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**Consideration of reports submitted by States parties
under article 40 of the Covenant**

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Kenya

Addendum

**Replies from the Government of Kenya to the list of issues
(CCPR/C/KEN/Q/3) to be taken up in connection with the
consideration of its third periodic report (CCPR/C/KEN/3)***

[30 May 2012]

* In accordance with the information transmitted to States parties regarding the processing of their reports, the present document was not formally edited before being sent to the United Nations translation services.

Constitutional and legal framework within which the Covenant is implemented, right to effective remedy (art. 2)

Reply to the issues raised in paragraph 1 of the list of issues (CCPR/C/KEN/Q/3)

1. Article 2 (6) of The Constitution of Kenya, 2010 provides the basis for the direct application and invocation of treaties or conventions ratified by Kenya. The provisions of the Constitution are largely informed by the provisions of the regional and international instruments that Kenya is a State party to. Since the adoption of the constitution, Kenyan judges have given effect to the provisions of the Covenant.

Application of articles 7 and 9 of the Covenant

2. Article 49 of the Constitution gives effect to articles 7 and 9 of the Covenant. It is now possible for an accused person on a murder charge to apply for and be released on bail/bond, where there is no compelling reason against such a release. This was followed in Republic Versus Dansom Mgunya and Kasim Sheebwana Mohammed, Criminal Case 26 of 2008 where the court invoked the provision to grant bail to the accused who had been in remand since 2008.

3. Further, the Constitution outlaws the remand in custody of any person for an offence that is punishable by a fine only or by imprisonment for not more than six months. This provision has been adhered to faithfully by the courts thus resulting in enhanced decongestion of prisons and remand institutions as well as safeguarding the rights of those accused.

4. The State has developed a draft pretrial policy with the technical input from civil society organizations and is in the process of holding roundtable discussions to review the contents of the same.

5. The Constitution espouses a plethora of rights which serve to introduce the humane treatment of those who are accused, detained, held in custody and imprisoned. A bill that provides for the humane treatment of persons detained, held in custody or imprisoned is under stakeholders' consultations and espouses Kenya's obligations under relevant regional and international human rights instruments.

6. Article 49(2) of the Constitution provides that no custodial sentence should be meted to petty offences which carry a punishment of a fine only or imprisonment of less than six months. This is aimed at decongesting prison and other detention facilities and ensuring that petty offenders are rehabilitated in the Community.

7. The principle of equality between men and women as articulated in the covenant is one of the national values provided for in the Constitution which binds all State organs, State officers, public officers and all persons whenever any of them applies or interprets the Constitution; enacts, applies or interprets any law; or makes or implements public policy.

Right to life

Application of article 6 of the Covenant

8. The courts have upheld the right to life and dignity of persons living with HIV/AIDS in cases filed before them. In the case of *P.A.O and 2 others v, The Attorney General of Kenya Petition No. 409 of 2009 Nairobi*, the Constitutional Court has barred the Government from implementing the Anti-Counterfeit Act of 2008 which would affect access to affordable anti-retroviral drugs. In her ruling the Judge stated "The right to life, dignity and health of people like the petitioners, who are infected with the HIV virus,

cannot be secured by a vague proviso in a situation where those charged with the responsibility of enforcement of the law may not have a clear understanding of the difference between generic and counterfeit medicine," In effect, the Judge found that the wording of the Act is unconstitutional and a threat to the right to life, dignity and health. With advice of the Attorney General, the minister concerned will be expected to amend the Act to reflect the judgment.

Legal aid

Application of article 14(d) of the Covenant

9. Under article 50(h) of the Constitution, an accused person has a right to a fair trial including having an advocate assigned to him/her at State expense, if substantial injuries would otherwise result, and be informed of this right promptly.

10. The Court of Appeal of Kenya, , *David Njoroge Macharia v. Republic*, Court of Appeal of Kenya, Criminal Appeal No. 497 of 2007, in a judgment delivered on 18 March 2011, reaffirmed the State's responsibility in provision of legal aid. The Court held that, under the new constitution when an accused person is subjected to a trial in respect of a serious offence for which the ultimate sentence is death without affording the benefit of legal counsel at State expense, it violates the new constitution and fundamental freedoms enshrined in the constitution and other international human rights instruments such as the International Covenant on Civil and Political Rights and the African Charter on Human and Peoples' Rights.

Death penalty

Application of article 6 of the Covenant

11. In *David Njoroge Macharia v. Republic* the court held that section 204 of the Penal Code (PC), to the extent that it provided that the death penalty is the only sentence in respect to the crime of murder, is inconsistent with the letter and spirit of the constitution which makes no mandatory provision. It held that section 204 of the PC which provides for a mandatory death sentence is antithetical to the constitution provisions on protection against inhuman, or degrading punishment and treatment and fair trial. They noted that although the constitution recognizes the death penalty as been lawful it does not provide that when a conviction of murder is recorded only the death sentence must be imposed.

24 hour rule

Application of article 9 of the Covenant

12. *Purity Kanana Kinoti v. Republic Of Kenya*, Misc Criminal Application, High Court 752/2010, in her petition the appellant asserted that she was detained by the police for more than 24 hours before being taken to court which constituted a violation of article 49(f) of the constitution and article 9 of the Covenant. The court granted compensation.

Right to a fair trial

Application of article 14 of the Covenant

13. In *Kenya Anti-Corruption Commission v. Stanley Mombo* High Court of Nairobi, civil suit no. 448 of 2008- -The Kenya Anti-Corruption Commission had filed a case before the High Court seeking determination of whether Mr Amuti had in possession unexplained assets and whether he should have been condemned to pay the Government the cash and value of properties acquired corruptly or in the alternative whether the cash, landed properties and motor vehicles should have been forfeited to the Government. The High

Court stated that the absence of a fair trial in the process stipulated under the ACECA Act rendered the trial inconsistent with the Constitution.

14. The High Court also declared section 55 (5) and (6), of the Anti-Corruption and Economic Crimes Act (ACECA), which gave KACC the powers to forfeiture of unexplained assets and , upon which the case was predicated, inconsistent with the provisions of articles 20,25,40(3) of the constitution.

15. The articles invoked relate to the application of the Bill of Rights, fundamental rights and freedoms that may not be limited, such as fair trial, and protection of the right to property.

Equality between men and women

Application of article 3 of the Covenant

16. Article 27 of the Constitution provides that everybody is equal before the law and has the right to equal protection and benefit of the law. Art 60 (f) of the Constitution provides for the elimination of gender discrimination in laws, customs and practice related to land and property. This gives married women a right to inherit their parents' estate.

17. In *Samson Kiogora Rukunga v. Zipporah Gaiti Rukunga*, Succession cause 308 of 1994, in the High Court At Meru , the court stated that the plaintiff herein was prohibited by article 60 (f) from discriminating against his sister Consolata in inheriting their deceased fathers estate. The court held that the marital status of women was not a basis to deny her the right to inherit her deceased father's estate.

18. In the case, *Center For Rights Education and Awareness and 7 Others v. the Attorney General Petition 16* of 2011, a High Court judge found that the nomination of candidates to position of Chief Justice,, Director of Public Prosecution, Attorney General and controller of Budget was unconstitutional to the extent that all nominees to the offices were of the male gender and an affront to the spirit of equality and freedom from discrimination under article 27 of the Constitution.

