

# Independent Reporting Mechanism

Action Plan Review:  
Kenya 2020–2022

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Open  
Government  
Partnership



Independent  
Reporting  
Mechanism

## Introduction

Starting in January 2021, the IRM began rolling out new products that resulted from the IRM Refresh process.<sup>1</sup> The new approach builds on lessons from more than 350 independent, evidence-based, and robust assessments conducted by the IRM and inputs from the OGP community. The IRM seeks to put forth simple, timely, fit-for-purpose, and results-oriented products that contribute to learning and accountability in key moments of the OGP action plan cycle.

The new IRM products are:

1. **Co-creation brief:** brings in lessons from previous action plans, serves a learning purpose, and informs co-creation planning and design. This product is scheduled to roll out in late 2021, beginning with countries co-creating 2022–2024 action plans.
2. **Action plan review:** an independent, quick, technical review of the action plan and the strengths and challenges the IRM identifies to inform a stronger implementation process. This product is scheduled to roll out in early 2021 beginning with 2020–2022 action plans. Action plan reviews are delivered 3–4 months after the action plan is submitted.
3. **Results report:** an overall implementation assessment that focuses on policy-level results and how changes happen. It also checks compliance with OGP rules and informs accountability and longer-term learning. This product is scheduled to roll out in a transition phase in early 2022, beginning with 2019–2021 action plans ending implementation on 31 August 2021. Results reports are delivered up to four months after the end of the implementation cycle.

This product consists of an IRM review of Kenya’s 2020–2022 action plan. The action plan is made up of eight commitments. This review analyzes the strength of the action plan to contribute to implementation and results. For the commitment-by-commitment data, see Annex 1. For details regarding the methodology and indicators used by the IRM for this action plan review, see Section I: Methodology and IRM Indicators.

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<sup>1</sup> For more details regarding the IRM Refresh, visit <https://www.opengovpartnership.org/process/accountability/about-the-irm/irm-refresh/>.

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## Section I: Overview of the 2020–2022 Action Plan

*Kenya’s fourth action plan continues ambitious reforms from prior plans, including the adoption of open contracting data standards, implementation of the Access to Information Act, and the promotion of meaningful participation in legislative processes. It introduces new policy areas like improving access to justice. Commitments primarily focus on increasing transparency and civic participation. They could include stronger actions to enhance accountability through feedback and redress mechanisms. Moving forward, the Kenyan OGP Steering Committee should strengthen its oversight role, coordinating with implementing agencies to ensure that milestones have adequate resources, are met on time, and to their full extent.*

Kenya plays a global leadership role as a member of the OGP Steering Committee, which has increased their drive to become a role model among OGP members. The introduction of their fourth action plan describes leadership objectives at local, national, regional, and global levels. This will allow Kenya to speak to open governance efforts at all levels of government, from subnational governments to their international peers. Moving forward, Kenya needs to address implementation gaps from past action plans by joining resources and actors to push for strong implementation of this plan.

Kenya’s fourth action plan (2020–2022) has eight commitments. Six are carried over from previous action plans, both to complete unfinished milestones and introduce new milestones to improve their ambition and promote reforms. For the first time, Kenya addresses access to justice as a policy area in an OGP action plan.

Multistakeholder engagement during the development of the action plan improved significantly compared to previous co-creation processes.<sup>1</sup> Various forums allowed government-CSO conversations. In the “Open Dialogue” forum, the government allowed all interested actors from government and civil society to jointly make and prioritize proposals. (For example, whereas there was a strong push for a standalone commitment on gender, the open dialogue forum agreed to integrate gender related activities into the milestones.) Clustered working groups of government and CSO actors then documented policy problems and designed specific commitments and milestones. The multistakeholder forum (MSF), made up of representatives from the different cluster groups, considered and endorsed the draft commitments for inclusion in the action plan.

This action plan has several important features that could generate strong results. The plan engages the three arms of government: the executive, legislative, and judicial (the first two

### AT A GLANCE

**Participating since:** 2011  
**Action plan under review:** 2020-2022  
**IRM product:** Action plan review  
**Number of commitments:** 8

**Overview of commitments:**

- Commitments with an open gov. lens: 8
- Commitments with substantial potential for results: 4
- Promising commitments: 4

### Policy areas

Carried over from previous action plans:

- Beneficial ownership
- Open contracting
- Legislative openness
- Open data
- Public service delivery

Emerging in this action plan:

- Access to justice

### Compliance with OGP minimum requirements for cocreation:

- Acted according to OGP process: Yes

having representation in the National Steering Committee). If commitments are fully implemented, Kenya could prove how coordination between the three powers of the state contributes to better results. Moreover, the alignment of government and CSO perspectives (from the strong multistakeholder engagement) and the involvement of the different arms of government creates buy-in and unity of purpose that could promote collaborative implementation. For example, involvement of CSOs could yield positive returns in resource mobilization and community engagement, while involvement of parliament may create familiarity and ownership of proposed bills, and thus speed up enactment. Finally, during the development of this plan, the MSF considered reforms that already had the approval and goodwill of government leadership, so that initiatives prioritized for implementation would be less affected by political transitions. This is particularly important as implementation will occur during general elections and constitutional amendments. During implementation, all actors from government and civil societies should work very closely to maintain this momentum and guard the ambition of the plan. The plan therefore aims to push implementation and institutionalization of these reforms to ensure continuity beyond political transitions.

This review focuses on the four most promising commitments. Whereas all eight commitments address long-standing priorities both at national and subnational levels, the following four commitments were selected as “promising commitments” based on their ambition, verifiability, and relevance to OGP values:

- Commitment 2 on open contracting aims to adopt an open contracting data standard for all stages of public procurement in Kenya and secure legislative frameworks for whistleblower protection.
- Commitment 4 on public participation and legislative openness seeks to open up parliament by providing access to, and publication of, parliamentary proceedings and tracking of bills and petitions. It will also entrench public participation and civic education by establishing legal frameworks and guidance, and adopt technology for participation.
- Commitment 6 will create structures for effective implementation of the Access to Information Act and provide an open and accessible public debt register.
- Commitment 7 proposes measures to enhance access to justice through implementation of alternative justice mechanisms.

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<sup>1</sup> In developing the third national action plan (2018–2020), Kenya did not meet the OGP minimum requirement for public influence during cocreation (known as “involve”). Details of that stakeholder engagement are provided in Kenya’s design report, available at <https://www.opengovpartnership.org/documents/kenya-design-report-2018-2020/>.

## Section II: Promising Commitments in Kenya's 2020-2022 Action Plan

Section II focuses on four commitments (2, 4, 6, and 7) that the IRM identified as having the potential to realize the most promising results. This review will inform the IRM's research approach to assess implementation in the results report. The IRM results report will build on the early identification of potential results from this review to contrast with the outcomes at the end of the implementation period. This review also analyzes challenges, opportunities, and recommendations to contribute to the learning and implementation process of this action plan.

This section does not include an individual review of four of the eight commitments from the action plan (1, 3, 5, and 8), which were assessed by the IRM to have modest potential for results. These commitments are a positive step forward but have moderate ambition. However, this classification is based on the commitment language as written; it is possible for the commitment actors to conduct implementation in a way that yields transformative results and significantly impacts policy areas.

