

**Submission from the Article 5 Initiative regarding Kenya's Second Periodic Report to the UN Committee
Against Torture ahead of the Committee's 50th Session**

April 2013

1. Introduction

This submission to the Committee against Torture (**CAT**) is prepared by the African Policing Civilian Oversight Form (**APCOF**)¹ on behalf of the Article 5 Initiative (**A5I**).²

A5I refers to the List of Issues to be considered during the examination of Kenya's second periodic report (**List of Issues**), dated 15 February 2011,³ and the Kenyan Government's second periodic report which was transmitted pursuant to the optional reporting procedures, dated 28 September 2012, (**Government Response**).⁴

The purpose of this submission is to provide further information to the Committee Against Torture (**Committee**) to assist in its consideration of the Government's Response at its next session in May 2013. This submission seeks to comment on the Government's Response to the List of Issues developed by the Committee, and where we consider necessary, provide further information to the Committee on Kenya's performance in respect of its obligations under the UN *Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment* (**UNCAT**).

2. Structure of this Submission

Part 3 provides the relevant socio-political background to this submission, and notes the challenges in providing a comprehensive analysis of Kenya's compliance with UNCAT during the reporting period.

Part 4 sets out A5I's recommendations in relation to improving Kenya's compliance with UNCAT.

Part 5 contains our substantive comments in relation to the Committee's List of Issues and the Government's Response.

3. Background

This submission has been prepared in the context of significant changes in Kenya's political, judicial, economic and social structures. As the Committee is aware, the mediated settlement to the 2007 post-election violence included a short to medium term plan to take legislative, policy and administrative measures to address the underlying causes of the violence. A key feature of the agreement was a constitutional and legislative reform agenda, and in 2010, a new Constitution came into operation.

In support of the new Constitution, Kenya is undergoing significant legislative, policy and administrative reform, including in relation to its political systems, police, prison services, and the judiciary. The reforms that have been implemented to date have strengthened the legal framework for the detection, prevention and punishment of torture and other ill treatment in the context of policing. At the time of writing, legislative

reform pertaining to the prison system, and broader criminal justice system, were still pending.

Accordingly, an analysis of the extent to which Kenya is fulfilling its obligations under UNCAT is complex. First, there is a lack of evidence-based research to determine whether the legislative reforms to date have made a positive impact on the realisation of UNCAT rights on the ground. Based on information from credible non-government organisations, it is disappointing that many issues raised by the CAT in its 2008 Concluding Observations persist in Kenya today and have not resulted in wholesale and practical changes on the ground, despite improvements to the constitutional and legal framework for policing.

Second, the reform process is not complete. ASI notes that there are a number of proposed laws, including the Prevention of Torture Bill (2011) that will, if passed in their current form, strengthen the legislative application to UNCAT. Until the reform process is complete, it is therefore difficult to ascertain the extent to which the Kenyan Government's intentions to meet its obligations under UNCAT will translate into legal, policy, administrative and practical reform.

4. Recommendations

THAT the Kenyan Government support the immediate passage into law of the Prevention of Torture Bill 2011 and the Protection of Persons Deprived of their Liberty Bill 2012.

THAT the Kenyan Government taken immediate steps to complete the review and necessary amendments to legislation to that govern places of detention, including the Prisons Act, to ensure that standards pertaining to conditions of detention, oversight for places of detention, the treatment of persons deprived of their liberty, and training standards are implemented in a manner that gives full effect to Kenya's obligations under UNCAT.

THAT the Kenyan Government, in consultation with civil society and the Kenya National Commission for Human Rights, develop a national torture prevention action plan to guide and monitor the implementation of the Prevention of Torture Bill, if passed, and associated law reform.

THAT the Kenyan Government ensure that the juvenile justice system is allocated the necessary financial and human resources to ensure that the treatment of children in the juvenile justice context accords with the best interests of the child, and Kenya's obligations in relation to UNCAT.

THAT the Kenyan Government provide the necessary financial and human resources to ensure the effectiveness of the witness protection scheme.

THAT the Kenyan Government ratify OPCAT and establishes an NPM with the mandate and resources to fulfil its role, as envisaged in OPCAT.

THAT the Kenyan Government provide the Independent Police Oversight Authority with the necessary human and financial resources to independently and effectively fulfil its mandate.

THAT the Kenyan Government undertake an urgent review of current law enforcement training with a view to ensuring training complies with Kenya's obligations under article 10 of UNCAT.

THAT the Kenyan Government review interrogation rules and instructions to ensure that they comply with UNCAT obligations, and to commit to regular review of interrogation rules and instructions with a view to preventing torture and other ill-treatment.

THAT the Kenyan Government allocate the necessary human and financial resources to support improvements to conditions of detention in all settings.

THAT the Kenyan Government take immediate steps to ensure independent and credible investigations into human rights abuses in Mt. Elgon, the Mandera Region, and in relation to the post-election violence.

THAT the Kenyan Government consult with relevant stakeholders, including the KNCHR and civil society, on the development of regulations and budget lines for the National Fund for Victims of Torture.

5. Articles 1 and 4

List of Issues 1, 2 (Legislative implementation of UNCAT)

Criminalisation of torture

A5I notes that the Government Response comprehensively details the improvements since 2008 to the constitutional and legal framework for the prevention of torture in Kenya. These are important structural improvements. A5I welcomes these positive developments and calls on the new Kenyan Government to continue the process of reform and give them expression in functional improvements as well.

