

INDEPENDENT REPORTING MECHANISM (IRM):

# KENYA PROGRESS REPORT 2016–2018

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Second Progress Report





# INDEPENDENT REPORTING MECHANISM (IRM): KENYA

## PROGRESS REPORT 2016–2018



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# EXECUTIVE SUMMARY: KENYA

## INDEPENDENT REPORTING MECHANISM (IRM): KENYA PROGRESS REPORT 2016–2018

**Kenya has made commitments in critical areas of governance. However, implementation remains limited due to financial and capacity constraints. Moving forward, the next action plan should focus on defining steps and goals for each commitment, and ensuring sufficient resources for full implementation.**

The Open Government Partnership (OGP) is a voluntary international initiative that aims to secure commitments from governments to their citizenry to promote transparency, empower citizens, fight corruption, and harness new technologies to strengthen governance. Kenya began participating in OGP in 2011. The Independent Reporting Mechanism (IRM) carries out an annual review of the activities of each country that participates in OGP.

The executive branch, under the co-chair of the Office of the Deputy President (ODP) and the Information and Communications Technology (ICT) Authority (within the Ministry of ICT), are the lead offices responsible for implementing Kenya's second action plan. The ODP has the legal power to enforce policy changes in other agencies. This, along with broader stakeholder involvement in developing the second action plan, resulted in a greater diversity of commitments covering a broader range of topics.

### OGP PROCESS

Countries participating in OGP follow a process for consultation during development of their OGP action plan and during implementation.

In February 2016, the lead agencies set up a new OGP steering committee to function as a regular multi-stakeholder forum. The committee comprises civil service organisations (CSOs), a private sector representative, and implementing government agencies. CSOs on the steering committee were limited to those based in Nairobi.

### AT A GLANCE

MEMBER SINCE: 2011

NUMBER OF COMMITMENTS: 8

#### LEVEL OF COMPLETION

Completed:	0 of 8
Substantial:	4 of 8
Limited:	2 of 8
Not started:	2 of 8

#### COMMITMENT EMPHASIS

Access to information:	7 of 8
Civic participation:	6 of 8
Public accountability:	2 of 8
Tech & innovation for transparency & accountability:	4 of 8

#### COMMITMENTS THAT ARE

Clearly relevant to an OGP value:	8 of 8
Of transformative potential impact:	3 of 8
Substantially or completely implemented:	4 of 8

**ALL THREE (★): 2 OF 8**

*This report was prepared by Caroline Othim, an Independent Researcher.*

During implementation, ad hoc consultations occurred between civil society and government actors. The interest of CSOs to participate improved engagement during implementation; they also raised concerns that the government's rhetoric of openness and accountability did not reflect actual implementation and enforcement mechanisms.

The government has not published a self-assessment report.

## COMMITMENT IMPLEMENTATION

As part of OGP participation, countries make commitments in a two-year action plan. The Kenya action plan contains thirteen commitments. Table 1 summarises each commitment's level of completion and potential impact. Table 2 provides a snapshot of progress for each commitment and recommends next steps. In some cases, similar commitments are grouped and reordered to make reading easier.

Note that the IRM updated the criteria for starred commitments in early 2015 in order to raise the standard for model OGP commitments. Under these criteria, commitments must be highly specific, relevant to OGP values, of transformative potential impact, and substantially completed or complete. Kenya received two starred commitments (Commitment 5 and Commitment 8).

**Table 1 | Assessment of Progress by Commitment**

COMMITMENT SHORT NAME	POTENTIAL IMPACT				LEVEL OF COMPLETION			
	NONE	MINOR	MODERATE	TRANSFORMATIVE	NOT STARTED	LIMITED	SUBSTANTIAL	COMPLETE
★ COMMITMENT IS MEASURABLE, CLEARLY RELEVANT TO OGP VALUES AS WRITTEN, HAS TRANSFORMATIVE POTENTIAL IMPACT, AND IS SUBSTANTIALLY OR COMPLETELY IMPLEMENTED.								
1. Transparent and participatory climate policies								
2. Preventive and punitive mechanisms against corruption								
3. Legislative transparency in Parliament and County assemblies								
4. Publication of oil and gas contracts								
★ 5. Transparency around bids and contracts by individuals								
6. Transparent public procurement process								
7. Access to government budget information and inclusive public participation								
★ 8. Right to information and records management								

**Table 2 | Summary of Progress by Commitment**

NAME OF COMMITMENT	RESULTS
<p><b>1. Transparent and participatory climate policies</b></p> <ul style="list-style-type: none"> <li>• OGP Value Relevance: Clear</li> <li>• Potential Impact: Moderate</li> <li>• Completion: Substantial</li> </ul>	<p>To strengthen their climate agenda, Kenya adopted Sustainable Development Goals and signed the Paris Agreement in December 2015. This commitment aims to create institutions to manage climate policies and a participatory environment for successful implementation of these climate frameworks. This commitment includes creation of an open forestry dataset and establishing a multi-stakeholder Climate Change Council and Directorate. Four of five milestones are complete or substantially completed, with only the Open Forestry Datasets milestone having limited implementation. Implementation has been challenging regarding the appointment of CSO representatives to the National Climate Change Council. The IRM researcher suggests increased collaboration between government and civil society and that the multi-stakeholder process be institutionalised in law.</p>
<p><b>2. Preventive and punitive mechanisms against corruption</b></p> <ul style="list-style-type: none"> <li>• OGP Value Relevance: Clear</li> <li>• Potential Impact: Minor</li> <li>• Completion: Limited</li> </ul>	<p>This commitment included a number of independent milestone activities aimed at installing or improving various national anti-corruption policies. Most of the activities are aspirational and do not include clear, concrete, and specific steps for making progress in enacting anti-corruption legislation and tools. Several of the proposed activities do not include a public-facing element, and therefore have unclear relevance to OGP values. Only one milestone (2.4) has seen progress in the first year of action plan implementation. This milestone aimed to propose, draft, and enact three pieces of legislation concerning whistleblower protection, anti-bribery, and false claims. The anti-bribery bill was enacted into law in December 2016, and the false claims legislation and the whistleblower protection bills were drafted, but not enacted, as of July 2017. The remaining eight activities have not started.</p>
<p><b>3. Legislative transparency in Parliament and County assemblies</b></p> <ul style="list-style-type: none"> <li>• OGP Value Relevance: Clear</li> <li>• Potential Impact: Moderate</li> <li>• Completion: Substantial</li> </ul>	<p>Kenya's 2010 Constitution requires public participation and involvement in all areas of governance. This commitment seeks to provide citizens with more opportunities to engage in reviewing draft legislation and offer input on public policies. The steps in this commitment could have been more clearly defined, and more ambitious in scope and scale. The government has made substantial progress toward implementation. The online bill tracking platform, "Dokeza," has a current list of bills for public view. It also allows citizens to track bills at each stage of discussion and provides the public with an opportunity to give input. Parliament and the County Assembly have published information about their activities on social media. Moving forward, the government will need to institutionalise progress on bill tracking, which is currently dependent upon partnerships with civil society groups. The IRM researcher recommends that counties ensure adequate resources for sustaining the national bill tracking tool.</p>
<p><b>4. Publication of oil and gas contracts</b></p> <ul style="list-style-type: none"> <li>• OGP Value Relevance: Clear</li> <li>• Potential Impact: Transformative</li> <li>• Completion: Limited</li> </ul>	<p>Recent discoveries of new crude oil and natural gas resources in Kenya have increased the urgency for developing a transparent extractives policy. This commitment aims to create the necessary framework for disclosing contract information and revenues derived from the oil and gas industry. Full implementation of these activities could open previously undisclosed information about contract processes and extractives revenue, which could be a potentially transformative change in government practice. After the first year of implementation, the Petroleum Bill, which requires a framework for reporting on revenues, had been passed. However, no progress has been made yet on releasing data, contracts, or financial information. Moving forward the government should establish the appropriate system to publish revenue information and ensure that contract information is made public and meets Open Contracting Data Standards (OCDS) requirements.</p>

NAME OF COMMITMENT	RESULTS
<p><b>★ 5. Transparency around bids and contracts by individuals</b></p> <ul style="list-style-type: none"> <li>• OGP Value Relevance: Clear</li> <li>• Potential Impact: Transformative</li> <li>• Completion: Substantial</li> </ul>	<p>This starred commitment aims to increase transparency by introducing beneficial ownership regulations and disclosure policies. If fully implemented, this commitment would legally require BO disclosure in public and private contracting process in Kenya. The Companies (Amendment) Act was passed in July and came into force in August 2017, introducing BO requirements for the first time. Under the new law, all companies must disclose the names and addresses of beneficial owners. At the end of the first year, the government had just begun preliminary work on developing a searchable online BO Registry. Moving forward, the IRM recommends the government create an independent oversight mechanism to ensure that all BO information reported in the National Registrar of Companies and the new online Registry is accurate and up-to-date. Inaccuracies or inconsistencies should trigger an investigation for full accountability.</p>
<p><b>6. Transparent public procurement process</b></p> <ul style="list-style-type: none"> <li>• OGP Value Relevance: Clear</li> <li>• Potential Impact: Moderate</li> <li>• Completion: Not Started</li> </ul>	<p>Kenya's Integrated Financial Management Information System (IFMIS) is an automated online system that enhances efficiency in planning, budgeting, procurement, expenditure management, and reporting in the National and County Governments. However, it does not meet Open Contracting Data Standards (OCDS). It lacks key datasets and mismanagement has allowed several poorly performing contractors to continue winning bids for publicly funded contracts. This commitment seeks to collect data on current disclosures in preparation for the development of an Open Data Policy for IFMIS and re-design of the portal to meet OCDS. After the first year, implementation has not started for this commitment.</p>
<p><b>7. Access to government budget information and inclusive public participation</b></p> <ul style="list-style-type: none"> <li>• OGP Value Relevance: Clear</li> <li>• Potential Impact: Moderate</li> <li>• Completion: Not started</li> </ul>	<p>This commitment aims to address budget transparency through a central online platform to publish budget documents, thereby standardising budget reporting, increasing public participation, and improving budget monitoring. The implementation of this commitment has not yet started. Moving forward, the IRM recommends improving budget participation in each county by strengthening the role of relevant government actors—such as county budget officers, the Parliamentary Budget Office and Commission on Revenue Allocation—in implementing this commitment.</p>
<p><b>★ 8. Right to information and records management</b></p> <ul style="list-style-type: none"> <li>• OGP Value Relevance: Clear</li> <li>• Potential Impact: Transformative</li> <li>• Completion: Substantial</li> </ul>	<p>This commitment seeks to transform Kenya's record management and transparency through seven steps including passing Right to Information (RTI) legislation and establishing a central digital repository for government records of public interest. This commitment has seen substantial completion. The Access to Information (ATI) Act passed in August 2016, the culmination of years of advocacy by civil society for a law to enforce constitutional provisions guaranteeing the public's right to information. The government also carried out several technical steps related to updating record management policies. However, the central digital registry is not yet established. Moving forward, implementation of the ATI Act should involve stakeholder consultation to effectively implement the law.</p>

## RECOMMENDATIONS

While Kenya's second action plan addresses a broad scope of priority policies, some areas need strengthening. The action plan should be commended for addressing priority policy areas for reform, such as climate change, beneficial ownership legislation, open contracting, and enforcing the right to information. The next action plan should strengthen and deepen this progress. Specifically, the next national action plan should focus on fewer, more defined goals for each commitment, ensuring clear identification of the implementing officials and the available resources. Commitments would benefit from being written with clear and verifiable objectives, explaining in explicit terms how inclusion in OGP will add value and bring about reform.


Beginning in 2014, all OGP IRM reports include five key recommendations about the next OGP action planning cycle. Governments participating in OGP will be required to respond to these key recommendations in their annual self-assessments. These recommendations follow the SMART logic; they are Specific, Measurable, Answerable, Relevant, and Time-bound. Given these findings, the IRM researcher presents the following key recommendations:

**Table 3 | Five Key Recommendations**

<b>1</b>	<b>Improve the action plan development process</b> Engage local level civil society and create commitments with clear and measurable objectives that build on open government initiatives from the first action plan. Identify lead officials responsible for each commitment and milestone.
<b>2</b>	<b>Address commitment implementation challenges</b> Ensure there is a budget line for OGP, improve interagency collaboration and produce quarterly Steering Committee meetings to monitor progress.
<b>3</b>	<b>Full Implementation of the Access to Information Act</b> To ensure timely and effective implementation of the law, take further steps to enhance record management and develop regulations to implement the law.
<b>4</b>	<b>Open contracting and beneficial ownership transparency</b> Open up IFMIS contracting processes, publish contracts in OCDS, and provide beneficial ownership information on the new public beneficial ownership registry.
<b>5</b>	<b>Expand and Protect Civic Space and civil liberties</b> Include commitments to protect or expand citizens' rights to organise, speak out, and report on government. Commitments could focus on making it easier for CSOs to register their organisation, receive and maintain funding, and organise and communicate to carry out their activities.

## ELIGIBILITY REQUIREMENTS:

To participate in OGP, governments must demonstrate commitment to open government by meeting minimum criteria on key dimensions of open government. Third-party indicators are used to determine country progress on each of the dimensions. For more information, see Section VII on eligibility requirements at the end of this report or visit [bit.ly/1929F1l](http://bit.ly/1929F1l).



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The Open Government Partnership (OGP) aims to secure concrete commitments from governments to promote transparency, empower citizens, fight corruption, and harness new technologies to strengthen governance. OGP's Independent Reporting Mechanism (IRM) assesses development and implementation of national action plans to foster dialogue among stakeholders and improve accountability.



# I | INTRODUCTION

The Open Government Partnership (OGP) is an international multi-stakeholder initiative that aims to secure concrete commitments from governments to their citizenry to promote transparency, empower citizens, fight corruption, and harness new technologies to strengthen governance. OGP provides an international forum for dialogue and sharing among governments, civil society organizations, and the private sector, all of which contribute to a common pursuit of open government.

Kenya began its formal participation in August 2011, when the then Minister for Foreign Affairs, Hon. Moses Wetangula, declared Kenya's intention to participate in the initiative by submitting a letter of intent to the OGP secretariat<sup>1</sup> and endorsed the Open Government Declaration. The Permanent Secretary, Ministry of Information, Communication and Technology, Bitange Ndemo, submitted a cabinet memorandum that was approved, authorising Kenya's participation in OGP.

In order to participate in OGP, governments must exhibit a demonstrated commitment to open government by meeting a set of (minimum) performance criteria. Objective, third party indicators are used to determine the extent of country progress on each of the criteria: fiscal transparency, public official's asset disclosure, citizen engagement, and access to information. See Section VII: Eligibility Requirements for more details.

All OGP-participating governments develop OGP action plans that elaborate concrete commitments with the aim of changing practice beyond the status quo over a two-year period. The commitments may build on existing efforts, identify new steps to complete ongoing reforms, or initiate action in an entirely new area.

Kenya developed its first action plan in 2012. The official implementation period for the action plan was July 2012 through June 2013. According to the OGP second cohort schedule, government and civil society members were to revise the first plan or develop a new plan by April 2014. Accordingly, the Kenya Open Government Working Group and the Kenya ICT Authority published a draft

revised national action plan<sup>2</sup> effective November 2014 to November 2016 for public input; however, this draft was not submitted to the OGP secretariat. Therefore, Kenya missed two deadlines in two successive years to prepare and submit a subsequent action plan until June 2016 when the second national action plan was submitted.

Kenya developed its second national action plan,<sup>3</sup> building on the first action plan, with an implementation period from 1 July 2016 through 30 June 2018. This midterm progress report covers the first year of implementation of this period, from 1 July 2016 to 30 June 2017. The IRM also publishes end of term reports to account for the final status of progress at the end of the action plan's two-year period. Any activities or progress made after the first year of implementation (1 July 2017 to 30 June 2018) will be assessed in the end-of-term report. This report follows on an earlier review of OGP performance, "Kenya Progress Report 2012–13," which assessed the development of the first action plan and its implementation from 1 July 2012 through 30 June 2013. The government has yet to publish its self-assessment report of the second national action as at end of May 2017.

In order to meet OGP requirements, the Independent Reporting Mechanism (IRM) of OGP has partnered with Caroline Othim, who carried out this evaluation of the development and implementation of Kenya's second national action plan. It is the aim of the IRM to inform ongoing dialogue around development and implementation of future commitments in each OGP-participating country. Methods and sources are dealt with in a Methodology and sources (Section VI) in this report.

<sup>1</sup> The letter is available at <https://www.opengovpartnership.org/country/kenya>.

<sup>2</sup> Available at <http://www.openinstitute.com/give-input-kenyas-ogp-action-plan/>.

<sup>3</sup> Available at <http://www.nation.co.ke/oped/Opinion/benefits-of-open-government-and-why-kenyans-should-own-it/440808-3293490-9h5b5v/index.html>.

## II | CONTEXT

The implementation of the second action plan took place during a tense political climate and national elections characterised by violence and repression. While Kenya stands out in the region for a strong, progressive constitution and vibrant civil society, deep problems of corruption, cronyism, and police violence hinder progress toward open government reform.

### 2.1 BACKGROUND

In recent years, Kenya has made significant advances in the areas of democracy and civil society compared to other sub-Saharan African countries. On 4 August 2010, Kenyans passed a referendum to adopt a new progressive Constitution, which was promulgated on 27 August 2010.<sup>1</sup> Kenya gained independence in 1963, but the years of transition were marked by political turbulence and human rights violations such as land clashes, massacres, arbitrary arrest, extrajudicial executions, detention without trial, electoral violence, grand corruption, and economic crimes. Many of these issues were attributed to a constitutional order that concentrated power in the presidency and limited other arms of government and civil society.<sup>2</sup> The passage of the 2010 Constitution represented a major shift in governance, and created an elaborate system of checks and balances, independent offices (auditor general and controller of the budget), and 10 independent commissions.<sup>3</sup>

Improving judicial independence has been one of the greatest undertakings to solidify Kenya's democracy and check the other branches of government. Critically, the 2010 Constitution reintroduced the Judicial Service Commission (JSC),<sup>4</sup> which mandated promoting the independence, effectiveness, and accountability of the judiciary.<sup>5</sup>

Another key reform area initiated under Kenya's 2010 Constitution was the devolution of power and resources to the subnational level to address challenges like regional inequalities and marginalisation of communities in decision-making and development. Disaggregating government services was also seen as vital to monitoring and curbing corruption, inefficient

use of public resources, and poor service delivery. In 2013, this devolution was implemented as set out in the constitution, transferring significant elements of fiscal and administrative authority from the central government to 47 county governments.<sup>6</sup> Increasing governance at the county level was aimed to improve democratic space for citizens to engage with the government, and to allow a broader base of participation.

The 2010 Constitution established periodic elections every five years; the first presidential election under this new system occurred in 2013. During presidential campaigns, open government reforms, centred around devolution, were frequently cited in party manifestos.<sup>7</sup> Power devolution remains a major gain from the new constitution.

Despite these positive developments, a number of shortcomings in open government policy remain, particularly in disclosure of public officials' wealth, open budgeting, and devolution of citizen engagement. Reports by Transparency International show a high perception of corruption. Transparency International Kenya has cited the Police, Judiciary, and Land Services as the most corruption-prone public institutions, which is detailed in the most recent East African Bribery Index (EABI) report.<sup>8</sup> The study found that 68 percent of Kenyans were asked (implicitly or explicitly) or offered to pay a bribe in order to access police services; 55 percent paid bribes to Land Services, 48 percent paid bribes for interactions with the judiciary, and 45 percent paid a bribe at the Civil Registration office. Corruption scandals have plagued the Uhuru Kenyatta regime, such as the National Youth Service, youth fund, Afya house, and Rio scandals. The fight against corruption was declared a priority in the State of the Nation address (26 March 2015).

Under Kenyan law, public officials are required to declare their own, their spouse's, and their dependent children's income, assets, and liabilities every two years. In addition, the 2012 Leadership and Integrity Act requires public officials to register potential conflicts of interest with their relevant commissions. However, these declarations are not disclosed to the public and thus escape scrutiny.<sup>9</sup>

State institutions tasked with combating corruption have been ineffective.<sup>10</sup> The Ethics and Anti-Corruption Commission (EACC), an independent agency created in 2011, has a legal mandate to investigate official corruption allegations, develop and enforce a code of ethics for public officials, and conduct public outreach on corruption.<sup>11</sup> However, the EACC lacks prosecutorial authority and must refer cases to the Office of the Director of Public Prosecutions (ODPP) to initiate criminal proceedings. Both the EACC and the ODPP are beset by technical and financial challenges that prevent them from fulfilling their mandate. The most recent reports show that for the 2014–15 fiscal year, EACC only referred two percent of the corruption cases it investigated to the ODPP, and of these, the ODPP only secured a single conviction.<sup>12</sup>

Mismanagement of public funds has been a recurring problem in Kenya. In August 2016, the head of the EACC resigned over allegations of misappropriating funds from the National Youth Service. Some reform projects appear to have made the problem worse, like the Integrated Financial Management Information System (IFMIS), launched in 2014 as an online clearinghouse for state procurements. In transitioning to an online monitoring system, records were improperly kept or entirely lost due to internet connectivity issues and low levels of computer training among officials and contractors, especially in remote areas. Furthermore, opposition allegations of an embezzlement scandal involving the National Youth Service and an improper awarding of a government contract to the Health Ministry implicate misuse of IFMIS.<sup>13</sup> The current action plan includes a commitment to improve disclosure through IFMIS.

The budget process in Kenya also suffers from insufficient transparency and public participation in oversight and monitoring. The Open Budget Survey

(OBS) 2015<sup>14</sup> gave Kenya a score of 48 out of 100 (0 being poor and 100 good) on transparency because it provides the public with limited budget information, and a score of 33 out of 100 on public participation. This shows only a slight improvement from Kenya's score of 36 for access to information in 2012, and a slight decline from a score of 39 for public engagement.<sup>15</sup> This suggests that the Government is weak in providing the public with opportunities to engage in the budget process. Effective implementation of public participation laws at the national and subnational level remains a challenge for engaging citizens and civil society organisations (CSOs), despite constitutional provisions as well as the existence of enabling legislation. The national action plan provides for the enactment of a stand-alone law on public participation.

Kenya enjoys a strong and active civil society and is a leader in the East African region. CSOs have been outspoken critics of the government's unfulfilled promises to tackle corruption, reporting on scandals, and high-level impunity. The sector is credited for aiding some of the transformative changes in Kenya such as the passage of the progressive 2010 Constitution and the 2013 Public Benefits Organizations Act, making it easier for NGOs to operate and replacing the outdated NGO Act of 1990.

