

**THE ROLE OF GENDER BUDGETING IN IMPLEMENTING THE OBLIGATION
TO PROVIDE RESOURCES TO REALISE WOMEN'S HUMAN RIGHTS IN
AFRICA**

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DECLARATION OF ORIGINALITY

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‘...the budget reflects the values of a country – who it values, whose work it values and who it rewards ... and who, and what, and whose work it doesn’t’.

Pregs Govender, former Parliamentarian of South Africa,
Foreword to the first women’s budget of South Africa in 1996

SUMMARY OF THESIS

This thesis analyses the role of gender budgeting in implementing the obligation to provide resources to realise women's human rights in Africa. It uses the Southern African Development Community's (SADC) guidelines on gender budgeting adopted in 2014 (SADC guidelines) and the South African initiatives as case studies.

In the first instance, the thesis considers the global, regional and sub-regional laws that make reference to the obligation to provide budgetary resources to realise women's human rights.

Having established that African states have the obligation to provide budgetary resources to realise women's human rights, this thesis secondly presents gender budgeting as a means to do so.

The thesis thirdly assesses the manner in which states can adopt gender budgeting to give effect to their women's human rights commitments. Learning from the shortcomings and the challenges of the SADC guidelines and the South African initiatives, this thesis proposes a framework on gender budgeting to be adopted by the African Union (AU).

The study fourthly expands on the role of the AU and the SADC to ensure that African states adopt gender budgeting as a means to provide sufficient budgetary resources to realise women's human rights.

Finally, the thesis has a chapter on conclusion and recommendations. This chapter elaborates on the key findings, provides for recommendations and makes suggestions for future research. The main recommendations of this thesis aim to ensure that African states adopt gender budgeting to implement their obligation to provide resources to realise women's human rights in their territory.

LIST OF ACRONYMS AND ABBREVIATIONS

| | |
|------------------------------|---|
| 3As and Q | Availability, accessibility, adaptability and quality |
| 4-As | Availability, accessibility, adequacy and adaptability |
| Abuja Declaration | Abuja Declaration on HIV/AIDS, Tuberculosis and Other Related Infectious Diseases |
| African Charter | African Charter on Human and Peoples' Rights |
| African Children's Charter | African Charter on the Rights and Welfare of the Child |
| African Children's Committee | African Committee of Experts on the Rights and Welfare of the Child |
| African Commission | African Commission on Human and Peoples' Rights |
| African Court Protocol | Protocol to the African Charter on the Establishment of an African Court on Human and Peoples' Rights |
| African Court | African Court on Human and Peoples' Rights |
| AMU | Arab Maghreb Union |
| APRM | African Peer Review Mechanism |
| AU | African Union |
| AU Commission | African Union Commission |
| AU Gender Directorate | Directorate of Women, Gender and Development at the African Union Commission |
| Beijing Platform for Action | Beijing Platform for Action for Equality, Development and Peace |
| CEDAW Committee | Committee on the Elimination of all forms of Discrimination Against Women |

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| CEDAW | Convention on the Elimination of all forms of Discrimination Against Women |
| CENSAD | Community of Sahel-Saharan States |
| COMESA | Common Market for Eastern and Southern Africa |
| Constitutive Act | Constitutive Act of the African Union |
| CRC Committee | Committee on the Rights of the Child |
| CRC | Convention on the Rights of the Child |
| CSOs | Civil Society Organisations |
| Declaration on Gender Equality | Solemn Declaration on Gender Equality in Africa |
| EAC Gender Framework | East African Gender and Community Development Framework |
| EAC | East African Community |
| ECCAS | Economic Community of Central African States |
| ECOSOCC | Economic, Social and Cultural Council |
| ECOWAS Protocol on Conflict | Economic Community of West African States Protocol relating to the Mechanism for Conflict Prevention, Management, Resolution, Peace Keeping and Security |
| ECOWAS Protocol on Democracy | Protocol on Democracy and Good Governance Supplementary to the Protocol relating to the Mechanism for Conflict Prevention, Management, Resolution, Peacekeeping and Security |
| ECOWAS | Economic Community of West African States |
| ESCR Committee | Committee on Economic, Social and Cultural Rights |

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|-----------------------------------|---|
| GIMAC | Gender Is My Agenda Campaign |
| GSBA | Gender sensitive budget analysis |
| GSFB | Gender sensitive budget formulation |
| Guidelines and Principles on ESCR | Guidelines and Principles on Economic, Social and Cultural Rights in the African Charter |
| HIV/AIDS | Human immunodeficiency virus infection and acquired immune deficiency syndrome |
| ICCPR | International Covenant on Civil and Political Rights |
| ICESCR | International Covenant on Economic, Social and Cultural Rights |
| IGAD SRHR Framework | Intergovernmental Authority on Development Sexual and Reproductive Health and Rights Strategic Policy Framework |
| IGAD | Intergovernmental Authority on Development |
| Joint Monitoring Committee | Joint Monitoring Committee on the Improvement of the Quality of Life and Status of Women |
| Maputo Protocol | Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa |
| MTEFs | Medium term expenditure frameworks |
| National Gender Policy | National Policy Framework for Women's Empowerment and Gender Equality of South Africa |
| NCPE | National Commission for the Promotion of Equality in Malta |
| NESRI | National Economic and Social Rights Initiative |

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|---------------------------------|--|
| NGOs | Non-Governmental Organisations |
| OAFLA | Organisation of African First Ladies against HIV/AIDS |
| OAU | Organisation of African Unity |
| Pan-African Parliament Protocol | Protocol to the Constitutive Act of the African Union relating to the Pan-African Parliament |
| Pretoria Declaration | Pretoria Declaration on Economic, Social and Cultural Rights in Africa |
| PTA | Preferential Trade Area for Eastern and Southern Africa |
| RECs | Regional Economic Communities |
| Rules of Procedure | Rules of Procedure of the African Commission on Human and Peoples' Rights |
| SADC Gender Protocol | Southern African Development Community Protocol on Gender and Development |
| SADC guidelines | Southern African Development Community guidelines on gender budgeting |
| SADC | Southern African Development Community |
| Special Rapporteur | Special Rapporteur on the Rights of Women in Africa |
| UDHR | Universal Declaration on Human Rights |
| UN | United Nations |
| UNDP | United Nations Development Programme |
| Vienna Convention | Vienna Convention on the Law of Treaties |
| WBI | Women's budget initiative |

CHAPTER ONE: INTRODUCTION

1.1 Background

The plight of women in Africa has been categorised as ‘shocking’.¹ Despite the fact that men and women are both human beings, women face more vulnerabilities. Inequality on the basis of gender ‘is entrenched in all societal structures’ of the region.² The idea that women are inferior to men is woven into the society.³ Africa is a continent that still faces the challenges of poverty and armed conflicts. Consequently women in Africa suffer since the above vulnerabilities, together with ‘retrogressive cultural practices and traditions’, undermine women’s human rights.⁴ Women in Africa have been victims of specific situations that act as challenges for the realisation of their human rights.⁵

Recognising that women face vulnerabilities, article 4(l) of the Constitutive Act of the African Union⁶ (AU) establishes the ‘promotion of gender equality’ as one of the principles according to which the AU should function. This implies that at the time of the establishment of the AU, African countries acknowledged that men and women are treated differently across the continent and that the regional human rights system should give attention to the phenomenon of gender inequality.

As a concrete step to ensure that African women are afforded the protection that they are entitled to, the Protocol to the African Charter on Human and Peoples’ Rights on the Rights of Women in Africa⁷ (Maputo Protocol) was adopted in 2003. There was a need for the Maputo Protocol since there was little consideration given to existing women’s human rights

¹ P Burnett et al ‘Introduction’ in P Burnett et al (eds) *Grace, tenacity and eloquence: The struggle for women’s rights in Africa* (2007) 1.

² K Stefiszyn ‘The African Union: Challenges and opportunities for women’ 5 *African Human Rights Law Journal* (2005) 358.

³ As above.

⁴ C Ageng’o ‘International women’s day – Can we dare celebrate?’ in Burnett et al (n 1 above) 6.

⁵ G Mutukwa ‘Home-grown rights instruments: Supporting the Protocol on the Rights of Women in Africa’ in Burnett et al (n 1 above) 18.

⁶ Adopted by African Heads of State in 2000, entered into force in 2001.

⁷ Adopted on 11 July 2003, entered into force on 25 November 2005.

standards on the continent.⁸ This protocol has been described as a ‘pioneering and legally binding instrument, which marks a new beginning in the promotion and protection of women’s human rights on the African continent’.⁹ The instrument is expected to accelerate the eradication of women’s human rights violations on the continent. It can be considered as an expression of the AU’s commitment to put women’s human rights in the forefront.

However, ratifying or domesticating a legal instrument does not automatically lead to the realisation of the rights therein. A proper implementation of the Maputo Protocol at the domestic level necessitates ‘strategies to engage with resource mobilisation, allocation and tracking’.¹⁰ Appreciating that resources are needed for the implementation of rights, the Maputo Protocol ‘enshrines provisions expressly providing for duties for resource allocation and even of budgetary arrangement’.¹¹ The provisions of the Maputo Protocol that provide for budgetary allocation prove that the framers recognised that implementation of the rights in the Maputo Protocol required resources.

Three articles of the Maputo Protocol are reflective of the African human rights system’s recognition of the role that budgetary allocation has in realising women’s human rights. Under article 4 of the Maputo Protocol that provides for the right to life, integrity and security of the person, states have the obligation to ‘provide adequate budgetary and other resources for the implementation and monitoring of actions aimed at preventing and eradicating violence against women’.¹² Article 26(2) of the Maputo Protocol provides for a broader budgetary reconstruction in order to give effect to the rights protected by the instrument and requires ratifying states ‘to adopt all necessary measures and in particular shall provide budgetary and other resources for the full and effective implementation of the rights herein recognised’. Article 10(3) of the Maputo Protocol goes a step further and imposes an obligation on states to redirect military expenditure to social development, and

⁸ F Banda ‘Protocol to the African Charter on the Rights of Women in Africa’ in M Evans & R Murray (eds) *The African Charter on Human and Peoples’ Rights: The system in practice, 1986-2006* (2008) 445.

⁹ C Ocran ‘Recent Developments-Actualities: The Protocol to the African Charter on Human and Peoples’ Rights on the Rights of Women in Africa’ 15 *African Journal of International and Comparative Law* (2007) 1 147.

¹⁰ M Rusimbi ‘Financing the Protocol: Considerations for influencing budgets from experiences in Tanzania’ in R Musa et al (eds) *Breathing life into The African Union Protocol on Women’s Rights in Africa* (2006) 38.

¹¹ SA Yeshanew *The justiciability of economic, social and cultural rights in the African regional human rights system* (2013) 262.

¹² Article 4(2)(i) of the Maputo Protocol.

to the promotion of women's human rights. It provides that 'States Parties shall take the necessary measures to reduce military expenditure significantly in favour of spending on social development in general, and the promotion of women in particular'.

The inclusion of budgetary allocation in three articles might give the impression that the framers of the Maputo Protocol did not want to let budgetary allocation be at the discretion of the state. Instead, the Maputo Protocol, which provides for norms that are aimed at eradicating the vulnerabilities that African women face, imposes an obligation on African states to provide sufficient budgetary resources to realise women's human rights across the continent.

Inspired by these provisions of the Maputo Protocol, this research analyses the role of gender budgeting in implementing the obligation to provide resources to realise women's human rights. It proposes a gender budgeting framework that the AU can adopt to guide African states in the implementation of their obligation to provide budgetary resources to realise women's human rights. The concept of gender budgeting is not foreign to global and regional human rights law.¹³ The United Nations (UN) has encouraged countries to adopt gender budgeting on several occasions.¹⁴ The Beijing Platform for Action for Equality, Development and Peace 1995 (Beijing Platform for Action), for instance, requires countries to integrate 'a gender perspective in budgetary decisions on policies and programmes, as well as the adequate financing of specific programmes for securing equality between women and men'.¹⁵ It further states that the implementation of the Beijing Platform for Action necessitates the adjustment of 'budgets to ensure equality of access to public sector expenditures' and the allocation of 'sufficient resources, including resources for gender-impact analysis'.¹⁶

¹³ See chapter two generally.

¹⁴ See section 2.3.3 below.

¹⁵ Paragraph 345 of the Beijing Platform for Action available at <http://www.un.org/womenwatch/daw/beijing/platform/plat2.htm> (accessed on 8 October 2014).

¹⁶ Paragraph 346 of the Beijing Platform for Action.

1.2 Research problem

According to the 2014 Gender Inequality Index of the United Nations Development Programme (UNDP),¹⁷ African countries are ranked low in terms of women's human rights.¹⁸ No African country offers a very high human development for women and about four are categorised as states that provide high human development for women with the majority falling in the category of either medium or low human development for women.¹⁹

Since most African countries offer a low human development for women, it can be deduced that gender inequality is still a harsh reality of the continent. Most societies continue to subject African women to numerous vulnerabilities in different spheres including in:²⁰ conflict situations, peace-keeping and refugee status; political representation; education and literacy; economic activity and employment; sexual and reproductive health; human immunodeficiency virus infection and acquired immune deficiency syndrome; and trafficking. Such vulnerabilities, in addition to others, are addressed in the Maputo Protocol that recognises that there is a need for budgetary allocations to realise the rights therein.

As at April 2016, 37 out of 54 African countries had ratified the Maputo Protocol since its entry into force.²¹ A situational analysis of women's human rights in the ratifying states reveals that all of them still face challenges in implementing the provisions of the Maputo Protocol. Amongst the provisions are those that relate to budgetary allocations to realise women's human rights as discussed in section 1.1.

¹⁷ UNDP 'Gender Inequality Index': The Gender Inequality Index 'measures gender inequalities in three important aspects of human development—reproductive health measured by maternal mortality ratio and adolescent birth rates; empowerment, measured by proportion of parliamentary seats occupied by females and proportion of adult females and males aged 25 years and older with at least some secondary education; and economic status expressed as labour market participation and measured by labour force participation rate of female and male populations aged 15 years and older' available at <http://hdr.undp.org/en/content/gender-inequality-index-gii> (accessed on 7 October 2014).

¹⁸ UNDP-Human Development Reports 'Table 4: Gender Inequality Index' available at <http://hdr.undp.org/en/content/table-4-gender-inequality-index> (accessed on 7 October 2014).

¹⁹ UNDP (as above): The four countries are Mauritius, Seychelles, Tunisia and Algeria.

²⁰ K Kemp 'General situation of women in Africa' in Musa et al (n 10 above) 3-8.

²¹ AU 'List of countries which have signed, ratified/acceded the Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa' (1 April 2016) available at http://www.au.int/en/sites/default/files/treaties/7783-sl-protocol_to_the_african_charter_on_human_and_peoples_rights_on_the_rights_of_women_in_africa_12.pdf (accessed on 8 June 2016).

Gender budgeting, as discussed in chapter two of this research, has been identified as a means through which states can realise their obligation to provide sufficient resources to realise women's human rights. Many African countries have policies concerning gender budgeting²² but as at May 2016, there was no African country that had integrated all of its aspects. The AU has made reference to gender considerations while budgeting.²³ However, it has not expanded on the framework for the adoption of gender budgeting.

Contrary to the AU, the Southern African Development Community (SADC) has developed guidelines on gender budgeting in 2014 (SADC guidelines). These guidelines provide different entry points to integrate gender budgeting in the public budgeting process. Nevertheless, these guidelines apply to only SADC member states. Although they can assist in implementing the provisions of the Maputo Protocol in SADC member states, they cannot be applied to all African countries. Additionally, there is no assessment as to whether the SADC guidelines represent an adequate framework.

The research problem arises from AU's lack of emphasis on the role of gender budgeting in the implementation of the obligation to provide resources to realise women's human rights in Africa. The thesis proposes that the AU, similar to the SADC, has to give particular focus to gender budgeting to assist African states to overcome the challenges in the implementation of their budgetary obligations in the Maputo Protocol. Such a step will ensure that African states consider women's human rights in their resource allocation process.

1.3 Research questions

This research analyses the role of gender budgeting in implementing the obligation to provide resources to realise women's human rights in Africa. The subsequent research questions are as follows:

²² For instance, countries like Botswana, Côte d'Ivoire, Ghana, Kenya, Malawi, Mauritius, Mozambique, Namibia, Rwanda, South Africa, Tanzania, Togo, Uganda, Zambia and Zimbabwe.

²³ See section 2.4 below.

- (i) What is the current global, regional and sub-regional legal framework for the provision of budgetary resources to realise women's human rights?
- (ii) How can gender budgeting assist African states in implementing the obligation to provide resources to realise women's human rights?
- (iii) How can the AU learn from the challenges of the SADC guidelines and the South African initiatives in developing a framework to guide African states in their gender budgeting initiatives?
- (iv) How can the AU and the SADC ensure that African countries adopt all components of gender budgeting to realise women's human rights in Africa?

1.4 Definition of terms

The research question has two key terms that are: gender budgeting and the provision of budgetary resources. These terms are often mentioned during the course of this research and it is important to define them for a reader to understand the scope of the research question from the outset. Moreover, the term gender budgeting is not a legal term. This thesis is being written in the field of law and as such it is important for it to define the scope of the key terms so that readers from all backgrounds understand their working definitions for the purposes of this thesis.

1.4.1 Gender budgeting

Many scholars and institutions have defined gender budgeting and what it entails. For the purposes of this thesis, the definition proposed by the Council of Europe will be used since it is one that covers the key features of gender budgeting and one that is simple to understand. The Council of Europe defines gender budgeting as follows:²⁴

...an application of gender mainstreaming in the budgetary process. It means a gender-based assessment of budgets, incorporating a gender perspective at all levels of the budgetary process and restructuring revenues and expenditures in order to promote gender equality.

²⁴ Council of Europe 'Gender budgeting: Conceptual framework, methodology and presentation of good practices' (2005) 10.

Gender budgeting basically assesses the manner in which governments' revenues and expenditures affect 'women and men, girls and boys'.²⁵ It encompasses everyone without any discrimination, is inclusive of women and recognises that there is a deficiency in the way there is provision of budgetary resources for women. It assesses the public budgeting process from a gender lens in order to ensure that resources are efficiently allocated to realise women's human rights.²⁶ Thus, the gender budgeting process aims at ensuring that women's human rights are considered in the public budgeting process.

1.4.2 Provision of budgetary resources

The definition of allocation of budgetary resources, for the purposes of this thesis, is derived from analysing different publications. Resource allocation is a 'decision-making process' which involves various government institutions, each having different priorities.²⁷ While budgeting, resources are allocated to each item to be able to realise the set goals of the country.²⁸ One way to assess public resource allocation is to look at the budgetary allocations.²⁹ Budgetary resources, for the purposes of this research, are 'financial resources' in a budget.³⁰ When a government is allocating budgetary resources towards a sector, it is reflecting its 'financial commitment' to that sector.³¹ Therefore, provision of budgetary resources means the amount of money that the government is committing to spend on a specific sector.

²⁵ D Budlender & G Hewitt 'Engendering budgets: A practitioner's guide to understanding and implementing gender-responsive budgets' (2003) 7 available at http://www.internationalbudget.org/wp-content/uploads/2011/01/Engendering_Budgets_final_doc.pdf (accessed on 11 August 2016).

²⁶ Council of Europe 'Gender budgeting: Final report of the group of specialists on gender budgeting' (2005) 10 available at [http://www.coe.int/t/dghl/standardsetting/equality/03themes/gender-mainstreaming/EG-S-GB\(2004\)RAPFIN_en.pdf](http://www.coe.int/t/dghl/standardsetting/equality/03themes/gender-mainstreaming/EG-S-GB(2004)RAPFIN_en.pdf) (accessed on 7 October 2014).

²⁷ Centre for Aid and Public Expenditure 'The basic budgeting problem: Approaches to resource allocation in the public sector and their implications for pro-poor budgeting' Working Paper 147 (2001) 23 available at <http://www.odi.org/sites/odi.org.uk/files/odi-assets/publications-opinion-files/2069.pdf> (accessed on 18 February 2015).

²⁸ RD Lee et al *Public budgeting systems* (2008) 2.

²⁹ E Ablo & R Reinikka 'Do budgets really matter? Evidence from public spending on education and health in Uganda' (1999) 1 available at <http://elibrary.worldbank.org/doi/pdf/10.1596/1813-9450-1926> (accessed on 11 August 2016).

³⁰ G Lancaster & F Withey *CIM coursebook 03/04 marketing fundamentals* (2003) 57.

³¹ World Bank 'Public expenditure reviews for education: The bank's experience' (1990) 20.

1.5 Vulnerabilities that African women face

The African Platform for Action³² identified the following ‘critical areas of concern’ for African women:³³

- (a) Women's poverty, insufficient food security and lack of economic empowerment;
- (b) Inadequate access to education, training, science and technology;
- (c) Women's vital role in culture, the family and socialization;
- (d) Improvement of women's health including family planning and population related programmes;
- (e) Women's relationship and linkages to environment and natural resource management;
- (f) Involvement of women in the peace process;
- (g) The political empowerment of women;
- (h) Women's legal and human rights;
- (i) Mainstreaming of gender-disaggregated data;
- (j) Women, communication, information and arts;
- (k) The girl-child.

Striving towards women's human rights in Africa encounters many challenges because women across the continent, especially those living in rural areas, face special circumstances which include:³⁴ ‘culture, religion, language, the impact of historical events in local settings, the natural environment and the political economy shaping subsistence and the distribution of resources’. The above has an impact on women's human rights and there is a need to ensure that every woman's background is taken into consideration while advocating for their human rights.

Despite the fact that discriminatory laws and practices have been abolished in many African countries, women are still subjected to serious discrimination due to the patriarchal nature of our society.³⁵ There is a competition between ‘norms that emphasize patriarchal family values’ and the law which provides for equality between men and women.³⁶

Ageng'o uses education to describe the above phenomena. According to her, many countries have laws and policies which state that children should have access to free education at

³² African Platform for Action adopted by the Fifth Regional Conference on Women held from 16-23 November 2014 at Dakar, Senegal.

³³ Paragraph 3 of the African Platform for Action.

³⁴ D Fox & N Hasci ‘Introduction’ in D Fox & N Hasci (eds) *The challenges of women's activism and human rights in Africa* (1999) 5.

³⁵ As above.

³⁶ A Hellum *Women's human rights and legal pluralism in Africa: Mixed norms and identities in infertility management in Zimbabwe* (1999) 35.

'primary or elementary level without discrimination on the basis of sex'.³⁷ Nevertheless, numerous girls drop out of schools early because of 'the burden of domestic chores'.³⁸ She highlights that the government should address the issues as from their roots and in the present case poverty was the reason why there were early school drop outs. Governments should adopt a gender perspective while addressing issues of poverty if it wants to ensure that discrimination against the girl child is eliminated.

Africa is a continent where being a male is associated with 'power, authority, and control'.³⁹ As a result, despite the presence of constitutional laws which prohibit discrimination on the basis of sex, numerous countries still allow for customary laws which undermine the rights of females.⁴⁰ The Constitution of most Anglophone African countries recognise 'customary law as being part of the formal legal system in the territory'.⁴¹

Making reference to the girl child, Ewelukwa has identified seven contributing factors which prevents equality between male and female:⁴² absence of a comprehensive non-discrimination law, a tension between protected rights and preserved cultures, inconsistency in Constitutional provisions, lack of harmonisation, wide gap between law and reality, unwaning influence of customary law and tendency of the governments to hide behind custom, inadequate coordination among government agencies, and a false public versus private distinction. The above factors act as challenges for the protection of women's human rights around the continent.

Women in Africa suffer violations of their human rights in the guise of traditional practices, which have been 'maintained from one generation to the next':⁴³ for instance, female circumcision. Packer has highlighted that 'the behaviour and decision-making of every individual is influenced to some degree by the web of socio-cultural norms within which he

³⁷ As above.

³⁸ As above.

³⁹ UU Ewelukwa 'The girl child, African states, and international human rights law – Towards a new framework for action' in O Nnaemeka & J Ezeilo (eds) *Engendering human rights: Cultural and socio-economic realities in Africa* (2005) 133.

⁴⁰ As above.

⁴¹ F Banda *Women, law and human rights: An African perspective* (2005) 33.

⁴² Ewelukwa (n 39 above) 134-136.

⁴³ C Packer 'Understanding the sociocultural and traditional context of female circumcision and the impact of the human rights discourse' in Nnaemeka & anor (n 39 above) 225.

or she lives'.⁴⁴ The women's human rights discourse in Africa cannot take place without taking into consideration culture. Respecting existing norms of society 'implies "belonging" and inevitably "conforming"'.⁴⁵ The Maputo Protocol prohibits harmful traditional practices⁴⁶ and the absence of harmonisation between customary and constitutional law at the domestic level represents a challenge for people who undergo through involuntary female circumcision to find justice.

The current study considers the allocation of budgetary resources to ensure that the vulnerabilities discussed in this section are eradicated. As such, the study recognises that the budgetary allocation process needs to take into account the specific situation of different African women. Gender budgeting, which is discussed in chapter 3, is therefore expected to ensure the allocation of budgetary resources in a manner that addresses the vulnerabilities that women face.

1.6 Literature review

1.6.1 The Maputo Protocol and the protection of women's human rights in Africa

The Maputo Protocol is the legal document in Africa that provides for the protection of women's human rights across the continent. The Maputo Protocol was adopted as a 'supplement'⁴⁷ to the African Charter on Human and Peoples' Rights⁴⁸ (African Charter) because of the uniqueness of the 'burning problems'⁴⁹ that concern women in Africa.⁵⁰ The adoption of the Maputo Protocol was an indication that it was time 'for a more forceful promotion of women's rights on the African continent' and that African governments were ready to allocate adequate resources to ensure a better protection of the human rights of

⁴⁴ Packer (n 43 above) 224.

⁴⁵ Packer (n 43 above) 225.

⁴⁶ Article 5 of the Maputo Protocol: Elimination of harmful practices.

⁴⁷ F Viljoen 'An introduction to the Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa' 16 *Washington and Lee Journal of Civil Rights and Social Justice* (2009) 19.

⁴⁸ Adopted on 27 June 1981, entry into force on 21 October 1986.

⁴⁹ E Durojaye 'Realizing access to sexual health information and services for adolescents through the Protocol to the African Charter on the Rights of Women' 16 *Washington and Lee Journal of Civil Rights and Social Justice* (2009) 157.

⁵⁰ MS Nsibirwa 'A brief analysis of the Draft Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa' 1 *African Human Rights Law journal* (2001) 40; Stefiszyn (n 2 above) 376.

women.⁵¹ Its adoption has contributed to the 'climate for the advancement of women's rights' in Africa to be 'more favourable than ever'.⁵²

The Maputo Protocol 'advances the human rights of African women through creative, substantive and detailed language'.⁵³ If implemented, the Maputo Protocol 'presents a potentially powerful tool for dealing with the inequalities still prevailing within our African societies'⁵⁴ since it adopts a 'holistic approach to women's rights'.⁵⁵ According to Chirwa, even a progressive interpretation of the African Charter could not achieve what the provisions of the Maputo Protocol can achieve.⁵⁶ Therefore, the Maputo Protocol was vital to ensure that all aspects of women's human rights in Africa are protected.

Banda has highlighted that the adoption of the Maputo Protocol is a pointer that women's human rights now form part of the discourse concerning human rights on the continent.⁵⁷ Despite the presence of the African Charter, which contained provisions concerning equality and non-discrimination, women in Africa were still victims of violations of their rights.⁵⁸ The Maputo Protocol even went a step further than the CEDAW since it contained more 'radical' provisions⁵⁹ in view of 'finding African solutions to African problems'.⁶⁰ The Maputo Protocol is therefore an important document for the protection of African women since it contains provisions aimed at the specific vulnerabilities that African women face.

The Maputo Protocol's basis is that 'discriminatory laws, policies and practices' that continue to exist in African countries act as an impediment for the protection of women's human

⁵¹ Ocran (n 9 above) 151-152.

⁵² Stefiszyn (n 2 above) 386.

⁵³ FJ Mohamed 'African Union Protocol on the Rights of Women in Africa: The SOAWR Campaign' in Musa et al (n 10 above) 14.

⁵⁴ Ocran (n 9 above) 152.

⁵⁵ Stefiszyn (n 2 above) 376.

⁵⁶ DM Chirwa 'Reclaiming (wo)manity: The merits and demerits of the African Protocol on Women's Rights' 53 *Netherlands International Law Review* (2006) 1 64.

⁵⁷ F Banda 'Blazing a trail: The African Protocol on Women's Rights comes into force' 50 *Journal of African Law* (2006) 1 84.

⁵⁸ Banda 2006 (n 57 above) 72.

⁵⁹ Banda 2006 (n 57 above) 73.

⁶⁰ L Nathan 'African solutions to African problems: South Africa's foreign policy' 92 *Zeitschrift für internationale Politik* (2013) 48: 'The idea of African solutions to African problems' has become a compelling maxim of the African Union'.

rights.⁶¹ The Maputo Protocol is an expression of the African Commission on Human and Peoples' Rights' (African Commission) function under article 45 of the African Charter⁶² to devise laws and rules that have as objective to solve 'legal problems relating to women's rights and freedoms, and upon which African governments may base their legislation that may in one way or another, affect the rights of women'.⁶³

Concerning the allocation of budgetary resources to realise the rights in the Maputo Protocol, Viljoen has stated that the instrument provides for a 'hierarchy of budgetary priorities'.⁶⁴ The AU has provided for a 'hierarchy of budgetary priorities' on previous occasions too. For instance, in the Abuja Declaration on HIV/AIDS, Tuberculosis and other related Infectious Diseases of April 2001 (Abuja Declaration), member states of the AU pledged to allocate 15% of their budget for the realisation of the right to health.⁶⁵ The provisions of the Maputo Protocol also establish the legal capacity of the African Commission or the African Court on Human and Peoples' Rights (African Court) to review the resources that governments allocate for the realisation of the rights protected by the document.⁶⁶ The 'hierarchy of budgetary priorities' provided by the Maputo Protocol therefore imposes an obligation on states to prioritise resource allocation for the realisation of the rights therein.

However, the implementation of the provisions of the Maputo Protocol at the domestic level is at the mercy of the political willingness of the government in the different African countries. The lack of political will, despite the fact that a country has ratified the Maputo Protocol, can act as a challenge for the realisation of the rights therein.⁶⁷ Another challenge identified in the implementation of the provisions of the Maputo Protocol is that there are

⁶¹ CG Ngwena 'Protocol to the African Charter on the Rights of Women: Implications for access to abortion at regional level' 110 *International Journal of Gynecology and Obstetrics* (2010) 163.

⁶² Article 45(1)(b) of the African Charter: 'The functions of the Commission shall be (1) To promote Human and Peoples' Rights and in particular: (b) To formulate and lay down, principles and rules aimed at solving legal problems relating to human and peoples' rights and fundamental freedoms upon which African governments may base their legislations'.

⁶³ JD Mujuzi 'The Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa: South Africa's reservations and interpretative declarations' 12 *Law, Democracy and Development* (2008) 2 43-44.

⁶⁴ Viljoen (n 47 above) 31.

⁶⁵ Paragraph 26 of the Abuja Declaration.

⁶⁶ As above.

⁶⁷ Ngwena (n 61 above) 166.

weak institutions in African states.⁶⁸ Almost all governments have established institutions to oversee the progress made in gender equality and the extent of compliance with the Maputo Protocol.⁶⁹ Nevertheless, the efficiency of these institutions is to be questioned. Their agenda to promote gender equality is most of the times at the mercy of budgetary and resource allocations.⁷⁰

The Centre for Human Rights at the University of Pretoria (Centre for Human Rights) conducted a study concerning the impact of the Maputo Protocol in some African countries as at 2011.⁷¹ In 2016, the Centre for Human Rights did a similar study to update the previous publication and to include additional countries.⁷² Many challenges were noted in relation to the realisation of the rights in the Maputo Protocol at the domestic level in these two studies. For instance, it was noted that the judiciary made reference to the Maputo Protocol with 'reluctance' and that few courts adopted a 'progressive approach' to the document.⁷³ Furthermore, the provisions of the Maputo Protocol are 'generally unknown' and lawyers rarely make reference to them in submissions.⁷⁴ It was further highlighted that very few National Human Rights Institutions use the provisions of the African Charter or the Maputo Protocol.⁷⁵ One of the obstacles in the implementation of the Maputo Protocol is that there is a lack of 'awareness and knowledge' of the instrument.⁷⁶ This demonstrates that African countries are not exploiting all the provisions of the Maputo Protocol. This might lead to the question as to whether the provisions of the Maputo Protocol are too ambitious within an African context.

⁶⁸ S Mukasa 'Domesticating the Protocol' in Musa et al (n 10 above) 29.