However, despite this progress, there is no comprehensive protection against torture in Kenyan law, despite an overarching constitutional prohibition against torture. Notably, the absence of the specific offence of torture in Kenyan criminal law creates a constitutional barrier to criminal prosecutions for torture on the grounds that the offence does not form part of Kenya's criminal law.

The absence of the statutory offence of torture also makes it difficult to determine the extent to which Kenya is now effectively dealing with cases against officials for acts that amount to torture or other forms of ill-treatment. Where prosecutions occur, for example, they are in relation to other offences under the Penal Code, including murder, assault and rape. Even in those instances, there are credible reports that law enforcement officials are seldom prosecuted, and when prosecutions occur, the penalties do not reflect the gravity of the offence.⁵

Accordingly, A5I welcomes the introduction of the Prevention of Torture Bill 2011, and calls on the new Kenyan Government to commit to ensuring the passage of the Bill through National Parliament with urgency during the first Parliamentary session of 2013.

Other concerns about legal framework

A5I notes the Government's view that to amend the Penal Code, Evidence Act and Criminal Procedure Code in accordance with paragraph 8 of the Committee's previous concluding observations would 'constitute a mere repetition' of the contents of the Prevention of Torture Bill 2011. A5I agrees with this statement in principle, but calls on the Government to ensure that necessary amendments to legislation that governs places of detention, such as the Prisons Act, to ensure that standards pertaining to conditions of detention, oversight, the treatment of persons deprived of their liberty, and training standards, are implemented in a manner that gives full effect, in accordance with its obligations under article 11 of UNCAT. Criminalisation of torture, although a vital feature of UNCAT implementation, must be coupled with implementation of the full suite of UNCAT protections.

Implementation of legislative framework

Implementation of the reforms delivered since 2008, and the implementation of those reforms which are still pending, are of particular concern to A5I. Since the post-election violence reform process, detailed in the Government's Response, there are still numerous and credible reports that torture and other ill-treatment by law enforcement officials persists,⁶ and that impunity for past and recent acts of torture remains an issue.⁷

There is no official data on the prevalence of torture in Kenya, and the Government has previously noted that available information may be unreliable because data is collected by the same law enforcement agencies against whom complaints of torture are made.⁸ Research by credible non-government organisations confirms that torture and other ill-treatment by law enforcement personnel persists. For example, during 2011, the Independent Medico-Legal Unit (*IMLU*) reported that it received complaints from victims of torture on a 'weekly' basis.⁹

In 2011, IMLU conducted a 'National Torture Prevalence Survey'.¹⁰ The report revealed that 61 percent of respondents think torture is very common, with 63 percent believing that the police are the main perpetrators. Twenty-three percent of respondees had experienced torture, but only 25 percent of those had made a formal report; and of those who made a report, 77 percent said that no action was taken.¹¹

In 2009 and 2011, security operations in the Mandera region against Al-Shabaab militants resulted in accusations of torture and rape against security officers (both police and military). These operations adopted a strategy of mass arbitrary detention in military camps, torture and collective punishment.¹² As with previous operations in the Mt. Elgon region,¹³ there has been no independent or credible investigations into allegations of human rights abuses.

Accordingly, A5I urges the Kenyan Government to establish mechanisms and tools to monitor the extent to which the implementation of the new legal framework improves measures aimed at the detection, prevention, and eradication of torture in practice. We also call on the Government to ratify OPCAT and to establish an NPM with the sufficient human and financial resources to fulfil its mandate.

List of Issues 3 (torture and ill-treatment in relation to the Children's Act)

A5I welcomes the proposed amendment to section 18(1) of the Children's Act to prohibit corporal punishment in all settings. However, we remain concerned about the treatment of children in the criminal justice system, particularly in relation to other ill-treatment when they are deprived of their liberty.

There are reports that despite the existence of dedicated juvenile justice detention facilities, there are occasions when children are held in adult police detention facilities,¹⁴ and in prisons which do not have facilities appropriate for children, including access to medical care and education.¹⁵ The enforcement of minimum standards for the treatment of children in juvenile detention remains 'weak' and there are reports of ill-treatment in juvenile and rehabilitation facilities.¹⁶ The Government has previously acknowledged that the juvenile justice system is inadequately funded and under-staffed.¹⁷

A5I calls on the Government to ensure that the juvenile justice system is allocated the necessary financial and human resources to ensure that the treatment of children in the juvenile justice context accords with the best interest of the child, and Kenya's obligations in relation to UNCAT. The CRC is clear that the deprivation of liberty should only be used as a measure of last resort and then for the shortest possible period. In particular, we submit that Kenya should use its well established probation service to ensure that children's exposure to the rigours of the criminal justice system is limited to the absolute minimum.

6. Article 2

List of Issues 5 (judicial reform)

A5I notes and welcomes the Government's Response to the List of Issues regarding the improvements made to the justice system to promote integrity, efficiency and transparency.

As the Committee is aware, the judiciary has been widely criticised¹⁸ as lacking independence, and of corruption, incompetence, scarcity of resources, and the weak and ineffective enforcement of human rights, including torture.¹⁹ Previous attempts to reform the judiciary have been made,²⁰ however, significant

structural reform was not realised until the adoption of the 2010 Constitution. Stalled reform efforts have contributed to the significant challenges in accessing justice in Kenya, including for victims and survivors of torture, and their families.

While structural changes to the judicial system are welcomed, A5I reiterates that the continuing absence of the statutory offence of torture in Kenyan criminal law makes it difficult to determine the extent to which the Kenyan court system is now effectively dealing with cases against officials for acts that amount to torture or other forms of ill-treatment.