- Commitment 1, on beneficial ownership, advances Kenya's efforts to fight corruption and comply with international standards. It continues incomplete activities of previous action plans and other ongoing government commitments, but faces significant commitment design problems. First, the commitment does not make the e-register public. The beneficial ownership information regulations of 2020<sup>1</sup> provides access only for certain authorities. As a result, a public notice by the Business Registration Services,<sup>2</sup> while communicating to the public on the use of the e-register, specifically indicates the inaccessibility of the register to the public. In the 2016 London Anticorruption Summit, Transparency International coded the commitment to establish a central public register on companies' beneficial ownership information "ambitious;"<sup>3</sup> no public access curtails this ambition. However, as explained by Stephanie Muchai,<sup>4</sup> publishing the beneficial ownership register would require an amendment of the 2019 Companies Act and the consequent 2020 regulations. This amendment may not be practical given the time, resource, and mobilization limits of the plan's implementation window. Secondly, the high court nullification of some laws<sup>5</sup> (including the Miscellaneous Amendment Act 2019 that gave effect to beneficial ownership) could stall efforts on beneficial ownership transparency. While the high court suspended its ruling for a period of nine months to allow the respondents to comply with constitutional requirements,<sup>6</sup> the court's ruling will determine the application and validity of the legislation, and by extension, the implementation of beneficial ownership transparency. Lastly, as explained in the 2018–2020 IRM design report,<sup>7</sup> the realization of Milestone 2 is contingent on significant external factors outside the mandate of the Business Registration Service (BRS). Milestone 2 relies on actions by the Ethics and Anticorruption Commission, the Public Procurement Regulatory Authority, and the courts to be able to generate a list of companies convicted of bribery and corruption; these institutions' cooperation is beyond the scope of the BRS. Further, the design report also highlighted the need to verify beneficial ownership information submitted by companies. The action plan does not indicate whether there will be any specific steps to verify such information. Therefore, although advancing beneficial ownership transparency is a priority among country

stakeholders, this commitment continues ongoing activities from previous action plans without addressing existing concerns about their implementation.

Two commitments (Commitment 3 on open development data and Commitment 5 on public service delivery) address pressing national issues, but their milestones do not clearly indicate how their implementation will yield significant results.

- Commitment 3 builds on Kenya’s previous action plan, which aimed to improve access to open geospatial data in four targeted policy priorities: food and nutrition security, disaster management, and health. It includes similar milestones continuing to increase the publication of capital projects’ GIS data in county budgets and promote its use through establishment of policy frameworks. It adds new activities that will establish conditional support grants and implement disaster early warning systems. However, it does not clearly state how the milestones address problems faced by citizens (e.g., food security, housing and infrastructure challenges, and climate change), or how citizens can interact with this information to promote solutions. Rather, the commitment’s influence is implied; the key output—datasets—will be relevant for internal use by other government operatives, who will then design products and policies that directly affect citizens.
- Commitment 5 will strengthen peer review and learning among county (decentralized) governments. However, going by the commitment language, the milestones only affect the government, and do not reference any specific interfaces where citizens and CSOs can engage to promote transparency or accountability, as implied in the commitment description. Thus, during implementation, the government should ensure civic participation and government accountability by creating a space for citizens to utilize the data published and provide feedback on government processes. Moreover, the commitment could promote accountability by explicitly guaranteeing that county governments address and act upon citizen feedback. Similarly, in launching the County Peer Review Mechanism, implementers could create active forums for citizen engagement and input.
- Commitment 8 creates OGP resilience through institutional support and multistakeholder engagement in OGP processes. Since it institutionalizes OGP processes and facilitates the action plan’s implementation, the IRM will assess it as part of Kenya’s efforts to meet OGP procedural recommendations and guidelines.

The four promising commitments that follow are all initially assessed to be ambitious, verifiable, and relevant to OGP values. They offer improvements to government practices to better realize open governance.

**Table 1. Promising Commitments**

**Commitment 2. Open Contracting:** Adoption and implementation of the Open Contracting Data Standards by Kenya’s e-government procurement system will enable the government to progressively publish information in an open data format, and enable CSO and citizen use of such information to monitor and provide feedback on projects’ lifecycles. Further, passing a whistleblower protection act will create a safe environment for citizens to flag corrupt practices without fear of intimidation.

**Commitment 4. Public Participation and Legislative Openness:** Opening up parliament and the senate’s buy-in into this OGP commitment will not only improve transparency and accountability initiatives, but will also be key in mobilizing other legislative entities like the national and county assemblies to follow suit. The Public Participation Bill will

give effect to the principles of public participation detailed in the Constitution of Kenya. Technology will advance public participation, especially given COVID-19 restrictions on assemblies. Legislation on civic education will allow CSOs and the government to proactively run awareness campaigns and engage citizens. Finally, the Public Benefits Organization Act will expand spaces for CSOs to carry out their mandate better.

**Commitment 6. Access to Information:** Access to information regulations will provide frameworks for effective information disclosures by public institutions. This will address a key challenge that has hampered transparency commitments in previous action plans.

**Commitment 7. Access to Justice:** Financing and implementing alternative justice systems, legal aid, and technical support can expand access to justice in Kenya. Importantly, citizen-government dialogue offer a platform for awareness creation, dissemination of information, and feedback mechanisms on alternative justice systems.

### **Commitment 2: Open contracting**

Lead institution: Public Procurement and Regulatory Authority (PPRA)

For a complete description, see Commitment 2 in Kenya's 2020–2022 action plan at: <https://www.opengovpartnership.org/documents/kenya-action-plan-2020-2022/>.

### **Context and Objectives**

Kenya has prioritized addressing corrupt contracting in two previous action plans. Both government and civil society stakeholders from the Kenyan OGP community recognize the need to increase transparency and accountability in all public procurement processes to reduce fraud and corruption. Public procurement in Kenya is subject to corruption and bribery, with various assessments implementing high levels of public fund losses. GAN Integrity's Risk & Compliance Portal (formerly The Business Anti-Corruption Portal) noted that tender fraud was the fastest growing economic crime in Kenya and coded the risk level as high.<sup>8</sup> Transparency International ranked Kenya 124<sup>th</sup> out of 180, with a Corruption Perception Index rating of 32 out of 100.<sup>9</sup> The Ethics and Anticorruption Commission showed that over 72% of respondents both from government and private suppliers agreed that corruption was widespread in public procurement.<sup>10</sup>

The government has promoted open contracting, with previous commitments focusing on open contracting data standards, inclusion via the Access to Government Procurement Opportunities (AGPO) initiative, access to information through data portals, and providing legislative frameworks. Amendments to the Public Procurement and Asset Disposal (PPAD) Act of 2015 effected the AGPO, which made a significant impact in including traditionally disadvantaged groups such as youth, women, and people living with disabilities (PWD). The Public Finance Management (PFM) Act of 2012 further articulated the scope and guidelines for open contracting and created frameworks for financial oversight, budget planning, public participation, and obligations of state officers.

The combination of the PFM Act and the PPAD Act enabled the creation and operation of the Integrated Financial Management System (IFMIS). IFMIS fully caters e-procurement, and importantly, publishes open contracting data on its Public Procurement Information Portal (PPIP).

In Kenya's third action plan, the government sought to implement Open Contracting Data Standards (OCDS) on the PPIP, while supporting women, youth, and PWDs to participate in public procurement. However, the OCDS were not implemented, and though more information



was published on the portal, this did not cover all public procurement by all government entities.<sup>11</sup>

Efforts thus far have focused on creating structures for open contracting and publishing information. However, challenges still exist to these processes. The legal provisions for open contracting are limited in scope, only requiring publication of information on the pre-tender and tender-and-contract award processes.<sup>12</sup> Open contracting initiatives were hindered by limited understanding and capacity of implementing officers, as well as low political will. Additionally, the legacy systems in use are outdated, and incompatible with OCDS open data formats.<sup>13</sup> However, some recent trainings and advocacy have caused positive changes.

Kenya's Institute of Economic Affairs noted that while the pre-tendering and tendering stages of public procurement often have transparency measures, corruption is reported more during the post-tender award processes, where there is limited publication and disclosure of information.<sup>14</sup> Additionally, most information provided on the PPIP refers to historical data and does not reflect ongoing contracts, nor does the portal provide gender disaggregated data.<sup>15</sup>

Another challenge to public procurement is victimization. Most economic corruption and malpractice goes unreported, mainly due to a fear of victimization.<sup>16</sup> Kenya does not have a comprehensive and dedicated law on whistleblower protection, although a legislative proposal was submitted to a national assembly subcommittee on 12 August 2020.<sup>17</sup> Currently, whistleblower protection is covered piecemeal under laws like the Access to Information Act (2016), the Anti-Corruption and Economic Crimes Act (2003), the Witness Protection Act (2012), and the Bribery Act (2016). The lack of a comprehensive legal safeguard for whistleblowers is a weakness in the country's fight against corruption.