⁶⁹ As above.

⁷⁰ Mukasa (n 68 above) 30.

⁷¹ Centre for Human Rights *The impact of the African Charter and Women's Protocol in selected African States* (2012) available at http://www.pulp.up.ac.za/pdf/2012_07/2012_07.pdf (accessed on 21 October 2014): The different countries studied were Benin, Burkina Faso, Cameroon, Chad, Congo, Côte d'Ivoire, Eritrea, The Gambia, Kenya, Lesotho, Mauritius, Mozambique, Niger, Nigeria, Rwanda, Senegal, Sierra Leone, South Africa and Zimbabwe.

⁷² V Ayeni *The impact of the African Charter and the Maputo Protocol in selected African countries* (2016) available at http://www.pulp.up.ac.za/pdf/2016_06/2016_06.pdf (accessed on 10 August 2016): The different countries studied were Burkina Faso, Cameroon, Côte d'Ivoire, Ethiopia, The Gambia, Ghana, Kenya, Lesotho, Malawi, Mauritius, Nigeria, Sierra Leone, South Africa, Swaziland, Tanzania, Uganda and Zimbabwe.

⁷³ Centre for Human Rights 2012 (n 71 above) 191; and Ayeni (n 72 above) 303.

⁷⁴ Centre for Human Rights 2012 (n 71 above) 192; and Ayeni (n 72 above) 307.

⁷⁵ Centre for Human Rights 2012 (n 71 above) 193; and Ayeni (n 72 above) 308.

⁷⁶ Centre for Human Rights 2012 (n 71 above) 194.

Indeed, as pointed out by Chirwa, the Maputo Protocol contains provisions that can prove to be ‘raw materials for its own failure’.⁷⁷ One of the examples he gives is concerning the right to reproductive health where a woman has the right to decide on the number and spacing of children when in the African society the decision to have children is one of the couple and not of the woman solely.⁷⁸ Nevertheless, as Chirwa further highlighted, to ensure a better protection of the rights of women across the continent, there is a need to focus on the strengths of the Maputo Protocol rather than on its weaknesses.⁷⁹ As such, African countries have to implement the provisions of the Maputo Protocol concerning budgetary allocations for women’s human rights despite the fact that the provisions can be interpreted to be contentious.

In addition to Chirwa’s point, before the adoption of the Maputo Protocol, Nsibirwa criticised the draft for being too ambitious since it might only be an additional human rights instrument only for ‘academic discourse’ and not ‘practical enforcement’.⁸⁰ Disagreeing with Nsibirwa, this research proposes that the provisions of the Maputo Protocol are more than for ‘academic discourse’. Since the entry into force of the Maputo Protocol, several African countries and institutions have adopted laws and policies that relate to the realisation of women’s human rights. Some examples in the context of the obligation to provide resources to realise women’s human rights are the adoption of SADC guidelines by the SADC and the statement made by South Africa’s Minister of Women to adopt gender budgeting.⁸¹

In a nutshell, the provisions of the Maputo Protocol aim to eradicate the vulnerabilities that women in Africa face. Its provisions, if translated into domestic laws and policies, ensure that women’s human rights are realised. However, as it is now, African states are still facing challenges in its implementation as discussed in this section. As indicated in section 1.2 above, this research explores the role of gender budgeting in the implementation of the obligation to allocate resources to realise women’s human rights. It assesses whether gender

⁷⁷ Chirwa (n 56 above) 64.

⁷⁸ Chirwa (n 56 above) 84.

⁷⁹ Chirwa (n 56 above) 96.

⁸⁰ Nsibirwa (n 50 above) 51.

⁸¹ South Africa.info ‘Call for ‘gender-responsive’ budgeting’ 3 August 2012 available at <http://www.southafrica.info/news/women-020812.htm#.VEYy7GeSyAk> (accessed on 21 October 2014).

budgeting can minimise the challenges in the implementation of the rights provided by the Maputo Protocol. The available literature on the Maputo Protocol does not make reference to gender budgeting as a means to minimise the obstacles in the realisation of women's human rights and this research intends to fill that gap. The originality of this thesis is that it proposes a practical solution for the implementation of the rights in the Maputo Protocol.

1.6.2 Relationship between budgeting and human rights

Reich stated that compared to two hundred years ago where human beings were fending for themselves, in the present times, 'most individuals are dependent on organized society for their needs'.⁸² This is so because, in Reich's words 'corn cannot be grown on sidewalks, nor can homes be built without materials and land'.⁸³ This change has triggered states' responsibilities 'to ensure the physical survival and well-being of their people'.⁸⁴

The state influences the economic sphere of a country through macroeconomic policies.⁸⁵ Macroeconomic policies are threefold including monetary policy, exchange rate policy and fiscal policy.⁸⁶ The monetary policy of a government, implemented by the Central Bank, concerns the regulation of the money supply in a country 'to achieve some combination of inflation and output stabilisation'.⁸⁷ Policy makers use the exchange rate policy to influence aggregate demand in a country: exchange rates have a direct impact on import and export and thus a change in the exchange rate will have a domino effect on the aggregate demand in the country.⁸⁸ The fiscal policy of a country relates to 'decisions that determine the

⁸² CA Reich 'The new property after 25 years' 24 *University of San Francisco Law Review* (1990) 228-229.

⁸³ Reich (n 82 above) 238.

⁸⁴ RE Robertson 'Measuring state compliance with the obligation to devote the "Maximum available resources" to realizing economic, social and cultural rights' 16 *Human Rights Quarterly* 4 (1994) 693.

⁸⁵ The Economic Times 'Macroeconomic policy' undated available at <http://economictimes.indiatimes.com/definition/macroeconomic-policy> (accessed on 25 August 2015).

⁸⁶ D Elson 'Integrating gender into government budgets within a context of economic reform' in D Budlender, et al (eds) *Gender budgets make cents: Understanding gender responsive budgets* (2002) 28; RA Musgrave *The theory of public finance: A study in public economy* (1959): These three macroeconomic policies were firstly identified by Musgrave who stated that there are three aspects of public household which are allocation, distribution and stabilisation.

⁸⁷ K Mathai 'Monetary policy: Stabilizing prices and output' undated available at <http://www.imf.org/external/pubs/ft/fandd/basics/monpol.htm> (accessed on 4 August 2016)

⁸⁸ Economics online 'Exchange rate policies' available at http://www.economicsonline.co.uk/Global_economics/Exchange_rate_policies.html (accessed on 25 August 2015).

government's budget, including the amount and composition of government expenditures and government revenues'.⁸⁹ The public budgeting process therefore falls within the fiscal policy of the government.

A budget is the 'most comprehensive statement of a government's social plans and priorities'.⁹⁰ It is the document that provides for government's revenue and the manner in which it is spending to further human rights. Government's revenue 'is the money that government thinks it will receive during the budget period' whereas governments' expenditure comprises of current and capital expenditure that the government intends to spend in that period.⁹¹ The expenditure of the government can influence the realisation of human rights in the country.

The contemporary budgeting process has been qualified as the 'authoritative qualification of resources by state'.⁹² Resources for the realisation of rights can be identified at five levels within the government namely at the level of expenditure, revenue, development assistance, debt and deficit financing, and monetary policy and financial regulation.⁹³ The current research is concerned with government expenditure that is necessary to ensure that women's human rights are realised.⁹⁴ It is important to note that government expenditure should be efficient.⁹⁵ The budget sets 'broad benchmarks' as to how the government is spending its resources.⁹⁶ Joseph Schumpeter, while reiterating the words of Rudolf Goldscheid, stated that '[t]he budget is the skeleton of the state stripped of all misleading ideologies'.⁹⁷ Hyde has argued that 'budgeting is the single most important decision-making in any governmental organization'.⁹⁸ As such, the budget mirrors the priorities of a

⁸⁹ International Encyclopedia of Social Sciences 'Macroeconomics' (2008) available at <http://www.encyclopedia.com/topic/Macroeconomics.aspx> (accessed on 25 August 2015).

⁹⁰ UNIFEM 'Gender responsive budgeting and women's reproductive rights: A resource pack' (2006) 16.

⁹¹ Budlender & Anor (n 25 above) 33.

⁹² As above.

⁹³ R Balakrishnan et al 'Maximum available resources and human rights: Analytical report' (2011) 5.

⁹⁴ As above.

⁹⁵ M Sepulveda *The nature of obligations under the International Covenant on Economic Social and Cultural Rights* (2003).

⁹⁶ D Elson et al 'Public finance, maximum available resources and human rights' in A Nolan et al (eds) *Human rights and public finance: Budgets and the promotion of economic and social rights* (2013) 22.

⁹⁷ JA Schumpeter 'The crisis of the tax state' 1954 100 (originally published in German).

⁹⁸ AC Hyde *Government budgeting: Theory, process and politics* (2002) 1.

government. The budgetary allocations of a state point out the manner in which the government is allocating its resources to realise its human rights obligations. Therefore, one may make reference to the budget to assess whether a state is allocating sufficient resources to abide by their human rights commitment.

Governments influence human rights in a country through different policies. Public services in the guise of, for example, 'schooling, health care, transport and social security', are provided to citizens in line with the achievement of 'a set of policy objectives such as universal literacy, a healthy population and reduced poverty'.⁹⁹ The budget of a country represents its policies in figures.¹⁰⁰ It is an expression of governments' priorities towards their different undertakings. Therefore, budgetary allocations must be reflective of a state's commitments towards its human rights obligations. Such an approach to budgeting has been qualified as human rights budgeting.

Human rights budgeting has been viewed as 'work that seeks to relate human rights to government budgets, and budget to human rights'.¹⁰¹ During the past years, key human rights protagonists in the guise of the UN and other human rights institutions have shown a tendency towards the adoption of standards of economic and social rights for budget analysis.¹⁰²

Elson and others have highlighted that the realisation of human rights heavily depend on resources and that 'a full realisation of human rights' requires more finance than 'the basic administration of justice'.¹⁰³ In the same vein, Saiz has stated that '[t]he effective protection of all human rights – whether civil, political, economic, social or cultural – has resource

⁹⁹ European Commission 'Briefing note: Gender budgeting: Its usefulness in programme-based approaches to aid' (2006) 9.

¹⁰⁰ E Klatzer et al 'Gender budgeting in the Constitution – A look at formal and real conditions in Austria' (2010) 48 available at http://library.fes.de/pdf-files/ipg/ipg-2010-2/05_a_buchinger_us.pdf (accessed on 4 October 2014).

¹⁰¹ A Blyberg 'The case of the mislaid allocation: Economic and social rights and budget work' 11 *SUR-International Journal on Human Rights* (2009) 6 125.

¹⁰² A Nolan 'Putting ESCR-Based Budget Analysis into Practice: Addressing the conceptual challenges' in Nolan et al (n 96 above) 41.

¹⁰³ Elson et al (n 96 above).

implications'.¹⁰⁴ In another co-authored article, Elson pointed out to the fact that human rights realisation 'requires resources as well as laws'.¹⁰⁵ Government expenditures should be 'efficient and effective' to allow an effective implementation of rights.¹⁰⁶ The budget of the government can be used to understand its 'spending priorities' and whether the state is investing enough in areas that allow for a realisation of human rights.¹⁰⁷

Thus, while formulating its budgetary policies, a government has to appreciate that the society is constructed in a manner that favours one group of individuals more than others. Budgets affect different members of the society differently and women are generally more prone to discrimination during resource allocations.¹⁰⁸ To ensure that women are not marginalised in the budgeting process, governments should ensure that their budgetary allocations have maximum impacts on women's human rights. This thesis proposes gender budgeting as a means to do so and it elaborates on the steps that states can take to ensure that their budgetary allocation of resources achieve the maximum result in line with the obligations in the Maputo Protocol. This thesis contributes to existing literature on human rights and budgeting by proposing steps that states can adopt to integrate gender budgeting in its public budgeting process.

1.6.3 Gender budgeting

Gender inequality has a domino effect on all members of the society since it shows inefficiency on behalf of the government.¹⁰⁹ Empowering women has the effect of providing countries with the possibility of a 'combination of increased productivity, improved human resources, less stress and better overall health'.¹¹⁰ There is an assumption that economic growth has a 'trickle down' effect on the human rights of the individuals in the society.¹¹¹

¹⁰⁴ I Saiz 'Resourcing rights: Combatting tax injustice from a human rights perspective' in Nolan et al (n 96 above) 78.

¹⁰⁵ R Balakrishnan & D Elson 'Auditing economic policy in the light of obligations on economic and social rights' 5 *Essex Human Rights Review* (2008) 1.

¹⁰⁶ Elson et al (n 96 above) 16.

¹⁰⁷ Elson et al (n 96 above) 22.

¹⁰⁸ E Bothale 'Gender-responsive budgeting: The case for Botswana' 28 *Development Southern Africa* (2011) 1 68.

¹⁰⁹ Elson 2002 (n 86 above) 24.

¹¹⁰ As above.

¹¹¹ Elson 2002 (n 86 above) 28.

However, the effect of economic growth on human rights is not direct and the state has to address each issue individually.¹¹²

Development in Africa is in the hands of men who are at the head of the state or at the head of the family.¹¹³ Howard has pointed out that women's human rights cannot be realised unless there are reforms within a country, including the economic sphere.¹¹⁴ She finds it preoccupying that women's status in the economic dimension in African countries is not given enough attention. Howard makes reference to the role of foreign aid in the protection of women's human rights but ignores the role of government's budget in furthering women's human rights.¹¹⁵

The expenditure aspect of fiscal policy has been identified as 'the most promising entry point for integrating a gender analysis'.¹¹⁶ The fiscal policy of the government comprises of revenues and public expenditures.¹¹⁷ Traditionally these two are included in a national budget and this policy can influence the distribution of income.¹¹⁸ The national budget is considered as a good starting point to integrate gender issues in macroeconomic policies of the government since the outcomes can be better assessed than if there is an integration of gender issues in the monetary policy.¹¹⁹

Governments might take a 'gender-blind' approach to budgeting without realising that the implementation of the policy is not done in a 'vacuum' but rather in a society where both men and women co-exist and should be beneficiaries of the policy.¹²⁰ By being 'gender-blind' some states might reinforce the inequalities that exist between men and women that is unfair

¹¹² As above.

¹¹³ RE Howard 'Women's rights and the right to development' in J Peters & A Wolper *Women's rights human rights: International feminist perspectives* (1995) 301.

¹¹⁴ As above.

¹¹⁵ Howard (n 113 above) 309.

¹¹⁶ As above.

¹¹⁷ Executive summary of IMF Policy Paper 'Fiscal policy and income inequality' (2014) available at <http://www.imf.org/external/np/pp/eng/2014/012314.pdf> (accessed on 25 August 2015).

¹¹⁸ As above

¹¹⁹ Budlender 'A global assessment of gender responsive budget initiatives' in D Budlender and G Hewitt (eds) *Gender budgets make more cents: Country studies and good practice* (2002) 85.

¹²⁰ European Commission 2006 (n 99 above) 8.

in a world where there should be more redistributive fiscal policies.¹²¹ This is also against most governments' undertaking to promote gender equality.¹²²

The 'traditional' view of the budget is that it should be 'free from value and which benefits all members of the public equally without any distinction'.¹²³ However, a number of human rights approaches to budgeting have been initiated in the past years with gender budgeting gaining 'considerable momentum'.¹²⁴ This is so because gender budgeting provides for a means through which there can be more gender equality within budgets.¹²⁵

Achieving gender equality has been one of the aims of different governments and gender budgeting is a 'strategy' to achieve that aim.¹²⁶ Gender budgeting is a 'tool' that recognises 'underlying inequalities' and provides for a redress for them through resource allocations.¹²⁷ It provides for new lenses through which the government can view its spending to promote gender equality. Gender budgeting has been identified as a means through which governments can live up to their international commitments to realise the rights of women through 'equality in the distribution, access and funding of public resources'.¹²⁸

Also known as women's budget, gender budgeting was first adopted by the Australian government in 1984¹²⁹ when the pilot Women's Budget Programme was launched.¹³⁰ Recognising that 'neither money nor budgets are gender-neutral',¹³¹ more countries have been adopting a gender approach to budgeting. Different stakeholders in these countries such as 'governments, intergovernmental organisations, development agencies, and civil

¹²¹ As above.

¹²² As above.

¹²³ S Quinn 'Gender budgeting: Practical implementation' (2008) 164 available at [https://www.coe.int/t/dghl/standardsetting/equality/03themes/gender-mainstreaming/CDEG\(2008\)15_en.pdf](https://www.coe.int/t/dghl/standardsetting/equality/03themes/gender-mainstreaming/CDEG(2008)15_en.pdf) (accessed on 8 September 2015).

¹²⁴ Quinn (n 123 above) 165.

¹²⁵ As above.

¹²⁶ C Randzio-Plath 'Gender budgeting and good governance' in K Prestin (ed) 'Gender budgeting and democratic governance: Experience from Africa and Europe' (2010) 3.

¹²⁷ Bridge (Development – Gender) 'Gender and budgets: Overview report' (2003) 5.

¹²⁸ E Villagomez 'Gender responsive budgets: Issues, good practices and policy options' (2004) 4.

¹²⁹ R Sharp and R Broomhill 'Budgeting for equality: The Australian experience' 8 *Feminist economics* (2002) 1 26.

¹³⁰ As above.

¹³¹ As above.

society groups' have been using gender budgeting as a 'central part of their strategy to advance gender equality'.¹³²

According to Alami, gender budgeting 'takes the debate on women's rights beyond a subjective understanding of gender equality and women's empowerment'.¹³³ Proponents of gender equality are often faced with the dilemma that governments rarely take concrete actions to give effects to their commitments. In this event, gender budgeting 'translates demands to address gender gaps in development and deficiencies in the achievement of women's rights into objective targets of public policy making with measurable results'.¹³⁴

It is to be noted the gender budgeting is not just the development of a 'methodology' to approach the budgetary system. Alami has referred to gender budgeting as follows:¹³⁵

...a long-term process that builds national ownership and political support, develops institutional capacities for results oriented planning and budgeting and establishes public finance systems that are designed with equity and effectiveness in mind.

As such, the adoption of gender budgeting is not only a budgeting method but it is a continuous process that is aimed towards a more efficient allocation of resources towards the realisation of women's human rights. It is not a one-time exercise but has to be integral to the budgeting process.

Gender budgeting can be introduced in public budgets in two ways:¹³⁶ The government can either identify one or more area(s) that can benefit from more resource allocation or it can systematically examine all the items in the budget so that they can have more gender equality. Both these approaches require the prioritisation of 'policies according to their relevance to gender' as a 'necessary first step'.¹³⁷

¹³² G Hewitt 'The Commonwealth Secretariat: The role of external agencies' in Budlender & Anor (n 119 above) 13.

¹³³ N Alami 'Institutionalizing gender responsive budgeting: Lessons learnt from UNIFEM programmes' (2008) 3 available at http://www.gender-budgets.org/joomdocuments/other-GB-programmes/Institutionalizing%20GB%20_%20paper%20by%20Alami.pdf (accessed on 6 October 2014).

¹³⁴ As above.

¹³⁵ Alami (n 133 above) 2.

¹³⁶ Quinn (n 123 above) 176-179.

¹³⁷ Quinn (n 123 above) 180.

Gender budgeting can serve a better purpose if individuals external to the budgeting process can access information relating to the budgeting process. More accountability and transparency in the budgeting process is therefore required. Spain, which has adopted a law that requires the presentation of a Gender Impact Report of the budget that is presented to the Parliament,¹³⁸ can be used as an example of how transparency and accountability are central to the process.

Gender budgeting has also been criticised, although most of the literature focuses on its potential. Most publications on gender budgeting refer to the process and to the challenges in the implementation of gender budgeting without laying emphasis on the critiques. Referring to the experiences of different countries, Mishra and Sinha have critically assessed the gender budgeting system in India to come up with some criticisms.¹³⁹ They make reference to the challenges of gender budgeting along with the criticisms of gender budgeting. This research highlights the two major criticisms identified although most of Mishra and Sinha's work refer to challenges.

The first drawback that they identified relate to methodological errors.¹⁴⁰ They made reference to situations where budget statements would refer to allocations to women whereas such allocations would benefit both men and women. Such methodological errors counter gender budgeting initiatives since they do not reflect the reality. Secondly, the lack of monitoring and auditing of gender budgeting initiatives were considered as a criticism of gender budgeting initiatives in India.¹⁴¹ Mishra and Sinha have pointed out that such a situation would mean that one cannot assess the impact of gender budgeting initiatives. As such, there would be no means through which one can know whether the gender budgeting initiatives have been successful.

¹³⁸ Quinn (n 123 above) 181.

¹³⁹ Y Mishra & A Sinha 'Gender responsive budgeting in India: What has gone wrong?' *Economic and Political Weekly* XLVII/17 (2012) available at <http://gender-financing.unwomen.org/~media/files/un%20women/grb/resources/grb%20in%20india%20what%20has%20gone%20wrong.pdf> (accessed on 17 June 2016).

¹⁴⁰ Mishra & Anor (n 139 above) 52.

¹⁴¹ As above.

This research puts forward that the above two criticisms can be avoided if governments follow the steps of gender budgeting processes as discussed in chapter 4 below. A proper gender budgeting analysis takes into account whether the resource allocation process is tackling the vulnerabilities that women face instead of putting men and women in the same basket. Furthermore, chapter 4 discusses the tools for assessing gender budgets. Such tools could counterattack the criticism of the lack of monitoring and auditing.

The available literature on gender budgeting therefore emphasises the benefits of gender budgeting and the challenges in its implementation. The scholars do not view gender budgeting as a policy which has adverse effects since their criticisms are limited. They rather believe that gender budgeting is a tool which can assist in the realisation of women's human rights once the challenges are overcome. This research relies on the above views to put forward gender budgeting as a means for states to implement their obligation to provide resources to realise women's human rights. It considers gender budgeting as a policy which will favourably influence spending on women's human rights. As such, the area of originality of this thesis is that it analyses gender budgeting as a means to implement the budgetary allocation provisions of the Maputo Protocol.

1.7 Assumptions

The current study rests on several assumptions. Firstly, it presumes that women face vulnerabilities that men do not as discussed in section 1.5 above. For instance, men do not go through pregnancy and do not require 'pre-natal, delivery and post-natal health and institutional services'¹⁴² and therefore states have to invest only on women concerning this vulnerability. As a result, women need more resource allocation in the budget.

Secondly, it assumes that there is a positive relationship between resource allocation and the realisation of women's human rights. The articles of the Maputo Protocol that impose budgetary obligations on states are the basis of this assumption. The fact that the instrument requires states to allocate budgetary resources to realise women's human rights implies that

¹⁴² Article 15(2)(b) of the Maputo Protocol.

it considers resource allocation as an important component of realisation of the rights therein.

The third assumption is that the criticisms of gender budgeting can be limited if the process is properly done as discussed in section 1.6.3 above. It presumes that the gender budgeting process will have a positive impact on women's human rights if states take into account all the steps in gender budgeting instead of adopting random gender budgeting initiatives.

1.8 Significance of the study

The primary aim of the current thesis is to ensure a better implementation of women's human rights on the continent and it is significant for African governments, the AU, sub-regional organisations and civil society organisations (CSO) that concentrate on women's human rights.

It has been more than 10 years since the adoption of the Maputo Protocol and as stated above, women's human rights on the continent still continue to be violated. Very often, scarce resources act as an escape route for the non-implementation of the rights protected by the Maputo Protocol. The Maputo Protocol clearly imposes an obligation on states to provide budgetary allocations to implement the rights protected therein. Despite the adoption of different gender budgeting initiatives, no African country has completely integrated gender budgeting in its budgeting processes. This can be the result of a lack of gender budgeting framework and guidelines at the level of the AU. By making reference to the SADC guidelines and the South African initiatives, this research intends to present a framework within which gender budgeting initiatives could operate in Africa.

The study is significant for African governments since they argue that they have resources constraints that prevent them from fully realising women's human rights in their country. Some African countries have still not adopted any gender budgeting initiatives. The present research studies how the AU can draw their attention to the concept. It presents gender budgeting as a concept that ensures the recognition of the vulnerabilities that women face and that provides efficient allocation of resources to eradicate same.

Although the Maputo Protocol contains provisions which can be used as the basis for the consideration of resource allocation to women when preparing budgets, it does not specifically expand upon the steps that the government should take to fulfil the obligation to provide adequate resources for the realisation of the women's human rights. State reporting guidelines adopted by the African Commission require states to report on their gender budgeting initiatives and on the manner in which they have implemented the obligation to allocate budgetary resources to realise women's human rights.¹⁴³ However, they do not provide any details on how a country should proceed towards the adoption of gender budgeting initiatives. The study is significant for the AU since it can be used as a tool to explain to African states the scope and extent of the articles in the Maputo Protocol that require them to provide budgetary resources to realise women's human rights.

In the fifth chapter, this research investigates into how the AU can ensure that states adopt gender budgeting to abide by their obligation to provide resources to realise women's human rights. In the Solemn Declaration on Gender Equality in Africa,¹⁴⁴ states agreed to 'increase budgetary allocations' in sectors of malaria, HIV/AIDS, tuberculosis and other related infectious diseases.¹⁴⁵ The Maputo Protocol extends budgetary allocations to all rights protected by the Maputo Protocol. This section can be relevant for the AU to understand its role to ensure that African states adopt gender budgeting to provide resources to realise women's human rights.

The research is of utmost significance to CSOs. This is so because CSOs are involved in assessing the budget to determine whether it takes into account the vulnerabilities that women face. As it is, they have to rely on the Maputo Protocol to find the basis for gender budgeting in the different countries. Countries generally have laws concerning the budgeting process without laying emphasis on addressing gender inequality. If a country has been

¹⁴³ AU 'Guidelines for state reporting under the Protocol to the African Charter on Human and Peoples' rights on the Rights of Women in Africa' available at http://www.chr.up.ac.za/images/files/documents/ahrdd/theme02/womens_protocol_stae_reproting_guidelines.pdf (accessed on 27 October 2014).

¹⁴⁴ Solemn Declaration on Gender Equality in Africa adopted by member states of the AU during the Third Ordinary Session of the AU Assembly 6-8 July 2004.

¹⁴⁵ Paragraph 1 of the Solemn Declaration on Gender Equality.

gender-blind while preparing its budget, CSOs involved in assessing the budget from gender lenses can engage in sensitisation and advocacy campaigns.

Moreover, while reporting under the African Charter and the Maputo Protocol, states are required to demonstrate how they have implemented the provisions of the Maputo Protocol.¹⁴⁶ As at August 2016, six African countries have reported under the Maputo Protocol namely Côte d'Ivoire, Malawi, Senegal, Nigeria, South Africa and Namibia.¹⁴⁷ Only South Africa, Malawi and Namibia followed the reporting guidelines under the Maputo Protocol.¹⁴⁸ None of these reports, however, clearly states how the country has allocated its budget to give effect to the rights protected by the Maputo Protocol. The current study lays emphasis on the realisation of women's rights around Africa through the adoption of gender budgeting. It is significant for both government officials who prepare state reports and for CSOs who submit shadow reports to the African Commission.

1.9 Method

This study qualitatively analyses the adoption of gender budgeting to implement the obligation to provide resources to realise women's human rights in Africa. Firstly, a desktop research has been carried out to review the literature concerning the Maputo Protocol, budgeting and human rights, and gender budgeting. This literature review is also used for the third chapter that seeks to establish the relationship between gender budgeting and the realisation of women's human rights.

Secondly, global, regional and sub-regional laws are studied to understand the existing obligations that states have to allocate sufficient resources to realise women's human rights. Primary sources include both treaties and soft law of the UN and the AU. The website of the Universal Human Rights Index has been used with the view of identifying general comments/general recommendations, and the concluding observations which make

¹⁴⁶ Article 26(1) of the Maputo Protocol: 'States Parties shall ensure the implementation of this Protocol at national level, and in their periodic reports submitted in accordance with Article 62 of the African Charter, indicate the legislative and other measures undertaken for the full realisation of the rights herein recognised.'

¹⁴⁷ African Commission 'State reporting' available at <http://www.achpr.org/states/> (accessed on 18 August 2016).

¹⁴⁸ State reporting guidelines (n 143 above).

reference to allocation of resources to realise women's human rights. As for the AU's provisions concerning budgetary allocation of resources towards women's human rights, the websites of the AU and the African Commission have been consulted. Secondary sources such as scholarly writings, journal articles and reports are also referred to.

The study thirdly analyses the different theories to understand which theories influence the adoption of gender budgeting for women's human rights. In particular, the theory of fiscal sociology and the feminist democratic theory have been expanded upon since they are the two theories that provide the rationale for gender budgeting.

Fourthly, despite the fact that the thesis generally draws experience from different countries, it focuses on the SADC guidelines and the South African initiatives. The thesis assesses these two against the main elements of gender budgeting which are elaborated upon in chapter three. This section identifies the shortcomings of the SADC guidelines and the South African initiatives.

1.9.1 South Africa as a case study

This research studies whether there can be a better realisation of women's human rights in Africa if states adopt gender budgeting as a means to allocate sufficient resources to realise women's human rights. As a first instance, the research studies the budgeting process of each country that has ratified the Maputo Protocol to know which African countries have included a gender aspect during fiscal allocations. It was noted that most of the Maputo Protocol ratifying countries have at one point or the other had gender considerations while budgeting.¹⁴⁹ For example, countries like Ghana,¹⁵⁰ Uganda,¹⁵¹ Kenya¹⁵² and South Africa,¹⁵³

¹⁴⁹ The researcher used the internet to find out about gender budgeting initiatives in the different African countries that have ratified the Maputo Protocol.

¹⁵⁰ P Agyare-Kwabi Policy brief 'Gender, social inclusion (GESI) and education in Ghana' (2013) available at http://www.starghana.org/userfiles/files/publications/STAR-Ghana_GESI%20Policy%20Brief_Education%20Final.pdf (accessed on 13 October 2014).

¹⁵¹ D Budlender 'Gender budgets: What's in it for NGOs?' 10 *Gender and development* (2002) 3 84.

¹⁵² Society for International Development Policy brief 'Gender responsive budgeting in Kenya' (2012) available at http://www.sidint.net/docs/GenderResponsiveBudgeting_PolicyBrief.pdf (accessed on 13 October 2014).

¹⁵³ Budlender 2002 (n 151 above) 84.

Tanzania,¹⁵⁴ Senegal¹⁵⁵ and Namibia¹⁵⁶ amongst others have at one point or the other, given focus to gender budgeting in their budgeting processes.

Till now, 37 countries have ratified the Maputo Protocol¹⁵⁷ and due to time and resources constraint, this research cannot look into all 37 of them. As a result, South Africa was identified as a case study. The rationale for choosing South Africa is that in addition to being the first African country to have adopted gender budgeting in 1995,¹⁵⁸ it was also one of the first countries in the world to have adopted gender budgeting initiatives.

Since the first gender budgeting initiatives in South Africa, there had been numerous steps taken to advance the human rights of women but nevertheless, 'women still bore a disproportionate burden of the triple challenges of poverty, inequality and unemployment'.¹⁵⁹ This might explain why the gender budgeting initiatives in South Africa lost their momentum and as it is now, gender budgeting initiatives do not have any consistency. They take the form of sporadic initiatives. However, the Minister of Women announced that there is the need to adopt gender budgeting in line with its obligations to realise women's human rights.¹⁶⁰

South Africa provides this study the opportunity to study the challenges that gender budgeting initiatives face since it is a country that, unfortunately, had a good start with gender budgeting initiatives, with them being currently scarce. It allows the analysis to draw recommendations for future gender budgeting initiatives.

¹⁵⁴ EH Mhina 'Gender budgeting experiences from Tanzania' (2007) available at http://www.un.org/womenwatch/daw/egm/financing_gender_equality/ExpertPapers/EP5%20Mhina.pdf (accessed on 13 October 2014).

¹⁵⁵ European Commission 2006 (n 99 above) 22.

¹⁵⁶ Republic of Namibia 'Beijing Declaration and Platform for Action (1995) and the outcome of the twenty-third special session of the General Assembly' (2000) available at http://www.unwomen.org/~media/headquarters/attachments/sections/csw/59/national_reviews/namini_a_review_beijing20.ashx (accessed on 13 October 2014).

¹⁵⁷ AU (n 21 above).

¹⁵⁸ ILO Bureau for gender equality 'Discussion paper for the ILO staff on the relevance of gender-responsive budget initiatives in promoting gender equality in decent work country programmes' 5.

¹⁵⁹ South Africa.info (n 81 above).

¹⁶⁰ As above.

