



Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment

Distr.: General
11 May 2009
English
Original: French

COMMITTEE AGAINST TORTURE

Forty-first session

SUMMARY RECORD OF THE 852nd MEETING

Held at the Palais Wilson, Geneva,
on Thursday, 13 November 2008, at 10 a.m.

Chairperson: Mr. GROSSMAN

CONTENTS

CONSIDERATION OF REPORTS SUBMITTED BY STATES PARTIES UNDER ARTICLE 19 OF THE CONVENTION (*continued*)

First periodic report of Kenya

This record is subject to correction.

Corrections should be submitted in one of the working languages. They should be set forth in a memorandum and also incorporated in a copy of the record. They should be sent *within one week of the date of this document* to the Editing Unit, room E.4108, Palais des Nations, Geneva.

Any corrections to the records of the public meetings of the Council at this session will be consolidated in a single corrigendum, to be issued shortly after the end of the session.

The meeting was called to order at 10.15 a.m.

CONSIDERATION OF REPORTS SUBMITTED BY STATES PARTIES UNDER
ARTICLE 19 OF THE CONVENTION (agenda item 5) (*continued*)

First periodic report of Kenya (CAT/C/KEN/1)

1. *At the invitation of the Chairperson, Ms. Karua, Ms. Nzomo, Ms. Mohamed, Ms. Njau-Kimani, Ms. Kimani, M. Kiraithe, Mr. MacGoye, Ms. Mwangi, Mr. Gicharu, Mr. Owade, Mr. Iringo and Mr. Kihwaga (Kenya) took their seats at the Committee table.*

2. Ms. KARUA (Kenya), presenting her country's first periodic report, said that Kenya attached major importance to promoting and protecting human rights; and, as a signatory of the Convention against Torture and Other Cruel, Inhuman and Degrading Treatment it believed no one should be subjected to torture or other cruel and inhuman treatment. Since 2003, it had paid special attention to the human rights violations embedded in its history: specifically, this involved a one-party dictatorial regime that had committed massive human rights violations on the basis of repressive laws and institutions inherited from the colonial period. Murder, torture, arbitrary detention, exile or economic ruin had been the fate of numerous Kenyans who had fought to uphold their rights and fundamental freedoms. Following the democratic elections of 2002, action had been taken to protect citizens and to promote peace, stability, liberty and justice throughout the country.

3. Several steps had been taken to turn Kenya into a country that respected human rights. A wide-ranging policy and plan of action were being prepared to tackle the country's problems and help ministries, government authorities and other stakeholders to include human rights in the national planning process. This would also provide an opportunity to reaffirm the Government's determination to protect and promote human rights. A programme addressing governance, justice and the law had also been introduced to reform the legal and judiciary sectors, and to implement a system of justice administration that was effective and fair, and guaranteed respect for and promotion of human rights.

4. Specific steps had been taken to eliminate torture and other cruel and degrading treatment. After taking office in 2003, the Government had opened the Nyayo House torture chambers to the public, where numerous political prisoners had been systematically tortured by public agents. It had also amended criminal law to protect suspects against torture: the 2007 law amending the Kenyan legal system in various ways banned the use of torture against individuals suspected of having committed a crime. Previously, confessions obtained in police stations by inexperienced police officers had given rise to allegations of torture. Henceforth, a suspect could only make a statement before a judge, magistrate, or police officer (not in charge of the inquiry) with the rank of Chief Inspector or higher, and in the presence of a third-party designated by the suspect. Corporal punishment had also been abolished. A torture victim could now download a P-3 medical examination form or obtain one from any public hospital, whereas previously this had to be obtained from the police, which raised problems when the perpetrator of the actions being alleged was a police officer. Lastly, in conjunction with national and international development partners, the Government had embarked on a reform of the training programme for members of the forces of law and order and civil servants, to emphasize human rights and the prohibition of torture. Human rights

were now an examination subject in all training institutions of the forces of law and order and other law enforcement agencies.

5. The Government had imposed a *de facto* moratorium on the death penalty: in February 2003, President Kibaki had suspended the execution of convicts sentenced to death, ordered the release of 281 prisoners who had been on death row, and commuted the sentences of another 195 prisoners to life imprisonment. Although that situation was not entirely satisfactory, it was the most humane alternative available until the Constitution could be altered. The authorities and the National Human Rights Commission, in conjunction with civil society organizations, were working to raise public awareness in Kenya of the retreat of capital punishment throughout the world, in the hope that Kenyan society, currently largely opposed to abolishing this form of punishment, would accept the idea and allow the country to sign the Second Optional Protocol on the International Covenant on Civil and Political Rights.

6. The Government had also reformed the country's prison services by implementing strategic programmes to promote human rights, good governance and democratic practices in the management of such establishments. The programmes in question aimed essentially at creating a safe and human environment for both prisoners and prison staff. In that regard, the law on prisons was currently being revised; and prisons had now been brought under independent surveillance: the law authorized members of the National Human Rights Commission to visit places of detention, and this had now been confirmed by a judicial ruling. Magistrates were encouraged to exercise their rights to visit such establishments to ensure that the human rights of detainees were not being ignored.

