

CRIMINALISATION

of rural-based human rights defenders
Impact and counterstrategies

KENYA



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Impact and counterstrategies*



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{ Acronyms

ACHPR	African Commission of People and Human Rights
AP	Administration Police
AU	African Union
CBO	Community-Based Organisation
CID	Criminal Investigations Department
CORD	Coalition for Reform and Democracy
CSO	Civil Society Organisation
DCIO	Divisional Criminal Investigation Officer
FIDH	International Federation for Human Rights
GSU	General Service Unit
HRD	Human Rights Defender
IPOA	Independent Policing Oversight Authority
JR	Judicial Review
KHRC	Kenya Human Rights Commission
KNCHR	Kenya National Commission of Human Rights
LAPPSET	Lamu Port-South Sudan-Ethiopia-Transport
LSK	Law Society of Kenya
MCA	Member of County Assembly
MRF	Malindi Rights Forum
MUHURI	Muslim Human Rights Institute
NARC	National Rainbow Coalition
NCHRD-K	National Coalition of Human Rights Defenders – Kenya
NGLHRC	National Gay and Lesbian Human Rights Commission
NGO	Non-Governmental Organisation
NIB	National Irrigation Board
NYS	National Youth Service
OCS	Officer Commanding Station
PBO Act	Public Benefit Organisations Act
TEA	Transgender Education and Advocacy
UN	United Nations
UPR	Universal Periodic Review

{ Executive summary

Criminalisation of human rights defenders and their work in Kenya is taking many forms – bureaucratic, legal, negative profiling and judicial harassment. Criminalisation serves the overall objectives, amongst others, of silencing activists or causing them to desist from activism; discrediting them in front of their family, community, or support base; putting legal restrictions on their work; deterring others from entering social and political activity; and reinforcing the status quo of patriarchal power and gender discrimination and to block advances on progressive rights as articulated by the Constitution of Kenya (2010).

HRDs and CSOs have been criminalised for calling for accountability for the 2007/8 post-election violence as well as grand corruption. Delays in the commencement of the Public Benefit Organisations Act 2013 (PBO Act), which streamlines regulation of NGOs, has left the door open for administrative harassment of civil society organisations (CSOs). As a result, they continue to operate within a hostile environment, characterised by threats of arbitrary de-registration and asset freezing, continuous attacks, and smear campaigns.

Some groups of defenders have been more frequently the target of criminalisation by State and non-State actors, due to the issues they work on. In particular, these are journalists and defenders working on the issues of land and environmental rights, police brutality and extrajudicial killings, and corruption. These groups often face various forms of criminalisation, largely through repressive measures adopted by the police and other state agents. There have also been groups specifically targeted for their work on children and women's rights, defenders of sexual and reproductive rights, and LGBTIQ rights.

Within the Counties, the dynamics become localised and varied depending on location. Land issues appear to be the most prevalent issue causing HRDs to be targeted for criminalisation in many rural counties for example in Nakuru and Kirinyaga (Mwea) as well as Coastal Counties of Kilifi and Taita Taveta. Environmental HRDs have also been major targets in areas selected as sites for major government projects as well as areas with multinational extractive companies. In Malindi along the Coast, defenders working on environmental issues allege that salt companies collude with police to arrest and take them to court on fabricated charges when they speak out against environment degradation and exploitation of workers. Similar cases are reported in agribusiness farms and ranches in Thika and Laikipia where the police are said to arrest and charge defenders for protesting agitating alleged unfair land distribution and access in the County.

Due to criminalisation of their work, some HRDs reported being ex-communicated by the church, the community, their families and their friends.¹ Sometimes, their social support system becomes almost non-existent and they become psychologically affected. Since they do not have enough resources or financial assistance for them to get psychiatric assistance, some of HRDs are unable to handle the pressure and end up having mental health issues.² Lack of adequate support and increased criminalisation of HRDs will eventually lead to them withdrawing from human rights work, which eventually impacts on the whole community and allows the number of aggressors to keep growing. Other HRDs will be demoralised and lose the trust of the community in helping them stand up against atrocities. Despite this situation, rural based HRDs and those in Nairobi's informal settlements are employing different counterstrategies to fight and prevent criminalisation of their work. These strategies as discussed in this report should be actively supported by key stakeholders.

¹ Interview with HRD based in Nairobi informal settlements, 30 November 2016.

² FGD interview with men in Nairobi informal settlements, 8 December 2016.

Recommendations

To the Kenyan authorities

- Enact policies and laws that provide an environment for defenders to conduct their work freely and in a safe and enabling environment.
- Amend or repeal all laws that are being used to criminalise human rights work since they contravene its international and regional obligations for example forcible detainer.
- Gazette and operationalize PBO Act 2013 which provides an enabling environment for NGOs to collaborate with the government on mutual basis. On operationalisation appoint/employ qualified, impartial individuals to the PBO Authority.
- Cease making statements that criminalise human rights defenders. This includes among others calling them “foreign agents.”
- Investigate and prosecute all reported cases of human rights defenders being threatened or actually harmed due to their work.

To the diplomatic missions in Kenya, international stakeholders and protection regimes with a mandate in African countries

- Take action to express concern at actions of criminalisation directed against HRDs, paying particular attention to individuals who have already been victims of the phenomenon or who are at risk of being so.
- Monitor cases of criminalisation by taking actions that might include:
- Observing trials where HRDs are accused of crimes.
- Visiting the places of detention where victims of criminalisation have been sent following arrest or for preventive or definitive detention.
- Visiting the areas in which HRDs are being criminalised, or run the risk of being so, in particular far-flung rural areas.
- Offer, or facilitate, support to family members of victims of criminalisation.

To national, local and international CSOs

- Continue engaging with the State to ensure they do not neglect their responsibility to protect HRDs.
- Quickly adapt their strategies to tackle evolving legal and policy measures that seek to criminalise human rights work.
- National organisations offering protection to HRDs should work closely and collaboratively with the rural CSOs to design flexible, adaptable, and specifically tailored protection mechanisms.
- Urban and rural based CSOs should form or enhance stronger solidarity networks to fight criminalisation of human rights defenders.
- Continue adopting and utilising strategies both at the national and county levels to fight criminalisation of HRDs.
- Make psychosocial assistance as a priority within their activities. A big impact of criminalisation of defenders happens mentally and if not attended to, can not only affect the HRD but also the family.
- Design more programs that seek to specifically address criminalisation of women and other minorities including LGBTIQ as special categories of defenders.

To donors

- Design projects specifically targeting rural based CSOs, who mostly might not have technical capacity to compete with national organisations for funding.
- Fighting criminalisation takes time and lots of resources. Donors should support HRDs over longer funding cycles to ensure their interventions are long lasting. This includes maintaining funding for CSOs and NGOs that might become victims of campaigns of stigmatisation and defamation, providing emergency funds to help cover the financial costs that may be incurred by HRDs as a result of criminalisation, as well as cases in which local laws impose restrictions on accessing funding.
- Hold consistent consultations including with rural CSOs with an aim of informing joint interventions and priority setting.
- Offer, or facilitate, support to family members of victims of criminalisation.

{ Introduction

Criminalisation of defenders and their work in Kenya has been an issue of great concern in recent years. Reports by the media and civil society organisations has highlighted instances where defenders are being subjected to harassment, intimidation, trumped up criminal charges, and negative profiling aimed at paralysing, intimidating and delegitimising their activities. Some of the defenders have wrongfully been denied rights to freedom of association, expression and peaceful assembly. Licences of human rights NGOs have been arbitrarily cancelled, bank accounts seized and their right to access funds violated. Further, there has been attempts to pass legislation that seeks to curtail the activities of HRDs through executive control and regulation of public benefit organisations.

As this report attests, criminalisation of human rights defenders in Kenya has increased since 2013, following the entry of the Jubilee government and President Uhuru Kenyatta into power.³ This is largely due to their role in monitoring, documenting and supporting the ICC process. In a strategy to win the 2013 elections, the Jubilee party had formulated and recast the ICC process as a Western tool that only targets African leaders. They further argued that those supporting the process, largely human rights defenders, were unpatriotic and agents of foreign powers. Others labelled CSOs, members of “evil society.”⁴

These statements continue to be made by government officials, and are often repeated, with the purpose of delegitimising HRDs and CSOs work. The unfortunate part is that this is gaining traction, affecting and stigmatising human rights defenders. Attacks and negative profiling of HRDs is becoming normalised, with defenders sometimes being depicted as criminals and constantly asked to justify their work. This puts a lot of psychological strain on the defenders and contributes to their stigmatisation as individuals and their work collectively. Finally, criminalisation has created a chilling effect on civil society as a whole and specifically within the communities or groups to which the defenders belong. This has led to some of the defenders ceasing their HRD work and others going slow on critical issues.

This report analyses criminalisation as the use of “legal frameworks, strategies and political and legal actions with the intention of treating [the defence, promotion and protection of human rights] as illegitimate and illegal.”⁵ Its ultimate aim is to attack HRDs and/or impede their work. The process of criminalisation involves an initial level - linked to the legal framework - known as primary criminalisation. The secondary criminalisation involves “the organs of control - judges, the police, etc. in selecting which illegal acts (violations of criminal laws) should be the subject of criminal prosecution and which individuals should be criminalised.”⁶ Hence, criminalisation of HRDs and their work starts from the passage of laws that directly target them and their work, making them “criminal” in nature. After the laws are passed and assented, the second phase in the criminalisation of HRDs occurs with the implementation of concrete actions by the institutions and when punishment is carried out. This

³ FIDH, and KHRC, (April 2014), ‘Kenya one year in office for Uhuru Kenyatta and William Ruto’.

⁴ Kenyans for Peace with Truth and Justice, The Kenyan Government wants you to spare a little hate for Civil Society. Available at: - <http://kptj.africog.org/the-kenyan-government-wants-you-to-spare-a-little-hate-for-civil-society/> on 18 February 2017.

⁵ Echeverría, J. (2012). ‘Criminalización de la protesta social’, Comisión Internacional de Juristas (CIJ). p.3. quoted in Protection International, *Criminalisation of Human Rights Defenders: categorization of the problem and measures in response*, PI, 2015. [https://c.ymcdn.com/sites/www.wingsweb.org/resource/collection/3F0EC9A8-2934-454A-A4AA63DA30CA30A5/Protection International Criminalisation PI English WebReady PDF.pdf](https://c.ymcdn.com/sites/www.wingsweb.org/resource/collection/3F0EC9A8-2934-454A-A4AA63DA30CA30A5/Protection%20International%20Criminalisation%20PI%20English%20WebReady%20PDF.pdf)

⁶ Pavarini, M. (2002). ‘Control y dominación: teorías criminológicas burguesas y proyecto hegemónico’. Siglo XXI Editores. Buenos Aires. p.147 quoted in Protection International, *Criminalisation of Human Rights Defenders: categorization of the problem and measures in response*, PI, 2015, [https://c.ymcdn.com/sites/www.wingsweb.org/resource/collection/3F0EC9A8-2934-454A-A4AA63DA30CA30A5/Protection International Criminalisation PI English WebReady PDF.pdf](https://c.ymcdn.com/sites/www.wingsweb.org/resource/collection/3F0EC9A8-2934-454A-A4AA63DA30CA30A5/Protection%20International%20Criminalisation%20PI%20English%20WebReady%20PDF.pdf)

process is conditioned by the selectiveness of a given criminal justice system and by other variables including organisational culture, levels of professionalism, the independence of officials and the like.⁷ As the cases highlighted in this report attest, these laws, policies and practices used to criminalise HRDs contradict not only the Constitution of Kenya (2010) but also the human rights instruments which Kenya has signed and ratified seeking to protect freedom of expression, assembly and association. Public interest cases that have been lodged challenging the criminalisation aspects have attested to this.

This report analyses and discusses criminalisation of human rights defenders in the rural areas and Nairobi's informal settlements. It seeks to:

- 1) Identify and analyse some of the criminalisation strategies being used by aggressors;
- 2) Understand the impact (political, financial, and well-being) on the targeted HRDs, their families and their CBOs; and
- 3) Identify some counterstrategies being used to fight and prevent criminalisation of HRDs.

A total of 45 people were interviewed for this report – 16 women; 27 men, 1 LGBTI HRD and 1 HRD living with disability from Nakuru, Eldoret, Mwea, Molo, Taita Taveta, Kilifi and Nairobi. Most of the rural HRDs interviewed are mostly organised into community-based organisations (CBOs) and face important challenges as they engage with state actors, investors and businesses who (independently or in collusion with one another) violate the rights of entire communities in pursuit of narrow economic and political interests. These HRDs rarely have access to the existing protection mechanisms and are thus forced to draw resources from their families, social, or community relationships and networks, and on informal knowledge systems, among other things, to protect themselves.