1.9.2 SADC guidelines

One of the objectives of this research is to formulate a framework that African countries could consider adopting for the integration of gender budgeting in their budgeting processes. One organisation that has concentrated on gender budgeting as a step to allocate sufficient resources to realise women's human rights is the SADC. SADC has developed guidelines on gender budgeting in 2014.¹⁶¹ These guidelines have drawn inspiration from successful gender budgeting experiences¹⁶² and provide for a framework to 'enhance' SADC member states'¹⁶³ initiatives in the adoption of gender budgeting. This research analyses the SADC guidelines. The framework adopted in this research is partially inspired from the SADC guidelines. This is so because they are the most elaborate and comprehensive guidelines at not only the continental level, but also at the global level.

1.10 Limitations

The current research focuses on the implementation of the provisions in the Maputo Protocol that require states to provide budgetary resources to realise the rights therein. Although the laws of the UN¹⁶⁴ concerning resource allocation for women's human rights are studied, there is very little focus on the Convention on the Elimination of all forms of Discrimination Against Women (CEDAW). This is so because the Maputo Protocol already contains the rights contained in the CEDAW and it even has additional rights not covered by the CEDAW. Moreover, the Maputo Protocol contains express provisions which require states to allocate budgetary resources to realise the rights therein. Additionally, the laws of sub-regional organisations are studied but focus is on the SADC since the latter, similar to the AU, provides for budgeting obligations to realise women's human rights.¹⁶⁵ The SADC has furthermore laid emphasis on gender budgeting. Since there is a constraint in terms of the word limit and time, it is more appropriate to explore the implementation of the provisions

¹⁶¹ Available at https://www.sadc.int/files/8914/4681/2781/SADC_GUIDELINES_ON_GENDER_RESPONSIVE_BUDGETING.pdf (accessed on 5 May 2016).

¹⁶² SADC guidelines 8-9.

¹⁶³ SADC guidelines 8.

¹⁶⁴ Sections 2.3.2 and 2.3.3 below.

¹⁶⁵ Section 2.5.1 below.

of the Maputo Protocol and the SADC Gender Protocol. As a result, only the AU's and SADC's role in ensuring the adoption of gender budgeting in African countries are studied.

Furthermore, concerning the study of the provisions at the global, regional and sub-regional level that relate to budgetary allocations to realise women's human rights or to gender budgeting, the research expands only on those organisations which provide for women's human rights and budgetary allocations to realise women's human rights. Hence, this study is exclusive of global, regional and sub-regional treaties and soft law that do not relate to budgetary allocation for women's human rights.

This study is also limited in that it concerns only the realisation of women's human rights through budgetary allocations. It does not, for instance, assess societal norms and peoples' mind-sets that impede upon the realisation of women's human rights.

Furthermore, gender budgeting can be considered from the revenue perspective since it also assesses how the revenue policies of the government affect women's human rights.¹⁶⁶ For the purposes of this research, only the expenditure part of the gender budgeting process is studied. This is so because the research is based on the obligation to allocate sufficient budgetary resources to realise women's human rights and this concerns the expenditure aspect of gender budgeting. As such, studying gender budgeting from the revenue perspective would not contribute towards answering the research question. As a result, the study of South Africa focuses on the expenditure aspect of the gender budgeting initiatives.

The budget process is done at different levels of government namely, national, provincial and municipal. The current study focuses on national expenditure and studies the national budgeting initiatives instead of the budgeting initiatives at all levels of government. This is so because national budgeting processes affect the provincial and municipal budgeting processes. It is assumed that gender budgeting at the national level will eventually have a trickle-down effect on provincial and municipal budgets. Furthermore, there are different dynamics for budgeting at the different levels which would require even more extensive analysis that the current research cannot afford due to time and word constraint.

¹⁶⁶ Section 3.2.1 below.

Finally, concerning the case study of South Africa, the research does not carry out a study on the impact of gender budgeting initiatives in South Africa. It relies on existing literature concerning the impacts of gender budgeting initiatives. As will be noted section 4.2.3 below, such literature exists only in relation to the joint initiatives of CSOs and Parliament. As such, the study does not cover the impact of gender budgeting initiatives at the departmental levels.

1.11 Structure

This research comprises of six chapters.

The first chapter, which is this one, is the introduction to the research. It is divided into different parts that comprise of the background, the research problem, the research questions, the definition of terms, a literature review of the key issues of the research, the assumptions, the significance of the study, the method adopted, the limitations to the study and the structure of the research.

The second chapter studies the global, regional and sub-regional framework to analyse the provisions that make reference to budgetary allocations to realise women's human rights. It studies both treaties and soft law.

The third chapter studies the relationship between gender budgeting and the provision of sufficient budgetary resources to realise women's human rights. It elaborates on the theories of fiscal sociology, the feminist legal theory and the feminist democratic approach. While so doing, it expands on the budgeting process, demonstrates the lack of gender focus in the budgeting process and elaborates on the concept of gender budgeting. The public budgeting process is expanded upon since the current study attempts to answer a legal question through resource allocation, which is in the field of finance. It is therefore important to elaborate on the link between the public budgeting process and human rights realisation before analysing the concept of gender budgeting.

The fourth chapter then assesses how African states can learn from the challenges of the SADC guidelines and the South African initiatives. It expands on the South African gender

budgeting experiences and the challenges presented. It further elaborates on the SADC guidelines with the view of finding deficiencies therein. This is done with the view of proposing a framework that African states could adopt with the view of integrating gender budgeting in their public budgeting process.

The fifth chapter studies the roles that the AU and the SADC have in the adoption of gender budgeting in different African countries. It studies the different organs of each institution that can include a gender budgeting mandate.

The last chapter is the conclusion. It combines the different findings of the other chapters to provide recommendations for the adoption of gender budgeting to allocate sufficient budgetary resources to realise women's human rights in Africa.

CHAPTER TWO: AFRICAN STATES' OBLIGATIONS TO PROVIDE BUDGETARY RESOURCES TO REALISE WOMEN'S HUMAN RIGHTS

2.1 Introduction

Chapter one proposed to assess the role of gender budgeting in providing sufficient budgetary resources to realise women's human rights in Africa. It provided several sub-questions which would contribute towards answering the main question. It indicated that the first sub-question to be answered relates to the obligations of African states to provide budgetary resources to realise women's human rights. Establishing the obligations of states to provide sufficient budgetary resources to realise women's human rights in Africa enables this thesis to present gender budgeting as a means to do so. It is important to establish such obligations since they are used as the basis to advocate for gender budgeting.

The current chapter studies the global, regional and sub-regional laws that impose an obligation on states to provide budgetary resources to realise women's human rights. It also expands on the soft law and recommendations of global, regional and sub-regional bodies that make reference to the allocation of budgetary resources to realise women's human rights. It starts with the obligations that African states have *vis-à-vis* women's human rights and what is required of states to realise women's human rights. Having established that the allocation of resources is central for states to realise their human rights obligations, this chapter studies the existing laws at the global, regional and sub-regional level. At the global level, there is firstly an analysis of the provisions that relate to a human rights approach to public budgeting and then, secondly, a study of international law and allocation of sufficient budgetary resources to realise women's human rights.

Thereafter, the African Union (AU) and budgetary allocation for the realisation of women's human rights is studied. In this section, there is firstly an assessment of declarations adopted by Heads of states in relation to gender budgeting and then, secondly, an analysis of the treaties of the AU, and the soft law of the African Commission on Human and Peoples' Rights (African Commission) and those of the African Committee of Experts on the Rights and Welfare of the Child (African Children's Committee). The most important document studied

is the Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa (Maputo Protocol) since not only is it the treaty which focuses on women's human rights at the continental level, but it also contains express budgetary provisions to realise women's human rights.

Sub-regional organisations in Africa have also adopted treaties and frameworks that concern both the allocation of budgetary resources to realise women's human rights and gender budgeting. Section 2.5 of this chapter elaborates on those treaties and soft law to understand the provision of budgetary allocations to realise women's human rights at the sub-regional levels.

The last section of this chapter is the conclusion where there is a summary of the findings of the different sections. The conclusion tries to categorise the provisions at the different levels that, in addition to imposing an obligation on states to provide budgetary resources to realise women's human rights, recommend on how to proceed with the allocation of sufficient budgetary resources to realise women's human rights.

2.2 African states' obligations *vis-à-vis* women's human rights

African states have ratified several human rights documents that make reference to women's human rights. Gender budgeting, according to the theories elaborated in chapter three, can give effect to those women's human rights. Before proceeding to the provisions of the laws that require states to allocate sufficient budgetary resources to realise women's human rights, there is a need to establish the obligations that states parties have *vis-à-vis* women's human rights once they have ratified a treaty. This section investigates the obligations that states have once they have ratified a treaty and it studies the obligations to respect, to protect, to promote and to fulfil.¹ These obligations were initially discussed by Eide who presented the three types of obligations that a state has.²

¹ *Social and Economic Rights Action Centre (SERAC) and Another v Nigeria* (2001) AHRLR 60 (ACHPR 2001) paragraph 44.

² A Eide 'The human right to adequate food and freedom from hunger' (1987) available at <http://www.fao.org/docrep/w9990e/w9990e03.htm> (accessed on 6 May 2016): Eide had initially identified 3 levels of obligations which include the obligations to respect, to protect and to fulfill.

The ratification of a global or regional treaty requires a state party to take steps to realise the rights therein. This section discusses the obligations that African states have to ensure that they provide budgetary resources to give effect to women's human rights. While so doing, the African Commission case of *SERAC v Nigeria*³ is referred to since it is a case at the African Commission level that expands extensively on the different obligations of states. This section makes reference to a case law instead of academic and scholarly writings to demonstrate what human rights bodies expect from states in practice.

Like Eide, the African Commission discussed only the obligations to respect, to protect and to fulfil. It considered the obligation to promote to overlap with the obligation to protect and the obligation to fulfil.⁴ The following paragraphs discuss how the three different obligations apply to women's human rights.

The obligation to respect implies that there should not be any interference 'in the enjoyment of all fundamental rights'.⁵ The state 'should respect right-holders, their freedoms, autonomy, resources, and liberty of their action'.⁶ Concerning the human rights of women, a state has the obligation to ensure that its policies and programmes do not encroach upon women's human rights. For instance, if the law provides for the free movement of women but there are policies that require the woman's guardian in the form of a close male relative to sign a letter of approval for her to move around, then the state is not respecting its obligations to respect women's human rights. The state must therefore consider an amendment in the law and it has to reflect the budgetary allocation to the relevant institution that will undertake the process of amending conflicting laws.

The state then has the duty to protect women from violations of their rights by third parties. This is done through the enactment of laws and through ensuring that there are effective remedies in the event someone infringes the laws.⁷ The state needs to 'take measures to protect beneficiaries of the protected rights against political, economic and social

³ *SERAC* (n 1 above).

⁴ *SERAC* (n 1 above) paragraphs 46 and 47.

⁵ *SERAC* (n 1 above) paragraph 45

⁶ As above.

⁷ *SERAC* (n 1 above) paragraph 46.

interferences'.⁸ One example of the obligation to protect women's human rights is the enactment of laws that provide for the legal age of marriage to be 18.⁹ This will ensure that children are not married off prematurely and that those who force children to get married face legal sanctions. The objective of such legislation is to ensure that other citizens do not infringe the rights enjoyed by girls.¹⁰ The enactment of legislation also ensures that the state is promoting women's human rights. Protecting women from third parties necessitates resources on behalf of the government. For instance, if a new law is being considered to increase the legal age of marriage to 18, the state needs to invest in officials working on the law and on resources related to the passing of the law in the parliament. Furthermore, in the guise of the obligation to promote, states need to put in place policies and programmes of action to popularise the law and this requires financial resources.

The African Commission merges the obligation to fulfil and the obligation to promote stating that they have common characteristics.¹¹ According to the African Commission, the obligation to fulfil 'is more of a positive expectation on part of the State to move its machinery towards the actual realization of the rights'.¹² A state is required 'to adopt appropriate legislative, administrative and other measures' to realise human rights to abide by its obligation to fulfil.¹³ To be able to realise a right, the state has to allocate resources towards it. For instance, to prevent maternal mortality in the context of the right to health and the right to life of women, the state has to allocate resources to the Ministry of Health. The Ministry of Health will in turn invest into the upgrade of existing facilities or in the setting up of new facilities that will ensure safer deliveries. Some general comments of the United Nations (UN) Committee on Economic, Social and Cultural Rights (ESCR Committee) have

⁸ As above.

⁹ Article 6(b) of the Maputo Protocol: 'States Parties shall ensure that women and men enjoy equal rights and are regarded as equal partners in marriage. They shall enact appropriate national legislative measures to guarantee that ... the minimum age of marriage for women shall be 18 years'; and article 21(2) of the African Children's Charter: 'Child marriage and the betrothal of girls and boys shall be prohibited and effective action, including legislation, shall be taken to specify the minimum age of marriage to be 18 years and make registration of all marriages in an official registry compulsory.'

¹⁰ The provisions of the Maputo Protocol extend to girls – Article 1(k) of the Maputo Protocol: "Women" means persons of female gender, including girls'.

¹¹ *SERAC* (n 1 above) paragraph 47.

¹² As above.

¹³ O De Schutter *International human rights law: Cases, materials and commentaries* (2010) 461.

clearly stated that the obligation to fulfil requires budgetary measures.¹⁴ There will be a violation of the obligation to fulfil in the event there is ‘insufficient expenditure or misallocation of public resources which results in the non-enjoyment of the right to health by individuals or groups’.¹⁵

Therefore, the different levels of obligations that a state has require it to allocate sufficient budgetary resources to realise women’s human rights. This might explain why different global, regional and sub-regional provisions make reference to budgetary allocations to realise the rights provided by different treaties.

2.3 International human rights law and provision of budgetary resources to realise women’s human rights

The UN has 193 members,¹⁶ out of which 54 are African states.¹⁷ The UN has adopted various human rights instruments that refer to budgetary allocations to realise human rights and some of them, as expanded upon below, concern the human rights of women and the provision of financial resources to realise those human rights. The following section studies the extent to which a state has to allocate its financial resources so that women’s human rights protected by UN instruments are realised. This section is important since it constructs the framework for the assessment of what amounts to ‘sufficient budgetary resources’.

¹⁴ General Comment 14 of the ESCR Committee on article 12 of the ICESCR ‘The right to the highest attainable standard of health’ adopted during its 22nd session in 2000 E/C.12/2000/4 paragraph 33; General Comment 17 of ESCR Committee on article 15(1)(c) of the ICESCR ‘The right of everyone to benefit from the protection of the moral and material interests resulting from any scientific, literary or artistic production of which he or she is the author’ adopted during its 35th session in 2005 E/C.12/GC/17 paragraph 28; General Comment 18 of ESCR Committee on article 6 of the ICESCR ‘The right to work’ adopted during its 35th session in 2005 E/C.12/GC/18 paragraph 22; and General Comment 21 of ESCR Committee on article 15(1)(a) of the ICESCR ‘Right of everyone to take part in cultural life’ adopted during its 43rd session in 2009 E/C.12/GC/21 paragraph 48.

¹⁵ General Comment 14 of the ESCR Committee (n 14 above) paragraph 52; General Comment 15 of ESCR Committee on articles 11 and 12 of the ICESCR ‘The right to water’ adopted during its 29th session in 2003 E/C.12/2002/11 paragraph 44(c).

¹⁶ UN website ‘What are member states?’ available at <http://www.un.org/depts/dhl/unms/whatisms.shtml> (accessed on 2 June 2015).

¹⁷ UN website ‘United Nations regional groups of member states’ available at <http://www.un.org/depts/DGACM/RegionalGroups.shtml> (accessed on 2 June 2015)

2.3.1 Measuring states' compliance with the obligation to realise women's human rights

State's compliance with its global, regional and sub-regional obligations to realise women's human rights can be assessed by studying whether the right in question has been realised. International mechanisms have developed several yardsticks to determine such realisation. This thesis makes reference to two such yardsticks (the yardsticks to measure compliance) that have been developed in the area of the right to education and the right to health. The reason for merging these two is that both make reference to more or less the same yardsticks except for one component. Moreover, since the study concerns all women's human rights, this thesis does not want to limit itself to one set of yardsticks. The first one relates to the availability, accessibility, adequacy and adaptability (4-As)¹⁸ of the rights in question which were developed in the context of the right to education. The second set of assessment consists of an analysis of the availability, accessibility, acceptability and quality (3As and Q) of the services which were developed in the context of the right to health.¹⁹ The difference between the two yardsticks to measure compliance is that while the one developed in the context of the right to education makes reference to adaptability, the other one makes reference to quality. This thesis makes reference to both adaptability and to quality. It considers that they are both important in determining whether a right has been realised. Therefore, the thesis makes reference to five components to determine whether a state has complied with a right in question

It is to be noted that these measures are mostly used in the area of socio-economic rights and their application to civil and political rights is still questioned.²⁰ However, some civil and

¹⁸ Preliminary report of the former Special Rapporteur on the right to education submitted to the Commission on Human Rights at its 55th session in 1999 E/CN.4/1999/49 available at <https://documents-dds-ny.un.org/doc/UNDOC/GEN/G99/101/34/PDF/G9910134.pdf?OpenElement> (accessed on 4 August 2016): To demonstrate the state obligations concerning the realisation of the right to education, the report came up with the 4-A's formula; and General Comment 13 of ESCR Committee on article 13 of the ICESCR 'The right to education' adopted during its 21st session in 1999 E/C.12/1999/10 paragraph 6 available at <http://www1.umn.edu/humanrts/gencomm/escgencom13.htm> (accessed on 26 February 2015): expanded upon the 4-As.

¹⁹ General Comment 14 of the ESCR Committee (n 14 above).

²⁰ De Schutter (n 13 above) 241.

political rights can be assessed according to the yardsticks to measure compliance since they also require budgetary allocations.

In terms of availability, the policies and programmes in place by the government should be 'available in sufficient quantity within the jurisdiction of the state party'²¹ to the women. For instance, in the context of maternal mortality rate, the state has the obligation to ensure that there is availability of the required delivery equipment and of experienced personnel in health centres across the country. The state has to take into account the financial implications of the above measures and has to provide for this expenditure in its budget.

Accessibility implies that the service should be 'accessible to everyone, without discrimination' within the jurisdiction of the state and accessibility is achieved when there is non-discrimination, physical accessibility, economic accessibility²² and information accessibility.²³ In the context of women's access to education, for example, the state has to ensure that the law prohibits discrimination on the basis of sex while accessing education. At the same time, it has to ensure that schools are set up in areas that are close to communities so that the girl child faces no challenge to go to school. The state has to ensure that there is no school fee so that the girl child who comes from a poor background can have access to education because often in a poor household boys have priority in such cases. Moreover, the state has to ensure that the girl child can access information about the different options that are available to her to attend school. The above measures referred to require the state to spend and therefore require resource allocation in the public budget.

The service that is being provided by the state has to be in a form that is accepted by the citizens.²⁴ For instance, the services concerning education will not be considered as acceptable by women if the language used to instruct the women is foreign to them and those concerning health will not meet the requirement of acceptability if they do not respect medical ethics. The state has to ensure that the education provided is in a language that is

²¹ General Comment 13 of the ESCR Committee (n 18 above) paragraph 6(a); General Comment 14 of the ESCR Committee (n above) paragraph 12(a).

²² General Comment 13 of the ESCR Committee (n 18 above) paragraph 6(b).

²³ General Comment 14 of the ESCR Committee (n 14 above) paragraph 12(b).

²⁴ General Comment 14 of the ESCR Committee (n 14 above) paragraph 12(c).

understood. To do so it either has to provide language courses for instructors who use a foreign language or it has to provide training courses for persons who are already conversant with the language. The state will be required to include this additional cost when allocating expenditure to the Ministry of Education so that the latter can undertake the above measures.

Adaptability means that the service 'has to be flexible so it can adapt to the needs of changing societies and communities and respond to the needs' of the people 'within their diverse and cultural settings'.²⁵ The right to education can be used to demonstrate adaptability. In some communities, girls still have the traditional role of looking after the family and doing the household chores. The government can come up with programmes where it provides education for the girl child in the hours where she is expected to be free from her household duties. This will require the state to pay additionally for resource persons who will undertake that task and this will require budgetary allocations.

Finally, the facilities, goods and services that lead to the realisation of the right in question have to be of good quality.²⁶ For instance, in the context of the right to reproductive health, the service will not be considered to be of good quality if the person assisting in child birth does not have any training on the matter. To ensure that a good quality of people assisting in child birth, the government will have to set up training programmes that will require financial resources.

The yardsticks to measure compliance are important for the study of a human rights approach to public budgeting, including gender budgeting, since budget framers can use them as a yardstick to allocate their resources to different sectors. As can be noted from the above discussion, while ensuring that they are abiding by all the yardsticks, states have to incur expenditure. Therefore resource allocation at the national level needs to ensure that the yardsticks to measure compliance are respected.

In relation to women's human rights, gender budgeting assesses the responsiveness of the expenditure on women's human rights. Gender budgeting therefore already considers

²⁵ General Comment 13 of the ESCR Committee (n 18 above) paragraph 6(d).

²⁶ General Comment 14 of the ESCR Committee (n 14 above) paragraph 12(d).

whether states' have taken into account the yardsticks to measure compliance while allocating its resources. As such, states' compliance with the obligation to realise women's human rights through the allocation of sufficient budgetary resources can be assessed by adopting gender budgeting. Having established the yardstick that can be used to assess whether a state is complying by its obligation to allocate sufficient budgetary resources to realise women's human rights, this chapter now moves to the provisions of global law that concern the provision of budgetary resources to realise women's human rights.

2.3.2 Global human rights law and budgeting

At the UN level, provisions relating to the allocation of sufficient budgetary resources can be found in both treaties and soft law. There is no agreed definition of soft law.²⁷ Dugard, while highlighting that soft law does not have the 'status of law', has defined it as comprising of 'imprecise standards, generated by declaration adopted by diplomatic conferences or resolutions of international organisations, that are intended to serve as guidelines to states in their conduct'.²⁸

Shelton has categorised soft law as primary soft law and secondary soft law. Primary soft laws are 'normative texts not adopted in treaty form that are addressed to the international community as a whole or to the entire membership of the adopting institution or organization' whereas secondary soft laws include the following:²⁹

...recommendations and general comments of international supervisory organs, the jurisprudence of courts and commissions, decisions of special rapporteurs and other ad hoc bodies, and the resolutions of political organs of international organizations applying primary norms.

Most of the secondary soft laws are the creation of treaty-based bodies. They are adopted in relation to treaty provisions and they expand upon them. Treaty bodies have often used soft laws to persuade states to adopt a human rights approach while budgeting.³⁰

²⁷ D Shelton 'Soft law' in D Armstrong (ed) *Routledge handbook of international law* (2009) 69; and A Aust *Handbook of international law* (2010) 11.

²⁸ J Dugard *International law: A South African perspective* 4th ed (2011) 33.

²⁹ See DL Shelton 'Soft law' (2008) 4-5 available at http://scholarship.law.gwu.edu/cgi/viewcontent.cgi?article=2048&context=faculty_publications (accessed on 1 September 2015)

³⁰ Some examples are: General Comment 3 of the ESCR Committee on article 2(1) of the ICESCR 'The nature of States parties' obligations' adopted during its fifth session in 1990; General Recommendation 24 of the

This section studies the treaties and the soft law of the UN to establish in the first instance, states' obligation to adopt a human rights approach to budgeting since human rights comprise women's human rights. Consequently, a human rights approach to budgeting encompasses budgeting for women's human rights. In a second instance, this section analyses the provisions of global law that specifically require states to allocate sufficient budgetary resources to realise women's human rights.

A The International Covenant on Economic, Social and Cultural Rights

The International Covenant on Economic, Social and Cultural Rights 1966 (ICESCR), together with the International Covenant on Civil and Political Rights 1966 (ICCPR) and the Universal Declaration on Human Rights 1948 (UDHR), constitute the International Bill of Human Rights.³¹ The provisions of the ICESCR are applicable to both women and men³² and as such, a human rights approach to implement the provisions of the ICESCR will have an impact on women's human rights. Concerning resource allocation, article 2(1) of the ICESCR provides the following:

Each State Party to the present Covenant undertakes to take steps, individually and through international assistance and co-operation, especially economic and technical, to the maximum of its available resources, with a view to achieving progressively the full realization of the rights recognized in the present Covenant by all appropriate means, including particularly the adoption of legislative measures.

Article 2(1) of the ICESCR makes reference to appropriate measures that include financial measures.³³ Non-realisation of the rights protected by the ICESCR has to be justified by

Committee on Discrimination Against Women (CEDAW Committee) on article 12 of the CEDAW 'Women and health' adopted during its 20th session in 1999 A/54/38/Rev.1; General Comment 16 of the ESCR Committee on article 3 of the ICESCR 'The equal right of men and women to the enjoyment of all economic, social and cultural rights' adopted during its 34th session in 2005 E/C.12/2005/4; and the Statement on the Evaluation of the obligation of states to take steps to the "maximum of available resources" under an Optional Protocol to the Covenant.

³¹ K Arambulo 'The International Covenant on Economic, Social and Cultural Rights and the Committee on Economic, Social and Cultural Rights' in P Van der Auweraert et al (eds) *Social, economic and cultural rights: An appraisal of current European and international developments* (2002) 58.

³² Article 2(2) of the ICESCR: The States Parties to the present Covenant undertake to guarantee that the rights enunciated in the present Covenant will be exercised without discrimination of any kind as to race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.

³³ General Comment 3 of ESCR Committee (n 30 above); and General Comment 17 of the ESCR Committee (n 14 above) paragraph 34: States have the obligation to take 'financial and other positive measures which facilitate the formation of professional and other associations representing the moral and material interests of authors, including disadvantaged and marginalized authors'.

demonstrating that ‘every effort has been made to use all resources that are at its disposition in an effort to satisfy’ the obligation imposed by the Covenant.³⁴

In the concluding observations concerning Philippines,³⁵ the ESCR Committee uses a ‘comparative analysis’³⁶ to demonstrate that the state had not respected its obligations under article 2(1) of the ICESCR. It was noted that the proportion of the national budget spent on military was far higher than the allocation to housing, agriculture and health combined.³⁷ The same observation was made in relation to the Republic of Korea’s state report where the ESCR Committee expressed concern about ‘the high level of defence expenditure’ that was ‘in contrast with the shrinking budget for key areas of economic, social and cultural rights’.³⁸

The ESCR Committee also expects states to formulate their budget in a manner that ensures the realisation of economic, social and cultural rights in all regions of a country, instead of focusing on one region. This was recommended to Sudan where the ESCR Committee recommended the state to allocate budgetary resources to decrease the regional disparities within the country concerning the enjoyment of economic, social and cultural rights.³⁹

The other indicator that the ESCR Committee considers is the comparison of resources spent by countries with the same development levels for similar items in the national budget.⁴⁰ This was done in the case of Dominican Republic where the ESCR Committee stated ‘with great concern that State expenditures on education and training as a proportion of public expenditure are less than half their average in Latin America.’⁴¹ States are recommended to

³⁴ General Comment 3 of the ESCR Committee (n 30 above) paragraph 10.

³⁵ ESCR Committee’s concluding observations of Philippines in ‘Report on the twelfth and thirteenth sessions’ (1996) E/1996/22.

³⁶ M Sepulveda *The nature of the obligations under the International Covenant on Economic, Social and Cultural Rights* (2003) 316.

³⁷ Concluding observations of Philippines (n 35 above) paragraph 121.

³⁸ ESCR Committee concluding observations of the Republic of Korea (2001) E/C.12/1/Add.59 paragraph 9; See also ESCR Committee concluding observations of Senegal (2001) E/C.12/1/Add.62 paragraph 23.

³⁹ ESCR Committee concluding observations on the second report of Sudan adopted during its 56th session (9 October 2015) E/C.12/SDN/CO/2 paragraph 22.

⁴⁰ Sepulveda (n 36 above) 317.

⁴¹ ESCR Committee concluding observations of the Dominican Republic in its ‘Report on the fourteenth and fifteenth sessions’ (1997) E/1997/22 paragraph 228.

ensure that expenditure for the rights in the ICESCR more or less match those of other countries with the same development level.

The fact that countries have not spent the resources allocated to a specific item due to 'inefficient administration or corruption' is also an indicator that they are not respecting their obligations under article 2(1) of the ICESCR.⁴² This was highlighted in the concluding observations for Colombia where the ESCR Committee stated that the Colombian government must utilise 'budget items earmarked for social expenditure in the State's overall budget and ensure that such appropriations are used for the purposes for which they were budgeted'.⁴³ Such an observation was also made for Kenya where the ESCR Committee recommended that the state improves 'its budget execution process with a view to spending all the allocated funding in a timely, effective and transparent manner'.⁴⁴ Therefore, 'maximum available resources' encompass the appropriations in the budget that have still not been spent.

The concluding observations on Uganda's initial report⁴⁵ highlighted the importance of national budgets allocation for the realisation of the rights provided by the ICESCR. It specifically recommended the following:⁴⁶

... the State party reprioritize its allocation of resources and steadily increase the share of the public budget available to these sectors with a view to ensuring the progressive realization of the rights contained in the Covenant.

States are therefore recommended to allocate budgetary resources to realise the rights in the ICESCR. The ESCR Committee also made reference to budgetary allocation for specific rights protected by the ICESCR.⁴⁷

⁴² Sepulveda (n 36 above) 317.

⁴³ ESCR Committee concluding observations of Colombia in its 'Report on the twelfth and thirteenth session' (1996) E/1996/22 paragraph 200(b).

⁴⁴ ESCR Committee concluding observations on the combined second to fifth report of Kenya adopted during its 57th session (4 March 2016) E/C.12/KEN/CO/2-5 paragraph 18.

⁴⁵ ESCR Committee concluding observations on the initial report of Uganda adopted during its 50th session (19 June 2015) E/C.12/UGA/CO/1.

⁴⁶ ESCR Committee concluding observations of Uganda (n 45 above) paragraph 8.

⁴⁷ ESCR Committee concluding observations of Kenya (n above) paragraphs 46, 50, 52 and 58; ESCR Committee concluding observations on the initial report of Namibia adopted during its 57th session (4 March 2016) E/C.12/NAM/CO/1 paragraphs 18, 20, 37, 48, 62 and 72; and ESCR Committee concluding observations on the initial report of Gabon adopted during its 51st session (29 November 2013) E/C.12/GAB/CO/1 paragraph 26.

Moreover, the ESCR Committee has recommended states to ensure that there is no decrease in resources that are allocated to the realisation of economic, social and cultural rights.⁴⁸ It has further stated that even when the government is trying to stabilise the economic situation, it must always ensure 'the core content of the rights'.⁴⁹ In the event a state does not have the necessary resources, the ESCR Committee has recommended states to consider economic, social and cultural rights in their negotiations with international financial institutions.⁵⁰

In addition to the concluding observations and general comments above, in 2007 the ESCR Committee made a statement concerning the obligation of states to take steps to make use of the maximum of available resources (2007 ESCR Committee statement).⁵¹ Paragraph 7 of the 2007 ESCR Committee statement provides that to combat discrimination, states should take 'budgetary measures in order to prevent third parties from interfering with the rights' protected by the ICESCR 'or to facilitate, provide and promote the enjoyment of these rights'. This statement further states that 'the obligation to protect and, to a greater extent, the obligation to fulfil, on the other hand, often require positive budgetary measures'.⁵² Thus, the realisation of the rights protected by a treaty necessitates budgetary allocations on behalf of the government.

The ESCR Committee has, in different general comments, also made reference to allocation of resources to realise human rights. In relation to the right to housing, states have the obligation to 'take whatever steps' that are necessary and this involves 'resource allocations and policy initiatives of a general kind'.⁵³ Concerning the realisation of the economic, social and cultural rights of persons with disabilities, General Comment 5 of the ESCR Committee provides that states have the obligation to take positive action and it recognises that such

⁴⁸ ESCR Committee concluding observations on the fourth and fifth periodic report of Angola adopted during its 58th session (24 June 2016) E/C.12/AGO/CO/4-5 paragraph 8.

⁴⁹ As above.

⁵⁰ ESCR Committee concluding observations on the second to fourth periodic report of Egypt adopted during its 51st session (29 November 2013) E/C.12/EGY/CO/2-4 paragraph 6.

⁵¹ ESCR Committee statement 'An evaluation of the obligation to take steps to the "maximum of available resources" under an optional Protocol to the Covenant' adopted during the 38th Session in 2007 E/C.12/2007/1.

⁵² ESCR Committee statement (n 51 above) paragraph 7.