This commitment continues open contracting efforts toward inclusion, access to information, provision of legislative and policy frameworks, adoption of data standards, and includes a new focus on whistleblower protection. It tackles national and international contracts. It builds on existing implementation of an e-government procurement system that: uses the open contracting standard; is interoperable with existing portals; and captures all information from all procuring entities. The commitment further aims to provide regulatory frameworks for implementing the e-government procurement system at national and county levels and for whistleblower protections, while creating mechanisms for public feedback throughout the project lifecycle.

Regarding inclusion in public procurement, most AGPO-targeted beneficiaries live in rural areas with limited internet connectivity.<sup>18</sup> However, the National Treasury publishes tender and contract information online. This prompted Milestone 7's low-tech dissemination of information and engagement. Milestone 8 proposes spaces for citizens to raise concerns and provide feedback on projects, without having to wait for a call for information by the Public Procurement Regulatory Authority or any other aggrieved party.

Milestone 1, which proposes to publish beneficial ownership information on foreign and local companies who bid for and win mining contracts, speaks to both open contracting and beneficial ownership. It furthers implementation of a commitment on publishing oil and gas contracts, started under the second national action plan (NAP).<sup>19</sup> The IRM's end-of-term-report suggested contracts were not published because of legislative gaps and recommended that government begin steps to publish oil and gas contracts.<sup>20</sup> This legislation was passed as part of Kenya's third action plan and the beneficial ownership registry was set up by the end of the plan's implementation period.

The commitment is relevant to OGP values of transparency and civic participation. While the commitment does not expressly demonstrate accountability, it could enhance accountability by clearly detailing how citizen feedback will be collected and processed, and establishing links between feedback mechanisms and redress actions.

### **Potential for results: Substantial**

This commitment addresses different aspects of public procurement including the lack of unified data on open contracting,<sup>21</sup> inclusion and participation by marginalized groups, and whistleblower protection. Publication of information and use of online platforms have been adopted across countries as best practices to enhance transparency, integrity, and efficiency in public procurement.<sup>22</sup> Furthermore, the United Nations Economic and Social Commission for Asia and the Pacific reviewed best practices for disability-inclusive public procurement in the USA and EU.<sup>23</sup> Some lessons learned are:

- (i) Inclusion initiatives must have enforcement power; either stringent enforcement mechanisms or giving incentives to responsible parties are effective ways to enhance implementation of any law or regulation.
- (ii) Capacity building for all targeted stakeholders support development and implementation of disability inclusive procurement policy.
- (iii) Involving civil society organizations and the private sector in developing and implementing disability-inclusive procurement policy is key for success.<sup>24</sup>

Establishing an e-government procurement system and making it interoperable with existing platforms should ensure seamless regulation of national- and county-level procurement activities. The e-government system, together with a fully operationalized PPIP will result in a functional government procurement system that provides unified data on open contracting. Adopting OCDS will bring the system in line with international best practices and provide procurement information in machine-readable format, in real time, and which is interoperable with existing platforms, thus easing the burden of design and installation. This could improve access to information and quality of due diligence actions, shorten procurement times, promote participation, and enhance the efficiency of monitoring contracting processes by government, CSOs, and the public.<sup>25</sup> Furthermore, development of an open contracting regulatory framework will provide enforceable mechanisms to guide data collection, disclosure, and management of e-government procurement systems for both national and county governments.

Whistleblower protection is critical to combat corruption. By enacting a stand-alone national legislation, amending procurement regulations, and providing an enabling framework for comprehensive whistleblower protection, Kenya will commit to ethical government business. Clearly defining the scope of protection will ensure that reporting platforms are robust and reliable, will minimize risk of victimization, and promise whistleblowers that the reported concerns will be dealt with appropriately. The commitment will also educate CSOs on whistleblower protection, with the aim of encouraging citizens to report corrupt practices.

Finally, providing information through low-tech and rural mechanisms is a positive step to encourage uptake of AGPO opportunities. However, this could be augmented with other initiatives such as entrepreneurial capacity building for citizens, and businesses monitoring, as discussed in the design report.

### **Opportunities, challenges, and recommendations during implementation**

Moving forward, the IRM recommends the following:

- Ensure strong collaboration between the National Treasury and the Public Procurement Regulatory Authority: According to one interviewee, the National Treasury lacked

responsiveness and was not as collaborative as desired. The 2018–2020 design report noted similar challenges facing the county government of Makueni, which was also implementing an open contracting commitment. The government will need to address this to avoid uncalled-for impediments to the commitment.

- Give explicit measures to strengthen accountability: The 2018–2020 design report stated that using OCDS on the portals does not automatically reduce corruption. Kenya should explain how these measures will be used to reduce corruption. The government could detail how the PPIP can be linked with the beneficial ownership register to enable verification of company details. This could also be linked to oversight and anticorruption authorities such as the Ethics and Anticorruption Commission, the anticorruption legal courts, and prosecution authorities for better access to and utilization of information. Additionally, the government could demonstrate how citizen feedback will be collected and processed, and establish links between the feedback and redress actions.
- Regularly train public officials on the laws and documentation standards: Implementers of this commitment could collaborate with the implementers of Commitment 6 (access to information) to develop standards for, and promote digitization of, records to enhance adoption of the open contracting data standards. Equally, the commitment stands to benefit from the curriculum training on access to information if the implementers include procurement officers and related personnel for capacity building.
- Promote citizen use of contracting information: Build partnerships, hold trainings, and conduct awareness campaigns to improve dissemination and promote data use by the government, CSOs, and the media.
- Encourage peer exchanges to learn from past experiences: The national government can study the experiences of two county governments, Makueni and Elgeyo Marakwet, who have implemented OCDS. There is an even greater opportunity for peer learning among other county governments, such as through the county peer-review mechanisms detailed in Commitment 5. Flagship initiatives such as this one could be recommended for adoption across all counties, and the Council of Governors tasked to ensure and monitor its implementation.

#### **Commitment 4. Public Participation and Legislative Openness**

Lead institution: The Senate of the Republic of Kenya

For a complete description, see Commitment 4 in Kenya’s 2020–2022 action plan at: <https://www.opengovpartnership.org/documents/kenya-action-plan-2020-2022/>.

#### **Context and Objectives**

A major highlight of Kenya’s constitutional framework is the requirement for public participation in all governance and administrative activities. Public participation is appreciated as the main vehicle for legislative openness. The Kenyan constitution and several other laws<sup>26</sup> address public participation. However, in practice, public participation has been hampered by challenges including a lack of interest from government actors in creating meaningful spaces for participation,<sup>27</sup> a lack of standards, inadequate access to information, non-inclusivity and the high cost and inadequate budgeting for public participation activities.<sup>28</sup> The result has been a tokenistic practice, with insufficient input into governance processes and service delivery.<sup>29</sup>

Kenya committed to increase openness and citizen engagement in parliamentary work under the Declaration on Parliamentary Openness.<sup>30</sup> Kenya also has addressed public participation and legislative openness in every OGP action plan. IRM design reports state that implementation of these efforts vary. NAP I saw not started/limited implementation, NAP II saw substantial; and

early results for NAP III indicate implementation is ongoing. Outcomes of these commitments include publishing county public participation guidelines, a public participation bill with stakeholder consultations, parliamentary proceedings and Hansards, live broadcast of parliament sessions, and bill trackers by parliament as well as civil society.<sup>31</sup>

This current commitment blends work from previous action plans<sup>32</sup> with new areas. Continued themes are: (i) passing public participation legislation, (ii) developing and implementing tools, technology, and alternative media for participation, (iii) access to information on government services and performance, and (iv) legislative openness (through disclosure of parliamentary information, access to proceedings, and development of trackers for bills and petitions). New areas are legislation for civic education and public benefit organizations, and enhancing inclusivity.

