harmonize and consolidate various laws on marriage, and defined marriage as the union between a man and a woman, either monogamous or polygamous.

15. Turning to the issue of domestic violence, she cited the most recent statistics available, which had been taken from the 2008–2009 demographic and health survey. They showed a correlation between the socioeconomic situation of women and their risk of exposure to physical violence. According to the survey, 47 per cent of married women had been subject to physical, psychological or sexual violence by their husbands in the previous 12 months, while 10 per cent had experienced all three forms of violence. Two per cent of the women surveyed had responded that they had subjected their spouses to physical violence during the previous year. She pointed out that, in Kenyan culture, the man was the head of the family, and violence against men was only reported if it was particularly serious. However, the Government was working to combat violence against women, men and children of both sexes.

16. **Mr. Kihwaga** (Kenya), replying to the questions on the death penalty, said that there had been a moratorium on executions since 1987. Capital punishment was still permitted by law, and the public was largely in favour of it. The Government was endeavouring to change attitudes, in close collaboration with civil society, religious organizations and the Kenyan Human Rights Commission. While the death penalty had in the past been imposed on minors, she stressed that that was no longer the case. Under the current law, only two serious crimes — murder and violent robbery — carried the death penalty. In 2009, the President had commuted more than 4,000 death sentences to life imprisonment. There were currently 1,552 men and 30 women on death row in Kenya. With regard to the mandatory nature of death sentences in the light of article 6 of the Covenant, she recalled that, in *David Njoroge Macharia v. Republic*, the court of appeal had in March 2011 held that the mandatory death sentence was contrary to the constitutional provisions on protection against cruel, inhuman or degrading treatment and the guarantee of the right to a fair trial. The Government was confident that, in time, that decision would be established as a precedent.

17. With regard to the application of article 14 of the Covenant, in the same ruling of March 2011, the court of appeal had reaffirmed that the State had the obligation to provide legal aid, by virtue of the Constitution and the Covenant. The problem was a lack of resources. Currently, legal aid was provided systematically only to persons accused of murder. In Kenya, there was only one lawyer for every 40,000 inhabitants.

18. **Mr. Maina** (Kenya) said that, under the Constitution, no person could be held in slavery or servitude, and no derogation was permitted from that right. In addition to the Counter-Trafficking in Persons Act adopted in 2010, other legislation contained provisions applicable in the context of the fight against trafficking for purposes of prostitution or forced labour, in particular the Citizenship and Immigration Act, the Sexual Offences Act, and, in respect of minors, the Children's Act. Many hotels in coastal towns had signed a code of conduct under which they undertook not to tolerate the exploitation or ill-treatment of children in their establishments. Training had been provided to members of the police, prosecutors and local officials to familiarize them with the Sexual Offences Act. The application of the Children's Act had strengthened the protection of children against trafficking. Targeted measures had been taken by the competent authorities on the basis of the statistics available on the number of abducted and trafficked children. There had been 121 recorded cases of child victims of trafficking in 2008–2009, 236 in 2009–2010 and 76 in 2010–2011; in the same periods, 800, 647 and 581 child abductions had been registered. The Persons with Disabilities Act had been amended to extend protection to persons with albinism. Border controls by the police had been strengthened with a view to combating trafficking in albinos to neighbouring countries. A number of cases of child trafficking had resulted in investigations and prosecutions. One such case had involved two children who had been abducted and sent to work in Tanzania; the Kenyan authorities had found the children and placed them in a children's home, and had arrested the perpetrators, who had trafficked a further 40 children and 6 adults.

19. **Mr. Andanje** (Kenya) said that Kenya had no policy for returning refugees who were victims of persecution in their countries of origin. Kenya was a party to the Organization of African Unity (OAU) Convention Governing the Specific Aspects of Refugee Problems in Africa, which provided broader guarantees than the 1951 Convention relating to the Status of Refugees, to which it was also a party. Under article 16 of the Refugees Act adopted in 2006, all recognized refugees were subject to the obligations and entitled to the rights specified in the international conventions to which Kenya was party. Article 18 of that act expressly defined the reasons for which a person could not be refused entry into Kenya or returned or extradited. Taking care of refugees was a heavy burden on the State. The Government had entered into a partnership with the Office of the United Nations High Commissioner for Refugees with the aim of improving security in the Dadaab