⁵³ General Comment 4 of ESCR Committee on article 11(1) of the ICESCR 'The right to adequate housing' adopted during its sixth session in 1991 E/1992/23 paragraph 15.

positive actions require additional resource allocation by the government to invest in tailored policies aimed at improving the life of persons with disabilities.⁵⁴ In the same vein, General Comment 6 of the ESCR Committee provides for the establishment of special measures to ensure that older persons benefit from the rights protected by the ICESCR and these include ‘relevant budget support’.⁵⁵

General Comment 12 of the ESCR Committee further requires states to take budgetary measures to ensure that the right to food is realised.⁵⁶ Even in cases of resources constraints, states have the obligation to ensure that the right to food is realised and while so doing, it must give special attention to vulnerable groups and individuals.⁵⁷ General Comment 16 of the ESCR Committee provides for the ‘adoption of temporary special measures to accelerate women’s equal enjoyment of their rights, gender audits, and gender-specific allocation of resources’.⁵⁸

All the above general comments point out the fact that the budget of a country has to take into account the impact of resource allocation on human rights. General Comment 6 is more specific to the rights of women and it recognises that women need more resource allocation and even though the ICESCR concerns everyone, General Comment 6 establishes that a state has to acknowledge that women require more resources and therefore has to adopt gender budgeting.

Academics have also interpreted the provisions of the ICESCR to imply that states have the obligation to allocate resources to realise the rights provided therein. For instance, Ssenyonjo has stated that the adoption of appropriate measures including financial measures can be used to make the country accountable: they can be used to ‘compel a state to explain what it is doing and why and how it is progressing, as expeditiously and effectively

⁵⁴ General Comment 5 of ESCR Committee ‘Persons with disabilities’ adopted during its 11th session in 1994 E/1995/22 paragraph 9.

⁵⁵ General Comment 6 of ESCR Committee ‘The economic, social and cultural rights of older persons’ adopted during the 13th session in 1995 E/1996/22 paragraph 18.

⁵⁶ General Comment 12 of ESCR Committee on article 11(1) of the ICESCR ‘The right to adequate food’ adopted during its 20th session in 1999 E/C.12/199/5.

⁵⁷ General Comment 12 of the ESCR Committee (n 56 above) paragraph 28.

⁵⁸ General Comment 16 of the ESCR Committee (n 30 above) paragraph 21.

as possible' towards the realisation of the rights protected by the ICESCR.⁵⁹ Furthermore, Robertson has reiterated that there is a need to take financial steps since the realisation of human rights is primordial for the survival for the society.⁶⁰ It has also been recognised that steps taken by the government are irrelevant if there are no resources allocated to support the steps.⁶¹

As can be derived from the interpretation of article 2(1) of the ICESCR by the ESCR Committee and by academics, the realisation of the rights provided by the ICESCR requires not only legislative measures but also financial resources. In addition to article 2(1) of the ICESCR, the general comments and concluding observations of the ICESCR Committee have been more comprehensive about the steps, including budgetary steps that states must take so that economic, social and cultural rights are realised.

B The International Covenant on Civil and Political Rights

The ICCPR was adopted by General Assembly resolution 2200A (XXI) on 16 December 1966 and came into force on 23 March 1976.⁶² Similar to the ICESCR, the provisions of the ICCPR extend to women in terms of article 2(1) of the ICCPR.⁶³ Article 2(2) of the ICCPR provides that states must 'undertake necessary steps ... to adopt such laws or other measures as may be necessary to give effect to the rights recognized in the present Covenant'.

The Human Rights Committee has interpreted article 2(2) of the ICCPR on several instances to include budgetary allocations as one of the measures to be taken by governments. General Comment 2⁶⁴ of the Human Rights Committee that concerned reporting guidelines recommends states reports to indicate the measures adopted by states to give effect to the

⁵⁹ M Ssenyonjo *Economic, social and cultural rights in international law* (2009) 56.

⁶⁰ RE Robertson 'Measuring state compliance with the obligation to devote the "maximum available resources" to realizing economic, social and cultural rights' 16 *Human Rights Quarterly* (1994) 4 700.

⁶¹ Robertson (n 60 above) 695.

⁶² Website of the office of the High Commissioner for Human Rights available at <http://www.ohchr.org/EN/ProfessionalInterest/Pages/CCPR.aspx> (accessed on 12 May 2015).

⁶³ Article 2(1) of the ICCPR: Each State Party to the present Covenant undertakes to respect and to ensure to all individuals within its territory and subject to its jurisdiction the rights recognized in the present Covenant, without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.

⁶⁴ General Comment 2 of the Human Rights Committee 'Reporting guidelines' adopted at its 13th session in 1981 HRI/GEN/1/Rev.6.

rights in the ICCPR. It further states that not only the legal measures should be mentioned but also 'further relevant facts which are likely to show the degree of the actual implementation and enjoyment of the rights' protected by the ICCPR.⁶⁵ This statement can be interpreted to include budgetary allocations information that fall within 'further relevant facts'.

General Comment 32 of the Human Rights Committee provides that states are recommended to provide resources to give effect to the right to equality before courts and tribunals and to a fair trial.⁶⁶ In relation to undue delays, it has been provided that if they are caused by 'a lack of resources and chronic under-funding, to the extent possible supplementary budgetary resources should be allocated for the administration of justice'.⁶⁷ This can be interpreted to mean that in the event a country is facing difficulties to give effect to the rights in the ICCPR due to resources constraint, it has to re-engineer its budget to ensure that that particular right is realised.

The Human Rights Committee has also considered budgetary allocation to institutions which are relevant for civil and political rights. For instance, in the concluding observations on the initial report of Burkina Faso, the Human Rights Committee has recommended the state to ensure that the National Human Rights Institution and the judiciary are allocated sufficient budgetary resources to execute their functions.⁶⁸ Such a recommendation was also made to Ghana concerning its Commission on Human Rights and Administrative Justice.⁶⁹ The Human Rights Committee has gone a step further and has considered the allocation of resources to the Office of the Ombudsman of Namibia to be insufficient and has recommended the state to increase its budgetary resources to this institution.⁷⁰

⁶⁵ General Comment 2 of the Human Rights Committee (n 64 above) paragraph 2.

⁶⁶ General Comment 32 of the Human Rights Committee on article 14 'Right to equality before courts and tribunals and to a fair trial' adopted during its 90th session in 2007 CCPR/C/GC/32.

⁶⁷ General Comment 32 of the Human Rights Committee (n 66 above) paragraph 27.

⁶⁸ Human Rights Committee concluding observations on the initial report of Burkina Faso adopted during its 117th session (11 July 2016) CCPR/C/BFA/CO/1 paragraph 8 and 32.

⁶⁹ Human Rights Committee concluding observations on the initial report of Ghana adopted during its 117th session (8 July 2016) CCPR/C/GHA/CO/1 paragraph 10.

⁷⁰ Human Rights Committee concluding observations on the second report of Namibia adopted during its 116th session (23 March 2016) CCPR/C/NAM/CO/2 paragraph 8.

While considering the report of the Russian Federation, in relation to reducing prison population, the Human Rights Committee commended the state for the allocation of additional resources but nevertheless highlighted that there is still overcrowding in the prisons and that the state has to take further measures to tackle the issue of overcrowding.⁷¹ It also noted the progress that Ireland made in relation to an increased budgetary allocation to combat domestic violence.⁷²

Despite the fact that the ICCPR does not expressly provide for budgetary allocation to ensure that the rights therein are protected, the general comments and the concluding observations of the Human Rights Committee seem to point that the ‘necessary measures’ that states are required to take include budgetary allocation.

C The Convention on the Rights of the Child

The Convention on the Rights of the Child (CRC) was adopted on 20 November 1989 and it entered into force on 2 September 1990. Concerning allocation of resources, article 2(2) of the CRC provides that ‘states shall take all appropriate measures’ to realise the rights therein. In addition to article 2(2), article 4 of the CRC, which had originally been proposed by Brazil,⁷³ requires states to ‘undertake all appropriate legislative, administrative, and other measures for the implementation of the rights’ of the document. Concerning, economic, social and cultural rights, states have the obligation to ‘undertake such measures to the maximum extent of their available resources and, where needed, within the framework of international co-operation’.⁷⁴

This section studies those documents of the Committee on the Rights of the Child (CRC Committee) that make reference to budgetary allocations for children. Although the focus of this study is the allocation of budgetary resources for women’s human rights, the study at

⁷¹ Human Rights Committee concluding observations on the sixth periodic report of the Russian Federation adopted in 2009 during its 2681st meeting CCPR/C/RUS/CO/6 paragraph 20.

⁷² Human Rights Committee concluding observations of the third periodic report of Ireland adopted in 2008 during its 2563rd and 2564th meetings CCPR/C/IRL/CO/3 paragraph 4.

⁷³ S Detrick *A Commentary on the United Nations Convention on the Rights of the Child* (1999) 102.

⁷⁴ Article 4 of the CRC.

the level of the CRC is relevant since articles 1⁷⁵ and 2(1)⁷⁶ of the CRC state that all the rights provided therein must be realised without discrimination on the basis of sex. Therefore budgeting for children will benefit budgeting for the girl child. Moreover, women are the ones who primarily take care of children and such care is unpaid for.⁷⁷ Hence, budgeting for children has a direct impact on women if it can recognise the care and compensate women who are taking care of the children.⁷⁸

In relation to the allocation of resources, the CRC Committee has recommended states to '[e]stablish a budgeting process which adequately takes into account children's needs at the national and territory levels' and to clearly indicate the allocation to children.⁷⁹ States have also been recommended to devise the budget in a manner that it takes into account vulnerable children.⁸⁰ In addition to including a child-rights perspective in the budget,⁸¹ the CRC Committee has recommended states to include 'specific indicators and tracking system' through which one can 'monitor and evaluate the adequacy, efficacy and equitability of resources allocated to the realisation of children's rights.'⁸²

⁷⁵ Article 1 of the CRC: 'For the purposes of the present Convention, a child means every human being below the age of eighteen years unless under the law applicable to the child, majority is attained earlier.'

⁷⁶ Article 2(1) of the CRC: States Parties shall respect and ensure the rights set forth in the present Convention to each child within their jurisdiction without discrimination of any kind, irrespective of the child's or his or her parent's or legal guardian's race, colour, sex, language, religion, political or other opinion, national, ethnic or social origin, property, disability, birth or other status.

⁷⁷ See generally V Esquivel 'Sixteen years after Beijing: What are the new policy agendas for time-use data collection?' 17 *Feminist Economics* (2011) 4.

⁷⁸ As above.

⁷⁹ CRC Committee concluding observations on the second to fourth periodic reports of Bosnia and Herzegovina adopted during its 61st session (17 September – 5 October 2012) CRC/C/BIH/CO/2-4 paragraph 16(a); see also CRC Committee concluding observations on the second to fourth periodic reports of Guyana adopted during its 62nd session (14 January-1 February 2013) CRC/C/GUY/CO/2-4 paragraph 15(a); CRC Committee concluding observations on the third and fourth periodic reports of Armenia adopted during its 63rd session (27 May – 14 June 2013) CRC/C/ARM/CO /3-4 paragraph 15(b).

⁸⁰ CRC Committee concluding observations on the second periodic report of Cameroon adopted during its 53rd session (29 January 2010) CRC/C/CMR/CO/2 paragraph 18(c).

⁸¹ CRC Committee concluding observations on the combined third to fifth periodic reports of the United Republic of Tanzania adopted during its 68th session (30 January 2015) CRC/C/TZA/CO/3-5 paragraph 14(b); CRC Committee concluding observations on the combined third to fifth periodic reports of Mauritius adopted during its 68th session (30 January 2015) CRC/C/MUS/CO/3-5 paragraph 16(b); and CRC Committee concluding observations on the combined second to fourth periodic report of the Congo adopted during its 65th session (31 January 2014) CRC/C/COG/CO/2-4 paragraph 17(b).

⁸² CRC Committee concluding observations on the second periodic report of South Africa adopted during its 73rd session (30 September 2016) CRC/C/ZAF/CO/2 paragraph 12.

States further have to increase their budgetary allocation to implement the rights protected by the CRC.⁸³ In addition to generally requiring states to increase their budget for children's rights, the CRC Committee has recommended states to increase their budgets in specific areas.⁸⁴ The CRC Committee has previously expressed concern about the fact that governments lack 'political will to increase the budget for programmes and policies for children'.⁸⁵ It has been highlighted that children are victims of unequal distribution of income and of inadequate budgetary allocation⁸⁶ and that states have to ensure that changes in budget, specifically cuts in budgets, do not adversely affect the level of enjoyment of the rights in the CRC.⁸⁷ In the same vein, states are expected to have predictable levels of allocation of budgetary resources towards the realisation of children's rights.⁸⁸

The CRC Committee does not only consider the budgetary allocations to programmes and policies relating to children, but also those of institutions that are responsible for children's rights. For instance, in the concluding observations of Sierra Leone, it recommended the state to increase its budget for the Ministry of Social Welfare, Gender and Children's Affairs.⁸⁹ Similarly, the CRC Committee has recommended states to ensure that children's rights monitoring bodies such as National Child Protection Committee, the National Action Committee against child labour and the Independent National Commission on Human Rights have a sufficient operating budget.⁹⁰ To ensure that there is no impunity of children's rights,

⁸³ CRC Committee concluding observations on the third periodic report of Nicaragua adopted during its 39th session (3 June 2005) CRC/C/15/Add.265 paragraph 17; and CRC Committee concluding observations on the second periodic report of Uganda adopted at the 40th session (30 September 2005) CRC/C/UGA/CO/2 paragraph 21.

⁸⁴ CRC Committee concluding observations on the combined third to fifth periodic reports of Mauritius (n 81 above) paragraph 16(a); and CRC Committee concluding observations on the combined second and third periodic reports of the Gambia adopted during its 68th session (30 January 2015) CRC/C/GMB/CO/2-3 paragraph 48(a).

⁸⁵ CRC Committee concluding observations on the third periodic report of Nicaragua (n 83 above) paragraph 16.

⁸⁶ As above.

⁸⁷ CRC Committee concluding observations on the second periodic report of South Africa (n 82 above) paragraph 12(d).

⁸⁸ CRC Committee concluding observations on the initial report of Gabon adopted during its 72nd session (3 June 2016) CRC/C/OPSC/GAB/CO/1 paragraph 40.

⁸⁹ CRC Committee concluding observations on the combined third to fifth periodic report of Sierra Leone adopted during its 73rd session (30 September 2016) CRC/C/SLE/CO/3-5 paragraph 8(a).

⁹⁰ CRC Committee concluding observations on the initial report of Madagascar adopted during its 70th session (2 October 2015) CRC/C/OPSC/MDG/CO/1 paragraph 20.

the CRC Committee has also recommended states to allocate sufficient budget to the police to enable them to carry out investigations of such violations.⁹¹

General Comment 1 of the CRC Committee provides that states should devote the maximum available resources to the realisation of the right to education of the child.⁹² The state's failure to provide adequate funding for the realisation of the child rights due to resources constraint cannot be used as an excuse for the non-fulfilment of this obligation.⁹³

General Comment 2 of the CRC Committee provides that states should set up special mechanisms that focus on the rights of the child.⁹⁴ In the event there are limited resources, the state needs to effectively allocate them. In the context of children's right to leisure, the state's budget must 'ensure that the allocation for children, in respect of cultural, artistic, sports, recreational and play activities' is representative of the number of children in the country.⁹⁵

General Comment 5 of the CRC Committee provides that measures adopted by states need to ensure that children's rights are realised.⁹⁶ It states that children should be made more visible in the national budget.⁹⁷ Furthermore, states are recommended to 'define specific budgetary allocations'⁹⁸ to demonstrate how it is addressing the rights in the CRC. They have to undertake studies concerning the impact of the government's budgetary allocation on children and their families.⁹⁹ States have to provide information about how they have

⁹¹ CRC Committee concluding observations on the initial report of Madagascar (n 90 above) paragraph 32(c).

⁹² General Comment 1 of CRC Committee on article 29(1): 'The aims of education' adopted during its 26th session in 2001 paragraph 28.

⁹³ As above; and General Comment 3 of the CRC Committee on 'HIV/AIDS and the rights of the child' adopted during its 32nd session in 2003 CRC/GC/2003/3 paragraph 14.

⁹⁴ General Comment 2 of the CRC Committee 'The role of independent human rights institutions in the promotion and protection of the rights of the child' adopted during its 32nd session in 2002 CRC/GC/2002/2 paragraph 6.

⁹⁵ General Comment 17 of the CRC Committee on article 31 'The rights of the child to rest, leisure, play, recreational activities, cultural life and the arts' adopted during its 62nd session in 2013 CRC/C/GC/17 part VIII.

⁹⁶ General Comment 5 of the CRC Committee on articles 4, 42 and 44(6) 'General measures of implementation of the Convention on the Rights of the Child' adopted at its 34th session in 2003 CRC/GC/2003/5.

⁹⁷ General Comment 5 of the CRC Committee (n 96 above) part G.

⁹⁸ CRC Committee concluding observations on the second to fourth periodic reports of Guyana (n 79 above) paragraph 14.

⁹⁹ CRC Committee concluding observations on the second periodic report of Latvia adopted during its 42nd session in 2006 CRC/C/LVA/CO/2 paragraph 15(b).

implemented a child-rights approach in the budgeting process¹⁰⁰ either in the state reports or in written replies provided to the CRC Committee.¹⁰¹ In the event this is not done, it will be a recommendation for the next report. For instance, the CRC Committee has highlighted that Italy has not provided the required information ‘regarding the implementation of its earlier recommendation on a child-specific analysis of all sectoral budgets across the State party and the regions’.¹⁰²

There should be provision for children with disabilities in the national budget so that they can be empowered to come out of poverty.¹⁰³ States must further provide for the maximum of available resources to ensure that programmes and policies in relation to children with disabilities are implemented.¹⁰⁴ Part D of General Comment 9 of the CRC Committee specifically makes reference to the consideration of the rights of children with disabilities while preparing the national budget.

Paragraph 34 of General Comment 11 of the CRC Committee¹⁰⁵ provides that states have to provide for the economic, social and cultural rights of indigenous children by making use of the maximum of their available resources and this includes international aid. Further, it states that there is a need for allocation of adequate resources for indigenous children to enjoy all the rights in the CRC.¹⁰⁶

Concerning violence against the child, General Comment 13 of the CRC Committee¹⁰⁷ provides that there is a need to allocate resources to implement programmes and policies to

¹⁰⁰ CRC Committee concluding observations on the third and fourth periodic reports of Armenia (n 79 above) paragraph 14; CRC Committee concluding observations on the second and third periodic report of Eritrea adopted during its 48th session in 2008 CRC/C/ERI/CO/3 paragraph 16; CRC Committee concluding observations on initial report of Serbia adopted during its 48th session in 2008 CRC/C/SRB/CO/1 paragraph 18.

¹⁰¹ CRC Committee concluding observations on initial report of Serbia (n 100 above) paragraph 17.

¹⁰² CRC Committee concluding observations on the third and fourth periodic reports of Italy adopted during its 58th session in 2011 CRC/C/ITA/CO/3-4 paragraph 14.

¹⁰³ General Comment 9 of the CRC Committee on ‘The rights of children with disabilities’ adopted at its 43rd session in 2007 CRC/C/GC/9 paragraph 3.

¹⁰⁴ General Comment 9 of the CRC Committee (n 103 above) paragraph 18.

¹⁰⁵ General Comment 11 of the CRC Committee on ‘Indigenous children and their rights under the Convention’ adopted during its 50th session in 2009 CRC/C/GC/11.

¹⁰⁶ General Comment 11 of the CRC Committee (n 105 above) paragraph 80.

¹⁰⁷ General Comment 13 of the CRC Committee on ‘The right of the child to freedom from all forms of violence’ adopted during its 46th session in 2011 CRC/C/GC/13 paragraph 72(h).

eradicate violence against the child. States are also recommended to find resources for the eradication of violence and this includes resources from the international level, and regional and international cross-border cooperation.¹⁰⁸

To ensure that children enjoy the highest attainable standard of health, General Comment 15 of the CRC Committee provides that states must make use of the maximum of their available resources.¹⁰⁹ States must further pay attention to the budgetary allocation for the realisation of the right to health of the child.¹¹⁰ The budget should clearly reflect that states have taken into account the yardsticks to measure compliance¹¹¹ while providing for the health of the child. There is further a need for a rights-based approach to budget analysis to assess how the budgetary allocations impact upon the health of the child.¹¹²

In 2014, the Office of the High Commissioner for Human Rights adopted a report that concentrates on budgeting for the rights of the child.¹¹³ The report notes that '[a] lack of sufficient, effective, inclusive and efficient public spending on children is one of the main barriers to the realization of the rights of the child'.¹¹⁴ It expands on budgeting for children's rights and recommends states to allocate budgetary resources to realise the rights of all human beings in the territory of that state and to primarily consider the best interests of the child while so doing.¹¹⁵

It has been stated that article 4 of the CRC is an opportunity for the UNICEF, other UN agencies and CSOs working with children's rights to advocate for budgetary allocation for the realisation of children's rights.¹¹⁶ In addition to article 4 of the CRC, the UNICEF, other

¹⁰⁸ General Comment 13 of the CRC Committee (n 107 above).

¹⁰⁹ General Comment 15 of the CRC Committee on article 24 'The right of the child to the enjoyment of the highest attainable standard of health' adopted during its 62nd session in 2013 CRC/C/GC/15 part III and IV.

¹¹⁰ General Comment 15 of the CRC Committee (n 109 above) part VI; See also General Comment 16 of the CRC Committee on 'States obligations regarding the impact of the business sector on children's rights' adopted during its 62nd session in 2013 CRC/C/GC/16.

¹¹¹ Section 2.3 above.

¹¹² General Comment 15 of the CRC Committee (n 109 above) part VI(D)(d).

¹¹³ Office of the United Nations High Commissioner for Human Rights (UNHCHR) 'Towards better investment in the rights of the child' adopted during its 28th session in 2014 A/HRC/28/33.

¹¹⁴ Report of the UNHCHR (n 113 above) paragraph 3.

¹¹⁵ Report of the UNHCHR (n 113 above) paragraph 67(b).

¹¹⁶ JR Himes 'The UN Convention on the Rights of the Child: More than a new utopia?' in C Rutgers (ed) *Creating a world fit for children: Understanding the UN Convention on the Rights of the Child* (2011) 39.

UN agencies and CSOs working with children's rights can refer to other articles, general comments and concluding observations of the CRC Committee to advocate for budgeting for children's rights. These provisions offer all relevant stakeholders the opportunity to collaborate with the government for a "step-by-step" financial and human-resource planning' which is necessitated for the progressive realisation of children's rights.¹¹⁷

Therefore, to ensure that the rights of the child are realised, states are recommended to adopt a child-rights approach to budgeting. The approach adopted by the CRC Committee and other human rights bodies with regard to budgetary allocations for human rights indicate that generally, states are required to allocate budgetary resources for human rights. Women's human rights form part of human rights and as such, while budgeting for human rights, states have to take into account women's human rights. However, recognising that such a budgetary allocation might not be mindful of the vulnerabilities that women as a group face, there are provisions at the international law level which relate directly to budgetary allocations for the realisation of women's human rights.

2.3.3 International human rights law and provision of budgetary resources for women's human rights

The main convention at the international level that provides for women's human rights is the Convention on the Elimination of all forms of Discrimination Against Women (CEDAW). The CEDAW was adopted on 18 December 1979 and entered into force on 3 September 1981. The CEDAW has been recognised as 'a socio-legal tool which within a single and unified framework is intended to help women fit into social, economic and political modernization processes in all parts of the world'.¹¹⁸

The CEDAW's objective is to ensure that there are both formal and substantive equality between men and women. Formal equality 'prohibits the use of distinctions between men and women in law and policy' while substantive equality 'looks at the impact of laws, policies

¹¹⁷ As above.

¹¹⁸ A Hellum *Women's human rights and legal pluralism in Africa: Mixed norms and identities in infertility management in Zimbabwe* (1999) 22.

and practices on women'.¹¹⁹ The achievement of substantive equality requires the government to provide sufficient resources to realise women's human rights.

It is to be noted that no provision of the CEDAW expressly provides for the allocation of resources to realise women's human rights. However, the articles of CEDAW make reference to the adoption of 'all appropriate measures' or the adoption of 'appropriate legislative and other measures' to ensure that the provisions in the document are realised. Article 3 of the CEDAW provides that states must take 'all appropriate measures' 'to ensure the development and advancement of women'. States further have to consider the field of economic while taking 'appropriate measures'.

In the case of *Alyne da Silva Pimentel v Brazil*, which concerned the right to maternal health of women, the CEDAW Committee recommended some steps that the state has to take.¹²⁰ In this case, the CEDAW Committee recommended states to take several steps, including the accessibility to adequate emergency obstetric care, provision of adequate professional training for health workers, and implementation of the national plan of action on the reduction of maternal mortality. While none of these recommendations make express reference to budgetary allocation of resources, it is implied that their execution would require financial resources. Therefore, one of the appropriate measures that the state is expected to take is to allocate sufficient resources to give effect to the recommendations by the CEDAW Committee.

As noted by Elson, 'it is inconceivable' that the appropriate measures referred to in the CEDAW do not have any 'implications for public finance'.¹²¹ Indeed, an interpretation of the above writings implies that in the event there has not been effective allocation of resources for the realisation of the rights protected by the CEDAW, the state is not abiding by its obligations under the document.¹²²

¹¹⁹ D Elson 'Budgeting for women's rights: Monitoring government budgets for compliance with the CEDAW' (2006) 31 and 32.

¹²⁰ *Maria de Lourdes da Silva Pimentel, represented by the Center for Reproductive Rights and Advocacia Cidadã pelos Direitos Humanos v Brazil* Communication No. 17/2008 paragraph 8.

¹²¹ Elson 2006 (n 119 above) 32.

¹²² D Elson 'Monitoring government budgets for compliance with CEDAW' (2005) 2.

The Committee on the Elimination of All forms of Discrimination Against Women (CEDAW Committee) has furthermore expanded upon the measures that states are required to take to give effects to the provisions of the CEDAW. General Recommendation 24¹²³ was the first recommendation of the CEDAW Committee that made express reference to budgetary resources and to the provision of sufficient budget for the realisation of the rights of women.¹²⁴ General Recommendation 24, which concerns the realisation of the right to health of women, recommends states to have a gender-based approach to budgeting. General Recommendation 24 provides that in line with their duty to fulfil rights, states have to ‘appropriate ... budgetary measures to the maximum extent of their available resources to ensure that women realize their rights to health care’.¹²⁵ Further recognising that women face more vulnerabilities in terms of health, General Recommendation 24 provides the following:¹²⁶

States parties should allocate adequate budgetary, human and administrative resources to ensure that women’s health receives a share of the overall health budget comparable with that for men’s health, taking into account their different health needs.

This recommendation requires states to have a gender approach when budgeting for health. States have to formulate programmes and policies that have women’s health as focus.¹²⁷ Health workers must further be trained on women’s right to health.¹²⁸

In relation to temporary measures to ensure that there is equality between men and women, General Recommendation 25¹²⁹ defines measures as including ‘allocation and/or reallocation of resources’.¹³⁰ Therefore, states are recommended to allocate sufficient budgetary resources as a means of temporary measures towards achieving gender equality.

¹²³ General Recommendation 24 of the CEDAW Committee on article 12 ‘Women and health’ adopted during its 20th session in 1999 A/54/38/Rev.1.

¹²⁴ General Recommendation 24 of the CEDAW Committee (n 123 above) paragraph 30.

¹²⁵ General Recommendation 24 of the CEDAW Committee (n 123 above) paragraph 17.

¹²⁶ General Recommendation 24 of the CEDAW Committee (n 123 above) paragraph 30.

¹²⁷ General Recommendation 24 of the CEDAW Committee (n 123 above) paragraph 31(a).

¹²⁸ General Recommendation 24 of the CEDAW Committee (n 123 above) paragraph 31(f).

¹²⁹ General Recommendation 25 of the CEDAW Committee on article 4(1) ‘Temporary special measures’ adopted during its 30th session in 2004.

¹³⁰ General Recommendation 25 of the CEDAW Committee (n 129 above) paragraph 22.

Expanding upon the core obligations of states under article 2 of the CEDAW, General Recommendation 28 of the CEDAW Committee¹³¹ has made reference to budgetary allocation to realise women's rights to equality and non-discrimination. States are recommended to devise policies to eradicate discrimination against women. While so doing, there is a need to allocate resources to determine that other relevant stakeholders have access to the development of the policy.¹³² A state further has to seek international aid to realise women's human rights in the event it is facing domestic resource constraint.¹³³ States must give financial assistance to independent associations and centres that legally assist women who have a case of discrimination.¹³⁴ Furthermore, in relation to the implementation of national plans of actions, policies and programmes, and relevant authorities concerning the promotion of equality, states must provide for adequate budgetary and financial resources.¹³⁵ Finally states are recommended to mainstream their budgeting so that there are enough funds to implement policies.¹³⁶ The above steps to be taken by states require states to adopt a gender lens while allocating their resources.

To combat the harmful practices that women across the world face, the CEDAW Committee and the CRC Committee adopted a joint recommendation/general comment on the topic (General Recommendation 31 of the CEDAW Committee).¹³⁷ In the event the government is decentralised, there should still be legislation that criminalises harmful practices and the devolved authorities need to be allocated the necessary resources to implement the laws.¹³⁸ States have to gear their resources towards the inclusion of all relevant stakeholders including at the community root levels and traditional leaders.¹³⁹ Overall, General

¹³¹ General Recommendation 28 of the CEDAW Committee on article 2 'The core obligations of states parties' adopted during its 47th session in 2010 CEDAW/C/GC/28.

¹³² General Comment 28 of the CEDAW Committee (n 131 above) paragraph 27.

¹³³ General Comment 28 of the CEDAW Committee (n 131 above) paragraph 29.

¹³⁴ General Comment 28 of the CEDAW Committee (n 131 above) paragraph 34.

¹³⁵ General Comment 28 of the CEDAW Committee (n 131 above) paragraphs 38(a) and 39.

¹³⁶ General Comment 28 of the CEDAW Committee (n 131 above) paragraph 28.

¹³⁷ Joint General Recommendation 31 of the CEDAW Committee on 'Harmful practices' adopted in 2014 CEDAW/C/GC/31.

¹³⁸ General Recommendation 31 of the CEDAW Committee (n 137 above) paragraph 46.

¹³⁹ General Recommendation 31 of the CEDAW Committee (n 137 above) paragraph 77.

Recommendation 31 of the CEDAW Committee recommends states to have an adequate budget for the elimination of harmful practices.¹⁴⁰

The CEDAW Committee has, during several instances, made mention of resource allocation for the realisation of women's human rights in its general/concluding observations. For instance, the CEDAW Committee commended the adoption of gender-responsive budgeting in the concluding observations of several countries.¹⁴¹ It further noted there is inadequate budgetary allocation for the realisation of women's human rights¹⁴² and called upon a country to allocate adequate financial resources to realise women's human rights.¹⁴³ Such recommendations were also made in relation to specific legislation that protect women's human rights.¹⁴⁴ The CEDAW Committee has also recommended states to take into account women who are more vulnerable such as women with disabilities and internally displaced women while formulating their budgets.¹⁴⁵

The CEDAW Committee has also made reference to budget allocation to specific areas and machineries. For instance, the concluding observations of the CEDAW Committee for Mongolia recommended the state to 'ensure sufficient budgetary allocations for accessible health services' and 'calls upon the state party to integrate a gender perspective in all health sector reforms'.¹⁴⁶ Furthermore, the CEDAW Committee has recommended states to provide

¹⁴⁰ General Recommendation 31 of the CEDAW Committee (n 137 above) paragraph 35.

¹⁴¹ CEDAW Committee concluding observations on the combined fourth and fifth periodic report of the Yugoslav Republic of Macedonia adopted during its 54th session in 2013 CEDAW/C/MKD/CO/4-5 paragraphs 4(b) and 5(b); CEDAW Committee concluding observations on the combined seventh and eighth periodic reports of Liberia adopted during its 62nd session in 2015 paragraph 17; and CEDAW Committee concluding observations on the combined fourth and fifth periodic reports of Namibia adopted during its 61st session in 2015 paragraph 5(c).

¹⁴² CEDAW Committee concluding observations on the combined fourth and fifth periodic report of Yugoslav Republic of Macedonia (n 141 above) paragraphs 16 and 37.

¹⁴³ CEDAW Committee concluding observations on the combined fourth and fifth periodic report of Yugoslav Republic of Macedonia (n 141 above) paragraphs 17, 19 and 38(a); and CEDAW Committee concluding observations on the combined sixth and seventh periodic report of Mali adopted during its 64th session in 2016 paragraph 34(a).

¹⁴⁴ CEDAW Committee concluding observations on the combined fourth and fifth periodic reports of the Gambia adopted during its 61st session in 2015 paragraphs 23(b) and 25(b).