19. Article 27 (3) asserts that women and men have the right to equal treatment, including the right to equal opportunities in political, economic, cultural and social spheres. Furthermore, the scope within which women and men are protected from violence has been widened to include the private spheres (art. 29 (c)).

20. The National Gender and Equality Commission's mandate includes acting as the principle organ of the State in ensuring compliance with all treaties and conventions ratified by Kenya relating to issues of equality and freedom from discrimination and relating to special interest groups including minorities and marginalized persons, women, persons with disability and other marginalized groups in national development and to advise the Government on all aspects thereof.

Citizenship

21. The Constitution of Kenya, 2010 gives equality to both women and men citizens to pass their citizenship to their children

Elections

22. Please see paragraphs 53 and 54 below

The National Assembly

23. In the composition of the National Assembly, 47 seats have been reserved for women elected by registered voters from the 47 counties (art. 97 (b)). It is stated herein that there is concern in the country that even with this provision the number of women in the

National Assembly may not still reach the one third threshold. In this regard the Ministry Of Justice, National Cohesion and Constitutional Affairs has introduced a bill to review this provision so as to ensure that no gender has more than 2/3's representation in Parliament as required by the Constitution

Senate

24. The Senate represents the interest of counties and their governments. It is also tasked with the responsibility of legislating on county issues, determining national revenue allocation and oversight among counties. Article 98 of the Constitution provides for 16 women who will be nominated through the political parties represented in the Senate. There is also a provision for an additional 2 women to represent the youth and persons living with disabilities, respectively.

Public appointments

25. Article 232 (1) accords adequate and equal opportunities for both men and women in the appointment, training and advancement at all levels of public service. These provisions enabled a large number of women to get appointed to the different Constitutional Commissions.

26. During the process of recruiting Judicial Officer (Magistrates and Judges), the Judiciary through the Judicial Service Commission is guided by the principles of competitiveness, transparency and promotion of gender equality.

Non-discrimination

In furtherance of article 2, paragraph 1 of the Covenant.

27. Article 27 (5) of the Constitution outlaws discrimination on the grounds of race, sex, pregnancy, marital status, health status, ethnic or social origin, colour, dress, language or birth. To give effect to this, article 27, paragraph 6, obligates the State to take legislative and other measures, including affirmative action programmes and policies designed to redress any disadvantages suffered by individuals or groups because of past discrimination.

28. Political parties are also expected to respect the rights of all persons to participate in the political process including persons with disabilities, minorities and marginalized groups.

29. It is now mandatory that persons with disabilities be represented in Parliament. The Constitution of Kenya, 2010 provides for representation by two persons with disabilities at Senate level [art. 98 (1) d], nomination of persons with disabilities in the national assembly [art. 97 (1) c], and at county levels [art. 177 (c)].

Equal access to public service

30. The principles of the Public Service under article 232 (1) (h) and (i) include representation of Kenya's diverse communities and affording equal opportunities for appointment, training and advancement at all levels of the public service of men and women, members of all ethnic groups and persons with disabilities.

Information on the measures taken to improve access to remedies by individuals

31. Article 159(2) (c) of the constitution of Kenya recognizes alternative forms of dispute resolution including reconciliation, mediation, arbitration and traditional dispute resolution mechanisms, to the extent that there are not repugnant to justice and morality.

32. Due to the complexity in both the common law adversarial system and court systems that take long to determine cases, many people have embraced traditional dispute resolution

mechanisms (TDR) which are inquisitorial and promote restorative justice. This is especially so in rural, informal settlements in towns, arid and semi-arid areas of Kenya.

33. The TDR are familiar, cheap, simple and accessible to the people of a given community and cultural heritage. The TDR integrate mediation, conciliation and arbitration with no need for legal representation. They resolve both serious and petty criminal and civil matters including murder, rape, succession, and land among others. Remedies include compensation in kind, for example payment of cows or goats.

Reply to the issues raised in paragraph 2 of the list of issues

34. The Kenya National Commission on Human Rights (KNCHR) is an independent Constitutional Commission entrenched under articles 59 (1) and the 248 of the Constitution of Kenya (2010). The Kenya National Commission on Human Rights Act, 2011 restructures the Kenya National Human Rights and Equality Commission pursuant to article 59 (4) of the Constitution. Prior to the current Act, the Commission was in existence by virtue of the repealed Kenya National Commission on Human Rights Act, 2002. The Commission operates independently to monitor and ensure that all human rights legislations are strictly adhered to and lobby pro-actively for a legal framework consistent with international standards and good practices in human rights. The budget of the Commission is a separate vote on the consolidated fund. The remuneration and benefits payable to, or in respect of, the members of the Commission cannot be varied to their disadvantage during their respective terms of office.

The extent to which KNCHR is empowered to order release of unlawfully detained persons

35. The Commission runs the following directorates, among others; Legal Services and Research & Advocacy directorates. The Legal services mandate relates to receiving processing, investigating admitted complaints and securing appropriate legal remedy. The Research and Advocacy programme undertakes research, inspects conditions of imprisonment, detention and makes appropriate recommendations with a view to reducing system violations of rights of persons in legal detention, custody and prisons.

36. Although the Constitution confers broad functions to the Commission, the current Act does not empower the Commission to issue orders of release where the Commission establishes that a person is unlawfully detained. Efforts are being made to review of the Act in order to fully give effect to its Constitutional mandate

Counter – terrorism measures and respect of covenant guarantees

Reply to the issues raised in paragraph 3 of the list of issues

38. In terms of measures taken to combat terrorism, the Constitution of Kenya provides for comprehensive provisions on protection of Human Rights as enshrined in Chapter Four (Bill of Rights) of the Constitution of Kenya. Any legislation, policy and administrative action must conform to the provisions of the Constitution. Kenya does not have a legal framework for terrorism. Any authority or response has been administrative and regulatory, but even then, such authority must comply with the provisions of the Constitution. Affected persons may seek redress when their rights have been denied, violated, infringed and/or threatened by instituting court proceedings as provided under articles 22 and 23 of the Constitution.

39. With regard to renditions please see reply to the issues raised in paragraph 15 of the list of issues.

Non-discrimination, equality between men and women (arts. 2, para. 1; 3 and 26)

Reply to the issues raised in paragraph 4 of the list of issues

40. The Constitution outlaws discriminatory attitudes, beliefs, practices, and administrative actions which have served to disadvantage women and girls in Kenya.

41. Under article 10 (2) (b) of the Constitution, embraces the principles of human rights, equality and non-discrimination, as national principles of governance. These principles constitute benchmarks of good governance, and consequently, measures by which Kenyans will judge their 'governors'. This constitutes a strong expression of the commitment to these principles by the peoples and government of Kenya.

42. The Constitution under article 21 (3) goes further to state that all State organs now have a duty to address the needs of women (among other vulnerable groups). Furthermore, the State shall enact and implement legislation to fulfil its international obligation in respect of human rights and fundamental freedoms. This includes the International Covenant on Civil and Political Rights, and the Convention on the Elimination of All Forms of Discrimination against Women among others. Article 21 (4) further provides that all State organs have the duty to take legislative and policy and other measures including the setting of standards for the progressive realization of the social and economic rights stated under article 43 of the Constitution.