The Kenya Human Rights Commission, a non-governmental organisation, has identified a number of barriers to effective redress for torture and ill-treatment through the courts, including executive interference in (i) decisions to prosecute; (ii) the work of judges and magistrates; and (iii) the collection and presentation of evidence by the police; and defiance by the Executive of court orders and other decisions pertaining to torture and ill-treatment.²¹ The extent to which the judicial reforms address these concerns is unknown at this time, and should be subject to a transparent and inclusive monitoring and evaluation process by Government.

In that regard, A5I encourages the Kenyan Government to establish a monitoring and evaluation program to understand how implementation of the new Constitution and policing legislation is impacting the detection, prevention and punishment of torture, and additional measures that may be taken to strengthen UNCAT compliance. This will be particularly important if and when the Prevention of Torture Bill is passed into law, and torture becomes an offence under Kenyan criminal law.

Also inhibiting the capacity of the judiciary to deal with torture and ill-treatment is Kenya's weak and ineffective witness protection system,²² despite the establishment of a witness protection scheme in 2006.²³ For example, in relation to the 2008 joint military and police security operation in Mt. Elgon, civil society had cited the lack of an effective witness protection system as a barrier to victims of torture filing legal complaints against the police and military.²⁴ This contributes to further entrenching a culture of impunity in relation to torture and ill-treatment in Kenya. A5I calls on the Kenyan Government to provide the necessary financial and human resources to ensure the effectiveness of the witness protection scheme.

List of Issues 6 (access to justice)

Despite legal guarantees to a lawyer,²⁵ Kenyan law enforcement has been criticised for failing to provide persons under arrest with appropriate legal safeguards, including the right to access a lawyer.²⁶ It is reported that persons arrested and brought to police stations are usually unable to access legal assistance because they lack financial means and/or because they are unaware of their right to counsel,²⁷ and A5I's recent consultations with Kenyan civil society confirms that these issues continue despite reform to the legislative framework for policing.

Limited public legal assistance, coupled with the high cost of retaining private lawyers in Kenya has a particularly adverse impact on access to justice because the majority of detainees are from economically disadvantaged communities, have low levels of education, and are less aware of their Constitutional rights. The Independent-Medico Legal Unit has found that only 34.3% of employed people are able to afford legal assistance, which puts the cost of legal services beyond the financial capacity of most Kenyans.²⁸

A5I calls on the Kenyan Government to increase the availability of legal services by ensuring that the National Legal Aid and Awareness Scheme (**NLAAS**) is rolled out across the country, with sufficient resources to provide legal assistance services to persons in police custody who are unable to afford a private lawyer.

List of Issues 7 (unlawful and arbitrary arrest)

Unlawful and arbitrary arrest remains a concern in Kenya, particularly in relation to vulnerable and marginalised people and communities. This continues to occur despite the recent strengthening of policing legislation and police oversight.²⁹ The link between corruption, arbitrary arrest, torture and other forms of violence, and people who are economically, culturally or socially disadvantaged has been previously made by the Independent Medico-Legal Unit (*IMLU*).³⁰ However, concrete measures to support the implementation of the new legislative framework for policing to address the issue of unlawful and arbitrary arrest, and corruption, remains outstanding.

A5I welcomes the introduction of an independent police oversight agency and calls on the Kenyan Government to ensure that the Independent Police Oversight Authority (*IPOA*) is sufficiently funded to address the issue of unlawful and arbitrary arrest and corruption in Kenya.

List of Issues 8 (bail system)

Remand prisoners constitute 44 percent of Kenya's prison population. Remand levels are high because the police lack capacity to complete investigations and identify witnesses in a timely manner. It is reported that remand prisoners have spent 'months if not years' in custody.³¹ During A5I consultations in Kenya, civil society has reported that while bail provisions have been strengthened by the new Constitution, as detailed in the Government's Response, the reality for most detainees is that the amount for bail is still set too high to be either reasonable or affordable. In this regard, A5I welcomes the Draft Bail Information and Supervision Bill, and urges the new Government to support its passage into law during the first Parliamentary term of 2013.

List of Issues 9 (allegations of torture and ill-treatment in police custody)

A5I welcomes the positive measures taken by the Government to address torture and ill-treatment in police custody, as detailed in paragraph 45 of the Government's Response. However, A5I remains concerned that notwithstanding amendments to the legislative framework governing Kenya's police, torture and other ill-treatment, and impunity for current and past offences, remain an issue.

The use of torture in post-independence Kenya has a long history³² and generally manifests in four settings: suppression of political dissent, in confinement, against weak and/or disadvantaged groups, and in the context of ethnic conflict.³³ Notwithstanding its ratification of the UNCAT, and the prohibition of torture in the Constitution, the Kenyan Government has been criticised for failing to take systemic action to address gaps in the legal framework for the protection against torture, to improve oversight mechanisms, and to address dire conditions of detention.³⁴

Despite persistent reports of torture perpetrated against persons deprived of their liberty in various settings and by various state actors, there is no official data on the prevalence of torture in Kenya. The Governance Justice Law and Order Sector reform program (*GJLOS*) had called for research to determine how often transgressions of legal prohibitions occur,³⁵ but the Government has not initiated research to this effect. Indeed, the Government has conceded that there are no reliable statistics on torture by law enforcement agencies, given that the same institutions entrusted with the data collection and publication are the same as those against whom complaints of torture are made.³⁶

IMLU estimates that approximately 5,000 people are victims of torture each year, with the police identified as the main perpetrators and the victims predominantly from marginalised and disadvantaged communities.³⁷ A GJLOS-commissioned study on Kenya Police culture and attitude found that the practice of torturing suspects was a cultural trait within the police force that all stakeholders (government, police and civil society) agreed needed to change.³⁸ Security operations in 2009 and 2011 in the Mandera region against Al-Shabaab militants similarly resulted in accusations of torture and rape against security officers (both police and soldiers). These

operations adopted a strategy of mass arbitrary detention in military camps, torture and collective punishment.³⁹ As with the Mt. Elgon operation, there have been no independent or credible investigations into the allegations of human rights abuses.