¹⁴⁵ CEDAW Committee concluding observations on the combined sixth and seventh periodic report of Mali (n 143 above) 18(c).

¹⁴⁶ CEDAW Committee concluding observations on the fifth, sixth and seventh periodic reports of Mongolia adopted during its 42nd session in 2008 paragraph 34; see also CEDAW Committee concluding observations on the combined sixth and seventh periodic reports of Madagascar adopted during its 62nd session in 2015

sufficient resources to the ministries and machineries that are responsible for women.¹⁴⁷ Additionally, states are recommended to ensure that such provision of resources are consistent and regular and that there are no drastic reductions in the budget allocation to national machineries.¹⁴⁸

The CEDAW Committee's concluding observations also take into account the disparities that exist in the enjoyment of women's human rights in rural and in urban areas. For instance, states have been recommended to increase their budget on education in order to build schools in rural areas¹⁴⁹ and to have gender considerations in such initiatives.¹⁵⁰ Additionally, states have been recommended to give particular attention to women in financial schemes available to women.¹⁵¹

Specific to the adoption of gender budgeting, the CEDAW Committee has recommended states to train staff in charge of budgeting on the concept of gender budgeting and to provide support to gender focal points in different ministries in their gender budgeting initiatives.¹⁵² In the concluding observations of Papua New Guinea, the CEDAW Committee showed 'concern about the lack of information on the specific budgetary allocations ...'.¹⁵³ The CEDAW Committee further urged Papua New Guinea to allocate the necessary financial

paragraph 17; and CEDAW Committee concluding observations on the fourth and fifth periodic reports of Eritrea adopted during its 60th session in 2015 paragraph 35(c).

¹⁴⁷ CEDAW Committee concluding observations on the combined seventh and eighth periodic reports of Liberia (n 141 above) paragraph 18(a); CEDAW Committee concluding observations on the combined third to seven periodic reports of Senegal adopted during its 61st session in 2015 paragraph 15(a) and CEDAW Committee concluding observations on the combined sixth and seventh periodic reports of Ghana adopted during its 59th session in 2014 paragraph 17(b).

¹⁴⁸ CEDAW Committee concluding observations on the combined seven and eight periodic reports of the United Republic of Tanzania adopted during its 63rd session in 2016 paragraph 15(b).

¹⁴⁹ CEDAW Committee concluding observations on the seventh periodic report of Malawi adopted during its 62nd session in 2015 paragraph 31(b).

¹⁵⁰ CEDAW Committee concluding observations on the combined fourth and fifth periodic reports of the Gambia (n 144 above) paragraph 33(a).

¹⁵¹ CEDAW Committee concluding observations on the second and third periodic reports of Mauritania adopted during its 58th session in 2014 paragraph 41.

¹⁵² CEDAW Committee concluding observations on the combined seventh and eighth periodic reports of Liberia (n above) paragraph 18(b) and (c); CEDAW Committee concluding observations on combined initial and second reports of Swaziland adopted during its 58th session in 2014 the paragraph 15(c); and CEDAW Committee concluding observations on the sixth periodic report of Burkina Faso adopted during its 47th in 2010 paragraph 14.

¹⁵³ CEDAW Committee concluding observations on the initial, second and third report of Papua New Guinea adopted during its 46th session in 2010 paragraph 37.

resources to implement the plans, policies, projects and programmes and requested the 'State party to provide information in its next report on the measures taken and their impact on gender'.¹⁵⁴

The above documents demonstrate that states that have ratified the CEDAW have to allocate sufficient budgetary resources to ensure that they achieve substantive equality. As noted in the general recommendations and the concluding observations, the steps that are required to be taken to give effect to the provisions of the CEDAW are inclusive of budgetary allocations. The CEDAW Committee's response concerning the adoption of gender budgeting in the Yugoslav Republic of Macedonia indicates that the provisions of the CEDAW indirectly require states to adopt gender budgeting.

In addition to the CEDAW, the Beijing Platform for Action for Equality, Development and Peace 1995 (Beijing Platform for Action), a primary soft law, is an agenda for women's empowerment adopted in 1995. It contains several steps that states need to take to achieve gender equality. After expanding upon the different avenues through which the state can ensure a better realisation of the human rights of women, it provides for financial arrangements.¹⁵⁵ It recognises that there have not been enough resources allocated towards the realisation of women's human rights¹⁵⁶ and that governments have the primary responsibility to implement the strategic objectives enunciated in the document.¹⁵⁷ Governments are required to analyse their expenditures to assess how women are benefiting from them and they have to adjust their budgets so that equality can be achieved.¹⁵⁸ They are further required to allocate sufficient resources to realise women's human rights and to conduct a gender-impact analysis of that allocation.¹⁵⁹

Similar to the provisions of the Maputo Protocol,¹⁶⁰ the Beijing Platform for Action requires the government to reduce military allocations in favour of the implementation of the

¹⁵⁴ CEDAW Committee concluding observations of Papua New Guinea on its initial, second and third report (n 153 above) paragraph 38.

¹⁵⁵ Paragraphs 345-352 of the Beijing Platform for Action 1995.

¹⁵⁶ Paragraph 345 of the Beijing Platform for Action 1995.

¹⁵⁷ Paragraph 346 of the Beijing Platform for Action 1995.

¹⁵⁸ As above.

¹⁵⁹ As above.

¹⁶⁰ Section 2.4.2(C) below.

strategies adopted.¹⁶¹ The political declaration during the 20th anniversary of the Fourth World Conference, where the Beijing Declaration was first adopted, further stated that governments pledge to mobilise financial resources, including resource allocation and priority expenditure for gender equality.¹⁶²

Therefore, in addition to the CEDAW, governments have shown the political will to allocate sufficient budgetary resources to realise women's human rights. These commitments provide the basis for the motivation of gender budgeting for the allocation of sufficient budgetary resources to realise women's human rights.

The study of global law has demonstrated that no treaty provision makes express mention of budgetary allocation to realise women's human rights. However, treaty monitoring bodies and primary soft law at the level of the UN have made several references to the adoption of budgetary resources to realise women's human rights. Having studied the provisions concerning the allocation of budgetary resources at the global level, the chapter now moves to the African Union.

2.4 The African Union and allocation of budgetary resources to realise women's human rights

Regional human rights systems, including the AU are considered as 'an important development in the human rights revolution'.¹⁶³ This is so because states at the regional level interact more amongst each other and there is more 'trust and interdependence', which are central to the effectiveness of human rights systems.¹⁶⁴

At the African level, the AU represents the human rights system of the region. The Constitutive Act of the AU was adopted on 11 July 2000¹⁶⁵ and it came into force on 26 May

¹⁶¹ Paragraph 349 of the Beijing Platform for Action 1995.

¹⁶² Commission on the Status of Women 'Political declaration on the occasion of the twentieth anniversary of the Fourth World Conference on Women' adopted during its 59th session in 2015 E/CN.6/2015/L.1* paragraph 6.

¹⁶³ GW Mugwanya *Human rights in Africa: Enhancing human rights through the African regional human rights system* (2003) 51.

¹⁶⁴ As above.

¹⁶⁵ The Constitutive Act of the AU available at http://www.au.int/en/sites/default/files/ConstitutiveAct_EN.pdf (accessed on 25 May 2015).

2001.¹⁶⁶ The document has been described as ‘the turning of a page in the history of the African continent’¹⁶⁷ as it represents the beginning of a new era for the ‘political, judicial, and economic organization for Africa’.¹⁶⁸

This section studies the soft law and treaty provisions of the AU that require African states to provide budgetary resources to realise women’s human rights. It firstly does so with the view of establishing African states obligations to allocate budgetary resources to realise human rights. Secondly, it analyses the provisions of regional law that require African states to provide budgetary resources to realise women’s human rights.

2.4.1 Regional human rights law and budgetary allocation for human rights

The AU has adopted several treaties and soft law, the provisions of which can be interpreted to include budgetary allocations to realise human rights. This sub-section analyses the provisions of those treaties and of both primary and secondary soft laws of the AU to assess whether they provide for budgetary allocation of resources towards the realisation of human rights generally and towards the realisation of women’s human rights in particular.

A The African Charter on Human and Peoples’ Rights

The African Charter on Human and Peoples’ Rights (African Charter) was adopted on 27 June 1981 and it entered into force on 21 October 1986 after ‘decades of pleas by the U.N. Commission of Human Rights’.¹⁶⁹ As at June 2016, it had been ratified by all AU members.¹⁷⁰

States party to the African Charter have the obligation to ensure that every individual benefits from the rights enshrined in the document without any kind of discrimination, including on the basis of sex.¹⁷¹ Article 3 provides for equality before the law and equal protection of the law. Women should therefore not suffer any type of discrimination when it

¹⁶⁶ CAA Packer & D Rukare ‘The new African Union and its Constitutive Act’ 96 *The American Journal of International Law* (2002) 2 365.

¹⁶⁷ As above.

¹⁶⁸ As above.

¹⁶⁹ Mugwanya (n 163 above) 45.

¹⁷⁰ AU ‘List of countries which have signed, ratified/acceded to the African Charter on Human and Peoples’ Rights’ (3 June 2016) available at http://www.au.int/en/sites/default/files/treaties/7770-sl-african_charter_on_human_and_peoples_rights_0.pdf (accessed on 12 August 2016).

¹⁷¹ Article 2 of the African Charter.

comes to ‘the implementation of national laws’ and states have to ensure that the laws ‘do not themselves discriminate’ between the different sexes.¹⁷² Article 18 of the African Charter further imposes an obligation on states to ensure that discrimination against women is eliminated. The fact there is an article which specifically addresses discrimination against women demonstrates that women’s human rights in Africa require ‘special attention’ and that states should not hesitate to adopt ‘a policy of positive discrimination in their favour’.¹⁷³ Article 19 further requires states to ‘ensure protection of the rights of the woman and the child as stipulated in international declarations and conventions’.¹⁷⁴ This article therefore incorporates the provisions of the CEDAW which is the global treaty that provides specifically for women’s human rights.

The above articles of the African Charter indicate that the document extends its protection to women. Ouguergouz has made reference to positive discrimination to realise women’s human rights.¹⁷⁵ Such positive discrimination can be interpreted to imply that obligations for budgetary allocations for human rights in the African Charter will extend to obligations for budgetary allocations to realise women’s human rights.¹⁷⁶

In relation to allocation of budgetary resources to realise human rights, article 1 of the African Charter provides that states ‘shall undertake to adopt legislative or other measures’ to give effect to the rights protected by the African Charter. Furthermore, under article 16 of the African Charter concerning the right to health, states have the obligation to take ‘necessary measures to protect the health of their people and to ensure that they receive medical attention when they are sick’.

These articles do not expressly mention the allocation of budgetary resources to realise the rights in the African Charter. However, according to Yeshanew, ‘other measures’ refers to ‘non-legislative steps that States are expected to take to realize all types of rights guaranteed

¹⁷² F Ouguergouz *The African Charter on Human and Peoples’ Rights: A comprehensive agenda for human dignity and sustainable democracy in Africa* (2003)80.

¹⁷³ Ouguergouz (n 172 above) 84-85.

¹⁷⁴ Article 18(3) of the African Charter.

¹⁷⁵ Ouguergouz (n 172 above) 84-85.

¹⁷⁶ As above.

by the Charter...'.¹⁷⁷ The non-legislative measures will include budgetary appropriation to give effect to the rights provided by the African Charter. The African Commission has adopted rules and principles which interpret budgetary allocation of resources as one of the steps that states have to take.

One of the functions of the African Commission is to 'formulate and lay down, principles and rules aimed at solving legal problems relating to human and peoples' rights and fundamental freedoms upon which African Governments may base their legislations'.¹⁷⁸ Such documents can be in the form of resolutions, general comments, declarations and guidelines. This section studies those principles and rules of the African Commission which recommend states to adopt budgetary allocation of resources to realise the rights provided by the African Charter whereas section 2.4.2(A) below expands on the general comments that relate to budgetary allocations for women's human rights. Concluding observations can also be analysed to understand the African Commission's expectations in terms of gender budgeting. However, this analysis is done in Chapter 5 in its section 5.1.1(B) while assessing the ways through which the African Commission can ensure that African states adopt gender budgeting as an integral part of their budgeting process.

(i) The Pretoria Declaration on Economic, Social and Cultural Rights in Africa

To give effect to the economic, social and cultural rights in the African Charter, the Pretoria Declaration on Economic, Social and Cultural Rights in Africa (Pretoria Declaration) was adopted during the African Commission's 36th session which was held in December 2004. The Pretoria Declaration makes reference to allocation of resources to realise economic, social and cultural rights. For instance, in paragraph 2, it provides that states have the obligation to 'adopt legislative and other measures ... by using the maximum of their resources' to realise the socio-economic rights in the African Charter. Paragraph 3 of the Pretoria Declaration requires states to 'address with all appropriate measures' their obligations with regard to economic, social and cultural rights.

¹⁷⁷ SA Yeshanew *The justiciability of economic, social and cultural rights in the African regional human rights system* (2013) 283.

¹⁷⁸ Article 45(1)(b) of the African Charter.

The use of the words ‘other measures’, ‘maximum of their resources’, and ‘appropriate measures’ indicate that states’ obligations are not limited to the adoption of legislative measures. States are recommended to go beyond the adoption of legislative measures and to adopt other measures, which can be interpreted as allocation of their resources, to give effect to the rights in the African Charter. Indeed, acknowledging that budgetary allocations are core to the realisation of economic, social and cultural rights, the Pretoria Declaration recommends states to ensure that the public budgeting process is ‘transparent and consultative’.¹⁷⁹

States are further recommended to ‘adopt measures for the prudent use of resources’ and this includes investing into different affordable options which gives most effect to economic, social and cultural rights.¹⁸⁰ Similar to the provision of article 10(3) of the Maputo Protocol,¹⁸¹ the Pretoria Declaration recommends states to ‘take necessary measures to reduce military expenditure significantly in favour of increasing spending on the implementation of economic, social and cultural rights’.¹⁸² This provision reinforces Africa’s position on excessive military expenditure and encourages states to invest more in human rights than the former.

The Pretoria Declaration provides for non-discrimination on the basis of sex when it comes to the realisation of socio-economic rights and it recognises that women are in a more disadvantaged position.¹⁸³ The Pretoria Declaration further recommends budgetary allocations to realise the economic, social and cultural rights protected by regional and international instruments.¹⁸⁴ Therefore, a combined reading of these two recommendations points out that the Pretoria Declaration requires states to demonstrate the budgetary steps that they have taken to address the needs of women.

¹⁷⁹ Paragraph 11(a)(v) of the Pretoria Declaration.

¹⁸⁰ Paragraph 11(a)(ix) of the Pretoria Declaration.

¹⁸¹ This article is discussed in section 2.4.2(C) below.

¹⁸² Paragraph 11(a)(xviii) of the Pretoria Declaration.

¹⁸³ Paragraphs 4 and 11(a)(xi) of the Pretoria Declaration.

¹⁸⁴ Paragraph 11(a)(v) of the Pretoria Declaration.

(ii) Guidelines and Principles on Economic, Social and Cultural Rights in the African Charter

Adopted during the 50th Ordinary session of the African Commission held in Banjul, the Gambia, from 24 October to 7 November 2011, the Guidelines and Principles on Economic, Social and Cultural Rights in the African Charter (Guidelines and Principles on ESCR) elaborates on budgeting for economic, social and cultural rights. Taxation has been identified as a resource to realise economic, social and cultural rights, and states are recommended to 'institute an effective and fair taxation system and a budgeting process that ensures that economic, social and cultural rights are prioritised in the distribution of resources'.¹⁸⁵ States further have to 'allocate sufficient resources within national budgets towards the realisation of each right'.¹⁸⁶ In cases of resource constraints, states are still required to realise the minimum level of economic, social and cultural rights of members of vulnerable groups, including women, by 'prioritising them in all interventions'.¹⁸⁷

The above provisions of the Guidelines and Principles on ESCR imply that the African Charter requires states to allocate sufficient budgetary resources to realise the minimal level of economic, social and cultural rights of women since they form part of vulnerable groups. States are recommended to prioritise women in 'all interventions' and as such, allocations of budgetary resources need to have maximal impact on women's human rights.

(iii) Resolution on Illicit Capital Flight from Africa

The Resolution on Illicit Capital Flight from Africa was adopted during the 53rd ordinary session of the African Commission which was held in April 2013.¹⁸⁸ While emphasising that illicit capital flights are challenges to the implementation of the African Charter, it states that 'human rights cannot be fully achieved without the availability of resources'.¹⁸⁹ It further notes with concern that states have often 'invoked lack of financial resources to effectively'

¹⁸⁵ Paragraph 15 of the Guidelines and Principles on ESCR.

¹⁸⁶ Paragraph 18 of the Guidelines and Principles on ESCR.

¹⁸⁷ Paragraph 17 of the Guidelines and Principles on ESCR.

¹⁸⁸ Website of the African Commission available at <http://www.achpr.org/sessions/53rd/resolutions/236/> (accessed on 13 May 2016).

¹⁸⁹ As above.

give effect to human rights.¹⁹⁰ The Resolution on Illicit Capital Flight also notes that ‘human rights cannot be fully achieved without the availability of resources’.¹⁹¹

Despite the fact that this Resolution is not specific to recommendations concerning the allocation of budgetary resources to realise women’s human rights, its provisions indicate that the African Commission recognises financial resources as a means to realise human rights. This Resolution demonstrates that the African Commission expects states to maximise their revenues in order to spend on human rights. This can be interpreted to mean that the African Commission recognises budgetary allocation of resources as imperative for the realisation of the rights provided by the African Charter.

The provisions of the African Charter and the above secondary soft laws of the African Commission demonstrate that African states are recommended to allocate budgetary resources to realise human rights provided by the African Charter. Additionally, as discussed in the previous sections, the African Charter considers women as part of a vulnerable group. Consequently, it has been recommended that the budgetary allocation process take into account the vulnerabilities that women face.

B The African Charter on the Rights and Welfare of the Child

The African Charter on the Rights and Welfare of the Child (African Children’s Charter) was adopted in 1990 and it entered into force on 29 November 1999. The African Children’s Charter provides that a state has the obligation to ensure that every child enjoys all the rights enshrined in the African Children’s Charter without any discrimination including on the basis of sex.¹⁹² As such, all the rights in the African Children’s Charter are applicable to the girl child.

The first article of the African Children’s Charter imposes an obligation on states to take ‘necessary steps ... to adopt such legislative or other measures as may be necessary to give effect to the provisions of this Charter’.¹⁹³ While this article applies to all the articles of the

¹⁹⁰ As above.

¹⁹¹ As above.

¹⁹² Article 3 of the African Children’s Charter.

¹⁹³ Article 1(1) of the African Children’s Charter.

African Children's Charter, there is also provision for measures to be taken concerning specific rights provided by the instrument.

In relation to the right to education, states have the obligation to 'take all appropriate measures' to fully realise that right and in particular 'to take special measures in respect of female ... children'.¹⁹⁴ In addition, concerning children who fall pregnant before completing their education, article 11(6) of the African Children's Charter imposes an obligation on states to 'take all appropriate measures' to ensure that the child has the opportunity to pursue their education. States further have to progressively use 'their available resources' to ensure that children with mental and physical disabilities do not face any inconvenience in relation to movement and access to public buildings.¹⁹⁵

In the context of the right to health, states have the obligation to take a number of steps to ensure that the child enjoys the highest attainable standard of health and this includes 'financial means' for the 'mobilization of local community resources in the development of primary health care for children'.¹⁹⁶ To protect a child against torture, a state needs to adopt 'specific legislative, administrative, social and education measures'.¹⁹⁷ These measures 'shall include effective procedures for the establishment of special monitoring units to provide necessary support for the child and for those who have the care of the child'.¹⁹⁸

States have the responsibilities, 'in accordance with their means and national conditions', to take 'appropriate measures' to assist parents and other persons responsible for the child to ensure that the child is taken care of.¹⁹⁹ In order to eliminate harmful social and cultural practices, states have the obligation to 'take all appropriate measures'.²⁰⁰ 'All necessary measures' shall further be taken 'to ensure that no child shall take a direct part in hostilities and refrain in particular, from recruiting any child'.²⁰¹ Similarly, in relation to refugee children, states have to take 'all appropriate measures' to give refuge to the child and to

¹⁹⁴ Article 11(3)(e) of the African Children's Charter.

¹⁹⁵ Article 13 of the African Children's Charter.

¹⁹⁶ Article 14(2)(j) of the African Children's Charter.

¹⁹⁷ Article 16(1) of the African Children's Charter.

¹⁹⁸ Article 16(2) of the African Children's Charter.

¹⁹⁹ Article 20(2) of the African Children's Charter.

²⁰⁰ Article 21(1) of the African Children's Charter.

²⁰¹ Article 22(2) of the African Children's Charter.

ensure that he enjoys the rights provided by the African Children's Charter.²⁰² 'All appropriate measures' also need to be taken to ensure that children are not objects of human trafficking and that the adopting parents do not have any financial gain in inter-country adoptions.²⁰³ States further need to take 'necessary measures' to re-unite children who have been separated from their parents.²⁰⁴

States also have the obligation to 'take all appropriate measures' to ensure that children do not abuse of drugs.²⁰⁵ 'All appropriate measures' need to be taken to ensure that children are protected against sale, trafficking and abduction.²⁰⁶

All of the above articles make reference to the adoption of measures which include legislative and other measures. Even if the African Children's Charter does not make express mention of the adoption of budgetary measures to give effect to the rights therein, the African Children's Committee has interpreted budgetary allocation of resources as one of the steps that states have to adopt during the state reporting process and in its general comments. The following sub-sections studies the general comments and the concluding observations of the African Children's Committee.

(i) State reporting process

While examining state reports, the African Children's Committee has made reference to the girl child and has noted that there are still discrepancies when it comes to the realisation of the rights of the girl child. The girl child forms part of marginalised vulnerable groups of children and require more protection.²⁰⁷

The education system, for example, is required to take into account that girls are prone to pregnancies. As a result, the state was recommended to adopt plans and policies to

²⁰² Article 23(1) of the African Children's Charter.

²⁰³ Article 24(d) of the African Children's Charter.

²⁰⁴ Article 25(2)(b) of the African Children's Charter.

²⁰⁵ Article 28 of the African Children's Charter.

²⁰⁶ Article 29 of the African Children's Charter.

²⁰⁷ African Children's Committee concluding recommendations on the initial report of Guinea adopted during its first extraordinary session in 2014 paragraph 14.

accommodate pregnant girls or child mothers.²⁰⁸ It was found that girls in Burkina Faso still have less access to education than boys²⁰⁹ and that there is a need for special measures²¹⁰ to combat violence against the girl child in Ethiopia.²¹¹

The African Children's Committee has interpreted other measures to be adopted to include budgetary allocation to realise children's rights at the national level.²¹² For instance, in the concluding recommendations for South Africa, it has urged the state to 'allocate the necessary budget for the promotion and protection of children's rights and ensuring its effective and efficient use'.²¹³ South Africa was further urged to adopt a 'child rights sensitive budgeting and expenditure'.²¹⁴ Similarly, Burkina Faso was recommended to allocate an adequate budget for programmes and policies for the realisation of the rights and welfare of the child.²¹⁵

States are required to include 'detailed and disaggregated statistical data' in their state reports.²¹⁶ For instance, in relation to the right to education, it was noted that Tanzania had limited information relating to budgetary allocations to education in its state report.²¹⁷ The African Children's Committee further stated that insufficient statistical data prevents the

²⁰⁸ African Children's Committee concluding recommendations on the first periodic report for Kenya paragraph 42; and African Children's Committee concluding recommendations on the initial report of Mozambique paragraph 24.

²⁰⁹ African Children's Committee concluding recommendations on the initial report for Burkina Faso adopted during its 14th session in 20093.

²¹⁰ African Children's Committee concluding recommendations on the initial report of Guinea paragraph 33: special measures are required in terms of the girl's right to education.

²¹¹ African Children's Committee concluding recommendations on the combined initial, first, second and third periodic reports of Ethiopia adopted during its first extraordinary session in 2014 paragraph 24.

²¹² African Children's Committee concluding recommendations on the combined initial, first, second and third periodic reports of Ethiopia (n 211 above) paragraphs 6 and 31(b).; African Children's Committee concluding recommendations on the initial report of Mali adopted during its 14th session in 2009 8; and African Children's Committee concluding recommendations on the initial report of Mozambique (n 208 above) paragraph 6.

²¹³ African Children's Committee concluding recommendations on the initial report of South Africa adopted during its first extraordinary session in 2014 paragraph 7.

²¹⁴ African Children's Committee concluding recommendations on the initial report for South Africa (n 213 above) paragraph 9.

²¹⁵ African Children's Committee concluding recommendations on the initial report for Burkina Faso (n 209 above) 8; African Children's Committee concluding 8 recommendations on the initial report of Guinea (n 210 above); see also generally the African Children's Committee concluding recommendations on the first periodic report for Kenya (n 208 above).

²¹⁶ African Children's Committee concluding recommendations on the initial report for South Africa (n 213 above) paragraph 10.

²¹⁷ African Children's Committee concluding recommendations on the initial report of Tanzania adopted during its 14th session in 2010 4.

African Children's Committee from evaluating and measuring the progress and the achievements of the country.²¹⁸

The above concluding observations of the African Children's Committee indicate that the African Children's Committee expects states to provide special protection for the girl child. It has further identified budgetary allocation of resources as a means of special protection to be afforded to the girl child.

(ii) General comments

The African Children's Committee's General Comment 1 on article 30 of the African Children's Charter on 'children of incarcerated and imprisoned parents and primary caregivers', issued in 2013, provides that states must adopt 'legislative and administrative measures',²¹⁹ 'appropriate measures',²²⁰ 'measures'²²¹ and 'policy measures'²²² and must set up 'mechanisms'²²³ to implement the provisions therein. Similarly, the African Children's Committee's General Comment 2 on article 6 of the African Children's Charter on 'right to birth registration, name and nationality' recommends states to adopt 'special',²²⁴ 'necessary'²²⁵ or 'appropriate'²²⁶ measures.

Although the African Children's Charter does not expressly mention budgetary allocations to realise the rights of the child, the general comments and concluding observations of the African Children's Committee provide that there is a need to adopt a children's rights approach to budgeting to realise the rights in the African Children's Charter. As such, the implementation of the provisions of the African Children's Charter requires budgetary allocations. The African Children's Charter also recognises that the girl child is more vulnerable than the boy child and has specific provisions for her in addition to stating that

²¹⁸ African Children's Committee concluding recommendations on the initial report of Rwanda adopted during its 16th session in 2010 2.

²¹⁹ Paragraphs 24(e) and 43 of General Comment 1 of the African Children's Committee.

²²⁰ Paragraph 25 of General Comment 1 of the African Children's Committee.

²²¹ Paragraphs 26 and 41 of General Comment 1 of the African Children's Committee.

²²² Paragraph 66(b) of General Comment 1 of the African Children's Committee.

²²³ Paragraphs 24(c), 28, 44, 66(c) and 66(e) of General Comment 1 of the African Children's Committee.

²²⁴ Paragraphs 53, 56 and 103 of General Comment 2 of the African Children's Committee

²²⁵ Paragraphs 23 and 102 of General Comment 2 of the African Children's Committee.

²²⁶ Paragraphs 22, 30, 40 and 41 of General Comment 2 of the African Children's Committee.

the rights in the African Children's Charter apply to both the girl child and the boy child. States can demonstrate that they have considered the vulnerabilities of the girl child through the allocation of sufficient budgetary resources to realise the rights of the girl child.

C Primary soft law of the African Union

In addition to the treaties and secondary soft laws, Heads of state at the AU level have adopted several documents which reiterate the provisions of some treaties or which are 'an intended precursor to adoption of a later treaty'.²²⁷ Two of them, which relate to government's budgets, are studied in the following sub-sections.

(i) Abuja Declaration on HIV/AIDS, Tuberculosis and Other Related Infectious Diseases

A human rights approach to public budgeting at the AU level was mentioned in the Abuja Declaration on HIV/AIDS, Tuberculosis and Other Related Infectious Diseases of 2001 (Abuja Declaration 2001) adopted by the Heads of African states. This Declaration was adopted as a result of a scourge in deaths due to human immunodeficiency virus infection and acquired immune deficiency syndrome (HIV/AIDS), tuberculosis and other related infectious diseases²²⁸ and it was acknowledged that there were extra efforts needed on behalf of African governments to tackle the above problems.²²⁹ The Abuja Declaration 2001 also recognises that women and girls are biologically more prone to HIV/AIDS and are therefore in a more disadvantaged situation.²³⁰ To combat HIV/AIDS, tuberculosis and other infectious diseases, the states committed to 'take all necessary measures to ensure that the needed resources are made available from all sources and that they are efficiently and effectively utilized'.²³¹ Going a step further, the states also pledged to allocate 'at least 15%' of their annual budget to 'the improvement of the health sector'.²³² In addition to the above, the states also undertook to mobilise all resources, including financial resources, for the

²²⁷ As above.

²²⁸ Abuja Declaration 2001 paragraph 3.

²²⁹ Abuja Declaration 2001 paragraph 6.

²³⁰ Abuja Declaration 2001 paragraph 7.

²³¹ Abuja Declaration 2001 paragraph 26.

²³² As above.

provision of 'care and support and quality treatment' to that section of the population that is affected with HIV/AIDS, tuberculosis and other related infections.²³³

However, since the adoption of the Abuja Declaration 2001, not many African countries have allocated 15% of their budget to health. A joint study by UNAIDS and the AU in 2013 demonstrated that six countries, namely, Liberia, Madagascar, Malawi, Rwanda, Togo and Zambia have been able to achieve the target of 15% set out in the Abuja Declaration 2001.²³⁴ As at that time, countries like Djibouti, Ethiopia, Lesotho and Swaziland were on track to abide by the Abuja Declaration 2001.²³⁵ The study noted that despite the fact that the majority of African states have increased their health budget after the adoption of the Abuja Declaration 2001, most of them are still far from the 15% target. This study is indicative of the fact that African states are not respecting their commitments to allocate the required resources to health.²³⁶

A human rights approach to public budgeting can be a step towards the realisation of the commitments in the Abuja Declaration. Such a step will ensure that human rights issues, particularly those which require much attention, are allocated more resources. The Abuja Declaration has noted that women and girls are more vulnerable to HIV/AIDS. Thus, the resource allocation process must take into account their impact on women and girls.

(ii) Solemn Declaration on Gender Equality in Africa

The Solemn Declaration on Gender Equality in Africa (Declaration on Gender Equality) was adopted during the third ordinary session of the Assembly of Heads of State and Government of Member States of the AU held in Ethiopia from 6 to 8 July 2004. It reaffirms the commitment of states to abide by the obligations to give effect to women's human rights in the different global and regional human rights treaties, including the Maputo Protocol. Its preamble further recognises the vulnerabilities that women across the continent face.

²³³ Abuja Declaration 2001 paragraph 30.

²³⁴ UNAIDS & AU 'Abuja+12: Shaping the future of health in Africa' (2013) 5.

²³⁵ As above.

²³⁶ For instance, a newspaper article criticised the budget for health of the Zimbabwean government as it did not allocate the required 15% as pledged under the Abuja Declaration: R Chipayi *Health Ministry bemoans 2015 budgetary allocation* The Herald 23 December 2014 available at <http://www.herald.co.zw/health-ministry-bemoans-2015-budgetary-allocation/> (accessed on 28 August 2015).

Moreover, states undertake to adopt a number of measures towards the realisation of women's human rights provided by different global and regional human rights treaties.

One of the measures includes the promotion of 'gender specific economic, social, and legal measures aimed at combating the HIV/AIDS pandemic'.²³⁷ They further commit to allocate budgetary resources to different sectors to 'alleviate women's burden of care'. In addition to the above, they commit to provide gender machineries in the different countries with 'enough human and financial resources to enable them to carry out their responsibility of promoting and tracking gender equality'.²³⁸

From the above, it can be deduced that the Declaration on Gender Equality recognises that there is a need to allocate financial resources towards women for countries to achieve gender equality. Through their commitments in the Declaration on Gender Equality, states have explicitly undertaken to take into consideration women's human rights during the public budgeting process. The adoption of gender budgeting by African countries will reflect countries' willingness to ensure that women's human rights are taken into account during the public budgeting process.

2.4.2 Regional human rights laws, the Maputo Protocol and budgetary allocation for women's human rights

Having studied regional human rights law and the allocation of budgetary resources to realise human rights, the study now turns towards the obligations that states have to provide sufficient budgetary resources to women's human rights by virtue of ratifying the Maputo Protocol. The Constitutive Act recognises gender equality as one of its principles. In its Preamble, it states that the adoption of the instrument was guided by the common vision to construct a 'united and strong Africa' and by 'the need to build a partnership between governments and all segments of CSOs, in particular women...'.²³⁹ Article 4(l) of the Constitutive Act further provides for the AU to function towards the promotion of gender

²³⁷ Declaration on Gender Equality paragraph 1.