and Kakuma refugee camps, strengthening surveillance of population movements along the border with Somalia and facilitating access by humanitarian workers to the camps so that they could provide essential services and the necessary material assistance to the refugees. Under that partnership, 349 additional security guards had been assigned to the Dadaab camp and 122 to the Kakuma camp, a special unit had been created specifically to guarantee the security of humanitarian workers, and a reception and processing centre had been established in Liboi. Child protection officers had been seconded to the camps in Dadaab and Kakuma to oversee the implementation of the social welfare programmes introduced for the benefit of children, assess the living conditions of children in the camps and make proposals to remedy the problems identified, intervene on behalf of children in distress, and seek out the parents or legal guardians of abandoned or lost children. As a result of the policy implemented by the Government, 90 per cent of internally displaced persons had been resettled, but 10 per cent had still not been permanently rehoused, either because of the hostility of the leaders or people of the communities asked to host them or because of the refusal of owners to sell their land at the price offered by the State, which they considered too low. In a bid to avoid further forced displacements in the future, the Government had combined the resettlement programmes with peacebuilding and reconciliation measures to promote the peaceful and harmonious coexistence of the various communities. An early intervention strategy had also been put in place to defuse situations that could potentially degenerate into intercommunal conflict, as had a national policy for the prevention of internal displacement and assistance to displaced persons, based on the applicable international instruments.

20. **Mr. Wamalwa** (Kenya) said that the Truth, Justice and Reconciliation Commission had not been in a position to submit its report in May 2012 as planned, but was expected to finalize it within a month. The report should make it possible to define clear guidelines for fulfilment of the reconciliation process and for redressing past injustices and human rights violations.

21. **The Chairperson** thanked the delegation for its replies and invited the members of the Committee to ask further questions.

22. **Mr. Ben Achour** said that, although the International Criminal Court had confirmed the charges of crimes against humanity against four Kenyans implicated in the post-election violence of 2007–2008, to date none of the accused had been handed over to the Court for trial, and it seemed that there had been attempts to stop the Court from dealing with the case. He wished to know where matters stood at present and whether the Government intended to cooperate fully with the International Criminal Court so that the proceedings could continue.

23. **Mr. Bouzid** asked whether the indication in paragraph 135 of the State party report that there were no new developments to report under article 4 of the Covenant meant that there was no law governing situations of public emergency. He wished to know which authority was competent to declare, extend or end a state of emergency and decide which rights were suspended, and to what extent such decisions were subject to judicial review.

24. **Ms. Motoc** asked for clarification on the public consultations held on bills to be voted on by Parliament, in particular whether the debates were open to the general public or limited to community leaders. She also wondered to what extent the process contributed to maintaining legislative provisions on traditional cultural practices that were contrary to the Covenant, such as polygamy.

25. **Sir Nigel Rodley** welcomed the fact that many of the recommendations he had made in 1999 following a visit to Kenya in his capacity as Special Rapporteur on torture seemed to have been implemented, even though the problem of torture persisted. He hoped that the State party would respond favourably to the request by the current Special Rapporteur on

torture, Mr. Juan Mendés, and that the latter would soon be able to visit the country. The introduction of a ban on corporal punishment in the new Constitution was a very positive development. Noting that, in paragraph 51 of its report, the State party mentioned that article 72 (b) of the Constitution required that capital offenders should be brought before a court within 14 days of their arrest, he took it that that requirement was contained in the previous Constitution and had no equivalent in the new Constitution, but sought confirmation of that point. Given that 4,000 death sentences had been commuted to life imprisonment in 2009, could the 1,582 individuals currently on death row also hope to have their sentences commuted? It was hard to believe that public opinion, particularly in a country such as Kenya, where there was a moratorium on executions, made it necessary to maintain the death penalty. The abolition of the death penalty was always contrary to public opinion. He wished to know whether prisoners sentenced to death were still housed in separate quarters and, if so, why that separation was maintained. He also asked if those on death row had to wear a uniform as other prisoners did.

26. **Mr. Flinterman** asked what measures the State party had taken to prevent further extrajudicial executions being committed by law enforcement agencies in the future. In particular, he wished to know if training programmes that paid special attention to alternatives to the use of force and firearms, including the peaceful settlement of conflicts, the understanding of crowd behaviour, and the methods of persuasion, negotiation and mediation had been put in place.