Urgent action by the Government is required to ensure that persons in police custody have access to fundamental legal safeguards set out in the Constitution and the National Police Services Act, such as the right to a lawyer, prompt access to a judicial authority, an independent medical examination and the right to contact with next of kin.

A5I also calls on the Government to take urgent steps to ensure independent, effective, and credible investigations into the allegations of human rights abuses in Mt. Elgon and the Mandera Region.

The Government must also take urgent and immediate steps to improve police training, particularly in relation to torture and ill-treatment, and prohibit the use of unofficial places of detention and incommunicado detention, particularly by the so-called 'special units', and to ensure that persons are only deprived of their liberty in official places of detention that are subject to independent oversight.

A5I also calls on the Government to ensure that oversight agencies, such as IPOA, are sufficiently funded to exercise their mandate to address, amongst other things, torture and ill-treatment in police custody.

List of Issues 10 (Kenya National Commission on Human Rights)

The Kenya National Commission on Human Rights (KNCHR) is Kenya's National Human Rights Institution. While it does important work in relation to the detection and reporting of torture, it is unable to provide complainants with enforceable remedies, nor are its recommendations required to receive a response by Government. The KNCHR's functions and powers are also limited in a number of other ways, including in relation to financial and human resources to implement its mandate to systematically visit places of detention or investigate systemic human rights abuses, such as torture.

A5I calls on the Kenyan Government to ensure that the KNCHR is sufficiently funded to exercise its mandate, receives the full support of Government in relation to the presentation of reports and findings into the treatment of persons deprived of their liberty, and conditions of detention, and that Government departments are required to respond to Parliament in relation to action taken to implement recommendations made by KNCHR.

List of Issues 11 (impunity)

Impunity for acts of torture is a serious concern to A5I, and it is disappointing that the Government has failed to address past impunity for torture during the post-election violence, and in relation to special operations, despite the Committee's previous Concluding Recommendations that urgent action be taken.

In the context of the post-election violence, for example, the role of the police is well documented, with several substantiated allegations of grave human rights abuses, including torture and ill-treatment.⁴⁰ The Waki Commission Report found that the police were responsible for 35.7% of the total number of deaths during the post-election violence.⁴¹ The previous Attorney-General had requested the Director of Public Prosecutions to create a team of State Counsels to undertake a review of all 2007 PEV cases, in collaboration with offices from the Kenya Police Force's Criminal Investigation Division. The mandate of the review is to establish whether there is sufficient evidence to support charges, and to recommend whether cases should proceed to trial. The team's preliminary findings included that inquest files were 'far from complete' and that without proper investigation and resources, 'prosecutions of police and officials are unlikely to take place'.⁴²

Despite the well-documented nature of the grave abuses that occurred during the PEV, the Government and prosecution services had not, at the time of writing, taken any concrete steps to prosecute perpetrators,

including members of the Kenya Police Force, the Kenyan Armed Forces and the Administration Police. We submit that this effectively creates a situation of impunity.

As discussed in relation to List of Issues 26, the Kenyan Government has also failed to take steps to ensure independent and credible investigations into the human rights abuses in Mt. Elgon and the Mandera Region.

Internal and external complaints and investigative mechanisms for Kenya's National Police Service have improved with the introduction of the National Police Service Act, as set out in the Government's Response. A5I welcomes these improvements and calls on the Government to ensure that (1) IPOA has sufficient funding and human resources to implement its mandate; and (2) that the work of IPOA be subject to independent monitoring and evaluation to determine the extent to which they are addressing issues of torture and ill-treatment, with a view to providing them with additional support if, and when, required.

The internal and external oversight systems of Kenya's prison systems remain a serious concern to A5I. As detailed elsewhere in this submission, the Kenyan Prison System has not undergone the same legislative, administrative and policy reform as the Kenya National Police Force, and is still governed by the Prisons Act. Accordingly, the systems, where they exist, fail to implement Kenya's obligations in relation to UNCAT. A5I urges the Kenyan Government to review and revise the legislative, policy and administrative frameworks governing the Kenya Prison Services with a view to fully implementing UNCAT obligations.

Finally, Kenya's failure to ratify OPCAT denies Kenyans an important oversight mechanism to protect against torture and other ill-treatment. A5I urges the Kenyan Government to immediately ratify and implement the OPCAT, and to establish a National Preventative Mechanism (*NPM*) with the mandate and resources to fulfil its role as envisaged in OPCAT.

7. Article 3, 5 and 7 (expulsion, refoulement, returns and extraditions)

List of Issues 16 – 21

As torture is not an offence under Kenyan criminal law (either by way of the Criminal Procedure Act or Penal Code), it is therefore not possible for the Government to facilitate an extradition on the grounds of allegations of torture. At the time of writing, Kenya had also failed to enter into any bi-lateral or multi-lateral extradition treaties that specifically include extradition on the grounds of the offence of torture.