43. On gender equality safeguards, article 27 of the Constitution (at sub-section (3)) expressly states that:

(a) 'Women and men have the right to equal treatment, including the right to equal opportunities in political, economic, cultural and social spheres';

(b) Article 24 (4) further lists grounds under which the State will not be able to discriminate, either directly or indirectly, as including: sex, pregnancy, marital status; all grounds upon which women have been disproportionately affected;

(c) To this end, article 27 (6) provides that the State 'shall take legislative and other measures, including affirmative action programmes and policies' to redress any disadvantage suffered from past discrimination.

(d) In addition, article 27(8) provides that the State shall take legislative and other measures to implement the principle that not more than two-thirds of members of elective or appointive bodies shall be of the same gender.

44. All of these measures – which are currently in the process of being actualized through policies, laws and administrative regulations, speak of strong efforts towards addressing the status of women's political, economic and social lives.

45. Another measure that has been taken is the establishment of the National Gender and Equality Commission whose core mandate is to promote gender equality and freedom from discrimination as provided by in article 27 of the Constitution. The Commission has investigative powers; and it will make periodical reports to Parliament of progress made.

Collection of comprehensive gender statistics to track progress

46. The ministry of Gender, Children and Social Development has in conjunction with Kenya's National Bureau of Statistics (KNBS) undertaken a number of key initiatives aimed at informing planning and budgeting processes in a manner that will ensure they address the status of women and girls in the social, political and economic spheres:

Creation of a Gender department within the KNBS

47. This department has been tasked with generating gender statistics in support of broad-based and targeted development programmes and initiatives. This department has been analyzing the Kenya Population and Housing Census data of 2009 by sex. The department also works with the ministry of Gender, Children and Social Development in compiling data towards the Africa Gender Development Index which looks at a broad range of quantitative and qualitative data under three blocks- social, political and economic.

Kenya Gender Data Sheet.

48. The ministry of Gender, Children and Social Development has with support from KNBS, developed a data sheet which contains gender-specific statistics and data disaggregated by sex at the level of administrative districts, i.e. population of persons of child-bearing age, of the youth and elderly persons; households by the sex of the household head, life expectancy, mean age at first marriage; under-5 mortality rates, primary school gross enrolment, primary to secondary transition rates, labour force participation rates, membership of cooperative societies; households with access to safe drinking water by sex of household head among others. The first data sheet was released in 2005 and a second updated datasheet was released in 2008. In addition to tracking progress these statistics are helpful in identifying problem areas for targeted interventions.

Production of the Bi-annual Reports on Affirmative Action on employment and Recruitment of women in the Public Service

49. The ministry of Gender, Children and Social Development has also since 2008, been compiling data on all government agencies and local authorities in line with a Presidential Decree issued on the Recruitment and promotion of women in the public sector, to ensure that women constitute at least 30 per cent of all appointments, recruitments and promotions. The report goes further to analyze the number of women in decision-making positions. As at June 2010, Women constituted 25.3 per cent of persons in job group P and above (senior assistant directors in ministries and above); they constituted 41.5 per cent of those in job group J-N (mid-level management) and 36.9 per cent of those in job group H and below (support staff). In total, women were found to constitute 38.4 per cent of those in the public service; they have therefore exceeded the 30 percent threshold that the Government has committed itself to though more needs to be done to improve their representation in job-groups P and above). The Public Service Commission has taken the matter further and is now publishing information on recruitments/promotions by sex and providing ratios by sex of all new recruitments.

Measures taken in the economic arena**Kenya's Vision 2030**

50. Kenya's long-term blueprint for economic development which was officially launched in 2008, identifies the disadvantages that women face in accessing productive resources and labour markets, and their under-representation in social and political leadership as some of its objectives (under the social sector). The Vision states that it will provide specific policy measures to correct the glaring gender gaps in access to and control of resources, economic opportunities, and power and political voice. The strategies identified under Vision 2030 are:

- Providing financial support to women to raise their incomes and reduce the gender gap in earnings (see the next bullet on how this has been done);
- Increasing female representation in Parliament (see below measures taken in the political arena);
- Instituting affirmative action towards a target of 30 per cent female representation in the public sector (see below. measures taken in the political arena);

- Reducing the male and female population below the poverty line to 25 per cent.
- Mainstreaming gender into government policies, plans, budgets and programmes.

The Employment Act, 2007

51. In addition to the Constitution, this Law:

- Prohibits trafficking and forced labour (section 4);
- Prohibits discrimination in employment; employment policy or practice (sections 5 (1) and 5 (7) (c));
- Prohibits direct or indirect discrimination and/or harassment on the grounds of sex or pregnancy; and discrimination in recruitment, training, promotion, terms and conditions of employment, termination of employment or other matters arising out of the employment (sections 5(3) and 46 (g));
- Provides for affirmative action measures to promote equality or address past discrimination (section 5 (3));
- Safeguards the principle of equal pay for equal work value (section 5(4));
- Prohibits sexual harassment (section 6);
- Protects the rights of female employees to three (3) months' maternity leave with full pay and provides for 2 weeks paternity leave on full pay, for male employees.

Youth Enterprise Development Fund (YEDF)

52. The ministry of Youth Affairs and Sports also runs a micro-enterprise fund to support male and female youths and as at 2008 it was estimated that 18,042 women (compared to 9,923 males) had accessed these funds.

Measures taken in the political arena

Political parties Act, 2011

53. Other than the provisions contained within the Constitution which provide for the two-thirds principle (of either gender) within the legislature and all other elective positions at national and county levels, the Political Parties Act which was enacted in 2011, also contains gender equality safeguards to the extent that the formation and purposes of political parties shall be subordinate to the Constitution (section 3(1)). Secondly section 7(2) of the Act provides that "political parties shall be qualified to be fully registered if (among others): its membership and the composition of its governing body both reflect gender balance." In this regard, The Constitution at article 90 (2) (b) specifically provides that for elective positions, provides that party lists shall comprise the appropriate number of qualified candidates and alternates between male and female.

54. Parties may be de-registered for failure to comply with these provisions (under section 21(1)). As at 2010, female representation in Parliament was estimated at 9.9 per cent; and 15.8 per cent at the local authorities' level. These numbers will likely see a significant improvement with the implementation of this Act and the enactment of a law, providing for how the two-thirds principle in elective positions shall be achieved.

Measures taken in the social sector

55. Kenya Education Sector Support Programme (KESSP) 2005-2010 which was based on the objective of providing every Kenyan with the right to quality education and training, led to the development of a database disaggregated by sex, of students and a decision by the education sector to re-admit young women who become pregnant or were subjected to early marriage, to school, to finish their studies. The ministry of Education under its Strategic

Plan of 2008-2012 also committed to operationalize a gender policy for the sector, with one of its focuses being to ensure girls' full and equal access to, retention and achievement in basic quality education. Challenges still remain in that some communities' attitudes towards the education of a girls child generally is still problematic; and human and financial resources are still limited to enable the full operationalization of the gender policy; but efforts are still on-going ;

56 Affirmative Action in public universities: Public universities in Kenya have also undertaken affirmative action in terms of the admission marks for entering public universities and this has seen female representation in public universities go from 31 per cent in 2007, to 39 per cent by 2010;

Reply to the issues raised in paragraph 5 of the list of issues

57. The delay in enacting these bills is regrettable but the Kenya government through the Commission on the Implementation of the Constitution's (CIC) unit on Human Rights is now undertaking consultations with the public on the contents of these Bills, pursuant to the new Constitution's promulgation (and in line with the mandate of the CIC), in order to gain the views of the public on the same before submitting them to Parliament.