To begin with, the report discusses the general operating environment for HRDs in Kenya before delving into how criminalisation is taking place and then discusses its impact on the HRDs. Before making recommendations, this report presents the strategies, which HRDs are using to protect themselves. It is hoped that the contents of this report will be useful for informing Kenyan authorities on the need to stop criminalising human rights work and defenders. It also seeks to inform key stakeholders, including donors and HRDs, on the different counterstrategies and recommendations to better protect rural-based HRDs and CSOs against criminalisation.

⁷. Ramírez, L.R.G. 'Criminalización de los conflictos agrarios en Guatemala' Revista KAS Análisis político. Seguridad y Justicia: Pilares de la Democracia. Vol. 5. p.138 quoted in [https://c.ycdn.com/sites/www.wingsweb.org/resource/collection/3F0EC9A8-2934-454A-A4AA63DA30CA30A5/Protection International Criminalisation PI English WebReady PDF.pdf](https://c.ycdn.com/sites/www.wingsweb.org/resource/collection/3F0EC9A8-2934-454A-A4AA63DA30CA30A5/Protection%20International%20Criminalisation%20PI%20English%20WebReady%20PDF.pdf)

Operating Environment for human rights defenders in Kenya

Tension and sometimes contradiction between requirements of the Constitution (2010) to uphold and protect human rights, old laws and the lack of political interest and will to protect HRDs are shaping the working environment for HRDs in Kenya. According to many defenders interviewed for this report, the State neither supports nor appreciates their work, and is trying to roll back human rights gains made owing to the promulgation of the 2010 Constitution.⁸

The 2010 Constitution reduced Executive powers, which had been enjoyed by the first two post-independence governments of President Jomo Kenyatta and Daniel Moi. Regimes of these two Presidents were characterised by authoritarianism, tribalism, nepotism, misappropriation of public funds, illegal land transfers and gross violations of human rights.⁹ However, this was met with resistance by HRDs, who called for constitutionalism and respect of rights but the government responded with detaining the leaders and some died in mysterious circumstances. Others went in to exile.

The situation became dire during the 24-year regime of President Moi, where political competition was stifled, especially following the 1982 attempted coup. It was during this regime, especially in the late 1980s and early 90s that the clamour for democracy and multi-partism, the criminalisation of human rights work and defenders became part of the official government narrative. Any human rights defenders or people working on civil and political rights, calling for respect of the Constitution were routinely rounded up, sometimes tortured, and arbitrarily arrested and detained for long periods without the right to due process.¹⁰ This was accompanied by direct attacks on Civil society organisations like the Kenya Human Rights Commission and Kituo Cha Sheria, which were attacked by goons sympathetic to the State; Centre for Law and Research International (CLARION) was arbitrarily closed for publishing material that allegedly “damaged credibility of the government.”¹¹

Independent press and magazines like the Finance, Nairobi Law Monthly, and Society which encouraged debate on important governance issues were often confiscated and the authors harassed, jailed, humiliated, beaten and even tortured. In other cases, the publishing offices were attacked and burned down.¹² The judiciary justified these oppressive practices as can be seen through Justice Dugdale’s ruling that the Bill of rights was unenforceable.¹³

⁸ FGD interviews with defenders from Nakuru, Eldoret, Mwea, Molo, Taita Taveta, Kilifi and Nairobi in November/December 2016.

⁹ Report of the Task Force on the Establishment of a Truth, Justice and Reconciliation Commission chaired by Prof Makau Mutua, 26 August 2003, 21.

¹⁰ Chege, M. (2008). ‘Kenya: Back From the Brink?’ *Journal of Democracy*. Vol. 9, No. 4, pages 125-139, 127-128;

Anderson, D. (2005), ‘Yours in struggle for majimbo: Nationalism and party politics of decolonisation in Kenya 1954-64, Vol 40 *Journal of Contemporary History* Issue 3, pages 547-564, 551.

¹¹ Kaberia, T. “Uhuru’s threat to NGOs is reminiscent of Moi’s crackdown in 1995,” <https://www.standardmedia.co.ke/ureport/story/2000139614/uhuru-s-threat-to-ngos-is-reminiscent-of-moi-s-crackdown-in-1995>, October 27, 2014.

¹² Nyamora, P.M (2007). ‘The role of alternative press in mobilization for political change in Kenya 1982-1992: Society magazine as a case study,’ A thesis submitted in partial fulfillment of the requirements for the degree of Master of Arts School of Mass Communications College of Arts and Sciences University of South Florida.

¹³ Hornsby, C. (2011). *Kenya: A History Since Independence*, I.B. Taurus 412

Despite this, there remained a brave group of defenders led by church leaders, trade unionists, politicians, and academia who continued agitating for reforms and good governance and were part of the open political landscape.¹⁴ In the face of attacks and criminalisation of their work, they received international support and funding, as well as other protection mechanisms including legal support, safe houses, relocation and asylum. Donors especially played a key role in protecting human rights defenders, opposition leaders and activists against state abuses. They not only mobilised support for the protection and promotion of human rights, but foreign Embassies also sometimes became a point for refuge for those running away and seeking asylum or temporary refuge.¹⁵

In the 2002 general elections, President Daniel Arap Moi who had ruled Kenya for 24 years (1978-2002) stepped down and the opposition National Alliance for Coalition and Reforms (NARC) won the elections.¹⁶ This political transition represented an important opportunity for Kenya to improve human rights and good governance since the new government was elected on a platform of change, good governance and accountability. There was renewed hope for Kenya's human rights movement since former human rights leaders and defenders were elected to parliament after the 2002 elections and others were appointed to key government positions under NARC.¹⁷ However, this optimism was dented by the outbreak of 2007/8 post-election violence, whose aftermath has had a deep bearing on the criminalisation of human rights work.

As has been extensively recorded elsewhere, the elections were disputed and violence broke out in various parts of the country, which led to the deaths of over 1,300 people and displacement of 600,000 others.¹⁸ In order to hold those responsible for organising and carrying out the post-election violence to account, the Coalition government of President Mwai Kibaki and Prime Minister Raila Odinga formed Commission of Inquiry into the Post-Election Violence (popularly known as Waki Commission) to investigate the 2007/8 violence.

In its final report, the Commission recommended the formation of a Special Tribunal for Kenya that was to prosecute those bearing the greatest responsibility for the atrocities committed in 2007/8. However, the Commission also recommended that should the tribunal not be formed or should it not function independently, a secret envelope containing names of those who bear the greatest responsibility to the violence would be forwarded to ICC for prosecution. The government was unable to pass legislation forming the Special Tribunal and eventually, the secret envelope containing names of suspects was sent to the ICC Prosecutor on July 2009. On 31 March 2010, the Pre-Trial Chamber II of the ICC approved the Prosecutor's request to investigate the Kenya situation and on 15 December 2010. The ICC Prosecutor named six people: then Deputy Prime Minister Uhuru Kenyatta, Industrialisation Minister Henry Kosgey, Education Minister William Ruto, Secretary to the Cabinet Francis Muthaura, radio executive Joshua Arap Sang, and former police commissioner Mohammed Hussein Ali as suspected perpetrators for possible prosecution.¹⁹

The realisation that senior and influential politicians from the two main parties were the main suspects and therefore the focus of the ICC investigation had several consequences. First, it heightened threats against witnesses, human rights defenders and organisations supporting them. Secondly, it reinforced

¹⁴ Mutua, M. (2008). 'Kenya's Quest for Democracy: Taming Leviathan'. Boulder, 82.

¹⁵ Brown, Stephen. "Foreign Aid and Democracy Promotion: Lessons from Africa." *European Journal of Development Research* 17, no. 2 (2005): 179–198; Brown, Stephen. "Authoritarian Leaders and Multiparty Elections in Africa: How Foreign Donors Help to Keep Kenya's Daniel arap Moi in Power." *Third World Quarterly* 22, no. 5 (2001): 725–739

¹⁶ Moi was constitutionally required to step down in 2002 after political negotiations in 1992 imposed term limits.

¹⁷ Biau, C. and Biau, J. (2008). 'Governmental Reform in Developing Countries: External Conditionality versus Peer Pressure. The Case of Kenya, Reinvention' *Journal of Undergraduate Research*, Volume 1, Issue 1.

¹⁸ Government of Kenya. (2008). Report of the Commission of Inquiry into Post-Election Violence (The Waki Report). Nairobi: GOK.

¹⁹ All the cases were to later collapse largely due to witness interference and lack of government cooperation with the Court.

political realignments to secure the interests and political careers of senior politicians who had been named by the ICC. Anything deemed a threat to these interests and alliances, including human rights defenders, was cast as an enemy of the country and of peace. Kenyatta and Ruto opportunistically formed an alliance and used the ICC cases to mobilise and rally their supporters into winning the 2013 elections.²⁰

As part of a broader narrative that re-cast the ICC as a tool of Western oppression, they started portraying human rights defenders as unpatriotic and agents of foreign powers for supporting the Court. Witnesses and HRDs were publicly verified and outed, putting them at the path of high personal risk, especially after Kenyatta and Ruto assumed power after winning the 2013 elections. As later discussed, the negative profiling of HRDs has found resonance not only in government, but also within the society, creating stigmatisation of their work and has acted as a means to justify criminalisation and attacks. Despite this, civil society organisations and HRDs have continued to publicly support the ICC process as the only remaining accountability avenue for PEV.

The government's lack of political will and interest in protecting HRDs is reflected in the international human rights arena. For example, on 25 November 2015 it opposed the passage of UN resolution entitled "Recognising the role of human rights defenders and the need for their protection."²¹ This resolution called for accountability for attacks on human rights defenders (including attacks on their family members) and urged states to release defenders who have been arbitrarily detained for exercising their fundamental rights to freedom of expression, peaceful assembly and association.²²

Kenya, as part of the African Group, had tabled 39 hostile amendments to the text. Those amendments sought to remove references to the legitimacy of the work of human rights defenders, and delete or weaken language regarding the need for their protection. The amendments also sought to delete whole paragraphs related to the need to combat impunity for violations and abuses against defenders and the need to ensure adequate procedural safeguards in judicial proceedings. The African Group's suggested amendments also proposed deleting a call for the release of defenders arbitrarily detained or imprisoned in violation of international human rights law for exercising their human rights and fundamental freedoms.²³ Concisely, the African Group opposed wording that condemned violence against HRDs, and provisions against criminalisation of their work. While all 39 proposed amendments were eventually withdrawn, unfortunately the text of the responsibility of business enterprises to respect the rights of HRDs to life, liberty and security of person was dropped in the final resolution.

By voting against the resolution, Kenya contradicted the objects and purposes of the Constitution (2010). The Constitution, especially the Bill of Rights, has undoubtedly expanded the civic space and ensured more protection of HRDs. It recognises the need to protect human rights and fundamental freedoms, as essential to preserve the dignity of individuals and communities, and to promote social justice and the realisation of the potential of all human beings. While the legal framework and reforms brought by the Constitution provide HRDs with better tools and avenues to uphold human rights in Kenya, this is not matched with reality. HRDs, especially those working in the rural areas and informal settlements, interviewed for this report raised a variety of issues related to criminalisation of their work, which has created a difficult working environment for them.

²⁰ Mueller, S. (2014). 'Kenya and the International Criminal Court (ICC): politics, the election and the law', Vol. 8 *Journal of Eastern African Studies* Issue 1, 25-42;

Lynch, G. (2014). 'Electing the 'alliance of the accused: the success of the Jubilee Alliance in Kenya's Rift Valley', Vol 8 *Journal of Eastern African Studies* Issue 1, 93-114.

²¹ See full resolution at http://www.un.org/ga/search/view_doc.asp?symbol=A/C.3/70/L.46/Rev.1 ; China and Russia asked for the resolution to be put to a vote during which 117 countries said "yes" in the vote, while 14 states voted "no". Those that voted "no" include China, Russia, Syria, Burundi, Kenya, Myanmar, Nigeria, Saudi Arabia, Zimbabwe, North Korea, South Africa, Iran, Pakistan, and Sudan. Later, South Africa changed its position and now supports the resolution.

²² ISHR, "General Assembly adopts important resolution on human rights defenders in face of opposition from China and Russia,"- <http://www.ishr.ch/news/general-assembly-adopts-important-resolution-human-rights-defenders-face-opposition-china-and-russia>

²³ Ibid.