The Extradition Acts provide that a person will not be surrendered to another country if such surrender will prejudice him or her at trial, or cause him or her to be punished, detained or restricted on the basis of his or her race. However, the law does not mention the prohibition of extradition if there is the risk of torture and there is no legal framework for assessing whether a person subject to expulsion or extradition will be in danger of facing torture or ill-treatment.⁴³

The Government has previously informed the Committee that it does not, in practice, extradite where there is a reasonable belief that they will experience torture or ill-treatment.⁴⁴ However, there are documented cases of terrorism suspects being extradited (including to Somalia, Ethiopia and Cuba) outside established legal procedures, and without regard to due process, such as habeas corpus.⁴⁵

As previously reported to the Committee, detainees held in Kenyan prisons and awaiting extradition for terrorism-related charges are reported to be held for weeks without access to lawyers, family members or diplomatic representatives, and in some cases are held without charge.⁴⁶ Where detainees have managed to file habeas petitions, in several cases the authorities disregarded court orders or pending judicial proceedings by moving detainees to other places of detention or rendering them to a second country (usually Somalia or Ethiopia).⁴⁷ Once returned, detainees have reported being tortured by the state's security organs.⁴⁸ These are serious violations of well established rights under the ICCPR.

Despite extradition law barring the expulsions of Kenyans from their country, the Government has reportedly removed their own citizens, often without extradition orders, to second countries for interrogation and prosecution in terrorism-related matters.⁴⁹

Somali refugees who register in one of the three refugee camps in Dadaab, north-eastern Kenya, are reported to experience threats of *refoulement*, over-crowding, police brutality, sexual violence, recruitment for military training, and restrictions on their freedom of movement.⁵⁰ As set out in the paragraphs above, Kenya's policy of encampment also has the effect of limiting refugee and asylum seekers' access to education and health services, as services within the camps are limited, and movement outside the camps restricted.⁵¹

Refugees are at significant risk of *refoulement* as there is no reference to the principle of non-*refoulement* in the Immigration Act or Refugee Act, and neither Act provides an independent review of removal orders.⁵² In 2009, for example, the UNHCR denounced the forcible return of at least 93 Somali asylum seekers in border areas, which were a violation of the non-*refoulement* principle, and which expose asylum seekers to the risk of torture and ill-treatment once returned.⁵³

Kenya's Muslim leaders have reported that the introduction of new anti-terror legislation in 2003, and the establishment of the Anti-Terrorism Police Unit, have resulted in discriminatory law enforcement practices against Kenya's Muslim community.⁵⁴ It is reported that approximately 100 Muslim people, including children, have experienced rendition to neighbouring countries, and returned to Kenya with 'visible scars of torture'.⁵⁵

A5I calls on the Kenyan Government to expedite the passage into law of the Prevention of Torture Bill 2011, and to take all necessary legislative, policy and administrative to ensure that its provisions in relation to extradition and adherence to the principle of non-*refoulement* are implemented, and subject to effective internal and external oversight.

8. Article 10

List of Issues 22 – 23 (human rights training)

In 2011, the Government reported that it was working with development partners, civil society and the national human rights institution to further develop and improve human rights training for law enforcement officials.⁵⁶

However, there is no information available on the specific curricula of police human rights training, on the ground that the training of law enforcement personnel is secret, and the training facilities are prohibited areas under the Protected Areas Act.⁵⁷ Therefore, it is difficult to ascertain whether the training received by police and prison officers complies with Kenya's obligations under article 10 of UNCAT.⁵⁸

A5I recommends that the Kenyan Government provide information on the extent to which law enforcement personnel receive training in relation to the absolute prohibition of torture and ill-treatment. In anticipation of the passage into law of the Prevention of Torture Bill 2011, we encourage the Government to revise all law enforcement training materials to ensure that they comply with Article 10 of UNCAT, and that this be undertaken in collaboration with the KNCHR and civil society.

9. Article 11

List of Issues 24 (interrogations)

A5I draws the Committee's attention to the fact that the relevant rules and instructions pertaining to interrogations are not publicly available, and there is no information on current practices. As the Committee has previously noted, there are, and continue to be, numerous and credible allegations of widespread use of torture in police custody, and an acknowledged reliance on the extraction of confessions from suspects.⁵⁹ A

study by IMLU revealed that of 900 people surveyed, 66.8 percent of respondents who had been police suspects reported that the police had inflicted pain on them in order to obtain a confession.⁶⁰

Given the significant barriers to accessing justice discussed elsewhere in this submission, there has been limited judicial recourse for prisoners whose convictions are based on confessions. So too, lack of access to legal services has also resulted in few detainees complaining about their treatment in detention, owing to a lack of knowledge about the procedures available for complaint.⁶¹

A5I calls on the Kenyan Government to review interrogation rules and instructions to ensure that they comply with UNCAT obligations, and to commit to regular review of interrogation rules and instructions with a view to preventing torture and other ill-treatment.

List of Issues 25 (conditions of detention)

A5I welcome the positive measures taken by the Kenyan Government in relation to improving conditions of detention, set out in paragraphs 90 to 97 in its response to the Committee's List of Issues. However, A5I is concerned at both the slow pace of reform in relation to implementation of UNCAT rights in the legal framework governing Kenyan Prison system, and the continuing lack of investment in prisons infrastructure; both of which contribute to conditions of prisons that amount to cruel, inhuman or degrading treatment. While one may be hesitant to embark on a prison construction programme, it has also become evident that the current prison infrastructure is simply not able to meet the minimum requirements of human detention as stipulated in the UNSMR and numerous soft law instruments, including instruments and declaration from the ACHPR.