However, in recent years, the space for civil society has been shrinking. In August 2017, the Kenya National Commission on Human Rights (KNCHR) reported government attacks on the African Centre for Open Governance (AFRICOG) and the Kenya Human Rights Commission, two of the leading rights and governance organisations in the country.<sup>16</sup> There are several examples of cases that have brought against non-governmental organisations (NGOs) on what are perceived to be falsified charges. In one cited example of repression, the Government NGO Coordination Board accused AFRICOG of 'financial and regulatory impropriety,' and called on other agencies, including the Directorate of Criminal Investigations and the Central Bank of Kenya, to freeze AFRICOG's bank accounts, arrest and prosecute the directors, and deport all foreign employees.<sup>17</sup> The operation was called off following protests, and the High Court found the NGO Board had violated AFRICOG and the

Human Rights Commission's rights. The NGO Board was later disbanded. However, the former head, Fazul Mahamed, continues to hold public office, despite having been declared unfit following investigations by the Commission for Administrative Justice for abuse of office and misconduct.<sup>18</sup>

Despite institutional strengthening under the 2010 Constitution, including solid grounding for rule of law and the protection of human rights, implementation is often weak.<sup>19</sup> Police brutality, abuse, and impunity stand as significant barriers to the free exercise of civil liberties and the full enforcement of the rule of law. According to Freedom House, in 2016, police officers killed 122 civilians, a seven percent increase from 2015. Notable cases of police brutality included use of beatings, tear gas, and live ammunition against opposition party demonstrators calling for electoral reform in May and June 2017. 10 demonstrators were killed.<sup>20</sup>

Deep-seated issues surrounding the rule of law in Kenya were again brought to the fore by elections in August 2017. One week before the elections, Christopher Chege Musando, a senior manager in information technology at the Independent Electoral and Boundaries Commission (IEBC), was found tortured and murdered.<sup>21</sup> The IEBC is responsible for counting votes and declaring the results. Human Rights Watch (HRW) reported that 'the election was marred by serious human rights violations, including unlawful killings and beatings by police during protests and house-to-house operations in western Kenya.<sup>22</sup> Protests began on 9 August, following allegations by the opposition candidate, Raila Odinga, that the electoral commission's system had been hacked and polling results manipulated.<sup>23</sup> The KNCHR reported on 12 August that at least 24 people had been killed and over 100 badly injured, though actual numbers are suspected to be much higher.<sup>24</sup> HRW described the killings as 'part of a pattern of violence and repression in opposition strongholds.<sup>25</sup>

Speaking to the strong role of the judiciary in checking other branches, the courts played an instrumental role in investigating and mediating the contested election results. Initially, incumbent President Uhuru Kenyatta was declared the winner, however, this was challenged

in court by runner-up Raila Odinga. On 1 September, the Supreme Court declared the win null and void and ordered new elections be held within 60 days.<sup>26</sup> New elections were set for 26 October, and the preceding weeks again were marked by violent protests and police brutality. On election day, police were heavily deployed to opposition party strongholds, and many opposition voters boycotted the election in protest. As KNCHR reported, civilian protestors also instigated violent action to intimidate voters and block polling stations, committing acts of violence and looting.<sup>27</sup>

The 2017 elections also spurred increased attempts by the government to limit freedom of expression.<sup>28</sup> Journalists and activists were arrested and prosecuted, while government officials allegedly pressured the media to censor criticism of powerful figures. According to Freedom House, a number of activists used the moderately independent judicial system to fight back against threats to freedom of expression.

Freedom of information in Kenya is protected by law and the recent Access to Information Act 2016 achieved a high rating by the Global Right to Information (RTI) index, placing Kenya 17 out of 102 countries globally.<sup>29</sup> A noted strength of the Act is its broad scope, which stipulates that the right of access applies to all material held by or on behalf of public authorities, recorded in any format, regardless of who produced it. No public bodies or classes of information are excluded from being subject to requests, including the executive branch (cabinet) and administration, covering all ministries, departments, local government, public schools, public health care bodies, the police, the armed forces, and security services.<sup>30</sup> Transparency advocates welcomed the law, but noted a broad exemption for national security matters and called for careful consultation on implementing regulations going forward.<sup>31</sup>

In 2011, Kenya joined the global Open Data Initiative (KODI)<sup>32</sup> and developed the Kenya Open Data Portal, which makes public government datasets freely accessible to the public in easy, reusable formats, supporting the government's efforts to proactively inform citizens and be accountable. Kenya was the

second African country (after Tunisia) to launch an open government portal. That same year, Kenya joined the Open Government Partnership (OGP). However, the momentum for open government reforms under the OGP initiative slowed as Kenya missed two successive deadlines to submit a national action plan. United States President Barack Obama's visit to Kenya in July 2015 raised the profile of open government, and reignited open government reforms. The current action plan includes themes that address some of the biggest challenges in Kenya's current national context.

## 2.2 SCOPE OF ACTION PLAN IN RELATION TO NATIONAL CONTEXT

The action plan included commitments that address key areas of concern for Kenyans such as anti-corruption, public participation, access to information, climate change, budget transparency, legislative openness, public procurement, and open contracting. However, a large number of commitments in the action plan include aspirational goals, but fall short of defining concrete, actionable steps toward changing government practice. The action plan could have placed more emphasis on defining and laying out a clear roadmap for implementing existing laws and tackling the specific challenges that have impeded implementation thus far.

The OGP national action plan references and reinforces goals that are part of larger national frameworks. For example, the action plan includes commitments toward achieving goals in Kenya's long-term development blueprint, the Kenya Vision 2030. Commitments shared across both plans include equitable social development in a clean and secure environment and a people-centred, accountable democratic system.<sup>33</sup> In addition, commitments in the current OGP action plan focus on improving implementation of Kenya's 2010 Constitution, in particular, ensuring that citizens' rights to participate in government and to access information are upheld in practice.

The government documents progress made toward open government reforms in the government delivery portal,<sup>34</sup> which the Office of the President launched in 2015. It highlights the achievement of the government over the last four years. The President's Delivery Unit was established within the Office of the President to improve the coordination of National Government flagship programs, and to monitor, evaluate, and report on the timely fulfilment of the President's key development priorities. The portal allows Kenyans to access details of all investments made by the Jubilee Government over the last four years. The portal delivers information on Jubilee flagship programmes, Ministry milestones, and work the National Government is doing in the country's 47 counties.

The urgent need to address the shrinking civic space was reiterated during an OGP roundtable meeting that brought together government and CSOs. It was identified as a key issue in a communiqué issued by CSOs that stated: 'The rapidly shrinking civic space in which citizens and civil society exercise their rights of expression, assembly, information and association is a disabling environment for the realization of open government in Kenya.' The scope of the action plan did not sufficiently address this priority within the country context. Although some commitments include elements to increase citizen engagement with government, none had the express goal of protecting or expanding citizens' rights to organise, speak out, or report on government. The shrinking space undermines the spirit of open government reforms and principles.<sup>35</sup> To promote effective citizen participation in decision-making processes, the government needs to strengthen mechanisms for ensuring citizens can receive feedback from public participation meetings and ensure that all principles of public participation are upheld.

- <sup>1</sup> Dr. Migai Akech, *Institutional Reform in the New Constitution of Kenya* (International Centre for Transitional Justice, Oct. 2010), 7, <https://www.ictj.org/sites/default/files/ICTJ-Kenya-Institutional-Reform-2010-English.pdf>.
- <sup>2</sup> *Id.* at 3.
- <sup>3</sup> Roland Ebole and Morris Odhiambo, *Governance Assessment Kenya January 2013 - July 2016* (Freedom House) <https://freedomhouse.org/sites/default/files/Governance%20Assessment%20Kenya%202016.pdf>.
- <sup>4</sup> Article 171.
- <sup>5</sup> Article 172.
- <sup>6</sup> United States Department of State - Bureau of Democracy, Human Rights and Labor, *Country Reports on Human Rights Practices - Kenya 2016 Human Rights Report* (3 March 2017) <https://www.state.gov/j/drl/rls/hrrpt/2016/af/265266.htm>.
- <sup>7</sup> Jubilee Coalition, *Transforming Kenya: Securing Kenya's Prosperity 2013 – 2017*, [https://issuu.com/jubileemanifesto/docs/jubilee\\_manifesto](https://issuu.com/jubileemanifesto/docs/jubilee_manifesto).
- <sup>8</sup> Transparency International - Kenya, *The East African Bribery Index* (2017) [tikenya.org/wp-content/uploads/2017/09/East-African-Bribery-Index-EABI-2017-1-1.pdf](https://tikenya.org/wp-content/uploads/2017/09/East-African-Bribery-Index-EABI-2017-1-1.pdf).
- <sup>9</sup> United States Department of State - Bureau of Democracy, Human Rights and Labor, *Country Reports on Human Rights Practices - Kenya 2016 Human Rights Report*.
- <sup>10</sup> Freedom House, *Freedom in the World Report 2017: Kenya* (2017) <https://freedomhouse.org/report/freedom-world/2017/kenya>.
- <sup>11</sup> United States Department of State - Bureau of Democracy, Human Rights and Labor, *Country Reports on Human Rights Practices - Kenya 2016 Human Rights Report*.
- <sup>12</sup> Freedom House, *Freedom in the World Report 2017: Kenya*.
- <sup>13</sup> *Id.*
- <sup>14</sup> International Budget Partnership (2015) <http://www.internationalbudget.org/wp-content/uploads/OBS2015-CS-Kenya-English.pdf>.
- <sup>15</sup> <file:///Users/caroline/Desktop/OBI2012-Report-English.pdf>.
- <sup>16</sup> Kagwiria Mbogori, "Attacks on the Civic Space by the Defunct NGOs Coordination Board" (Kenya National Commission on Human Rights, 16 Aug. 2017) [knchr.org/Portals/0/PressStatements/KNCHR%20PRESS%20STATEMENT-%20ATTACK%20ON%20CIVIC%20SPACE.pdf?ver=2017-08-16-153342-550](https://knchr.org/Portals/0/PressStatements/KNCHR%20PRESS%20STATEMENT-%20ATTACK%20ON%20CIVIC%20SPACE.pdf?ver=2017-08-16-153342-550).
- <sup>17</sup> *Id.*
- <sup>18</sup> *Id.*
- <sup>19</sup> Freedom House, *Freedom in the World Report 2017: Kenya*.
- <sup>20</sup> United States Department of State - Bureau of Democracy, Human Rights and Labor, *Country Reports on Human Rights Practices - Kenya 2016 Human Rights Report*.
- <sup>21</sup> Kimiko de Freytas-Tamura, "Kenyan Election Official Is Killed on Eve of Vote," (New York: New York Times, 31 Jul. 2017) <https://www.nytimes.com/2017/07/31/world/africa/chris-musando-kenya-election-official-dead.html>.
- <sup>22</sup> Human Rights Watch, "Kenya: Post Election Killings, Abuse," (27 August 2017) <https://www.hrw.org/news/2017/08/27/kenya-post-election-killings-abuse>.
- <sup>23</sup> *Id.*
- <sup>24</sup> Kagwiria Mbogori, "Status Update on Developing Post Election Human Rights Violations" (Kenya National Commission on Human Rights, 12 Aug. 2017) [knchr.org/Portals/0/PressStatements/Press%20statement-%20Developing%20Post%20elections%20scenarios%202017%20.pdf?ver=2017-08-12-202548-3%20KNCHR](https://knchr.org/Portals/0/PressStatements/Press%20statement-%20Developing%20Post%20elections%20scenarios%202017%20.pdf?ver=2017-08-12-202548-3%20KNCHR).
- <sup>25</sup> Human Rights Watch, "Kenya: Post Election Killings, Abuse," (27 August 2017) <https://www.hrw.org/news/2017/08/27/kenya-post-election-killings-abuse>.
- <sup>26</sup> Kagwiria Mbogori, "Preliminary Findings of the 26 October Repeat Presidential Election in Kenya" (Kenya National Commission on Human Rights, 3 Nov. 2017) <http://knchr.org/Portals/0/PressStatements/Preliminary%20Findings%20of%20the%2026th%20October%20Repeat%20Presidential%20Election%20in%20Kenya%203rd%20November%202017.pdf?ver=2017-11-03-133124-760>.
- <sup>27</sup> *Id.*
- <sup>28</sup> Audrey Wabwire, "Kenya's Government Should Know Free Press is Crucial for Fair Election: Journalists Face Intimidation" (Human Rights Watch, 22 Aug. 2017). <https://www.hrw.org/news/2017/08/22/kenyas-government-should-know-free-press-crucial-fair-election>.
- <sup>29</sup> "Global Right to Information Rating - Year 2017" (Access Info, Centre for Law and Democracy, 3 Feb. 2018) [www.rti-rating.org/year-2017/](http://www.rti-rating.org/year-2017/).
- <sup>30</sup> *Id.*
- <sup>31</sup> Freedom House, *Freedom in the World Report 2017: Kenya*.
- <sup>32</sup> Kenya OpenData, "Home" (ICT Authority) [www.opendata.go.ke](http://www.opendata.go.ke).
- <sup>33</sup> Kenya Vision2030, "About Kenya Vision 2030" (2018) accessed 14 November 2017, [www.vision2030.go.ke/about-vision-2030/](http://www.vision2030.go.ke/about-vision-2030/).
- <sup>34</sup> President's Delivery Unit, "Home" (Office of the President) <https://www.delivery.go.ke>.
- <sup>35</sup> Kenya Human Rights Commission, *Towards a Protected and Expanded Civic Space in Kenya and Beyond*, (KHCR Report, October 2016) <http://www.khcr.or.ke/civic-space-publications/173-towards-a-protected-and-expanded-civic-space-in-kenya-and-beyond/file.html>.

# III | LEADERSHIP AND MULTI-STAKEHOLDER PROCESS

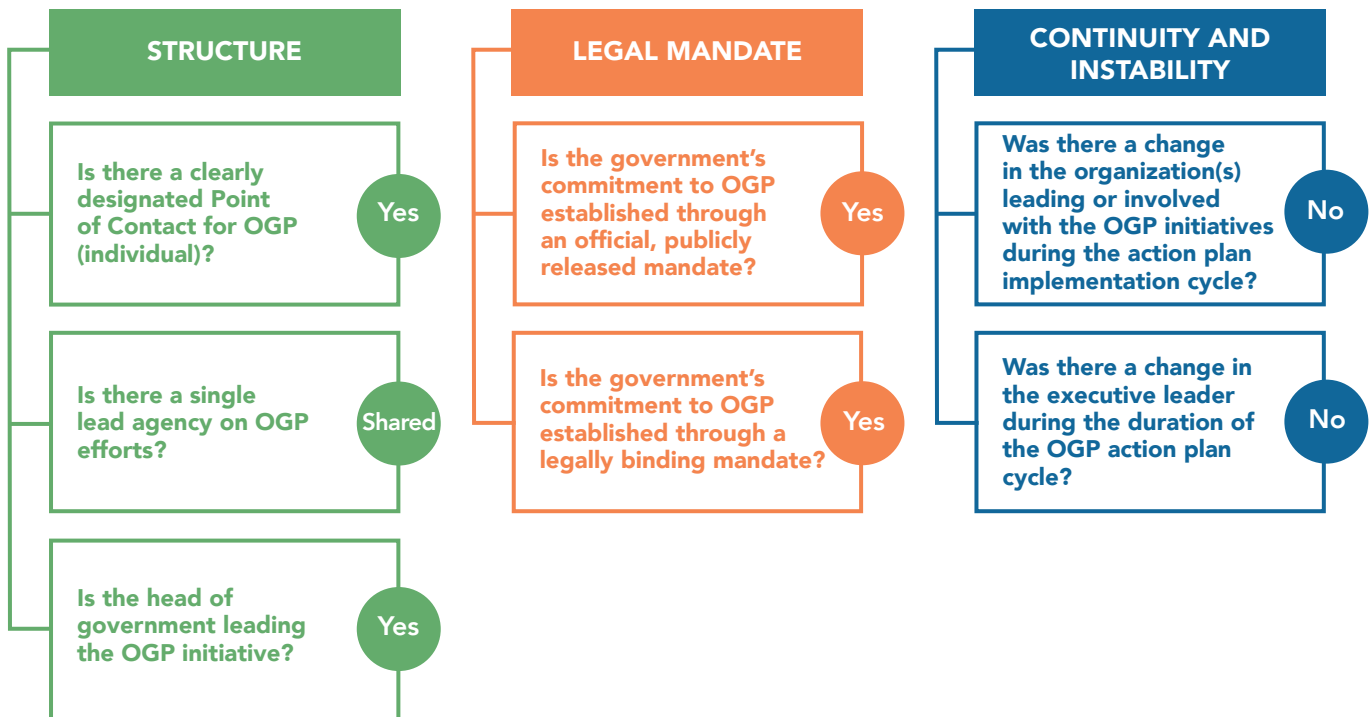
The co-creation process between government and civil society included a broad range of stakeholders and a formal OGP Steering Committee was established in February 2016. Despite this positive step, formal consultations were delayed until May, did not provide sufficient advance notice to participants, and lacked awareness-raising activities. Moving forward, the Steering Committee will function as the multi-stakeholder forum for regular consultation on commitment progress.

## 3.1 LEADERSHIP

This subsection describes the OGP leadership and institutional context for OGP in Kenya. Table 3.1

summarises this structure while the narrative section (below) provides additional detail.

**Table 3.1 | OGP Leadership**



The co-chair of the Office of the Deputy President (ODP) and the Information and Communications Technology (ICT) Authority, an agency within the Ministry of ICT under the executive branch, are the lead offices responsible for Kenya's OGP commitments. The lead agency during the development and implementation of the first action plan was solely the ICT Authority. Despite the mandate conferred on the ICT Authority, the Authority had little legal power to enforce policy changes on other ministries, departments, and agencies (MDAs) regarding OGP issues. In assessing the performance of OGP in Kenya, it was noted that a lead office with higher authority would ensure proper coordination of OGP with the MDAs. The Office of the Deputy President was therefore designated a co-chair because the presidency has the legal power to enforce policy changes on other agencies within the government (see Table 3.1 OGP Leadership). As a result of this mandate, and broader involvement of stakeholders, the second action plan is more diverse and the commitments cover a broader spectrum of issues relevant to OGP. The ODP has also proposed to have commitment implementation included in the ongoing duties of the responsible public officers.

The co-chairs allocated four staff (two from ODP and the other two from ICT Authority) to oversee the development and implementation of the action plan. It is notable, that the two staff from the ICT Authority left office in the period immediately after submission of the second national action plan. In FY 2016/2017 and 2017/2018, there were no direct budget lines in the Executive's budget for planning and coordination of OGP-related activities. However, implementing agencies fund their designated commitments from their own budgets. Both the change in ICT staffing (which will require training for the new officials on OGP matters) and the lack of guaranteed budgetary support for all commitments will likely affect the implementation of the second national action plan.

In order to lead the development of the second national action plan, a multi-agency steering committee was formed in February 2015. It comprised of parliament and government agencies, one private-sector body

(Kenya, Private Sector Alliance - KEPSA) and four civil society organisations: Hivos; Article 19; International Commission of Jurists Kenya (ICJ Kenya); and Transparency International Kenya (TI-Kenya) and. The steering committee is co-chaired by the Office of the Deputy President and ICT Authority. The ICT Authority houses the OGP steering committee Secretariat while the Office of the Deputy President coordinates and is responsible for the activities regarding OGP by the Secretariat. Section 1.3 describes the activities of the steering committee.

Since Kenya is a decentralised country, the national and subnational governments are distinct and interdependent and conduct their business through consultation and cooperation.<sup>1</sup> A couple of commitments in the national action plan require implementation at both the national and subnational government levels. The two levels must therefore consult and coordinate as needed. However, this consultation (even within government) occurred only in the capital, Nairobi, during the development of the action plan (see Section II on "Development of Action Plan").

The general elections of August 2017 caused challenges to the implementation of the action plan as some of the key staff in charge of implementation were running as candidates or working on campaigns, often in breach of the elections offenses law.<sup>2</sup> However, open government was one of the key election issues and major political parties made promises and pledges in their manifestos toward opening government.

## 3.2 INTRAGOVERNMENTAL PARTICIPATION

This subsection describes which government institutions were involved at various stages in OGP. The next section will describe which nongovernmental organisations were involved in OGP.



**Table 3.2 | Participation in OGP by Government Institutions**

HOW DID INSTITUTIONS PARTICIPATE?	MINISTRIES, DEPARTMENTS, AND AGENCIES	LEGISLATIVE	JUDICIARY (INCLUDING QUASI-JUDICIAL AGENCIES)	OTHER (INCLUDING CONSTITUTIONAL INDEPENDENT OR AUTONOMOUS BODIES)	SUBNATIONAL GOVERNMENTS
<b>Consult:</b> These institutions observed or were invited to observe the action plan but may not be responsible for commitments in the action plan.	7 <sup>3</sup>	0	0	0	0
<b>Propose:</b> These institutions proposed commitments for inclusion in the action plan.	7 <sup>4</sup>	0	0	0	0
<b>Implement:</b> These institutions are responsible for implementing commitments in the action plan whether or not they proposed the commitments.	17 <sup>5</sup>	National Assembly, Senate, Parliament Service Commission	Office of the Director of Public Prosecutions	6 <sup>6</sup>	All 47 County Assemblies, All 47 County Executives

In Kenya, government participation in OGP processes was limited to government ministries, departments, and agencies. A total of seven MDAs participated and were consulted and invited to propose commitments. Table 3.2, above, details which institutions were involved in OGP. The judiciary, the legislature (both National Assembly and Senate), constitutional commissions, independent offices and subnational governments were not part of the consultative process. They were neither consulted nor invited to give commitments proposals.

The government sent formal invitations to contribute to the relevant MDAs and civil society organisations (CSOs). These parties worked closely with staff from the two lead offices, the Deputy President Office and the ICT Authority. MDAs and civil society sent representatives to the consultations with proposals for improving commitments. These meeting attendees, comprised of both CSOs and government officials, provided technical recommendations for the content and structure of the commitments. Five in-person meetings were held, including two broad consultations at the national level. The Steering Committee was divided into four OGP challenge areas, two led by civil society and two by government. A validation workshop was convened to adopt the national action plan.

### 3.3 CIVIL SOCIETY ENGAGEMENT

Implementation of Kenya’s first OGP action plan finished in June 2014. Since then, Kenya missed two successive

deadlines to prepare and submit a subsequent action plan, finally submitting the second plan in June 2016. However, even though the government missed the deadlines, the ICT Authority and several CSOs continued to make efforts in developing the second plan with a proposal to have an inter-ministerial committee spearhead the process. However, the 2013 general elections and changes among key ICT ministry staff caused delays.

In February 2016, consultations between the Office of the Deputy President and the Ministry of ICT began the process again. The government formed a steering committee comprised of parliament and government agencies, four CSOs, and one private-sector body that included representatives from Article 19, Transparency International, International Commission of Jurists, Africa Centre for Open Governance and Kenya Private Sector Alliance. The Ministry of ICT and the Office of the Deputy President co-chaired this committee. The steering committee members were formally invited to provide input on the national action plan. One of the committee members confirmed that a Google group was formed to facilitate, information sharing, including the OGP timeline. The steering committee members were divided to lead discussions on four pillars modelled around the core open government principles, two led by civil society and two by government. These four areas were transparency, civic participation, public accountability, and technology

and innovation for openness and accountability. The CSOs and the private sector were expected to consult their constituents and submit proposals on the content and structure of commitments that affected their interests. As a result, a CSO caucus was convened before the final consultation to ensure that those who did not receive the formal invitation had an opportunity to share their comments on the draft action plan. The civil society caucus therefore provided an opportunity for more CSOs to give input on the draft action plan. The caucus was also actively involved in drafting the commitments and providing technical recommendations regarding content and structure. For instance, International Budget Partnership and Mzalendo Trust were largely involved in drafting commitments on open budgets and legislative openness respectively. However, subnational governments, parliament and the judiciary were not part of the consultations to develop the action plan.

One major challenge to the process was the geographically limited representation by CSOs. The CSOs invited to

the steering committee were limited to those based in Nairobi, with many coming from non-local international organisations such as HIVOS, Article 19, and Transparency International - Kenya. The government did not consider geographic diversity or inclusion of smaller, Kenya-based CSOs, be they national or subnational organisations. There were no formal public consultations involving the larger public as required by the Kenyan Constitutional provisions on public participation. The participating CSOs however, had the requisite technical capacity covering the broad areas of the eight commitments.

The national action plan is largely derived from an existing set of commitments in the government development blueprint, Vision 2030.<sup>7</sup>

Countries participating in OGP follow a set of requirements for consultation during development, implementation, and review of their OGP action plan. Table 3.3 summarises the performance of Kenya during the 2016–2018 action plan.