27. **Mr. Kälin** noted the assurance given by the delegation that a judge was always on duty during judicial vacations, but still considered that undue delays in court appearances could be caused by the constitutional provision that an arrested person who could not be brought before a court within 24 hours of being arrested had to wait until the next ordinary court day. Police officers should therefore be given clear instructions not to follow that particular provision to the letter. The reform undertaken to combat police corruption was a step in the right direction and should remain a priority as further improvement in the situation was still much needed. The fact that the police antiterrorist unit did not have broader powers than the ordinary police was commendable, but did therefore raise questions as to the legality of refusing to allow the National Human Rights Commission and consular representatives to visit the persons suspected of having participated in terrorist activities, who had been arrested in 2006. While noting the delegation's replies concerning the Mohammed Abdulmalik case, he pointed out that it was a complex case in which many grey areas remained, particularly since the leaking of official documents from the United States authorities.

28. Noting that the delegation had not responded to the questions on the return to Somalia, at the end of January 2007, of several individuals suspected of having participated in terrorist activities when their appeal was still pending before the High Court, he requested further information on that matter. Kenya was known for not returning refugees to countries they had fled or where they risked persecution, yet under the Refugees Act, a threat to national security was recognized as a reason to derogate from the principle of non-refoulement. He wished to know how that exception could be reconciled with the absolute prohibition on returning individuals, whether or not they had refugee status, to a country where they might face torture or their lives might be at risk. While he had noted the information concerning measures taken to strengthen security at the Dadaab refugee camp, he wished to know about measures taken following the violence that had broken out in the camp at the end of 2011. The bill on internally displaced persons was a major step forward, and its forthcoming adoption should pave the way for Kenya's ratification of the Convention for the Protection and Assistance of Internally Displaced Persons in Africa (Kampala Convention). He also hoped that the final version of the bill on evictions and resettlement that was to be submitted to Parliament for adoption would contain provisions

expressly prohibiting forced evictions and guaranteeing consultation and alternative accommodation.

29. **Mr. Sarsembayev** said that, under the Constitution, Muslims could apply to special courts in all matters related to civil status, marriage, divorce and inheritance. He wished to know what justification there was for that special status, whether Muslims were obliged to apply to the special courts or simply had the option of doing so, whether women were afforded the same legal protection before those courts, and whether the courts had criminal jurisdiction.

30. **Mr. Wamalwa** (Kenya) said that the Government had been collaborating fully with the International Criminal Court since the beginning of the proceedings against four Kenyan nationals. The persons concerned had participated in the preliminary hearings and confirmation of charges hearings, and had duly respected the conditions restricting liberty imposed by the Court. A pretrial conference had taken place in June 2012, and 10 and 11 April 2013 had been set as the opening dates for the trials. The Government had informed the Court that the necessary steps had been taken to respond to the Court's concerns with regard to the protection of witnesses. To date, there had been no request to hand over the accused persons. He assured the Committee that Kenya would continue to cooperate with the Court in all cases concerning Kenyan nationals, regardless of the reservations expressed in respect of the Court within the African Union.

31. **Ms. Chweya** (Kenya) said that, under article 58 of the Constitution, a state of emergency could only be declared in the event of war, invasion, general insurrection, disorder, natural disaster or other public emergency. The state of emergency was declared by the President, and a law governing its modalities was adopted. The declaration of a state of emergency and the law adopted in consequence thereof did not have retroactive effect and were valid for 14 days from the date of the declaration. The state of emergency could only be extended by Parliament. The Supreme Court, meanwhile, could rule on the validity of the declaration of a state of emergency, the extension of the state of emergency and the related law, and ensured that Kenya respected its international obligations. Kenya had not had a state of emergency for many years.

32. **Mr. Okeyo** (Kenya) assured the Committee that traditional cultural practices were not considered obstacles to the application of the Covenant. Rather, they were sensitive issues that the authorities inevitably had to take into account. However, the Constitution provided a number of guarantees. For instance, article 60 of the Constitution provided that land should be held, used and managed in a manner that conformed to the principle of gender equality and eliminated traditional practices that had a detrimental effect on women's rights. Nonetheless, it was true that cultural factors, including polygamy in particular, had delayed the adoption of several bills. It was difficult for deputies to disregard the majority opinion among voters on issues such as marriage and polygamy; moreover, there was a consultation process on all bills, involving all stakeholders, whose views on those matters ranged from liberal to conservative. Public participation in the legislative process was a requirement under the new Constitution, the aim being to expand the democratic space. The authorities were very proud of the process, but were also conscious that it could sometimes impede the adoption of laws. They were therefore committed to combining legislative participation and civic education measures to help change attitudes. Important progress had already been made, as the Parliament had been able to overcome cultural resistance and adopt the law on female genital mutilation, for example.