7. Several other measures that had been in preparation when the initial report was being written were now in force. An independent Police Surveillance Council, with members drawn from civil society organizations and the private sector, had been set up to strengthen mechanisms for filing complaints against law-enforcement agencies, in keeping with the widely shared belief that they could not act as judges on their own behalf. A Permanent Complaints Review Committee, created in mid-2007, had been tasked with mediating and processing complaints filed against public agents and organizations. A national programme of legal aid and awareness-raising had also been implemented to promote access to justice, particularly for poor and vulnerable population groups. The Government was aware that torture also posed problems related to gender inequalities, particularly because women and children were more exposed to certain practices that could be assimilated to torture. The Childrens Act and the Sexual Offences Act prohibited and suppressed female genital mutilation and early or forced marriages. The Ministry for Gender Equality, Sport, Culture and Social Services coordinated an Interministerial Committee on Female Genital Mutilation, which aimed to implement the National Plan of Action to eradicate such practices. In the majority of police stations in Nairobi, a special service had been set up with appropriate staffing to ensure that the victims of sexual violence were properly received and provided with the services they needed. The Chief of Police had set up a task force to investigate sexual offences that had been committed by members of the security forces during the disturbances following the December 2007 national elections. The Attorney General had prepared a reference manual for investigators and prosecutors, doctors, gender equality activists and other users of criminal justice services, to explain the Sexual Offences Act, set standards and make recommendations on best practices to be implemented. He had

also issued rules on sexual offences that had been published in the Official Journal in October 2008, and would be used to regulate implementation of the law. Lastly, with regard to judicial proceedings, Kenya had implemented a policy under which police officers had to report to the Attorney General when individuals accused of a crime had not been referred to the court system within the established period.

8. As was the case with other countries that had experienced rapid change, Kenya still had to deal with numerous problems in terms of promoting and protecting human rights. In particular, the Convention had not been incorporated into domestic law, and torture remained undefined; there were no data in this area, criminal gangs and organized crime were politicized and posed a threat to national security; small weapons proliferated; and terrorist threats had multiplied as a result of the instability prevailing in the region. Despite these difficulties, in many cases civil servants had been accused, tried and convicted by the criminal courts for having committed acts covered by the definition of torture given in the first Article of the Convention; and torture victims who had applied to the civil courts for compensation had been compensated by the State. Lastly, the Commission of Judicial Inquiry responsible for investigating the violence after the 2007 elections had recently published its first report on the atrocities that had been committed.

9. Ms. SVEAASS (Rapporteur for Kenya) regretted the delay with which Kenya's initial report had been submitted, but welcomed the prospect of engaging in constructive dialogue with the delegation with a view to eradicating torture in the State Party. While welcoming the new positive events that had occurred in Kenya, such as ratification of the Convention against Torture and other international human rights instruments, and the steps taken to develop the law and protect individual rights, the Committee was duty bound to draw attention to the problems and shortcomings that existed in the country's legislation and the failings encountered in implementing its provisions. It was also incumbent upon the Committee to highlight points on which it considered the State Party was not respecting the provisions of the Convention. In that regard, the considerable frankness with which the State Party had recognized its shortcomings and suggested solutions to rectify them, was particularly praiseworthy.

10. In recent years, the country had undergone radical change, and the peaceful transition towards democracy in 2002 had fuelled very high hopes. Nonetheless, the past year had been extremely difficult and painful in many respects. The Committee was deeply concerned by the reports of serious violence that it was receiving, and the extent to which this remained prevalent in the State Party. It was also aware of the major problems the country was facing in terms of property and the right to land, along with other social and economic injustices — all of which were issues addressed in the National Accord and which constituted one of the underlying causes of torture. While the initial report would refer to the legal foundations and their evolution, other issues would also be raised concerning information coming to the Committee's notice on rights violations and violence committed by the State.

11. The Committee would firstly base its comments on the report submitted by the State Party, but would also take account of reports it had received from national and international non-governmental organizations, which had also been made available to the State Party. The initial report consisted of directives relating to the initial reports. As the State Party had said it had held lengthy consultations with civil society, the Committee would like to have more detailed information on the form of

those consultations. It appreciated the Kenya had drawn attention to weaknesses or problems that had not been resolved, but it deplored the fact that the report contained no statistics, when such data were necessary for evaluating situations. Furthermore, the annexes cited in the report had not been provided to it. Lastly, the State Party had not prepared the basic document providing the Committee with in-depth information on the situation in the country. In general, the report suffered from a lack of precise information or statistical data on many important issues, even allowing for the fact that it had been prepared in 2007, although numerous laws adopted since were not mentioned in it.

12. The question of the definition of torture was addressed in paragraphs 19, 23 to 25 and 31 and 32 of the report (CAT/C/KEN/1). Under the terms of paragraph 23, "Kenya was a dualist State in which the incorporation of international instruments into domestic law required legislation to be passed by Parliament." Consequently, international instruments were not considered as forming part of legislation and could not be directly applied by the courts or the administrative authorities, unless they were expressly incorporated into domestic law. Nonetheless, paragraph 19 stated that the courts would take steps to interpret laws so as to avoid conflict with the latter and the instruments to which Kenya is a Party. Paragraph 25 also recognized that while it prohibited torture, the Constitution defined this much more narrowly than the first Article of the Convention. Furthermore, neither the Penal Code nor the Code of Criminal Procedure contained provisions expressly defining the crime of torture. Yet the strongest argument in favour of incorporating the definition of torture contained in the First Article of the Convention and the criminalization of all acts of torture had been given by the Kenyan Constitution, which in Article 77-8 provided that no one could be convicted for a criminal offence if it was not defined and if the punishment involved was not specified in a law. The Constitution thus prevented people from being punished for crimes which were not defined by law. Paragraph 27 specified that "the various acts constituting torture in the sense of the Convention were covered by the scope of application of various laws. This was specifically the case of beatings and assault, rape, indecent exposure and murder, when committed in the presence of a civil servant or perpetrated by a civil servant while fulfilling his or her functions." Important elements of the definition of torture were not covered by those laws, however, which was a serious problem. The Committee would like to know what plans existed to incorporate the Convention into domestic law and what steps had been taken to do so. It regularly drew attention to the failings created by the lack of a clear definition of torture in national legislation, since that situation could facilitate the committing of acts of torture and impunity.