{ Common trends in criminalisation of individual human rights defenders and organisations

1. Legislation

The most egregious attempts at criminalisation of human rights work has been through legislation. Various laws including the NGO Coordination Act of 1990 (Act No. 19, Laws of Kenya), the Companies Act Cap 486 (for Companies Limited by Guarantee), Societies Act (CAP 108), Trustee Perpetual Succession Act (CAP 164), and Trustees Act (CAP 167) provide the registration of a diverse spectrum of the civil society organisations that do public benefit work. These presents multiple and overlapping, legal and regulatory regimes governing the CSOs leading to difficulties in monitoring their compliance and accountability.

Furthermore, these laws do not conform to the 2010 Constitution and have been used to arbitrarily target and criminalise civil society and HRDs. For example, the NGO Coordination Act gives the regulator for the sector, the NGO Coordination Board, excessive administrative powers that have been used to negatively affect HRD work thereby reducing civil society space.

The Board could refuse registration of an NGO if it is satisfied that its proposed activities or procedures are not “in the national interest,” an excuse that has been used to deny registration. While the Board may sometimes furnish the applicant with an explanation for the refusal of registration, it is not legally required to do so.²⁴ In addition, an NGO can be denied registration if the Registrar has “reasonable cause to believe” that the society has among its objects, or is likely to pursue or be used for, any unlawful purpose or any purpose prejudicial to or incompatible with the peace, welfare or good order in Kenya, or that the interests of peace, welfare or good order in Kenya would otherwise be likely to suffer prejudice by registration of the society.²⁵

These terms are vague and ambiguous, which invite arbitrary and subjective decision-making, leaving the NGO board with leeway of using them to limit the civic space. For example, the NGO Coordination Board refused to register the National Gay and Lesbian Human Rights Commission (NGLHRC), on the basis that homosexuality is criminalised in country.²⁶ This is despite Article 36 of the Constitution (2010) granting ‘every person’ the right to form an association ‘of any kind’ regardless of their gender or sexual orientation;

Second, the NGO Coordination Act is vague and ambiguous on a number of issues where wide discretion is given to the NGO Board and the Minister. For example, the certificate of registration for NGOs may contain such terms and conditions as the NGO Coordination Board may prescribe. There are no guidelines, however, to ensure that the Board uses this prescriptive power in a clear, objective and predictable manner.²⁷ Third, the NGO Coordination Act does not explicitly provide a fixed period within which the NGO Coordination Board must act on NGO registration

²⁴ ICNL, (2016). “Civic Freedom Monitor: Kenya,” <http://www.icnl.org/research/monitor/kenya.html> 10 December 2016;

²⁵ Ibid.

²⁶ Petition **NO 440 of 2013. Full ruling can be found at** <http://kenyalaw.org/caselaw/cases/view/108412/>

²⁷ Ibid.

applications. In practice, however, applications for NGO registration are often processed in or about 90 days.²⁸

In order to harmonise these laws to ensure they conform to Constitution (2010) and enhance general management of public benefits organisations, the government in 2013 undertook a sector wide consultative process, which led to the drafting and passage of the Public Benefits Organisations Act (2013). The Act was hailed by public benefit organisations as the beginning of a new era” in which relations between the Government and non-state actors should be characterised by mutual respect and a spirit of complementarity as opposed to suspicion.”²⁹

However, to date the Act has not been gazetted and has become a point of contention between the Government and CSOs. Without undertaking any public participation or consultation with CSOs, between 2013 and 2014, there were five attempts to amend the PBO Act. They included two separate sets of amendments under Miscellaneous Amendments Bills (November 2013 and June 2014) and a Memorandum containing 54 amendments (October 2014). Some sections of the PBO Act were, however, amended in the Security Amendment Bill 2014.³⁰ The most contentious issues surrounding the proposed amendments, which have been successfully thwarted by civil society, revolves around the issue of external funding to NGOs and regulation.

There have been proposals to cap foreign funding of NGOs to 15 per cent and that all funding should be channelled through the yet to be set up Government PBO Authority.³¹ This proposal was rejected overwhelmingly by MPs in November 2013.³² Some of the Members of Parliament mentioned the fact that they had benefited from the support and existence of the civil society in Kenya and they were not going to restrict the work of that important sector. Other Members of Parliament considered the economic importance of the civil society sector in Kenya. The funding proposals re-emerged in October 2014 coupled with the added suggestion that those organisations that receive more than 15 per cent could be classified as foreign agents.³³ However, it has not been brought back for passing by parliament.

The above provisions were highly criticised by local, regional and international HRDs and CSOs, which accused the government of attempting to use the amendments to take punitive action against certain NGOs due to their role in supporting the ICC cases. A group of U.N. Special Rapporteurs noted that this type of legislation is not unique to Kenya stating that the Bill is an evidence of a growing trend in Africa and elsewhere, whereby governments are trying to exert more control over independent

²⁸ Ibid.

²⁹ Churchill, S.(2015) “Self-regulation key to success of new NGO law,” June 28 2015,

<https://www.standardmedia.co.ke/article/2000086203/self-regulation-key-to-success-of-new-ngo-law>

³⁰ The only exception is the **PBO (Amendment) Bill, 2016, which has been tabled** by the MP for Ndhiwa Constituency, Hon. Agostinho Neto with the support of CSOs. The bill seeks to commence the PBO Act as well as amend the clause giving Cabinet Secretary of the Ministry of Devolution and Planning the discretion to decide when the PBO Act 2013 shall commence. The Bill went through the first and second reading on April 27, 2016 and August 11, 2016, respectively. It is set for the third reading, which is the last stage in the legislative process once parliament resumes in February 2017.

³¹ This is copycat regulation from the charities act in Ethiopia and Russia.

³² Kiplang’at, J. and Ngirachu, J. (2013) .“MPs throw out Bill targeting NGOs,” *Daily Nation*, 4 December 2013. - <http://mobile.nation.co.ke/news/MPs-throw-out-Bill-targeting-NGOs/-/1950946/2099062/-/format/xhtml/-/7ye4lv/-/index.html>

³³ Zirulnick, A. (2014). “Backlash to ICC trial? How Kenyan bill could clamp down on 'foreign influences'.” November 7, 2014.- <http://www.csmonitor.com/World/Africa/2014/1107/Backlash-to-ICC-trial-How-Kenyan-bill-could-clamp-down-on-foreign-influences>

groups using so-called 'NGO laws.'³⁴ "The amendments to the regulations of associations contained in the draft law could have profound consequences for civil society organisations in Kenya, including for those involved in human rights work, and could deter individuals from expressing dissenting views," the Former UN Special Rapporteur on the situation of human rights defenders, Margaret Sekaggya, stressed.³⁵

Simultaneously, the government successfully pushed two laws to control freedom of expression and the media. In 2013, the government passed the Kenya Information and Communication (Amendment) Bill and the Media Council Bill (2013),³⁶ both of which sought to provide the government with extensive powers over the media. Specifically, the Information and Communication Act, 2013, created a government-appointed Communications and Multimedia Appeals Tribunal with unfettered powers to impose penalties on media practitioners, including revocation of accreditation, seizure of property, and heavy fines of up to 500,000 Kenyan Shillings (EUR 4,460³⁷) on journalists, and up to 20 million Kenyan shillings (EUR 178,400) on media companies. The adoption of these two laws was preceded by instances of open and fierce criticisms from some State officials about the alleged partisanship or non-professionalism of journalists and media houses. Passing of these laws further criminalised freedom of expression and the media and has a chilling effect.

Other legal frameworks that have been used to criminalise HRDs include Kenya's Penal Code (2009), which criminalises consensual same sex practices among adults and, if found guilty, one is punishable by up to 14 years imprisonment (Sections 162 to 165). While few convictions have been carried out so far under this law,³⁸ it has been used to justify physical violence, harassment, arbitrary arrest and detention, stigmatisation and discrimination against LGBTI persons and those defending their rights. For instance, the High Court in Mombasa on 4 January 2017 ruled that anal examinations are a legitimate way of determining whether an accused has had homosexual sex and therefore justified anal testing of two men who had been accused of homosexuality.³⁹

Although Kenya has devolved certain functions to its 47 Counties, legislation and practices adopted and engaged by Central Government are replicated at the local level affecting rural HRDs. The replication has a greater effect at rural level due to the lack of support and understanding of the rights of individuals as per the constitution. Local authorities and politicians also act arbitrarily for example on March 2, 2016, Martha Wanjiru, a Nyeri County based blogger was released unconditionally from police custody after being held for allegedly insulting the Nyeri Governor's brother via Facebook.⁴⁰ Nevertheless, the prosecution could prefer charges against her if police launched a fresh probe.

³⁴ OHCHR (2013), "Kenya: Statute Law Bill poses grave threat to civil society and must be rejected – UN rights experts," December 3 2013. -

<http://newsarchive.ohchr.org/en/NewsEvents/Pages/DisplayNews.aspx?NewsID=14055&LangID=E#sthash.sl28zGv8.dpuf>

³⁵ *ibid.*

³⁶ The laws are available at:

http://kenyalaw.org/kl/fileadmin/pdfdownloads/AmendmentActs/2013/KenyaInformationandCommunications_Amendment_Act2013.pdf and <http://www.mediacouncil.or.ke/en/mck/index.php/publications/media-laws/viewdownload/9-media-laws/28-media-act-2013>

³⁷ Conversions at the rate of 1 EUR = Kshs. 112.11 as derived from 'The Money Converter'. <http://themoneyconverter.com/KES/EUR.aspx> on 05 January 2017.

³⁸ FIDH, and KHRC, (2014), 'Kenya one year in office for Uhuru Kenyatta and William Ruto'. <http://www.khrc.or.ke/mobile-publications/civil-political-rights/26-kenya-one-year-in-office-for-uhuru-kenyatta-and-william-ruto/file.html>

³⁹ Human Rights Watch (2016, June). Kenya: Court Upholds Forced Anal Exams. - <https://www.hrw.org/news/2016/06/16/kenya-court-upholds-forced-anal-exams> on 04 January 2017.

⁴⁰ "Nyeri blogger accused of insulting Governor's brother released, charges terminated," http://www.the-star.co.ke/news/2016/03/02/nyeri-blogger-accused-of-insulting-governors-brother-released-charges_c1305604

Wanjiru was taken to court over her claims in the social media post that the Governor's brother was misusing county government resources. She was charged with misuse of a telecommunication gadget and held at Nyeri Central police station.

While the expansive Bill of Rights provides for civil and political, as well as economic, social and cultural rights, we have recently seen numerous attempts at clawing back these rights through offensive legislation, key of which criminalizes human rights work and largely undermines freedom of expression, assembly and association. The legal recognition and protection of defenders is crucial to ensuring that they can work in a safe, supportive environment and be free from attacks, reprisals and unreasonable restrictions. It also contributes to the broader goals of upholding human rights, and promoting democracy, good government, sustainable development and respect for the rule of law.⁴¹

2. Bureaucratic targeting

The above legislative initiatives have been matched by repeated attempts to de-register NGOs and otherwise impede their work through bureaucratic measures. It is in the interests of the Government not to operationalise the PBO Act 2013 as currently is, since it loses control of regulating public benefit organisations, leaving the NGOs to self-regulate. The PBO Act proposes a regulatory authority, similar to the current NGO Coordination Board, and a PBO Federation to replace the NGO Council. The authority is largely appointed by the Cabinet Secretary, while the federation is the sector association. The federation will have representation on the authority and as self-regulation mechanism, is the most preferred by CSOs. However, if the law is operationalised, it means the NGO Coordination Board will lose the administrative powers it has of arbitrary sanctioning NGOs. These wide-ranging powers as we have been used to criminalise human rights work and rural based NGOs.

On 24 November 2016, the NGO Co-ordination Board was moved from the Ministry of Devolution and Planning to the Ministry of Interior and Coordination of Government.⁴² This reshuffle took place a week after the Cabinet Secretary in the Ministry of Devolution and Planning, Hon. Mwangi Kiunjuri had operationalised the Public Benefits Organisations Act 2013, something that CSOs had been pushing for many years. He had at the same time sent on compulsory leave the NGO Coordination Board Executive Director Fazul Mohamed, whom CSOs had accused of being allegedly behind attempts to criminalise human rights work using his office.⁴³

Moving the NGO Board to the Ministry of Interior was a big step in firmly criminalising CSOs in Kenya. All along the government had projected a shadow of suspicion and mistrust over NGOs but placing their regulator under the Security docket firmly positioned CSOs in the path of surveillance, equating them to criminals. The effect of this was that some of the Governors in the Counties started calling for HRDs and CSOs to be vetted by security agencies.⁴⁴ This will in the long run likely accelerate criminalisation of human rights work.