33. **Mr. Kiraithe** (Kenya), replying to the questions on measures taken to put a stop to extrajudicial executions, pointed out that Kenya had established a long-term programme to that end, under which the standard instructions applicable to all internal security operations had been revised in order to ensure that the procedures used systematically included

monitoring of respect for human rights, and to minimize, or indeed eliminate, the risk of unprofessional conduct and human rights violations. It was also planned to organize information meetings mandatorily providing for evaluation of the effects of operations on respect for human rights and alerting agents assigned to those operations to the consequences of their actions. In addition, a new training programme for police officers was being implemented. Provisions of the Constitution and the Bill of Rights were among the subjects tested, and it was necessary to pass the tests on those two instruments in order to be eligible for promotion or have a continuing training session validated. The new instructions on internal security operations also took account of the particular needs of women and children. The Independent Police Oversight Authority, which was not yet fully operational, was also expected to significantly improve the situation. The aims in establishing that body had been to make the police more aware of their responsibilities, assure the public that all complaints made by individuals would be promptly and independently investigated, and strengthen the integrity of State institutions. Given the importance of the Authority in consolidating the rule of law, the Parliament was required by law to allocate all of the resources necessary for the Authority to carry out its activities.

34. With regard to the allegations of illegal transfers of persons in 2006 and 2007, the delegation was not aware of the content of the official United States documents mentioned, and was therefore not in a position to reply to the questions on that subject.

35. The right of private persons to make arrests was provided for in the Code of Criminal Procedure, which stipulated that a private person could arrest any person who committed an offence in his presence, who evaded arrest by the police, or who could reasonably be considered to be subject to an arrest warrant. All the provisions of the Bill of Rights were repeated in the Police Station Service Charter, which was made available in Swahili and English and, if necessary, in local languages, and was posted prominently in all police stations. As Saturday, Sunday and public holidays were not considered ordinary court days, a person arrested on a Friday had to be brought before a judge by Monday morning at the latest.

36. Prisoners sentenced to death were held in separate cells but generally wore the same uniform as other prisoners. The rule that the perpetrators of capital offences had to be brought before a court within 14 days of their arrest was no longer applied.

37. National security was governed by article 238, paragraph 2 of the Constitution, and was subject to the authority of the Constitution and the Parliament. National security was enforced in accordance with the law and in strict compliance with legality, democracy, and human rights and fundamental freedoms, and national security agencies respected the various cultures and communities of Kenya in the exercise of their duties. The recruitment of national security agents took account of the diversity of the Kenyan population, which was reflected proportionally.

38. **Ms. Lichuma** (Kenya), replying to the questions on the jurisdiction of Islamic courts and the guarantees they provided in terms of gender equality and women's rights, said that, under article 169 of the Constitution, the Islamic courts were lower courts. They applied sharia law in cases relating to civil status, marriage, divorce and inheritance, and all parties to proceedings had to be Muslims and to have accepted that the case be brought before an Islamic court. There had been instances in which Muslims had refused to let an Islamic court deal with a case in which they were involved, as had been their right even before the adoption of the new Constitution, and the case had therefore been tried by an ordinary court. Muslim women generally applied to the Islamic courts in all matters concerning family law. However, as people were not always aware of the location or competence of those courts, the authorities had taken measures to improve information to the public, especially women, in that regard. In any event, the Islamic courts had no jurisdiction in criminal cases.

39. **Mr. Rivas Posada** said that the legislative work under way to guarantee the right to legal aid should improve the representation of individuals facing trial, but stressed the need to ensure that all accused persons were able to avail themselves of the services of a lawyer. Financial autonomy was crucial to the independence of the judiciary. In the replies to the list of issues, a number of measures had been mentioned, in particular the establishment of the Judiciary Fund, independent of the executive branch and administered by the Chief Registrar. He requested further information on the conditions of appointment, the status and the remit of the Chief Registrar, and the criteria for the establishment of the Fund. He welcomed the adoption of a law governing the training, responsibilities and capacities of judges, which aimed to improve the administration of justice. He would welcome additional information on the Islamic courts. The delegation had indicated that those courts functioned on the basis of common law and domestic law, but he wished to know what norms applied to them and whether they were necessarily sharia norms. In particular, he asked how a balance was achieved in practice between the need to respect the procedural norms of common law and domestic law and the need to apply the substantive rules on which those courts relied in their spheres of competence. It had been said that the rulings of the Islamic courts could be appealed before the Supreme Court, but it was important to ascertain whether those rulings had to be recognized in some way by the State in order to be enforceable. In other words, did the ordinary courts hand down a particular decision to approve the rulings of the Islamic courts? The delegation had candidly acknowledged that the administration of justice by the Islamic courts faced challenges on account of the fact that people did not have the means to pay legal fees and were not always well informed as to the location of the courts. It therefore went without saying that the State party should consider paying greater attention to those issues in order to fully guarantee respect for the rights of Muslim men and women in the area of justice. He asked what measures the authorities planned to take to overcome the difficulties that had been identified.