58. Discriminatory customary laws and practices: The above Bills were designed to address these discriminatory practices, but the Constitution also tackles the same under articles 2 (4), 44, 65, 60 (1) and 68(c) (vi).

59. Other than the pending Bills, laws are currently being developed under the stewardship of the ministry in charge of land issues in Kenya, to address the governance of land management and use in Kenya, in line with these constitutional provisions. Under the African customary law polygamy is permitted. The Marriage Bill endorses polygamy but only in situations where there is consensus between the parties.

State of emergency (art. 4)

Reply to the issues raised in paragraph 6 of the list of issues

60. The constitution does allow for the limitation of certain rights and fundamental freedoms by legislation during a declaration of a state of emergency only to the extent that the limitation is strictly required by the emergency. Further, the legislation must be in conformity with the State's obligations under international laws applicable to a state of emergency including the Covenant on Civil and Political Rights. This article should be read together with article 25 which articulates the fundamental rights and freedoms that may not be limited and which resonates with the provisions of the international human rights instruments that Kenya is a State party to. These absolute prohibition on slavery, torture and other cruel, inhuman and degrading treatment and punishment, the right to a fair trial and the rights to an order of habeas corpus.

Right to life (art.6)

Reply to the issues raised in paragraph 7 of the list of issues

61. Security operation in Mt. Elgon was mounted in order to eliminate security threats posed by the Sabaot Land Defence Force (SLDF) a notorious and ruthless gang which was using torture and murder on innocent people who did not support their course. At the height of the violence in March 2008 SLDF activities had led to murder of 400 innocent people, displacement of 30,000 people and closure of 16 schools. Police teaming up with the military were able to stop the mayhem. During the security operation, about 1200 suspects were arrested and most of them arraigned in court. The arrests were effected by security

agents, members of the public and some voluntarily surrendered to the authorities. Some are believed to have fled to Uganda and some are still at large. However, there were allegations of torture of innocent people by security forces.

62. On 22 May, 2008, the Commissioner of Police appointed a team whose terms of reference were: To investigate all allegations of human rights abuses in Mt Elgon; To identify the perpetrators; To make appropriate recommendations; and make such other recommendations necessary to ensure that such abuses are not repeated in future.

63. The team analysed the various reports which had been compiled by the Independent Medical Legal Unit (IMLU), Western Kenya Human rights Watch (WKHRW), the International Committee of the Red Cross (ICRC) and the Kenya National Commission on Human Rights (KNCHR). The IMLU and the WKHRW were found to have documented too generalized allegations of the purported victims and did not have the victims' particulars to facilitate further inquiries. The KNCHR and the ICRC reports documented victims of alleged torture which were inquired into and most of them could not be traced even after tracing their homes. According to the investigation team, the reports therefore did not conclusively establish that the security officers did torture victims as claimed. This is given credence by the findings of the United Nations Special Rapporteur on extrajudicial, arbitrary or summary executions, Professor Philip Alston, on his Mission to Kenya from 16-25 February 2009 who appreciated instances where the military had been falsely accused of committing atrocities upon e.g one, Mr. Mokoit only for the individual to voluntarily retract his version of the story. There were, however, confirmed cases of torture of SLDF members and sympathizers by members of the public who engaged in revenge attacks. Apart from that, SLDF torture methods have been well documented, the torture included chopping off of ears, fingers and other body parts with many victims succumbing to the serious injuries inflicted on them.

Compensation

64. The Truth Justice and Reconciliation Commission was created by the Truth, Justice and Reconciliation Act, 2008. Its mandate areas are: establishing the facts about human rights violations committed between 12 December 1963 and 28 February 2008, recommending the prosecution of suspected perpetrators and reparations for the victims and providing a forum for reconciliation (section 5). In particular, the Commission would: investigate the violations, as well as their context, causes and circumstances; identify the individuals and institutions responsible for the violations; identify the victims; educate and engage the public; and make recommendations for reparations and prosecutions, as well as institutional, administrative and legislative reform (section 6).

65. The Commission held a hearing in the Mt Elgon region. The Commission is currently compiling its final report which will include recommendations on all its mandate areas.

66. For P.E.V cases: On ⁹February 2012 the Government of Kenya officially established a Multi agency taskforce to undertake a countrywide review and evaluation of all the local post election violence (P.E.V) cases under investigation and pending before court with a view to recommending ways and means of ensuring fair and speedy determination. The team is also required to advise on other alternative dispute resolution mechanisms which include reconciliation, mediation, arbitration and other traditional dispute resolution strategies.

67. In order to facilitate the process about 5700 files were transmitted to the Taskforce by the Police. The team has begun its work and has so far reviewed 1450 cases.

68. The charges preferred against the offenders include arson, murder, rape and stock theft. The Taskforce has recommended the following:

- That some of the files be referred back to police for thorough investigations

- The immediate prosecution of a number of cases where evidence has been disclosed suspects identified;
- The urgent need for the establishment of a forensic laboratory, and
- Capacity building for the police in areas, such as, crime scene investigation.

69. Measures taken to cooperate with the ICC: The International Crimes Act 2008 which is in force and binding domesticates the Rome Statute obligations in Kenya, especially the issue of cooperation with the Court. On 3 September 2010, Kenya entered into a cooperation Agreement with the ICC vide exchange of letters. The Court was granted immunities and privileges which are given to other international organizations accredited to Kenya. Legal Notice No. 170 giving effect to the Agreement was officially gazetted on 29 September 2010 in the Kenya Gazette. Since this matter arose, senior Court officials have visited Kenya without any impediment, and their entry, stay and requests for meetings have been effectively facilitated. This includes a number of meetings between the Prosecutor and Government officials at the highest level. The Court has also been able to deploy investigators into regions affected and the Government has done everything possible to facilitate their work.

70. Pursuant to the cooperation Agreement, and in order to establish an operational base in Kenya, the Court has recently deployed officials in Kenya who conducted out thorough investigations, identified and presented their evidence to the court which indicted the suspects. Kenya has kept its door open to ensure that the ICC is able effectively conduct its business. In fact in May, 2012 the Court's lawyers and investigators made a fresh visit to the hotspot areas in Eldoret, Naivasha and Nakuru to collect more evidence.

Reply to the issues raised in paragraph 8 of the list of issues

71. Allegations of excessive use of force by the police have been made every time there has been a security exercise by the police. Recognizing this as a major human rights issue, the State has now put in place an Independent Civilian Police Oversight Authority whose main objectives shall be to hold the Police accountable to the public in the performance of their functions; investigate any complaints related to disciplinary or criminal offences committed by any member of the Service, whether on its own motion or on receipt of a complaint, and make recommendations to the relevant authorities, including recommendations for prosecution, compensation, internal disciplinary action or any other appropriate relief, and shall make public the response received to these recommendations. All unresolved matters related to the above shall now be reviewed.