**Table 3.3 | National OGP Process**

KEY STEPS FOLLOWED <span style="background-color: #0056b3; color: white; padding: 2px 5px; border-radius: 5px;">2 of 7</span>			
<b>BEFORE</b>	<b>1</b> <b>TIMELINE PROCESS &amp; AVAILABILITY</b>	<b>2</b> <b>ADVANCE NOTICE</b>	<b>3</b> <b>AWARENESS RAISING</b>
	Timeline and process available online prior to consultation <span style="float: right; color: white;">✗</span>	Advance notice of consultation <span style="float: right; color: white;">✓</span>	Government carried out awareness-raising activities <span style="float: right; color: white;">✗</span>
	<b>4</b> <b>MULTIPLE CHANNELS</b>	<b>5</b> <b>DOCUMENTATION &amp; FEEDBACK</b>	
	Online consultations: <span style="float: right; color: white;">✗</span> In-person consultations: <span style="float: right; color: white;">✓</span>	Summary of comments provided <span style="float: right; color: white;">✗</span>	
<b>DURING</b>	<b>6</b> <b>REGULAR MULTI-STAKEHOLDER FORUM</b>		
	Did a forum exist? <span style="float: right; color: white;">✓</span>	Did it meet regularly? <span style="float: right; color: white;">✓</span>	
<b>AFTER</b>	<b>7</b> <b>GOVERNMENT SELF-ASSESSMENT REPORT</b>		
	Annual self-assessment report published? <span style="float: right; color: white;">✗</span>	Report available in English and administrative language? <span style="float: right; color: white;">✗</span>	
	Two-week public comment period on report? <span style="float: right; color: white;">✗</span>	Report responds to key IRM recommendations? <span style="float: right; color: white;">✗</span>	

### Table 3.4 | Level of Public Influence

The IRM has adapted the International Association for Public Participation (IAP2) “Spectrum of Participation” to apply to OGP.<sup>8</sup> This spectrum shows the potential level of public influence on the contents of the action plan. In the spirit of OGP, most countries should aspire for “collaborative.”



### 3.4 CONSULTATION DURING IMPLEMENTATION

As part of their participation in OGP, governments commit to identify a forum to enable regular multi-stakeholder consultation on OGP implementation. This can be an existing entity or a new one. This section summarises that information.

To gather feedback from multiple stakeholders, the researcher participated in six stakeholder consultations. The first meeting was convened on 22 February 2017 in Nairobi by the Office of the Deputy President, in collaboration with Hivos and Article 19,

and drew participants from government, civil society and the private sector. This meeting sought to: begin government, private sector and civil society coordination and engagement within the identified areas of the national action plan; share information and progress on initiatives, actions, and plans since July 2016; and coordinate meetings on potential commitment areas that were nominated by organisations. During this meeting, participants decided to form clusters to monitor the action plan’s implementation, but as of 25 May 2017, the structure and operations of these clusters have not been established.

Civil society convened the second meeting, held on 23 May 2017 at the Intercontinental Hotel, drawing participation from civil society organisations only. The aim of this meeting was to formalise thematic clusters in the action plan. This involved assigning CSOs to monitor implementation of commitments in their respective areas of work. The areas of interest included: climate change, transparency and accountability, legislative openness, extractives, open contracting, budget transparency, and access to information. Four thematic commitment clusters were formed. This meeting further developed a communiqué of CSOs' requests for the government and CSO positions on OGP-related matters in Kenya.

These two meetings were both held in Kenya's capital, Nairobi. In addition, three separate stakeholder consultations were organised by the Constitution and Reform Education Consortium (CRECO) on 19 January, 24 March and 21 July 2017 to create awareness of the OGP brand as well as OGP commitments and the extent of implementation at the subnational level. The meetings were held in Nakuru County and the sessions drew participants from CRECO member organisations (MAPACA and CEDGG) and County Oversight Committee members from Nakuru and Elgeyo Marakwet counties. CRECO also organised two public meetings in Elgeyo Marakwet and Makueni counties, which the researcher did not participate in. These meetings were open to the public to discuss ways of holding public officials accountable to opening up government. An OGP national learning platform meeting was also held on 10 and 11 October 2017 in Nairobi. The aim of the meeting was to take stock of progress made in implementing OGP commitments at national and subnational levels and to strategize to account for the shrinking civic space, election season and dwindling donor funds supporting CSO-led OGP activities. The event drew participants from both government and civil society. CRECO involvement at the national level involves stakeholder engagement meetings with CSOs and government representatives; at the county level, CRECO holds public awareness

and hearing meetings with county leadership, opinion leaders, youth, women, religious leaders and representatives of different sections of society.

Government and civil society interviewees noted that consultations were carried out ad-hoc, with no formal relationship between civil society and government actors during implementation and there is need to improve this engagement so that both parties are equals at the table. Interviewed CSO representatives expressed concern that the government's rhetoric of openness and accountability does not match implementation and enforcement mechanisms. According to CSOs, the government needs to reach out and involve more governance CSOs in the OGP process. Participation by civil society must improve and increase in number, as this shortcoming exposes the small number of voices behind the OGP process. Also, the OGP concept, process and narrative should be institutionalised within government agencies to ensure stability and continuity throughout staff transitions.

### 3.5 SELF-ASSESSMENT

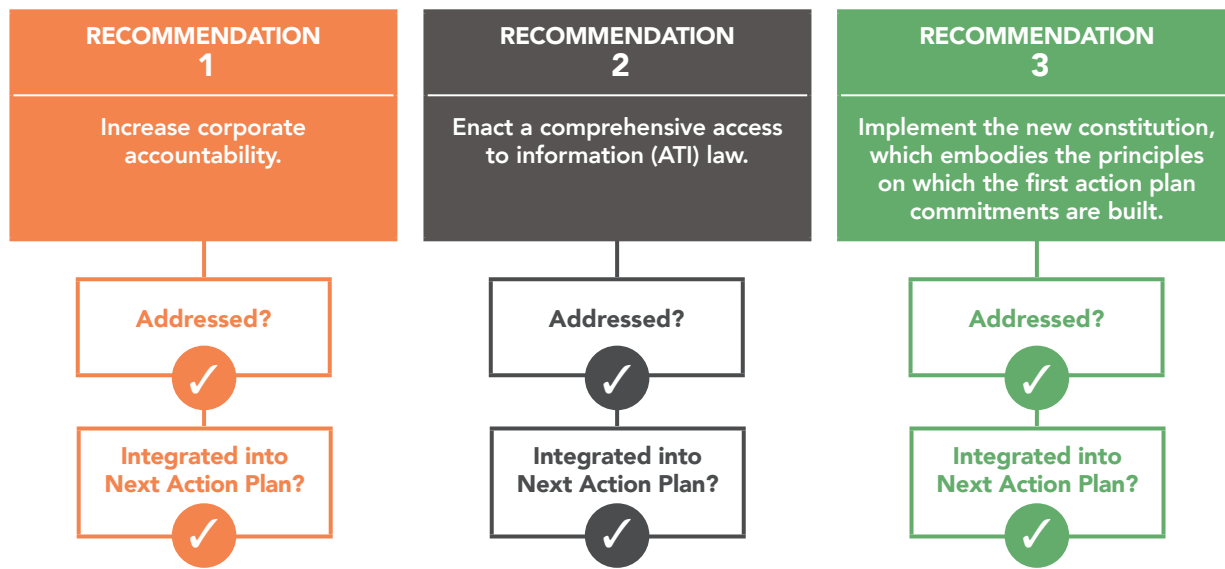
The OGP Articles of Governance require that participating countries publish a self-assessment report three months after the end of the first year of implementation. The self-assessment report must be made available for public comments for a two-week period. This section assesses compliance with these requirements and the quality of the report.

As of this report, the government had not published a self-assessment report.

### 3.6 RESPONSE TO PREVIOUS IRM RECOMMENDATIONS

Starting in the second year of assessments, reports shall also include a section for follow-up on recommendations issued in previous reports. This follow-up process will also be carried out in accordance with the principles set out in this document.

**Table 3.5 | Previous IRM Report Key Recommendations**



The government addressed all three recommendations and integrated them into the second national action plan. Recommendation one, on increasing corporate accountability, looks at the ability of the public to hold corporations accountable. This concept demands fundamental changes to the legal framework in which companies operate. This is captured in the second action plan through commitments regarding open contracting in the extractives sector, public procurement process and beneficial ownership. Further, recommendation two, on enacting a comprehensive access-to-information (ATI) law, was reflected in the commitment to enhance the right to information by strengthening access to information and record

management. The third recommendation, regarding the new constitution, embodies the principles on which the first action plan commitments were built and is a continuing thread in the second national action plan. Stakeholders identified all three recommendations as priority areas to contribute to the opening up of government. The discussion to enact an access-to-information law has been a decade-long debate and having it in the second national action plan emphasised the need to enact this law. Lastly, stakeholders believe the government should strive to ensure full implementation of Kenya’s 2010 Constitution, highlighting the provisions that would contribute toward opening government.

<sup>1</sup> Kenya Const. Article 6 (2) (2010).

<sup>2</sup> Charles k, “Uhuru accused of using state resources for campaign,” (Hivisasa, Jun. 2017) <https://hivisasa.com/posts/uhuru-accused-of-using-state-resources-for-campaign>.

<sup>3</sup> The Presidency - Office of the Deputy President, ICT Authority, Ministry Environment and Natural Resources, Ministry of Sports, Culture and the Arts, Kenya National Archives and Documentation Service (KNADS), Ministry of Mining and National Treasury, State Law Office and Department of Justice.

<sup>4</sup> The Presidency - Office of the Deputy President, Ministry Environment and Natural Resources, Ministry of Sports, Culture and the Arts, Kenya National Archives and Documentation Service (KNADS), Ministry of Mining, National Treasury and ICT Authority, State Law Office and Department of Justice.

<sup>5</sup> Ministry Environment and Natural Resources, Ministry of Sports, Culture and the Arts, Kenya National Archives and Documentation Service (KNADS), Ministry of Mining, National Treasury, Ministry of ICT, Ministry of Devolution and Planning, Ministry of Foreign Affairs, Ministry of Public Service, Youth and Gender, ICT Authority, Kenya Open Data Initiative (KODI), Kenya Revenue Authority, Kenya School of Government, Forestry Service (KFS), National Sector Working Groups, Legislative & Intergovernmental Liaison Office (LILO), National Council for Law Reporting, State Law Office and Department of Justice, Office of the Director of Public Prosecutions, and all public entities.

<sup>6</sup> Commission for Administrative Justice, Controller of Budget, Auditor General, Council of Governors, Intergovernmental Budget and Economic Council (IBEC), and Ethics & Anti-Corruption Commission.

<sup>7</sup> Kenya Vision 2030 Actin Plan Pillars <http://www.vision2030.go.ke/about-vision-2030/>.

<sup>8</sup> IAP2 International Federation, “IAP2’s Public Participation Spectrum” (2014) [c.yimcdn.com/sites/www.iap2.org/resource/resmgr/foundations\\_course/IAP2\\_P2\\_Spectrum\\_FINAL.pdf](http://c.yimcdn.com/sites/www.iap2.org/resource/resmgr/foundations_course/IAP2_P2_Spectrum_FINAL.pdf).

# IV | COMMITMENTS

All OGP-participating governments develop OGP action plans that include concrete commitments over a two-year period. Governments begin their OGP action plans by sharing existing efforts related to open government, including specific strategies and ongoing programs.

Commitments should be appropriate to each country's unique circumstances and challenges. OGP commitments should also be relevant to OGP values laid out in the OGP Articles of Governance and Open Government Declaration signed by all OGP-participating countries.<sup>1</sup>

## WHAT MAKES A GOOD COMMITMENT?

Recognising that achieving open government commitments often involves a multiyear process, governments should attach time frames and benchmarks to their commitments that indicate what is to be accomplished each year, whenever possible. This report details each of the commitments the country included in its action plan and analyses the first year of their implementation.

The indicators used by the IRM to evaluate commitments are as follows:

- **Specificity:** This variable assesses the level of specificity and measurability of each commitment. The options are:
  - High: Commitment language provides clear, verifiable activities and measurable deliverables for achievement of the commitment's objective.
  - Medium: Commitment language describes activity that is objectively verifiable and includes deliverables, but these deliverables are not clearly measurable or relevant to the achievement of the commitment's objective.
  - Low: Commitment language describes activity that can be construed as verifiable but requires
- **Relevance:** This variable evaluates the commitment's relevance to OGP values. Based on a close reading of the commitment text as stated in the action plan, the guiding questions to determine the relevance are:
  - Access to Information: Will the government disclose more information or improve the quality of the information disclosed to the public?
  - Civic Participation: Will the government create or improve opportunities or capabilities for the public to inform or influence decisions?
  - Public Accountability: Will the government create or improve opportunities to hold officials answerable for their actions?
  - Technology & Innovation for Transparency and Accountability: Will technological innovation be used in conjunction with one of the other three OGP values to advance either transparency or accountability?<sup>2</sup>
- **Potential impact:** This variable assesses the *potential* impact of the commitment, if completed as written. The IRM researcher uses the text from the action plan to:
  - Identify the social, economic, political, or environmental problem;
  - Establish the status quo at the outset of the action plan; and
  - Assess the degree to which the commitment, if implemented, would impact performance and tackle the problem.

**Starred commitments** are considered exemplary OGP commitments. In order to receive a star, a commitment must meet several criteria:

- Starred commitments will have “medium” or “high” specificity. A commitment must lay out clearly defined activities and steps to make a judgement about its potential impact.
- The commitment’s language should make clear its relevance to opening government. Specifically, it must relate to at least one of the OGP values of Access to Information, Civic Participation, or Public Accountability.
- The commitment would have a “transformative” potential impact if completely implemented.<sup>3</sup>
- The government must make significant progress on this commitment during the action plan implementation period, receiving an assessment of “substantial” or “complete” implementation.

Based on these criteria, Kenya’s action plan contained two starred commitments (Commitment 5 and Commitment 8).

Finally, the tables in this section present an excerpt of the wealth of data the IRM collects during its progress reporting process. For the full dataset for Kenya and all OGP-participating countries, see the OGP Explorer.<sup>4</sup>

## GENERAL OVERVIEW OF THE COMMITMENTS

The national action plan focused on commitments representing major thematic areas, such as anti-corruption, climate change, extractives transparency, beneficial ownership, record management, and access to information. The majority of milestones for each commitment in the action plan stand alone, and

correspond to ongoing high-level policy plans, such as the Vision 2030 plan, National Climate Change Framework, and anti-corruption agenda. While many milestones could act as standalone commitments, the researcher has left them as steps toward achieving overarching policy goals as defined by the commitment text. This decision was taken because many milestone activities are part of other national frameworks and policy plans in their respective thematic areas, and logically could be assessed together.

It should also be noted that the CSOs involved in the OGP process in Kenya played a unique role in monitoring and implementing some of the commitments. In some instances, CSOs effectively implemented commitment milestones through their own independent work and focus areas. Often, this was done with cooperation and support from the government. One example of this is found in Commitment 3, where the legislative tracking software, “Dokeza,” was developed and distributed by the CSO Mzalendo Trust, in collaboration with the National Assembly and Senate.

## THEMES

Some commitments in the action plan included a diverse set of milestones with very different goals and diverse activities. While the IRM did not break these up into separate commitments for assessment, it should be noted that some milestones were of unclear relevance to OGP values, or were written with such low specificity that implementation could not be verified. For example, Commitment 2 on anti-corruption enforcement had ten milestones but only two were of clear relevance to OGP. In total, there were 8 commitments in Kenya’s second action plan.

<sup>1</sup> Open Government Partnership: Articles of Governance, June 2012 (Updated March 2014 and April 2015), [https://www.opengovpartnership.org/sites/default/files/attachments/OGP\\_Articles-Gov\\_Apr-21-2015.pdf](https://www.opengovpartnership.org/sites/default/files/attachments/OGP_Articles-Gov_Apr-21-2015.pdf).

<sup>2</sup> IRM Procedures Manual. Available at: [http://www.opengovpartnership.org/sites/default/files/IRM-Procedures-Manual-v3\\_July-2016.docx](http://www.opengovpartnership.org/sites/default/files/IRM-Procedures-Manual-v3_July-2016.docx).

<sup>3</sup> The International Experts Panel changed this criterion in 2015. For more information visit: <http://www.opengovpartnership.org/node/5919>.

<sup>4</sup> OGP Explorer: [bit.ly/1KE2Wil](http://bit.ly/1KE2Wil).

# 1 | TRANSPARENT AND PARTICIPATORY CLIMATE POLICIES

## **Commitment Text:**

*Title: 1. More transparent and participatory development of climate policies at the national and subnational level*

*Status quo or problem addressed by the commitment: Kenya, as many Countries in the world acceded to the Paris Agreement in December 2015 that provides a framework for multilateral cooperation on Climate Change. The agreement speaks to the need to strengthen transparency and accountability mechanisms that ensure countries make progress on achieving their national determined contributions and other commitments. The SDGs adopted in September 2015 also sets ambitious targets that require creativity and innovation in their measurement and achievement.*

*Main objective:*

- *Create transparent and responsive institutions that manage and develop climate policies in Kenya. Brief description of commitment*
- *Commitment seeks to create a transparent and participatory environment for the implementation of sound climate policies as per the Climate Change Act 2016.*

## **Milestones:**

1. *Develop robust transparent multi-stakeholder consultative process to operationalize the Climate Change Act*
2. *Establishment of the multi-stakeholder Climate Change Council and Climate Change Directorate*
3. *Open Up Forestry Datasets, encouraging its reuse and the development of user-friendly data-driven apps and services by civil society organizations and the private sectoruyó*
4. *Ratification of the Paris Climate treaty by Kenyan Parliament*
5. *Development and approval of the climate change policy*

**Responsible institution(s):** Ministry of Environment and Natural Resources

**Supporting institution(s):** Office of the Deputy President; Ministry of Environment and Natural Resources; Kenya Forestry Service (KFS); Ministry of Foreign Affairs; ICT Authority - Kenya Open Data Initiative (KODI); African Centre for Technology Studies (ACTS); SIFA Kenya; INFONET; Africa Greenbelt Movement; Transparency International (TI); Kenya Association of Manufacturers (KAM); TOTAL KENYA; and Food and Agriculture Organization (FAO)

**Start date:** 1 August 2016

**End date:** 30 May 2018



COMMITMENT OVERVIEW	SPECIFICITY				OGP VALUE RELEVANCE				POTENTIAL IMPACT				ON TIME?	COMPLETION			
	None	Low	Medium	High	Access to Information	Civic Participation	Public Accountability	Tech. and Innov. for Transparency and Accountability	None	Minor	Moderate	Transformative		Not Started	Limited	Substantial	Complete
1. Overall			X		X	X		X			X		Yes			X	
1.1. Multi-stakeholder consultative process for Climate Change Act			X			X					X		Yes			X	
1.2. Climate Change Council and Climate Change Directorate				X		X					X		Yes			X	
1.3. Open Up Forestry Datasets				X	X			X			X		Yes		X		
1.4. Ratification of Paris Agreement				X	X	X					X		Yes				X
1.5. Climate change policy		X			Unclear					X			Yes				X

## CONTEXT AND OBJECTIVES

Since 2010, the government of Kenya has taken bold measures against threats posed by climate change, such as developing a National Climate Change Framework Policy<sup>1</sup> and a Climate Action Plan 2013–2017.<sup>2</sup> Kenya’s economy is highly dependent on natural resources and therefore is highly vulnerable to climate variability and change.<sup>3</sup> The Ministry of Environment and Natural Resources is at the forefront of climate change mitigation and adaptation reform. Prior to the development of the OGP national action plan, climate change policy in Kenya lacked sufficient mechanisms to ensure transparency, public participation, and accountability as provided for in the Paris Agreement. The Paris treaty requires governments to participate with various stakeholders and report on potential emissions and planning for climate change adaptation and mitigation.

The activities included in this commitment aim to increase citizen involvement in environmental policy and make more information available to citizens. Milestone

1.1 envisions involving civil society stakeholders in implementing the Climate Change Act of 2016.<sup>4</sup> Prior to the development of the national action plan, a number of CSO-coordinated consultative networks and coalitions were in place, such as the Kenya Climate Working Group (KCCWG).<sup>5</sup> However, the Ministry of Environment did not engage with CSOs. If implemented in full, this milestone would ensure CSOs involvement in working with the government on climate change policies.

Milestone 1.2. further involves stakeholders in implementing the Climate Change Act by establishing a multi-stakeholder climate change council and directorate. These two bodies form a coordination mechanism to oversee the implementation of the national climate change action plan, guide policy, and conduct research. The law mandates the Climate Change Directorate act as the lead government agency for coordinating intragovernmental national climate change plans and operations. The Directorate acts as the secretariat of the Climate Change Council, while the Council gives strategic policy direction.

The Council, formed November 2016, is chaired by the President who also appoints up to nine councilmembers. It consists of the Cabinet Secretaries responsible for environment and climate change affairs; the National Treasury; economic planning; energy; the chairperson of the Council of Governors; representatives of the private sector; the Civil Society; marginalised communities and academia. Excepting the Cabinet Secretaries, the nominees must be vetted by Parliament.

The activities described in Milestone 1.3. focus on opening forestry datasets to the public and encouraging their reuse. Public use of forestry datasets would lead to greater transparency in issues concerning environmental degradation and land conflicts in Kenya. This data is also vital for stakeholders working in these areas. Environmental issues in Kenya include deforestation, soil erosion, desertification, water shortage and degraded water quality, flooding, poaching, and domestic and industrial pollution. Government-generated climate data is currently in geospatial form, and CSO respondents indicated a call for support to make the data more accessible and formatted so that the data could be reused.

Milestone 1.4, to ratify the Paris Climate Treaty within the Kenyan parliament, includes several key provisions. The government of Kenya acceded to the Paris Agreement in December 2015 leading to Kenyan laws strengthening transparency and accountability mechanisms in environmental reforms. The constitution of Kenya recognises all international commitments ratified by Kenya. Article 2 (6) states that, "Any treaty or convention ratified by Kenya shall form part of the law of Kenya under this Constitution." Ratifying the Paris Agreement could transform government practice in working with stakeholders to address the effects of climate change.

Finally, Milestone 1.5, to develop and approve the climate change policy, requires the government to create an overarching framework to enforce its commitment to addressing climate change. The policy document is intended to identify new laws needed to achieve its goals. As written, this milestone is not specific, and would have been more relevant if developed before the enactment of the Climate Change Act of 2016. It is unclear what additional climate policies will be developed under this step.

A key member from the Ministry of Environment and Natural Resources notes that while the Ministry is making progress on the commitment activities, stronger commitments are needed to achieve a greater impact. Activities under this commitment are ongoing government initiatives and their contribution to change in government practice may be limited, depending on how they are implemented. Some of the milestones' language is vague in describing how their implementation will ensure climate change policy in Kenya is more transparent and accountable.

This commitment, if fully implemented, would fill operational gaps and increase CSO involvement in implementing Kenya's new national climate policies. By including this commitment in the action plan, it leverages CSO networks involved in OGP to bring more voices into implementing national climate policies, and if fully implemented, would fulfil civic participation requirements as designated under the Paris Climate Agreement, while also strengthening best practices for involving more stakeholders in climate policy. For this reason, the commitment can be considered to have a moderate impact on opening government.

## COMPLETION

The Ministry of Environment and Natural Resources has made significant progress in the first year of implementation toward achieving the commitment. Three out of the five milestones have been fully completed while two have been substantially completed as elaborated below.

### *1.1. Develop robust transparent multi-stakeholder consultative process to operationalize the Climate Change Act – Substantial*

The Climate Change Act passed in May 2016 prior to the development of the OGP action plan. It has provisions for public participation and access to information as espoused in Article 24 and Article 30 on the public engagement strategy. Civil society has been consulted through the Kenya Climate Working Group (KCCWG)<sup>6</sup> and climate hearing forums held at the local level to collect views. The multi-consultative process needs to be anchored in law through a ministerial directive or circular on its guidelines.