In 2008, the Government established a Correctional Service Reform secretariat to review the legal framework for prisons.⁶² However, at the time of writing, the Kenya Prison Service was still subject to *The Prisons Act 1977* (Cap 90). Despite Constitutional guarantees for the rights of persons deprived of their liberty, the Prisons Act is silent on minimum conditions of penal institutions.

A traditionally low level of investment in the Kenyan prison system has resulted in endemic over-crowding, poor physical conditions, lack of infrastructure, and staff shortages. In 2008, former Member of Parliament, Marsden Madoka, released a report on the state of Kenya's prisons, which was scathing on issues of prison conditions, corruption and mismanagement.⁶³ Previous reform efforts, primarily implemented through the Governance, Justice, Law and Order Sector (**GJLOS**) to reduce overcrowding and improve conditions of detention, been 'ineffectively' implemented, and any successes are reliant on broader reform of the criminal justice institutions, which were still pending (and largely remain so) at the time of the review.⁶⁴

As a result of largely ineffective reform, the conditions of prisons in Kenya have been described as amounting to cruel, inhuman or degrading treatment, with dire conditions, particularly in relation to overcrowding, lack of appropriate health services, insufficient food, and high levels of violence. Deaths as a result of poor conditions have been reported prisons,⁶⁵ and the Kenyan High Court has described the country's prisons as 'death chambers' and noted that 'going to prison...has become a sure way for a death certificate'.⁶⁶

In police cells, inhumane conditions exist, caused by over-crowding, with reports that suspects sleep standing due to overcrowding, and the spread of communicable diseases among detainee populations.⁶⁷ Deaths as a result of poor conditions have been reported in police stations.⁶⁸

A5I calls on the Kenyan Government to support the passage into law of the Prevention of Torture Bill 2011, and the Treatment of Persons Deprived of their Liberty Bill 2012. Legislative reform in relation to conditions of detention must also be supported by policy, training and budgetary initiatives to ensure that measures to improve conditions of detention, and improve the treatment of persons deprived of their liberty, receive the necessary human and financial resources to support meaningful and progressive reform.

10. Articles 12 and 13

List of Issues 26 – 30 (investigations and prosecutions)

As the Committee is aware, torture, and other human rights abuses such as enforced disappearances, rape and extrajudicial executions were committed in Mt. Elgon between 2006 and 2008 in an ongoing armed conflict between Kenyan security forces (mainly the military, with some support from the police) and the Sabaot Land Defence Force (SLDF).⁶⁹ Most abuses occurred during the joint military and police operation against the SLDF, known as Operation Okoa Maisha, in 2008. The Kenyan Government claims that the Operation was led by the Kenya Police, but witnesses report that the operations were primarily led by the military.⁷⁰ Security forces detained 3,000 men and boys, and tortured thousands. Over 1,400 torture-related injuries were recorded, a 'conservative estimate' of 200 deaths and dozens of rapes, and as at October 2011 more than 300 men remained missing (the majority of whom were taken into military custody).⁷¹ Neither the military, the police nor the Kenyan Government have undertaken independent and credible investigations into the human rights abuses in Mt. Elgon.⁷²

Security operations in 2009 and 2011 in the Mandera region against Al-Shabaab militants similarly resulted in accusations of torture and rape against security officers (both police and military officers). These operations adopted a strategy of mass arbitrary detention in military camps, torture and collective punishment.⁷³ As with the Mt. Elgon operation, there have been no independent or credible investigations into the allegations of human rights abuses.

Women are also reported to be at a particular risk of rape by police officers during special police operations, for example, security operations in slum areas and informal settlements.⁷⁴

A5I calls on the Kenyan Government to take immediate steps to ensure independent and credible investigations into the human rights abuses in Mt. Elgon and the Mandera Region.

List of Issues 33 (complaints processes)

A5I welcomes the Government's improvements to the P3 form. However, we remain concerned that, the procedural steps that victims are required to take to lodge a P3 form are onerous and create a barrier to effective complaints and investigations into torture. As the Committee is aware, the Form must be completed by a medical practitioner, who documents the degree of injury sustained. However, there are costs associated with access to a medical examination for this purpose, which impacts on the ability of those without financial means of making a complaint of torture.⁷⁵

A5I welcomes the introduction of a new system of internal accountability for the police pursuant to the National Police Services Act. At the time of writing, there was no information about the effectiveness of this new system, and we encourage the Kenyan Government to ensure that IPOA has sufficient human and financial resources to effectively fulfil its mandate.

In relation to complaints in prisons, prisoners and their legal representatives can make complaints about torture to any prison officer, District Commission, the KNCHR, a visiting judge, or by filing a petition with the courts.⁷⁶ Internal complaints mechanisms in the prison system are problematic on a number of levels; including that complaints are generally made to the same institution implicated in torture and other ill treatment, there is no transparency in the internal procedures, and no credible data on disciplinary action (if any) taken against officials in relation to complaints of torture. A5I calls on the Kenyan Government to take legislative, policy and administrative steps to strengthen the internal accountability and complaints mechanisms in the Kenya Prisons System, to ratify OPCAT, and establish an NPM with a mandate to undertake all duties envisaged by OPCAT.