⁴¹ ISHR, "Model law for the recognition and protection of human rights defenders,"

https://www.ishr.ch/sites/default/files/documents/model_law_full_digital_updated_15june2016.pdf

⁴² Olick, F. (2016). "Uhuru removes NGOs from Kiunjuri, gives to Nkaissery amid civil society protests," The Star, December 13, 2016.

⁴³Wesangula D (2017, January) "Fazul: The ghost buster exorcising Jubilee's enemies"

Available at: <https://www.standardmedia.co.ke/article/2000229110/fazul-the-ghost-buster-exorcising-jubilee-s-enemies> accessed on 18 February 2017.

Interview with member of CSO reference group, 14 December 2016

⁴⁴ Ndanyi, M. (2016). "NGOs conducting civic education in Rift to be vetted," The Star, December 15, 2016

In the last two years, using the NGO Coordination Board, the government has deregistered NGO and denied others certificates, actions that have been quashed by the Courts terming them unconstitutional. For example in October 2015, the NGO Coordination Board announced the intended de-registration of over 950 NGOs, including the Kenya Human Rights Commission, one of the oldest and most reputable NGOs in Kenya.⁴⁵ Seven months earlier, the government had gazetted a number of organisations as “specified entities” under the Prevention of Terrorism Act 2012, including Muslims for Human Rights (MUHURI) and Haki Africa. In December 2014, the NGO Coordination Board announced the de-registration of 510 NGOs due to financial non-compliance; 15 of those were accused of being a “conduit of terrorism”⁴⁶ but these allegations were not proven and most of the NGOs continued operation. Even if the courts indicted the NGO Coordination Board, the intended chilling effect had already penetrated the sector, with many expressing concern and fear of the future. There is propaganda in town that we are foreign agents. This is propagated by the County Governor who has even asked the security agents to vet us. We are not sure what this means,” said an activist in Eldoret.⁴⁷

3. Negative profiling of HRDs

The post 2013 environment for human rights work has become tremendously difficult, largely due to the political stand taken by the government, which has criminalised human rights work. In a strategy to win the 2013 elections, The National Alliance party (now the Jubilee party) had formulated and recast the ICC process as a Western tool that only targets African leaders. They further argued that those supporting the process, largely human rights defenders, were unpatriotic and agents of foreign powers. Others called CSOs members of “evil society.”

These statements aim at delegitimising the work of human rights defenders, generating an adverse environment for the defence of human rights. They constitute the prelude to the initiation of unfounded criminal accusations and judicial proceedings against them. For example, the NGO Coordination Board on January 8 2016 threatened to start criminal proceedings against the Kenya Human Rights Commission (KHRC), which it accused of illegal handling of funds amounting to more than KES 1.2. billion (est. € 10.7 million)⁴⁸. The board also accused KHRC of engaging in alleged tax fraud after it purportedly paid board members through unregistered accounts.⁴⁹ The accusations were made in a report that was leaked to the media. KHRC however denied these accusations, saying the board was acting in malice and had not shared the audit report for them to respond to the issues before making a final report. That the report was leaked to the media without sharing it with KHRC showed the NGO board was acting in bad faith⁵⁰ Despite the conclusion of this matter, KHRC’s reputation will have already been damaged substantially.

These narratives and negative profiling has found resonance in the rural areas as narrated by a HRD. “There is propoganda in the town that we are foreign agents. This is propagated by the County

⁴⁵ Wanzala, O. (2015). “957 NGOs to be de-registered for financial malpractice”, Daily Nation, 28 Oct 2015, online, available at <http://www.nation.co.ke/news/957-NGOs-to-be-deregistered-for-financial-malpractice/-/1056/2933956/-/ffetmuz/-/index.html>

⁴⁶ “Kenya “deregisters” NGOs in anti-terror clampdown”, BBC News, 16 Dec 2014, online, available at <http://www.bbc.com/news/world-africa-30494259>

⁴⁷ Interview with a human rights defender in Eldoret, 5 December 2016.

⁴⁸ Conversions at the rate of 1 EUR = Kshs. 112.11 as derived from ‘The Money Converter. <http://themoneyconverter.com/KES/EUR.aspx> on 05 January 2017

⁴⁹ Munuhe, M. (2017). “Board wants KHRC accounts frozen over tax evasion,” January 8th 2017, <https://www.standardmedia.co.ke/article/2000229072/board-wants-khrc-accounts-frozen-over-tax-evasion>

⁵⁰ Ibid.

Governor. The DCIO⁵¹ also is not my friend and he says we human rights people are bad. This is mainly because of the work we did of supporting the ICC cases.”⁵² Another HRD from Nakuru said, “Many people call us names like thieves and accuse us of benefitting from donor funds. The police call us activists in a degrading manner saying we are troublesome people.”⁵³

The negative profiling is affecting work of HRDs and their relationship with other members of the community where they live. Most of those we interviewed said other people see them as sell-outs and against development. “There are allegations that HRDs speak out against certain government officials out of bitterness because they didn’t get positions or they fell out with the official. This makes the community lose faith in them,” said a HRD.⁵⁴ “The police have also been discouraging people not to report cases with human rights organisations and ask them, “now what will human rights people do for you? This is to make our name bad and limits our outreach,” narrated another HRD.⁵⁵

For LGBTIs in the rural areas we visited, they have been called terrorists, further endangering their lives. On 26 March 2014 during a discussion of anti-homosexuality laws in Parliament, Leader of the Majority Aden Duale, upon being asked why the government was not actively pursuing homosexuals, responded by comparing gay people with terrorists. He argued, ‘We need to go on and address this issue the way we want to address terrorism.’⁵⁶ Some LGBTI members had to suspend their activities in Eldoret after Uasin Gichu County Governor Jackson Mandago equated homosexuality to terrorism.⁵⁷ This was a direct threat and negative profiling of LGBTI members and their supporters in the County. They had to suspend activities for a while to monitor the situation.⁵⁸ However, it is not the first time such statements are being made by people in authority. Nyeri County Commissioner on 2 September 2015 issued arrest threats against gay and lesbian sex workers and the head of police reportedly said that 12 suspects had been arrested.⁵⁹

Such profiling denies the LGBTIQ community much needed allies as narrated by one of the defenders: “it is hard to get allies to network and join in this work. What we suffer is stigmatisation by association e.g. we wanted to work with one of the local university’s but they refused saying they support and understand our work but they would not want the name of the university to get into unnecessary controversy. They thought the university will be said to be supporting gays”.⁶⁰

4. Criminalisation of Women Human Rights Defenders

Criminalisation of individual HRDs is worse for women. In a patriarchal society like Kenya, women are judged more harshly than men when they pursue interests that are perceived not to conform to society’s norms. . Thus, it is easy to damage their reputations in ways that can cause lasting social and

⁵¹ Divisional Criminal Investigation Officer (DCIO).

⁵² Interview with Eldoret based HRD, 5 December 2016.

⁵³ Interview with Nakuru based HRD, 31 November 2016.

⁵⁴ interview with a Nairobi based HRD, 29 November 2016.

⁵⁵ Interview with Eldoret based HRD, 5 December 2016.

⁵⁶ “Homosexuality a serious problem as terrorism, says Duale,” <http://mobile.nation.co.ke/news/Homosexuality-a-serious-problem-as-terrorism--says-Duale/1950946-2258336-format-xhtml-8uydt3z/index.html>, 26 March 2014.

⁵⁷ Ndanyi, M. (2015). “We can’t tolerate gays - Governor Mandago,” June 03, 2015, http://www.the-star.co.ke/news/2015/06/03/we-cant-tolerate-gays-governor-mandago_c1145816

⁵⁸ Interview with LGBTI Eldoret based HRD, 5 December 2016.

⁵⁹ “Alarm raised on gay, lesbian prostitutes in Nyeri,” 2 September 2015, <http://mobile.nation.co.ke/counties/Alarm-gay-lesbian-prostitutes-Nyeri-/1950480/2855296/-/format/xhtml/-/hw1ad4z/-/index.html>

⁶⁰ Interview with an LGBTIQ HRD, Eldoret, 5 December 2016.

professional harm. Women HRDs interviewed for this report narrated how they are normally called “prostitutes” and “home wreckers,” a clear stigma on them. “When we report to the Police, they call us prostitutes, beat us and threaten us. We are single mothers. I am not just worried for I narrated one WHRD.”⁶¹ The same was recorded in Nakuru. “We are called prostitutes or home breakers, terms which I would not want my daughter to hear me being associated with.”⁶² Another HRD working on ICC cases in Nakuru was threatened with her picture being photo shopped and put online as a nude. “I was really scared. This information goes to the family and people like me with a daughter are very cautious in case she hears what people are saying,” said a Nakuru based WHRD.⁶³

The reputation of women is thus easily damaged and as some noted, it is hard to start or sustain romantic relationships since in the context of the patriarchal system, they are not seen as submissive.⁶⁴ For single women with children, when they are arrested, they are mostly worried on whether there is anyone taking care of them. The psychological stress worsens if they are detained for long due to inability to pay hefty court fines.

Female respondents noted that abuses and stigmatisation increases when they are pursuing domestic violence or rape cases. Those handling domestic violence are accused of getting into personal issues between husband and wife etc. “At one time I was asked why there is no one who is fit enough to marry me or am I not beautiful enough? The men perpetrators accuse us of all manner of things. It is depressing when these things are said and sometimes you feel like stopping the work.”⁶⁵ “I had rescued a girl who had procured an abortion and appealed through Facebook for resources to help her. Members of my community accused me of helping young girls procure abortions. As a result, people shunned me and my reputation was affected. My work was also affected. Some of the agencies I worked with regularly side-lined me. My credibility was somehow in doubt even from other HRDs. For me it was simple. The girl was going to be charged with a felony and was being targeted by police and community, I had to intervene,” narrated a WHRD.⁶⁶

A focus group discussion (FGD) informant in Nairobi said how she was threatened by police after reporting a child defilement case. “Wanasema hii vitu yenu ya human rights, human rights mtaacha. Inakuhusu nini? Nyinyi ni wachochezi tu” (These things of yours called human rights you are going to stop them. What does this case have to do with you? You people are just inciters).⁶⁷

In case of rape especially of unmarried women, the police double stigmatize women when they go to report, asking humiliating questions of why were the person was abused or why they don’t have a husband. These abuses reflect, or are made worse by, the wider context of gender inequality in Kenyan society and the social stigma has served to subject some women HRDs into toning down, abandoning their activism or even fleeing the country altogether. “I am no longer active on social media. I had become too political and a lot of people had attacked me for my opinions online. I don’t want the threats to materialize,” said a female HRD based in Nairobi.⁶⁸

5. Judicial Harassment

The 2010 Constitution created an independent Judiciary as a strong pillar in protecting justice and rule of law. However, the judiciary has been accused of entertaining malicious prosecutions of HRDs, unjustifiably delaying cases and setting punitive bail to HRDs. Rather than be seen as a defender and

⁶¹ FGD interviews with HRDs based in Nairobi informal settlements, 30 November 2016. Translation provided by the author.

⁶² Interview with a Nakuru based HRD, 31 November 2016.

⁶³ Interview with Nakuru based HRD, 31 November 2016.

⁶⁴ Interviews with various HRDs in Nairobi, Eldoret, Nakuru.

⁶⁵ Interview with Nakuru based HRD, 31 November 2016.

⁶⁶ Interview with HRD based in Nairobi informal settlements, 30 November 2016.

⁶⁷ FGD interviews with HRDs based in Nairobi informal settlements, 30 November 2016. Translation provided by the author.

⁶⁸ Interview with HRD from informal settlements in Nairobi, 30 November 2016.

protector of human rights, the Judiciary has at times served to further criminalise HRDs. This is particularly successful and stressful with rural HRDs, who most often cannot afford to pay lawyers or go through the lengthy court processes, and most opt out of protecting and defending human rights to avoid jail.

Arrests, charges and prosecution on crimes related to Freedom of Assembly and Association as well as punitive bail terms were pointed out as the most common form of judicial harassment of HRDs. Freedom of assembly is protected in Kenya's Constitution by guaranteeing every person with the right to "peaceably and unarmed, to assemble, to demonstrate, to picket, and to present petitions to public authorities" (article 37). Moreover, the Public Order Act regulates the organisations and staging of public gatherings and demonstrations. It states that "Any person intending to convene a public meeting or a public procession shall notify the regulating officer of such intent at least three days but not more than fourteen days before the proposed date of the public meeting or procession" (section 5(2)).