Reply to the issues raised in paragraph 9 of the list of issues

72. Protection of human rights defenders and other witnesses remains a key priority of Government, in order to facilitate the successful prosecutions of organized crimes, corruption, unlawful killings and transnational crimes. A Witness Protection (Amendment) Act, passed in 2010, provides the framework for the protection of witnesses in Kenya. It provides for an Independent Witness Protection Agency with direct funding from the Consolidated Fund and a Witness Protection Programme. With this Agency in place, it is hoped that witnesses who may help in solving these murders may come forward. The file remains open

Reply to the issues raised in paragraph 10 of the list of issues

73. While the death penalty still remains in the laws of Kenya, there has been a moratorium on the sentence since 1987. It is noteworthy that the courts have been highly proactive in this area and held that the death penalty is not mandatory. The Court of Appeal of Kenya in *David Njoroge Macharia v. Republic* held that section 204 of the penal code was unconstitutional to the extent that it provided that the death penalty is the only sentence in respect to the crime of murder is inconsistent with the letter and spirit of the constitution which makes no mandatory provision.

74. The Government of Kenya is in the process of developing a Treaties Bill that will facilitate the ratification processes in Kenya in accordance with the constitution of Kenya, 2010.

75. Children are not subject to the death sentence in Kenya.

Prohibition of torture and cruel, inhuman or degrading treatment; liberty and security of person and treatment of persons deprived of their liberty (arts. 7, 9 and 10)

Reply to the issues raised in paragraph 11 of the list of issues

Steps taken to eliminate domestic violence

76. Kenya's Vision 2030 identified the need to reduce gender-based violence and in this regard, some of the measures that are mentioned hereinafter encompass the Constitution and policy and legislative measures to correct the glaring gender gaps in access to and control of resources, economic opportunities, and power and political voice, were considered as promoting this agenda;

Constitution of Kenya

77. Article 28 protects the inherent dignity of the persons. Article 29 on freedom and security explicitly outlaws any violence from either private or public sources as well as any torture in any manner- including physical and psychological torture; and treatment in a cruel, inhuman or degrading manner. Article 30 also outlaws slavery and servitude and unlike other rights, these rights under articles 29 and 30 shall not be limited.

Sexual Offences Act 2006

78. This Law explicitly outlaws rape, attempted rape, sexual assault, defilement and attempted defilement of children, and sexual harassment and was considered a significant victory for advocates against sexual and/or gender based violence in Kenya in that it criminalizes offences that were previously not covered, including sexual violence against males and boys, and forcing a person to engage in a sexual act for cultural or religious reasons. The Act domesticates the provisions of the Convention on the Elimination of All Forms of Discrimination against Women, the Convention on the Rights of the Child, and the African Charter on the Rights and Welfare of the Child. It provides procedures for proper investigations to be conducted – including the protection of vulnerable witnesses,. It also provides for the treatment and supervision of convicted offenders. There is however need to building the capacities of key agencies that is the Judiciary, the police services and the health sector- and providing the technical staff and infrastructure (equipment, office facilities) that can support the kinds of services needed to successfully undertake such prosecutions. Culture also remains a challenge as these kinds of crimes are still considered as 'private' and reporting them is a challenge.

Employment Act, 2007

79. This Act under section 6(1) (d) explicitly outlaws sexual harassment which it describes as including: physical behaviour of a sexual nature which directly or indirectly subjects the employee to behaviour that is unwelcome or offensive to that employee and that by its nature has a detrimental effect on that employee's employment, job performance, or job satisfaction (the Sexual Offences Act of 2006, sexual harassment also constitutes a legally actionable offence).

80. The National Gender and Equality Commission was established in 2011 and has undertaken a number of critical initiatives in support of this agenda. They include:

- The development of a National framework towards response and prevention of Sexual and gender based violence;
- Development of a National plan of Action to Aid the development of the National framework towards response and prevention of Sexual and gender based Violence
- Research /mapping of sexual and gender based violence services available in Kenya
- Spearheading the coordination of Sexual and gender based initiatives at the national level;
- Research on the status of gender based violence in Kenya, and;
- Piloting of Gender-based violence information management system in Kenya in six public health facilities throughout Kenya (and increasing coverage as resources become available);
- Spearheading with the ministry of Gender, Children and Social Development, campaigns on 16 days of activism against violence against women.

81. The Office of the Director of Public Prosecutions has also operationalized a Sexual Offences, Gender Violence and Victim's Rights Section manned by trained prosecutors within the directorate. It has embarked on the following key initiatives:-

- Training and sensitization of investigators, police prosecutors and judicial officers on Sexual and Gender based violence cases throughout the country aiming at enhancing capacity of law enforcement officers on the area and expectations;
- Specialized training on forensic investigations, crime scene management, collection, preservation and presentation of evidence in joint collaboration with Women Justice and Empowerment Initiative (WJEI) the training included mock/moot court demonstrations;
- In collaboration with the Task Force on Implementation of the Sexual Offences Act 2006, the Directorate developed and gazette regulations for Effective implementation of the Sexual Offences Act;
- Promotion and enhancement of Inter-agency Co-operation and Collaboration Mechanisms in the fight against Sexual and Gender Based Violence with partners including USAID, FIDA-K, CRADLE, IJM-K, WILDAF, CREAM and the Law Society of Kenya;
- Appointment and gazetting of Special Prosecutors (advocates with expertise) to prosecute selected complicated Sexual and Gender Based Violence cases;
- Professionalization of prosecution services; a key strategic objective for the Office of the Director of Public Prosecution towards a gradual phasing out of police prosecutors;
- Participated in several countrywide public forums in collaboration with the Task force on Implementation of the Sexual Offences Act to sensitize the general public on Sexual Offences and Gender Based Violence;
- Participated in the preparation and recent launch of the Chief Justice Rules of Practice and Procedure known as the Sexual Offences Rules of Court 2011;
- In collaboration with the UNODC, GIZ and a consultant developed the Prosecutors Training Manual 2007 which underwent review, validation and is currently awaiting launch and publication sometime in June 2012;
- Rolling out of the validated Prosecutors Training Manual is intended to kick off immediately after publication;

- In collaboration with GIZ, we are in the process of preparing Prosecution Guidelines on Sexual Offences and Gender Based Violence;
- In the process of developing a Prosecution Victim Rights Charter.

Reply to the issues raised in paragraph 12 of the list of issues

82. Female Genital Mutilation (FGM): In addition to articles 2, 28, 29 and 44 of the Constitution, in 2008 the Government developed a National Policy for the abandonment of FGM. Since then a law has been passed, namely the Prohibition of FGM Act, 2011. This Law prohibits the performance of FGM; and the aiding, abetting and/or counselling in the procurement of FGM; the procurement of FGM in another country and the use of one's premises in the act of FGM and the possession of tools for such a procedure (under sections 19-23 of the Act), effectively outlawing FGM throughout Kenya.

Data collection

83. The ministry of Planning, National Development and the Vision 2030 's Monitoring and Evaluation Directorate in its annual crime statistics, publishing data on certain classes of offences such as rape and attempted rape. However, a lot more data needs to be collected for the purposes of the Sexual Offences Act.

Reply to the issues raised in paragraph 13 of the list of issues

84. On measures taken to prevent and punish acts of torture in police custody, the constitution of Kenya safeguards the freedom and security of a person and prohibits torture in any manner, cruel, inhuman or degrading treatment.