### *1.2. Establishment of the multi-stakeholder Climate Change Council and Climate Change Directorate – Substantial*

The Climate Change Act passed in May 2016 provides for the creation of the National Climate Change Council. The Climate Change Directorate is to act as the secretariat to the Council.<sup>7</sup> The Council comprises of nine members: four cabinet secretaries, and one representative each from the Council of Governors, the private sector, Civil Society, marginalised communities, and academia. With the exception of the cabinet secretaries and the chairperson of the council of governors, the other remaining four nominees are required to be vetted by Parliament.

During the parliamentary vetting of the nominees, the National Assembly rejected two nominees representing the civil society and marginalised community.<sup>8</sup> The names of the approved nominees to the council were then officially published in the Kenyan Gazette number 136 of 2016 on 7 November 2016. However, the council has not been fully formed due to a dispute over the selection process for CSO and marginalized community representatives. Transparency International Kenya, the Green Belt Movement, and Pan-African Climate Justice Alliance, in close collaboration with other CSOs working on climate change, filed a court case in January 2017.<sup>9</sup> The CSOs had gone through an elaborate process to select a CSO representative but discovered that the nominee had been dropped through Gazette number 136 of 2016. The ongoing case is challenging the process. The Orders for stay were not granted,<sup>10</sup> and the hearing is set for 20 November 2017.

Immediately after the passage and commencement of the Climate Change Act in May 2016, the Climate Change Directorate was established by the Ministry of Environment and Natural Resources. Among other functions, the Directorate is the lead agency of the government on national climate change plans and actions to coordinate operations. Under the Directorate, the National Climate Change Resource Centre (NCCRC)<sup>11</sup> was established in the Ministry of Environment and Natural Resources. The NCCRC is the national repository for climate change information and houses the Climate Change Directorate offices. The Directorate is responsible for managing a climate change registry<sup>12</sup> of appropriate mitigation actions by the public and private entities. The registry enables government and

non-government actors to better understand climate change actions in Kenya, and assist the Climate Change Directorate to fulfil domestic and international reporting requirements on climate change. The registry includes actions that were taking place in 2013, the first year of Kenya's National Climate Change Action Plan 2013-2017, and up to May 2017.

### *1.3. Open Forestry Datasets – Limited*

The Ministry of Environment, in close coordination with the Kenya Forest Service, is working to open and make publicly available forestry datasets in GIS and other user-friendly formats. The respondent from the Ministry explained that officials from the Ministry and the Kenya Forest Service have held meetings to discuss what datasets are to be opened up, such as forest maps.<sup>13</sup>

### *1.4. Ratification of the Paris Climate treaty by Kenyan Parliament – Complete*

The Paris Agreement went through parliamentary approval per the Treaty Making and Ratification Act of 2012. The Cabinet Secretary Ministry of Environment and Natural Resources submitted the Agreement to the Cabinet with a supporting memorandum. The Cabinet approved ratification of the Agreement; the Cabinet Secretary then submitted the Agreement and the memorandum to Parliament who approved the Agreement without reservations and it took effect 27 January 2017.

### *1.5. Development and approval of the climate change policy – Complete*

As of November 2017, the draft climate change policy<sup>14</sup> was awaiting Cabinet approval.<sup>15</sup> The climate change framework seeks to facilitate a coordinated, coherent and effective response to the local, national and global challenges and opportunities presented by climate change. An overarching mainstreaming approach has been adopted to ensure integration of climate change considerations into development planning, budgeting and implementation across all sectors and levels of government. The Policy therefore aims to enhance adaptive capacity and build resilience to climate variability and change, while promoting a low carbon development pathway. The government of Kenya has made significant progress toward achieving the commitment on climate change action by implementing an enabling policy and legislative framework.<sup>16</sup>

## EARLY RESULTS (IF ANY)

The ratification of the Paris Agreement is a big milestone for ensuring more transparent and accountable climate change policies. Creation of the Climate Council and Climate Change Directorate are positive steps however, staffing of the Council has been challenged by civil society. TI Kenya is lobbying for more openness in the staffing process and is contesting of the appointment of the right CSO representative in the council through court action.

## NEXT STEPS

In the next action plan, the Ministry of Environment and Natural Resources needs to collaborate with all stakeholders to ensure effective implementation of the Climate Change Act by holding sensitisation forums on the climate change legislation. Organisations and networks working on climate change issues such as Kenya Water and Sanitation Network, Africa Youth Initiative on Climate, Kenya Climate Finance Network, Umande Trust, and CARE International should be brought into consultations.<sup>17</sup>

- The Cabinet needs to approve the climate policy and develop relevant regulations to ensure implementation of the Climate Change Act. The multi-stakeholder process needs to be institutionalised through a government circular outlining the guidelines for establishment, composition, and nomination of representatives, as well as their function and oversight. This could ensure that relevant CSOs and climate groups have a permanent voice and remain engaged in implementing climate policies.
- There is need for education and capacity building on how to participate in the consultations so a broader range of CSOs can engage in the process rather than just subject matter experts.
- The Ministry of Environment and Natural Resources needs to ensure that civil society representatives are duly selected and included in the work of the Climate Change Council and Directorate.

<sup>1</sup> David B. Adegu, "National Climate Change Framework Policy & Bill" (National Climate Change Secretariat Ministry of Environment, Water & Natural Resources, 2015) [www.thecvf.org/wp-content/uploads/2015/07/Kenya.pdf](http://www.thecvf.org/wp-content/uploads/2015/07/Kenya.pdf).

<sup>2</sup> National Climate Change Action Plan 2013 -2017 (Government of Kenya, 2013) <https://cdkn.org/wp-content/uploads/2013/03/Kenya-National-Climate-Change-Action-Plan.pdf>.

<sup>3</sup> Sessional Paper No. 3 of 2016 on National Climate Change Framework Policy, Ministry of Environment and Natural Resources, Executive Summary.

<sup>4</sup> The Climate Change Act (2016) strengthens climate change governance and coordination, and envisages the integration of climate change considerations into development planning, budgeting and implementation under the National Climate Change Action Plan (NCCAP).

<sup>5</sup> KCCWG is a forum that brings together CSOs, donor partners, government departments and agencies.

<sup>6</sup> KCCWG, "About Us" (accessed 21 Feb 2018) <http://www.kccwg.org/about.html>.

<sup>7</sup> The Council comprises of nine members: four cabinet secretaries representing the ministries of (1) environment and climate change affairs, (2) the National Treasury, (3) economic planning, and (4) energy; as well as (5) the chairperson of the Council of Governors; (6) a representative of the private sector; (7) a representative from Civil Society; (8) a representative of marginalised communities and (9) academia. With the exception of the cabinet secretaries and the chairperson of the council of governors, the other four nominees are required to be vetted by the Parliament.

<sup>8</sup> Gideon Keter, "House rejects two nominees to National Climate Change Council" (The Star, 11 Jan. 2017) [https://www.the-star.co.ke/news/2017/01/11/house-rejects-two-nominees-to-national-climate-change-council\\_c1485259](https://www.the-star.co.ke/news/2017/01/11/house-rejects-two-nominees-to-national-climate-change-council_c1485259).

<sup>9</sup> The case reference is JR No.11 of 2017.

<sup>10</sup> *Republic v National Assembly & 2 others Ex-parte Green Belt Movement & 5 others* (High Court of Kenya at Nairobi, 13 Feb. 2017) <http://kenyalaw.org/caselaw/cases/view/131918/>.

<sup>11</sup> Kenya Climate Change Knowledge Portal, "NCCRC - National Climate Change Resource Centre" (Ministry of Environment, Climate Change Directorate, accessed 21 Feb. 2018) [lecrd.co.ke/nccrc-national-climate-change-resource-centre/](http://lecrd.co.ke/nccrc-national-climate-change-resource-centre/).

<sup>12</sup> Ministry of Environment and Natural Resources, "National Climate Change Registry" (accessed 21 Feb. 2018) [kenyaclimateregistry.info/urrlgn.aspx](http://kenyaclimateregistry.info/urrlgn.aspx).

<sup>13</sup> Examples of Kenyan forest maps may be found at <http://www.arcgis.com/apps/View/index.html?appid=fc9f167106e44f3cbd0e0b31f23b6794>.

<sup>14</sup> "Sessional Paper No. 3 of 2016 on National Climate Change Framework Policy (Ministry of Environment and Natural Resources) [webcache.googleusercontent.com/search?q=cache:17B-999pyh8oJ:www.ke.undp.org/content/dam/kenya/docs/energy\\_and\\_environment/2016/Climate-Change-Framework-Policy\(31Nov2016\).doc%3Fdownload+&cd=1&hl=en&ct=clnk](http://webcache.googleusercontent.com/search?q=cache:17B-999pyh8oJ:www.ke.undp.org/content/dam/kenya/docs/energy_and_environment/2016/Climate-Change-Framework-Policy(31Nov2016).doc%3Fdownload+&cd=1&hl=en&ct=clnk).

<sup>15</sup> President's Delivery Unit, "Environment and Natural Resources" (Office of the President, accessed 21 Feb. 2018) <https://www.delivery.go.ke/ministryprojects/14>.

<sup>16</sup> Ratified agreements include:

- \* The Paris Agreement,
- \* National Wetlands and Conservation Management Strategy,
- \* The Climate Change Act 2016- enacted,
- \* Established the Directorate of Climate Change,
- \* Established the National Climate Change Council,
- \* Approved National Environment Policy,
- \* Approved Education for Sustainable Development Policy,
- \* Approved National Wetlands Conservation and Management Policy,
- \* Approved Integrated Coastal Zone Management Policy,
- \* Approved Environment Management and Coordination (Amendment) Act No. 5 of 2015,
- \* Climate Change Policy awaiting approval from the Cabinet,
- \* Approved Hazardous Waste Regulation,
- \* Approved National Action Plan on Persistent Organic Pollutant,
- \* The Natural Resources (Classes of Transaction Subject to Rectification), Bill 2015,
- \* Prepared National Determined Contribution (NDC) and submitted to UNFCCC in April 2016,
- \* Developed National Green Economy Strategy and Implementation Plan (GESIP), and
- \* The government mainstreamed climate change into sectoral planning.

<sup>17</sup> Suswath Kenya, *Kenya National Baseline Project*, (Promoting the Implementation of the Paris Agreement in East Africa (PIPA Project), May 2017) [www.inforce.org/africa/pdfs/PIPA\\_Kenya\\_Baseline\\_Report\\_May\\_8\\_2017.pdf](http://www.inforce.org/africa/pdfs/PIPA_Kenya_Baseline_Report_May_8_2017.pdf).

## 2 | PREVENTIVE AND PUNITIVE MECHANISMS AGAINST CORRUPTION

### **Commitment Text:**

*Title: 2. Enhancing preventive and punitive mechanisms in the fight against corruption and unethical practices*

*Status quo or problem addressed by the commitment: Despite there being a number of initiatives to fight corruption going back ten years, corruption in Kenya remains pervasive and endemic. It's one of the biggest challenges facing Kenya today. It undermines our security, accountability systems, access to services among others. Tackling both the supply and demand side of corruption is a necessary imperative to further accountability for corruption cases.*

*Main objective: To minimize corruption and wastage for better service delivery to the citizen in order to achieve national aspirations as contained in the Kenya national vision 2030.*

### **Milestones:**

#### **Anti-corruption and Ethics Regulatory Reforms**

*Milestone 2.3. Legal reforms to enhance the effectiveness of the Ethics and Anti-Corruption Act and Leadership and Integrity ACTs, Economic Crimes ACT etc*

*Milestone 2.6. Finalize and adopt the National Policy Framework on Ethics and Anti-Corruption.*

#### **Legislate Whistleblower Protection**

*Milestone 2.4. Enact a Whistle Blower Protection, Anti-Bribery Bill and False Claims legislation.*

#### **Anti-Corruption Partnerships**

*Milestone 2.1. Establish a public-private partnership for information sharing that brings together governments, civil society and private sector to detect, prevent and disrupt corruption*

*Milestone 2.7. Mount and Sustain a values/ethics campaigns by civil society, government and private sector on anti-corruption*

#### **Increase corruption monitoring**

*Milestone 2.2. Develop with civil society and private sector, a technology driven project monitoring portal for citizens to participate in project identification, evaluation, report and provide feedback to enhance accountability in government initiatives.*

#### **Implement and enforce anti-corruption regulations**

*Milestone 2.5. Enforcing the Code of ethics for suppliers undertaking public procurement, including professional enablers (lawyers and accountants)*

*Milestone 2.8. Enforce adherence to provisions of Executive Order No. 6 on Ethics and Integrity in the Public Service*

#### **Improve preventive and punitive anti-corruption measures**

*Milestone 2.9. Enhance structured coordinated multi-agency effort in tackling corruption.*

\*Editorial Note: Milestone 2.10, "Improve Corruption Perception Index (CPI) ranking," will not be assessed, as this is an aspirational activity that does not have measurable or verifiable steps for implementation. The CPI is a tool developed by Transparency International to annually rank countries by their perceived levels of corruption, as determined by expert assessments and opinion surveys.

Note Also: The milestones for this commitment have been clustered by 6 thematic groupings. The original milestones have been reorganised under these themes but retain the same numbers as in the National Action Plan.

**Responsible institution(s):** Office of Attorney General & Department of Justice; Ministry of Public Service, Youth and Gender; The Presidency; Office of the Director of Public Prosecutions; Ethics & Anti-Corruption Commission; Parliament and Senate; Business Against Corruption Kenya (BACK); TI Kenya; and Society for International Development (SID) International Commission of Jurists; Kenya Private Sector Alliance (KEPSA); Kenya Association of Manufacturers (KAM); Katiba Institute; AfriCog; Ushahidi

**Start date:** January 2016

**End date:** June 2017

COMMITMENT OVERVIEW	SPECIFICITY				OGP VALUE RELEVANCE				POTENTIAL IMPACT				ON TIME?	COMPLETION			
	None	Low	Medium	High	Access to Information	Civic Participation	Public Accountability	Tech. and Innov. for Transparency and Accountability	None	Minor	Moderate	Transformative		Not Started	Limited	Substantial	Complete
2. Overall		X				X	X			X			No		X		
<b>ANTI-CORRUPTION AND ETHICS REGULATORY REFORMS</b>																	
2.3. Reforms to the Ethics and Anti-Corruption Act, Leadership and Integrity Act, and Economic Crimes Act		X			Unclear					X			No	X			
2.6. National Policy Framework on Ethics and Anti-Corruption			X		Unclear					X			No	X			
<b>NEW ANTI-CORRUPTION LEGISLATION</b>																	
2.4. Whistleblower Protection, Anti-Bribery Bill, and False Claims legislation		X					X				X		Yes		X		

COMMITMENT OVERVIEW	SPECIFICITY				OGP VALUE RELEVANCE				POTENTIAL IMPACT				ON TIME?	COMPLETION			
	None	Low	Medium	High	Access to Information	Civic Participation	Public Accountability	Tech. and Innov. for Transparency and Accountability	None	Minor	Moderate	Transformative		Not Started	Limited	Substantial	Complete
<b>ANTI-CORRUPTION PARTNERSHIPS</b>																	
2.1. Public Private Partnership		X			Unclear					X			No	X			
2.7. Values/ethics campaigns		X			Unclear				X				No	X			
<b>INCREASE CORRUPTION MONITORING</b>																	
2.2. Citizen project monitoring portal		X				X				X			No	X			
<b>IMPLEMENT AND ENFORCE ANTI-CORRUPTION REGULATIONS</b>																	
2.5. Code of Ethics for public procurement suppliers		X			Unclear					X			No	X			
2.8. Enforce Executive Order No. 6 on Ethics and Integrity in the Public Service		X			Unclear					X			No	X			
<b>IMPROVE PREVENTIVE AND PUNITIVE ANTI-CORRUPTION MEASURES</b>																	
2.9. Coordinated multi-agency effort in tackling corruption		X			Unclear					X			No	X			

## CONTEXT AND OBJECTIVES

It is estimated that Kenya loses up to 608 billion of the Kenyan Budget annually through corruption.<sup>1</sup> Corruption poses a major threat to the country's economic growth, democracy, and stability by depleting funds that could be used for vital public service delivery, such as health, education, water, sanitation, and social protection.

The anti-corruption agenda was a key component of the Jubilee Coalition's manifesto in 2013 and the promise

to "clean up government by introducing some of the toughest anti-corruption legislation in the world." The Jubilee leadership promised zero tolerance for corruption and abuse for personal gain in addition to a commitment to remove parliamentary immunity to corruption charges. Despite these pledges, key anti-corruption agencies so far have failed to prevent or limit theft of public goods and have achieved limited progress in recovery of stolen assets and even fewer convictions for those who have stolen or abetted the theft and misuse of public resources.

This commitment was not well defined and included a number of independent milestone activities. The IRM has clustered them under six thematic groupings to better assess their aims and completion. All are related to various national anti-corruption frameworks, but most of the activities described in this cluster are aspirational and do not include clear, concrete, and specific steps for making progress in implementing anti-corruption policies. Several of the commitment activities also propose internal government reforms that do not include a public-facing element, and therefore have unclear relevance to OGP values.

#### *Anti-corruption and Ethics Regulatory Reforms (Milestones 2.3 and 2.6)*

Kenya has passed a number of anti-corruption and ethics acts between 2003 and 2012.<sup>2</sup> Despite the existence of ethics laws, there have been many recent corruption scandals in Kenya, particularly in public financing, service delivery, and the health sector.<sup>3</sup> The main challenge is that existing laws and regulations are scattered among different statutes and are consequently enforced by different agencies. The disjointed legal and institutional framework to address corruption allows for malpractice such as bribery, misuse of state and public resources, money laundering and crime.<sup>4</sup> If fully implemented, the proposed commitments could be a step forward to improve coordination across government agencies and effectively enforce anti-corruption laws and accountability mechanisms. However, the commitment does not specify which agencies will lead the coordination effort, how the laws will be better enforced, or how progress could be measured and monitored in a meaningful way. Therefore, the specificity of this commitment is low, its relevance to OGP values cannot be determined, and the potential impact is minor.

#### *Legislate Whistleblower Protection (Milestone 2.4)*

The purpose of this commitment is to propose, draft, and enact three pieces of legislation. The current whistleblower protection framework is under the Anti-corruption and Economics Act 2003 and the Witness Protection Act 2006. If a stand-alone law were enacted, it could consolidate and review the provisions of the two laws that currently govern whistleblower protection.

The new law would protect citizens across all branches of government from retaliatory action for voluntarily disclosing information about dishonest or illegal activities occurring in a government organisation. This could help to advance government accountability to public.

The anti-bribery bill has been enacted into law, and provides for the prevention, investigation and punishment of bribery. The purpose of this milestone is to fully implement the existing law. The false claims legislation bill has already been drafted and needs to be passed into law. The False Claims Bill seeks to give private individuals, civil society groups and other interested parties power and financial muscle to institute public assets recovery proceedings.

#### *Anti-Corruption Partnerships (Milestone 2.7 and 2.1)*

Corruption in Kenya persists despite anti-corruption measures implemented by the government, such as enacting anti-corruption and good governance legislation.<sup>5</sup> Public Private Partnerships (PPPs) and anti-corruption and values/ethics campaigns (Milestone 7) could bring together government, civil society and the private sector to detect and disrupt corruption through information sharing and civic pressure. If fully implemented, the activities in this commitment could raise the profile of anti-corruption efforts. However, as written the commitment milestones do not specify clearly how citizens will be engaged, or how their participation would relate to enforcing consequences for perpetrators of corruption. Given that a public-facing element is not explicitly included in the commitment text, these milestones are of unclear relevance to OGP.

In addition, prior to development of the OGP action plan, the government had partnered with civil society and other stakeholders in the fight against corruption. For example, in 2014, the government established a National Anti-Corruption Campaign Steering Committee, comprised of government officials, CSOs and the private sector, to ensure zero-tolerance on corruption.<sup>6</sup> The campaign employed sensitisation and awareness activities to empower the public to fight corruption. The government also uses the Integrated Public Complaints Reporting Mechanism (IPCRM)<sup>7</sup> to



address complaints received by key state institutions in the fight against corruption that fall within their mandate. Given that similar initiatives have already been carried out, the milestones' potential impact is considered minor to none. The milestones are aspirational and do not specify how any of the previous efforts in this area will be improved upon or changed to be more effective.

#### *Increase Corruption Monitoring (Milestone 2.2)*

Prior to the development of the national action plan, no official corruption monitoring mechanism at the national level existed for citizens. This technology-driven project will be a monitoring portal that allows citizens to participate in anti-corruption project identification, evaluation, and reporting. Citizens will be able to provide feedback to enhance accountability in government initiatives. Citizen-led monitoring could increase public accountability through enabling the public to perform a watchdog role. However, the commitment does not specify how the portal will be developed, what information it will provide, or how citizens will be able to participate in corruption monitoring. Therefore, the potential impact is minor.

#### *Implement and Enforce Anti-Corruption Regulations (Milestones 2.5 and 2.8)*

This commitment is to enforce two current anti-corruption regulations. First, ensuring compliance with the Code of Ethics in public procurement, and second, Executive Order No. 6 on Ethics and Integrity in public service delivery. This commitment remains largely aspirational as it does not include specific steps or actionable changes for enforcing the current regulations. The specific government bodies overseeing the compliance are not named, and no accountability mechanism is defined to measure progress or verify improvement. Therefore, the specificity is low and the potential impact is minor.

#### *Improve Preventive and Punitive Anti-Corruption Measures (Milestone 2.9)*

Transparency International's Global Corruption Barometer (GCB) 2015<sup>8</sup> indicates that 70 percent of Kenyans think that government is doing a poor job at handling corruption, with the statistics showing-

increasing rates of corruption. This commitment aims to improve preventive and punitive measures for corruption but it does not include a public-facing element, and is therefore of unclear relevance to OGP values.

## COMPLETION

### *2.4. Legislate Whistleblower Protection: Limited*

This commitment sought to enact a new whistleblower protection law, Anti-Bribery Bill and False Claims legislation. The State Law Office, in close collaboration with stakeholders, fast-tracked the enactment of several laws. The Bribery Act<sup>9</sup> was drafted and enacted into law on 23 December 2016. The State Law Office sought input from relevant state and non-state actors and stakeholders including CSOs such as TI- Kenya. The Kenya Association for Manufacturers (KAM) was also engaged in the development and enactment of the Bribery Act 2016. The Act provides for prevention, investigation and punishment of bribery and entered into force on 13 January 2017.

The Whistle-blowers Protection Bill,<sup>10</sup> which had been drafted prior to and amended during the action plan period, has not made any progress. A False Claims Bill that was also drafted prior to the action plan has not made any progress. These Bills had still not passed into law when the eleventh Parliament went into recess for the August 2017 elections, and will need to be reintroduced in the new twelfth Parliament.

#### *Remaining Milestones: None*

There is no publicly available evidence that the government has undertaken any activities to meet the objectives highlighted under Commitments 2.1, 2.2, 2.3, 2.5, 2.6, 2.7, 2.8, or 2.9 in the first year of implementation. The researcher interviewed the involved actors and responsible institutions like TI Kenya, Society for International Development (SID), International Commission of Jurists, Kenya Association of Manufacturers (KAM) and Ushahidi. These commitments are based on ongoing initiatives under broader anti-corruption policy in Kenya, but there is no specific evidence that the commitments have been implemented.

## NEXT STEPS

Many of the anti-corruption commitments contained aspirational goals but lacked clear, measurable, time-bound steps to move forward and affect change.

For the next action plan, the researcher recommends including a theme on anti-corruption with clear and measurable activities that add value to the pre-existing anti-corruption policies and government practice.

- Government needs to ensure effective enforcement of the existing anti-corruption laws. To ensure the accountability of public institutions in charge of anti-corruption, they should be subject to the Access to Information Law and comply with disclosure.