However, this provision has been abused by the police, who more often than not still disrupt the HRD meetings and proceed to arrest and charge them with illegal assembly. The Magistrate or Judge then hands down punitive bail. In Taita Taveta for instance, 10 land rights HRDs were arrested at a meeting discussing land rights and corruption then charged with "participation in an unlawful assembly" in breach of Section 79 of the Penal Code, following which a hefty bail of KES 300,000 (EUR 2,676) was imposed on each of them.⁶⁹ Even if they wanted to, no organisation can marshal the collective bond of KES 3 million (EUR 26,760) for all the HRDs, which is frustrating to the HRDs.⁷⁰ On 14 May 2015, 17 protesters who took part in the 'Occupy Parliament' protests against the raising of salaries of Members of Parliament were charged with taking part in a riot and breach of peace. The protesters were released on a cash bail of KES 20,000 (EUR 200) each, or surety of KES 10,000 (EUR 100).⁷¹ The HRDs were arrested despite having informed police that they would hold the demonstrations. Such action intimidates and deters HRDs, creating a 'chilling effect' on their work.

It is worth noting that the judiciary (through the former Chief Justice's Rule) has made public bail and bond policy guidelines, which are supposed to guide Magistrates and Judges while setting bond and bail, in order to *secure the presence of suspects at trial, and to avoid a situation where people who might be innocent are needlessly punished*.⁷² These guidelines, however, do not seem to be consistently followed, with punitive use of the bail and bond system continuing to be highlighted by HRDs, which very often disproportionately affects their work. At other times, Magistrates deny HRDs bail for bailable offences after the prosecution argues that they are still investigating allegations of breach of peace. Most of the time, no evidence is submitted while making this request.⁷³

Pursuance of trumped up charges has also been noted as one of the ways HRDs have continued to be criminalised through the Courts. The trumped charges are intended to harass, intimidate and silence them. Cases recorded and highlighted include that of Joel Ogada of Marereni, Kilifi County, who was arrested on 14 March 2016 and charged under section 233 of the Penal Code, with

⁶⁹ CR Case No 381/2016.

FIDH (2016, November). Kenya: Arbitrary detention and disproportionate bail against 10 land rights defenders from Taita Taveta County. <https://www.fidh.org/en/issues/human-rights-defenders/kenya-arbitrary-detention-and-disproportionate-bail-against-10-land> on 04 January 2017.

⁷⁰ Interview with a Nairobi based HRD, 29 November 2016.

⁷¹ Musa Haron, "Kenya Occupy protesters charged over live pig protest," <https://newint.org/blog/majority/2013/05/17/kenya-occupy-parliament-pigs/>

⁷² National Council on the Administration of Justice, (2015). Bail and Bond Policy Guidelines March 2015, http://www.kenyalaw.org/kl/fileadmin/pdfdownloads/Bail_and_Bond_Policy_Guidelines.pdf

⁷³ Interview with HRDs lawyer, 14 December 2016.

threatening to kill a security guard of Kurawa Salt Company. Ogada is a farmer and a member of the Malindi Rights Forum (MRF) who had been previously charged with trespass and assault, for which he was acquitted. His latest arrest took place only six months after he was released from serving two years in prison on fraudulent charges of committing arson against the same company.⁷⁴ Fellow human rights defenders and observers saw his previous court cases as dubious and orchestrated.⁷⁵

In Nakuru County, On 26 August 2013, Bernard Macharia Mwangi, a Nakuru based human rights defender, was arraigned before the Chief Magistrate's Court and charged with two offences of possession of an imitation of a firearm and possession of ammunitions without a firearms certificate in criminal case no. 2891 of 2013. On 26 January 2017, Bernard was acquitted of the firearm and ammunitions case for lack of evidence.

Further, together with one Isaac Nderitu Waitherero, Bernard was again charged on 2 March 2015 with the offences of conspiracy to defeat justice and child pornography in criminal case no. 470 of 2015. This case was terminated in favour of Isaac and Bernard on 20 July 2016 after several prosecution witnesses had testified and it had clearly emerged that there was no evidence to convict them.

Bernard's problems started in 2013, he protested against assault, harassment and extortion of Isaac Nderitu by the Kabatini Chief. Isaac used to run bicycle repair and a video screening businesses and the area chief used to collect KES 200 'protection' every week. On this occasion, Isaac had refused to part with the money. "Being a Human Rights Defender, I felt that Isaac's rights were being abused and I took it upon myself to have action taken against the Chief," explained Bernard. However, after filing the complaint, Bernard says he was summoned by the then OCS at Bahati Police Station and warned to drop the case or trampled up charges would be brought against him.⁷⁶

In Nairobi, one of the women hawkers who have been protesting alleged harassment by the City Council askaris (security officers) has six pending cases against her, five of which have been brought by one City council officer.⁷⁷ These cases are meant to intimidate the HRDs not to pursue their work.

The Preservation of Public Security Act, (amended in 1997) still permits the arrest and detention of journalists on grounds of 'compromising public safety, public order, morality or internal defence'. This Act has of recent being invoked by the government and can severely restrict freedom of expression, association and personal liberties. In April 2015, former Nation Media Group editors Macharia Githo and Bernard Namunane, were summoned to appear at the criminal investigations department (CID) headquarters over two articles relating to the deportation by the Dutch government of a National Intelligence Service officer. The two did not obey the summons because, according to their lawyer, the letter summoning them failed to comply with the Constitution in several respects, and did not disclose identity of the aggrieved party.⁷⁸ In the same month, K24 TV investigative reporter Purity Mwamba and her Swahili managing editor Franklin Samburu were summoned and interrogated by detectives from the anti-terror police unit over an investigative story "Beta La Halifax" (Den of Crime)

⁷⁴ Frontline Defenders (2016), Case History: Joel Ogada, <https://www.frontlinedefenders.org/en/case/case-history-joel-ogada>, accessed on 31 January 2017.

⁷⁵ Interview with NGO program officer monitoring cases of harassment of HRDs, 29 November 2016; See also "Stop Violations Against Kenyan Human Rights Defenders" <https://www.civilrightsdefenders.org/news/stop-violations-against-kenyan-human-rights-defenders/>

⁷⁶ Interview with Nakuru HRD, December 1, 2016.

⁷⁷ Interview with NGO program officer monitoring cases of harassment of HRDs, 29 November 2016.

⁷⁸ Article 19, (2015). 'Silenced and Intimidated: Attacks on Freedom of Expression in Kenya', January - September 2015, https://www.article19.org/data/files/medialibrary/38167/FOR-WEB-LAUNCH-2-11-Kenya_monitoring-violations_report_PDF.pdf

which would have exposed security lapses at the General Service Unit (GSU) ⁷⁹headquarters. The story was never aired.⁸⁰ In May 2015, Deputy News Editor and Nakuru Bureau Chief for Standard newspaper Alex Kiprotich was summoned to the Criminal Investigations Department (CID) to reveal sources of information in a story about senior police officers who narrowly escaped death, when they were ambushed by bandits at Kalpat in Nadome, Baringo County.⁸¹

6. Complicity of businesses/corporates

There were few cases captured where businesses and corporates were complicit in criminalising of human rights work. Private companies not only worked to protect suspects of human rights violations, but sometimes were said to have conducted smear campaigns against human rights defenders in order to affect their credibility.

A HRD recounted attacks against her when protesting against a private hospital over issues of maternal deaths. "A director of a private hospital hired gangs and goons to intimidate me because I was protesting the fact of too many maternal deaths at the hospital. Afterwards, police took me into custody during a protest and about three crazy charges were brought against me. My case was dropped but their message had been received... The director of the same private hospital ordered activists to spread negative propaganda about me. They were my friends then they just started discrediting me everywhere I went. I've lost enough friends now."⁸²

Activists from Malindi Rights Forum (MRF), a CBO dedicated to protecting land rights of farmers in the area, have faced false charges and constant harassment from Kurawa Salt mining Company due to their human rights work calling on the company to fairly compensate farmers displaced as a result of its extractive work. For instance, on 21 September 2015 a Malindi court terminated a 2013 case in which MRF defender Joel Ogada had been charged with forcible detainer under section 91 of the Criminal Procedure Code. The case has not proceeded due to lack of witnesses. When the matter came up for hearing, the prosecutor indicated he could not proceed and discharged the accused person under section 87 of the Criminal Procedure Code.

Exactly a month before, on 20th August 2015, Ogada had been acquitted under Section 210 of the Criminal Procedure Code in another matter 677/2011 in which he had been charged with creating disturbance. This acquittal is based on the fact that the prosecution did not make a case against him sufficiently to require him to make a defence. The foregoing clearly goes to show that these were clearly criminalisation instances aiming to intimidate and harass Ogada for his continuous struggle against the illegal alienation of the Kurawa Farmers Association members' land for salt mining without their consent or due compensation.⁸³

⁷⁹ "The *General Service Unit (GSU)* is a paramilitary wing in the National Police Service of *Kenya*, consisting of highly trained police officers." <http://www.kenyapolice.go.ke/2015-09-07-17-41-13/general-service-unit.html>, accessed on 31 January 2017.

⁸⁰ Ibid.

⁸¹ Ibid.

⁸² Interview with female HRD in Nairobi Informal Settlements, 30 November 2016.

⁸³ Interview with NGO program officer monitoring cases of harassment of HRDs, 29 November 2016; See also "Stop Violations Against Kenyan Human Rights Defenders" <https://www.civilrightsdefenders.org/news/stop-violations-against-kenyan-human-rights-defenders/>, Frontline Defenders (2016), Case History: Joel Ogada <https://www.frontlinedefenders.org/en/case/case-history-joel-ogada> accessed on 31 January 2017.

Members of Mwea foundation, working to protect rights of rice farmers in Mwea have faced been criminalised for their human rights work and advocacy against the National Irrigation Board (NIB).⁸⁴ Some officials of the foundation are reported to have been physically assaulted and stripped in public in efforts to make them stop working. Others intimidated that administration officers, regular police officers, youth, and even gang members have sent them threatening messages and even abducted some of the foundation officials warning them to stop the human rights work.⁸⁵

Sometimes the business people hire goons and militias to intimidate the HRDs. One defender narrated how he was continually intimidated by 'unidentified individuals' following his organisation's investigation into alleged corrupt dealings between the National Youth Service (NYS) and Esaki Ltd, a private company working with the NYS.⁸⁶ In Eldoret, a HRD interviewed reported how businessmen allegedly funded goons to disrupt their meetings calling for support of the ICC cases. They also allegedly funded parallel meetings. "They said we have forgiven each other and there is no need of the civic education. They called us foreign agents. The police did nothing when we reported these to them," he said.⁸⁷

The same was reported in Nakuru, where business people allegedly hired goons to intimidate the HRDs who were asking the County Governor to give alternative land to hawkers who were being moved out of the Central Business District. The businessmen wanted the hawkers out of the CBD because they are business rivals. However, the HRDs were not specifically against the exercise, but rather wanted to be given alternative land to carry out their business. "It is easy for the business people to hire the gangs since their names will not be soiled and not many people will know who is behind the violence and intimidation," said a HRD. He added, "But we know the businessmen pay them. Some even came to intimidate me during that time. We have to talk about this since it is our work."⁸⁸

Complicity of the businesses and their partnership especially with the police is a point of distress for HRDs. This is an issue that the Working Group of the United Nations on the issue of human rights and transnational corporations and other businesses, has expressed concern about, especially over increased attacks and intimidation by State and non-State actors.⁸⁹

⁸⁴ Mwea Foundation leads the campaign challenging the constitutionality of the Irrigation Act. Established in 1966, this law is argued to be archaic including one that prohibits women from owning land. Additionally, this Act is challenged because it confers on the National Irrigation Board (NIB) sweeping powers with regard to administration of the Mwea rice farms. See Kenya Human Rights Commission (2000) Dying to be free: The struggle for rights in Mwea.

⁸⁵ Interview with Mwea HRD, 02 December 2016.

⁸⁶ Frontline Defenders (2016, July) Kenya – Threats and intimidation against human rights defender Joseph Njuguna.

⁸⁷ Interview with Eldoret based HRD, December 5, 2016.

⁸⁸ Interview with Nakuru based HRD, November 30, 2016.

⁸⁹ See A/HRC/26/25, Report of the Working Group on the issue of human rights and transnational corporations and other business enterprises, May 5, 2014, para. 69-70.