85. In 2008, the President established a Police Reforms Implementation Task Force, whose recommendations for a holistic reform within the police department resulted into the merging of the previously dual policing model into one, creation of a civilian policing oversight authority and comprehensive review of the police training curriculum and legislation on policing. Subsequently, the National Assembly enacted the following legislation: National Police Service Act, National Police Service Commission Act and the Independent Policing Oversight Authority Act. Further, plans are underway for the vetting of officers serving within the National Police Service as at the effective date of the Constitution on their suitability to continue to serve.

86. The National Police Service has with the guidance of the Police Reforms Implementation Committee developed a training curriculum which includes torture and ill-treatment as an examinable subject. More than 18,000 police officers have been subjected to this training module. Article 49(1)(c) of the Constitution guarantees the right of an accused person to communicate with an advocate and other persons whose assistance is necessary. Naturally, this includes independent medical examiners and relatives.

87. A Prevention of Torture Bill has been developed through the concerted effort of relevant government agencies, civil society, and the Kenya National Commission on Human Rights. The overall objective of the bill is to define torture and to provide for the prevention, prohibition and punishment of acts of torture and other cruel, inhumane or degrading treatment or punishment and rehabilitation of victims of torture. The Bill is currently with the Committee on the Implementation of the Constitution (CIC) for review and technical advice on its compliance with the Constitution of Kenya, 2010.

88. The State has also prepared the National Coroners bill to provide for a National Coroner's Service which shall have jurisdiction to investigate the cause of death where the deceased person is reported to have died: a violent or an unnatural death; a sudden death of which the cause is unknown; in police custody; in prison, or in such a place and in such circumstances as to require an inquest under any other law, and shall as soon as practicable hold an inquest into such death.

89. It also provides that whenever a person dies while in custody, the person in charge of shall forthwith notify the coroner with jurisdiction in the area where the prison is situated and shall not dispose of the body except with a warrant issued by such coroner. The bill is currently undergoing stakeholders' consultations.

90. The Independent Policing Authority has power to conduct inspections of Police premises, including detention facilities under the control of the Police Service and investigating any death or serious injury occurring or suspected of having occurred as a result of police action. Where appropriate, the Authority is mandated to provide relevant information to enable a victim of unlawful police conduct, to institute and conduct civil proceedings for compensation in respect of injuries, damages and loss of income.

Reply to the issues raised in paragraph 14 of the list of issues

91. With respect to measures taken to prevent unlawful or arbitrary arrest by the police, article 49 of the Constitution provides that an arrested person has a right to be released on bond or bail, on reasonable conditions, pending a charge or trial, unless there are compelling reasons not to be released. Further, the Constitution outlaws the remand in custody of any person for an offence that is punishable by a fine only or by imprisonment for not more than six months. The State has developed a draft pre-bail policy with the technical input from civil society organizations and is in the process of holding roundtable discussions to review the contents of the same.

92. Article 23 of the constitution grants the High Court jurisdiction to hear and determine applications for redress of a denial, violation or infringement of, or threat to, a right or fundamental freedom in the Bill of Rights. In any proceeding brought in this regard a court may grant appropriate relief, including: (a) a declaration of rights, (b) an injunction; (c) a conservatory order; (d) a declaration of invalidity of any law that denies, violates, infringes, or threatens a right or fundamental freedom in the Bill of Rights and is not justified under article 24; (e) an order for compensation; and (f) an order of judicial review. Article 49(f) of the constitution directs that an arrested person must be brought before a court as soon as reasonably possible but not later 24 hours after being arrested.

93. The mandate of the Independent Policing Authority should also go a long way into checking these unlawful acts.

Reply to the issues raised in paragraph 15 of the list of issues

Renditions and involuntary returns

94. In Kenya, the only legal means by which a crime suspect may be transferred from Kenya for trial to another country is if the procedure is prescribed under an act of Parliament or pursuant to a treaty or convention ratified by Kenya.

Refugees

95. In 2009, the Government established the Refugee Regulations which are operational guidelines to ensure the effective implementation of the Refugee Act, 2006. The Government is also currently drafting a National Refugee Policy to address the many challenges that continue to confront the country. For example, there has been growing concern that all those crossing the border into Kenya are not true refuge seekers but illegal immigrants to cause chaos and instability in Kenya. Some are linked to the Islamist Al Shabaab insurgents, who have threatened Kenya in the past. Kenya has suffered several terrorist bombings and continues to do so.

96. The major challenge that the Government is facing is distinguishing genuine Somali asylum seekers from those persons who may be a threat to the security of the country. It is noteworthy to state that no official order has been made by the Government for arbitrary return refugees and asylum seekers. Returns are done through voluntary repatriation or by other legal means which takes into consideration safety and dignity of the persons involved.

Reply to the issues raised in paragraph 16 of the list of issues

97. With regard to information on measures taken to address dire conditions of detention, the Constitution safeguards the rights of persons detained, held in custody or imprisoned. It also guarantees the right of such persons to petition for an order of habeas corpus. Further, the Constitution expressly provides for the enactment, within four years from the effective date, of legislation on the humane treatment of the said persons taking into account taking into account the relevant international instruments.

98. Further measures by the State to improve conditions of detention include the development of a draft Correctional Policy deals with both the functions of Prisons and Probation Departments.

99. To reduce overcrowding in prisons, the State is using Community Service Orders provided for under Community Service Orders Act No. 10 of 1998 which is implemented by the Judiciary and Probation Department. The Constitution of Kenya, 2010 provides that the President may exercise Power of Mercy in accordance with the advice from the Advisory Committee established under the Power of Mercy Act No. 21 of 2011. This power can be exercised in: granting pardon to a person convicted of an offence; postponing the carrying out of punishment either for a specified or indefinite period; substituting a less severe form of punishment; and remitting all or part of a punishment.

100. Part IV of the Prisons Act, Chapter 90 of the Laws of Kenya, provides for offences by prison officers and penalties. In this regard nine prison officers facing allegations of torture in court have been interdicted as a disciplinary measure. The Prevention of Torture bill, 2011, seeks to render inadmissible in evidence any information, confession or admission obtained by torture

Reply to the issues raised in paragraph 17 of the list of issues

101. The review of the children's Act is still in process. When crimes are committed jointly by adults and children, the judicial system has tended to prosecute the children alongside the adult. Owing to the lack of adequate juvenile facilities in the country accused and convicted juveniles are incarcerated in adult prison. However the juveniles are kept in separate blocks and only meet the adults during meals and sport activities.

Reply to the issues raised in paragraph 18 of the list of issues

102. Police posts were erected in all IDP camps to ensure security and protection of displaced persons. A Policy on Internally displaced people (IDPs) is in the process of being developed. The policy provides a framework for the protection of IDPs in Kenya and also aims to prevent future displacement and to fulfil the country's obligations under international IDP law.

103. The Department of Refugee Affairs works closely with civil society organizations such as Refugee Consortium of Kenya and Kituo cha Sheria in enforcing the legal rights of refugees.

Elimination of slavery and servitude (art. 8)**Reply to the issues raised in paragraph 19 of the list of issues**

104. Under the Constitution slavery and servitude are some of the non derogable rights in Kenya. Measures taken to combat the trafficking of persons for prostitution and forced labour include the enactment of the Kenyan Citizenship and Immigration Act No. 2 of 2011 Part VI, Immigration Controls, Section 33. Since the Counter Trafficking in Persons Act was passed in 2010, there are a number of cases in court on the same. One case which has been concluded is that of a Rwandese woman who has been sentenced to 15 years in prison for the offences of child abduction and subjecting a child to prostitution. The Office of the

Director of Public Prosecutions is a member of the Counter Trafficking Steering Committee which is spearheaded by the Ministry of Gender. Note that some of the offences enshrined in the Children Act [revised edition 2010 and the Penal Code Chapter 63 of the Laws of Kenya are similar to those enshrined in the Counter Trafficking of Persons Act. The difference is in the severity of the penalty which is severe in the latter.