Previous commitments initiated drafting and consultations on public participation guidelines and legislation, but enactment of the law remains incomplete. Similarly, several gaps stand in the way of legislative openness. Proceedings and Hansards of parliament committees and county assembly committees have not been adequately provided or made accessible. This limits the ability of citizens and parliamentary monitoring organizations such as Mzalendo Trust to track and monitor discussions and contributions in the various committees.<sup>33</sup> At the time of this research,<sup>34</sup> there were several trackers available on the National Assembly website that provided information on status of bills tabled before the House.<sup>35</sup> Similarly, the Senate website listed bills and allowed citizen comments on the bills. While these initiatives are commendable, the commitment implementers sought to enhance the trackers to provide more information, and expand citizen-legislator interactions on the platforms. The previous steps implemented have largely been technical or formal steps to improve participation. The underlying constraints have not been adequately addressed. Access to information has improved over the years, but is not yet at “best practice” level. Similarly, none of the commitments or milestones have addressed the fridity from government actors in creating meaningful spaces for participation, nor addressed the high cost of public participation activities.

The commitment provides mechanisms for better-structured participation, inclusivity, and transparency in legislative processes. It is anticipated that the proposed legislation will provide guiding standards for participation and will address inclusivity. The commitment also embraces technology to enhance participation, particularly important during the Covid-19 pandemic. Additionally, the two new areas (drafting of the national civic education law and implementing the Public Benefits Organization Act) will expand spaces for civic engagement, ultimately aiming to counter the fridity of government officials by increasing citizen demand for meaningful participation. The Public Benefit Organization Act was enacted in 2013 (but commenced in 2016) to provide a legislative framework for the registration, regulation, and oversight of public benefit organizations such as nongovernmental and civil society organizations. Although this legislation is enacted, the regulations that guide implementation of the act are not yet finalized, hence the aim of the milestone.<sup>36</sup>

Milestone 8 contributes to the broader reforms listed under Commitment 8, Milestone 6. The aim of the speaker’s roundtable is to widen conversation on OGP beyond the few selected legislators, to increase uptake of initiatives through awareness creation, and advocate for establishing technical teams on OGP at both the Senate and National Assembly.

These reforms are relevant to the OGP values of access to information and civic participation.

**Potential for results: Substantial**

The milestones in this commitment are broad in scope and put forward different activities not necessarily linked to each other, but independently valuable. Individually, the milestones have varying potential for results, but cumulatively, they have the potential to generate important changes across government.

The Constitution of Kenya requires the parliament and county assemblies to involve the public in their legislative processes. Regarding public service delivery, the constitution requires transparency and public provision of timely, accurate information, as well as involvement by the people in the decision making. The African Center for Open Governance, in its policy brief on Public Participation and Parliamentary Oversight,<sup>37</sup> discusses factors hindering meaningful public engagement in the parliamentary committees and made recommendations, some of which speak to this commitment. These include: (i) making online resources interactive to improve interactions between legislators and committees, and also the public and the parliament; (ii) promoting user-friendly technical access through better navigation aids and presentation styles, and (iii) applying reforms on parliamentary openness to county assemblies, with appropriate modifications. This commitment sets out to create new, and enhance existing, opportunities for the public to learn about, track, and influence parliamentary activities. The proposed trackers will improve on the initiatives of NAP III and be more interactive and more informative. The service charters will be developed to provide necessary information on government services and hopefully foster informed decision making by citizens.

Providing access to information through disclosure of committee proceedings (parliament and county assemblies) is pertinent to informed participation and monitoring by citizens and CSOs. This commitment undertakes to make parliamentary committee proceedings accessible. Most of the technical work by parliament is handled at committee level, and thus it is imperative that the Hansard from these committees are made equally accessible. Devolving transparency initiatives of the Senate and National Assembly to county assemblies while expanding access to information and citizen engagement at all levels will widen access to information and space for citizen participation.

Regarding public participation guidelines, several versions of guidelines are pre-existing, such as the guidelines for public participation in the legislative processes and the county public participation guidelines.<sup>38</sup> However, these provide general overarching direction, stating the key areas for participation and the general right to participation. They do not spell out specific steps to ensure inclusivity, nor do they provide clear redress mechanisms for citizen feedback. Milestone 7 borrows from the experience of Elgeyo Marakwet<sup>39</sup> on inclusivity in public participation and tracking input from citizens proposals to final decision making. While guidelines anchored in legislation can institutionalize public participation, guidelines alone are insufficient to ensure meaningful participation. Successful participation requires the commitment and initiative by the government, citizens, and CSOs, as well as adequate funding for participation activities.

Implementing the Public Benefits Organization Act will strengthen the relationship between CSOs and government, and will regulate the sector by setting standards of governance within the sector, mechanisms for self-regulation, protective rights, and by enhancing cooperation between government, development actors, stakeholders, and citizens. More importantly, as explained by Pamela Ager (Oraro and Company Advocates), implementing the act will require the government to respect the freedom of association and assembly and provide an enabling environment in which public benefit organizations can be established and function. Further, the

government will be enjoined to involve public benefit organizations in policy decisions that affect them, particularly at the local level.<sup>40</sup>

The speaker's roundtables will build resilience by establishing a practice that will influence the next elected House to uphold and promote OGP initiatives. It also builds into Commitment 8, which proposes roundtables with the three arms of government. Anticipated outcomes of the speaker's roundtables include: (i) briefings and engagement between legislators and implementers to begin advocacy for legislative and resource support, (ii) support for donors' roundtable since parliamentarians are expected to participate in the donors' meetings, and (iii) promoting the cocreation of solutions by government and CSOs.

### **Opportunities, challenges, and recommendations during implementation**

Moving forward, the IRM suggests:

- Ensure adequate financing: Despite repeated efforts, initiatives on public participation remain incomplete, with inadequate financing being a key challenge.<sup>41</sup> Implementers should capitalize on the strong CSO engagement to collaboratively advocate for national and county government financing.
- Advocate for a public participation law: While the 2018–2020 NAP sought to pass a national public participation law, the court ordered an immediate cessation of considering any bill before the Senate and National Assembly, to meet requirements of Article 110 (3) of the Constitution<sup>42</sup>. While the consequent actions of the parliamentary houses is beyond the scope of this action plan, implementers could lobby for prioritizing the public participation bill when consideration resumes.
- Enact the civic education legislation: The proposed civic education legislation can promote civic participation and is timely given the approaching constitutional amendments and general elections. This regulation would assist CSOs' advocacy work. Implementation could advance beyond drafting the law and target its enactment.
- Devolve legislation trackers to county assemblies: Implementers could develop trackers for county assemblies to allow for transparency and interaction at the local level. Additionally, county trackers will be helpful for Senate's monitoring of county activities.
- Strengthen CSO participation in implementing the commitment: Several milestones' general content and implementation steps will be a challenge in implementation and monitoring. Mzalendo, as the lead CSO implementer, could bring together other civic actors to advocate for, and support strong implementation of the commitment.

### **Commitment 6: Access to Information**

Lead institutions: Commission on Administrative Justice (CAJ); Ministry of ICT; Kenya National Archives & Documentation Service (KNADS); Public Debt Management Office; and the National Treasury

For a complete description, see Commitment 6 in Kenya's 2020–2022 action plan at: <https://www.opengovpartnership.org/documents/kenya-action-plan-2020-2022/>.

### **Context and Objectives**

Access to information in Kenya has seen proactive participation and advocacy by CSOs such as Article 19, the International Commission of Jurists-Kenya Section, Transparency International and the Katiba Institute. Over the years, the push for access to information came largely from CSOs and was given a major boost with the promulgation of the 2010 Kenyan Constitution, Article 35. The government promoted access to information by establishing the Commission on Administrative Justice (CAJ)<sup>43</sup> in 2011. During cocreation, this commitment was a priority for both government and CSOs.