13. During the 10 years that had passed since ratification of the Convention, Kenyan law had been thoroughly redrafted, so the provisions of that instrument could have been integrated into it on several occasions: the first time, when Parliament had promulgated law No. 10 of 1997, which had introduced Article 14A of the Police Service Act in Article 20 of the Law on the Powers of Traditional Chiefs, with a view to incriminating and preventing acts of torture committed by police officers and traditional chiefs — while expressly prohibited, the acts in question had not been defined. A second time was adoption of the 2001 Childrens Act, Article 18 of which prohibited torture, without defining it. A third occasion was the adoption of the 2003 Criminal Law Amendment such that only confessions made before a magistrate in a public hearing could be admitted as evidence; and the fourth

opportunity was the promulgation of the 2007 law making various amendments to the Kenyan legal system. It was therefore reasonable to question the priority being given by the State Party to incorporating the Convention into its domestic law.

14. A consequence of the foregoing was that acts of mental or psychological torture could not be punished under the current penal system, as was recognized in paragraph 62 of the report. In view of the destructive effects of mental torture, it needed to be remembered that impunity for such acts was totally unacceptable in all societies and that its long-term psychological and social consequences were very serious. To provide legal and moral responses to torture, a definition was needed that took account of all of its constituent elements, so as to be able to define the responsibility incurred for such acts and to enable victims to file complaints and demand reparation. Paragraph 26 of the report noted that when allegations of torture were filed, the Government applied sanctions and internal disciplinary measures against the perpetrators and prosecuted them in some cases. The Rapporteur wanted more precise details of the measures in question, the number of cases and the number of people found guilty, and she wanted to know whether the results of sanctions and disciplinary measures taken domestically had been communicated or made public. She also wanted details of the compensation paid by the Government to victims who had brought a case for reparation, particularly on the procedure, number of compensations paid and the number of people benefiting from rehabilitation programmes.

15. Article 2 of the Convention, which required the State Party to prevent acts of torture being committed, was extremely important for the Committee's work, and the delegation probably knew that in November 2007 it had adopted a general observation on the application of that Article outlining steps to be taken at different levels to prevent torture. The Rapporteur was using the occasion to stress the importance that the Committee attached to the finding of evidence of torture, such as medical examinations; and in particular she wanted to pay tribute to the work accomplished by the Independent Medical Legal Unit (IMLU), which carried out its activities in conformity with the provisions of the Istanbul Protocol.

16. With regard to the effective legislative, administrative, and judicial measures to be taken to prevent acts of torture, Ms. Sveaass wanted to know what provisions were in force in the State Party to prevent rights violations from occurring that could be assimilated to acts of torture. In particular, as regards the rights and guarantees applicable to persons deprived of their freedom, she enquired about the duration of provisional detention and the average time that elapsed before the persons in question were brought before the justice system, when and how they were informed of their rights, particularly their right to a lawyer and an independent doctor, how families were informed, etc., and whether it was possible to file complaints when those rights were not respected.

17. The Committee had received reports of arbitrary arrests, particularly during the disturbances that had occurred recently in the State Party. It wanted to know whether there were mechanisms in place to put an end to arbitrary and illegal arrests. Arrests, particularly those made during mass demonstrations, were susceptible to excessive use of force. It would be useful to have details not only on current legislation, but also on the specific implementation of measures to prevent acts of torture being committed during police activities, to pursue inquiries and punish the perpetrators of such acts. It would be useful to know what rules governed

the behaviour of police officers, the framework in which they operated, and the sanctions involved in the event of non-compliance. The State Party had evoked the problem of police training and the transfer of responsibility for arrests, but the Committee was very concerned by the violence reported during the operations undertaken at Mount Elgon and Matari, where the police and army had operated together. A report from the Humanitarian Affairs Coordination Bureau, dated 6 November 2008, highlighted the seriousness of the situation in the Mandera district, where many people had been displaced and disturbances were continuing. It appeared that ongoing security operations were aggravating the problems rather than resolving them; and serious human rights violations had occurred, particularly abusive imprisonment, acts of torture, sexual crimes and looting. Although such violence had caused deaths in the district, fact-finding missions had met with resistance. An elderly deputy of the district had been arrested, and the demonstration organized in Nairobi to demand his release had been repressed by the police by firing fired shots into the air and using tear gas. The deputy had been released two or three days later. Apparently some aspects of those events remained unclear. The delegation could perhaps indicate whether it was intending to ask the National Human Rights Committee to undertake an inquiry; in which case it would be necessary to know how the Government would follow up on its conclusions. For its part, the Commission responsible for investigating the post-electoral violence had submitted its conclusions in October 2008. It would be interesting to know how these would be followed up. Ms. Sveaass also noted with satisfaction that significant work was being done in Kenya by human rights activists at grass-roots level. Nonetheless, according to non-governmental resources, they were facing numerous difficulties. Further details on that subject would be useful.