Independence of the judiciary and the right to a fair trial (art. 14)

Reply to the issues raised in paragraph 20 of the list of issues

105. Under the constitution the State is expected to ensure access to justice for all persons and, if any fee is required, it shall be reasonable and shall not impede access to justice. Further article 50(2)(h) provides that an accused person has a right to be assigned an advocate by the State at the State's expense, if failure to do so is likely to result in substantial injustice. The State is in the process of expanding the regime of criminal offences that can benefit from a legal assistant scheme pilot project. Towards this end, capital offenders, particularly those charged with robbery with violence are provided with legal representation in a pilot project in Mombasa.

106. A Legal Aid Bill is in the process of being developed. Among other things the bill once enacted will provide a legislative framework for the promotion of access to justice by providing a legal aid scheme that assists persons who have insufficient means to pay for legal services to have access to them. This will cover both criminal and civil cases.

Reply to the issues raised in paragraph 21 of the list of issues

107. The Constitution safeguards the independence of the judiciary and grants judges' security of tenure till the age of seventy. A critical component of judicial independence is financial autonomy. It also sets up the Judiciary Fund which reaffirms this independence. The Fund is administered by the Chief Registrar of the Judiciary. The Fund is a charge on the Consolidated Fund and therefore frees the finances of the judiciary from the control of the executive arm of Government. The independence of the judiciary and judicial officers is further fortified and indeed expounded upon in the constitution which provides that in the exercise of judicial authority, the judiciary, shall be subject only to this constitution and the law and shall not be subject to the control or direction of any person or authority. The Constitution also safe guards the independence of the judges by granting them security of tenure till the age of seventy.

108. To ensure that the principles of integrity, accountability and transparency are upheld a Vetting of Judges Act was enacted. The Act establishes the mechanisms and procedures for the vetting of judicial officers who held office prior to the promulgation of the constitution on their suitability in accordance with the principles set out in the articles 10 and 159 of the constitution. A vetting board was appointed in 2011 and is in currently executing its mandate.

Reply to the issues raised in paragraph 22 of the list of issues

109. The Kadhis courts of Kenya are part of the judicial system of Kenya utilizing English common law and Kenyan legal practice and procedure in the resolution of legal disputes on matters of personal status, marriage, divorce and succession where both parties profess the Muslim faith. The Kadhis Court of Kenya gains its legitimacy from the Constitution of the Republic of Kenya at article 170(1) as follows: The rulings of the Kadhis, Court are subject to appeal in the High Court.

110. It should be noted that the jurisdiction of the Kadhi courts do not bar a Muslim woman from accessing the ordinary courts and Kenya has had land mark cases where this has happened. *E.g Chelanga v. Juma, Probate and Administration Cause No 258/1996, (2002) 1KLR, p. 339.*

111. However for Muslim women, Kadhis courts are a primary avenue for accessing justice in family law which is a critical area in women's lives. However this access is hindered by a number of factors: Lack of information about the location of the Kadhis' courts, lack of finances to pay court fees, shortage of court process servers which often results in women having to personally effect service on the defendants who in most cases would be their estranged husbands and the lack of female Kadhis and court clerks is also a barrier to access justice. The Chief Justice of Kenya has commenced discussion on the need to recruit women representatives in the Kadhi courts. Additionally a simplification of Kenya's Civil Procedure Code was developed through the concerted efforts of UNIFEM and MUHURI in order to explain certain key parts of the civil procedure.

Freedom of opinion and expression, freedom of assembly, and freedom of association (arts. 19, 21 and 22)

Reply to the issues raised in paragraph 23 of the list of issues

112. The freedom of expression is a fundamental human rights protected by section 33 of the constitution. However the constitution permits restrictions on the right to freedom of expressions which are only provided for by law, and which are necessary in a democratic society to protect a limited list of stated public interests, which do not go beyond those permitted under international law.

Reply to the issues raised in paragraph 24 of the list of issues

113. The arrests in 2008 were before the promulgation of the Constitution of Kenya, 2010. The right to assemble entails elements of peaceably and unarmed. Where the law enforcement officers have information that these elements have been violated then it is their duty to request the assembly to disperse in peace. The law enforcement officers are under a duty to provide the necessary security within their means to ensure that citizens enjoy the right to assemble, demonstrate picket or present petitions to public authorities. In the High Court case no. 183 of 2012, a Constitutional matter challenging the dispersal of an assembly the High Court ordered the Police to give security in assemblies that were peaceful and unarmed.

Measures for the protection of minors (art. 24)

Reply to the issues raised in paragraph 25 of the list of issues

114. The Department of Civil Registration operates under the Births and Deaths Registration Act. The Department of Civil Registration is mandated to register all births and deaths occurring in Kenya and those of Kenyans occurring abroad. To achieve the above objectives the department works in close collaboration with provincial administration and ministry of health for registration of births and deaths occurring at home and health institutions respectively. A birth must be registered within six months from the date of occurrence; usually a few weeks after the registration a birth certificate is issued. . Any registration after six months of birth is considered late registration, when the process is more complex and lengthy, and there is also a penalty which acts as a deterrent to the registration of children. The Government is reviewing this Act, which hope will ensure greater access to registration services for Kenyans. The fact that every child now requires a birth certificate to register for national exams will also motivate parents to register their children. Other initiatives include: use of mobile phone text messages to record vital events at community level. Both government and civil society organizations are undertaking training sessions to educate Kenyans on the value of prompt registration of births.

Citizenship

115. The Kenya Citizenship and Immigration Act implements Chapter 3 of the Constitution. It provides:

– That a person born of a Kenyan parent irrespective of the place of birth automatically becomes a citizen of Kenya by birth. (This provision is particularly important for the Kenyan woman who can now transfer citizenship to her children who are born of foreign fathers). Further, persons who were born before the effective date whether or not they were born in Kenya and either their mother or father was a Kenyan is considered to be a citizen by birth. The Act provides a limitation to the aforementioned proviso by clarifying that a person born outside Kenya shall be a citizen by birth only if on the date of the birth his or her mother or father was or is a citizen of Kenya. The Constitution applies the effect of this provision retrospectively meaning that people who were previously not entitled to citizenship status under the previous constitution are now entitled to Kenyan citizenship.

– A child found in Kenya who is, or appears to be, less than eight years of age, and whose nationality and parents are not known, is presumed to be a citizen by birth.

– A person, who is a Kenyan citizen by birth and who, on the effective date, has ceased to be a Kenyan citizen because the person acquired citizenship of another country, is entitled on application to regain Kenyan citizenship.