{ Impact of criminalisation

7. Increased intimidation and attacks

Criminalisation of HRDs and their work has led to increased attacks on them by State and Non-State actors. These includes physical attacks, abuse, emotional stress and particularly for women HRDs, threat of or actual sexual abuse. Little is done to address these attacks leading to high levels of impunity and de-legitimation of the HRDs in their communities. Further, inadequate protection mechanisms have led to the perpetrators being bold, knowing nothing will be done to them and the HRDs are vulnerable with little support. Chiefs, regular and Administration Police have been pointed out as being the most notorious for the attacks on people protesting and demanding for the protection of human rights.

For example, on 23 June 2016, Josephat Mwenda, a motorcycle operator was killed together with his lawyer who was representing him in Court on 6 counts of fabricated charges which included: (i) riding a motorcycle without a helmet; (ii) riding a motorcycle without a reflective jacket; (iii) carrying excess passengers; (iv) carrying un-insured passengers; (v) riding un-insured motorcycle; and (vi) riding a motorcycle without a driving license. Mwenda had initially lodged a complaint with the Independent Policing Oversight (IPOA) against a senior officer at the Syokimau Administration Police (AP) camp who had allegedly shot him in April 2015 as he dismounted a motorcycle after the officers had waved him down to stop.⁹⁰ After refusing to drop the complaint, he was arrested and charged with the 6 counts. Their bodies, alongside that of their taxi driver, Joseph Muiruri, were recovered on June 30, 2016 from Ol-Donyo Sabuk River in Machakos County, eastern Kenya, a week after they went missing. Four administration Police (AP), officers, one of whom Mwenda was defending himself against in court that day, have been charged with murder.

Apart from being accused of being involved in murder, police are also said to be used by people in powerful positions to threaten HRDs. For example in Taita Taveta near the Coast, a respondent narrated how an MP allegedly sent police led by the OCS to threaten HRDs speaking out against his land grabbing. In Makueni in the Eastern part of Kenya, HRDs have been threatened by police boldly where they are warned that even if they get bail they will be arrested again in a short while.⁹¹

In other cases, they have been attacked for following up cases touching on police accountability. “Once I was attacked by goons sent by police while working on an extra-judicial killing case involving my brother-in-law. While beating me, the attackers mentioned police officers by name saying, “nyinyi ndio mnasumbua” (You are the ones disturbing us). They were clearly acting on the police officer’s behest.⁹²

The leaders and perpetrators since they are powerful and influential sometimes mobilise the community against the HRDs and smear their names and reputation. This is unfortunate since most of the HRDs interviewed singled out the community as an effective line of defence when their work is criminalised and they are attacked by aggressors. An Eldoret based HRD said how the Chiefs, MCAs and police disrupt their meetings by telling people not to attend them since the CSOs are “against” the government. “Sometimes they send goons to come and disrupt the meetings that we have or demand the sitting allowances saying we have a lot of money from wazungus (donors). Sometimes they plan parallel meetings in the same halls or hotels we have booked so as to disrupt them and

⁹⁰ interview with Human rights defender involved in the case, 1 December 2016.

⁹¹ Interview with a HRD, 29 November 2016.

⁹² Interview with HRD based in Nairobi informal settlements, 30 November 2016.

nothing is done. This has negatively affected our work; we cannot move freely since you can easily become a target.”⁹³

In Laikipia County, a teacher allegedly impregnated a schoolgirl and the head teacher raised the issue up to the Teachers Service Commission level, which employs all teachers in the country. The family of the girl tried to have the case settled out of court and when the head teacher refused, they mobilised the community against her.⁹⁴ A similar situation arose in Homa Bay County where the mother of a rape victim and the HRD helping her were assaulted, threatened and called homewreckers and prostitutes thus creating stigma around them.⁹⁵ This climate of hostility underscores a worsening environment for human rights defenders in Kenya. Coupled with State led criminalisation of human rights work, will only make the situation worse.

8. Shrinking civic space

One of the most profound implications of criminalisation of human rights is shrinking civic space. Many HRDs are increasingly fearing speaking out as before so that they are not ostracised and stigmatised by National and County Government officials and office bearers including the Chiefs and Police or the community where they live. Others have a genuine fear of retribution or do not want to put their families at risk, since they might have seen what has happened to their colleagues.

According to some of the respondents, it is now becoming the norm to weigh words or actions before taking a stand since you are not sure of getting wider support from other defenders. Sadly, some of the people have stopped defending rights and have opted for other safer careers or professions. “We thought we could create a mass of human rights defenders but this is not going to be a reality soon. The numbers of HRDs are shrinking; the families are intimidated and push the HRDs to stop the work.”⁹⁶

Many actors including Maina Kiai, Immediate Former UN Special Rapporteur on the rights to Freedom of peaceful assembly and of association have raised concern on the shrinking civic space, which he called “one of the defining human rights issues of 2015.”⁹⁷ However, in the report he warns that the space might be already gone. Criminalisation and reduction of the civic space leads to reduction of knowledge and support for human rights. If it closes, many people especially the most vulnerable and marginalised will not raise alarm or report violations since they will be double stigmatised.

9. Stress on family and personal relationships

When faced with danger, HRDs often look up to the family as a first point of contact to mitigate the situation and help them escape. They are also part of an informal network, together with friends, who contribute financially in the absence of outside support from NGOs to post bail, pay lawyers or assist the HRD to temporarily relocate. It is thus a crucial unit in offering support to HRDs in the course of their work.

However, criminalisation of human rights work has had a tremendous negative impact on families of HRDs. They live in fear of their family members or themselves being attacked or imprisoned for long periods. It is difficult to also continue human rights work knowing that, if arrested, the HRD may be prevented from ever seeing their family again. Fear of separation is real not only as a result of

⁹³ Interview with a HRD based in Eldoret, 5 December 2016.

⁹⁴ Interview with HRD based in Nairobi informal settlements, 30 November 2016.

⁹⁵ Interview with CSO leader monitoring attacks on HRDs in various parts of the country, 29 November 2016.

⁹⁶ Interview with a Nakuru based HRD, 30 November 2016.

⁹⁷ OHCHR. (2015). ‘The Year in Assembly and Association Rights’, http://freeassembly.net/wp-content/uploads/2016/01/UNSR-FOAA-Annual-Report-2015_r.pdf

imprisonment but also in case the HRD is exiled leaving the family behind. These fears put pressure on the HRD to consider the risks they take or even the work they are doing.

Respondents interviewed noted families and relationships breaking down and separations, mostly due to the lack of sustenance once the man who is breadwinner, is arrested. This is especially tough if he is held in custody for long, and the Courts impose a heavy fine on them. The family is left to make tough choices on posting bail or buying food and other essentials. Other respondents noted that arraigning the HRD in court is enough to stigmatise him even though he might not be found guilty. "People in rural areas believe the Government, meaning the Chiefs, are always right.

They say they have all the intelligence hence when one is arrested they must be guilty. Even after being released as an innocent person, the HRD faces additional stigmatisation of being a suspected criminal and it is hard for them to get work locally."⁹⁸ In other instances, the family could be isolated from the community, further stigmatising them. "People have side lined and isolated my family. They have even refused them to join self-help groups. They ask me why I do not do any other work and stop this human rights work. My wife has also being asking me why I can't start a business or do something else."⁹⁹

The HRD thus gets pressure from the family to stop the human rights work so that he can earn an income and sustain themselves. If they do not stop the HRD work, cases of psychological stress increase, and in the absence of any counselling support, separation and divorce follow. Others as a result of broken families have resorted to drinking and substance abuse.¹⁰⁰HRDs said that criminalisation of their work has led to their children being traumatised and ridiculed, further pushing them to the precipice. Some said they worry what their children hear people saying about them since most of it is slander and it is hard to explain why police keep arresting them if they are innocent.¹⁰¹

One HRD working on supporting ICC cases narrated how he had to transfer his child to another school in a different County after other pupils called her father a traitor of the country and community and ridiculed her.¹⁰² This was because the HRD was identified as one of those supporting and working for accountability of the 2007/8 post-election violence. Her school grades starting falling and she did not want to attend class anymore. Another HRD in Nairobi made the connection between her work and school performance. "My son's grades had dropped a lot at some point. At the time, I had been handling some big cases with a lot of risks. I later realised the connection between his grades and my work. He was worried about me and his studies were affected. He could not concentrate."¹⁰³

10. Missed income/employment opportunities

Due to the nature of their work, employment and income opportunities for HRDs are difficult to come by, leading to them suffering financially. Any gainful employment they have is always disrupted by court proceedings and sometimes lose their jobs if jailed. HRDs also lose money through payment of hefty fines, which they mostly raise through fundraisers. To make it worse, it takes so long to get back the bail after the case is dismissed and they have to constantly follow up with the courts.

⁹⁸ Interview with a Nakuru based HRD, 31 November 2016.

⁹⁹ Interview with an Eldoret based HRD, 5 December 2016.

¹⁰⁰ FGD interview with men in Nairobi informal settlements, 8 December 2016.

¹⁰¹ This was echoed by various HRDs in Nairobi, Eldoret, Nakuru.

¹⁰² interview with an Eldoret based HRD, 5 December 2016.

¹⁰³ Interview with a HRD based in Nairobi informal settlements, 30 November 2016.

Since their names have been tarnished and labelled “anti-government,” HRDs who are business people have missed business opportunities and tenders from the County government since they are known to be against corruption. No one would like to be associated with them.¹⁰⁴ Some of the HRDs have lost their jobs due to direct criminalisation of their human rights work.

One respondent working to rehabilitate sex workers narrated how her business was destroyed by security forces. “Well now I have no job because GSU officers destroyed my bar because of assisting sex workers. I was accused of promoting prostitution, rape and called a prostitute. It’s just really hard to continue doing this work. I can’t live like this.”¹⁰⁵ Other HRDs have lost their jobs after refusing to stop agitating for labour rights within their companies and have been threatened with imprisonment on trumped up charges.¹⁰⁶

Lack of income or job opportunities puts a strain on the HRDs since it is hard to balance work and the pressures of earning enough for daily basic needs. This has forced some to reconsider engaging in the human rights work so that their families do not suffer financially. Other HRDs have recommended that NGOs should be giving them regular work contracts or stipends to ensure they cover their basic needs as they continue defending human rights.

11. Psychological trauma and stress

Defenders and their work have been publicly misrepresented, being described as, among other things, terrorists, rebels, subversives or foreign agents. These labels are not great in any community and have led to a lot of stigmatisation of the defenders, which causes them to lose their status in their community.

As articulated by one of the defenders, “sometimes we are paraded in the barazas (public meetings/forums) and threatened in public. We are also denied opportunities to speak in the barazas since the leaders do not want to be asked questions holding them to account in public. The leaders also sometimes call us names like changaa (local illicit alcohol) drinkers and say our work is to drink and sleep in the ditches. It is humiliating and stigmatising.”¹⁰⁷ For some Gay and Lesbian defenders, even getting basic services is becoming difficult because of their sexual orientation. “It is hard for us to get safe space to hold meetings and some of the service providers have refused to host us saying they have a reputation to maintain,” said an LGBTI activist based in Eldoret.¹⁰⁸ This criminalisation has affected their relationship with the community and delegitimised their positive role in society. It psychologically affects the HRDs as their reputation and that of their families is broken, and find themselves doing *damage* control for the rest of their career.

The psychological stress does not only affect the HRD but extends to the family, especially when they are arrested, shown on television being beaten or people talking behind their backs. This sometimes affects the children but unfortunately, psychosocial support is hardly available. “My children are living quite a difficult life. They see me when I have been beaten. They are scared and they live in fear. They run away from the police. I have insomnia. I am always up late thinking. My daughter has also started staying up and I am worried that she has been affected as well,” said a woman HRD.¹⁰⁹ A HRD from Meru perfectly analogised his fear and uneasiness in this statement: “I am like an antelope in the wilderness expecting danger at any moment. The threats really get to me.”¹¹⁰

¹⁰⁴ FGD interviews, Molo, 31 November 2016.

¹⁰⁵ FGD interviews with women in a Nairobi informal settlement, 2 December 2016.

¹⁰⁶ interviews with HRDs in informal settlements in Nairobi, 6 December 2016.

¹⁰⁷ Interview with HRD bases in Nakuru, 30 November 2016.

¹⁰⁸ Interview with an LGBTI activist, Eldoret, 5 December 2016.

¹⁰⁹ Interview with HRD from informal settlements in Nairobi, 30 November 2016.

¹¹⁰ Interview with a HRD from Mwea, 8 December 2016.