18. Important legislative proposals had been made with a view to improving protection of the rights of women and children, which was encouraging. Nonetheless a law setting the age of criminal responsibility at eight years was still in force, which was contrary to the definition of the child provided in the Childhood Act, under which a child was anyone under the age of 18. The delegation could perhaps comment on that point, and also indicate what had happened to the Draft Constitution in which a large number of clauses had been devoted to the rights of the child and their protection, but the draft seemed to have been abandoned. The delegation had said that laws had been adopted to prohibit certain unlawful traditional practices such as genital mutilation and early marriage. Further details on how those laws were being applied and their impact on the incidence of the practices in question would be useful, since combating violence against children was a priority.

19. In Kenya, as in many other countries, violence against women was a persistent problem within the family and community, and also in detention centres. Victims found it very difficult to file complaints about the mistreatment inflicted on them; and very often their complaints were filed away with no follow-up. The delegation had said steps had been taken to allow appropriate treatment of women victims of violence, particularly sexual violence. It was important that the State Party also target efforts on establishing an effective complaints mechanism, the conduct of inquiries, prosecution of the guilty, their conviction and reparation for victims. Suitable reception facilities were also essential. Any supplementary information that the delegation could provide on steps taken in this area would be welcome.

20. Article 83 of the Kenyan Constitution provided that the prohibition of torture could not be derogated, even in times of war. Nonetheless, many civilians had been subjected to torture by members of the security forces during the post-electoral disturbances. Explanations for this would be desirable. Furthermore, in paragraph 52 of its Report, the State Party indicated that an order given by a superior or representative of public authority could not be invoked to justify acts of torture, which is consistent with Article 2 of the Convention. Nonetheless, the Police Service Act required all police officers to promptly execute any legal order received from their superiors in the exercise of their functions; and it punished the execution of an illegal order with a term of imprisonment of three months or a fine of 5,000 shillings, or both (Articles 15 and 63 of the aforementioned law). Given the absence of a definition of torture in Kenyan legislation, it was necessary to know how the order to commit an act of torture would be classified with regard to those provisions.

21. The 2006 Refugees Act, which was not yet in force, provided that no one could be barred from entry into the country, or deported from Kenya to another country where he or she risked persecution on the grounds of race, religion, nationality, membership of a particular social class, or political opinions; but the risk of torture was not included among the reasons impeding expulsion. One could therefore question the compatibility of that provision with Article 3 of the Convention. Further details of the legal framework governing procedures for expulsion, extradition and other forms of banishment from national territory would be useful, as well as on the way risks were assessed and by whom. The State Party indicated its report that administrative decisions could be appealed, which was essential with regard to the Convention. It would be interesting to know whether inquiries had been undertaken following the expulsion decisions taken in violation of Article 3 of the Convention and, if so, whether the victims had obtained any reparation.

22. Article 21(1) of the Refugees Act allowed the Immigration Minister to expel a refugee on national security grounds, which could be interpreted as an exception to the principle of non-refoulement. It would be useful to hear the delegation's opinion on that subject, particular regarding the 2003 bill to suppress terrorism, which provided that Kenya could extradite an individual suspected of terrorist activities to another country when such activities constituted offences covered by a convention against terrorism to which Kenya was a Party, and if an extradition treaty had been agreed between Kenya and the requested Party. It was necessary to know with which countries Kenya had concluded extradition treaties, and how the risk of torture was taken into account in extradition proceedings under those treaties. The State Party should not forget that the fight against terrorism had to be pursued in a way that respected the absolute prohibition on torture, which included the principle of non-refoulement. Nonetheless, the Committee had received reports that Kenyan and foreign nationals had often been transferred to countries where they ran a foreseeable risk of torture. In January 2007, eight Kenyan nationals suspected of being terrorists had been arrested at Kiunga and sent to Ethiopia, where they had been held for several months. Ms. Sveaass asked for details on how that case had been followed up.

23. With regard to the lack of a definition of torture in Kenyan domestic law, the Report (paragraphs 62 and 63) stated that the committee responsible for coordinating its preparation had made recommendations aimed at incorporating a definition of torture into domestic law that was consistent with that provided by the

Convention, and that the Law Reform Commission had taken up the issue. It would be interesting to know how the work of that commission on the subject was progressing.

24. Under the terms of Article 4 of the Convention, all acts of torture should be subject to punishment proportional to their seriousness. But, under certain Kenyan laws, for example the Childhood Act and the Police Service Act, which suppressed acts of torture, even if not defined as such, such acts were only subject to imprisonment of between one and 12 months, or fines of between €5 and €500. It would be interesting to hear from the delegation what steps could be taken to ensure that acts of torture were sanctioned with the severity required by their gravity.

25. The State Party indicated in its report (paragraph 65) that as torture had not been defined as a crime under penal legislation, it could not give rise to extradition. The fact that the definition of torture contained in the Convention had not been incorporated into domestic law therefore prevented a State Party from fulfilling its obligations under Article 5 of the Convention. Kenya had ratified the Rome Statute of the International Criminal Court, and it would be useful to know what measures had been taken to implement its provisions in domestic law.