²³⁸ Declaration on Gender Equality paragraph 12.

²³⁹ Preamble of the Constitutive Act paragraph 7.

equality. This article is demonstrative of the fact that Africa commits to combat discrimination that occurs against women 'on a routine and systematic basis'.²⁴⁰

To ensure that African states abide by the principles of the Constitutive Act, the AU has adopted the Maputo Protocol in 2003. Before the adoption of the Maputo Protocol, soft law drew attention to the discrimination that women face across Africa. For instance, the Kigali Declaration of 2003 noted with 'great concern that the rights of women and children in spite of the progress achieved, remain insufficiently protected in many African countries' and welcomed the progress in terms of the draft of the Protocol on the Rights of Women.²⁴¹

In order to ensure that women's human rights are put in the forefront by the African Commission, there was a suggestion to either amend and revise the 'African Charter, which would be difficult and meet with a great deal of resistance' or to prepare 'an additional protocol to the African Charter'.²⁴² The power to adopt an additional protocol to the African Charter emanates from article 66 of the African Charter which provides that '[s]pecial protocols or agreements may, if necessary, supplement the provisions of the present Charter'. The idea of an additional protocol on the rights of women in Africa emanated from a meeting organised by WiLDAF in 1995 in Lomé, Togo, pursuant to which, during its 31st ordinary session in 1995, the Assembly of Heads of States of the Organisation of African Unity (OAU) mandated the African Commission to draft a protocol on women's human rights in Africa.²⁴³

Despite having been subject to resistance and difficulties before its coming into force, the Maputo Protocol has 'many positives'.²⁴⁴ The Maputo Protocol 'highlights the fact that the understanding of the nature of women's oppression has become more textured'.²⁴⁵ The

²⁴⁰ GJ Naldi 'The African Union and regional human rights system' in M Evans & R Murray (eds) *The African Charter on Human and Peoples' Rights: The system in practice, 1986-2000* 2nd edition (2008) 22.

²⁴¹ Paragraph 16 of the Kigali Declaration.

²⁴² F Banda 'Blazing a trail: The African Protocol on Women's Rights comes into force' 50 *Journal of African Law* (2006) 1 67-68.

²⁴³ M Wandia 'Rights of women in Africa: Launch of a petition to the African Union' *Pambazuka News* 3 June 2004 available at <http://www.pambazuka.org/gender-minorities/rights-women-africa-launch-petition-african-union> (accessed on 18 August 2016).

²⁴⁴ F Banda 'Protocol to the African Charter on the Rights of Women in Africa' in Evans & Anor (n 240 above) 453.

²⁴⁵ Banda 2006 (n 242 above) 80.

Maputo Protocol is a reflection of not a lack of norms regulating women's human rights, but rather of a deficiency in the realisation of women's human rights.²⁴⁶ Therefore, the Maputo Protocol highlights and expands upon the protection of women's human rights in the African Charter.²⁴⁷

The Maputo Protocol is the most relevant African document for the current study. This is so because while the African Charter and the African Children's Charter impose an obligation to generally 'adopt legislative or other measures' to give effect to their provisions,²⁴⁸ the Maputo Protocol 'enshrines provisions expressly providing for duties for resource allocation and even of budgetary arrangement' to realise women's human rights.²⁴⁹ This 'does not have the form of typical human rights provisions that govern the relationship between states and individuals'.²⁵⁰

At the global level, the treaties of the UN make reference to 'maximum available resources', 'necessary measures', 'appropriate measures', and 'necessary steps' without expressly mentioning budgetary allocation of resources. The provisions of the treaties have later been interpreted by treaty monitoring bodies to include budgetary allocation of resources in the steps that states must take to realise the rights protected by the treaty. The absence of express budgetary provisions in international treaties might have been motivated by the fact that the international community did not want to encroach upon the sovereignty of a state by imposing an obligation upon states on the way in which they are supposed to allocate their resources. Nevertheless, as discussed in section 5.1.1 below, once a state has ratified a treaty, it is bound by its provisions. The African Commission or the African Court on Human and Peoples' Rights (African Court) can therefore make reference to the provisions of the

²⁴⁶ F Viljoen *International human rights law in Africa* (2012) 251.

²⁴⁷ F Viljoen 'An introduction to the Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa' 16 *Washington and Lee Journal of Civil Rights and Social Justice* (2009) 19.

²⁴⁸ Article 1 of the African Charter: 'The Member States of the Organization of African Unity parties to the present Charter shall recognize the rights, duties and freedoms enshrined in this Chapter and shall undertake to adopt legislative or other measures to give effect to them.'; Article 1.1 of the African Children Charter: Member States of the Organization of African Unity Parties to the present Charter shall recognize the rights, freedoms and duties enshrined in this Charter and shall undertake to the necessary steps, in accordance with their Constitutional processes and with the provisions of the present Charter, to adopt such legislative or other measures as may be necessary to give effect to the provisions of this Charter.'

²⁴⁹ Yeshanew (n 177 above) 262.

²⁵⁰ As above.

Maputo Protocol in the event a ratifying state has not provided sufficient budgetary resources to realise women's human rights.

However, the provisions of the Maputo Protocol do not 'invite' the African Commission or the African Court to suggest the amount to be allocated to a specific item. These institutions' powers are limited in the sense that they can only review the allocation made and state whether they are sufficient or not.²⁵¹ The provisions of the Maputo Protocol concerning budgetary allocations therefore enable the African Commission and the African Court to review the budgetary allocations of a state for the realisation of women's human rights.

The current section unpacks those provisions of the Maputo Protocol which impose an obligation on states to provide budgetary resources to realise women's human rights. It studies articles 26(2), 4(2)(i) and 10(3) of the Maputo Protocol with the view of establishing that African states have the obligation to provide budgetary resources to realise women's human rights.

A Article 26(2) of the Maputo Protocol

Article 26(2) of the Maputo Protocol provides for a broader budgetary reconstruction in order to give effect to the rights protected by the instrument.²⁵² More specifically, it provides that 'States Parties undertake to adopt all necessary measures and in particular shall provide budgetary and other resources for the full and effective implementation of the rights herein recognised'.

Unlike articles 4(2)(i) and 10(3) of the Maputo Protocol,²⁵³ the current article is broader and gives more leeway to states. It can be argued that article 26 of the Maputo Protocol is inclusive of articles 4(2)(i) and 10(3) of the instrument since 'all necessary measures' to 'provide budgetary ... resources' for the realisation of the rights protected by the Maputo Protocol includes a reduction in military expenditure,²⁵⁴ and also targets violence against women. Article 26 of the Maputo Protocol imposes a general obligation on states to allocate

²⁵¹ Viljoen 2009 (n 247 above) 31.

²⁵² Article 26(2) of the Maputo Protocol: 'States Parties undertake to adopt all necessary measures and in particular shall provide budgetary and other resources for the full and effective implementation of the rights herein recognised.'

²⁵³ Sections 2.4.2(B) and 2.4.2(C) below.

²⁵⁴ Yeshanew (n 177 above) 294.

sufficient budgetary resources to realise the women's human rights protected by the Maputo Protocol.

The African Commission has adopted general comments²⁵⁵ under different provisions of the Maputo Protocol which make reference to budgetary allocations. The mention of budgetary allocations might be an expression of an implementation of article 26(2) of the Maputo Protocol since states have to bear same in mind while devising programmes and policies to implement the different provisions of the document.

The African Commission 'proactively'²⁵⁶ issued general comments on articles 14(1)(d) and (e) of the Maputo Protocol in 2012 (General Comments 1) under article 45(1)(b) of the African Charter. These general comments are intended to be 'used by human rights treaty bodies to interpret the provisions of relevant international legal instruments, with a view to assisting States to fulfil their obligations under such instruments'.²⁵⁷ Paragraph 48 of General Comments 1 of the African Commission is particularly relevant for the allocation of sufficient budgetary resources to realise women's human rights. It states that there should be provision of financial resources in line with article 26(2) of the Maputo Protocol to 'fund and empower public health authorities to provide a comprehensive range of services for the prevention and treatment of every person's sexual and reproductive health'.

While categorising them as 'an important milestone in the history of the Commission',²⁵⁸ Durojaye has pointed out that General Comments 1 of the African Commission can be used 'as a tool for advocacy and for interaction with policy makers at national and regional level'.²⁵⁹ The General Comments 1 are an 'authoritative clarification' of steps that states must take to abide by their obligations under articles 14(1)(d) and (e) of the Maputo Protocol.²⁶⁰

²⁵⁵ Article 45(1)(b) of the African Charter: One of the functions of the African Commission is to 'formulate and lay down, principles and rules aimed at solving legal problems relating to human and peoples' rights and fundamental freedoms upon which African Governments may base their legislations'.

²⁵⁶ R Murray and D Long *The implementation of the findings of the African Commission on Human and Peoples' Rights* (2015) 67.

²⁵⁷ General Comments on article 14(1)(d) and (e) of the Maputo Protocol paragraph 1.

²⁵⁸ E Durojaye 'The General Comments on HIV adopted by the African Commission on Human and Peoples' Rights as a tool to advance the sexual and reproductive rights of women in Africa' (2014) 127 *International Journal of Gynecology and Obstetrics* 308.

²⁵⁹ Durojaye (n 258 above) 307.

²⁶⁰ Durojaye (n 258 above) 308.

As such, the General Comments 1 of the African Commission authoritatively clarifies that states have to allocate financial resources for women's human rights.

Recognising that the allocation of resources is important for the realisation of the provisions of the African Charter, General Comment 2 on articles 14(1)(a), (b), (c) and (f) and articles 14(2)(a) and (c) of the Maputo Protocol adopted in 2014, also expresses concerns about allocation of financial resources.²⁶¹ It provides that states 'should allocate adequate financial resources for the strengthening of public health services so that they can provide comprehensive care in family planning/contraception and safe abortion'. It further provides for specific budget allocations to implement the provisions of General Comment 2 and the provision of information for the purposes of monitoring, control and accountability.

In addition to the above two general comments already adopted, the African Commission is in the process of developing a general comment on child marriage in collaboration with the African Children's Committee.²⁶² The draft general comment makes reference to article 26 of the Maputo Protocol in several instances and identifies lack of budgetary resources as a challenge to combat child marriage while reiterating states' obligations to allocate sufficient resources for same

The above general comments of the African Commission in relation to the Maputo Protocol recommend states to allocate sufficient budgetary resources to realise women's human rights. They take inspiration from the provisions of article 26 of the Maputo Protocol that requires states to allocate sufficient budgetary resources to realise the rights provided therein.

B Article 4(2)(i) of the Maputo Protocol

Under the rights to life, integrity and security of African women, states have the following obligation:

... take appropriate and effective measures to ... provide adequate budgetary and other resources for the implementation and monitoring of actions aimed at preventing and eradicating violence against women.

²⁶¹ Paragraph 62 of General Comment 2 of the African Commission.

²⁶² On file with the author.

Violence against women is a form of gender-based violence which is defined as ‘violence that is directed against a woman because she is a woman or that affects women disproportionately’.²⁶³ The term violence against women has several manifestations which include ‘violence by an intimate partner’, ‘rape/sexual assault and other forms of sexual violence perpetrated by someone other than a partner’, ‘female genital mutilation, honour killings and the trafficking of women’.²⁶⁴

The UN Economic Commission for Africa considered violence against women as ‘the most widespread and socially tolerated of human rights violations’ worldwide.²⁶⁵ The mention of allocation of budgetary resources in article 4(2)(i) of the Maputo Protocol may be interpreted to imply that the AU considered the lack of budgetary allocations as a challenge to combat violence against women. The inclusion of budgetary resources in article 4(2)(i) of the Maputo Protocol indicates that states have to prioritise its programmes, plans of action and policies aimed at eradicating violence against women.

However, states often put forward the argument that they do not have sufficient resources to implement the provisions of this article.²⁶⁶ Nevertheless, the involvement of CSOs,²⁶⁷ and an active and efficient judiciary can ensure that a state is abiding by its obligations under article 4(2)(ii) of the Maputo Protocol. The *Zambian case of Katakwe v Edward & Others*²⁶⁸ can be used as an example to demonstrate the role that non-state actors have in the application of the provisions of the Maputo Protocol. In this case, the plaintiff sued the government for failing to protect her from sexual violence. The plaintiff argued that this

²⁶³ General Recommendation 19 of the CEDAW Committee on ‘Violence against women’ adopted during its 11th session in 1992 paragraph 6.

²⁶⁴ World Health Organisation ‘Global and regional estimates of violence against women: Prevalence and health effects of intimate partner violence and non-partner sexual violence’ (2013) 4.

²⁶⁵ UN Economic Commission for Africa ‘Violence against women in Africa: A situational analysis’ (undated) available at <http://www1.uneca.org/Portals/awro/Publications/21VAW%20in%20Africa-A%20situational%20analysis.pdf> (accessed on 12 May 2016).

²⁶⁶ M Muriithi ‘An analysis of the Protocol to the African Charter on Human and Peoples’ Rights on the Rights of Women in Africa’ (2013) 44 available at http://www.equalitynow.org/sites/default/files/MaputoProtocol_JourneytoEquality.pdf (accessed on 31 August 2015).

²⁶⁷ As above.

²⁶⁸ *Rosaria Mashita Katakwe v Edward Hakasenke & Others* *Zambian High Court* 30 June 2008 2006/HP/0327 available at http://www.equalitynow.org/sites/default/files/zambia_high_court_judgment.pdf (accessed on 31 August 2015).

failure on behalf of the state amounted to a violation of article 4(2)(i) of the Maputo Protocol. Nevertheless, the Court did not discuss this article while coming to its judgement. However, this case demonstrates that lawyers are aware of the existence of the provisions of the Maputo Protocol which make reference to budgetary allocations. This is a ray of hope for future cases which concern non-allocation of sufficient budgetary resources to realise women's human rights. If cases are brought to court, and jurisprudence is established, states are more likely to consider resource allocation for women's human rights in their future budgets.

Article 4(2)(i) of the Maputo Protocol therefore relies on budgetary allocation of resources to eradicate violence against women. It seeks to transform the dynamics of violence against women and recognises that such a transformation is not possible without sufficient budgetary resource allocation.

C Article 10(3) of the Maputo Protocol

Article 10(3) of the Maputo Protocol imposes on states the obligation to 'take the necessary measures to reduce military expenditure significantly in favour of spending on social development in general, and the promotion of women in particular'. The uniqueness of article 10(3) of the Maputo Protocol is that it explicitly directs states to have a budget restructuring in favour of social development and the promotion of women. It has been highlighted that the current provision has been inserted to ensure a better realisation of socio-economic rights across Africa.²⁶⁹

The classification of priority in terms of expenditure is unique to article 10(3) of the Maputo Protocol and it has been considered as a 'radical departure from existing human rights norms'.²⁷⁰ It provides for a 'hierarchy' in terms of budgetary expenditure²⁷¹ and considers expenditure on social development more important than expenditure on military. Giacca has stated that article 10(3) of the Maputo Protocol, in addition to article 26 of the Maputo Protocol, can be interpreted to mean that states have to construct their budget in a manner

²⁶⁹ G Giacca *Economic, social and cultural rights in armed conflict* (2014) 50.

²⁷⁰ As above.

²⁷¹ As above.

that realises all the rights in the Maputo Protocol.²⁷² This argument might be motivated by the fact that social development and the promotion of the human rights of women affect all articles provided by the Maputo Protocol.

Furthermore, as highlighted by Yeshanew, in case of non-respect of article 10(3) of the Maputo Protocol, there can be 'judicial or quasi-judicial enforcement' and this might create the 'risk' that there is impeachment upon 'the legislative or executive terrain of governance'.²⁷³ According to him, once a country has ratified the Maputo Protocol, it can be considered as it giving consent to the issue of monitoring organs to interfere into the way it deals with its budget.²⁷⁴ Article 10(3) of the Maputo Protocol therefore allows the African Commission or the African Court to review the state budget in a continent which is full of incidences where leaders have misallocated state resources.²⁷⁵ If there is a strong will on behalf of the African Commission or the African Court, article 10(3) of the Maputo Protocol can be used to hold many countries responsible for misallocation of their budgetary resources.

This article indicates that African countries agree to reduce their military expenditure to promote the rights of women. It can be considered as making a 'policy prescription for states to reduce military expenditure and channel the proceeds to social spending'.²⁷⁶ States therefore undertake to ensure that their future budgets reflect a reduction in military expenditure in favour of social development and the promotion of women.

However, the implementation of article 10(3) of the Maputo Protocol can be problematic since military expenditure matters concern the security of states and a reduction of that expenditure jeopardise same. Although not being the only composition of national security, military expenditure is a central element of national security.²⁷⁷ Interchangeably used with the term defence, national security is the 'safeguarding of a people, territory, and way of

²⁷² As above.

²⁷³ Yeshanew (n 177 above) 263.

²⁷⁴ As above.

²⁷⁵ Giacca (n 269 above) 50.

²⁷⁶ Yeshanew (n 177 above) 291.

²⁷⁷ JJ Romm *Defining national security: The nonmilitary aspects* (1993) 1.

life'.²⁷⁸ The issue is whether states risk the safety and the right to peace of its 'people, territory, and way of life' by reducing their military expenditure. States can easily justify the non-application of article 10(3) of the Maputo Protocol by stating that it was more important to protect the national security. This is where the African Commission or the African Court could intervene to assess whether, indeed, the state could not take the necessary steps to reduce military expenditure because it would jeopardise national security.

Additionally, the interpretation of the term 'necessary measures' can be very subjective. While reviewing the budget of a country, the African Commission might not consider necessary the measures taken by the state and can find that the state has not respected the provisions of the Maputo Protocol while the state can argue that the steps it has taken are necessary for the interest of the state. Yeshanew has noted that this term can represent a challenge for a 'monitoring organ' which is trying to decide what would amount to 'necessary measures'.²⁷⁹ However, the African Commission is the body responsible for the interpretation of the Maputo Protocol and states must accept the interpretation of the African Commission as to whether states have taken the 'necessary measures' to give effect to the provisions of article 10(3) of the Maputo Protocol.

Thus, African countries which have ratified the Maputo Protocol are expected to take 'necessary measures to reduce military expenditure significantly in favour of social development and the promotion of women'. They are not expected to rely on escape routes such as the part concerning 'necessary measures' to justify non-implementation of the provisions of the article as this will be non-respect of the principle of *pacta sunt servanda* under article 26 of the Vienna Convention on the Law of Treaties 1969 (Vienna Convention).

Additionally, article 31 of the Vienna Convention provides that states should interpret treaties in 'good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose'. The object and purpose of the Maputo Protocol is the protection of women's human rights. As such, an interpretation

²⁷⁸ AA Jordan et al *American national security* (2009) 1.

²⁷⁹ Yeshanew (n 177 above) 293.

of ‘necessary measures’ under article 10(3) of the Maputo Protocol will be in favour of the realisation of women’s human rights to the detriment of military expenditure.

Therefore, African states have the obligation to adopt necessary measures to reduce military expenditure in favour of social development and the promotion of the rights of women. As expanded upon in this section, the military is a crucial component of national security and this might imply that states are not expected to stop spending on military. However, states have to adopt ‘necessary measures’ in the event they are excessively spending on military. The appreciation of the ‘necessary measures’ taken can be assessed by the African Commission.

The previous sections have demonstrated that the AU does consider budgetary allocations for the realisation of women’s human rights. However, the Maputo Protocol is the only document at the level of the AU which expressly provides for the allocation of resources to realise women’s human rights. This thesis lays emphasis on budgetary allocations for women’s human rights in Africa and it derives its legitimacy from the provisions of the Maputo Protocol. However, protection of women’s human rights can also be made at the sub-regional level. The following section studies the sub-regional organisations in Africa which make reference to budgetary allocations for the realisation of women’s human rights.

2.5 African sub-regional organisations and gender budgeting

Regional economic communities (RECs) recognised by the AU are as follows:²⁸⁰

- The Arab Maghreb Union (AMU)
- The Common Market for Eastern And Southern Africa (COMESA)
- The East African Community (EAC)
- The Economic Community of Central African States (ECCAS)
- The Economic Community of West African States (ECOWAS)
- The Intergovernmental Authority on Development (IGAD)

²⁸⁰ Assembly AU/Dec.112 (VII) DOC.EX.CL/278(IX) available in French at http://www.au.int/en/sites/default/files/ASSEMBLY_FR_01_JULY_03_JULY_2006_AUC_SEVENTH_ORDINARY_SESSION_DECISIONS_DECLARATIONS.pdf (accessed on 15 July 2015).

- The Southern African Development Community (SADC)
- The Community of Sahel-Saharan States (CENSAD)

The current research expands upon those sub-regional organisations that have provisions regarding the allocation of budgetary resources to realise human rights or women’s human rights. For instance, the 1989 Treaty which established the AMU makes no mention to women’s human rights and to resource allocation and there have been no subsequent conventions or agreements concerning the above.²⁸¹ Furthermore, the CENSAD and ECCAS make no mention to women and to budgetary allocation of resources. Therefore, the current research does not examine the above RECs.

The current section studies the provisions of some of the above RECs concerning the provision of sufficient budgetary resources to realise women’s human rights. The analysis of the different RECs is deemed important since the current study provides for a framework at the African level: it is imperative to understand the different undertakings at the sub-regional levels. Moreover, chapter five elaborates on the steps that the AU can adopt to ensure that African countries adopt gender budgeting. The study of the sub-regions which provide for budgetary resource allocation for women’s human rights can inspire the initiatives of the AU.

2.5.1 The Southern African Development Community

The Southern African Development Community (SADC) was created in 1992 and it currently comprises of 15 member states.²⁸² The SADC and its member states must bear into account human rights while fulfilling their functions.²⁸³ Gender mainstreaming²⁸⁴ in the community

²⁸¹ Website of the AMU available at <http://www.maghrebarabe.org/en/conventions.cfm?type=1> (accessed on 7 July 2015).

²⁸² Website of SADC available at <http://www.sadc.int/about-sadc/> (accessed on 6 July 2015): The 15 member states are Angola, Botswana, Democratic Republic of Congo, Lesotho, Madagascar, Malawi, Mauritius, Mozambique, Namibia, Seychelles, South Africa, Swaziland, Tanzania, Zambia and Zimbabwe.

²⁸³ Article 4(c) of the SADC Treaty 1992.

²⁸⁴ Article 1(2) of the SADC Gender Protocol: Gender mainstreaming has been defined as ‘the process of identifying gender gaps and making women’s, men’s, girls’ and boys’ concerns and experiences integral to the design, implementation, monitoring and evaluation of policies and programmes in all spheres so that they benefit equally’.

building process is one of the human rights objectives of the SADC.²⁸⁵ Article 6(2) of the SADC Treaty provides for non-discrimination on the grounds of gender.

Article 22 of the SADC Treaty further requires member states to 'conclude such Protocols as may be necessary in each area of cooperation, which shall spell out the objectives and scope of, and institutional mechanisms for, cooperation and integration'. The SADC adopted such a protocol towards 'cooperation and integration' in relation to women's human rights.

Recognising that women in Southern Africa face vulnerabilities, the SADC Protocol on Gender and Development (SADC Gender Protocol) was adopted in 2008 to ensure that there is no discrimination on the basis of gender. As at August 2016, 11 member states have ratified the SADC Gender Protocol.²⁸⁶ The SADC Gender Protocol requires member states to adopt 'affirmative action²⁸⁷ measures' which address the challenges that women and girls face in their daily life.²⁸⁸ The objectives of the SADC Gender Protocol²⁸⁹ are the elimination of discrimination, the achievement of gender equality and the fulfilling of the rights in regional and international human rights instruments amongst others. The SADC Gender Protocol provides for a panoply of steps that member states have to take to ensure that the vulnerabilities that women face are eradicated.

At the SADC level, different provisions of its legal documents make reference to budgetary allocation. Article 5(1)(f) of the SADC Treaty provides that one of the objectives of the SADC and its member states is to 'promote and maximise ... utilisation of resources in the region'. Article 2(1)(c) of the SADC Gender Protocol imposes an obligation on states to 'cooperate in facilitating the development of human, technical and financial capacity for the implementation of this Protocol'. Going a step further, article 15(2) of the SADC Gender Protocol expressly provides that member states 'shall ensure gender sensitive and responsive budgeting at the micro and macro levels, including tracking, monitoring and

²⁸⁵ Article 5(1)(k) of the SADC Treaty.

²⁸⁶ SADC website available at <http://www.sadc.int/issues/gender/> (accessed on 3 August 2016).

²⁸⁷ Article 1(2) of the SADC Gender Protocol: "[A]ffirmative action' means a policy programme or measure that seeks to redress past discrimination through active measures to ensure equal opportunity and positive outcomes in all spheres of life'.

²⁸⁸ Article 2(1)(c) of the SADC Gender Protocol.

²⁸⁹ Articles 3 and 5 of the SADC Gender Protocol.

evaluation'. Reiterating the importance of gender budgeting in the allocation of sufficient budgetary resources to realise the rights protected by the SADC Gender Protocol, article 33 of the document states the following with regard to financial provisions:

1. States Parties shall ensure gender sensitive budgets and planning, including designating the necessary resources towards initiatives aimed at empowering women and girls.
2. States Parties shall mobilise and allocate the necessary human, technical and financial resources for the successful implementation of this Protocol.

The above provisions of the SADC Gender Protocol and the SADC Treaty demonstrate that the SADC's legal instruments impose an obligation on member states to allocate sufficient budgetary resources to realise women's human rights. The SADC has gone a step further than the AU with its legal instruments expressly providing for the adoption of gender budgeting as a step to allocate sufficient budgetary resources to realise women's human rights.

These provisions indicate that the SADC has considered gender budgeting as a means to allocate sufficient budgetary resources to realise women's rights. Highlighting the importance of gender budgeting in the realisation of women's human rights, the SADC has adopted guidelines on gender budgeting in 2014. These guidelines are studied in detail in chapter four of this thesis.

2.5.2 The Economic Community of West African States

The Economic Community of West African States (ECOWAS) was originally established in 1975²⁹⁰ but the organisation was reviewed in 1993 and a new treaty was adopted.²⁹¹ It currently comprises of 15 West African States.²⁹² The judicial precedents of the ECOWAS demonstrate that this REC is dedicated to ensure that women's human rights are upheld. For instance in the case of *Koraou v Niger*²⁹³ where a woman had been held as a slave for nine years, the Republic of Niger was held responsible for its administrative and judicial

²⁹⁰ ECOWAS website available at <http://www.ecowas.int/about-ecowas/basic-information/> (accessed on 16 July 2015).

²⁹¹ S Ebobrah & A Tanoh *Compendium of African sub-regional human rights documents* (2010) 183.

²⁹² ECOWAS website available at <http://www.ecowas.int/member-states/> (accessed on 16 July 2015): The ECOWAS member states are Benin, Burkina Faso, Cape Verde, Côte d'Ivoire, The Gambia, Ghana, Guinea, Guinea Bissau, Liberia, Mali, Niger, Nigeria, Senegal, Sierra Leone, and Togo.

²⁹³ *Koraou v Niger* (2008) AHRLR 182 (ECOWAS 2008).

authorities inactions. The ECOWAS Court further ordered Niger to pay compensation in monetary terms to the victim.²⁹⁴

Article 63 of the ECOWAS Treaty focuses on women and development. Under this article, member states have the obligation to 'formulate, harmonise, co-ordinate and establish appropriate policies and mechanisms for the enhancement of the economic, social and cultural conditions of women'.²⁹⁵ Member states are further required to 'take all necessary measures' to ensure that the challenges that women face to contribute to regional development are minimised. Therefore, member states have to develop programmes and policies which ensure that women are empowered to participate at the regional level. These programmes and policies require resources on behalf of the government and as such member states have to adopt budgetary measures to give effect to the provisions of the ECOWAS Treaty.

The ECOWAS Protocol relating to the Mechanism for Conflict Prevention, Management, Resolution, Peace Keeping and Security of 1999 (ECOWAS Protocol on Conflict) acknowledges that there is a need to develop policies for vulnerable groups, including women, following a conflict.²⁹⁶ Article 44(f) of the ECOWAS Protocol on Conflict further provides that member states affected by violent conflict are required to provide 'assistance to vulnerable persons, including ... women'.

The Protocol on Democracy and Good Governance Supplementary to the Protocol relating to the Mechanism for Conflict Prevention, Management, Resolution, Peacekeeping and Security of 2001 (ECOWAS Protocol on Democracy) makes specific reference to women's human rights and to international and regional instruments protecting women's human rights.²⁹⁷ In relation to elections, member states shall adopt 'all appropriate measures' to ensure that women enjoy equality when it comes to voting or to be voted, and participation in policies formulation processes.²⁹⁸ With regard to education, member states must adopt policies

²⁹⁴ *Koraou v Niger* (n 263 above) paragraph 96.

²⁹⁵ Article 63(1) of the ECOWAS Treaty.

²⁹⁶ Preamble of the ECOWAS Protocol on Conflict.

²⁹⁷ Preamble of the ECOWAS Protocol on Democracy.

²⁹⁸ Article 2 of the ECOWAS Protocol on Democracy.

which promote women's education and training 'at all levels and in all fields'.²⁹⁹ Member states also have the obligation to eliminate stereotypes against women.³⁰⁰ In addition to the above provisions, section VIII of the ECOWAS Protocol on Democracy is dedicated to women, children and the youth. Article 40 of the ECOWAS Protocol on Democracy requires member states to 'eliminate all forms of discrimination and harmful and degrading practices against women'.

The ECOWAS Declaration on the Fight against Trafficking in Persons 2001 recognises in several paragraphs of its Preamble that women are vulnerable to trafficking. It requires member states to adopt several steps including legislation, programmes, policies and regional cooperation to minimise the vulnerabilities that women face with regard to human trafficking.

The above protocols and declaration require member states to adopt measures to ensure that the vulnerabilities that women face are minimised. Taking steps require financial resource allocation on behalf of the government. As such, although the legal instruments of the ECOWAS do not expressly make reference to the allocation of budgetary resources to realise women's human rights, the wordings used can be interpreted to include the same.

2.5.3 The East African Community

The East African Community (EAC) Treaty came into force in 2000 and it 'revived' the organisation which had become 'defunct' in 1977.³⁰¹ It was then amended in December 2006 and August 2007.³⁰² The East African Community (EAC) currently comprises of six countries namely Burundi, Kenya, Rwanda, South Sudan,³⁰³ Tanzania and Uganda and its headquarters is in Arusha, Tanzania.³⁰⁴ Human rights influence the EAC to a great extent because any

²⁹⁹ Article 30(4) of the ECOWAS Protocol on Democracy.

³⁰⁰ Article 30(5) of the ECOWAS Protocol on Democracy.

³⁰¹ Ebobrah & Anor (n 291 above) 37.

³⁰² As above.

³⁰³ Website of the EAC available at <http://www.eac.int/news-and-media/press-releases/20160325/4th-eac-partnership-fund-high-level-dialogue-held-dar> (accessed on 30 June 2016).

³⁰⁴ Website of the EAC available at http://www.eac.int/index.php?option=com_content&view=frontpage&Itemid=1 (accessed on 7 July 2015).

foreign country which is involved with it needs to adhere to human rights amongst other things.³⁰⁵

One of the objectives of the EAC is gender mainstreaming and enhancing ‘the role of women in cultural, social, political, economic and technological development’.³⁰⁶ Further, one of the fundamental principles of the EAC is good governance and it includes ‘equal opportunities, gender equality’. In addition to the above, chapter 22 of the EAC Treaty provides for the enhancement of women’s role in socio-economic development. Several provisions of this chapter make reference to the amendment of laws in favour of women, to the formulation of policies and programmes to empower women, and to the adoption of technologies which ensures the progress of women. The above steps require resources on behalf of the government and therefore they indirectly require member states to allocate financial resources to realise women’s human rights.

The EAC approved the East African Gender and Community Development Framework (EAC Gender Framework) in 2006.³⁰⁷ The purpose of the EAC Gender Framework is to ‘serve as a guide in the preparation and implementation of development programmes and projects at different levels in a gender responsive way’.³⁰⁸ In addition to mainstreaming gender in the midst of the EAC, it aims to ensure gender responsiveness of ‘community development activities at different levels’.³⁰⁹ One of the principles of the EAC Gender Framework is the principle of gender equality and equity in resource allocation.³¹⁰ The EAC Gender Framework recognises that women play an important role in economic growth and performance and provides for the consideration of gender at the macro-economic level and at the level of resource application.³¹¹ The EAC Gender Framework requires member states to adopt, at the macro-economic level, ‘gender and equity budgeting’, amongst others.³¹²

³⁰⁵ Article 3(3)(b) of the EAC Treaty.