- Further, the next steps in implementing the anti-corruption portal should be to define the leading institution that will oversee its development, and give detailed requirements for how the portal will enable citizens to participate in tracking anti-corruption projects, proposing ideas, and reporting on violations. The government should allow a period of public input on how to create the portal and develop clear, measurable steps and a timeline for implementation.

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<sup>1</sup> Reuters, "Sh608 billion of Kenya budget lost to corruption every year - EACC chairman Kinisu" (The Star, 10 Mar. 2016) [https://www.the-star.co.ke/news/2016/03/10/sh608-billion-of-kenya-budget-lost-to-corruption-every-year-eacc\\_c1310903](https://www.the-star.co.ke/news/2016/03/10/sh608-billion-of-kenya-budget-lost-to-corruption-every-year-eacc_c1310903).

<sup>2</sup> At the national level, the government has implemented anti-corruption measures and enacted an anti-corruption legal framework. In 2003, the anti-corruption legislation included The Corruption and Economic Crimes Act, No 3 of 2003 (ACECA) and the Public Officer Ethics Act, No 4 of 2003 (POEA). Later, the Public Procurement and Disposal Act was passed in 2005 and the Proceeds of Crime and Anti-money Laundering Act in 2009. The government passed the Independent Ethics and Anti-corruption Commission Act (EACCA), the Public Finance Management Act 2012, and Leadership and Integrity Act 2012 after promulgation of the 2010 Constitution of Kenya.

<sup>3</sup> It involved fraudulent withdrawal of billions of shillings from the Central Bank of Kenya (CBK) as export compensation for gold that was never exported; Moses Njagih, "National Youth Service (NYS) probe turns to Sh6.3b paid through 28 banks" (Standard Digital, 27 Nov. 2016) <https://www.standardmedia.co.ke/article/2000224870/national-youth-service-nys-probe-turns-to-sh6-3b-paid-through-28-banks>; Eunice Kilonzo, "Youth Fund boss at centre of Sh180m scandal resigns," (Daily Nation, 25 Mar. 2016) <https://www.nation.co.ke/news/Embattled-Youth-Fund-chair-Bruce-Odhiambo-resigns/1056-3132994-920ovmz/index.html>.

<sup>4</sup> *The Money Factor in Poll Race: A monitoring Report of the 2007 General Elections* (Coalition for Accountable Political Financing (CAPF), 2008).

<sup>5</sup> These include the Anti-Corruption and Economic Crimes Act, the Public Officer Ethics Act 2003, the Government Financial Management Act, and the Public Audit Act. Empowered by the Anti-Corruption and Economic Crimes Act, the government did set up the National Anti-Corruption Campaign Steering Committee in May 2004 to spearhead a national campaign to ensure zero-tolerance for corruption. On 9 September 2004, the President, acting under the aforesaid Act, approved the nomination of the Director and three assistant directors to the newly launched Kenya Anti-Corruption Commission.

<sup>6</sup> The campaign steering committee was established via Gazette Notice No. 6707 dated 19 September 2014.

<sup>7</sup> The composition of the Complaint Mechanism is drawn from National Anti-Corruption Campaign Steering Committee, Commission on Administrative Justice, Kenya National Commission on Human Rights, National Commission on Integration and Cohesion, and Transparency International - Kenya.

<sup>8</sup> Afrobarometer, *People and Corruption: Africa Survey 2015 - Global Corruption Barometer*, (Transparency International 1 Dec. 2015) [https://www.transparency.org/whatwedo/publication/people\\_and\\_corruption\\_africa\\_survey\\_2015](https://www.transparency.org/whatwedo/publication/people_and_corruption_africa_survey_2015).

<sup>9</sup> Kenya Gazette Supplement No. 197 (Acts No. 47) (Nairobi: The Government Printer, 30 Dec. 2016) [kenyalaw.org/kl/fileadmin/pdfdownloads/Acts/BriberyAct\\_47of2016.pdf](http://kenyalaw.org/kl/fileadmin/pdfdownloads/Acts/BriberyAct_47of2016.pdf).

<sup>10</sup> Office of the Attorney General and Department of Justice, "Developments at State Law Office and Department of Justice" (2016) [www.statelaw.go.ke/score-card/](http://www.statelaw.go.ke/score-card/).

## 3 | LEGISLATIVE TRANSPARENCY IN PARLIAMENT AND COUNTY ASSEMBLIES

### **Commitment Text:**

*Title: 3. Enhance transparency in the legislative process in Parliament and County Assembly*

*It is challenging for the public to access bills tabled in Parliament. Further, the notice given by the relevant Parliamentary committees for input by the public is not sufficient. In addition, public access to Parliament buildings is highly regulated due to security concerns. Parliamentary calls for memoranda and invitations to public hearings are only published in newspapers as advertisements, which only about 2% of the Kenyan population have access to. It would be more effective if other media such as radio and mobile phone, which 80% of Kenyans can access, were used. There is need for improved tracking of bills including the realtime changes made at various stages of the legislative process. Currently you can only track the process of the bill as opposed to the content.*

### *Brief Description of Commitment*

*Enact public participation policy and law to prescribe citizen engagement avenues, thresholds, timelines and formats in which Parliamentary information should be availed. By availing information through technology - websites, SMS short-codes, radio and social media platforms - legislators facilitate more inclusiveness in decision-making and provide avenues for feedback.*

*\*Editorial Note: This commitment text has been abridged for brevity. For full text, see National Action Plan 2016–18.*

### **Milestones:**

- 1. Enact Public Participation legislation and policy to prescribe avenues, timelines and threshold necessary*
- 2. Provide tracked copies of bills in every stage of discussion in Parliament*
- 3. Adopt open-source platforms to enhance internal parliamentary and county assembly communication and also facilitate information sharing with the public*
- 4. Publish weekly Senate, National Assembly, County Assembly plenary and committees proceedings*
- 5. Facilitate citizen engagement with Parliament and County Assembly via alternative media*
- 6. Increase Parliament's participation in the Legislative Openness working group*

**Responsible institution(s):** Parliament Service Commission; County Assemblies; Department of Justice; Legislative & Intergovernmental Liaison Office (LILO); and National Council for Law Reporting

**Supporting institution(s):** County Governments, Presidency Mzalendo Trust, Parliamentary Initiatives Network, Kenya – Network of CSOs. Ushahidi

**Start date:** 1 July 2016

**End date:** 30 June 2018

COMMITMENT OVERVIEW	SPECIFICITY				OGP VALUE RELEVANCE				POTENTIAL IMPACT				ON TIME?	COMPLETION			
	None	Low	Medium	High	Access to Information	Civic Participation	Public Accountability	Tech. and Innov. for Transparency and Accountability	None	Minor	Moderate	Transformative		Not Started	Limited	Substantial	Complete
3. Overall			X		X	X		X			X		No			X	
3.1. Public Participation legislation and policy		X				X				X			No			X	
3.2. Track bills in every stage of discussion in Parliament			X		X						X		No	X			
3.3. Adopt open-source platforms		X			X					X			No		X		
3.4. Weekly Senate, National Assembly, County Assembly plenary and committees proceedings				X	X						X		No				X
3.5. Citizen engagement with Parliament and County Assembly via alternative media		X			X		X				X		No		X		
3.6. Parliamentary participation in the Legislative Openness working group		X			Unclear					X			No		X		

## CONTEXT AND OBJECTIVES

The legislative and budgeting process in Kenya has a history of secrecy and excluding civic participation. With the promulgation of the 2010 constitution,<sup>1</sup> public participation became a crucial pillar of the Constitution. Article 118 (b) of the Constitution, read together with the Public Finance and Management Act and the Public Procurement Act, requires public participation and involvement in all areas of governance, including the legislative process, the budget process, and the procurement process. This commitment seeks to provide citizens with more opportunities to review

draft legislation and provide input on public policy development and implementation. However as written, the commitment could be better defined and wider in scope to realize transformative changes. Therefore, overall the commitment's potential impact is considered moderate.

### 3.1. Enact public participation legislation and policy

This milestone focuses on implementing legislation to expand the public participation framework. As written, the text does not clarify whether these steps will bolster already existing regulations for guaranteeing public

participation in the law-making process, or if it will pass new legislation to strengthen this policy area. The aims include developing citizen engagement mediums and timelines to enable public involvement in legislative decision-making. This milestone does not specify how it will be carried out and enforced. Due to the ambiguity regarding whether it will enforce existing rules or will develop new ones, the potential impact is minor, as it is unclear how the activities will move government practice beyond the current baseline.

### *3.2. Provide tracked copies of bills in every stage of discussion in Parliament*

The milestone seeks to address the challenge of public access to tracked copies of bills tabled in Parliament (both National Assembly and Senate) due to the required user fees. CSOs noted that even the lead online publisher of laws in Kenya, *Kenya Law*<sup>2</sup> goes through the process of purchasing bills from the Government Press and cannot access them before the government printer makes them available. The Senate lacks sufficient capacity to disclose and publish the Senate committees' Hansard (the official report and minutes of parliamentary proceedings) to ensure all discussions around bills are captured. There is a need for improved bill tracking, including the real-time changes made at various stages of the legislative process. Allowing the public to track changes to the bills as they move through the drafting process is relevant to access to information, and it could transform the way citizens follow development of legislation.

### *3.3. Adopt open-source platforms to enhance internal parliamentary and county assembly communication and also facilitate information sharing with the public*

This milestone seeks to address the challenge of information sharing and feedback from parliament and county assemblies. Currently, Parliamentary committees give insufficient notice for public input. Developing an open source platform and utilising alternative ways to give citizens adequate notice and opportunities to provide feedback could improve civic engagement in Kenya. However, this commitment includes aspirational language that does not provide clear steps, plans, or activities that could be taken to implement such changes; therefore, the potential impact is minor.

### *3.4. Publish weekly Senate, National Assembly, County Assembly plenary and committees' proceedings*

The milestone seeks to ensure the publication of the respective Hansards from the Senate, National Assembly, and County Assembly plenary and committee proceedings. This is an ongoing practice as the Hansard is available through the parliamentary website and county websites. This milestone will not change any government practice and therefore its potential impact will be none as it maintains the status quo.

### *3.5. Facilitate citizen engagement with Parliament and County Assembly via alternative media*

The milestone seeks to promote local and national government's use of alternative media such as web portals and social media like YouTube. By using technology, Parliament and County Assemblies could use new tools to open their legislative data and increase citizen understanding of the legislative process. It is coded as relevant to access to information, and technology and innovation. This commitment is vague with low specificity, and therefore the potential impact is minor because it is not clear which new media will be used and how. In addition, the government already uses media such as YouTube or Twitter to provide information. Such platforms are not generally for gathering public feedback, and as written are not clearly relevant to civic participation.

### *3.6. Increase Parliament's participation in the Legislative Openness<sup>3</sup> working group*

Currently, Parliament participates actively in the OGP Legislative Openness working group through legislators including Hon. Johnson Sakaja, Hon. Agnes Zani and Hon. Jessica Mbalu. The working group aims to promote peer learning and provide technical support to help OGP-participating governments implement their commitments. The Legislative Openness Working Group focuses on deepening the exchange of knowledge across governments, parliaments, civil society and international institutions regarding the opportunities and challenges associated with opening the legislative process.<sup>4</sup> This milestone seeks to increase participation from the whole House to be part of this working group to ensure legislative engagement in open government

reform efforts. However, this participation is related to internal government processes and does not directly increase opportunities for citizens to engage with government. It is therefore of unclear relevance to OGP values.

## COMPLETION

### *3.1. Enact Public Participation legislation and policy – Limited*

A stand-alone public participation legislation and policy has yet to be enacted. However, a number of laws have provisions on public participation, including the Constitution. During the first Senate,<sup>5</sup> a Bill on public participation was published on 25 November 2016<sup>6</sup> and it went through the first reading. It provides a general framework for effective public participation to give effect to the constitutional principles of democracy and constitutional provisions for participation of the people. However, it lapsed as the Senate recessed for the August 2017 elections. The Institute for Social Accountability, in close collaboration with the county government of Nairobi, developed a model public participation law and organised meetings to discuss public participation, including a conversation about the Nairobi County Proposed Public Participation Policy, held on 13 June 2017 at the Basketball Court in Nyayo National Stadium.

### *3.2. Provide tracked copies of bills in every stage of discussion in Parliament – Complete*

The National Assembly and Senate, in close collaboration with a Kenyan based civil society, Mzalendo Trust,<sup>7</sup> developed a web-based platform called Dokeza,<sup>8</sup> which is Swahili for “share your idea.” It is an annotated bill tracker that not only tracks the stage at which a bill is at, but tracks the amendments and the justification for amendments offered at each stage of a law’s development. Dokeza offers an option for providing public comments on specific bills being drafted and gives information on public hearings to be held. Dokeza has been endorsed by Parliament, both the National Assembly and the Senate, as an innovative platform.<sup>9</sup> The platform strives to make bills under the public participation phase interactive so that lawmakers may interact with citizens to improve bills that are up for discussion. However, County Assemblies do not have a

similar platform. Counties use their websites to publish the county bills, but they cannot be tracked over the stages of development. Therefore, there is room for further improvement at the local government level.

### *3.3. Adopt open-source platforms to enhance internal parliamentary and county assembly communication and also facilitate information sharing with the public – Limited*

Both Parliament and County Assemblies have yet to adopt open-source platforms to enhance communication with the public. The Senate Liaison Office, under the Office of the Speaker, states it is working to establish an information-sharing framework with the assemblies coordinated between the county liaison officers across the 47 county assemblies, though evidence of progress is not publicly available. According to a government respondent, the Parliament website is to be revamped to provide a platform to share information with the public, enhance greater engagement and provide instant feedback through a live chat tool with the public and CSOs regarding legislative business.

### *3.4. Publish weekly Senate, National Assembly, County Assembly plenary and committee proceedings – Substantial*

The Senate<sup>10</sup> and National Assembly,<sup>11</sup> have continued publishing their weekly Hansard. Weekly plenary proceedings continue to be published on the Parliament website the day following each sitting. The revamped website will eventually enable committees to broadcast their proceedings as well, but this step has not been started. At the county level, County Assemblies publish their weekly County Assembly plenary and committees’ proceedings. Some of the counties that publish include Elgeyo Marakwet.<sup>12</sup> This county is on its own a participant of the OGP subnational pilot program and is implementing its own action plan with five commitments.<sup>13</sup>

### *3.5. Facilitate citizen engagement with Parliament and County Assembly via alternative media – Complete*

Parliament and some County Assemblies have set up interactive websites and social media accounts as a means of citizen engagement. Parliament currently uses social media to engage the public through Twitter<sup>14</sup> and

Facebook.<sup>15</sup> Recently, Parliament activated a YouTube<sup>16</sup> account whereby the public can view parliamentary proceedings. However, this has yet to gain popularity. As of this report, the YouTube account had 323 subscribers with 545 views in a country of approximately 50 million people according to UN estimates. There may be a need to popularise alternative media as a mode for citizen engagement with Parliament and County Assemblies.

### 3.6. Increase Parliament's participation in the Legislative Openness working group – Limited

Parliament has participated in some meetings in the OGP legislative openness working group. However, there may be need for a more coordinated approach to be taken within Parliament to ensure consistent participation in the working group.

## EARLY RESULTS (IF ANY)

The annotated bill tracker platform, "Dokeza," is a useful tool to track bills at each stage of discussion and to offer an opportunity for the public to give their input. This platform makes bills under the public participation phase available and interpreted by an expert to make the law easily understandable. Kenyans then have a chance to give their views in the various sections of the bill and even share their input on social media. The platform currently has an up-to-date list of bills that can be tracked.<sup>17</sup>

## NEXT STEPS

The commitment on legislative openness is timely and relevant to enhance public participation in law-making. The next action plan can extend the scope of the current plan to provide clear and measurable commitments for parliamentary openness.

There is need to institutionalise the positive progress on the bill tracking annotation tool developed by Mzalendo Trust within the government to ensure sustainability and that the portal is hosted within Parliament's website and regularly updated.

Counties should progressively set aside funds to ensure an adequate budget for maintaining the bill tracking annotation tool.

Although a legal framework for participation at the county level exists, there are insufficient resources and incentives for county officials to ensure this participation is meaningful. Also, participatory frameworks should address gaps that still exist at the county level, in particular, strengthening existing formal regulations (e.g. penalising counties that don't comply) or finding other ways to incentivise and support these participatory spaces.

<sup>1</sup> Kenya Constitution (2010) [www.kenyalaw.org/Downloads/The%20Constitution%20of%20Kenya.pdf](http://www.kenyalaw.org/Downloads/The%20Constitution%20of%20Kenya.pdf).

<sup>2</sup> Kenya Law (accessed 21 Feb. 2018) [kenyalaw.org/kl/](http://kenyalaw.org/kl/).

<sup>3</sup> Open Government Partnership, "Working Group: Legislative Openness - About" (Washington, DC: OGP, 2018) <https://www.opengovpartnership.org/about/working-groups/legislative-openness-0>.

<sup>4</sup> Open Government Partnership, "Working Group: Legislative Openness - Governance" (Washington, DC: OGP, 2018) <https://www.opengovpartnership.org/about/working-groups/legislative-openness/governance>.

<sup>5</sup> Public Participation Bill, 2016 (Senate Bills, 2016) [www.parliament.go.ke/the-senate/house-business/senate-bills/item/3460-public-participation-bill-2016](http://www.parliament.go.ke/the-senate/house-business/senate-bills/item/3460-public-participation-bill-2016).

<sup>6</sup> Kenya Gazette Supplement No. 175 (Senate Bills No. 15) (Nairobi: The Government Printer, 8 Nov. 2016) [kenyalaw.org/kl/fileadmin/pdfdownloads/bills/2016/PublicParticipationBill\\_2016.pdf](http://kenyalaw.org/kl/fileadmin/pdfdownloads/bills/2016/PublicParticipationBill_2016.pdf).

<sup>7</sup> Mzalendo Trust, a non-partisan organisation, monitors the Kenyan Parliament with a mission to facilitate public participation in Parliamentary processes through information sharing, research and networking.

<sup>8</sup> Dokeza, "Home" (Mzalendo, 2018) <https://dokeza.mzalendo.com>.

<sup>9</sup> Traditionally, Parliament advertises calls for memoranda in leading newspapers (mostly Nation and The Standard) and give Kenyans a maximum of six days to submit their views through written memoranda to Parliament. Outreach through newspapers is mandated by the law but it has limited reach as only about 500,000 Kenyans regularly buy these papers, therefore there is low to no participation.

<sup>10</sup> Dokeza seeks to: empower the public to voice their opinions whether as individuals or informal communities of interest or practice; enable organisations in Nairobi and other parts of the country to collate public opinion and draft memoranda within the stringent timelines Parliament gives; serve as a repository of public commentary on various calls for memoranda; provide Members of Parliament and government institutions an opportunity to practice open stakeholder management in drafting a bill or during its public participation phase; test the access to information law by encouraging Parliament, the National Council for Law Reporting, the Kenya Law Reforms Commission, Attorney General and Government Printers to make legislative information accessible to the public within sensible timelines and in formats that are user friendly.

<sup>11</sup> Parliament of Kenya "Hansard – The Senate" (accessed 21 Feb. 2018) [www.parliament.go.ke/index.php/the-senate/house-business/hansard](http://www.parliament.go.ke/index.php/the-senate/house-business/hansard).

<sup>12</sup> Parliament of Kenya "Hansard – The National Assembly" (accessed 21 Feb. 2018) <http://www.parliament.go.ke/index.php/the-national-assembly/house-business/hansard>.

<sup>13</sup> The County Assembly of Elgeyo-Marakwet, "Hansard" (accessed 21 Feb. 2018) [www.emca.or.ke/hansard/](http://www.emca.or.ke/hansard/).

<sup>14</sup> Open Government Partnership, "Elgeyo Marakwet, Kenya" (Washington DC: OGP 2018) <https://www.opengovpartnership.org/countries/elgeyo-marakwet-kenya>.

<sup>15</sup> "The National Assembly of Kenya" (Twitter, accessed 21 Feb. 2018) <https://twitter.com/NAssemblyKE>.

<sup>16</sup> "Parliament of Kenya" (Facebook, accessed 21 Feb. 2018) <https://www.facebook.com/ParliamentKE/>.

<sup>17</sup> "Parliament of Kenya" (YouTube, accessed 21 Feb. 2018) <https://www.youtube.com/channel/UCXuseB7juWB7DlGJcwtHFQ>.

<sup>18</sup> Dokeza, "Home."

## 4 | PUBLICATION OF OIL AND GAS CONTRACTS

### **Commitment Text:**

*Title: 4. Publish Oil and Gas Contracts, including revenue information to ensure transparency and accountability of the extractive sector*

*Status quo or problem: Companies engaged in extractives (largely foreign) have had a tendency of nondisclosure of prospecting information and revenues, seemingly accountable only to their shareholders. Since natural resources need to benefit entire ecosystems and value chain, new partnerships are required between government and natural resources industry to ensure that taxpayers receive every shilling they are due from the extraction of our natural resources. Such compliance will also ensure equitable distribution of proceeds from extractives and reduction of potential conflicts. Pro-active disclosure of information to local governments and citizens is also required to ensure better natural resource management.*

*Main objective: Improve natural resource governance systems to ensure transparency and accountability of the extractive sector.*

*Brief description of commitment: Disclose contractual information and revenues derived from the Oil and Gas Industry.*

### **Milestones:**

- 1. Adopt and implement a progressive and transparent policy and legislative framework for upstream, mid-stream, and downstream extractive activities: specifically publication of contracts within the Oil and Gas Industry*
- 2. Make information on decision-making and financial flows related to the extractive industries publicly accessible and usable.*
- 3. Hold regular meetings with civil society, private sector and County Governments to strengthen their understanding of EITI.*
- 4. Hold quarterly reviews local and with other leading EITI champions to review progress and preparedness towards signing of EITI*

**Responsible institution(s):** Ministry of Mining

**Supporting institution(s):** Ministry of Mining; Office of the Attorney General & State Department of Justice; Transparency International (TI - Kenya); Society for International Development (SID); Kenya Oil & Gas Coalition; Hivos Foundation; and Institute for Law and Environmental Governance (ILEG)

**Start date:** 30 June 2016

**End date:** 30 May 2018



COMMITMENT OVERVIEW	SPECIFICITY				OGP VALUE RELEVANCE				POTENTIAL IMPACT				ON TIME?	COMPLETION			
	None	Low	Medium	High	Access to Information	Civic Participation	Public Accountability	Tech. and Innov. for Transparency and Accountability	None	Minor	Moderate	Transformative		Not Started	Limited	Substantial	Complete
4. Overall				X	X	X						X	No		X		
4.1. Policy and legislative framework for oil and gas contract publication				X	X							X	No		X		
4.2. Open information on extractive industries' decision-making and financial flows			X		X	X					X		No		X		
4.3. EITI meetings with civil society, private sector, and county governments			X			X				X			No	X			
4.4. Quarterly reviews of progress and preparedness towards signing of EITI			X			X				X			No	X			

## CONTEXT AND OBJECTIVES

This commitment addresses transparency and accountability in the extractives sector. Kenya is a resource-rich country and the recent discovery of new sources of crude oil and natural gas increases the urgency for developing a transparent extractives policy.

### 4.1. Adopt and implement a progressive and transparent framework for extractive activities: specifically, publication of contracts within the Oil and Gas Industry

With the absence of a proper regulatory framework to ensure the country does not experience the “natural resource curse,” the oil and gas industry is a fast-developing area of law in Kenya. The government has been establishing laws and regulations that will govern

companies that have been allocated, or intend to apply for, oil-prospecting rights in Kenya. The exploration and production of oil and gas has been primarily regulated by the Petroleum (Exploration and Production) Act, 1986 Cap 308<sup>1</sup> and its regulations. The Kenyan government has not previously produced national reports monitoring the implementation of public contracts. The absence of such reports hinders public scrutiny of contract implementation. Adopting a legal framework<sup>2</sup> to publish oil and gas contracts could deliver better goods and services, deterring fraud and corruption and saving the Kenyan government time and money. The oil and gas sector has previously been shrouded in secrecy and publishing contracts would be a transformative move to open previously undisclosed information about contracting processes in oil and gas.