26. The absence of a definition of torture also hindered application of Articles 6 to 9 of the Convention. In the case of Article 6, the report (paragraph 69) said that when the presumed perpetrator of an offence giving rise to extradition was in the territory of the State Party, the person in question was arrested and held while investigations took place. Ms. Sveaass asked for details on the procedure followed in such cases. The State Party indicated in its report that persons suspected of acts of torture, whether nationals or foreigners, could be prosecuted for certain offences repressed by the Penal Code (paragraph 71), but the lack of a definition of torture in criminal law made it impossible to know for certain what decisions had been taken by the courts in this type of case (paragraph 75), which was inconsistent with Article 7 of the Convention. Lastly, the State Party said that it was cooperating with the International Criminal Court for Rwanda, for the purpose of extraditing persons accused of war crimes, crimes against humanity and acts of torture committed in Rwanda (report, paragraph 80). More wide-ranging information on the modalities of the corporation would be welcome.

27. Mr. WANG Xuexian (Co-rapporteur for Kenya) welcomed the efforts made by the State Party to present a clear, concise report that was consistent with the general guidelines issued by the Committee on the presentation and content of periodic reports. He had listened with great interest to the preliminary statement by Ms. Karua and the description of the various initiatives taken by the Kenyan Government, two of which he considered particularly positive: the preparation of a strategy and wide ranging plan of action on human rights; and the launch of a programme to reform the governance, justice, and public order sectors.

28. In 2003, human rights and humanitarian law had been added to the training programme for police officers and prison staff, which was positive. It was necessary to know whether military personnel also received training in those areas, since, under Article 10 of the Convention, all personnel, both civil and military, who were likely to participate in the detention, interrogation or treatment of persons deprived of their freedom should receive training of the provision of torture. It would also be interesting to know whether there was a code of conduct for such staff that

summarized the rules governing the detention, interrogation and treatment of persons deprived of their freedom.

29. The current systematic reform of the legal and judiciary sectors was a welcome initiative. The report stated that the regulation on prisons had been revised and that its definitive text had been established, whereas the relevant regulations on the law on the police force and the law on the administrative police were still being drafted. Further details on their state of progress would be useful. The overcrowding of prisons was worrying. The Committee was aware that the challenges to be met were numerous for developing countries such as Kenya, and lack of resources made the task even more difficult. But to effectively prevent torture in detention, the State Party should endeavour to abide by a set of minimum rules for the treatment of detainees.

30. In her preliminary statement, Ms. Karua had mentioned that prisons would henceforth be subject to independent oversight. Nonetheless, the National Human Rights Commission, which should have free access to all the places of detention, was encountering resistance from the authorities. The delegation could perhaps comment on that situation. Prosecuting judges were authorized to make regular visits to prison establishments, but apparently they seldom did so, and it was necessary to know why. Furthermore, four special units had been created in the police force to investigate certain types of offence, but as the units in question did not have their own premises they were forced to hold suspects in other places whose whereabouts were not always known. In such conditions, the fundamental guarantees that should be assured for all detainees, in other words the right to contact members of their family, the right to speak to a lawyer at the right to request an examination by a doctor of their choice, were being compromised. Mr. Wang Xuexian would welcome information on the mandate of those special units and the regulations applicable to them, as well as the places of detention they used.

31. Article 12 of the Convention required an impartial inquiry to be opened immediately whenever there were reasonable grounds to believe that an act of torture had been committed. In such cases, an inquiry was essential because it was the only way to protect the victim against new persecutions and to prevent evidence from disappearing. It would be useful to know what procedure was used to ensure that inquiries were undertaken with the necessary diligence and impartiality.

32. The right to file a complaint guaranteed by Article 13 of the Convention was now better protected because the P-3 medical examination form that torture victims had to submit to be able to file a complaint was available not only in police stations but also online and in hospitals. According to information received, however, a fee was payable to obtain the form, which would prevent the poorest victims from filing complaints on acts of torture perpetrated against them. Could the delegation confirm that information? It would also seem that 80% of complaints of torture filed by the detainees to the competent jurisdiction were shelved without follow-up and that the police officers involved in such cases continued to fulfil their functions during the inquiry, instead of being suspended. Mr. Wang Xuexian would like to hear the delegation's views on that subject.

33. In one of its reports, the National Human Rights Commission had referred to complaints that the police had been involved in almost 500 extrajudicial executions between June and October 2007. It would be interesting to know what measures the

Government intended to take to verify the those allegations. For its part, the commission responsible for investigating the post-election violence had concluded in its report that 1,133 people had been killed during those events, 405 of them as a result of bullet wounds. During the same period, 29 women had been gang-raped by members of the police at Kibera. Mr. Wang Xuexian wanted to know whether those events would give rise to inquiries.

34. The right to file a complaint protected by Article 13 of the Convention included a guarantee that the complaint would be fully investigated by the competent authorities. In her preliminary statement, Ms. Karua had mentioned the creation of a Police Oversight Council responsible for investigating violations committed by police officers. More details on the composition of that body would be welcome. It would also be interesting to know what stage had been reached in the process of setting up an office to receive complaints from private individuals against state institutions and officials. According to certain NGOs, medical reports, including the P-3 forms, were often ignored by judges. Was that true? If there was a special procedure for filing complaints against acts of torture committed by State agents, or appeals for special reparation concerning such acts, the Committee would appreciate further details.

35. In Kenya, anyone who had been subjected to torture could file a civil action for reparation, whether or not the case had been heard by a criminal jurisdiction, and this was an excellent development. But those judicial remedies were not sufficient to guarantee victims the payment of compensation. Even where victims obtained a favourable ruling, the compensation agreed upon was often only paid several years later. It was necessary to know what factors, apart from lack of State funds, could explain such dysfunction. It would also be interesting to hear whether, in the case of the death of the victim of torture, his or her descendants could file for compensation.