40. **Mr. Kälin** noted that the delegation had indicated that the media and civil society enjoyed freedom of expression and freedom of assembly. While that appeared to be the case, there had been worrying incidents, particularly the one mentioned in paragraph 24 of the list of issues, namely the arrest by the police of over 60 journalists and civil society activists who had gathered to protest the Kenya Communications (Amendment) Bill. According to the written replies, the law enforcement officers had acted to provide the necessary security to enable those concerned to exercise their right to assemble. It was not clear how that right could be protected by arresting the very people who were exercising it, and he invited the delegation to comment in that regard. As to the rights of members of minorities, although the delegation had indicated that the right to nationality was guaranteed to all persons, according to information provided to the Committee, members of certain minority communities allegedly had experienced difficulties in obtaining Kenyan nationality. He wished to know what the obstacles were and what measures the authorities had taken to remedy the situation.

41. The African Commission on Human and Peoples' Rights considered that the Endorois had been displaced from their ancestral lands in conditions that violated their rights. As far as he was aware, the Kenyan Government had not given effect to the decision handed down by the Commission, and he wished to know the Kenyan authorities' position on the matter and what reparation measures it planned to take.

42. **Ms. Waterval** noted that challenges remained in relation to birth registration. Parents often only registered their children because they had to produce a birth certificate in order to sit the primary school-leaving examination. In her view, registration should take place much earlier, before children started school, and one solution to the problem might be to deploy mobile registration units throughout the country, as had been done in her own country, Suriname.

43. With regard to the protection of lesbian, gay, bisexual and transgender (LGBT) persons, it was mentioned in the written replies that the Government had tried to accord them certain protections. It would be useful to know what measures had been taken for that purpose. The State should promote tolerance and understanding vis-à-vis sexual minorities and prosecute the perpetrators of attempts on the life of members of those minorities. The State party was also encouraged to consider decriminalizing homosexuality.

44. She welcomed the adoption of the HIV/AIDS Prevention and Control Act, and the awareness-raising and education campaigns on HIV/AIDS, the establishment of a national programme, and, more generally, the efforts to promote the right to health of the groups concerned. However, a number of problems remained, particularly the fact that persons who needed it did not always have access to antiretroviral therapy. The Government should allocate additional resources to combat HIV/AIDS and ensure that all infected persons, in particular members of sexual minorities, had access to treatment and sustainable care.

45. Noting that the Ogiek community, like other marginalized communities, continued to face difficulties in terms of its status and land rights, she asked for details on the Interim Coordinating Agency that had been set up. She also drew attention to the need to give effect to the decision of the African Commission on Human and Peoples' Rights on the forced eviction of Ogieks from their lands. The State party was urged to adopt a law on community land in order to establish the legal framework for the use, transfer and administration of such land, but also to provide guarantees in relation to the exploration and exploitation of the natural resources of marginalized communities. The Government should also give effect to the decision of the African Committee of Experts on the Rights and Welfare of the Child on Nubian children. It also appeared that Somalis in Kenya and other communities in border areas in the north of the country had to undergo extraordinary screening in order to obtain identity papers. All persons, without discrimination, should be guaranteed the right to a passport, an identity document and to be registered in the civil register. The State party should not only publish the rules governing naturalization and the registration of stateless persons, but also launch national programmes to raise public awareness of the importance of registration and inform the public of the procedure for obtaining identity documents.

46. Lastly, it had been mentioned that several bodies had been involved in the drafting of the third periodic report, but nothing had been said about the participation of representatives of ethnic and minority groups. She wished to have confirmation of whether they were incorporated in civil society organizations.