{ Counterstrategies being employed to fight and prevent criminalisation of HRDs

HRDs have used various fora to advocate against legal, policy and political rhetoric that seeks to criminalize them and their work. These includes engaging the policy makers and legislators in boardrooms, rallying the citizens through street protests and debates at National, County and Sub-county levels, online advocacy among other avenues. The multi-faceted strategies serve different purposes. One, they assist in drawing the attention of allies and general public to issues of criminalisation of HRDs and the need to resist them. Secondly, they reach out and address legislators and policy-makers, influencing them to consider their concerns/objections when making public policies or laws that tend to criminalise HRDs. Thirdly, they have pressurised repeal of laws and policies that criminalise human rights defenders mostly through sponsoring and supporting public interest litigation.

The context, resources, money and information available for the defenders to mitigate threats and level of risk that the HRD can take seems to dictate the counter strategies employed by the defenders. The common ones highlighted by the defenders include:

12. Public-interest litigation

A number of NGOs and individuals have filed public interest litigation to fight criminalisation of human rights defenders and their work. This has served to challenge laws that violate equality or human rights standards, seeking clarification on an untested point of law, identifying gaps in the law or challenging the existing interpretation or enforcement. Recent litigations include:

Security amendment laws (2014)

Eight offensive clauses in the controversial Security Laws Act (2014) were declared unconstitutional by the High Court on 23 February 2015, after a successful petition (petition N°. 628 of 2014) filed by Coalition for Reforms and Democracy (CORD), the Kenya National Commission on Human Rights (KNCHR), Law Society of Kenya (LSK) and civil society organisations.¹¹¹ The Court of Appeal upheld the judgment. The Judges ruled that Section 12 on the publication or broadcast of images of dead or injured people, which are “likely to cause fear and alarm in the general public, or disturb the peace”, was disproportionate. The Court found that there was no rational connection between the limitation on publications and the fight against terrorism. It further agreed with the petitioners that the criminalisation of the publication or broadcast of information (Section 64) ‘which undermines investigations or security operations’ by the national police and defence forces would have a chilling effect on freedom of expression. The Court held that the effect of the prohibition would amount to “a blanket ban on publication of any security-related information without consulting the National Police Service”. It was feared that these clauses would have been used to clamp down on freedom of expression and journalists would be arrested and if found guilty fined up to KES 5 million (EUR 44,600) or a jail term of three years.

¹¹¹ <http://www.klrc.go.ke/images/images/downloads/SLAA-ruling.pdf>

13. Criminal defamation (Section 194 of the Penal Code)

The High Court on 6 February 2017 declared Defamation (under the Penal Code, Chapter 63, Article 194), as unconstitutional as it violates Article 33 of the Constitution.¹¹² In a case filed by ARTICLE 19 alongside Jaqueline Okuta and Jackson Njeru, the court found that the prospect of criminal proceedings and a jail term of up to 2 years for defamation was unnecessary, excessive and unjustifiable in an open and democratic society, and the law creates a disproportionate limit on freedom of expression. Jaqueline and Jackson had been charged with defamation for publishing posts about a prominent Kenyan lawyer on a consumer protection Facebook page called 'Buyer Beware'. Jackson is an administrator of the page. This was big win for freedom of expression in Kenya as the government has used the section to punish legitimate criticism from journalists, HRDs and other citizens.

14. Public Benefits Authority Act (PBO, 2013)

In December 2016, the Trusted Society of Human Rights Alliance moved to court seeking the Devolution Cabinet Secretary Mwangi Kiunjuri and his Interior Security counterpart Joseph Nkaissery punished for failing to gazette the PBO Act 2013.¹¹³ Kiunjuri had in October 2016 been ordered by the court to gazette the Act within 14 days, but has yet to do so. He however had told the court that his hands were tied over the issue, because the NGO sector had been transferred to the Interior ministry and he cannot set and gazette the date of entry into force of the PBO Act as ordered by the court.

In the earlier case, the Trusted Society of Human Rights Alliance had gone to court seeking judicial review against the Devolution Cabinet Secretary following his failure to implement the PBO Act, as well as his attempt to restrict freedom of association through the appointment of a governmental taskforce in 2015 which proposed draconian amendments to the already adopted legislation. On 31 October 2016, Justice J. Onguto of the High Court ruled that the Cabinet Secretary of the Ministry of Devolution and Planning had 14 days to set and gazette the date of entry into force of the PBO Act (2013).¹¹⁴ He further declared that the delayed gazetting of the Act for more than 1,000 days since its signing into law on January 14, 2013, was "an abuse of discretion", which should be exercised in public interest, and deemed it "unconstitutional." The judge also declared that the decision to appoint a Taskforce to amend and/or propose amendments to the PBO Act before it became operational was illegal.¹¹⁵

15. Decriminalising LGBTIQ rights

(l) On 24 April 2015, the High Court ruling in *Eric Gitari v Non- Governmental Organisations Co-ordination Board & 4 others* [2015] termed as unconstitutional failure by the NGO Coordination Board to register the National Gay and Lesbian Human Rights Commission (NGLHRC), on the basis that homosexuality is criminalised in country.¹¹⁶ The Board was subsequently ordered to register the Commission. The High Court found that Article 36 of the Constitution grants 'every person' the right to form an association 'of any kind' regardless of their gender or sexual orientation; and that the Penal Code does not criminalise homosexuality, but rather certain sexual acts 'against the order of nature', which is not defined, nor does it contain any provision that limits the freedom of association of

¹¹² Section 194 of the Penal Code reads "Any person who, by print, writing, painting or effigy, or by any means otherwise than solely by gestures, spoken words or other sounds, unlawfully publishes any defamatory matter concerning another person, with intent to defame that other person, is guilty of the misdemeanor termed libel."

¹¹³ At the time of writing this report, the case had not been determined.

See Maina, C. (2016). "Lobby sues Nkaissery, Kiunjuri over PBO Act," 24 December 2016, http://www.the-star.co.ke/news/2016/12/24/lobby-sues-nkaissery-kiunjuri-over-pbo-act_c1477398

¹¹⁴ Kadida, J. (2016). "Kiunjuri ordered to gazette PBO Act in 14 days," *The Star*, 31 October 2016,

¹¹⁵ *Ibid.*

¹¹⁶ Petition **NO 440 of 2013. Full ruling can be found at** <http://kenyalaw.org/caselaw/cases/view/108412/>

individuals on the basis of their sexual orientation. In response to arguments concerning religion and morality, the Court held that religious and moral beliefs could not be a basis for limiting rights.

With respect to Article 27 of the Constitution that protects the right to equality and non-discrimination, the Court found that Article 27 includes discrimination on basis of sexual orientation based on the breadth of that article and a holistic reading of the Constitution which emphasizes inclusiveness, human dignity and equality (as the Court put it 'to allow discrimination based on sexual orientation would be counter to these constitutional principles.'). The NGO Coordination Board and the Attorney General filed notice of their intention to appeal the decision on 29 April 2015. In June 2015, the NGO Coordination Board filed its memorandum of appeal.

(ii) The High Court on July 23, 2014 in a ruling on Republic v Non-Governmental Organisations Coordination Board & another ex-parte Transgender Education and Advocacy & 3 others (JR Miscellaneous Application 308a of 2013) ordered the NGO Coordination Board to register a transgender advocacy group, the Transgender Education and Advocacy (TEA).¹¹⁷ The court in its ruling found that the Board had discriminated against the TEA by denying it registration as well as its right to freedom of association on the basis of gender or sex, which was unconstitutional. It also said its inaction in refusing to register the TEA constituted an unreasonable exercise of discretion.

(iii) On June 8 2016, five persons and three organisations, including the Gay and Lesbian Coalition in Kenya, filed a petition (Petition 234 of 2016) challenging Section 162 (a) and (c) and Section 165 of the Penal Code.¹¹⁸ These provisions criminalise 'carnal knowledge against the order of nature' and 'gross indecency' respectively and have been used in the past to criminalise adult, consensual, and private same-sex sexual conduct. They have been used to justify violence and discrimination against persons on grounds of sexual orientation, gender identity and expression.

The net effect of these litigations is that they have been used to challenge government policies and procedures that violate human rights or equality standards. In doing so, this has provided a check on government statutory and public bodies like the NGO-coordination board, holding them to account for failures to uphold domestic and international human rights standards. The positive rulings have also ensured that the law responds to the needs of the public, particularly disadvantaged and minority groups like the LGBTI community. Finally, the cases, especially the Security Amendment Act (2014), helped raise awareness and created public debate of various human rights issues. This brought pressure for legislative change outside the courtroom.

16. Protection mechanisms by NGOs

Despite the lack of legal framework that is specifically protecting human rights defenders, Kenya has many organisations undertaking this task.

The Kenya National Commission on Human rights (KNCHR) is established under article 59 of the Constitution of Kenya 2010, and its main goal is to investigate and provide redress for human rights violations, to research and monitor the compliance of human rights norms and standards, to conduct human rights education, to facilitate training, campaigns and advocacy on human rights as well as

¹¹⁷ <http://kenyalaw.org/caselaw/cases/view/100341/>

¹¹⁸ "Petition To Fill Human Rights Protection Gap Affecting LGBQ Persons", <https://www.galck.org/petition-to-fill-human-rights-protection-gap-affecting-lgbq-persons/>

collaborate with other stakeholders in Kenya.¹¹⁹ Though it has established its independence and is a point of call for HRDs, the KNCHR lacks capacity to provide adequate protection to HRDs. In addition, its mandate is much wider and is not exclusively about protecting HRDs. The Witness Protection Agency, under the Witness Protection Act, (Cap 79 Laws of Kenya) has the mandate to protect witnesses at risk. However, this is a government agency and hence there are questions regarding its independence especially while protecting witnesses, some who would be HRDs against powerful government officials.¹²⁰

Apart from these two key government agencies, Kenya has many local, regional and international NGOs who undertake work of protecting human rights defenders. They include National Coalition of Human Rights Defenders – Kenya (NCHRD-K), ARTICLE 19, Front Line Defenders, Gay and Lesbian Coalition of Kenya, Peace Brigades International and Protection International among others. These NGOs individually or jointly offer a range of services including relocation and safe housing for a limited period of time, short term funding to HRDs for relocation purposes, physical accompaniment to police stations and government officers capacity building on risk assessment and mitigation for physical, digital and psychosocial threats. The NGOs more or less work in the same manner: the HRD's case is brought to their attention; they obtain the case details from the HRD or a partner; do an evaluation to establish the best way of supporting the HRD. Other times, the help sought is not given or different assistance is suggested and provided depending on resources available and circumstances.

In a whole, however, most of the NGOs working on protecting HRDs who have been criminalised for their work have capacity and funding challenges that limit their work. Secondly, there is the issue of bureaucracy and the sometimes tedious, time-consuming process of getting protection. It takes time before a case is filed, investigated/verified and assistance is offered. In times of emergency, the HRDs feel this is tedious and unnecessary. "You find that only some HRDs get assistance from CSOs because they are more known. It divides the HRDs and destroys the networks. Assist all the ones who are in need without singling out the more popular HRDs,"¹²¹ said a HRD.

While it is necessary to undertake the vetting to ensure the scarce resources are used for the most deserving cases, the slow bureaucratic process could lead to disillusionment especially if the threat becomes real and the HRD is harmed. It becomes more complicated since due to financial constraints the NGOs can only offer support for a limited period. Hence, the protection or assistance is not sustainable for a long time and in case of continued criminalisation or threats, the HRD might opt to stop doing the work. Lastly, most of the NGOs are based in Nairobi and do not have offices in the rural areas or informal settlements where majority of the criminalised HRDs live and do their work. The NGO outreach therefore is limited and assistance takes long to reach these defenders.

The weakness of the formal protection mechanisms by NGOs and government have thus led to the HRDs continuing to be criminalised for their work. This has resulted in informal mechanisms - family, social or community relationships and networks, and on informal knowledge systems, among other things being the solution for HRDs at first instance. They also reach out to the formal mechanisms, but this is to largely complement their informal efforts.¹²²

17. Informal self-protection mechanisms

Faced with increased criminalisation of their work and security threats, and the reality of weak protection mechanisms, HRDs have resulted to adopting and employing informal protection

¹¹⁹ The KNCHR succeeded the Standing Committee on Human Rights established in 1996 through presidential decree, which was later anchored in an Act of Parliament passed in 2002 before becoming a Constitutional Commission. The Commission is established in accordance with the United Nations approved Paris Principles.