³⁰⁶ Article 5(3)(e) of the EAC Treaty.

³⁰⁷ Ebobrah & Anor (n 291 above) 58.

³⁰⁸ Paragraph 5 of the EAC Gender Framework.

³⁰⁹ Paragraph 5.4(ii) of the EAC Gender Framework.

³¹⁰ Paragraph 5.5(ii) of the EAC Gender Framework.

³¹¹ Paragraph 6.2.1 of the EAC Gender Framework.

³¹² Paragraph 6.2.2 of the EAC Gender Framework.

The EAC acknowledges that women in the different member states can promote economic growth and development and therefore policies at the macro-economic level need to take into account the empowerment of women. The reference to ‘gender and equity budgeting’ in the EAC Gender Framework indicates that the EAC not only recognises the importance of the allocation of budgetary resources to realise women’s rights, but that it has also recognised gender budgeting as a means to do so.

2.5.4 The Common Market for Eastern and Southern Africa

The Common Market for Eastern and Southern Africa (COMESA) replaced the Preferential Trade Area for Eastern and Southern Africa (PTA) to transform into a common market as had been envisaged by the 1982 Treaty establishing the PTA.³¹³ The COMESA was created by the 1993 COMESA Treaty. It currently comprises of 19 member states.³¹⁴ The COMESA was expected to ‘mark a new stage in the process of economic integration’ and to consolidate ‘economic cooperation through the implementation of common policies and programmes aimed at achieving sustainable growth and development’.³¹⁵

The COMESA Treaty has a section on the role of women in development and it recognises that ‘women make significant contribution towards the process of socioeconomic transformation and sustainable growth’.³¹⁶ Member states have the obligation to adopt ‘legislative and other measures’ to ensure that women fully participate in development.³¹⁷ Furthermore, concerning women in business, member states have to, amongst others, ‘initiate changes in educational and training strategies to enable women to improve their technical and industrial employment levels through the acquisition of transferable skills’.³¹⁸

³¹³ Website of the COMESA available at http://about.comesa.int/index.php?option=com_content&view=article&id=95&Itemid=117 (accessed on 7 July 2015).

³¹⁴ Website of COMESA available at http://about.comesa.int/index.php?option=com_content&view=article&id=123&Itemid=121 (accessed on 7 July 2015): The 19 Member States of the COMESA are Burundi, Union of the Comoros, Democratic Republic of Congo, Djibouti, Egypt, Eritrea, Ethiopia, Kenya, Libya, Madagascar, Malawi, Mauritius, Rwanda, Seychelles, Sudan, Swaziland, Uganda, Zambia and Zimbabwe.

³¹⁵ Preamble of the COMESA Treaty.

³¹⁶ Article 154 of the COMESA Treaty.

³¹⁷ As above.

³¹⁸ Article 155(1)(e) of the COMESA Treaty.

The COMESA developed the 2002 Gender Policy while relying on articles 154 and 155 of the COMESA Treaty. The main objective of the COMESA Gender Policy is as follows:

to facilitate the mainstreaming of gender perspectives into all policies, structures, systems, programmes and activities of COMESA in order to make them gender responsive and contribute to the effective achievement of sustainable socioeconomic development in the region.

The COMESA Gender Policy therefore recognises that there is a need to gender mainstream all the 'policies, structures, systems, programmes and activities' towards gender equality. To achieve the objective of the COMESA Gender Policy, member states have to fulfil their obligations under various regional and international human rights instruments which provide for women's human rights.³¹⁹ Paragraphs 4(i) and 4(k) of the COMESA Gender Policy respectively provide that member states must be encouraged to mainstream gender and that there should be the mainstreaming of gender analysis at the 'macro, meso and micro levels'.

Despite the fact that it is not expressly mentioned that member states should allocate sufficient budgetary resources to realise women's human rights to give effect to the provisions of the COMESA Treaty and the COMESA Gender Policy, the above provisions can be interpreted to include such requirement. For instance, as can be noted from the discussions above, 'other measures' also include budgetary measures and gender mainstreaming and gender analysis can be done at the national budget level. Therefore, the provisions of the COMESA Treaty and the COMESA Gender Policy can be interpreted to include budgetary allocations to empower women to participate in gender and business.

2.5.5 The Intergovernmental Authority on Development

The Intergovernmental Authority on Development (IGAD) was launched in Nairobi in 1996 and it replaced the Intergovernmental Authority on Drought and Development which had existed since 1986.³²⁰ Its current members are Djibouti, Eritrea, Ethiopia, Kenya, Somalia,

³¹⁹ Paragraph 4 of the COMESA Gender Policy.

³²⁰ AU website available at <http://www.au.int/en/recs/igad> (accessed on 16 July 2015).

Sudan, Uganda³²¹ and South Sudan.³²² The IGAD was established by the IGAD Agreement and its headquarters is in Djibouti.³²³

The Executive Secretary of IGAD has highlighted that ‘gender programs are high in the organization’s priorities’.³²⁴ To address the vulnerabilities that women face in terms of high maternal mortality rate, high infant and child mortality rate, lack of family planning, unsafe abortion, HIV/AIDS, sexually transmitted diseases, inadequate support for adolescent reproductive services, female genital mutilation, low budgetary allocation, and weak health systems, the Ministers in charge of Gender and Women Affairs of IGAD member states endorsed the IGAD Sexual and Reproductive Health and Rights Strategic Policy Framework (IGAD SRHR Framework) in 2006.³²⁵

One of the sections of the IGAD SRHR Framework is ‘financing and budgeting for sexual and reproductive health’.³²⁶ This section provides for a budget line item for sexual and reproductive health. It states that the expenditure on sexual and reproductive health must be easily identified in the health budget. Furthermore, there needs to be an increase in resources to sexual and reproductive health and rights programmes, including the adequate and efficient utilisation of available resources.³²⁷

The provisions of the IGAD SRHR Framework demonstrate that the IGAD is concerned about insufficient budgetary allocations for the realisation of women’s sexual and reproductive rights. Taking into consideration the provisions of the IGAD SRHR Framework and the statement of the Executive Secretary which identified gender as one of the priorities of the IGAD, it can be derived that the IGAD does recognise budgetary allocations as a step to address gender issues.

³²¹ Ebobrah & Anor (n 291 above) 305.

³²² Reuters Africa ‘East African bloc admits South Sudan as member’ 25 November 2011 available at <http://af.reuters.com/article/investingNews/idAFJ0E7A00A820111125> (accessed on 16 July 2015).

³²³ Article 2 of the IGAD Agreement.

³²⁴ IGAD ‘ES: Gender is high on IGAD priorities’ 17 December 2008 available at http://www.igad.int/index.php?option=com_content&view=article&id=128 (accessed on 16 July 2015).

³²⁵ Ebobrah & Anor (n 291 above) 315.

³²⁶ Paragraph 4.5 of the IGAD SRHR Framework.

³²⁷ Strategic Focus 1 of the IGAD SRHR Framework.

2.6 Conclusion

This chapter aimed to study the global, regional and sub-regional laws to assess whether they impose an obligation states to allocate sufficient budgetary resources to realise women's human rights. As it can be derived from the normative framework and the soft law assessed, at the different levels, states have committed to allocate sufficient budgetary resources to realise women's human rights.

At the UN level, the treaties make mention of the adoption of steps for the realisation of human rights generally. For instance, as discussed, the use of the term 'maximum available resources' in article 2 of the ICESCR or the term 'necessary steps' in article 2 of the ICCPR or the terms 'appropriate measures', 'other measures' and 'to the maximum extent of their available resources' in the CRC indicates that the UN recognises that there is a need to allocate budgetary resources to realise the rights provided by the treaties. The general comments and concluding observations of the treaty monitoring bodies of ICESCR, ICCPR and CRC expand upon the terms mentioned above and include budgetary allocations as one of the steps that states are recommended to take to realise human rights domestically.³²⁸

More specifically for the allocation of budgetary resources to realise women's human rights at the global level, the Beijing Platform for Action and the CEDAW, which use terms such as 'appropriate measures' or 'appropriate legislative and other measures', and the general recommendations of the CEDAW were studied. This section demonstrated that although the CEDAW does not specifically impose an obligation on states to provide budgetary resources

³²⁸ The recommendations made were in the following terms: The public budget has to be devised in such a way that clearly indicates the resource allocations; the allocation of budgetary resources towards human rights of a state has to be more or less similar to that of a state with the same level of development; the state has to demonstrate that it has undertaken every effort to use the resources at its disposal to realise the rights provided by the treaties; the state has to make sure that the expenditure is sufficient to realise the rights provided by the treaties, that there is no misallocation of funds and that the amount actually spent on an item is equal to that allocated in the budget; states have to give priority to spending on items which will enable the realisation of human rights, and this includes cutting down on unnecessary military spending; there is a need to take positive actions and temporary measures in the budget which will reduce the inequality gap and which will ensure a better realisation of the human rights of marginalised or vulnerable groups and this includes women; and the state report of a country has to indicate the budgetary allocations to realise the rights provided for by the treaty.

to realise women's human rights, the provisions of the CEDAW have been interpreted to include same.³²⁹

Similarly, at the continental level, the different laws were studied to assess whether they provide for budgetary allocation of resources to realise women's human rights. The most important document studied was the Maputo Protocol because it is a document which concerns women's human rights and it expressly provides for budgetary allocations. In a nutshell, the regional frameworks require states to allocate sufficient budgetary resources to realise women's human rights.³³⁰

The AU has gone a step further than the UN and has express provisions about budgetary allocations to realise women's human rights in the Maputo Protocol. This is indicative of the fact that the continent is concerned about the situation of women's human rights and acknowledges that resource allocation is mandatory to realise women's human rights.

In addition to global and regional law, there was a study of sub-regional organisations in Africa which adopted documents that are significant for the allocation of sufficient budgetary resources to realise women's human rights. The African sub-regional documents, similar to the UN and the AU, require member states to adopt affirmative actions to ensure that women's human rights are realised. SADC has been very explicit about financial resources to

³²⁹ The CEDAW Committee has recommended the following while interpreting the steps that states are required to take to give effect to the provisions of the CEDAW: To assess the impact that their resource allocations have on gender and have to adopt gender-responsive budgeting; states have to provide information concerning budgetary allocations for the realisation of women's human rights; states have to adjust their public budgets so that gender equality can be achieved; a reduction in military expenditure to realise the strategies adopted to give effect to women's human rights; the adoption of temporary measures in the form of allocation or reallocation of resources to ensure that equality is achieved; the provision of adequate budgetary resources for the implementation of national plans of actions, policies and programmes; and resources have to be allocated to ensure that there is the inclusion of all relevant stakeholders, including at the community level, to discuss women's human rights.

³³⁰ Regional human rights provisions make reference to the following: An increase in budgetary allocation to realise women's human rights; empowering gender machineries by allocating the required financial and human resources; the use of maximum available resources; the adoption of a consultative and transparent budgeting process; the reduction of military expenditure in favour of social development and in favour of the promotion of the rights of women; the adoption of legislative steps to address concerns regarding scarce resources to realise human rights; state reports have to be indicative of the practical steps taken to give effect to women's human rights, and they have to include statistical data on the amount spent to give effect to women's human rights; a broader budgetary reconstruction in favour of women's human rights; and the adoption of budgetary measures to protect women from violence;

give effects to the rights protected by the SADC Gender Protocol and it even requires member states to adopt gender budgeting at micro and macro levels. Similarly, the EAC Gender Framework recommends member states to adopt gender budgeting towards achievement of gender equality. However, the SADC has laid more emphasis on gender budgeting and has even developed guidelines for countries to adopt the same. This research proposes a gender budgeting framework to be adopted by the AU and as such, the SADC's initiatives are more relevant. Due to time and words constraint, this research focuses on the SADC guidelines as a case study to understand the challenges in the adoption of gender budgeting in practice in its chapter four.

The above global, regional and sub-regional provisions require states to allocate sufficient budgetary resources to realise women's human rights. Some of the treaty provisions are very clear as to the adoption of gender budgeting. Some of them make reference to budgetary allocation to realise women's human rights. Where some of the treaty provisions are not clear about financial resources to realise the rights therein, the treaty monitoring body, through general comments/recommendations or concluding observations, expanded upon the steps that countries have to take and included budgetary allocations to realise the rights therein. Therefore, African states have the obligation or have been recommended to adopt gender budgeting or to allocate sufficient budgetary resources so that there can be a better realisation of women's human rights across the continent.

The above provisions of the law and recommendations are inclusive in a human rights approach to public budgeting. A human rights approach to public budgeting therefore gives effect to the provisions of the laws and the recommendations above. Gender budgeting forms part of a human rights approach to public budgeting and it is relevant for the purposes of allocating sufficient budgetary resources to realise women's human rights. Gender budgeting recognises the vulnerabilities that women face and assesses the allocations in the budget with the lens of giving priorities to those areas which will further the realisation of women's human rights.

CHAPTER THREE: GENDER BUDGETING AND THE PROVISION OF BUDGETARY RESOURCES TO REALISE WOMEN'S HUMAN RIGHTS

3.1 Introduction

Chapter two established that African states have the obligation to provide budgetary resources to realise women's human rights. Building upon the previous chapter, the current chapter studies gender budgeting as a means to provide resources to realise women's human rights in Africa. It reviews the existing theories and literature with the view of establishing the relationship between gender budgeting and the provision of resources to realise women's human rights. It studies the relevant theories that relate to the adoption of gender budgeting to allocate sufficient budgetary resources to realise women's human rights. It further studies the gender budgeting process with the view of presenting the concept of gender budgeting to implement the obligations discussed in chapter two.

The chapter begins by studying the theory behind public budgeting and the realisation of human rights. The theory of fiscal sociology is analysed to motivate for a human rights approach to the public budgeting process. This analysis is expected to explain the rationale for states to allocate their resources to realise human rights. Since women's human rights form part of human rights, this section gives legitimacy to requiring governments to allocate resources to realise women's human rights. Then, the chapter expands on the human rights approach to public budgeting and analyses the concept.

It further studies the lack of focus on gender issues during the preparation of the public budget. It emphasises the gender-blindness of public budgets and how this leads to an inadequate allocation of financial resources for the realisation of women's human rights. The research subsequently analyses the theory behind the adoption of gender budgeting. Feminism theories are analysed to establish the theory behind gender budgeting and the realisation of women's human rights.

In order to understand the concept of gender budgeting, the chapter explains the essential elements and the process through which gender budgets can be adopted. It further elaborates on the tools that can be used to assess a gender budget and highlights the

challenges in the adoption of gender budgeting. Finally, the chapter concludes by analysing the different theories to provide for the theoretical framework behind the adoption of gender budgeting for the realisation of women's human rights.

3.2 Theory behind public budgeting and realisation of human rights

Gender budgeting, as expanded upon in chapter one, concerns the allocation of budgetary resources to eradicate the vulnerabilities that women face.¹ It stems from the understanding that governments have to allocate budgetary resources to realise human rights. This section elaborates on the theoretical framework which requires governments to use the public budgeting process to realise human rights. It does so by studying the public budgeting process, the theory of fiscal sociology and a human rights approach to the theory of fiscal sociology.

3.2.1 Public budgeting

A public budget is 'a document that includes the ... government's expenditure² and revenue³ proposals, reflecting its policy priorities and fiscal targets'.⁴ The contemporary budgeting process was developed 'in the late 19th and early 20th centuries as a means of exerting

¹ Section 1.6.3 above.

² TR Jain & SJ Kaur *Public finance and international trade* (2009-10) 15: 'Public expenditure refers to expenditure incurred by the central state or local government of a country for its administration, social welfare, as well as growth and development of the country'; G Ruggeri 'Public expenditure incidence analysis' in A Shah (ed) *Public sector governance and accountability series: Public expenditure analysis* (2005) 5: Government expenditures take four forms and they are as follows: (a) direct spending through its department and agencies as recorded in budgetary transactions, (b) direct spending through funds that are not included in the budget, (c) indirect spending through the business enterprises it owns or controls, and (d) spending programs delivered through the tax system, commonly known as tax expenditures; and IMF Statistics Department 'Government finance statistics yearbook' (2008) 30 available at <https://www.imf.org/external/pubs/ft/gfs/yearbook/2008/gfsy08.pdf> (accessed on 4 September 2015): The IMF categorises expenditure by their functions which are as follows: general public services; defence; public order and safety; economic affairs; environmental protection; housing and community amenities; health; recreation, culture and religion; education; and social protection.

³ Jain et al (n 2 above) 33: 'Public revenue ... includes all incomes and receipts of the government through various sources'; and RD Lee et al *Public budgeting systems* (2008) 45 and 70: Government does not 'get money' and spend it. It rather 'obtains revenues' through determined sources and it has the obligation to spend those revenues on public goods and services. One of the main sources of government income is through the collection of taxes.

⁴ UN Human Settlements Programme & Municipal Development Partnership for Eastern and Southern Africa 'Participatory budgeting in Africa: A training companion with cases from eastern and southern Africa' Volume 1: Concepts and principles (2008) 20.

legislative control over resource allocation decisions by executive'.⁵ Although the public budgeting exercise differs in different countries, it is basically realised through four main steps that are: 'formulation, enactment, implementation and oversight/evaluation'.⁶ These steps are undertaken by the following different actors or their equivalent:⁷ The Ministry of Finance who is 'responsible for the management of public expenditure'; spending agencies which are usually headed by the different ministers; the cabinet which 'approves the government budget'; legislature which 'enacts the budget in law'; and the auditor who 'verifies compliance with the budget law'.

Public budgets are 'instruments by which the governments raise and allocate the financial resources of the state'.⁸ They are considered as the outcome 'of the judgements of those legally responsible for requesting, recommending, appropriating, and spending public money'.⁹ According to the rationalist approach, while budgeting, 'decision-makers will seek optimal solutions in the broad public interest'.¹⁰ The budgeting process has been referred to as a 'giant juggling act' where various stakeholders manage the balls without the balls crumbling down.¹¹ As such, budget framers need to set different goals to ensure an efficient resource allocation process that prevents the economy from crumbling down.

While identifying areas of intervention in cases of market failures, governments are recommended to have as a goal the reduction of poverty and inequality.¹² Policy makers have the task of distributing the resources within the society.¹³ While allocating their resources,

⁵ Centre for Aid and Public Expenditure 'The basic budgeting problem: Approaches to resource allocation in the public sector and their implications for pro-poor budgeting' Working Paper 147 (2001) 23 available at <http://www.odi.org/sites/odi.org.uk/files/odi-assets/publications-opinion-files/2069.pdf> (accessed on 18 February 2015).

⁶ Handbook for realising the human rights to water and sanitation: From policy to practice undated 5 available at <http://www.righttowater.info/wp-content/uploads/Handbook-HRWS-%E2%80%93Chapter-2.-Budgeting.pdf> (accessed on 18 February 2015).

⁷ For a detailed discussion about the role of the different actors, see Centre for Aid and Public Expenditure (n 5 above) Box 3: The administrative process 24.

⁸ J Shultz 'Promises to keep: Using public budgets as a tool to advance economic, social and cultural rights' Reflections and strategies based on a three-day dialogue between international human rights and budget activists, convened by the Mexico City office of the Ford Foundation and FUNDAR-Center for Analysis and Research, in Cuernavaca, Mexico, January 2002 10.

⁹ KG Willoughby *Public budgeting in context: Structure, law, reform, and the results* (2014) 7.

¹⁰ Centre for Aid and Public Expenditure (n 5 above) 29.

¹¹ RD Lee et al (n 3 above) 187.

¹² Centre for Aid and Public Expenditure (n 5 above) 18.

¹³ Centre for Aid and Public Expenditure (n 5 above) 21.

governments have to minimise the ‘uncertainties’ and to do so, they base themselves on ‘their experience, take their cue from other participants, seek to satisfice rather than optimise, and prefer cautious, incremental change to risky, radical shifts in policy or budget allocations’.¹⁴ Consequently, governments have to learn from these experiences to allocate their resources in a manner that benefits the society. As such, governments have the responsibility to take into account the society during the resource allocation process.

The contemporary budgeting process is a structured exercise that is done by the government in order to efficiently allocate its budgetary resources to ensure that the society as a whole benefits. This budgetary allocation of resources therefore influences the realisation of human rights in the countries. The intervention of the government for the provision of budgetary resources to realise human rights is important since a perfect market will not invest in a commodity if it is not reaping any profits.¹⁵ Public finance scholars view the state as the ‘organization that either does or should correct market failures through providing public goods and correcting for misallocations created by externalities’.¹⁶ Through public finance, states change the resource allocations that the market economy would have had.¹⁷

Governments therefore have to take human rights into account while allocating its resources since the private sector does not provide for public goods that are not profitable. The public budgeting process has to maximise citizens’ access to public goods, which in turn influences the realisation of their human rights. Such an allocation of budgetary resources is commonly known as a human rights approach to public budgeting.¹⁸

3.2.2 Theory of fiscal sociology

Taxes collected by the government are collective properties that need to be distributed among the citizens.¹⁹ The idea of taxes being collective properties stemmed from the theory

¹⁴ Centre for Aid and Public Expenditure (n 5 above) 30.

¹⁵ T Kelly ‘Public expenditures and growth’ 34 *Journal of Development Studies* (2007) 1 62.

¹⁶ RE Wagner *Fiscal sociology and the theory of public finance: An exploratory essay* (2007) 3.

¹⁷ Wagner (n 16 above) 179.

¹⁸ KG Willoughby (n 9 above) 381.

¹⁹ Wagner (n 16 above) 25.

of fiscal sociology.²⁰ Towards the end of World War I Goldscheid defined fiscal sociology as 'the functional interdependence between state finances and social development, as well as the nature of the state in any particular historical setting'.²¹ Fiscal sociology is, in simple terms, 'the study of the social processes behind taxation and public finances'.²² It studies the relationship between taxes and expenditure and its impact on society.²³ According to this concept, the state, which was then 'personified by the prince could seek either revenues or services in kind' from the citizens but in return, the latter could then have a 'claim', which could be 'satisfied' either 'out of the general tax revenue or by services in kind'.

Schumpeter elaborated on the issue of fiscal sociology and analysed Goldscheid's approach. He stated that a state's 'fate' depends heavily on 'the economic bleeding which the needs of the state necessitates' and on 'the use to which its results are put to use'.²⁴ He further noted that the 'fiscal history' of a country determines the 'spirit of a people, its cultural level, its social structure, the deeds its policy may prepare' amongst others.²⁵ Both of them examined the taxation system and how it should be used to redistribute the income to the citizens.

Fiscal sociology's scope includes 'constitutional, legal and institutional influences on the budget' amongst others.²⁶ It has been considered as the effective provision of 'the synthetic unification of economic, sociological, political and legal approaches to public policy issues'.²⁷ It therefore provides for the framework for public budgeting.

A combined interpretation of the above works leads to the conclusion that the theory of fiscal sociology provides for a framework within which taxes must be collected and distributed amongst citizens. The works of Goldscheid, Schumpeter and McLure are based on the

²⁰ JG Backhaus 'Fiscal sociology: What for?' (2001) 10 available at https://www.uni-erfurt.de/fileadmin/user-docs/Finanzwissenschaft/bibliothek/valedictory_lecture.pdf (accessed on 28 October 2014).

²¹ R Goldscheid as quoted by RA Musgrave 'Schumpeter's crisis of the tax state: An essay in fiscal sociology' 2 *Journal of Evolutionary Economics* (1992) 99.

²² JL Campbell 'The state and fiscal sociology' 19 *Annual review of Sociology* (1993) 163.

²³ Campbell (n 22 above) 164.

²⁴ JA Schumpeter 'The crisis of the tax state' in R Swedberg *The economics and sociology of capitalism* (1991) 100.

²⁵ Schumpeter (n 24 above) 101.

²⁶ M McLure 'Fiscal sociology' Discussion paper available at https://ecompapers.biz.uwa.edu.au/paper/PDF%20of%20Discussion%20Papers/2003/03_16_McLure.pdf (accessed on 3 March 2015) 2.

²⁷ McLure (n 26 above) 7-8.

premises that when a state is taking away money from the citizens in the form of taxes, this money has to be invested towards improving their lives. The theory of fiscal sociology thus provides for the context of public budgeting. Additionally, it lays the foundation for governments to spend on goods and services for the citizens.

3.2.3 Human rights approach to the theory of fiscal sociology

Despite the fact that the theory of fiscal sociology was developed in the field of economics and to determine the manner in which a state should repay its debts, the theory is relevant for this study since both Goldscheid and Schumpeter have acknowledged that the state's intervention is important for the economy to function properly.²⁸ Both of them recognised that '[t]he character of the state depends upon the character of public finances'.²⁹ As such, a state that wants to be compliant with its human rights obligations has to manifest this will in its public finance system.

Recognising the link between human rights and public finance, Waris extrapolated human rights from fiscal sociology 'as a measure of the complex social interactions through their participation of society and citizens in the institutional processes of the fiscal state'.³⁰ She stated that the allocation of resources 'is decided upon by the "rulers" often with no requirement that reference be made to the people/citizens who contributed to the funds now at the state's disposal'.³¹ She further noted that 'the use of limited resources and its prioritisation has been left traditionally to the state'.³² Waris has explained the relationship between the revenue of the state and realisation of rights in international conventions by stating that the state has the responsibility to make provision for the realisation of the rights and this requires resources.³³

Waris' extrapolation of human rights from fiscal sociology can be interpreted to mean that the theory of fiscal sociology lays the basis to make governments accountable for the

²⁸ Waris' argument below.

²⁹ As above.

³⁰ A Waris *Tax and development: Solving Kenya's financial crisis through human rights: A case study of Kenya's constituency development fund* (2013) 9-10.

³¹ Waris (n 30 above) 4.

³² As above.

³³ As above.

distribution of their resources. Waris' inclusion of human rights in the theory of fiscal sociology indicates that the public finance system of a country has to take human rights into consideration. Despite the fact that her work focuses on taxation and human rights, she has clearly established that the state has to use the taxes collected to realise human rights. Thus, the resource allocation process has to take into account human rights. A state has to consider the needs of its people while distributing its revenue. The state has to further include its citizens in the resource allocation process.

The definition provided in section 3.2.1 above does not state that governments have to prepare their budgets in a manner that takes human rights into account. This is so because the public budgeting process is usually in the domain of public finance and the latter does not dwell on the specifics of human rights. Waris' extrapolation is an important one since it adds human rights consideration to the public budgeting process. Her work can be used by governments to integrate human rights consideration in the public budgeting process of the state. Such integration will give legitimacy to the consideration of human rights during the resource allocation process.

The works of Waris and those mentioned in the previous sub-section therefore provide for the rationale for states to allocate their budgetary resources to realise human rights. Public budgeting is a tool in the hands of the state to maximise the revenue collected for the benefit of its citizens. States therefore have to adopt a human rights approach to public budgeting to give effect to their human rights commitment.

Waris' work and the theory of fiscal sociology lay the foundation for requiring the government to allocate its revenues to realise the rights of its citizens. This research extends the theory of fiscal sociology and Waris' work to all the revenues of the government and not only those collected through tax. It proposes the human rights approach to the theory of fiscal sociology to give effects to the commitments of states to allocate resources to realise human rights.

3.3 Integrating a human rights approach to public budgeting

Waris' extrapolation of the theory of fiscal sociology has established that the public finance system of the government has to take human rights into account. The government can do so by adopting a human rights approach to the public budgeting process. This section intends to understand a human rights approach to public budgeting and how it can be applied at the expenditure level in the public budget.

3.3.1 Human rights approach to public budgeting

A budget whose policies and programmes positively impact on human rights is a pro human rights budget.³⁴ Tracking human rights aspects in the budget has been referred to as 'detective work' because analysts have to work on the budget to assess what has been done in favour of the advancement of human rights and what else could have been done.³⁵ This activity has been termed as human rights budgeting. Human rights budgeting is, in simple terms, 'work that seeks to relate human rights to government budgets, and budget work to human rights work'.³⁶ The public budget is important for civil society organisations (CSOs) to assess how much resources a government is allocating to realise human rights.³⁷

States have international obligations to realise the rights provided by the international legal instruments that they have ratified. It has been argued that the mere existence of international and domestic laws does not lead to realisation of the rights and that there is a need to adopt policies for the implementation of the laws.³⁸ National budgets reflect those policies adopted and are imperative for the relevant stakeholders to assess whether the government is translating its commitments in concrete actions.

A human rights approach to public budgeting enables the government to abide by its human rights commitments at the global, regional and domestic level. To know whether a government is respecting its international obligations under the international legal

³⁴ KG Willoughby (n 9 above) 381.

³⁵ A Blyberg 'The case of the mislaid allocation: Economic and social rights and budget work' (2009) 123.

³⁶ Blyberg (n 35 above) 125.

³⁷ Institute for socio-economic studies 'Budget and rights: Developing a budget analysis method from the perspective of human rights' (2008) available at <http://www.inesc.org.br/library/technical-notes/NT.%20157%20-%20%20Budget%20and%20rights.pdf> (accessed on 26 August 2015) 2.

³⁸ Institute for socio-economic studies (n 37 above) 3.

instruments that it has ratified, one can turn towards its public budget and assess its 'revenue, allocations and expenditures'.³⁹ The analysis of a national budget from a human rights perspective can be done either through revenue or through expenditure analysis.

The overall aim of this research is to analyse the role of gender budgeting in the implementation of the obligation to allocate resources to realise women's human rights in Africa. Thus, the focus is on the expenditure part of the national budget and not on the revenue side. Therefore this research does not expand upon human rights approach at the revenue level in the national budget⁴⁰ but rather concentrates on the human rights approach at the expenditure level. Such a limitation stems from the research question that concerns the obligation to allocate resources to realise women's human rights.

3.3.2 Human rights approach at the expenditure level in the national budget

By studying the different budget initiatives around the world, the National Economic and Social Rights Initiative (NESRI) has broken down the different types of human rights approaches to budgeting at the national level.⁴¹ Firstly, the rights-based or normative budgeting adopts a human rights approach while allocating resources to the budget items and it includes human rights budgeting, equality budgeting, gender budgeting, and advocacy and mobilisation for a social justice budget. This includes the alternative budget approach that assesses the impact on different line items if the expenditure pattern is changed.

The second type of human rights approach to public budgeting mentioned in the NESRI paper is participatory budgeting. This concept was coined in Brazil in the 1980s⁴² but there

³⁹ H Hofbauer et al 'Dignity counts: A guide to using budget analysis to advance human rights' (2004) 1 available at <http://internationalbudget.org/wp-content/uploads/Dignity-Counts-A-Guide-to-Using-Budget-Analysis-to-Advance-Human-Rights-English.pdf> (accessed on 26 August 2014).

⁴⁰ Hofbauer et al (n 39 above) 35: A human rights approach to the revenues of the national budget studies the available financial resources of the country and the future means through which the state is planning to obtain its revenues; An analysis of the revenue of the budget from a human rights perspective will include an analysis of the taxation system of the country and the impact of the conditions attached to the different international sources from which it received financial aid or funding.

⁴¹ NESRI Background paper 'Moving towards human rights budgeting: Examples from around the world' (2011) available at http://www.nesri.org/sites/default/files/Moving_Toward_Human_Rights_Budgeting.pdf (accessed on 26 August 2015).

⁴² Y Sintomer et al 'Transnational models of citizen participation: The case of participatory budgeting' 8 *Journal of Public Deliberation* (2012) 2 4.

is still no definition of the term. It is basically a process which ‘allows the participation of non-elected citizens in the conception and/or allocation of public finances’.⁴³ Five criteria are central to participatory budgeting and they are as follows:⁴⁴

- (i) The discussion of ‘the financial and/or budgetary dimension’ since it is a process which concerns limited resources;
- (ii) The involvement of stakeholders from the city level and the involvement of ‘a (decentralized) district with an elected body and some power over administration’;
- (iii) The holding of several meetings where stakeholders can express their view;
- (iv) The creation of a platform where members from the public can express their concerns to the institutions responsible for the budget preparation; and
- (v) Accountability on the steps taken to give effects to the provisions of the budget.

Therefore, a participatory national budget has to give opportunities to all relevant stakeholders and members of the public to discuss the allocation of resources.

The NESRI Background Paper also makes reference to institutionalisation and enforceability of budgeting guidelines and initiatives in the context of a human rights approach to budgeting.⁴⁵ For instance, the NESRI paper mentions the United Kingdom where the Equality and Human Rights Commission has the powers to ensure that equality policies are implemented.⁴⁶ As such, in the event the government does not implement the contents of the national budget, the Equality and Human Rights Commission has the mandate to bring a case to the Court to impose an obligation on the state to execute the provisions of the budget. Another example is that of Ireland where the state has set up an advisory council to guide the policies that realise economic and social rights.⁴⁷ Such a human rights approach to public

⁴³ Sintomer et al 2012 (n 42 above) 2.