11. Article 14

List of Issues 37 (redress)

As torture is not a crime under Kenyan criminal law, there is no specific right to seek redress torture, including compensation, guarantees of non-repetition, and access rehabilitation services. Victims of torture have the right to seek an order for compensation (amongst other remedies) from the courts for a breach of their Constitutional rights, which includes freedom from torture and ill-treatment,⁷⁷ file a criminal case or institute, or a civil suit for compensation.⁷⁸

While acknowledging the list of successful compensation cases provided by the Kenyan Government in its response to the Committee's List of Issues, we remain concerned that for the vast majority of Kenyans, the use of the civil law system to obtain compensation is costly and subject to significant barriers and delays, which limits its effectiveness as an option for redress for victims of torture.⁷⁹ Moreover, civil claims are focussed on monetary compensation and fails to address the other aspects of redress as outlined in CAT General Comment 3. There are also challenges associated with pursuing a criminal case, as it is often the same agencies against which accusations of torture are made who are responsible for investigating allegations of torture.

If passed in its current form, the Prevention of Torture Bill establishes a National Fund for Victims of Torture, and makes provisions for support and protections of victims, restitution, civil action and medical treatment/counselling for victims. Accordingly, A5I calls on the Kenyan Government to support the passage into law of the Prevention of Torture Bill, and to consult with relevant stakeholders, including the KNCHR and civil society, on the development of regulations and budget lines for the National Fund for Victims of Torture.

12. Article 15

List of Issues 38 (evidence obtained by torture)

Kenyan law provides suspects with a range of procedural rights to safeguard against torture for the purposes of obtaining a confession or other evidence, as set out in paragraph 120 – 122 of the Kenyan Government's response to the Committee's List of Issues, including the treatment of evidence obtained by torture in the Prevention of Torture Bill 2011.

However, despite these safeguards, accusations of torture against the police for the purpose of extracting confessions persist, and impunity for past offences has not been addressed.⁸⁰ Given the barriers to accessing justice discussed elsewhere in this submission, there is limited judicial recourse available to prisoners whose convictions are based on confession

A5I calls on the Kenyan Government to support the passage into law of the Prevention of Torture Bill 2011, and to provide training to law enforcement personnel to support best practice investigation and evidence gathering techniques, with a view to reducing the reliance on confession-based convictions.

13. Other Issues

List of Issues 40 (death penalty)

The 2010 Constitution maintained the death penalty which is, pursuant to the Penal Code, mandatory for treason, murder, robbery with violence, and attempted robbery with violence. Children and pregnant women are exempt from the imposition of the death penalty.⁸¹ The method of execution is hanging.⁸²

A5I notes that the death penalty applies to offences which are not in the category of 'most serious crimes' within the meaning of the International Covenant on Civil and Political Rights (*ICCPR*).⁸³ The imposition of the death penalty for the offence of robbery with violence is especially concerning, as the elements of the crime

have resulted in a low evidentiary threshold for conviction.⁸⁴ It is also concerning that there is no guarantee of government-sponsored legal aid for those charged with robbery with violence, and only limited legal aid for those charged with murder.

There are reports that despite the prohibition on sentencing children to death, magistrates have nonetheless imposed death sentences on children under 16 years, which were later overturned on appeal.⁸⁵

Since 1987, there has been a *de facto* moratorium on carrying out executions, and at the time of writing, the former President had commuted 3,953 death sentences to life imprisonment.⁸⁶ The Government has stated that while it is committed to the abolition of the death penalty, community consultations during the 2010 Constitutional review process revealed widespread public support for its retention.⁸⁷

The superior courts of Kenya have recently taken an activist approach in relation to the death penalty, with the decision in *Godfrey Ngotho v Republic* [2010] finding that the mandatory application of the death penalty for the crime of murder is unconstitutional on the grounds that it is 'antithetical to the constitutional provisions on the protection against inhuman or degrading treatment or punishment and fair trial'.⁸⁸ However, there are reports that despite the current moratorium, lower courts have continued to impose the death penalty.⁸⁹

The Government has acknowledged that 'extended stay in death row causes undue mental anguish and suffering, psychological trauma, anxiety and constitutes inhuman treatment'.⁹⁰

A5I calls on the Kenyan Government to take immediate steps to abolish the death penalty, and to take the steps previously recommended by the Committee.

List of Issues 42 (OPCAT)

A5I welcomes the Government's reply to the issues raised in paragraph 42 of the List of Issues, and urges the Government to take immediate steps to pass into law the Ratification of Treaties Bill, and to sign, ratify and implement OPCAT.

¹ APCOF is a network of African policing oversight practitioners from state and non-state institutions. It promotes democratic policing through strengthening civilian oversight over the police in Africa. APCOF undertakes research, provides technical support to state and non-state actors, including civil society organisations, the police, and new and emerging oversight bodies in Africa. See <http://www.apcof.org.za>

² A5I works for the prevention and eradication of torture in Africa through the development of practice-aimed resources. A5I focuses on six post-conflict African countries, namely Burundi, Kenya, Mozambique, Rwanda, South Africa and Uganda. It is a partnership between the Gender, Health and Justice Research Unit (University of Cape Town), the Human Rights Implementation Centre (University of Bristol), Civil Society Prison Reform Initiative (University of the Western Cape), and APCOF. See <http://www.a5i.org>. A5I is being funded with the financial assistance of the European Union. The contents of this report are the sole responsibility of A5I and can under no circumstances be regarded as reflecting the position of the European Union.

³ CAT/C/KEN/Q/2.

⁴ CAT/C/KEN/2.