Equal protection of the law and non-discrimination (arts. 2 and 26)

Reply to the issues raised in paragraph 26 of the list of issues

116. Kenya is currently not undertaking any measures to decriminalize same sex unions. Public opinion is strongly against the legalization of same sex unions. The Constitution provides under article 45 (2) that a person has the right to marry a person of the opposite sex, based on the free consent of both parties. However, under article 27 (4), the Constitution, the grounds prohibited for non-discrimination are not limited and therefore this allows room for individuals to claim the violation of their rights on the grounds of their sexual orientation, in the event that they are discriminated against either directly or indirectly by the State or other individuals. In this regard, the National Gender and Equality Commission, together with the Kenya National Human Rights Commission and the Commission on Administrative Justice, all have a role to play, based upon their respective mandates. Until such time that public opinion will change, the Government has tried to accord certain protections to lesbian, gay, bisexual and transgender (LGBT) persons. In the health sector, the Government has on close collaboration with civil society and private sector providers, sought to address the health-care needs of this group in the area of HIV/AIDS where they are particularly vulnerable. The Kenya National AIDS Strategic Plan 2009/10-2012/13 contains strategies designed at promoting the health rights of this group towards mitigating their risk to HIV/AIDS, which include: formative research to identify groups, needs and vulnerabilities, and design targeted prevention programmes; monitor and evaluate. Additionally, undertake risk awareness creation and reduction, advocacy, capacity building, mobilization and outreach activities along hotspots and community drop-in centres.

Reply to the issues raised in paragraph 27 of the list of issues

117. Other than the Constitutional safeguards which seek to protect the individual against discrimination on the grounds of their health status (article 27(4) and which confer upon each individual the right to the highest attainable standard of health including healthcare and especially reproductive health care (art. 43 (1) (a)), there have been other policy, legislative and administrative measures put in place, by the Government of Kenya to ensure access to treatment of those infected by HIV/AIDS:

The HIV and AIDS Prevention and Control Act, 2006

118 In terms of addressing stigma and discrimination this Act which became operational in 2009, has been key in that it aims to raise public awareness and education on the causes and consequences of HIV, as well as the modes of transmission and means of prevention. It also seeks to protect the rights of people living with HIV (including protections from compulsory testing; the right of pre and post testing counselling; confidentiality in the treatment of results and penalties where such rights are breached). It also addresses the right of access to health care, while outlawing any form of discrimination against persons living with HIV/AIDS in the workplace, at healthcare facilities, and in schools. It provides penalties in the event of such discrimination. The Act also established an Equity (HIV and AIDS) Tribunal (section 25) to determine complaints arising from complaints of breaches of this law (section 26). This tribunal shall have the powers of a court of the first class (section 27).

119. Section 24 of the Act (and section 26 of the Sexual Offences Act, 2006) however goes further to criminalize the transmission of HIV and concerns have been raised that this may reverse the gains made in reducing the stigma associated with the disease.

120. The courts have upheld the rights of persons living with HIV and AIDS individuals in cases filed before them. In the case of *P.A.O and 2 others v. The Attorney General of Kenya Petition No. 409 of 2009 Nairobi*, the Constitutional Court has barred the Government from implementing the Anti-Counterfeit Act of 2008 as it applies to generic medicines until a verdict is delivered in a case filed by three people living with HIV in July 2009. In another case i.e. *J. A. O. v. Home Park Caterers & Metropolitan Hospital HCC No. 38 of 2003 Nairobi*, an individual challenged their dismissal on the grounds that she was discriminated against because of her HIV status which had been revealed to her employers without her consent. The case was concluded in 2008 with the individual receiving Kes. 2.25million.

Kenya National HIV and AIDS Strategic Plan of 2009/10 – 2012/13

121. It is a strategy that seeks to lay out strategies for achieving universal access to essential services for HIV prevention, treatment, care and support using a number of approaches: (a) provision of HIV prevention, treatment, care and support services based on an ‘engendered rights-based approach’; (b) mainstreaming HIV across key sectors, addressing both causes and consequences of the epidemic; (c) community-based programmes and social transformation for an ‘AIDS competent society’; and (d) by ensuring that all actors are harmonized and operate within one national strategy and one results framework. Under this strategic plan the National AIDS Control Council’ Gender Technical sub-committee also published a National Action Plan 2009/10-2012/13 on ‘Mainstreaming Gender in HIV Responses in Kenya’ and it aims to act as a reference manual for stakeholders, to guide their interventions, and enable them to monitor outcomes with a gender lens.

The National Aids Control Council (NACC) and AIDS Control Units

122 Under the National Aids Control Council (NACC) the Government also operates regional offices, district technical committees and Constituency AIDS Control Committees (CACCs). Each government ministry also has AIDS Control Units to coordinate the efforts of the National AIDS Control Council and the implementation of their strategic plans, at the ministerial level.

Rights of persons belonging to minorities (art. 27)**Reply to the issues raised in paragraph 28 of the list of issues**

123. The Constitution places on the State the duty to address the needs of vulnerable groups within society which includes minorities and marginalized groups and to take affirmative action to redress any disadvantage suffered by individuals or groups in the past. Kenya does not have one State agency dealing particularly with issues of minorities however their concerns are addressed in different government department implementing various rights. The ministry of land developed the National Land Policy, which is the framework being used to address land disputes and address historical injustices relating to land. It recognizes the vulnerability of marginalized groups and provides for collective land rights and a de-centralized land governance structure. The Ministry Of Justice, National Cohesion And Constitutional Affairs has drafted a draft National Policy On Human Rights will provide a comprehensive and coherent framework that articulate the core content of the different categories of human rights and provides guidance to government and other actors in carrying out programmes, strategies and plans that will enhance the realization and enjoyment of rights by the people of Kenya. In the policy the State undertakes to adopt legislative and affirmative action to ensure that minorities and marginalized groups realize all the rights and fundamental freedoms as set out in the Bill of Rights, on a basis of equality, taking into account their identity, way of life, special circumstances and needs .

124. The Government of Kenya is committed to the protection of the right to life of all Kenyans and has taken steps to ensure all minority groups are well provided for. Regarding the Mau forest, an Interim Coordinating agency has undertaken an inventory of the existing Ogiek community with a view to obtaining a clear assessment of their status and land rights and ensuring access to land. With regard to the concerns of the Awer, Galjrael, Somali, Nubian, and Oromo groups, Article 12(1) of the Constitution entitles every citizen to the rights, privileges and benefits of citizenship, subject to the limits provided or permitted by the Constitution.

125. The Constitution further provides for the manner in which citizenship can be acquired and The Kenya Citizenship and Immigration Act, 2011 provides for the criteria necessary to gain Kenya citizenship. The legislation allows those who have been lawfully resident in Kenya for seven years to apply for registration for Kenyan citizenship and anyone who has lived in Kenya for over 40 years an opportunity to apply for citizenship. It caters for children found in Kenya, stateless persons and migrant workers and those who have been lawfully residence in Kenya.

Dissemination of information relating to the Covenant and the Optional Protocol (art. 2)**Reply to the issues raised in paragraph 29 of the list of issues**

126. The third periodic country report was developed through a highly participatory and consultative process. The report was prepared, reviewed and validated through the concerted efforts of government ministries and departments, civil society organizations, the Kenya National Commission on Human Rights.

127. In 2010, the Kenya National Commission on Human Rights and the Ministry of Justice, National Cohesion and Constitutional Affairs convened a workshop with Kenyan stakeholders to discuss and disseminate information on various optional protocols including the Second Optional Protocol to the International Covenant on Civil and Political Rights aiming at the abolition of the death penalty.