47. **Ms. Njau-Kimani** (Kenya) said that access to justice was guaranteed to everyone under article 50 of the Constitution, which provided, inter alia, that all persons accused of an offence had the right to choose and be represented by a lawyer. The guarantee of legal representation for those facing trial did not apply only in criminal cases. The authorities were currently establishing the system of legal aid and a bill set out the detailed modalities for the granting of such aid and established that services in that field should be easily accessible, of good quality and in compliance with constitutional provisions. In that context, there were also plans for awareness-raising activities, measures to support community legal services, including research and education activities and fundraising, and promotion of methods of conflict resolution, in both criminal and civil cases, so as to improve access to justice.

48. Under the Constitution, the Chief Registrar was the chief administrator of the judiciary, and was appointed by an independent body, the Judicial Service Commission, to which his office belonged. In addition, the Judiciary Fund was administered by the Chief Registrar, and was thus directly managed and controlled by the judiciary, without any interference from the executive branch. In 2012, the Fund had been allocated 15 billion Kenyan shillings, five times more than in 2011. The independence of the judiciary was also

recognized in article 160 of the Constitution, which provided that the judiciary was answerable only to the Constitution and the law, and that in the exercise of its prerogatives, it was not subject to the control of any other authority or person. Judges could not be removed from their posts until the age of 70. In order to ensure respect for the principles of integrity, responsibility and transparency, a law establishing the vetting mechanism and procedure for members of the judiciary had been adopted, and a vetting board had been established in 2011. The board vetted in particular judicial personnel who had been in their posts since before the adoption of the new Constitution, and it carried out its duties in accordance with articles 10 and 159 of the Constitution. The Government was aware that the judicial system had not always adequately guaranteed the administration of justice. Acting on the principle that judicial authority was derived from the people, it had therefore, in consultation with the interested parties, developed the framework for the transformation of the judiciary, which should fully ensure equality before the law and respect for all the guarantees to a fair trial. To that end, the judiciary would be required to take measures to eliminate the obstacles that hindered the public's access to information, to ensure the geographical proximity of the courts and to simplify judicial proceedings so that all parties could fully understand and participate in them. It would then be necessary to establish a strategy to increase the number of courts, particularly mobile courts, and to adopt a litigants' charter. There would also be a need to disseminate information on legal costs and the judicial calendar, to reduce legal costs and to establish a legal aid office in all jurisdictions in order to help people who conducted their own defence to understand the procedure. It would also be necessary to ensure that courts were not intimidating places and that they had a reception desk. Other measures were planned, such as the establishment of specific courts for certain vulnerable groups, such as minors, or special courts for petty offences. Finally, the judiciary would strive to promote and facilitate methods of non-judicial dispute settlement.

49. **Mr. Kiraithe** (Kenya) said that freedom of expression was a fundamental right protected by the Constitution, albeit with a number of legitimate restrictions. The arrests in 2008 had taken place prior to the adoption of the new Constitution, in 2010, but it should also be borne in mind that the right of assembly implied that the gathering was peaceful, which, according to the police, had not been the case. In such situations, law enforcement officers had a duty to maintain security by asking participants to disperse calmly or, if necessary, by arresting demonstrators and organizers who broke the law. Since 2008, the supervision of public demonstrations had changed significantly: the police no longer followed the processions and human rights defenders marched alongside others who wished to exercise their freedom of expression. The police had received training on how to negotiate with demonstrators, and that had produced positive results. However, human rights defenders also had duties, including the duty to request reparations if they considered that their right to demonstrate had not been respected, and not to clash with the police or cause harm to their fellow citizens. Discussion forums had been created to facilitate relations between human rights defenders and the police, and very recently, police officers and human rights defenders had marched together on the occasion of the Saba Saba festival.

50. **Ms. Chweya** (Kenya) explained that, under the Constitution, the State had a duty to respond to the needs of the most vulnerable groups in society, including minorities and marginalized groups, and to take measures to remedy any situations of inequality. The Constitution recognized the right of traditional communities to protect their culture and identity from assimilation. Although no specific institution dealt with minority issues, the concerns of minorities were addressed by various ministerial departments, including the Ministry of Lands and the Ministry of State for National Heritage and Culture. The national land policy was the frame of reference for the settlement of land disputes and historical land-related injustices, and a land commission had also been established to investigate past and present injustices in that area and make recommendations to remedy them. In the