In August 2015, the Kenya Civil Society Platform on Oil and Gas (KCSPOG) wrote a letter to President Uhuru Kenyatta regarding transparency of contract information and management in the extractives sector.<sup>3</sup> There the advocacy efforts of the civil society platform played a part in ensuring inclusion of this commitment on publication of contract in the action plan.

#### *4.2. Make information on decision-making and financial flows related to the extractive industries publicly accessible and usable*

With the recent oil discovery in Turkana County, stakeholders in the extractives sector have been calling for a comprehensive and consolidated legislative framework to help track revenue from the sector and enable Kenyans to understand its contribution to the economy. The Mining Act 2016<sup>4</sup> was enacted in early 2016 to strike a balance between investor interest, public interest, and financial obligations to mineral rights holders. This milestone seeks to publish key information on decisions and financial flows in extractive sector, information that previously was not available. Therefore, if completed, this commitment could be a transformative move to make new information available and contribute to discussions on the responsible management of the extractive sector.

#### *4.3. Hold regular meetings with civil society, private sector and county governments to strengthen their understanding of EITI*

The Extractives Industry Transparency Initiative (EITI) is a standard by which information on the oil, gas and mining industries is published. The EITI Standard requires countries and companies to disclose information on the key steps in the governance of oil, gas and mining revenues, including contracts and licensing, production, revenue collection, allocation, public spending, and public benefit. It is relevant to the OGP value of civic participation. Its impact is coded minor because the scope of public participation is unclear. The commitment does not specify how often meetings will be held, the format for discussion, who will be responsible for convening them, and who will be invited.

#### *4.4. Hold quarterly reviews local and with other leading EITI champions to review progress and preparedness towards signing of EITI*

This milestone seeks to create an enabling environment that will lead to Kenya adopting the EITI Standards. The signing of the EITI will demonstrate the government's commitment to enhance transparency and accountability in the extractives sector. Currently 50 countries are EITI compliant and a further three have committed to applying as candidates. Presently, Kenya is neither compliant nor a candidate country. This step has minor potential impact as its full implementation could be an incremental step towards strengthening accountability to stakeholders, especially communities affected by mining. As Kenya moves toward enhancing the effectiveness and proper enforcement of the petroleum and mining laws, an EITI pilot would be a major step forward.

## COMPLETION

#### *4.1. Adopt and implement a progressive and transparent policy for extractive activities: specifically, publication of contracts within the Oil and Gas Industry – Limited*

This commitment has seen some limited progress. The process to bring the Petroleum (Exploration, Development & Production) Bill 2017 before Parliament has been lengthy. A technical committee under the Ministry of Energy prepared this new petroleum Bill after reviewing the Petroleum Exploration and Production Act of 1986. On the 23rd September 2016, President Uhuru Kenyatta communicated to the National Assembly his refusal to assent to The Petroleum (Exploration, Development and Production) Bill.<sup>5</sup> Then, an amended version of the Bill was again proposed and went through the first reading at the National Assembly on 8 November 2017. It did not advance, and was withdrawn based on disagreement and errors in the draft over revenue sharing percentages. A new draft with revised revenue structures was republished and reintroduced to the National Assembly on 6 December 2017, and a first reading was scheduled for February 2018.<sup>6</sup>

However, as this milestone is to adopt and implement extractives policy, it remains limited given that implementation remains in the early, preliminary stages. According to the Act, the government will establish the Upstream Petroleum Regulatory Authority (UPRA) and National Upstream Petroleum Advisory Committee (NUPAC). It also provides for awarding exploration blocks through competitive tendering. Additionally, the law requires the Cabinet Secretary to develop a framework for reporting, transparency, and accountability in the sector. This requires publication of all agreements, records, annual accounts, reports of revenues, fees, taxes, royalties and other charges, relevant data and information support payments made by a contractor and payments received by the national government, county governments and local communities. After an exploration company declares a commercial discovery, the Energy Secretary will approve the field development plan, which must be ratified by Parliament. In regard to revenue sharing, the national government will retain 75 percent of the profit from commercial oil and gas produced, with the host county government receiving 20 percent and the local community 5 percent. Later, the county governments will be expected to make laws forming a board of trustees and regulating cautious utilisation of the funds received.

#### *Milestones 4.2., 4.3., and 4.4.*

These milestones were not started in the first year of implementation. No measures were taken to publish information on decision-making or financial flows related to the extractive industries (4.2), the government did not assign an agency to organise regular meetings with civil society, private sector and county governments regarding EITI (4.3) and there is no publicly available evidence that quarterly reviews for Kenya's preparedness towards EITI have taken place (4.4).

## EARLY RESULTS (IF ANY)

There are no early results for these commitments. Prior to the national action plan, the government implemented a comprehensive legal and policy framework to govern the oil and gas industry, but legislative gaps exist regarding the publication of public contracts with the oil and gas industry. The next step is to ensure proper and effective implementation and enforcement. Given the lack of progress on the other milestones, there are no early results available yet. This could be attributed to the transition of personnel within the Ministry of Mining, which has resulted in the key OGP champion being moved to another ministry.

## NEXT STEPS

CSOs respondents interviewed for this report believe that the Kenyan government should carry this commitment forward in its next action plan. They recommend:

- To ensure transparency and accountability in the extractives sector, the government needs to establish an appropriate system to publish royalties, petroleum and mining revenues. Publication of information should also cover oil and gas payments.
- This should include desegregating amounts going to subnational governments from those going to the national government and identifying the different types and sources. Specifically, list the names of the companies in their locality, the tax collections from each company, type of revenue, date of payment, place of extraction and computation of the subnational share.
- The Ministry of Petroleum and Mining needs to ensure that information on contracts is made public in accordance with government policy through open contracting. This will require publication of contracts in the Open Contracting Data Standard (OCDS).

<sup>1</sup> Petroleum (Exploration and Production) Act, Cap 308, available at [kenyalaw.org/lex/actview.xql?actid=CAP%20308](http://kenyalaw.org/lex/actview.xql?actid=CAP%20308).

<sup>2</sup> Legislation that is crucial for governance of this sector include: Mining Act 2016; Constitution of Kenya 2010; Petroleum (Exploration and Production) Act, Cap 308; Energy Act; Environmental Management and Coordination Act (EMCA); Income Tax Act; Industrial Training Act, Cap 237; Occupational Safety and Health Act, Cap 514; Land Act, Cap 280; and Petroleum (Exploration and Production) (Training Fund) Regulations, 2006.

<sup>3</sup> The Kenya Civil Society Platform on Oil & Gas, "Kenya commits to implementing EITI" (KCSPOG, 6 Aug. 2015) [kcsfog.org/kenya-commits-to-implementing-eiti/](http://kcsfog.org/kenya-commits-to-implementing-eiti/).

<sup>4</sup> Kenya Gazette Supplement No. 71 (Acts No. 12) (Nairobi: The Government Printer, 13 May 2016) [kenyalaw.org/kl/fileadmin/pdfdownloads/Acts/MiningAct\\_No12of2016.pdf](http://kenyalaw.org/kl/fileadmin/pdfdownloads/Acts/MiningAct_No12of2016.pdf).

<sup>5</sup> <https://citizentv.co.ke/news/uhuru-not-genuine-on-petroleum-bill-raila-150572/>.

<sup>6</sup> [http://kenyalaw.org/kl/fileadmin/pdfdownloads/bills/2017/Petroleum\\_Exploration\\_DevelopmentandProductionBill\\_2017.pdf](http://kenyalaw.org/kl/fileadmin/pdfdownloads/bills/2017/Petroleum_Exploration_DevelopmentandProductionBill_2017.pdf).

## ★ 5 | TRANSPARENCY AROUND BIDS AND CONTRACTS BY INDIVIDUALS

### **Commitment Text:**

*Title: 5. Ensure greater transparency around bids and contracts by individuals and companies in Kenya*

*Status quo or problem addressed by the commitment: Systems within Government and Private Sector have long tolerated those who have been suspect to benefit from illicit gain, money laundering, manipulating of public tenders and contracts. This ability circumvents checks and balanced within our systems and have normalized the abnormal. Furthermore, we have not ensured full disclosure of information of such activities. According to the Global Finance Integrity Report, more than US\$13.5 billion flowed illegally into or out of Kenya from 2002 through 2010 through the mis-invoicing of trade transactions, fueling crime and costing the Kenyan government at least US\$3.92 billion in lost tax revenue.*

*Main objective: Publish information on beneficiaries of contracts by individuals and companies in Kenya.*

*Brief description of commitment: Create an open, usable and publicly accessible beneficial ownership register, including information of the 'actual owners' and 'beneficiaries' of Companies.*

### **Milestones:**

- 1. Initiate an open and transparent multistakeholder consultation on the state, perception and legislation on Beneficial Ownership in Kenya.*
- 2. Prepare legislation and submit legislation to the National Assembly*
- 3. Develop an Open, accessible and usable Beneficial Ownership Registry*

**Responsible institution(s):** Office of the Attorney General

**Supporting institution(s):** State Department of Justice & Office of the Attorney General; Kenya Revenue Authority; Article 19; Tax Justice Network (TJN-A); International Budget Partnership (IBP); Infonet Africa; and Ushahidi

**Start date:** 30 June 2016

**End date:** 30 May 2018

COMMITMENT OVERVIEW	SPECIFICITY				OGP VALUE RELEVANCE				POTENTIAL IMPACT				ON TIME?	COMPLETION			
	None	Low	Medium	High	Access to Information	Civic Participation	Public Accountability	Tech. and Innov. for Transparency and Accountability	None	Minor	Moderate	Transformative		Not Started	Limited	Substantial	Complete
5. Overall			X		X	X		X				X	Yes			X	
5.1. Multi-stakeholder consultation on Beneficial Ownership			X		X	X					X		Yes			X	
5.2. Prepare and submit BO legislation to the National Assembly			X		X						X		Yes				X
5.3. Develop Beneficial Ownership Registry			X		X			X			X		Yes		X		

## CONTEXT AND OBJECTIVES

This commitment seeks to address transparency in the public procurement process by introducing beneficial ownership regulations and disclosure policies. Beneficial ownership<sup>1</sup> describes the natural person who directly and ultimately owns, controls or benefits from a company or trust fund and the income it generates. The absence of proper checks and balances within the Kenyan financial architecture has resulted in limits to full disclosure of information such as contract beneficiaries. Illicit financial flows (IFF) have been identified as a key factor undermining domestic resource mobilisation in Africa. The High-level Panel on Illicit flows from Africa (HLP) report titled "Track It, Stop It, Get It"<sup>2</sup> identifies the three major causes of IFF in Africa to be through harmful commercial transactions by multi-national corporations (MNCs), criminal activities, and corruption and abuse of power by state officials. The HLP report indicated that Kenya lost up to 1.5 billion dollars between 2002 and 2011 due to trade invoice errors. According to this report, illicit flows from Kenya are estimated to be as high as 8.3 percent of the country's GDP. According to the African Development Bank, the exploitation of weak legal and regulatory framework

and capacity challenges has stifled the socio-economic progress by draining scarce foreign exchange resources, reducing government tax revenues, deepening corruption, aggravating foreign debt problems and increasing economic dependency.<sup>3</sup>

This commitment addresses beneficial ownership transparency in Kenya by proposing legislation to require beneficial ownership reporting and by making reported information open, accessible and useable for the public. As written, the commitment could be more specific by defining the full scope of each step. For example, the commitment does not clearly state whether beneficial ownership disclosure to the public will be required for all companies and individuals operating in the Kenyan financial system, or if it will be applied only more narrowly to those bidding on publicly funded government contracts.

The baseline for this commitment is represented by the Companies Act of 2015, which consolidated and reformed the law relating to incorporation, registration, operation, management, and regulation of companies and makes other provisions relating to companies in Kenya. This commitment proposed legislative steps

that go beyond the 2015 Act to require that companies report and disclose beneficial ownership information.

The commitment fails to specify the required details about how beneficial owners will be defined in law, and what identifying information they will be required to disclose (for example name, tax ID, citizenship status, addresses).

If fully implemented as written, this commitment would legally require that companies record and make public the beneficial owners of companies for the first time in Kenya. This would allow citizens and CSOs to access information about all beneficiaries of public contacts, allowing them to track the ultimate beneficiaries of public spending. Such opening could have a transformative impact on citizens' ability to access information identifying conflicts of interest and corruption. Beneficial ownership information is also a necessary prerequisite for tracking illicit financial flows. This is a new commitment, and Kenya is using the OGP platform to address corruption through beneficial ownership transparency for the first time.

## COMPLETION

### *5.1. Initiate a multi-stakeholder consultation on Beneficial Ownership in Kenya – Substantial*

The Kenyan government has committed to meeting a number of international obligations regarding the implementation of beneficial ownership policy. The procurement and oversight authority, under the Treasury, has partnered with CSOs such as Hivos to help in making the beneficial ownership registry a reality.

The government, in close collaboration with TI-Kenya, organised a training on beneficial ownership for key government departments. It convened the stakeholders to participate at a forum discussing its findings of the status of legal and policy frameworks for beneficial ownership in Kenya.

The meeting was held on 31 August 2017. The various stakeholders were from the Government and private sectors and the discussions included what the laws in Kenya provided for in terms of disclosure of beneficial ownership, and what more could be done to align these laws with international best practice. The meeting was

well-attended with representatives from the Office of the Attorney General, the Kenya Revenue Authority, the Capital Markets Authority, the Financial Reporting Centre, the Kenya Human Rights Commission, FIDA-Kenya, the Kenya Association of Manufacturers, the Kenya Private Sector Alliance, the International Commission of Jurists and the Companies Registry, amongst others.

TI-Kenya also recently conducted an assessment of legal frameworks, capacity building for civil society and government, and multi-stakeholder dialogues regarding beneficial ownership.<sup>4</sup>

### *5.2. Prepare legislation and submit legislation to the National Assembly – Complete*

The Companies (Amendment) Act 2017, was assented to by President Uhuru Kenyatta on 21 July, 2017 and came into force on 3 August, 2017. This amended the Companies Act, 2015 to introduce for the first time in Kenya regulations on beneficial ownership for public and private companies. The Companies (Amendment) Act, 2017 defines beneficial ownership and requires companies to keep a register of beneficial owners and to submit a copy of such to the national Registrar of Companies. As defined in the OGP commitment, this milestone was to prepare new legislation and submit it to the National Assembly. However, stakeholders found it sufficient to amend the existing Companies Act to include the provision on beneficial ownership instead of enacting a standalone law.<sup>5</sup>

Transparency International has assessed the new legislation and found that when compared against the ten international beneficial ownership transparency principles,<sup>6</sup> Kenya's performance ranges from average to very strong in nine out of ten principles. The new law was found to be especially strong in their definition of a beneficial owner as "a natural person who ultimately owns or controls a legal person or arrangements or the natural person on whose behalf a transaction is conducted, and includes those persons who exercise ultimate effective control over a legal person or arrangement."<sup>7</sup> The new law applies to all companies registered under the Companies Act. Therefore, all companies will have to amend their registers to include

details of beneficial owner(s) or risk a fine of up to 500,000 shillings (about 4,900.00 USD).<sup>8</sup> It is also now a legal requirement that the name and address of the beneficial owners (if any) be entered in the companies' registers of members which must be filed with the Registrar of Companies within 30 days after its completion and which will be available for inspection by the public. Section 93 (9) of the law further provides that any amendment to the register of members is to be filed with the Registrar within 14 days after the amendment.<sup>9</sup> The law's greatest weakness is the lack of an auditing or oversight mechanism to ensure that the information companies report is accurate, complete, and up-to-date.

### 5.3. Develop a Beneficial Ownership Registry – Limited

Under the Companies (Amendment) Act 2017, the law requires beneficial ownership information maintained by the Registrar of Companies be available for inspection by the public. As of September 2017, in order to ascertain the beneficial ownership of a company, one may conduct an online official search on the e-Citizen platform for companies registered under the Companies Act of 2015. For companies registered under the older Companies Act (Cap 486), one may file an application with the Registrar requesting a CR12 which contains the details of all the members at a fee of 600 KES (about 6.00 USD).<sup>10</sup> According to TI- Kenya's analysis of the legal framework, the Registrar must include the shareholders of a company, the beneficial owners, the directors, and the address of the company. Additionally, the Registrar is required to keep all records "in such form as will enable all the information contained in the records to be readily available for inspection and copied."<sup>11</sup>

To fully realise this, the Registrar of Companies, under the State Law Office, Office of the Attorney General, and Department of Justice is currently developing forms to aid collection of beneficial ownership information. InfoNET Africa,<sup>12</sup> an ICT-based NGO, is establishing an open beneficial ownership register in close collaboration with the government and wider consultations with stakeholders. This would be linked to the Public Service, Public Procurement, and Campaign Financing Acts, as well as the global beneficial

register.<sup>13</sup> "This is a tool for exposing and ending the clandestine activities of anonymous companies, part of a broader effort to curtail the widespread global problem of bribery and other illegal activities."<sup>14</sup> The register is being created by a coalition of international organisations, including Global Witness, Open Contracting Partnership, OpenCorporates, The B Team, The Web Foundation, Transparency International and ONE. Once this new register is online and available, users will have immediate access to beneficial ownership information in one centralised portal.

## EARLY RESULTS (IF ANY)

No early results can be determined yet as the law passed at the conclusion of the first year of the commitment's implementation.

## NEXT STEPS

This commitment should be carried forward to the next action plan, taking into consideration the following recommendations for strengthening beneficial ownership regulations and the register of companies.

One major weakness in the current law is that companies are only required to report the name and address of beneficial owners to the Registrar. The scope should be broadened to require companies report both on their own registers and in the official Registrar the following information on all beneficial owners: tax ID number, nationality, country of residence, and a description of how control is exercised.

The Registrar should be mandated to verify all beneficial ownership information recorded, including relevant information such as identifying all company shareholders. The information reported to the Registrar should be investigated for inconsistencies, comparing findings and information using other independent and reliable sources such as government databases, on-site inspections, and analytic software. To achieve this, an independent auditing authority or ombudsman should be set up to verify information recorded in the Registrar, and define clear rules for the frequency of inspection and consequences for reporting false or inaccurate information.

The records maintained by the Registrar of Companies are accessible to the public, with some exceptions, including omitting privately held company information. Future commitments could include regulations for beneficial ownership reporting by private companies. In addition, shareholders in companies should also be required to disclose all beneficial ownership information, and face sanctions if found in non-compliance.

The new online registry of beneficial owners should be in open data format and developed in line with open data principles.

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<sup>1</sup> The term is often used to contrast with the nominee company owners, who might be registered as legal owners of the asset without any benefits. Nominees obscure the real company structure and owners. Professional nominees are paid a fee for their services but otherwise have no interest in the transactions. Nominees can also be family members or friends.

<sup>2</sup> Available at <https://www.uneca.org/publications/illicit-financial-flows-why-africa-needs-%E2%80%9Ctrack-it-stop-it-and-get-it%E2%80%9D>.

<sup>3</sup> Governance and Public Financial Management Coordination Office, "Bank Group's Policy on the Prevention of Illicit Financial Flows" (African Development Bank Group, Mar. 2017) [https://www.afdb.org/fileadmin/uploads/afdb/Documents/Policy-Documents/Bank\\_Group\\_Policy\\_on\\_the\\_prevention\\_of\\_illicit\\_financial\\_flows.pdf](https://www.afdb.org/fileadmin/uploads/afdb/Documents/Policy-Documents/Bank_Group_Policy_on_the_prevention_of_illicit_financial_flows.pdf).

<sup>4</sup> Nikhil Sesai, et al., "Towards Beneficial Ownership Transparency in Kenya" (Transparency International - Kenya, accessed 21 Feb 2018) <https://tikenya.org/wp-content/uploads/2017/11/Beneficial-Ownership.pdf>.

<sup>5</sup> TI Kenya Representative, personal interview.

<sup>6</sup> Nikhil Sesai, et al., "Towards Beneficial Ownership Transparency in Kenya."

<sup>7</sup> Kenya Gazette Supplement No. 70 (National Assembly Bills No. 23) (Nairobi: The Government Printer, 12 May 2017) [kenyalaw.org/kl/fileadmin/pdfdownloads/bills/2017/CompaniesAmendmentBill2017.pdf](http://kenyalaw.org/kl/fileadmin/pdfdownloads/bills/2017/CompaniesAmendmentBill2017.pdf).

<sup>8</sup> Daly & Inamdar, "Impact of the New Companies (Amendment) Act 2017 ("The Amendment Act") (legal analysis), <http://www.dalyinamdar.com/wp-content/uploads/2017/10/IMPACT-OF-THE-NEW-COMPANIES-AMENDMENT-ACT-2017.pdf>.

<sup>9</sup> Robson and Harris Advocates, "Key Highlights on the Amendments to the Companies Act, 2015" (1 Nov. 2017)

<sup>10</sup> <http://robsonharrisadvocates.com/key-highlights-on-the-amendments-to-the-companies-act-2015/>.

<sup>11</sup> Daly & Inamdar, "Impact of the New Companies (Amendment) Act 2017 ("The Amendment Act") (legal analysis).

<sup>12</sup> Nikhil Sesai, et al., "Towards Beneficial Ownership Transparency in Kenya."

<sup>13</sup> InfoNET is a technological innovation and development facility that is committed to expand the democratic space by strengthening collaboration between government, private sector, civil society and citizens by fostering good economic and democratic governance as well as service delivery through the strategic use of technology.

<sup>14</sup> Open Ownership, "Home" (accessed 21 Feb. 2018) <https://openownership.org/>.

<sup>15</sup> Nikhil Sesai, et al., "Towards Beneficial Ownership Transparency in Kenya."



## 6 | TRANSPARENT PUBLIC PROCUREMENT PROCESS

### **Commitment Text:**

*Title: 6. Create transparent public procurement process, public oversight of expenditure and ensure value-for-money towards citizen priorities*

*Status quo or problem addressed by the commitment: Open contracting, the use of data, disclosure and engagement throughout the full procurement cycle, is an essential. The current portal <http://bit.ly/1MntBgK> by the National Treasury through the IFMIS Re-engineering Department does not conform to Open Contracting Standards. There are key datasets that speak to transparency that are not currently available in the portal. There are several companies that keep getting government contracts, yet deliver bad services or constantly do not meet contractual obligations and have found a way to continuously get awarded contracts.*

*Main objective: Create transparent public procurement process, public oversight of expenditure and ensure value-for-money towards citizen priorities.*

*Brief description of commitment: Implement the Open Contracting Data Standards (OCDC) on Public Sector Procurement and tender process in Kenya, including a do-not-pay database for blacklisted contractors.*

### **Milestones:**

- 1. Mapping current disclosures and data collection against the Open Contracting Data Standard as part of the preparation for the development of an Open Data Policy for IFMIS.*
- 2. Re-design the Suppliers Portal of IFMIS according to Open Contracting Data Standards (OCDS)*

**Responsible institution(s):** National Treasury

**Supporting institution(s):** National Treasury; Council of Governor; Intergovernmental Budget and Economic Council (IBEC); ICT Authority – Kenya; Open Data Initiative (KODI); Institute of Economic Affairs (IEA); Institute of Certified Public Accountants of Kenya (ICPAK); International Budget Partnership (IBP); and Article 19 East Africa

**Start date:** 30 June 2016

**End date:** 30 May 2018

COMMITMENT OVERVIEW	SPECIFICITY				OGP VALUE RELEVANCE				POTENTIAL IMPACT				ON TIME?	COMPLETION			
	None	Low	Medium	High	Access to Information	Civic Participation	Public Accountability	Tech. and Innov. for Transparency and Accountability	None	Minor	Moderate	Transformative		Not Started	Limited	Substantial	Complete
6. Overall		X			X			X			X		No	X			
6.1. Mapping data for OCDS		X			X			X		X			No	X			
6.2. Re-design the Suppliers Portal for OCDS		X			X			X			X		No	X			

## CONTEXT AND OBJECTIVES

The commitment seeks to address the problem of secrecy in public contracts by mapping current disclosures and data collection against the Open Contracting Data Standard (OCDS) in preparation for the development of an Open Data Policy for Integrated Financial Management Information System (IFMIS). IFMIS is an automated online system that enhances efficiency in planning, budgeting, procurement, expenditure management and reporting in the national and county governments in Kenya. Public contracting in Kenya has been characterised by poor planning and corruption as well as poor contract management.<sup>1</sup> Contracting information is often unavailable for public monitoring. For instance, a petition was filed in court that challenged the awarding of a government contract to a single-sourced contractor for a landmark railway project; the petition alleged that the Government failed to undertake due diligence in contracting the China Road and Bridge Corporation, which was blacklisted by the World Bank and declared ineligible for World Bank funding.