⁵ See for example, CAT (2008), *Concluding Observations - Kenya*, CAT/C/KEN/CO/1, [23]; and Open Society Justice Initiative (2011), *Committee on the Elimination of Racial Discrimination: Submission for Review of Kenya*, [22].

⁶ Independent Medico Legal Unit, *Rights Journal: Facing up to Torture in Kenya*, July 2011, available at <http://www.imlu.org> (accessed on 12 February 2013). See also, Human Rights Watch (2009), 'Bring Your Gun or You'll Die': *Torture, Rape, and Other Serious Human Rights Violations by Kenyan Security Forces in the Mendera Triangle*, 4 and 19; Aggrey Mutambo, 'Kenya: Military Accused of Torture in Mendera', *Daily Nation*, 7 December 2011; and Xan Rice, 'MoD threatens to halt training of Kenyan military over claims of rights abuses', *The Guardian*, 29 July 2008.

⁷ See: Independent Medico Legal Unit (2008), *Double Tragedy: Report on Medico-Legal Documentation and Torture and Related Violations in Mt Elgon 'Operation Okoa Maisah'*, 5; Human Rights Watch (2008), 'All the Men Have Gone': *War Crimes in Kenya's Mt. Elgon Conflict*, 32; HRC (2009), A/HRC/11/2/Add.6, [52]-[53]; Human Rights Watch (2011), 'Kenya: Account for 'Disappeared' in Insurgency Crackdown', 27 October 2011, <http://www.hrw.org/news/2011/10/27/kenya-account-disappeared-insurgency-crackdown> (accessed on 12 February 2012); 'Kenyan children tell of abductions, torture', *MSNBC*, 24 June 2008; and Robert Wanyoni, 'Kenyan Army withdraws from Mt Elgon amid torture claims', *The Standard*, 1 September 2008.

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- ¹³ See: Independent Medico Legal Unit (2008), *Double Tragedy: Report on Medico-Legal Documentation and Torture and Related Violations in Mt Elgon 'Operation Okoa Maisah'*; Human Rights Watch (2011), *'Hold Your Hearts': Waiting for Justice in Kenya's Mt. Elgon Region*, 42; and A/HRC/11/2/Add.6, [52]-[53]. See also, Track Impunity Always, *Report to the Human Rights Committee in its Consideration of Kenya's third periodic report*, http://www.ccrcentre.org/doc/HRC/Kenya/3rdReport/NGO%20Information/Kenya_103_TRIAL_Summary_en.pdf (accessed on 1 February 2012).
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- ¹⁵ *Ibid.*
- ¹⁶ CRC (2007), *State Party Report: Kenya*, CRC/C/KEN/2, [159].
- ¹⁷ CRC (2007), *State Party Report: Kenya*, CRC/C/KEN/2, [3].
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- ¹⁹ See, for example, Justice Jackton B. Ojwang, *The Independence of the Judiciary in Kenya*, *Kenya Law Review*, Vol. II [2008-2010], 10; Human Rights Council, *UPR Compilation of Office of the High Commissioner of Human Rights: Kenya*, A/HRC/WG.6/8/KEN/2, [34]; Human Rights Council, *State UPR Report: Kenya*, A/HRC/WG.6/KEN/1, [57]; Human Rights Committee, *Concluding Observations: Kenya*, CCPR/CO/83/KEN, [20], [20]; Human Rights Committee, *State Party Report: Kenya*, CCPR/C/KEN/2004/2, [132]; Human Rights Committee, *Kenya comments on Concluding Observations*, CCPR/C/KEN/CO/2/Add.1, [44]; Human Rights Council, *Report of the Special Rapporteur on extrajudicial, summary and arbitrary executions: Mission to Kenya*, A/HRC/11/2/Add.6, [23], [29], [31], [95].
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- ²⁶ CAT (2009), *Concluding Observations - Kenya*, CAT/C/KEN/CO/1, [13].
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- ²⁸ World Organisation Against Torture (2008), *Addressing the economic, social and cultural root causes of Torture in Kenya: An alternative report to the Committee against Torture*, [16].
- ²⁹ HRC (2010), *UPR Summary prepared by OHCHR - Kenya*, A/HRC/WG.6/8/KEN/3, [70].
- ³⁰ Independent Medico-Legal Unit (2007), *Understanding Torture in Kenya: An Empirical Assessment*; and HRC (2010), *UPR Summary prepared by OHCHR - Kenya*, A/HRC/WG.6/8/KEN/3, [70].
- ³¹ GJLOS (2007), *Mid-Term Review of GJLOS Reform Programme: Consultants' Final Report*, 17 January 2007, 58 – 59, http://www.gilos.go.ke/Completed_Final_Report%20%20MTR_GJLOS_07.pdf, (accessed on 17 May 2011).
- ³² The use of torture in post-independence Kenya has been thoroughly documented by the Kenya Human Rights Commission (an NGO, not to be confused with the KNCHR) in its publication: KHRC (2009), *Surviving After Torture: A Case Digest on the Struggle for Justice by Torture Survivors in Kenya*, <http://khrc.or.ke> (accessed on 30 November 2011).
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- ³⁴ Independent Medico-Legal Unit (2008), *Alternative Report to the United Nations Committee Against Torture, 41st Session – 3rd to 21st November 2008*, [1] – [2].
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- ⁴⁶ Human Rights Watch (2008), *'Why Am I Still Here?': The 2007 Horn of Africa Renditions and the Fate of Those Still Missing*, 10.
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- ⁵⁹ CAT (2009), *Concluding Observations - Kenya*, CAT/C/KEN/CO/1, [13].
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