context of land reform, a bill on community lands which would establish the legal framework for the protection of those lands was currently being drafted. The Government had also drawn up a draft national policy and plan of action for the promotion and protection of human rights, under which remedial legislation measures would be adopted with a view to enabling minorities and marginalized groups to exercise all the rights and freedoms enshrined in the Bill of Rights, in conditions of equality and respect for their identity, their way of life and their particular needs. The Truth, Justice and Reconciliation Commission would shortly submit its conclusions and make recommendations on ways of resolving the problems. With regard to the decision of the African Commission on Human and People's Rights concerning the Endorois, the Attorney General and the Ministry of Justice were currently considering the modalities for applying the decision; the Government was also examining the decision on Nubian children and would take the necessary steps to ensure that it was implemented. As to the Mau forest, a coordinating agency had been set up to carry out an evaluation of the land rights of the Ogieks and ensure their access to land.

51. **Ms. Sinyo** (Kenya) said that the law on the registration of births and deaths had been revised in order to bring it into line with the Constitution and that the new bill on registration and identification would facilitate the proper registration of all births and deaths in the country. Many registry offices had been established, and in each district registry officials were responsible for assisting communities to declare births. The number of registered births had increased. Mobile registry offices had also been created to facilitate registration in semi-arid regions. With regard to the requirement that all candidates for final primary and secondary level examinations should present a birth certificate, she recalled that it had been introduced in order to encourage the registration of births, even if it was delayed. Requesting the certificate on entry to primary school, as had been suggested by one of the Committee members, would not serve that purpose. On the subject of deaths, the provincial heads of administration were responsible for facilitating the declaration of a death and the obtention of death certificates.

52. With regard to the acquisition of nationality, the new Constitution provided that all Kenyan citizens — men and women — passed on their nationality to their children, regardless of whether they were born on Kenyan territory or abroad. She pointed out that, by retroactively conferring Kenyan nationality on children born out of wedlock, the new Constitution remedied the discrimination faced prior to its adoption by children born to a father of foreign nationality, who under the former Constitution had not been granted Kenyan nationality. Furthermore, the Civil Registration Department had undertaken a reform aimed at consolidating all data in a single registry in order to avoid any discrimination, particularly between the north and the south of the country, and the bill to that effect would soon be submitted to Parliament. Finally, the Citizenship and Immigration Act adopted in 2011 had not yet been implemented as the implementing regulations had only just been finalized.

53. **Ms. Lichuma**, referring to the Islamic courts, said that the legislation did not contain any contradictions. A Kadhi chief was appointed by the Kadhi court, which was a subordinate court, and its decisions were applied at that level. If the decision of a Kadhi court was appealed, the case was referred to the High Court. When a Kadhi court handed down a decision based on sharia law, the decision was enforced without another court having to order its enforcement, unless the decision was appealed.

54. Turning to the issue of HIV/AIDS, she recalled that Kenya had been severely affected by the epidemic. Considerable progress had been made over the past 20 years, and, despite the limited resources available, efforts were currently under way to ensure universal access to care and treatment. The 2009–2013 strategic national plan to combat HIV/AIDS classified homosexuals, sex workers and intravenous drug users as the most at-risk populations, and guaranteed their right to health and to treatment; resources were set aside

for the care of those who presented for treatment, but it was true that many did not, as homosexuality was a criminal offence. The estimated cost of the strategic plan was 3.556 billion US dollars, 57.9 per cent of which was for care and treatment, 19.5 per cent for prevention, 13.8 per cent for administration, and 8.4 per cent for assistance to orphans and vulnerable children. Kenya appreciated the financial support received from the international community. The Anti-Counterfeit Act had recently been reviewed after a case brought before the courts had revealed that there was confusion between generic and counterfeit medicine; the court had suspended the application of the relevant section of the Act.

55. **Mr. Kihwaga** (Kenya) said that it was pointed out in the periodic report that public opinion remained strongly opposed to the recognition of same-sex unions, and that Kenya had not taken any legislative measures to decriminalize such unions. However, the situation had improved since the report had been drafted, in particular as a result of the adoption of the new Constitution, which provided that all individuals were equal before the law and had the right to equal protection and equal benefit of the law. In addition, three constitutional commissions had been established — the National Gender and Equality Commission, the National Human Rights Commission and the Commission on Administrative Justice — which were expected to foster an environment conducive to debate on that sensitive issue. Understandably, however, the situation could not be expected to change overnight, and it might therefore take a number of months, or even years, to make any progress. The State's position was that all individuals, without distinction, had to be treated equally, and that it was not acceptable to treat somebody differently on the basis of their perceived sexual orientation.