Access to information (ATI) is a constitutional right in Kenya. The (ATI) law grants citizens access to information held by both public and private entities, but it is citizen driven, meaning citizens must know and exercise their right for the law to be effective and yield outcomes in transparency and the fight against corruption. Several legal cases<sup>44</sup> have demonstrated challenges Kenyans face in accessing information, despite the law. Similarly, the International Commission of Jurists (Kenya Section) has previously decried the limited and inconsistent publication of information by public health institutions,<sup>45</sup> and highlighted the right of citizens to access information in extractive sector, noting one consequence of being an impasse in Turkana County regarding the Early Oil Pilot Scheme.<sup>46</sup>

In the 2016–2018 national action plan, Kenya committed to enhancing the right to information by strengthening record management and access to information. This NAP also supported passage of the Access to Information Act in September 2016, which supports citizens' right to access information, and links ATI with record management. Further, the IRM's 2016–2018 end-of-term report noted that the CAJ mainstreamed ATI training for public officials through a performance contracting system, and sensitized public bodies on their duties and obligations. Further, the government established an online portal under CAJ for submitting ATI requests. The ICT's Authority's Electronic Records and Data Management Standard was approved in August 2016, effective January 2017. However, the ATI regulations were not put in place, nor was a central digital registry for government records and data established.<sup>47</sup>

As detailed in the current NAP, effective implementation of the ATI Act has been challenged by a lack of guidelines on how public institutions should disclose information, poor monitoring frameworks, and non-digitization of records. According to CAJ,<sup>48</sup> the nonexistent regulations and guidelines have resulted in opacity in institutions' disclosures and citizen access to information. However, NAP does not continue work on establishing a digital registry for government records and data.

The aim of this commitment is to implement the ATI Act by passing regulations and creating frameworks for enforceable implementation by state entities. This will be achieved through:

- i. passing regulations to unpack and operationalize the main ATI law;
- ii. beginning an ATI training program for public officers but also open to the private sector;
- iii. setting up mechanisms for adoption of ATI laws by local governments;
- iv. enforcing disclosure by public institutions through a reporting framework; and
- v. digitizing records.

Implementing this commitment could support other commitments such as open contracting, where there are nondisclosures by procuring entities and the procurement portal data is not OCDS-compliant.<sup>49</sup> If fully implemented, the commitment will address the barriers to ATI highlighted in the 2018–2020 IRM design report.<sup>50</sup>

The commitment is relevant to the OGP values of transparency, civic participation (through public participation in developing the regulations), and accountability (through redress mechanisms for government agents who do digitize and publish data).

### **Potential for results: Substantial**

Access to information is vital for civic participation and accountability; failure to provide access to information prevents citizens from making informed decisions and holding actors accountable. The IMF notes that the full implementation of the ATI act, with regulations and proactive disclosures, is vital to enhancing transparency and accountability.<sup>51</sup>

Through this commitment, the government promises to address the major hindrances to ATI. The commitment pledges to pass the ATI regulations, involving public input, which will allow full implementation of the ATI law. Digitization of records will aid organizations in meeting the standards for publishing information, which will aid implementation of other initiatives such as open contracting and compliance with ATI requirements as under the Memorandum of Economic and Financial policies provided to the IMF.

ATI training will build capacity of state officers to publish all necessary information in appropriate formats and will promote effective responses to citizen requests for information. The Kenya School of Government<sup>52</sup> builds officials' capacity for efficiently providing public services and can conduct continued training of public officers in ATI. This training is crucial for resilience as the course can be held every year with attendance by different public officers and organizations. The training will also target the members of county assemblies, which might ease the process of translating the national law to the county level.<sup>53</sup>

Regarding Milestone 6, information on public debt has been extensively provided on the websites of the Central Bank<sup>54</sup> and National Treasury.<sup>55</sup> These include the public debt registers, debt sustainability analysis, and annual debt management reports. However, this information is not in a machine-readable format, nor is it in real time. While the Central Bank data is machine-readable, it does not contain underlying information as provided by the National Treasury. Although the milestone does not detail its activities, the government point of contact, Phillip Thigo,<sup>56</sup> explained that the commitment will upgrade all available registers to real time, machine-readable data. Once the register is upgraded, open, and accessible, it will disclose treasury and other public institutions' information in compliance with ATI law, which will be monitored through Milestones 4 and 5.

### **Opportunities, challenges, and recommendations during implementation**

Enacting ATI laws and regulations is the beginning of a wider scope of activities. Even with the significant steps promised in this commitment, there is room to advance ATI in Kenya. The IRM suggests the following:

- Coordinate regulations: The government and its co-implementers should coordinate different ATI regulations to prevent conflicts between the Access to Information Act, the Data Protection Act, and the Official Secrets Act.<sup>57</sup> The government should collaborate with this commitment's stakeholders so that all ATI interests can coexist.
- Develop a systemic and sustainable support system for citizen engagement with published data: The public debt register comes amidst public outcry on the debt situation in the country. Kenyans are dissatisfied with the rising debt<sup>58</sup> and suspect the debt could be higher than reported.<sup>59</sup> Despite the government providing public debt information, citizens still lack adequate information. Making the data machine-readable is critical for open government and open data, and directly influences how citizens and other entities can use the information. While an open and accessible public debt register could increase the usability of the data provided, Milestone 6 could go further in ensuring citizens can adequately use the published information. For example, the government should facilitate citizen interaction with the register so they might make inquiries or provide feedback. Additionally, CSOs could be engaged to promote awareness and use of the public debt register to influence citizens' decision making.

### **Commitment 7: Access to Justice**

Lead institutions: Alternative Justice Systems (AJS) Implementation Committee; the Employment, Labour and Relations Court; and the National Legal Aid Service



For a complete description, see Commitment 7 in Kenya's 2020–2022 action plan at: <https://www.opengovpartnership.org/documents/kenya-action-plan-2020-2022/>.

### **Context and Objectives**

The Kenya Constitution (2010) provides an overarching guarantee on access to justice for all persons. However, studies show that access to justice has been hampered by high court fees, geographical access, understaffing of the judiciary, and a case backlog.<sup>60</sup> The constitution further provides for the use of alternative forms of dispute resolution for all citizens. The Afrobarometer Round 8 Survey<sup>61</sup> showed that Kenyans generally embraced out-of-court settlements compared to courts and tribunals. The Justice Needs and Satisfaction in Kenya Survey<sup>62</sup> indicated that only 10% of Kenyans use formal justice systems for dispute resolution, implying that most Kenyans use informal mechanisms. Additionally, Covid-19 has rendered the courts increasingly difficult to access due to technology barriers, so community-based alternative justice systems (AJS) are providing a better platform for justice administration.

However, AJS face challenges like a lack of formal recognition, gender injustices, exclusion of marginalized and vulnerable groups, and insufficient regulation, which limits accountability. The Alternative Justice Systems policy (August 2020)<sup>63</sup> gives AJS guidelines for both the judiciary and all justice-sector institutions. The Legal Aid Act (2016) effected constitutional stipulations on facilitating access to justice and social justice; established the National Legal Aid Service; and provided funding for legal aid. However, implementing the legal and policy frameworks has been slow. The Legal Aid Act establishes a legal aid fund, but this isn't operational due to funding constraints. The AJS policy framework and implementation process is still new.

In the 2012–2013 NAP, Kenya promoted transparency in justice administration through vetting judicial officers and integrating new technologies to improve expediency in judgements.

This commitment covers two broad objectives: (i) to increase the state's capacity to provide legal aid for indigent clients and (ii) to lead implementation of the AJS policy. The commitment proposes activities to speed up implementation of the legal and policy frameworks, thus enhancing access to justice in the country. Through citizen-government dialogue, the commitment will raise public awareness and offer citizens an opportunity to give feedback on AJS mechanisms and policy. Milestone 3 will bring together government budget actors to set aside the much-needed funds that will allow both state and non-state legal aid providers to expand access to justice. The commitment further seeks to have model programs to address two key challenges. Milestone 2 details the government piloting AJS in Mombasa county, where it will train the Mombasa Legal Aid Unit (MLAU) on AJS and link them with the national judiciary so that they can refer cases that qualify for AJS. Milestone 4 proposes a program to offer support to self-representing indigents, who are faced with technological challenges.