The current suppliers' portal<sup>2</sup> by the National Treasury through the IFMIS Re-engineering Department does not conform to Open Contracting Standards. The main objective of this commitment therefore is to ensure

the implementation of the Open Contracting Data Standards (OCDS) in public sector procurement and the tender process in Kenya. OCDS ensures disclosure and use of data on public contracts, allowing engagement and public oversight throughout the full procurement cycle.

The commitment is relevant to access to information, and technology and innovation for transparency and accountability. Its potential impact is coded as major because its full implementation as written would create a more transparent public procurement process through open contracting data standards.

## COMPLETION

This commitment has not started. The point of contact at the National Treasury, which is the lead implementation agency, indicated he was not aware of the commitment.<sup>3</sup>

ARTICLE 19 is discussing with the Public Procurement and Oversight Authority mapping current disclosures and data collection against the Open Contracting Data Standard in preparation for the development of an Open Data Policy for the Integrated Financial Management Information System (IFMIS). A major setback has been that the mandate is under the National Treasury and not the Public Procurement and Oversight Authority.

During the CSO roundtable meeting to track progress of OGP commitment implementation in May 2017, participants discussed the opportunity to provide technical support to the current Integrated Financial Management Information System (IFMIS) to ensure it is aligned with the Open Contracting Data Standard. Hivos and Article 19 pledged support for multi-stakeholder engagements to improve transparency in public procurement and financial value for citizens' public priorities. However, the government has not taken any steps towards implementation.

## NEXT STEPS

The researcher recommends the commitment be carried forward to the next national action plan.

It is recommended that the Public Procurement and Oversight Authority be the lead agency for the commitment on public procurement and open contracting. Elements of IFMIS should be handled by the IFMIS department of the National Treasury.

To leverage the expertise of CSOs such as ARTICLE 19 and Hivos, the government needs to actively engage with these groups through a roundtable to take stock of progress, reflect on gaps and map the way forward.

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<sup>1</sup> Okiya Omtatah Okioti & 2 others v Attorney General & 3 others (High Court of Kenya at Nairobi, 2014) <http://kenyalaw.org/caselaw/cases/view/103808/>.

<sup>2</sup> IFMIS Re-Engineering, "Home" (2018) [supplier.treasury.go.ke/site/tenders.go/index.php/](http://supplier.treasury.go.ke/site/tenders.go/index.php/).

<sup>3</sup> Jerome Ochieng, meeting with the IRM researcher, National Treasury, IFMIS offices: 12 Oct. 2017.

# 7 | ACCESS TO GOVERNMENT BUDGET INFORMATION AND INCLUSIVE PUBLIC PARTICIPATION

## **Commitment Text:**

*Title: 7. Improving access to government budget information and creating wider and more inclusive structures for public participation*

*Status quo or problem/issue to be addressed: Poor public access to budget information within set timelines and standard formats insufficient public participation throughout the budget cycle Loss of public resources due to fiscal malfeasance.*

*Brief Description of Commitment: To improve access to government spending information and implement wider and more inclusive public participation structures with the target improving Kenya's Open Budget Index from a score of 48 to 60 points by December 2017.*

*OGP challenge addressed by the commitment: Increasing public integrity: transparent public spending will increase the government's accountability to the public. More democratic processes in the formulation, adoption and application of the budget will also increase public integrity. More effectively managing public resources: a transparent budget submitted to legislative oversight will reduce the risk of mismanagement of public funds and corruption, which will increase the efficiency of public resources.*

## **Milestones:**

- 1. Create one central online platform to publish budget documents*
- 2. Set and follow common standards in the preparation and presentation of all budget documents*
- 3. Public participation by the national government will be more open and inclusive and progressively.*
- 4. Budget implementation will be more open to the public and Parliament should work with local communities to monitor project implementation.*

*\*Editorial note: The commitment text has been abridged for brevity. For full text, please see the National Action Plan 2016–18.*

**Responsible institution(s):** National Treasury

**Supporting institution(s):** Controller of Budget and the Auditor General; National Sector Working Groups; Ministry of Devolution and Planning; Kenya School of Government; National Assembly; International Budget Partnership (Kenya); Institute of Economic Affairs (IEA); ICJ; Council of Governors; and Ushahidi

**Start date:** 1 July 2016

**End date:** 30 June 2018

COMMITMENT OVERVIEW	SPECIFICITY				OGP VALUE RELEVANCE				POTENTIAL IMPACT				ON TIME?	COMPLETION			
	None	Low	Medium	High	Access to Information	Civic Participation	Public Accountability	Tech. and Innov. for Transparency and Accountability	None	Minor	Moderate	Transformative		Not Started	Limited	Substantial	Complete
7. Overall				✓	✓	✓	✓				✓		No	✓			
7.1. Central online platform for budget documents				✓	✓						✓		No	✓			
7.2. Standards for all budget documents			✓		✓						✓		No	✓			
7.3. Public participation by the national government	✓					✓			✓				No	✓			
7.4. Open budget implementation and monitoring with Parliament and local communities		✓				✓	✓			✓			No	✓			

## CONTEXT AND OBJECTIVES

The government of Kenya has in the recent past made significant steps to enhance openness in the planning and budgeting process, to increase budget transparency, and to improve public participation by putting in place a comprehensive legal framework. Examples include the enactment of constitutional provisions on public finance and the implementation of the Public Finance and Management Act 2012. However, challenges of accessing budget information within set timelines and standard formats, and a lack of public participation persists. The commitment seeks to address these challenges as well as the misappropriation of public resources. The Open Budget Survey (OBS) 2015, commissioned by International Budget Partnership, examined 102 countries in budget transparency, participation, and oversight. Kenya scored 48 out of 100 in budget transparency, 33 in public participation, 49 in oversight by legislature and 67 by audit (1 being

poor and 100 being excellent). If this commitment is fully implemented as written, it could be a moderate step forward toward increasing public integrity and promoting transparent public spending that would increase the government's accountability to the public. Coupled with legislative oversight, this could reduce the risk of mismanagement of public funds and corruption.

Proposed activities include creating a central online platform to publish budget documents; setting and following common standards in preparing and presenting all budget documents; and increasing openness in public participation by the national government. In addition, the budget implementation will be more open to the public.

This commitment advances the OGP values of access to information, civic participation and public accountability as well as technology and innovation for transparency and accountability. Its potential impact is coded as moderate because full implementation could

ensure more transparency in public spending, thereby increasing the government's accountability to the public. For example, publication of the budget documents on an online platform may enhance access to budget information not previously available to Kenyans. However, several of the commitment's milestones are not specific, so the scope and scale of proposed reforms cannot be determined accurately.

### *7.1. Create one central online platform to publish budget documents*

The Public Finance and Management Act 2012 requires all key budget documents to be made publicly available. The current government practice is that the national government publishes budget documents through the national treasury website<sup>1</sup> while counties publish the same on their websites. International Budgetary Partnership Kenya (IBP Kenya)<sup>2</sup> shows that only about 20 percent of key county budget documents that were supposed to be online were available.<sup>3</sup> The common practice for the National Treasury and county treasuries has been to provide hard copies of documents to participants during the public meetings, and this limits effective participation because of the large volume of the documents that participants had to process without sufficient notice. This milestone therefore seeks to create one central online platform and publish budget documents within seven days of their tabling or publication and in machine-readable formats. This includes documents produced by the government at the national and county levels, going back five years. There have been ongoing discussions between the Controller of Budget and various organisations to create one space where all county and national budgets are available to the general public under the World Bank Boost project which is linked to the Kenya open data portal and there are plans to launch a national and county portal that is directly supported by National Treasury.

### *7.2. Set and follow common standards in the preparation and presentation of all budget documents*

The PFM Act requires that the budget be presented in a program-based format. This is a move from the line item-based budgeting that was in place before the enactment of the PFM Act and the promulgation of the constitution of Kenya 2010. This presentation allows for more detailed information to be shared and enables

trend analyses. The law, however, is not explicit on the formatting of other budget documents. This milestone therefore seeks to set common standards in the preparation and presentation of all budget documents. Envisioned activity is clear and detailed and the potential impact could be moderate in improving the presentation and readability of budget documents.

### *7.3. Public participation by the national government will be more open and inclusive and progressively*

Public participation is required by both constitutional provisions and enabling legislation. The milestone seeks to address the challenge of effective participation, as the law is silent on the thresholds of what constitutes effective participation. However, the commitment does not specify how the government will comply with the law to ensure public participation improvement in open budgeting. This step is written as an aspirational goal to strengthen public participation framework and it is not clear what activities are to be carried out, therefore the potential impact is none.

### *7.4. Budget implementation will be more open to the public and Parliament should work with local communities to monitor project implementation*

Budget implementation information by the national and county treasuries has been shrouded in secrecy. Constitutional and legal provisions require budget information to be made publicly available for scrutiny by the two levels of government; the Controller of Budget releases quarterly and year-end implementation reports, which can be used to monitor the budget implementation by citizens.

The milestone seeks to open budget implementation information and have Parliament work with local communities to monitor budgets. While this commitment is relevant to public accountability, its text does not explain how Parliament will engage with local communities and how the monitoring will take place. This diminished its potential impact to minor.

## COMPLETION

The implementation of this commitment has not started during the first year of the action plan. None of the milestones have made any progress. The central online platform for publishing budget documents

has not been created and subsequently budget documents in program-based format have not been published. The researcher did not find any evidence of parliament-led citizen monitoring projects. However, there are a number of CSO-led initiatives on project monitoring, including citizen report cards, social audits, and community monitoring scorecards by CSOs such as National Taxpayers Association, The Institute for Social Accountability, the Society for International Development, among others.

There are ongoing discussions, originally starting before the action plan, between the Controller of Budget and various organisations to create one space where all county and national budgets are available to the public under the World Bank Boost project<sup>5</sup> which is linked to the Kenya open data portal.

## EARLY RESULTS (IF ANY)

This commitment covers budget transparency, which is an area that is part of a larger framework that predates the national action plan. There is no evidence that increased transparency is related to the OGP commitment however, the national and county treasuries should be commended for increasingly making available the budget documents on their websites.<sup>6</sup> According to IBP Kenya, Baringo County has consistently been the best performer across all the studies showing a consistent pattern of transparency.

## NEXT STEPS

To fully implement the milestones and address budget transparency moving forward, the following steps are recommended:

- To enhance budget transparency, the government should take concrete steps to institutionalise citizen oversight. This could include mechanisms to allow

monitoring of government allocations and spending through social accountability mechanisms like budget expenditure tracking and social audits.

- Budget discussions usually occur through sector hearings, public forums convened according to the government sectors.<sup>7</sup> Currently, they take place during the formulation and approval of the budget. To improve citizen engagement, a stand-alone national public participation policy and legislation will need to be developed. The Office of the Attorney General is currently drafting a national public participation policy. That policy can include specific provisions on participation mechanisms during the formulation and implementation of the budget.
- The next action plan should build on progress of current commitments concerning transparency, public participation and accountability of county budgets, particularly by strengthening the role of government actors relevant to this commitment, such as county budget officers, the Parliamentary Budget Office and Commission on Revenue Allocation.
- The Kenya School of Government plans to carry out case studies on what is working at different stages of the budget process and use the findings to improve training courses for government officials on citizen engagement. In addition, the Commission on Revenue Allocation will update and enforce 2015 guidelines issued by County Budget and Economic Forums (including indicators and targets). These findings and activities can serve as a basis for developing ambitious citizen engagement commitments in the next action plan, particularly commitments that monitor whether meaningful citizen engagement occurs in practice, and learn from identifying best practices.

<sup>1</sup> The National Treasury, "Home/Budget," (2018) [www.treasury.go.ke/budget.html](http://www.treasury.go.ke/budget.html).

<sup>2</sup> International Budget Partnership, "Are Counties Making Budget Documents Available to the Public? A Review of County Websites" (Apr. 2017) <https://www.internationalbudget.org/wp-content/uploads/kenya-county-budget-transparency-review-march-2017.pdf>.

<sup>3</sup> Margaret Njugunah, "Kenya: Counties Not Making Key Documents Available Online - Study," (All Africa, 2017) [allafrica.com/stories/201709260031.html](http://allafrica.com/stories/201709260031.html).

<sup>4</sup> The World Bank, "Open Budgets Portal" (2017) [boost.worldbank.org](http://boost.worldbank.org).

<sup>5</sup> Id.

<sup>6</sup> International Budget Partnership, "Are Counties Making Budget Documents Available to the Public? A Review of County Websites."

<sup>7</sup> Sector examples include: agriculture, fisheries and livestock; public works, roads, transport, energy and disaster management; trade, cooperatives, tourism and industry; health and sanitation; education, vocational training and childhood development; public service, ICT and intergovernmental relations; lands, housing and urban development; community development, sports, culture and social services; water, environment and natural resources; finance and economic planning; and governance, justice, law and order (GJLOS).

## ★ 8 | RIGHT TO INFORMATION AND RECORDS MANAGEMENT

### **Commitment Text:**

*Status quo or problem/issue to be addressed: The backbone of a transparent and accountable government is strong records management. Modernization of records management improves performance and promotes openness and accountability by better documenting the actions and decisions of the government. The transition to digital information creates new opportunities for records management, but much of government still relies on outdated systems and policies.*

*Main Objective: Improve the quality and storage of records created across the public service with a view of improving service delivery to the citizens.*

*Brief Description of Commitment: Improve management of public records by developing and implementing comprehensive policies, procedures and systems that will ensure creation of complete, accessible and authentic records.*

### **Milestones:**

1. Pass Access to Information Legislation
2. Review of Public Archives and Documentation Service Act & Record Disposal Act
3. Develop and implement comprehensive records management policies, procedures and guidelines
4. Develop minimum technical requirements for implementation of Electronic Document & Records Management System (EDRMS)
5. Strengthen the capacity of records management professionals and public officials
6. Establish a programme of public education for citizens and public officials about the right to protect, preserve and access information
7. Establish a central digital repository for government records and data and all information of public interest

**Responsible institution(s):** Ministry of Sports, Culture and the Arts

**Supporting institution(s):** Ministry of ICT; ICT Authority; Commission for Administrative Justice; all public entities; ICJ – Kenya; Article 19 Eastern Africa; Transparency International – Kenya; and Freedom of Information Network

**Start date:** 1 July 2016

**End date:** 30 June 2018



COMMITMENT OVERVIEW	SPECIFICITY				OGP VALUE RELEVANCE			POTENTIAL IMPACT				ON TIME?	COMPLETION				
	None	Low	Medium	High	Access to Information	Civic Participation	Public Accountability	Tech. and Innov. for Transparency and Accountability	None	Minor	Moderate	Transformative		Not Started	Limited	Substantial	Complete
8. Overall				✓	✓							✓	No			✓	
8.1. Access to Information Legislation				✓	✓							✓	Yes				✓
8.2. Review Public Archives, Documentation Service Act, & Record Disposal Act				✓	✓						✓		No			✓	
8.3. Records management				✓	✓						✓		Yes			✓	
8.4. Technical requirements for EDRMS implementation			✓		✓						✓		No		✓		
8.5. Capacity strengthening of records management professionals and public officials			✓		✓						✓		Yes				✓
8.6. Access to information education for citizens and public officials			✓		✓						✓		Yes				✓
8.7. Central e-repository for government records, data and information of public interest				✓	✓							✓	No	✓			

## CONTEXT AND OBJECTIVES

The commitment seeks to modernise record management to improve performance and promote openness and accountability by better documenting the actions and decisions of the government. While much of government still relies on outdated systems and policies, the transition to digitally stored information creates new opportunities for record management. The objective of the commitment is to improve the quality and storage of government records to ensure that access to information and Freedom of Information (FOI) requests can be realised. Kenya is required comply with information requests and disclosure under the terms of several treaties and agreements it has ratified, including the Universal Declaration of Human Rights (UDHR) and the International Covenant on Civil and Political Rights (ICCPR).<sup>1</sup> In addition, the 2010 Constitution guarantees the right to access information. However, in practice, there have been several pieces of legislation that have contradicted the right to information (e.g. the Official Secrecy Act, the Service Commissions Act, and National Assembly Powers and Privileges Act) and access to information has been weak.<sup>2</sup> Efforts to develop and pass an implementing law for ensuring access to information in practice had not taken shape until August 2015 when the Access to Information Bill, 2015, sponsored by Hon. Priscilla Nyokabi, underwent the first reading at the National Assembly.

During the development of the OGP Action Plan, the Access to Information Bill was being drafted and negotiated in parliament. This commitment is twofold, seeking to pass the legislation into law, and then bringing official record management up to standard to enable officials to locate and disclose information requested through a new FOI system.

If this commitment is fully implemented, it would improve access to information and management of public records in a transformative way. Creation of complete, accessible and authentic records is seen as an essential pre-requisite for effective implementation of the access to information law. Furthermore, the passage of the access to information law enshrines in law a number of progressive freedom of information principles, as it affirms a legally enforceable right

for every citizen to access all information held by public entities and private bodies; clear and simple procedures for assessing information; the creation of a comprehensive proactive disclosure regime; and a provision for exempt information subject to international standards. The commitment is coded as relevant to access to information.

### *8.1. Pass Access to Information Legislation*

The passage of the draft Access to Information Bill 2015 legislation is assessed as a transformative action, as it would be an enabling legislation to fully realise in practice the right to information guaranteed to Kenyan citizens under the 2010 Constitution. The Bill will promote proactive publication, dissemination, and public access to information by the Kenyan public, further protecting this right. It also spells out the mechanisms for ensuring public access to information, as well as the factors that may hinder the right to this access. The bill stipulates a 21-day period for responding to information requests, and includes a mechanism of redress in the case of delayed government response. If the government refuses to grant access or hides some of the information through redaction, or if the public servant asked for specific information charges exorbitant fees, gives stale information or refuses to update existing information that is out of date, then the public can report the matter to the Commission on Administrative Justice for review and enforcement orders. If found guilty, civil servants will be fined up to 50,000 KES or spend three years in jail.<sup>3</sup>

### *8.2. Review of Public Archives and Documentation Service Act & Record Disposal Act*

Kenya's Public Archives and Documentation Service Act seeks to facilitate the management of public sector records in Kenya. It is seen as a success story by many other African archival institutions. The Department has made major strides in developing record services, opening five regional centres and partially automating most of its finding aids. The goal of the Regional Archives is to systematically offer critical advice on proper management of public records to government ministries, departments, state corporations and county governments, among other public bodies, with a view to improving record management systems, procedures

and practices. However, major aspects of managing public sector records remain chaotic and many civil servants flout regulations governing the management and disposal of public records. The National Archives must focus on the management of the entire lifecycle of records rather than managing only the archival preservation stage and enhancing accessibility of government records. Reviewing these two laws will ensure this is done and that the responsibility for record keeping is shared between government agencies and the Kenya National Archives and Documentation Service (KNADS).

### *8.3. Develop and implement comprehensive record management policies, procedures and guidelines*

Sections 4 and 7 of the Public Archives and Documentation Service Act, Chapter 19, Laws of Kenya have provisions on record management. These provide guidelines for permitting public examination of any public records, and advice on the care, preservation, custody and control thereof. The law covers transference of custody of any public records, which should be housed in the national archives. The current government practice is that public record management in Kenya is governed by the Public Archives and Documentation Service Act, Cap 19, 1965 (Revised 2003) and reviewed by the Access to Information Act 2016. Additionally, several rules, regulations and circulars have been issued to address effective management of records.<sup>4</sup> Despite the efforts made by the government, record management in the country still remains a challenge due to lack of standardised practices and procedures. This milestone therefore seeks to implement comprehensive record management policies, procedures and guidelines to address these challenges. Its impact is moderate because if the milestone is fully implemented, properly managed records would contribute to policy formulation, leading to faster decision-making and more efficient and effective public service delivery.

### *8.4. Develop minimum technical requirements for implementation of Electronic Document & Records Management System (EDRMS)*

An electronic document and record management system (EDRMS) is a type of content management system and refers to integrating the combined technologies of document and record management systems. Electronic document and records management aims to manage documents and records throughout the document lifecycle, from creation to destruction. This milestone will therefore seek to develop the minimum technical requirements for the implementation of the EDRMS. Its impact is coded as moderate because the EDRMS software would manage all government documents and records across the government ministries, departments and agencies. Also, in today's digital world where global mobile data traffic is increasing, managing electronic records stemming from social media platforms, emails, etc. is equally important.

### *8.5. and 8.6. Strengthen the capacity of record management professionals and public officials and establish a programme of public education for citizens and public officials about the right to protect, preserve and access information*

These two milestones seek to strengthen the capacity of record management professionals and public officials and to establish a programme of public education for citizens and public officials about the right to protect, preserve and access information. Low capacity in record management is recognised as a challenge within the civil service as well as the general citizenry. KNADS already operates a research and education program, and an outreach program. These programs will therefore be strengthened. The two milestones have a clear target group but lack specificity regarding individuals within the identified public service and general public groups. Given that the target group and program content is unclear, the IRM researcher rated these milestones as having minor potential impact.

### *8.7. Establish a central digital repository for government records and data and all information of public interest*

The current government practice is that the respective government ministry, department and agencies have a repository of government records and data that is closely managed by KNADS. A central repository will allow for

an online and one-stop solution for government records and data and allows for faster, easier information access and secured archival retrieval.

## COMPLETION

### *8.1. Pass Access to Information Legislation – Complete*

The Access to Information Act<sup>5</sup> was passed in August 2016 to give effect to Article 35 of the Constitution and to confer on the Commission on Administrative Justice (CAJ) the oversight and enforcement functions and powers. The enactment of this law was the culmination of years of advocacy, undertaken principally by civil society, to have a right to information law in place; instrumental CSOs included Article 19, Transparency International Kenya, and ICJ Kenya under the auspices of the freedom of information network. The role of the CAJ in this respect includes handling complaints relating to access to information; consideration of reports from public bodies on implementation of the Act; and monitoring Kenya's implementation of international obligations relating to access to information.

The national archives director indicated that they have formally initiated a working relationship with the CAJ through a formal letter to the commission. They have held consultations on how to effectively implement the Access to Information Act, especially regarding the protection, preservation and destruction of government records. The public is keen to have the law fully implemented and the information request process institutionalised in practice. For example, a law firm and one of the media houses made a request for the records of a report on judges and vetting board, particularly on the judges who were dismissed. This is in accordance with the access to information law, which provides for a 21-day hold to publish any requested government record as opposed to the 30-year hold envisioned in the public archives and documents service Act, CAP 19 of the Kenyan laws.

### *8.2. Review of Public Archives and Documentation Service Act & Record Disposal Act – Substantial*

Some provisions of the Public Archives and Documentation Service Act and the Record Disposal

Act were reviewed by the enactment of the Access to Information law in 2016. In addition, the National Archives has held two internal meetings and consultations to identify areas for review in these two acts to bring them in line with the Constitution and the Access to Information Law. The draft review areas were submitted to the Permanent Secretary in the Ministry of Culture, Sports and Arts for further comments and to ensure ownership. Further, legal officers from the National Archives submitted a copy of the review areas to the AG for his legal advice.