36. The Chief of Justice had published a directive under which constitutional or judicial appeals must be heard by the competent jurisdictions in Nairobi. It would be useful to know whether individuals living far from the capital could file their appeals through other means, such as e-mail, representation by a third party, etc.

37. Regarding Article 15 of the Convention, Mr. Wang Xuexian recalled that in 2003 an amendment had been made to Kenyan legislation whereby statements made by a suspect during police questioning could not be used as evidence in the trial unless those statements had been made in the presence of a magistrate. Nonetheless, in 2007, a new amendment had been made to the relevant provisions of the law, such that the police and courts were now authorized to accept statements that could be used during a trial. The delegation was asked to explain why the Kenyan authorities had reversed the original decision, and to give examples of cases in which the courts had considered statements as inadmissible because they had been obtained through torture.

38. In relation to Article 16 of the Convention, the Co-rapporteur had learnt from NGO reports that when the disturbances or conflict broke out, women were the first victims of violence, particularly sexual violence. He wanted to know whether that was because the perpetrators knew they had impunity or whether there were other causal factors. Lastly, it would be important to know whether the 3,741 people who were on death row in Kenya were aware of the existence of the *de facto* moratorium on capital punishment.

39. Mr. GAYE noted that after the disturbances following the December 2007 elections, the judiciary had announced that members of the police force found guilty of abuse of power by turning a blind eye to acts of torture committed by private militia personnel, would be dealt with very severely by the courts. Nonetheless, such statements seemed likely to prove hollow, given the absence of a definition of torture in domestic law, since no one could be convicted of a crime if the acts committed were not suppressed by the Penal Code.

40. The delegation was also invited to indicate what specific steps the State Party had taken to effectively combat corruption within the law enforcement agencies, and, in particular, to give details on how it intended to strengthen the independence of the justice system, including prosecution services. The delegation was also invited to comment on allegations that the Chairperson of the National Human Rights Commission had systematically been refused access to places of detention. The delegation could give more wide-ranging details on access to legal aid for persons belonging to the least advantaged population groups and comment on information that the State Party was not respecting the principle of non-refoulement contained in Article 3 of the Convention, with regard to refugees from Somalia.

41. Mr. GALLEGOS CHIRIBOGA welcomed the fact that an independent board consisting of civil society representatives had been set up to strengthen the effectiveness of public bodies responsible for processing complaints filed against members of the police force. Nonetheless, he wanted to know whether the mandate of those agencies could be widened to also cover acts committed by non-State actors. He also asked for an estimate of the number of perpetrators of violations, particularly sexual violence against women, that enjoyed impunity.

42. Ms. BELMIR, noting that a large number of people were being held on remand and the level of bail demanded from them and their next of kin to obtain their release was exorbitant, wondered whether the police were using the remand system to extract money from such persons. She was also worried to hear that the age of criminal responsibility was set at eight years in the State Party, which meant that a child of that age could theoretically be sentenced to death. With regard to the situation of women, she recalled that the practice of female genital mutilation had no religious foundation and she hoped that the Kenyan Government would take steps to eradicate it. She also pointed out that many Muslim countries already prohibited polygamy, or were planning to do so, since it generated inequalities among the women concerned and represented an affront to their dignity.

43. Ms. GAER welcomed the fact that women were strongly represented in the Kenyan delegation, and noted, having read the report (paragraph 104) that the State Party had acknowledged that torture had been a systematic practice in the past. Nonetheless, according to the parallel report sent to the Committee by an NGO group, citing examples of torture subsequent to the period covered by the report, it would appear that torture continued to be systematically practised in Kenya. She asked the delegation to comment on that divergent point of view.

44. Referring to the report of the Special Rapporteur on the Question of Torture following the visit he had made in 1999 to Kenya (E/CN.4/2000/9/Add.4), in which 106 cases of torture were cited, Ms. Gaer wanted to know whether inquiries had been opened on those cases, whether the victims had been compensated, and also whether a person claiming to have suffered torture abroad could seek reparation in the criminal or civil courts of the State Party.

45. Noting with satisfaction that a special team had been created in the police force to investigate sexual violence committed by members of the security forces during the disturbances that had followed the elections of December 2007, Ms. Gaer asked the delegation to describe the composition of that team, specify whether the inquiries opened had yet produced results and communicate recent information on its activities, particularly concerning inquiries possibly opened on gang-rapes committed in Kisumu, Nairobi and Mombasa.

46. According to the parallel NGO report, the prison occupancy rate in Kenya was 284%, and abuse, violence among prisoners and sexual violence were widespread in places of detention. According to the report on Kenya published in 2008 by the State Department of United States of America, such violence was occurring not only among detainees but also the guards. Ms. Gaer therefore wanted to know whether the State Party had set up a surveillance mechanism for violence of this type, whether inquiries had been opened on the incidents in question, and whether steps had been taken to protect victims that filed complaints from reprisals. Lastly, it would be interesting to know what follow-up had been given to cases of torture outstanding in the courts that had been cited in Annex V of the parallel report. If those cases had been tried, the delegation could report the outcome of each case, specifying the nature of the sentences handed down and indicating whether the victims had obtained reparation.