This commitment is relevant to OGP values of access to information, civic participation, and public accountability, and further promotes use of technology and innovation to enhance accountability. It fosters public accountability by supporting legal aid, which is critical to check government overreach, especially in criminal proceedings a loss of liberty is at stake. The commitment also strives to make justice mechanisms cheaper, faster, and easier to use, and adopts technology and innovation to increase the reach of justice mechanisms, especially important during a pandemic where physical and in-person interactions are limited. Overall, this commitment will enable citizens to exercise their right to information on their own proceedings as well as their right to hold the justice system accountable for timely and efficient resolutions. It will also allow citizens to access remedies for their disputes when warranted. Finally, Milestone 1 supports citizen-government dialogue to create awareness and promote citizen

input while implementing AJS. This dialogue will enhance access to information by publicizing the AJS policy.

### **Potential for results: Substantial**

By targeting the alternative justice mechanisms mostly used by Kenyans, this commitment promises significant changes for citizens' access to justice. One AJS challenge is co-referencing case information between the courts and AJS mechanisms. This commitment offers a practical way to facilitate court-AJS cooperation and provides a learning experience for the involved actors like the Mombasa Legal Aid Unit, judicial officers, and CSOs to apply AJS while processing cases. This will translate to a greater number of cases diverted to AJS mechanisms, a decreased backlog in court cases, and more resolved cases across both justice mechanisms. Successful lobbying for legal aid funding can strengthen legal aid services and enable better access to justice. Finally, the commitment addresses technological challenges faced by citizens in accessing justice.

Milestone 4 addresses technological barriers faced by self-representing indigents. Since the COVID-19 pandemic began, the judiciary introduced an online platform with e-filing systems and online court proceedings. Some self-representing litigants had difficulty navigating the online services and lost track of their cases. If Milestone 4's Virtual Court Center becomes fully operational, the judiciary can refer self-representing litigants who need technological support to the center, where they would be assisted in processing their applications, filings, and in attending virtual court sessions.

This commitment is timely given the upcoming elections. Following the post-election violence in 2007–2008, organizations such as Kituo cha Sheria used AJS for accountability. Kituo adopted AJS so victims and perpetrators could come together to resolve issues and reconcile. Kituo cha Sheria finds AJS a strategic policy to be implemented during the forthcoming election period.

### **Opportunities, challenges, and recommendations during implementation**

- Leverage external support to enhance outcomes: This commitment aligns with the EU & UNODC Programme for Legal Empowerment and Aid Delivery<sup>64</sup> and has attracted support by other organizations such as the International Development Law Organization<sup>65</sup> and the state and nonstate actors listed in the action plan. Commitment implementers could leverage this multistakeholder support to enhance execution of the activities and realize the desired impact.
- Ensure resource availability: Resource mobilization and funding will be a challenge. Kenya's judiciary has received declining funding over the past four financial years,<sup>66</sup> which may affect the commitment's success. Implementers could develop and implement a detailed roadmap of specific targets and activities needed to achieve each milestone's objective. For example, Kituo cha Sheria<sup>67</sup> reported that the commitment-cluster members individually fundraised while also collectively lobbying government and identifying finance partners.
- Enhance the scope of Milestones 2 and 4: Milestones 2 and 4 promise substantial changes but are limited to pilot activities in Mombasa and Nairobi. Implementers should create a plan, backed by adequate resources, for expanding the programs across the country in order to yield a transformative impact.
- Publish more judicial information: Consider publishing all relevant information, not only for this commitment, but also for other judicial processes and reforms to enhance transparency and promote citizen awareness and engagement.

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- <sup>4</sup> Stephanie Muchai (East Africa lead for Open Contracting at Hivos/Open Contracting, Country Engagement Developer, CSO OGP SC member), interview by IRM researcher, 5 Apr. 2021.
- <sup>5</sup> *Senate of the Republic of Kenya & 4 others v Speaker of the National Assembly & another; Attorney General & 7 others (Interested Parties)* eKLR (High Court of Kenya, 2020) <http://kenyalaw.org/caselaw/cases/view/202549/>.
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- <sup>11</sup> Muchai, interview.
- <sup>12</sup> The Public Procurement and Asset Disposal Act (No. 33 of 2015): The Public Procurement and Asset Disposal Regulations, 2020, Kenya, [file:///C:/Users/hp/Downloads/L.%20N.%20No.%2069%20\(PUBLIC%20PROCUREMENT%20AND%20ASSENT%20DISPOSAL\)%20REGULATIONS%202020..pdf](file:///C:/Users/hp/Downloads/L.%20N.%20No.%2069%20(PUBLIC%20PROCUREMENT%20AND%20ASSENT%20DISPOSAL)%20REGULATIONS%202020..pdf).
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<sup>23</sup> UN Economic and Social Commission for Asia and the Pacific, “Disability-Inclusive Public Procurement: Promoting Universal Design and Accessibility” in *Social Development Policy Paper* no. 1 (2019), [https://www.unescap.org/sites/default/files/PP%202019-01\\_Disability%20Inclusive%20Procurement\\_rev.pdf](https://www.unescap.org/sites/default/files/PP%202019-01_Disability%20Inclusive%20Procurement_rev.pdf).

<sup>24</sup> *Id.*

<sup>25</sup> Oduor-Noah.

<sup>26</sup> These laws include the Public Finance Management Act, 2012, County Governments Act, 2012, Urban Areas and Cities Act, 2012 and the Intergovernmental Relations Act, 2012.

<sup>27</sup> Brendan Halloran, *Without a Will, Is There a Way? Kenya’s Uneven Journey to Budget Accountability* (International Budget Partnership, Oct. 2017), <https://www.internationalbudget.org/wp-content/uploads/kenyas-uneven-journey-to-budget-accountability-ibp-case-study-2017.pdf>.

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<sup>29</sup> Caroline Gaita (Exec. Dir. of Mzalendo Trust), interview by IRM researcher, 10 May 2021.

<sup>30</sup> For more information on the open parliament declaration, see <https://openingparliament.org/declaration/>.

<sup>31</sup> For detailed activities and results from the different action plan commitments, see Kenya’s 2012–2013 progress report ([https://www.opengovpartnership.org/wp-content/uploads/2019/07/Kenya\\_final\\_2012\\_0.pdf](https://www.opengovpartnership.org/wp-content/uploads/2019/07/Kenya_final_2012_0.pdf)) and Kenya’s 2016–2018 end-of-term report (<https://www.opengovpartnership.org/documents/kenya-end-of-term-report-2016-2018/>).

<sup>32</sup> The previous action plans can be found at <https://www.opengovpartnership.org/documents/kenya-action-plan-2012-2013/>, <https://www.opengovpartnership.org/documents/kenya-action-plan-2012-2013/>, and <https://www.opengovpartnership.org/documents/kenya-action-plan-2018-2020/>.

<sup>33</sup> Caroline Gaita (Exec. Dir. of Mzalendo Trust), interview by IRM researcher, 27 May 2021.

<sup>34</sup> Research was done in May 2021.

<sup>35</sup> The trackers and public comments portal can be viewed at <http://www.parliament.go.ke/the-national-assembly/house-business/bills> and <http://www.parliament.go.ke/the-senate/senate-bills>.

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<sup>38</sup> These guidelines can be found at: [http://www.parliament.go.ke/sites/default/files/2018-04/27\\_Public\\_Participation\\_in\\_the\\_Legislative\\_Process.pdf](http://www.parliament.go.ke/sites/default/files/2018-04/27_Public_Participation_in_the_Legislative_Process.pdf) and <https://countytoolkit.devolution.go.ke/public-participation>.

<sup>39</sup> Elgeyo Marakwet was among the pioneering local governments participating in the OGP Local. The county has had commitments on expanding spaces for civic engagement and yielded some positive results, including the development of participation guidelines. Details of the action plans and results can be found here <https://www.opengovpartnership.org/members/elgeyo-marakwet-kenya/>.