### *8.3. Develop and implement comprehensive records management policies, procedures and guidelines – Substantial*

The National Archives has supported the development of various policies and guidelines for individual government ministries, departments and agencies instead of having one national policy. This is because MDAs and organisations face different record management challenges. In the period between 2014 and 2017, it is estimated that 10 to 20 MDAs, including county governments, have benefited from the support of the National Archives to develop their record management policies. A Ministerial Procedural manual has also been adopted and is to be included under ISO-Standards of the ministry.

### *8.4. Develop minimum technical requirements for implementation of Electronic Document & Records Management System (EDRMS) – Limited*

Records and Information Management East Africa (RIMEA) held an EDMS workshop on digitising records and automating processes and workflows from 3 to 7 October 2016 in Naivasha, Kenya for record management officers, record managers, administration officers, information scientists, ICT managers, ICT officers and knowledge managers from both the private and public sector. The theme for the workshop was "Electronic Document Management Systems: Using Records and Digitization to reduce inefficiency and curb corruption."

This milestone has not been implemented fully. The National Archives has developed internal standards but has not issued them to MDAs. The National Archives has also procured servers for storing electronic data so that when standardised EDRMs is developed and implemented, records will fit into the server seamlessly.

#### *8.5. Strengthen the capacity of record management professionals and public officials – Complete*

The National Archives held seminars and lectures for record management officials to educate them on record classifications. Beyond improving management, this also educates officials on the various archival sources, who may then better enable users in identifying valuable information. Counties have also been involved as their capacity is low and new, being only instituted by the 2010 Constitution. The National Archives have formally reached out to the counties for this partnership and they have also received requests for capacity-building from the counties.

#### *8.6. To establish a programme of public education for citizens and public officials about the right to protect, preserve and access information (Milestone 5 and 6) – Complete*

In the area of education, historical films and video shows are organised for schools, visiting teams, and members of the public on the premises, free of charge. Conducted tours of the KNADS Art Gallery, which features a permanent exhibition and lectures on selected historical subjects, are given to these teams on request. This forms part of the continuing education on the value of the various archival sources of information for all prospective users. Lectures to schools and colleges are tailored according to their syllabi. The KNADS outreach publicity programme sends brochures and newsletter to all schools in the country (except those in distant North Eastern districts) that encourage the schools, colleges and other learning institutions to visit KNADS. This will educate younger generations to be potential users. Tourists stand to benefit from Kenya's research and education service by sampling a variety of African art, cultural, and Kenyan history displays in the Art Gallery.

#### *8.7. Establish a central digital repository for government records and data and all information of public interest – Not started*

The central digital repository is yet to be established. The EDRMS integrated platform envisioned in Milestone 4 will create an online repository and one-stop solution for effective service delivery and public accountability as it allows for faster and anytime-anywhere information access and secured archival retrieval.

Meetings have been held with an e-governance department and the team developed a prototype policy but it has not been formally signed and adopted. The location of the datacentre has been identified and the public works ministry has provided guidance on how repository would appear. A retreat was held to develop guidance in the utilisation of the central digital repository for government records and data.

The National Archives Director noted that information and records are available in their offices (e.g. reports from COB, AG, etc.) and there is need to publish the available information to encourage usage. However, inadequate resources is a hindrance. Further collaboration is required to fully implement the milestone.

### EARLY RESULTS (IF ANY)

Citizens are already using the provision for access to information. For instance, the respondent at CAJ indicated that the first complaint relating to access to information was filed with the Commission on Administrative Justice (the Office of the Ombudsman) seeking to have Safaricom Limited (a private company) release data pertaining to a registered mobile phone number. This is just but a single case that demonstrates the import of the Access to Information Act, 2016. The National Archives Director received information requests as well. The new law provides for access to information and requires public and private entities to, among other things, facilitate access and publication of information held by them; the law also requires publication of any public contract and policies affecting the public. It is too early to assess results on the commitment as many of the milestones are still in progress.

## NEXT STEPS

It is recommended to include an access to information commitment in the next action plan. Commitments in this area need to aim at the effective implementation of the provisions within the ATI Act and the empowerment of oversight institutions such as the Commission on Administrative Justice and the National Archives.

To ensure timely and effective implementation of the Act in practice, regulations must be developed through stakeholder-wide consultations to further operationalise the law.

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<sup>1</sup> Adili, *Access to Information in Kenya*, Issue 155 (Transparency International - Kenya, Oct-Nov 2015) <https://tikenya.org/wp-content/uploads/2017/06/adili-155-access-to-information-in-kenya.pdf>.

<sup>2</sup> Id.

<sup>3</sup> Kenneth Odera, "Kenya's New Access To Information Act Will Compel Public Entities To Disclose Information Upon Request" (IAfrikan Digital, accessed 12 Feb. 2018) <https://www.iafrikan.com/2016/09/13/kenyas-new-access-to-information-act-will-compel-public-entities-to-disclose-information-upon-request/>.

<sup>4</sup> They include: The Records Disposal Act, Cap. 14, 1962; The Anti-Corruption and Economic Crimes Act, 2003; Public Officer Ethics Act, 2003; Statistics Act, 2006; Public Procurement and Disposal Act, 2005; Public Audit Act, 2003; Government Land Act, Cap. 280, 1915; Registered Land Act, Cap. 300, 1963; Value Added Tax Act, Cap. 476, 1990; Financial Management Act, 2004; Directorate of National Intelligence Service Act, 1998; The Evidence Act, Cap. 80, 1977 (Revised 1989); Kenya Information and Communication Act, No. 2 of 1998 (Revised 2009); Freedom of Information 2007; Government Financial Regulations and Procedures, Chapter, 23 §3 – 5; Ministry of State for Public Service - Personnel letter No. 1/2008 (DPM.12/6A Vol. 1 (71); ISO 15489 (2001): Information and Documentation – Records Management; Kenya Police Standing Orders, 2001; Government of Kenya Security Manual, 2005; and Departmental Records Retention Schedules.

<sup>5</sup> Access to Information Act, No. 31 of 2016, available at [kenyalaw.org/lex/actview.xql?actid=No.%2031%20of%202016](http://kenyalaw.org/lex/actview.xql?actid=No.%2031%20of%202016).

# V | GENERAL RECOMMENDATIONS

Kenya has made commitments in critical areas of governance. However, implementation of these commitments has demonstrated little progress due to financial and capacity constraints as well as the prevailing political climate due to elections. Stakeholders stress the need to continue work on the current commitments and recommend intergovernmental coordination, better planning and budgeting process for the next action plan.

This section aims to inform development of the next action plan and guide completion of the current action plan. It is divided into two sections: 1) recommendations identified by civil society and government officials while writing this report and 2) recommendations of the IRM.

## 5.1 STAKEHOLDER PRIORITIES

Many civil society actors interviewed by the IRM researcher were satisfied with the content of the second action plan. CSOs consider that commitments in the action plan cover important areas that need government attention and renewed action. However, a key concern was implementation of the existing commitments and the funding for the national action plan with adequate budgetary allocation to OGP activities.

Regarding the action plan development process, stakeholders cite it is important that the government institutionalises the OGP steering committee as an official regular multi-stakeholder forum for consultation on OGP implementation. The government also needs to establish knowledgeable OGP Point of Contacts (PoCs) in all the lead ministries and agencies to provide regular updates to the steering committee on commitment implementation.

## 5.2 IRM RECOMMENDATIONS

In developing the next action plan, the government could take a more proactive approach to include the wider public and CSOs outside the capital in multi-stakeholder consultations. This should increase transparency and public participation in action plan development as well as future self-assessment and post-implementation activities. The government should

ensure more public participation in both the drafting and implementation of the action plan and the self-assessment.

In addition to deepening and strengthening reforms around the commitments included in the second action plan, the next plan should focus on better institutionalisation and sustainability of OGP work in Kenya.

### 1. Improve action plan development process

OGP action plan development has mainly included Nairobi-based civil society groups and there is low level of awareness of the OGP as well as the action plan commitments; it is therefore recommended that the government carry out awareness raising activities about OGP and create meaningful participation opportunities for national CSOs.

Kenya's action plan includes reforms in key policy areas including climate action, beneficial ownership, open contracting, freedom of information and anti-corruption. However, commitments fell short of clearly defined steps for implementation and did not fully communicate intended outcomes and changes in government practice.

- An effort should be made to include more local and subnational CSOs in open government work involving local levels. This could be done by involving citizen groups in the commitments that have elements pertaining to county governments such as open budgeting, and citizen monitoring of spending.

- The next action plan should build from the positive progress begun under this plan to strengthen and deepen initiatives in these major reform areas. Specifically, commitments in the next action plan need to be written with clear, measurable, verifiable, and feasible objectives. The next national action plan should include better defined steps and goals for each commitment, ensuring clear identification of the responsible implementing officials and the resources available for implementation.

## 2. Address commitment implementation challenges

There is no explicit budget line for OGP-related planning and coordination activities and there are human resource constraints at both national and subnational levels. Further, the national action plan lacks a budgeted implementation plan for the activities.

- Greater efforts are needed to institutionalise OGP in government ministries, departments and agencies. Each implementing institution needs to identify technical midlevel staff to be trained on OGP and retain institutional knowledge. The lead agencies for commitments and milestones should have a clear mandate to implement the work. Where a commitment is implemented by different agencies, the specific milestones should be assigned as such. There is need to strengthen interagency coordination between implementing agencies, perhaps through an interagency collaborative framework.
- The OGP steering committee could work with the Ministry of Finance to include funding of OGP activities in the national budget. The drafters of the next action plan can consider developing a budgeted implementation matrix identifying available resources and areas where additional funding is needed.
- During action plan implementation, the Steering Committee (government, CSOs, private sector and other interest groups) should convene quarterly to monitor progress. Meeting outcomes should be published so all interested stakeholders can be kept apprised of progress.

## 3. Ensure full implementation of the Freedom of Information Act

To ensure effective implementation of the Access to Information Act passed in 2016 it is essential to improve record management and empower oversight institutions such as the Commission on Administrative Justice and the National Archives. To ensure timely and effective implementation in practice, the next action plan could include regulations for implementation of the Act and develop these regulations through an inclusive stakeholder consultation process to further implement the law.

## 4. Open contracting and beneficial ownership transparency

The next action plan could include commitments that are particularly relevant to the controlling illicit financial flows and reducing public sector corruption. The commitments can capitalise on the achieved successes in the area of open contracting and beneficial ownership transparency and include further measures to continue progress.

- Open up IFMIS contracting processes and take necessary steps to start publishing contracts in Open Contracting Data Standards.
- The law on beneficial ownership transparency needs to be strengthened to require the following information on beneficial owners: tax ID number, nationality, country of residence, and a description of how control is exercised. The National Registrar should be mandated to verify all recorded beneficial ownership information, including relevant information such as identifying all company shareholders. An independent auditing authority should be set up to verify information recorded in the Registrar and define clear rules for the frequency of inspection and consequences for reporting false or inaccurate information. The information reported to the Registrar should be investigated for inconsistencies, comparing findings and information using other independent and reliable sources



- The current action plan does not include a commitment on asset declaration of public officials. The next plan can focus to strengthen regulations on asset declarations to include more oversight, strict monitoring and enforcement.

**5. Expand and protect civic space and civil liberties:**

The next action plan should include commitments to protect or expand citizens’ rights to organise, speak out, and report on government. These commitments should

directly respond to issues of shrinking civic space in Kenya by ensuring that laws, regulations, and executive policies do not inhibit civil liberties and freedoms. Commitments could focus on making it easier for NGOs/CSOs to register their organisation, receive and maintain funding, and organise and communicate to carry out their activities.

**Table 5.1 | Five Key Recommendations**

<p><b>1</b></p> <p><b>Improve the action plan development process</b></p> <p>Engage local level civil society and create commitments with clear and measurable objectives that build on open government initiatives from the first action plan. Identify lead officials responsible for each commitment and milestone.</p>	<p><b>2</b></p> <p><b>Address commitment implementation challenges</b></p> <p>Ensure there is a budget line for OGP, improve interagency collaboration and produce quarterly Steering Committee meetings to monitor progress.</p>	<p><b>3</b></p> <p><b>Full Implementation of the Access to Information Act</b></p> <p>To ensure timely and effective implementation of the law, take further steps to enhance record management and develop regulations to implement the law.</p>	<p><b>4</b></p> <p><b>Open contracting and beneficial ownership transparency</b></p> <p>Open up IFMIS contracting processes, publish contracts in OCDS, and provide beneficial ownership information on the new public beneficial ownership registry.</p>	<p><b>5</b></p> <p><b>Expand and Protect Civic Space and civil liberties</b></p> <p>The next action plan should include commitments to protect or expand citizens’ rights to organise, speak out, and report on government. Commitments could focus on making it easier for CSOs to register their organisation, receive and maintain funding, and organise and communicate to carry out their activities.</p>
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# VI | METHODOLOGY AND SOURCES

The IRM progress report is written by researchers based in each OGP-participating country. All IRM reports undergo a process of quality control to ensure that the highest standards of research and due diligence have been applied.

Analysis of progress on OGP action plans is a combination of interviews, desk research, and feedback from nongovernmental stakeholder meetings. The IRM report builds on the findings of the government's own self-assessment report and any other assessments of progress put out by civil society, the private sector, or international organisations.

Each IRM researcher carries out stakeholder meetings to ensure an accurate portrayal of events. Given budgetary and calendar constraints, the IRM cannot consult all interested or affected parties. Consequently, the IRM strives for methodological transparency and therefore, where possible, makes public the process of stakeholder engagement in research (detailed later in this section.) Some contexts require anonymity of interviewees and the IRM reviews the right to remove personal identifying information of these participants. Due to the necessary limitations of the method, the IRM strongly encourages commentary on public drafts of each report.

Each report undergoes a four-step review and quality-control process:

1. **Staff review:** IRM staff reviews the report for grammar, readability, content, and adherence to IRM methodology.
2. **International Experts Panel (IEP) review:** IEP reviews the content of the report for rigorous evidence to support findings, evaluates the extent to which the action plan applies OGP values, and provides technical recommendations for improving the implementation of commitments and realization of OGP values through the action plan as a whole. (See below for IEP membership.)
3. **Prepublication review:** Government and select civil society organizations are invited to provide comments on content of the draft IRM report.
4. **Public comment period:** The public is invited to provide comments on the content of the draft IRM report.

This review process, including the procedure for incorporating comments received, is outlined in greater detail in Section III of the Procedures Manual.<sup>1</sup>

## INTERVIEWS AND FOCUS GROUPS

Each IRM researcher is required to hold at least one public information-gathering event. Researchers should make a genuine effort to invite stakeholders outside of the "usual suspects" list of invitees already participating in existing processes. Supplementary means may be needed to gather the inputs of stakeholders in a more meaningful way (e.g., online surveys, written responses, follow-up interviews). Additionally, researchers perform specific interviews with responsible agencies when the commitments require more information than is provided in the self-assessment or is accessible online.

Primary information for this report was obtained through four stakeholder meetings, individual interviews, and questionnaires when interviews were not possible.

The researcher participated in four stakeholder meetings held in Nairobi and Nakuru organised by the ODP, Hivos and Article 19 and CRECO respectively as of 27 May 2017. Respondents were kept anonymous, as this is necessary for freedom of expression.

The first stakeholder meeting was held in Nairobi on 22 February 2017. Participants were drawn from government ministries, departments and agencies, CSOs and the private sector, while the second meeting was restricted to CSOs only and was held on 23 May 2017. These meetings were in the form of roundtable meetings. The Nakuru stakeholder reflection meetings

were held on 19–20 January 2017 and 20-21 March 2017. The Nakuru meetings drew participants from CRECO-implementing partners and county oversight committee members (these are citizen action groups from the county level) from Makueni and Elgeyo Marakwet counties. Nakuru was considered a more central location to bring together these participants. Multiple types of interaction were employed including facilitated sessions and group discussions.

The first Nairobi meeting was co-convened by the Office of the Deputy President and Article 19 in support of implementing Kenya's second OGP National Action Plan. The purpose of this meeting was to: begin government, private sector and civil society coordination and engagement within the identified areas of the national action plan; support information and progress-sharing between all actors on initiatives, actions and plans in the implementing period since July 2016; coordinate planning for thematic groupings nominated to represent areas of commitment in the Kenya OGP Action Plan. Participants discussed the progress, implementation needs and working area commitments of Kenya's Second National Action Plan 2016-2018. Stakeholders made reference to the following main points: the shrinking civic space and its impact on civil society as well as open government; the need for accountability in past, present and future implementation and resourcing; the need to make open government a high priority agenda with public officials; the impact of implementation limitations on access to information within the open government agenda; no direct budgetary provisions for open government in spite of a national action plan for the same; the need to demonstrate collaborative approaches between government and civil society in realising the action plan commitments; progress in implementing climate and access to information legislation; and the development of mechanisms to track implementation of open government commitments.

The second Nairobi meeting was convened by Hivos and Article 19 for CSOs only with an aim of consolidating gains and tracking progress of commitment implementation as well as developing a communiqué outlining the CSO position on OGP

and key requests to government. Further, the CSOs established work cluster meetings, created workplans with timelines up to December 2017, picked cluster organisers and set the next date for individual cluster meetings.

The first CRECO Nakuru reflection meeting took place on 19 and 20 January 2017 in Nakuru at Fairfield Hotel with a total of 28 participants (18 male and 10 female). The participants comprised of 20 COC members (10 from the two counties of Elgeyo Marakwet and Makueni), CEDGG, and MAPACA; representatives from the CRECO Secretariat and the IRM researcher were the facilitators. The main objectives of the induction meeting were as follows: to introduce participants to the project objectives and expected results; train and share OGP NAP II monitoring mechanisms; and to plan for project activity implementation in Makueni and Elgeyo Marakwet Counties.

The goal of the CRECO project titled "Monitoring and Supporting the Kenyan Government to Achieve OGP Commitments" is to ensure that both the national and county governments provide a conducive environment for accountability, transparency and service delivery through inclusive public participation in Open Government Partnership (OGP). The key outputs for the project are: i) strong partnerships built between state and non-state actors for engagement on National Action Plan II; ii) awareness created among citizens on OGP/NAP II to enable them to hold duty bearers accountable for open governance and OGP/NAP II processes; and iii) implementation monitored and findings and recommendations shared with relevant stakeholders for adoption. Key outcomes that the project aims to achieve include: broadened and increased number of CSOs engaged in OGP current commitments and space widened for future engagement (NAP III).

CRECO organised a second reflection meeting with the same target participants as the first reflection meeting. The status of governance and service delivery that relates to OGP process was discussed and shared. Other outputs included sharing developed COC county work plans and strategies, and targeting governance institutions for engagements.

Individual interviews were conducted in various institutions. When interviews were not possible, the IRM researcher sent respondents questionnaires. Institutions that provided information were:

- Office of the Deputy President
- Ministry of ICT - ICT Authority
- Ministry Environment and Natural Resources
- Ministry of Sports, Culture and the Arts - Kenya National Archives and Documentation Service (KNADS) department
- Ministry of Mining
- National Treasury
- Public Procurement Authority
  
- Hivos East Africa
- Article 19
- Transparency International, Kenya Chapter
- The International Commission of Jurists-Kenya Chapter
- Kenya Association of Manufacturers
- Ushahidi
- Constitution & Reform Education Consortium
- Parliamentary Initiatives Network
- The Open Institute
  
- The Africa Centre for Open Governance
- Mzalendo Trust
- Strathmore University - Extractives Baraza

- International Budget Partnership

## ABOUT THE INDEPENDENT REPORTING MECHANISM

The IRM is a key means by which government, civil society, and the private sector can track government development and implementation of OGP action plans on an annual basis. The design of research and quality control of such reports is carried out by the International Experts Panel, comprised of experts in transparency, participation, accountability, and social science research methods.

The current membership of the International Experts Panel is

- César Cruz-Rubio
- Hazel Feigenblatt
- Mary Francoli
- Brendan Halloran
- Hille Hinsberg
- Anuradha Joshi
- Jeff Lovitt
- Fredline M'Cormack-Hale
- Showers Mawowa
- Ernesto Velasco

A small staff based in Washington, DC, shepherds reports through the IRM process in close coordination with the researchers. Questions and comments about this report can be directed to the staff at [irm@opengovpartnership.org](mailto:irm@opengovpartnership.org).

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<sup>1</sup> IRM Procedures Manual, V.3: <https://www.opengovpartnership.org/documents/irm-procedures-manual>.

# VII | ELIGIBILITY REQUIREMENTS ANNEX

The OGP Support Unit collates eligibility criteria on an annual basis. These scores are presented below.<sup>1</sup> When appropriate, the IRM reports will discuss the context surrounding progress or regress on specific criteria in the Country Context section.

In September 2012, OGP officially encouraged governments to adopt ambitious commitments that relate to eligibility.

**Table 7.1 | Eligibility Annex for Kenya**

CRITERIA	2011	CURRENT	CHANGE	EXPLANATION
Budget Transparency <sup>2</sup>	4	4	No change	4 = Executive's Budget Proposal and Audit Report published 2 = One of two published 0 = Neither published
Access to Information <sup>3</sup>	3	4	Increase	4 = Access to information (ATI) Law 3 = Constitutional ATI provision 1 = Draft ATI law 0 = No ATI law
Asset Declaration <sup>4</sup>	4	4	Increase	4 = Asset disclosure law, data public 2 = Asset disclosure law, no public data 0 = No law
Citizen Engagement (Raw score)	3 (5.29) <sup>5</sup>	3 (5.00) <sup>6</sup>	No change	<i>EIU Citizen Engagement Index raw score:</i> 1 > 0 2 > 2.5 3 > 5 4 > 7.5
<b>Total / Possible (Percent)</b>	14/16 (88%)	15/16 (94%)	Increase	75% of possible points to be eligible

<sup>1</sup> For more information, see <http://www.opengovpartnership.org/how-it-works/eligibility-criteria>.

<sup>2</sup> For more information, see Table 1 in <http://internationalbudget.org/what-we-do/open-budget-survey/>. For up-to-date assessments, see <http://www.obstracker.org/>.

<sup>3</sup> The two databases used are Constitutional Provisions at <http://www.right2info.org/constitutional-protections> and Laws and draft laws at <http://www.right2info.org/access-to-information-laws>.

<sup>4</sup> Simeon Djankov, Rafael La Porta, Florencio Lopez-de-Silanes, and Andrei Shleifer, "Disclosure by Politicians," (Tuck School of Business Working Paper 2009-60, 2009), <http://bit.ly/19nDEfK>; Organization for Economic Cooperation and Development (OECD), "Types of Information Decision Makers Are Required to Formally Disclose, and Level Of Transparency," in *Government at a Glance 2009*, (OECD, 2009), <http://bit.ly/13vGtqS>; Ricard Messick, "Income and Asset Disclosure by World Bank Client Countries" (Washington, DC: World Bank, 2009), <http://bit.ly/1cloyf>. For more recent information, see <http://publicofficialsfinancialdisclosure.worldbank.org>. In 2014, the OGP Steering Committee approved a change in the asset disclosure measurement. The existence of a law and de facto public access to the disclosed information replaced the old measures of disclosure by politicians and disclosure of high-level officials. For additional information, see the guidance note on 2014 OGP Eligibility Requirements at <http://bit.ly/1EjLJ4Y>.

<sup>5</sup> "Democracy Index 2010: Democracy in Retreat," The Economist Intelligence Unit (London: Economist, 2010), <http://bit.ly/eLC1rE>.

<sup>6</sup> "Democracy Index 2014: Democracy and its Discontents," The Economist Intelligence Unit (London: Economist, 2014), <http://bit.ly/18kEzCt>.



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