47. Mr. KOVALEV enquired about the fate of a presumed terrorist of Kenyan origin, Mohammad Abdul Malik, who, according to several NGOs, had been arrested in February 2007 and then transferred to the Guantanamo base with the consent of the Kenyan Government. To date, he had not been given the right to receive visits, not even a lawyer, and his status was not clearly defined. His next of kin in Kenya had filed a writ of *habeas corpus* to request a review of the legality of his detention, but this had been rejected by the High Court because the Kenyan courts on the grounds that it did not have jurisdiction since the person in question was not a Kenyan national — which his of kin contested, providing supporting evidence. Mr. Kovalev wanted clarification on the grounds for the High Court decision, and asked whether the Government intended to take steps to gain access to the person in question.

48. Mr. MARIÑO MENÉNDEZ wanted to know whether Kenyan legislation provided that indigent people that were victims of torture as criminal suspects were entitled to legal aid, and whether foreigners arrested by the forces of law and order had to be informed of their right to request assistance from a representative of the consular or diplomatic authorities of the State of which they were nationals. He also asked the delegation to indicate whether persons deprived of their freedom had access to a doctor of their choice or, at least an independent doctor, and whether a legal medical institute independent of the State existed in Kenya.

49. In addition, Mr. Mariño Menéndez asked the delegation to specify whether police prosecutors actually existed in the State Party, and to describe in detail how the prosecution was structured. In view of Kenya's ethnic, religious, and cultural diversity, he wondered whether women were tried by different courts and judged under different laws depending on whether they belonged to one or other ethnic or religious minority. The delegation could indicate how jurisdictions were distributed between the civil and religious courts, in particular with regard to family law, and

whether legislation was unified such that all women living in Kenya could exercise the same rights.

50. He also asked whether the State Party intended to legislate to incorporate the Rome Statute of the International Criminal Court, which Kenya had ratified, into its domestic law. Noting that, according to information provided by the State Party, a subordinate who obeyed an illegitimate order from a superior committed an offence, Mr. Mariño Menéndez asked the delegation to specify what was covered by the expression "illegitimate order", and to comment on allegations that the penalties provided for punishing that type of offence were too lenient.

51. The delegation was also invited to specify the minimum age of criminal responsibility, and indicate whether Kenya intended to ratify the Convention for the Suppression of Trafficking in Persons and of the Exploitation of the Prostitution of Others. Lastly, Mr. Mariño Menéndez noted that the State Party had not yet incorporated the Convention into its domestic law, which compromised effective application of Article 3. According to information received, the Kenyan authorities had refused to allow a whole group of refugees from Somalia to enter their territory, thereby violating the generally recognized principle of non-refoulement. The delegation was asked to comment on that issue.

52. Ms. KLEOPAS expressed concern that the authorities did not immediately investigate cases of torture. She reminded the delegation that that was an obligation under Article 12 of the Convention, and it was not necessary for a victim to have filed a complaint: a simple accusation, for example by an NGO, was sufficient to justify the opening of inquiry. Nonetheless, solidly documented allegations were not lacking, particularly in the report of the National Human Rights Commission. Holding independent inquiries was particularly important in cases of violence blamed on the police. The Commission of Inquiry on Post-Electoral Violence (the Waki Commission) had published its report, but nothing had been said about following it up. Further details would also be welcome on the steps being taken to combat violence against women. Lastly, it would be interesting to know the status of the draft laws on domestic violence and human trafficking.

53. The Chairperson welcome the fact that suspects were now questioned only by higher-ranked officers, but he wondered whether the State Party intended to provide oversight for questioning procedures, as a supplementary guarantee. The P-3 form, relating to complaints of torture, was very useful, but ways needed to be found, in consultation with civil society, to simplify and disseminate it more widely. Furthermore, the programme for training officials and agents of the forces of law and order, which the delegation had said was being reorganized, should include studies of specific cases to support theoretical teaching. In this regard, it should be remembered that NGOs and local academic institutions could also play an important role in training. Nonetheless, a specific example of an official brought to justice would be more effective than any course in discouraging the use of torture. It was therefore essential to combat impunity relentlessly.

54. The delegation had not specified whether certain crimes were automatically subject to the death penalty, without the possibility of any attenuating circumstance being taken into consideration. The fact that the National Human Rights Commission was free to inspect places of detention was positive, but it needed resources to do so, which it not seem to have. Another welcome step was the creation of the national legal aid and awareness-raising programme, which could be

completed by setting up local courts, as some countries had successfully done, or mediation mechanisms, which generally succeeded in resolving 90% of cases.

55. The Committee would like to know whether inquiries had been opened in the case of the Kenyan nationals who had been handed over to the Ethiopian authorities, and of Mohammad Abdul Malik, who, according to Human Rights Watch was being held at Guantanamo Bay after being arrested by the Kenyan authorities in February 2007. Rendition of detainees in that way was contrary to the principle of non-refoulement contained in Article 3 of the Convention.

56. Some NGOs reported that torture victims were forced go to Nairobi to file a complaint, and that disabled detainees were not entitled to use their crutches or other prostheses in prison. The delegation was asked to comment on that information. Civil society organizations and the Human Rights Commission also stated that the poorest communities were most prone to torture and abuse, particularly in urban areas. It would be interesting to know whether the State Party had considered analysing the phenomenon with a view to taking appropriate measures. While poverty reduction was clearly outside the Committee's mandate, poverty could not be ignored since it influenced the risk of torture. Lastly, the Chairperson welcomed the closure of Nyayo House and the creation of the Independent Police Surveillance Council and the Permanent Complaints Review Committee. The Committee would monitor its work closely.