<sup>40</sup> Ager, “Out With the Old, in With the New.”

<sup>41</sup> *Id.*

<sup>42</sup> The detailed court ruling can be found at: <http://kenyalaw.org/caselaw/cases/view/202549/>.

<sup>43</sup> The Commission on Administrative Justice is a government body tasked with oversight and enforcement functions, which include handling complaints relating to access to information and considering reports from public bodies on the ATI Act’s implementation. For more information, see <https://www.ombudsman.go.ke/>.

<sup>44</sup> See Maureen Kakah, “Access to Public Information an Uphill Struggle in Kenya Despite Law” (Business Daily, 27 Feb. 2019), <https://www.businessdailyafrica.com/bd/data-hub/access-to-public-information-an-uphill-struggle-in-kenya-despite-law-2240542>; Transparency International Kenya, “Media Advisory on Access to Information Petition” (7 Jul. 2020), <https://tikenya.org/media-advisory-on-access-to-information-petition/>, and Commission on Administrative Justice, *Handbook on Best Practices on Access to Information in Kenya* (Aug. 2018), [https://countytoolkit.devolution.go.ke/sites/default/files/resources/Handbook\\_on\\_Best\\_Practices\\_on\\_Implementation\\_of\\_Access\\_to\\_Information\\_in\\_Kenya.pdf](https://countytoolkit.devolution.go.ke/sites/default/files/resources/Handbook_on_Best_Practices_on_Implementation_of_Access_to_Information_in_Kenya.pdf).

<sup>45</sup> International Commission of Jurists Kenyan Section, *Assessment Report: Status of Implementation of the Regulatory & Policy Framework on Access to Information in the Health Sector in Kenya* (2020), [https://icj-kenya.org/news/sdm\\_downloads/assessment-report-status-of-implementation-of-the-regulatory-policy-framework-on-access-to-information-in-the-health-sector-in-kenya/](https://icj-kenya.org/news/sdm_downloads/assessment-report-status-of-implementation-of-the-regulatory-policy-framework-on-access-to-information-in-the-health-sector-in-kenya/).

<sup>46</sup> International Commission of Jurists Kenyan Section, “Access to Information in Extractives is Crucial” (15 Oct. 2018), <https://icj-kenya.org/news/access-to-information-in-extractives-is-critical/>; International Commission of Jurists Kenyan Section, *Citizen’s Access to Information Guide* (2018), [https://icj-kenya.org/news/sdm\\_downloads/citizens-access-to-information-guide/](https://icj-kenya.org/news/sdm_downloads/citizens-access-to-information-guide/).

<sup>47</sup> *Id.*

<sup>48</sup> Violah Ocholla (Dir. Admin., Commission on Administrative Justice), interview by IRM researcher, 28 May 2021. For more information about the CAJ, see <https://www.ombudsman.go.ke/index.php/access-to-information-centre>.

<sup>49</sup> Challenges to open contracting are discussed under the first promising commitment.

<sup>50</sup> *Id.*

<sup>51</sup> International Monetary Fund, *Kenya Country Report* no. 21/72 (2021), <file:///C:/Users/hp/Downloads/dsacr2172.pdf>.

<sup>52</sup> For more information about the Kenya School of Government, see <https://ksg.ac.ke/about-ksq/>.

<sup>53</sup> Ocholla, interview.

<sup>54</sup> Information on Kenya's public debt is found at: <https://www.centralbank.go.ke/public-debt/>.

<sup>55</sup> Kenya's External Public Debt Register is found at: <https://www.treasury.go.ke/external-public-debt-register/>.

<sup>56</sup> Phillip Thigo (government point of contact), interview by IRM researcher on 31 May 2021.

<sup>57</sup> See Article 19, "Kenya: Official Secrets Act Incompatible with Freedom of Expression Standard" (14 Sep. 2020), <https://www.article19.org/resources/kenya-official-secrets-act-incompatible-with-freedom-of-expression-standards/>,

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<sup>58</sup> "Letter from Africa: Kenyans Protests Over Growing Debt" (8 Apr. 2021), <https://www.bbc.com/news/world-africa-56651735>; Mzalendo, @mzalendowatch, "The IMF has released a statement following public outcry over the government's growing appetite for debt after it approved a Sh257 billion loan to Kenya, saying its bailout has saved the country from a debt crisis in the mid of the Covid-19 pandemic." (Twitter, 8 Apr. 2021)

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<sup>61</sup> Afrobarometer, "Summary of Results: Afrobarometer Round 8 Survey in Kenya 2019" (2021),

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<sup>62</sup> The Hague Institute for Innovation of Law, "Justice Needs and Satisfaction in Kenya" (2017),

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<sup>63</sup> The Alternative Justice Systems Baseline Policy and the Alternative Justice Systems Framework Policy can be found at: <https://ajskkenya.or.ke/taskforce-papers-and-reports/>.

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2018), <https://www.unodc.org/easternafrika/en/programme-launched-to-improve-access-to-justice-through-kenyas-judiciary.html>.

<sup>65</sup> International Development Law Organization, "Enhancing Access to Justice Through Alternative Dispute

Resolution in Kenya" (20 Apr. 2018), [https://www.idlo.int/fr/news/highlights/enhancing-access-justice-through-](https://www.idlo.int/fr/news/highlights/enhancing-access-justice-through-alternative-dispute-resolution-kenya)

[alternativ-dispute-resolution-kenya](https://www.idlo.int/fr/news/highlights/enhancing-access-justice-through-alternative-dispute-resolution-kenya).

<sup>66</sup> Presentations made during the Institute of Economic Affairs public forum on Pre-Budget Hearing 2020/21 for the judiciary, held 5 February 2020, can be found here: [file:///C:/Users/hp/Downloads/1580992662%20\(2\).pdf](file:///C:/Users/hp/Downloads/1580992662%20(2).pdf),

<file:///C:/Users/hp/Downloads/1580992980.pdf>, and <file:///C:/Users/hp/Downloads/1620136340.pdf>.

<sup>67</sup> Dr. Annette Mbogoh (Exec. Dir., Kutoi cha Sheria), interview by IRM researcher, 25 May 2021.

## Section III: Methodology and IRM Indicators

The purpose of this review is not an evaluation as former IRM reports. It is intended as an independent, quick, technical review of the characteristics of the action plan and the strengths and challenges the IRM identifies to inform a stronger implementation process. This approach allows the IRM to highlight the strongest and most promising commitments based on an assessment per the key IRM indicators, particularly commitments with the highest potential for results, the priority of the commitment for country stakeholders, and the priorities in the national open government context.

To determine which reforms or commitments the IRM identifies as promising the IRM follows a filtering and clustering process:

**Step 1:** Determine what is reviewable based on the verifiability of the commitment as written in the action plan.

**Step 2:** Determine if the commitment has an open government lens. Is it relevant to OGP values?

**Step 3:** Commitments that are verifiable and have an open government lens are reviewed to identify if certain commitment needs to be clustered. Commitments that have a common policy objective or commitments that contribute to the same policy issue should be clustered and its “potential for results” should be reviewed as a whole. The clustering process is conducted by IRM staff, following the steps below:

- a. Determine overarching themes. They may be as stated in the action plan or if the action plan is not already grouped by themes, IRM staff may refer to the thematic tagging done by OGP.
- b. Review objectives of commitments to identify commitments that address the same policy issue or contribute to the same broader policy or government reform.
- c. Organize commitments by clusters as needed. Commitments may already be organized in the action plan under specific policy or government reforms or may be standalone and therefore not clustered.

**Step 4:** Assess the potential for results of the cluster or standalone commitment.

The filtering process is an internal process and data for individual commitments is available in Annex I below. In addition, during the internal review process of this product, the IRM verifies the accuracy of findings and collects further input through peer review, OGP Support Unit feedback as needed, interviews and validation with country stakeholders, and sign-off by the IRM’s International Experts Panel (IEP).