56. **Mr. O'Flaherty** said that, while it was indeed mentioned in the report that the majority of the population was opposed to same-sex unions, the Committee was particularly concerned by the fact that consensual sexual relations between adults of the same sex constituted a criminal offence; if that was indeed the case, he wished to know whether the State party planned to take measures to decriminalize consensual sexual relations between adults of the same sex rather than same-sex unions. Prohibiting and criminalizing such relations forced people to hide and pushed them to the margins of society, which had repercussions on public health. The more a community was marginalized, the greater its exposure to risks such as HIV infection. Decriminalization would therefore be in the interests of society as a whole and would help overcome prejudice, intolerance, violence and discrimination, in particular against homosexuals. Governments sometimes had to take difficult decisions, even if they were unpopular, in the interests of protecting the rights of their people.

57. **Mr. Flinterman**, noting that Kenya now had a strong legislative framework to combat trafficking in persons, asked for details of the code of conduct voluntarily adopted by the coastal hotels; he wished to know the main points, what happened if a hotel did not adopt the code, and which authorities were responsible for monitoring compliance with the code.

58. **Mr. Kälin** said that, according to the Kenyan police charter, suspects had to be brought before a judge within a maximum of 24 hours; that period could be extended to 14 days in some cases. The wording of that provision was rather vague, and could be taken to mean that the period ranged from 24 hours to 14 days; it was therefore essential that the police be well informed as to exactly what was allowed under the Constitution.

59. **Mr. Neuman** said that it was imperative that all children born in the territory of a State be registered at birth and be able to prove their identity, even if that identity did not correspond to the nationality of the State concerned. He requested confirmation that the State party's manifest willingness to improve birth registration and ensure the registration of all children born in its territory extended to children who did not have the right to

Kenyan nationality, and that those children would also be registered in the civil register, even if they were not registered as citizens.

60. **Mr. Wamalwa** (Kenya) confirmed that no measures had been taken to decriminalize either same-sex unions or sexual relations between persons of the same sex. Kenya did not intend to legalize homosexuality, be it between men or women. The new Constitution and the new institutions established had brought about many changes, and there had been many developments in the country, but the State's position on that issue remained unchanged and in all likelihood would not change in the near future.

61. **Mr. Maina** (Kenya) said that the code of conduct for the protection of children against sexual exploitation in the travel and tourism industry had entered into force in 2006, and to date more than 60 of the 120 hotels in the coastal region had adopted it. The code covered issues related to the sexual exploitation of children and trafficking in children for purposes of prostitution.

62. **Mr. Kiraithe** (Kenya) said that Mr. Kälin's comment on the maximum time limit for detention before being brought before a judge would be taken into consideration, and that the necessary steps would be taken to ensure that all members of the police were properly informed that the maximum period allowed under the Constitution was 24 hours.

63. **Ms. Sinyo** (Kenya), replying to Mr. Neuman, confirmed that all children born on Kenyan territory were registered in the civil register, including those born in refugee camps or in prison.

64. **Mr. Wamalwa** (Kenya) thanked the members of the Committee for the sincere and frank dialogue. The Committee's recommendations would give a new impetus to Kenya's unstinting efforts to promote and protect human rights in compliance with the Covenant. It was hoped that as a result of the new Constitution, the new institutions and Kenya's progress in strengthening human rights and the rule of law, the forthcoming general election would pass off peacefully and that there would be no post-election violence as in 2007. There were still major problems to resolve, such as piracy, which was widespread in the region, and the situation in the Dadaab refugee camp.

65. **The Chairperson** said that the Committee had taken note of the considerable progress made by the State party since 2005, including the many laws adopted and, in particular, the promulgation of the new Constitution, and welcomed the fact that most of the provisions of the Covenant were incorporated in Kenyan legislation. A number of concerns had been raised during the debate, which had been fruitful and constructive: post-election violence; discrimination; judicial and police reform, which had not yet yielded sufficient results, and the fight against impunity, which should be pursued; the death penalty, torture and extrajudicial executions; and criminalization of same-sex unions. The Committee hoped that the Government would review its practice on all those issues in order to bring them into line with the Covenant. While a sound constitutional framework was essential, it was also necessary to have the necessary legislation, policies and institutions to give effect to the provisions of the Constitution. Kenya still had a long way to go to guarantee genuine equality, an independent and responsible law enforcement system, access to justice and the exercise of many other rights.

The meeting rose at 12.55 p.m.