57. Ms. KARUA (Kenya) thanked the Committee for its comments and said that the delegation would do its best to reply precisely during the time available. She also wanted to make a number of general comments.

58. The fact that torture was not defined in the Constitution or in legislation made it hard to prosecute torturers, but not impossible, because it was the judges in courts of first instance who had to assess acts constituting torture, particularly in the case of psychological torture, which was harder to prove. State agents accused of torture could also be prosecuted for various crimes defined in the Penal Code, such as assault, beatings and serious wounding, or even murder. It was intended to rectify those shortcomings in the constitutional and legislative reform currently underway. Admittedly that could have been done as part of legislation making various amendments to Kenyan law, but the legislation had been delayed several times owing to political difficulties, before finally being passed in 2007. Torture victims could also apply to the civil courts, but many of them did not do so, through ignorance or lack of funds. Implementation of a reparation mechanism for victims of violence perpetrated by State agents would be considered in the framework of judicial reform. The creation of a mediation mechanism, as suggested by the Chairperson, was also under serious consideration, particularly to clear the case backlog. P-3 forms were now freely available at hospitals and online, but what happened was that victims had to pay for the form to be filled out by the doctor or at the police station. It was therefore necessary to force the persons concerned to comply with their obligations, and measures would be adopted in that regard. On the other hand, it was untrue that torture victims had to go to Nairobi to file a complaint: that requirement only applied to requests for judicial review, and had been introduced by the Chief of Justice in response to the proliferation of such requests, which were often filed simultaneously in several places by the same person.

59. No sanction had been imposed in relation to the arrests of Mohammad Abdul Malik and the Kenyans sent to Ethiopia, since those cases were covered by a tacit

political agreement with the United States. Measures had also been taken domestically, but it was difficult to discuss them owing to the political dimension of the cases in question. In any event, Kenya intended in future to respect international laws and its own legislation in its dealing with other countries.

60. The Kenyan Human Rights Commission was an independent organization with an official mandate to investigate human rights violations, and the Government could not interfere in its work. Although it had official access to all places of detention, prison establishments, with which its relations were difficult, were reluctant to open their doors to the Commission, but would now have to realize that this was not a matter of choice but an obligation.

61. In addition to Judge Waki, the Commission of Inquiry into Post-Electoral Violence consisted of a former New Zealand police chief and a legal expert from the Democratic Republic of the Congo. As its report had been published only very recently, in October 2008, it had not yet been reviewed by the Council of Ministers. Nonetheless, the Government was already implementing its recommendations, one of which was to create an independent court to hear cases of violence that had occurred following the elections. That court would include some non-Kenyan judges. With regard to allegations of arbitrary arrest during the post-electoral violence, it needed to be pointed out that criminal gangs had participated in the disturbances, and in any event only the police were entitled to arrest civilians, even if the armed forces assisted in their operations. Complaints of sexual violence perpetrated by police officers during those events were currently being examined by the task force set up as an internal body by the Chief of Police; but they would later be the subject of an independent inquiry. It should be recalled that while police inquiry mechanisms had thus far been strictly internal, implementation of the Independent Civil Council to oversee the police force would make it possible also to exercise external and independent oversight.

62. Kenya was aware that poverty was the main reason leading young people to engage in criminal activities in organized gangs. For that reason, job creation was one of the objectives defined in point 4 of the National Reconciliation Dialogue set up under the auspices of Kofi Annan. In addition, a draft law to incorporate the Rome Statute into domestic law was currently being examined by Parliament, along with a draft law on the treatment of women. With regard to constitutional reform, although the 2005 referendum had failed, a draft law to relaunch the process had recently been adopted.

63. Although the moratorium on the death penalty had not been officially announced, no execution had taken place since 1987, and the aim was to amend the Constitution to ban capital punishment. Furthermore, over 280 convicts sentenced to death had been released in 2003 and another 195 had had their sentence commuted. Every detainee could see a doctor from a public hospital; but to see a physician of choice required filing a request with the court and assuming the costs involved. Police prosecutors report to the Prosecutor General, as do all State law officers, but the latter only deal with the most serious cases.

64. Mr. Mariño Menéndez had asked whether women from certain communities, specifically Muslim communities, were an unequal position before the law, particularly in family cases. While the Constitution recognized the jurisdiction of customary or Islamic courts to try cases of a personal nature such as marriage, divorce and inheritance, it also required national legislation to be applied to

everyone equally. Consequently, any ruling issued by a customary or Islamic courts could be challenged in the civil courts, which could rule in favour of the primacy of national laws.

65. Kenya had always been a land of asylum, as evidenced by the large number of refugees living in the country. Only recently had the immigration process slowed down, as a result of the controls deemed necessary for national security reasons, particularly along the Somalian border.

66. The Government was in continuous dialogue with NGOs which participated specifically in the programme on governance, justice and the law referred to earlier; and they were invited to express their opinion on all types of procedural matters, including the use of the P-3 form. Lastly, while Kenyan legislation was now generally complete, there were still difficulties in implementing it. It should not be forgotten that nothing had been done to prevent torture for decades, and it had almost become normal practice. A reform of all institutions was being undertaken, which was a lengthy undertaking, although everything possible was being done to hasten the process.

67. The Chairperson thanked the delegation and invited it to continue the dialogue at a later meeting.

68. *The Kenyan delegation withdrew.*

The meeting rose at 1.02 p.m.