¹²⁰ The Kenyan Section of the International Commission of Jurists (2010). ICJ Kenya's Critique of the Witness Protection (Amendment) Bill.

¹²¹ FGD interview with men in Nairobi informal settlements, 8 December 2016.

¹²² Researchers personal notes from earlier field work undertaken in July 2015 with support University of York.

mechanisms in order to stay safe. By “informal mechanisms”, we mean the range of processes and resources that fall outside of the formal institutional protection structures ran and managed by NGOs and donors. This is not to suggest they are inferior in nature, but they are informal since they are not institutionalised in any manner. These include creating personal relationships and networks, being street smart, knowing the geographical area they live and having basic knowledge on what to do when faced with danger.

In order to avoid criminalisation, defenders have opted not to be in forefront of issues, but strategically organize from behind the scenes. This is because they have already been identified as “trouble makers” and hence easy to pick out mostly during demonstrations. This spreads the risk of personal criminalisation. “I avoid being the face or the ringleader of everything that comes up. If I lead today tomorrow someone else takes the lead so we look like we are sharing responsibilities so that if someone is targeting leaders of an issue you would be targeting more than one person. So if there is a threat you would be sharing the risk,” said a Nakuru HRD.¹²³

Apart from individuals, other HRDs let the community at large take the lead since it is harder to follow the community than a few individuals.¹²⁴ Most HRDs we talked to said they no longer handle cases emanating from where they live since this repeatedly put them in harm’s way. They opt to pass the case on to other defenders to handle it and hence minimize risk. Others said they strategically ensure they involve local leaders including Chiefs and MCAs when planning meetings and have them open and give key note addresses. In order to avoid the continued criminalisation especially of the LGBTI community, they prefer not to publicise or brand their meetings. Other defenders in order to avoid being called foreign agents said they do not invite Western donors to their meetings.¹²⁵

When physically attacked, most defenders said they rely on good personal relationships with family or friends in order to stay safe. This seemed the most common form of informal protection mechanism to assist in navigating security threats. Some of the HRDs talked of how family and friends always look out for them daily and help them escape when faced with danger. “At least two of my friends know where I am going and what is likely to happen. I have to inform them when there is a slight change. We also agree when am expected home and what time,” said an LGBTI activist in Eldoret.¹²⁶

Another HRD said when he is following a sensitive case he moves and stays with different HRDs and not at his own home for fear of being attacked.¹²⁷ Another narrated, “On a personal level, I have agreed with my nuclear family that I will not appear in the media at all. I have also shared my three numbers with very close friends since this is part of my security network. The nuclear family gets anxious when my phone is off.”¹²⁸ “Some of my neighbours know what I do and have trained them to look out for suspicious people. One time some nine guys came looking for a lady with dreadlocks and they were told no one like that lives there yet I was inside the house. I was lucky since I did not know what intentions they had,” said a Nakuru HRD.¹²⁹

The personal relationships and networks are the first point of contact for HRDs when faced with danger. They assist in accounting for the HRDs whereabouts and ensuring socio-economic support in critical situations. For example, this is the first place where the HRDs source for funds to enable them pay legal fees, police bond, briefly relocate among other strategies. Family and friends are the ones who keep the HRD going in the face of increased criminalisation of their work. However, as earlier noted, they could also be a source of pressure for the HRD to leave their work especially if they are directly targeted. Their support thus is very crucial.

¹²³ Interview with HRD, Nakuru, 31 November 2016.

¹²⁴ Interview with HRD from Nairobi informal settlements, 7 December 2016.

¹²⁵ Interviews with defenders in Nairobi, Eldoret and Nakuru, November-December 2016.

¹²⁶ Interview with an LGBTI activist, Eldoret, 5 December 2016.

¹²⁷ Interview with HRD, Nakuru, 31 November 2016.

¹²⁸ Interview with a HRD, Eldoret 6 November 2016.

¹²⁹ Interview with HRD, Nakuru, 30 November 2016.

Other tactics mentioned include “going underground,” a common phrase for lying low or relocating temporarily until the situation normalizes; switching off phones and removing batteries to avoid being tracked, not staying out at late in social places; operating and organising almost anonymously so that it is not easy for people to know the organisers or the schedules of activities. These tactics have been suggested and in some cases perfected as a result of trainings by human rights NGOs. The defenders interviewed acknowledged the benefit of these trainings and they have shared the knowledge with others who did not participate.

18. Networking and collaboration

In order to cope and fight criminalisation of their work, HRDs are forming or have formed networks and partnerships in the Counties and informal settlements. The networks are useful in many ways not least offering safe spaces for HRDs to discuss and strategize how to deal with the increased criminalisation of their work without fear of being identified and further criminalised. “We have decided to form County coalitions for HRDs. This helps us to deal with cases collectively to avoid being isolated as individuals. It makes it hard for someone to target individuals since the person pursuing the case is an organisation,” said a Nakuru HRD.¹³⁰

These networks are not only localised but have reached out to the national NGOs and other networks in the neighbouring counties e.g. in Molo, the human rights defenders partner with their counterparts in neighbouring Nakuru County, seeking advice and sharing resources. Malindi Rights Forum, which largely works on environmental and land issues closely, collaborates with Action Aid, Haki Sheria and Kenya Human Rights Commission based in Nairobi. The National Coalition for Human Rights Defenders,¹³¹ although based in Nairobi has representatives in all the 47 Counties in the country. This has increased its reach and is normally a point of reference for most HRDs in the rural areas seeking assistance due to attacks as a result of criminalisation of their work. “We are also working on protecting HRDs according to thematic areas. I.e. police reform sector, extractive industry, land reform Sector etc. Protecting HRDs working on the different themes will help identify their specific protection needs,” said a NCHRD-K representative.¹³²

These networks also allow faster reactions to emergencies and optimise the few existing resources. Furthermore, they offer defenders at risk a wide range of experience, capacities and protection strategies developed by the various members of the network. Finally, through these networks, defenders can amplify their colleagues’ complaints of reported aggressions and generate action from the responsible agencies. As noted by an Eldoret based HRD. “We make sure that we have one or two national organisations that can take our cases to the media and government offices. If anything happens here, we call people to come because at the end of the day we live here, so we are at more risk than national organisations, so it is safer if they come here.”¹³³

All the defenders interviewed for this report have also sought to collaborate with duty bearers but more specifically with IPOA, KNCHR, and police Internal Affairs unit. This is in recognition that the government has primary responsibility to ensure a safe environment for people to exercise their right to defend human rights. As narrated by a Nakuru HRD, “When holding the HRD forums here sometimes with the National Coalition, we invite the police. The Nakuru OCS has been very helpful

¹³⁰ Interview with Nakuru HRD, 30 November 2016.

¹³¹ It is commonly called the Coalition. It is the only locally established NGO concerned specifically with the protection of HRDs at risk. It was established in in 2007. It runs three main programmes for HRDs: a protection programme, an advocacy programme, a capacity building programme for HRDs.

¹³² Interview with NCHRD-K representative, 31 November 2016.

¹³³ Interview with Eldoret HRD, 5 December 2016.

and listens to us. He engages with us honestly and has an open mind. We involve him in our meetings since the police are mostly the perpetrators of the violence but they have a role to play in protecting us too. We have also created municipality dialogue forums where the county commander participates as a facilitator to talk about human rights violations. This is good since he is the ultimate authority in terms of security in the county. This has also helped us in having good relations with the police and is able to talk to them when following up cases. We have mutual respect of each other and dialogues over issues. The negative tag of human rights people has gone down a bit.”¹³⁴

Another HRD talked of the mutual benefit of this collaboration. “We have changed our engagement and we do not do any demonstrations since it is seen as combative. When there is an issue if it involves police brutality we just go and talk to the OCS (Officer commanding Station). This is working since he also does not want to deal with demonstrations and the obvious aftermath of police violently breaking them up. Talking to each other with the duty bearers has also assisted in building bridges between the government and CSOs to a large extent.”¹³⁵

The defenders have also formed strategic partnerships with the community, which though sometimes can be the aggressors, also offers the HRDs an additional layer of protection. Defenders during the interviews pointed out different instances when members of the community have alerted them of danger or plans of aggressors attacking them or their activities. One HRD in Nakuru narrated how members of the community called her Member of Parliament after suspected police officers abducted her and this was how she was quickly released. She feared being “disappeared” by the police were it not for the community. Another HRD in Eldoret when he is holding forums out of town, contracts and pays the local hotel or women to prepare the food and tea. This ensures that they see him as one of their own, supporting local business.¹³⁶ After being banned from accessing services at a local hotel, an Eldoret based LBGTI HRD narrated how they have now created different allies within the business community “if at all they have an open mind. It takes time but we are seeing it is working.”¹³⁷

Nevertheless, these networks face challenges of funding and capacity. Most of the funding goes to national based NGOs yet most of the impact of criminalisation is felt by rural based HRDs. Even in the face of increased criminalisation in the Counties, protection has not been devolved. More directed funding needs to be directed to defenders, networks and NGOs in the counties.

19. International advocacy

Kenya’s HRDs have also conducted regional and international advocacy to rally support for decriminalisation of their work. This has been through direct lobbying AU and UN Member States and providing shadow reports when Kenya is under review. The rural based HRDs are normally represented in the national consultative forums where they give input to shadow reports. Sometimes they also take part in the lobbying at the AU and UN sessions. “If we have funds, we normally take some of the rural based HRDs to Banjul for the Africa Commission sessions or Geneva for the UPR. This assists them to present their issues regarding decriminalisation of their work directly to the international community,” said a HRD from one of the NGOs based in Nairobi.¹³⁸

¹³⁴ interview with Nakuru HRD, 30 November 2016

¹³⁵ Interview with Eldoret HRD, 5 December 2016.

¹³⁶ Interview with Eldoret HRD, 5 December 2016.

¹³⁷ Interview with Eldoret HRD, 5 December 2016.

¹³⁸ Interview with a HRD based in Nairobi, 17 February 2017.

This direct lobbying has had some success. For example, during Kenya's second UPR cycle in 2015,¹³⁹ CSO's lobbied Member States to urge it to review laws and policies that decriminalize human rights work. As a result, States recommended that Kenya decriminalises sexual relations between consenting adults of the same sex and put an end to the social stigmatisation of homosexuality. These recommendations were, however, rejected by Kenya but it promised to adopt a comprehensive anti-discrimination law affording protection to all individuals, irrespective of their sexual orientation or gender identity. Further, during Kenya's second review in November 2015, around 20 Kenyan NGOs accredited to the Africa Commission on Human and Peoples Rights (ACHPR)¹⁴⁰ made alternative reports to the Commission highlighting cases of human rights violations and making recommendations that included urging the Government to stop criminalisation of human rights work.

Conclusion

This report highlights the increasing trend of criminalisation of human rights defenders in Kenya. It argues that criminalisation also leads to HRDs being labelled and stigmatised which can inhibit others from carrying out human rights work.

Terrorism, radicalisation and the formation of outlawed groups have presented human rights defenders (HRDs) with additional challenges. It has allowed the government to enforce outdated punitive laws, and use of administrative law provisions to clamp down on Civil Society Organisations. HRDs are increasingly facing the risk of being branded terrorists and sympathisers of criminal groups.

At the same time, criminal justice systems are being applied selectively to obstruct HRDs from doing their work in Kenya. HRDs in various parts of the country demanding accountability of officials and increased political participation have been arrested, detained without trial for prolonged periods, in situations reminiscent of the 1990s. In this sense, HRDs are being criminalised by using existing criminal justice or administrative legal frameworks.

Impunity and disregard for the law is normalising the criminalisation of HRDs. Abuse, physical threats and negative labelling of HRDs - being called foreign agents, sympathisers of western powers, enemies of development or government - has become routine. Though the 2010 Constitution through the Bill of Rights has consolidated the rights and gains fought for over the years by human rights defenders and has proven to be an invaluable ally in defending civic space and human rights defenders in Kenya it is not enough. This is because those who attack the defenders are powerful individuals who rarely get arrested or prosecuted for their actions. Grassroots defenders, NGOs without significant access to national and international networks, those working in remote areas with poor access and communications, and those working on high profile or emblematic cases are most vulnerable. They are easy targets for politicians, Chiefs, Members of County Assemblies, Members of parliament and other powerful people who have resources to hire goons to ruin their reputation or silence them. This is working especially in the Counties because the defenders have no adequate support to protect them.

¹³⁹ A process in which UN Member States human rights record is reviewed every four years.

¹⁴⁰ Only NGOs accredited to the ACHPR can make submissions or contribute to the floor during a session.



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