As described in the filtering process above, the IRM relies on **three key indicators** for this review:

### I. Verifiability

- **Yes/No:** Is the commitment specific enough to review? As written in the action plan, are the objectives stated and actions proposed sufficiently clear and include objectively verifiable activities to assess implementation?

\* Commitments that are not verifiable will be considered “not reviewable”, and further assessment will not be carried out.

### II. Relevance (Does it have an open government lens?)

This indicator determines if the commitment relates to open government values of transparency, civic participation, or public accountability as defined by the *Open Government Declaration*, OGP's *Articles of Governance*, and by responding to the guiding questions below. Based on a close reading of the commitment text, the IRM first determines whether the commitment has an open government lens:

- **Yes/No:** Does the commitment set out to make a policy area, institution, or decision-making process more transparent, participatory, or accountable to the public?

The IRM uses the OGP values as defined in the *Articles of Governance*. In addition, the following questions for each OGP value may be used to identify the specific open government lens in commitment analysis:

- **Transparency:** Will the government disclose more information, improve the legal or institutional frameworks to guarantee the right to information, improve the quality of the information disclosed to the public, or improve the transparency of government decision-making processes or institutions?
- **Civic Participation:** Will the government create or improve opportunities, processes, or mechanisms for the public to inform or influence decisions? Will the government create, enable, or improve participatory mechanisms for minorities or underrepresented groups? Will the government enable a legal environment to guarantee freedoms of assembly, association, and peaceful protest?
- **Public Accountability:** Will the government create or improve opportunities to hold officials answerable for their actions? Will the government enable a legal, policy, or institutional frameworks to foster accountability of public officials?

### III. Potential for results

Formerly known as the “potential impact” indicator, it was adjusted, taking into account feedback from the IRM Refresh consultation process with the OGP community. With the new results-oriented, strategic focus of IRM products, this indicator was modified so that in this first review it laid out the expected results and potential that would later be verified in the IRM results report after implementation. Given the purpose of this action plan review, the assessment of “potential for results” is only an early indication of the possibility the commitment has to yield meaningful results based on its articulation in the action plan in contrast with the state of play in the respective policy area.

The scale of the indicator is defined as:

- **Unclear:** the commitment is aimed at continuing ongoing practices in line with existing legislation, requirements, or policies without indication of the added value or enhanced open government approach in contrast with existing practice.
- **Modest:** a positive but standalone initiative or change to process, practice, or policies. These commitments do not generate binding or institutionalized changes across government or institutions that govern a policy area (e.g., tools like websites, data releases, trainings, or pilot projects).
- **Substantial:** a possible game changer for practices, policies, or institutions that govern a policy area, public sector, or relationship between citizens and state. The commitment generates binding and institutionalized changes across government

This review was prepared by the IRM in collaboration with Ruth Kendagor and overseen by the IRM's International Experts Panel (IEP). The current IEP membership includes:

- César Nicandro Cruz-Rubio
- Mary Francoli

- Brendan Halloran
- Jeff Lovitt
- Juanita Olaya

For more information about the IRM, refer to the “About IRM” section of the OGP website, available [here](#).



## Annex 1: Commitment-by-Commitment Data<sup>1</sup>

<p><b>Commitment 1: Beneficial Ownership</b></p> <ul style="list-style-type: none"> <li>• Verifiable: Yes</li> <li>• Does it have an open government lens? Yes</li> <li>• Potential for results: Modest</li> </ul>
<p><b>Commitment 2: Open Contracting</b></p> <ul style="list-style-type: none"> <li>• Verifiable: Yes</li> <li>• Does it have an open government lens? Yes</li> <li>• Potential for results: Substantial</li> </ul>
<p><b>Commitment 3: Open Data for Development</b></p> <ul style="list-style-type: none"> <li>• Verifiable: Yes</li> <li>• Does it have an open government lens? Yes</li> <li>• Potential for results: Modest</li> </ul>
<p><b>Commitment 4: Public Participation and Legislative Openness</b></p> <ul style="list-style-type: none"> <li>• Verifiable: Yes</li> <li>• Does it have an open government lens? Yes</li> <li>• Potential for results: Substantial</li> </ul>
<p><b>Commitment 5: Improving Public Service Delivery</b></p> <ul style="list-style-type: none"> <li>• Verifiable: Yes</li> <li>• Does it have an open government lens? Yes</li> <li>• Potential for results: Modest</li> </ul>
<p><b>Commitment 6: Access to Information</b></p> <ul style="list-style-type: none"> <li>• Verifiable: Yes</li> <li>• Does it have an open government lens? Yes</li> <li>• Potential for results: Substantial</li> </ul>
<p><b>Commitment 7: Access to Justice</b></p> <ul style="list-style-type: none"> <li>• Verifiable: Yes</li> <li>• Does it have an open government lens? Yes</li> <li>• Potential for results: Substantial</li> </ul>
<p><b>Commitment 8: Building Open Government Resilience</b></p> <ul style="list-style-type: none"> <li>• Verifiable: Yes</li> <li>• Does it have an open government lens? Yes</li> <li>• Potential for results: Modest</li> </ul>

<sup>1</sup> Commitment titles may have been edited for brevity. For the complete text of commitments, see Kenya's action plan at: <https://www.opengovpartnership.org/documents/kenya-action-plan-2020-2022/>.

## Annex 2: Minimum Requirements for Acting According to OGP Process

According to OGP’s Procedural Review Policy, during development of an action plan, OGP participating countries must meet the “involve” level of public influence per the IRM’s assessment of the co-creation process.

To determine whether a country falls within the category of “involve” on the spectrum, the IRM assesses different elements from *OGP Participation and Co-Creation Standards*. The IRM will assess whether the country complied with the following aspects of the standards during the development of the action plan, which constitutes the minimum threshold:

1. **A forum exists:** There is a forum to oversee the OGP process.
2. **The forum is multistakeholder:** Both government and civil society participate in the forum.
3. **Reasoned response:** The government or multistakeholder forum documents or can demonstrate how they provided feedback during the co-creation process. This may include a summary of major categories and/or themes proposed for inclusion, amendment, or rejection.

The table below summarizes the IRM assessment of the three standards that apply during the procedural review. The purpose of this summary is to verify compliance with procedural review minimum requirements; it is not a full assessment of performance under *OGP Co-Creation and Participation Standards*. A full assessment of co-creation and participation throughout the OGP cycle will be provided in the results report.

**Table 2. Summary of minimum requirements to act according to OGP Process**

<i><b>OGP Standard</b></i>	<i><b>Was the standard met?</b></i>
<b>A forum exists.</b> Two key committees spearheaded the design of this action plan. These committees led the implementation of NAP III and were retained for designing NAP IV. The steering committee included high-level government and CSO officials who provided strategic direction for OGP processes. The technical committee included the commitment leads and other experts who provided technical leadership in drafting the commitment and milestones. These committees are leading the implementation process. <sup>1</sup>	Green
<b>The forum is multistakeholder.</b> Both committees (steering and technical) comprised of government and nongovernment actors. With each commitment, there was an equal match of government to CSO actors. <sup>2</sup>	Green
<b>The government provided a reasoned response</b> on how the public’s feedback was used to shape the action plan. In all stages of discussion—proposals, prioritization, final design,	Green

and commitment drafting—both government and CSOs were involved, and reasoned responses were provided during the joint meetings. Commitments clustered according to theme were drafted jointly by government and CSOs and open for public review and comments via online platforms.<sup>3</sup> All feedback was collated and considered by the technical committee.<sup>4</sup>

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<sup>1</sup> Sharon Chebet (government point of contact), interview by IRM researcher, 25 May 2021.

<sup>2</sup> *Id.*; Caroline Gaita (Exec. Dir. of Mzalendo Trust, and CSO-convenor for Kenya's NAP IV), interview by IRM researcher on 10 May 2021.

<sup>3</sup> Online platforms included various Twitter handles, WhatsApp, LinkedIn, and government and CSO websites, like Mzalendo Trust.

<sup>4</sup> Gaita, interview.