⁴⁴ Y Sintomer et al ‘Participatory budgeting in Europe: Potentials and challenges’ 32 *International Journal of Urban and Regional Research* (2008) 1 168.

⁴⁵ NESRI (n 41 above) 10.

⁴⁶ As above.

⁴⁷ NESRI (n 41 above) 11.

budget concerns the implementation of the budget. It provides for a platform to make the government accountable for the resource allocation in its national budget.

Taking the above into consideration, the human rights approach to public budgeting at the expenditure level focuses on maximising the impact of budgetary resource allocation on human rights. A human rights approach to public budgeting, to some extent, addresses the concerns of Waris who stated that the traditional resource allocation process is an exercise which is done mostly by the state.⁴⁸ A participatory budgeting requires states to include other stakeholders. The involvement of other stakeholders implies that citizens have a forum to discuss the manner in which they want their money to be spent. This exercise can, to some extent, ensure that the revenues of the government are allocated according to the needs to its people.

3.4 Analysis of a human rights approach to public budgeting

The link between a human rights approach to public budgeting and a more efficient resource allocation has led the international human rights system to encourage states to adopt a human rights lens in their resource allocation process. This has been done through treaty provisions or soft law.⁴⁹ As discussed in this section, a human rights approach to public budgeting enables the population and CSOs to participate in the resource allocation process.

A human rights approach to public budgeting further allows stakeholders to assess whether the state is abiding by its obligations in the international human rights instruments it has ratified.⁵⁰ The literature on human rights approach to budgeting makes reference to mostly the pros of adopting the same. For instance, it has been argued that a human rights approach to public budgeting can enable the population to assess whether the government is fulfilling its obligation to allocate the maximum of its available resources to progressively realise human rights.⁵¹ A briefing by Free Legal Advice Centres listed the benefits of a human rights

⁴⁸ Waris (n 30 above).

⁴⁹ See chapter two for more information about the international law and a human rights approach to public budgeting.

⁵⁰ H Hofbauer et al (n 39 above)

⁵¹ Institute for Socioeconomic studies Discussion paper 'Budgets and rights: Developing a budget analysis method from the perspective of human rights' (2009) 7 available at

approach to public budgeting: progressive realisation of rights; protection of minimum core of rights; assessment of whether rights are adequate, affordable and accessible; information about whether states are abiding by their obligation to immediately realise some rights; analysis of whether the state is making use of the maximum of its available resources; whether there is non-retrogression in the protection of the human rights; and it provides for information which can enable relevant stakeholders to make impact assessments.⁵² CSOs can make use of the public budget prepared through a human rights approach to assess whether the government is abiding by its international obligations by exploiting the international law principles such as ‘consultations (participation), transparency, accountability, minimum core provision, and equality and non-discrimination’.⁵³

Despite the benefits of a human rights approach to public budgeting, states still hesitate to engage in this process. There is not much literature that explain the reasons as to why states hesitate to adopt a human rights approach to public budgeting. As pointed out by Kuosmanen, there is a lack of analysis to explain the cognitive challenges that governments face in adopting a human rights approach to public budgeting.⁵⁴ His work focuses on the epistemic challenges in the inclusion of a human rights approach in public budgets. Kuosmanen does not expressly elaborate on the challenges and instead identifies the factors that contribute to an ‘imperfect knowledge’ of a human rights approach to public budgeting.⁵⁵ This section refers to those factors as challenges instead of factors that contribute to an imperfect knowledge. The motivations for such a stand is that the factors identified by Kuosmanen can be analysed broadly as challenges in the adoption of a human rights approach to public budgeting even if the ‘imperfect knowledge’ aspect is ignored.

<http://www.inesc.org.br/headlines/banners2/inesc-online/library/technical-notes/NT.%20157%20-%20%20Budget%20and%20rights.pdf> (accessed on 28 August 2015).

⁵² Free Legal Advice Centres Briefing ‘A human rights approach to budgeting’ (2014) 2-6 available at http://www.flac.ie/download/pdf/flac_briefing_on_human_rights_approach_to_budgeting.pdf (accessed on 28 August 2015).

⁵³ Free Advice Legal Centres (n 52 above) 7.

⁵⁴ J Kuosmanen ‘Human rights, public budgets, and epistemic challenges’ 17 *Human Rights Review* (2016) 2 247.

⁵⁵ Kuosmanen (n 54 above) 251-260.

In addition to Kuosmanen's propositions, Allison, in his work concerning the adoption of a human rights approach to fisheries policies⁵⁶ advanced some arguments against the adoption of a human rights approach to public budgets. This section makes reference to these two works to highlight the challenges in the adoption of a human rights approach to public budgeting.

3.4.1 Complex nature of the public budgeting process

Kuosmanen firstly identifies the concept of polycentricism as a challenge to a human rights approach to public budgeting.⁵⁷ According to him, the public budget has several complicated policies that are aimed at realising human rights which include 'the specific needs of right bearers, the inherent qualities of human rights and the nature of the broader circumstances within which public budgeting takes place'.⁵⁸ These complex issues complicate the adoption of a human rights approach to public budgeting and as a result act as a challenge.

The current thesis concerns the realisation of women's human rights through the adoption of gender budgeting. It is thus proposed that to overcome this challenge of a human rights approach to public budgeting, budget framers consider the vulnerabilities that women face as a starting point. Recognising that public budgeting is a complex process, this thesis presents a framework that breaks the public budgeting process and provides different entry points for gender budgeting.⁵⁹ The framework provided by this thesis breaks down the gender budgeting process to avoid the issue of polycentricism.

3.4.2 Ambiguous and controversial nature of human rights

Kuosmanen secondly identifies the ambiguous and controversial nature of human rights as a hurdle for the adoption of a human rights approach to public budgeting.⁶⁰ Despite the fact that human rights are universal, he states that different entities still have different interpretations of human rights. Allison's work expands on the challenges that the adoption

⁵⁶ EH Allison 'Should states and international organizations adopt a human rights approach to fisheries policy' 10 *Maritime Studies* (2011) 2.

⁵⁷ Kuosmanen (n 54 above) 252.

⁵⁸ As above.

⁵⁹ Chapter four.

⁶⁰ Kuosmanen (n 54 above) 254.

of a human rights approach to budgeting faces as a result of the ambiguous and controversial nature of human rights.⁶¹ He gives examples of the excuses that governments are able to create as a result of the controversial nature of human rights. Allison identified that governments who fail to adopt a human rights approach to public budgeting often put forward the excuse that human rights is a western concept that promotes individual rights at the expense of the collective national interests and that it does not take into account that citizens also have responsibilities.⁶²

Allison uses two arguments to refute the above proposition.⁶³ His first reference is to the work of Sen⁶⁴ who argued that Asian values are inventions of Asian leaders who do not want to give up power and use the cultural differences between the west and Asia to justify non-respect of their obligations. Similarly, in the context of this research, African leaders have endorsed African regional instruments and they cannot use the excuse of the western world imposing their concepts in Africa. Additionally, South Africa was one of the first countries in the world to have adopted gender budgeting. Therefore, the argument that a human rights approach to public budgeting is western does not hold ground for the purposes of this research.

Allison's second rebuttal is that the right to development, which encompasses various economic, social and cultural rights, finds its roots in the third world and non-realisation of these rights cannot be justified by invoking the fact that they are rights that concern only the western world. This research focuses on women's human rights in Africa. As studied in chapter two, the Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa (Maputo Protocol) imposes an obligation on states to allocate sufficient budgetary resources to realise women's human rights. Therefore, the argument of a human rights approach to public budgeting being a western concept does not apply as the obligation to allocate sufficient budgetary resources to realise women's human rights emanates from an African treaty. The provisions of the Maputo Protocol that impose an obligation on states

⁶¹ Allison (n 56 above) 2.

⁶² Allison (n 56 above) 105.

⁶³ As above.

⁶⁴ A Sen 'Human Rights and Asian Values' during the 16th Morgenthau Memorial lecture on ethics and foreign policy (1997).

to allocate sufficient budgetary resources to realise women's human rights indicate that the African continent has accepted a human rights approach to public budgeting as a means to realise human rights. Thus, African governments cannot take advantage of the controversial and ambiguous nature of human rights to escape from their obligation to provide resources to realise women's human rights.

3.4.3 Cognitive factors

Kuosmanen thirdly advances cognitive factors as a challenge in the adoption of a human rights approach to public budgeting.⁶⁵ According to him, human beings are prone to make mistakes while taking decisions and this can affect the public budgeting process. He states that the public budgeting process is a collective endeavour which can be biased by the inputs of the different parties.

The observations by Allison are relevant for this section. He makes reference to political behaviour and biasness as a challenge for the adoption of a human rights approach to public budgeting. Allison advances that law and policy making is political and that the realisation of rights might require challenging the abuse of power by the more powerful.⁶⁶ In many countries, corruption is at the root of non-realisation of human rights and a human rights approach to public budgeting can expose such corruption. As such governments are reluctant to give the population the chance to question them.

Allison also points out that the non-adoption of a human rights approach to public budgeting prevents international organisations from being too political.⁶⁷ The adoption of a human rights approach to public budgeting will reveal the lacunas of the state in terms of realisation of the human rights of its citizens. International organisations do not want to be viewed as being 'political' by questioning the state about its resource allocation process. They sometimes refrain from interfering in the public budgeting process of a country and give aid nevertheless. This acts as a disincentive for countries to adopt a human rights approach to

⁶⁵ Kuosmanen (n 54 above) 255.

⁶⁶ Allison (n 56 above) 107.

⁶⁷ Allison (n 56 above) 107-108.

public budgeting because they are aware that as long as they fulfil certain conditions, they will get the aid required.

The above two examples given by Allison demonstrate that cognitive factors influence the adoption of a human rights approach to public budgeting. However, in the context of gender budgeting, governments have ratified the Maputo Protocol which expressly provide for the obligation to allocate resources to realise women's human rights. African countries are accountable to the African Commission on Human and Peoples Rights (African Commission), which is the monitoring body of the Maputo Protocol, when it comes to the implementation of this obligation. As such, they cannot let the budgeting processes to be influenced by their bias.

Concerning international organisations, Allison has argued that this can be remedied by a partnership between international organisations and CSOs which advocate for the adoption of a human rights approach to public budgeting. CSOs can further pressurise international organisations to take interest in budgetary allocations for the realisation of human rights. Moreover, budget support⁶⁸ programmes can be linked to policies that influence human rights. In the context of this thesis, budget support can be aimed at policies which eradicate the vulnerabilities that women in Africa face.

3.4.4 Methodological factors

Fourth, Kuosmanen identifies that the methodologies adopted can act as a challenge in the adoption of a human rights approach to public budgeting.⁶⁹ A human rights approach to public budgeting requires methods from the areas of economics and human rights. Such a combination might be difficult to achieve since most of the times one has either experience in human rights or in economics. Economics and human rights are different fields with different jargons and as a result, one might not be successful in combining both.

However, he gives examples of situations where human rights impacts assessments were required of economic decisions. For the purposes of this research, it is presumed that such

⁶⁸ See S Koeberle & Z Stavreski 'Budget support: Concept and issues' in S Koeberle et al (eds) *Budget support as more effective aid? Recent experiences and emerging lessons* (2006) 5 for further discussion on budget support.

⁶⁹ Kuosmanen (n 54 above) 256.

methodological challenges can be overcome by training budget framers on the importance of human rights considerations during the preparation of the budget. As expanded upon in chapter four, focal points can be created in different ministries and specially within the ministries responsible for finance that will ensure that the resource allocation process is inclusive of gender considerations.

3.4.5 Resources

Kuosmanen's fifth and final challenge relate to resources.⁷⁰ He puts forward that resources affect all the previous issues discussed and that imperfect knowledge of resources can lead to the non-adoption of a human rights approach to public budgeting. His argument can be interpreted to imply that resources are an important part of a human rights approach to public budgeting and that insufficient resources act as a challenge for the adoption of the same.

Allison also considers the issue of resources and states that the process of a human rights approach is usually slow and expensive.⁷¹ A human rights approach to public budgeting takes time as it involves more stakeholders. Moreover, there is a need to assess the impact of the expenditure of each line item and as such the process can be expensive. It has been argued that there is a set off between the resources in terms of time and finance invested in a human rights approach against economic growth.⁷² Nevertheless, as rightly highlighted by Allison, this argument can be countered by the fact that human rights realisation will have a positive impact on economic growth: he gives the example of the realisation of education and its link with economic growth. As such, even if integrating a human rights approach to public budgeting is slow and requires resources, it has a positive long-term impact on the country's development.

In a nutshell, the works of Kuosmanen and Allison represent the arguments that have been put forward for the non-adoption of a human rights approach to public budgeting but each of them has a counter argument. Most of the counter arguments highlight the fact that a

⁷⁰ Kuosmanen (n 54 above) 258.

⁷¹ Allison (n 56 above) 106.

⁷² As above.

human rights approach to public budgeting is the proper channel to ensure that governments allocate their resources efficiently to realise the human rights of its citizens.

Their work is relevant for this research since they counter-argue most arguments against the adoption of a human rights approach to public budgeting. From the outset, they tackle the criticisms of a human rights approach to public budgeting to make way for the adoption of gender budgeting. This research concerns gender budgeting, which is a manifestation of a human rights approach to public budgeting. Consequently, it would be rational to believe that the arguments advanced for the non-adoption of a human rights approach to public budgeting would extend to gender budgeting. This section pre-emptively addresses the critiques of gender budgeting as a result of being a manifestation of a human rights approach to public budgeting. However, this does not mean that gender budgeting has only the above challenges. As discussed in section 3.7.6 below, the application of gender budgeting faces other challenges in addition to the ones discussed in this section.

3.5 Lack of gender focus in a human rights approach to public budgeting

A human rights approach to public budgeting should be sufficient for the realisation of women's human rights. This is so because the taking into account of human rights itself encompasses women's human rights. Despite this, the concept of gender budgeting is gaining more scale for the realisation of women's human rights. The trend is now to have a cross-sectoral approach to the realisation of women's human rights through the adoption of gender mainstreamed policies at all levels of spending. This section highlights the shortcomings of a human rights approach to public budgeting for the protection of women's human rights.

The national budget is considered as a 'gender-neutral policy instrument'. It is supposed 'to address the needs of *everyone* in a *uniform, apparently neutral way*'.⁷³ However, it has been suggested that this gender neutrality is in fact 'gender blindness' as the national budget then disregards the differences between men and women.⁷⁴ Most expenditure in a national

⁷³ Bridge (Development – Gender) 'Gender and Budgets: Overview report' (2003) 10.

⁷⁴ As above.

budget do not target a specific gender and this could lead to a failure to realise women's human rights.⁷⁵ The national budget is not concerned with the 'different needs and priorities' that women and girls have and a gender-blind national budget will usually fail to adopt policies which aim at remedying the disadvantaged situation of women and girls.⁷⁶ For example, being gender neutral, a government can allocate its resources to the area of health without taking into account that women have specific sexual and reproductive needs. Such a gender-neutral allocation of resources to the area of health ignores women's specific sexual and reproductive needs and it can be categorised as being gender blind.

The lack of recognition that some groups are more disadvantaged and require more resource allocation has negative effects on the realisation of their rights.⁷⁷ People belonging to disadvantaged groups rely on government expenditure for an improvement in the conditions in which they survive. ⁷⁸ Bridge has highlighted that neutrality in a budget can accentuate inequalities.⁷⁹ Extending this argument to the rights of women, a gender-neutral budget can lead to more gender inequalities. For instance, a human rights budget can allocate resources towards policies to ensure that everyone has access to education. This initiative does not take into account policy measures for girls who are married and who have to stay at home to look after their household. Gender budgeting will recognise that girls face such situations and as a result allocate resources to policies aimed at empowering those girls to attend school.

The fiscal policy of a government, through the national budget, is the means through which the government can influence the human rights situation in the country.⁸⁰ The adoption of a human rights approach to budgeting ensures a better protection of everyone in the country. However, a gender neutral public budgeting process is ignorant of the vulnerabilities that women face and ignores that they require additional resource allocation for the realisation

⁷⁵ UNIFEM 'Budgeting for women's rights: Monitoring government budgets for compliance with CEDAW: A summary guide for policy makers, gender equality and human rights advocates' (2008) 7.

⁷⁶ As above.

⁷⁷ Bridge (n 73 above) 10.

⁷⁸ As above.

⁷⁹ As above.

⁸⁰ Section 3.3 above.

of their rights. This is why there has been the adoption of gender budgeting which ensures a better integration of women's human rights in the public budget.

Although Waris' extrapolation of human rights from the theory of fiscal sociology should ideally address the needs of all human rights, this section demonstrates that a human rights approach to public budgeting does not always address the vulnerabilities that women face. Her analysis of the theory of fiscal sociology is nevertheless important to this research since it provides legitimacy for requiring governments to allocate sufficient budgetary resources to realise human rights. Relying on her argument that governments have to allocate their resources to realise human rights, this research proceeds with the theory behind gender budgeting and the realisation of women's human rights.

3.6 Theory behind the adoption of gender budgeting and the realisation of women's human rights

The lack of focus on women's human rights generally was revealed when feminists around the world were turning towards the international human rights law to seek remedies for women's human rights violations.⁸¹ It was revealed that women were excluded from the existing international human rights discourse and this was detrimental to the protection of their human rights. Feminists have as objective the empowerment of women and to provide for a platform where they can continue doing things they have always done as well as doing things which they were not allowed to do before.⁸²

Feminists, as a 'group' seek 'the empowerment of women and the transformation of institutions dominated by men'.⁸³ Such a transformation can be achieved only if there are sufficient budgetary resources that give effect to women's human rights at the domestic level. As demonstrated in section 3.5, the budgeting process is generally gender blind. To

⁸¹ E Friedman 'Women's human rights: The emergence of a movement' in J Peters & A Wolper *Women's rights human rights: International feminist perspectives* (1995) 27.

⁸² CA Mackinnon *Feminism unmodified: Discourses on life and law* (1987) 22; C Beyani 'Toward a more effective guarantee of women's rights in the African human rights system' in RJ Cook (ed) *Human rights of women: National and international perspectives* (1994) 304.

⁸³ MA Fineman 'Feminist legal theory' 13 *Journal of Gender, Social Policy and the Law* (2005) 1 14.

remedy the gender blindness of the public budget, Australian feminist economists developed the concept of gender budgeting.⁸⁴

Gender budgeting, in addition to the manifestation of a human rights approach to the theory of fiscal sociology, is a reflection of the struggle of feminists to include women's needs in the budgetary resource allocation process. This section studies the theory behind the adoption of gender budgeting for the realisation of women's human rights. It firstly elaborates on the feminist legal theory and women's human rights, and secondly analyses the feminist democratic approach and its relationship with gender budgeting.

3.6.1 Feminist legal theory and women's human rights

Feminism basically investigates into female subordination by their male counterparts, tries to understand the motivation behind this phenomenon and tries to change the disadvantaged position that women are in.⁸⁵ Tamale states that there is urgency to change the situation of African women.⁸⁶ Feminist legal theory also recognises the urgency to eradicate the vulnerabilities that women face and considers female subordination in conjunction with the law.⁸⁷ Including women's issues in the human rights discourse has enabled the international society to come up with laws which protect women's human rights.⁸⁸

The recognition of women in the law has been defined as 'a goal in its own right'.⁸⁹ This is so because it is a means through which women can be protected from male domination. Feminism has been applauded for identifying the concept of 'masculist legal theory' which was used to suppress women.⁹⁰ The objective of feminist legal theory is to interpret the experiences of women as 'justified beliefs' while providing for the protection of their rights.⁹¹

⁸⁴ R Sharp & R Broomhill 'Budgeting for equality: The Australian experience' 8 *Feminist Economics* (2002) 1 26-27.

⁸⁵ C Dalton 'Where we stand: Observations on the situation of feminist legal thought' 3 *Berkeley Women's Law Journal* (1987) 1 2.

⁸⁶ S Tamale 'African feminism: How should we change' 49 *Development* (2006) 1 39.

⁸⁷ Dalton (n 85 above) 2.

⁸⁸ As above.

⁸⁹ KA Lahey 'Reasonable women and the law' in MA Fineman & NS Thomadson (eds) *At the boundaries of law: Feminism and legal theory* (1994) 3.

⁹⁰ As above.

⁹¹ JE Grbich 'The body in legal theory' in Fineman & Anor (n 89 above) 70.

While writing a legal theory, one should bear in mind the existing framework and challenge it by imagining different situations which might be beneficial to women.⁹²

Mossman highlighted the impact of including 'feminist agenda' in the laws.⁹³ She uses the 1873 United States (US) case of *Bradwell v Illinois*⁹⁴ to illustrate how the non-recognition of the rights of women in the laws can lead to ignoring their rights. The judge in that case stated that women are vulnerable and that their destiny was to be a wife and a mother. While so stating, the judge did not refer to any legal texts but to the divine law. The Judicial Committee of the Privy Council held a different view from the above in 1930 in the case of *Edwards v AG of Canada*.⁹⁵ Lord Sankey stated the following:⁹⁶

The exclusion of women from all public offices is a relic of days more barbarous than ours, but it must be remembered that the necessity of the times often forced on man customs which in later years were not necessary.

These words mean that despite the fact that women in previous times required a different treatment from men, the times had changed and there is a need for change in the way women are treated.

The African continent has also acknowledged the role of law in the protection of the rights of African women. Many African societies actually respect 'womanhood' and this view has been used as 'a powerful symbol in the modern struggle for woman's rights'.⁹⁷ As a result of years of advocating by Women in Law and Development in Africa (WILDAF), a Special Rapporteur on the Rights of Women in Africa was identified as a special mechanism of the African Commission at the Commission's 23rd Session on April 1998.⁹⁸

⁹² Grbich (n 91 above) 71.

⁹³ MJ Mossman 'Feminism and legal method: The difference it makes' in Fineman & Anor (n 89 above) 284.

⁹⁴ *Bradwell v Illinois* (1873) 83 US 16 Wall 130.

⁹⁵ *Edwards v AG of Canada* (1930) AC 124 available at <http://www.chrc-ccdp.ca/en/browseSubjects/edwardspc.asp> (accessed on 2 March 2015).

⁹⁶ *Edwards v AG of Canada* (n 95 above) 128.

⁹⁷ S Nzenza-Shand 'Take me back to the village: African women and the dynamics of health and human rights in Tanzania and Zimbabwe' in O Nnaemeka & J Ezeilo (eds) *Engendering human rights: Cultural and socio-economic realities in Africa* (2005) 63.

⁹⁸ F Viljoen *International human rights law in Africa* (2012) 375.

In the contemporary Africa, women's human rights are no longer invisible and marginalised and there are 'attempts to develop laws, policies and practices'.⁹⁹ Despite the fact that the 'explicit articulation of women's rights and gender equality is a fairly recent development in the African Union' the Maputo Protocol has been adopted and it 'is a comprehensive, binding instrument on women's rights'.¹⁰⁰

The adoption of the Maputo Protocol by the African Union (AU) could be interpreted to mean that the African countries recognise the importance of the law in the eradication of the vulnerabilities discussed in section 1.5 above. This is so because having a separate instrument which protects women's human rights is reflective of the fact that Africa has now recognised that there is a need to empower women so that they are accorded the same treatment as men.

The provisions of the Maputo Protocol are still controversial in many African societies.¹⁰¹ For instance, a Kenyan NGO, KELIN, has noted that governments are still reluctant to the provisions of the Maputo Protocol.¹⁰² Nevertheless, the document is a reflection of an application of the feminist legal theory in Africa. This is so because it is aimed at changing the way women are treated. The provisions of the Maputo Protocol seek to transform the society from one that suppresses women to one that empowers women and brings them on par with men.¹⁰³ Recognising that transformation requires budgetary resources, the Maputo Protocol, as studied in section 2.4.2 above, requires states to provide sufficient budgetary resources to realise women's human rights. The articles in the Maputo Protocol which make reference to budgetary allocations indicate that the African continent considers the same so important that it has adopted it as a law. The budgetary allocation provisions of the Maputo

⁹⁹ R Manjoo 'Women's human rights in Africa' in M Ssenyonjo (ed) *The African regional human rights system: 30 years after the African Charter on Human and Peoples' Rights* (2012) 137.

¹⁰⁰ As above.

¹⁰¹ Many African countries have entered into reservations while ratifying the Maputo Protocol to demonstrate that they do not undertake to abide by all the obligations: Uganda, Cameroon, Kenya, Namibia, and South Africa have reservations to specific articles of the Maputo Protocol. Moreover, different societal attitudes towards women act as a challenge for the implementation for the provisions of the Maputo Protocol.

¹⁰² KELIN 'Government reluctance to Maputo Protocol is a danger to women's reproductive health' (2016) available at <http://www.kelinkenya.org/2016/06/civil-society-groups-discuss-sexual-reproductive-health-guided-maputo-protocol/> (accessed on 12 August 2016).

¹⁰³ FJ Mohamed 'African Union Protocol on the Rights of Women in Africa: The SOAWR Campaign' in R Musa et al (eds) *Breathing life into The African Union Protocol on Women's Rights in Africa* (2006) 14

Protocol seek to transform the African societies by imposing an obligation on states to consider women in their public budgeting process.

Since the concept of gender budgeting aims to give effect to the obligation to provide resources to realise women's human rights, it can be considered as a manifestation of the feminist legal theory. Gender budgeting can be viewed as a platform through which African women can use the law to improve their human rights situation. Gender budgeting is expected to bring attention to 'the whole philosophy of democratisation, redistribution and transformatory practice'.¹⁰⁴ As such, gender budgeting is seen as a process which can change budgetary allocation for women. In addition to the feminist legal theory, the feminist democratic theory has been identified to provide the rationale for the adoption of gender budgeting to realise the obligation to allocate sufficient resources to realise women's human rights.

3.6.2 Feminist democratic theory

The notion of feminist democratic theory emerged because of the struggle of feminists to firstly 'expand the scope of feminist interventions in democratic theory' and to secondly 'foreground feminist engagements so that they might receive more attention by mainstream democratic theorists'.¹⁰⁵ Klatzer and Mader have examined the theoretical background for gender budgets, which is an innovation of feminism,¹⁰⁶ and have identified the feminist democracy theory as the backbone of the process.¹⁰⁷

In the context of gender budgeting, democratisation has two interpretations that are 'the right to say in budgetary policy processes and gender-democratic contents substance'.¹⁰⁸ The female democratic theory is a 'transformative theory' that has as objective the inclusion

¹⁰⁴ J Ahikire 'African feminism in context: Reflections on the legitimate battles, victories and reversals' 19 *Feminist Africa* (2014) 17.

¹⁰⁵ N McAfee & RC Snyder 'Feminist engagements in democratic theory' 22 *Hypatia* (2007) viii.

¹⁰⁶ Tamale (n 86 above) 41.

¹⁰⁷ See generally E Klatzer and K Mader 'Explaining the theoretical foundations and methodological approach of gender budgeting: Feminist democratic implications' presented at The First International Conference on Gender Responsive Budgeting and Social Justice held at Vilnius in 2008 available at file:///C:/Users/User.CREATEK2012/Downloads/Expanding%20the%20Theoretical%20Foundations%20and%20Methodological%20Approach%20of%20Gender%20Budgeting%20(1).pdf (accessed on 14 October 2014).

¹⁰⁸ Klatzer & Anor (n 107 above) 5.

of both men and women in democratic practices.¹⁰⁹ Klatzer and Mader regrouped the criteria of feminist democratic theory in three categories which are: input, withinput and output. Inputs are the 'ones that are relevant for the formulation of policies and the agenda setting process', withinputs concern those 'that have to be fulfilled within the political process of decision-making in as well outside of political institutions' and outputs relate to the 'quality of political institutions, processes and political output'.¹¹⁰

The current research relies on all three categories of the feminist democratic theory to advocate for gender budgeting. Although Klatzer and Mader singled out the output category as the theory behind gender budgeting, this thesis advocates for all three categories to be considered as the basis for the gender budgeting process. The reasoning behind such a consideration is that gender budgeting does not only concern the output, but also the process and the formulation of policies. Gender budgeting requires the government to ensure that the formulation of policies and agenda are mainstreamed, that decisions are executed while taking gender into account, and that the final output is gender mainstreamed.

According to Vickers, the extent of gender sensitiveness of a country can be measured by, *inter alia*, 'addressing issues of particular concern for specific groups of women, especially regarding physical and economic security, and their sexual and reproductive health and self-determination'.¹¹¹ According to Benhabib, the feminist democratic theory should take into account the welfare of everyone in the country, including women.¹¹² She further stated that a decision of the government should be accepted only if the decision making process included the following:¹¹³

- the equal participation of all sectors of the society where everyone was afforded the 'same chances to initiate speech acts, to question, to interrogate and to open debate'
- the right of everyone to ask questions about the options provided; and

¹⁰⁹ Klatzer & Anor (n 107 above) 6.

¹¹⁰ As above.

¹¹¹ J Vickers 'What makes some democracies more 'women-friendly'?' undated 22 available at <http://www.cpsa-acsp.ca/papers-2006/Vickers.pdf> (accessed on 14 October 2014).

¹¹² S Benhabib *Democracy and difference: Contesting the boundaries of the political* (1996).

¹¹³ Benhabib (n 112 above) 70.

- the right of everyone 'to initiate reflexive arguments about the very rules of the discourse procedure and the way in which they are applied or carried out'.

Gender budgeting is a reflection of the feminist democratic theory in the sense that women are given the right to initiate, participate and question the resource allocation of the government. To achieve a situation where there is a proper gender budget, a national budget has to assess the 'effectiveness' of the public expenditure and to what extent it has been able to achieve women's human rights protection.¹¹⁴ The analysis of the expenditure from a gender lens would require stakeholders to take into account the impact of the expenditures on both men and women.

The feminist democratic theory is a subset of the feminist legal theory which requires the government to take into account the human rights of women while devising its laws and policies. It advocates for the realisation of the rights of women through the budgeting process. Therefore, it can be derived that different branches of feminism advocate for the adoption of gender budgeting as a means to allocate sufficient budgetary resources to realise women's human rights.

The human rights approach to the theory of fiscal sociology, the feminist legal theory and the feminist democratic theory provides the rationale for the adoption of gender budgeting to allocate sufficient budgetary resources to realise women's human rights. This research does not single out one theory but is instead based on a combination of the theories discussed. There is both a vertical and a horizontal relationship between the theories.

Goldscheid's theory of fiscal sociology has established that states have to use the revenue collected to provide goods and services for their citizens. This gives legitimacy to gender budgeting since it requires a state to allocate the budgetary resources that it has to its citizens. Waris' extrapolation of human rights from the theory of fiscal sociology is a vertical one since it stems from the theory of fiscal sociology. She recognises that states have to redistribute their revenues for the provision of goods and services to their citizens, but she additionally highlighted that states must consider human rights in the process. Thus, one

¹¹⁴ D Elson 'Budgeting for women's rights: Monitoring government budgets for compliance with the CEDAW' (2006) 31.

combined theory for the adoption of gender budgeting is a human rights approach to the theory of fiscal sociology.

However, the human rights approach to the theory of fiscal sociology does not fully realise women's human rights as was highlighted in section 3.5. Section 3.5 reached the conclusion that a gender neutral budget might ignore the vulnerabilities that women face. Moreover, the theory of fiscal sociology concerns only those revenues which have been collected as taxes and not all of the government's revenues. However, this study concerns the allocation of all the revenues of the government. As a result, the feminism theories were studied in parallel to the human rights approach to the theory of fiscal sociology. The feminist legal theory demonstrated that provisions of international law, which impose an obligation on states to allocate sufficient budgetary resources to realise women's human rights, are demonstrative of the use of the law to achieve transformation in the society. Obligations to provide budgetary resource allocations to realise women's human rights are thus within the ambit of the feminist legal theory.

The last theory assessed in relation to the adoption of gender budgeting to allocate sufficient budgetary resources to realise women's human rights was the feminist democratic theory. Despite the fact that Klazter and Mader identified only the output category of the feminist democratic theory as the basis for gender budgeting, this thesis considers all categories important for the adoption of gender budgeting.

This research could have proceeded with only the feminist democratic theory. Nevertheless, as elaborated upon in the previous paragraphs, the other theories are also relevant for the study. While the human rights approach to the theory of fiscal sociology provides the basis for requiring governments to allocate sufficient budgetary resources, the feminist legal theory and the feminist democratic theory legitimise the adoption of gender budgeting to implement the obligation to provide resources to realise women's human rights.

3.7 Essential elements of gender budgeting

A gendered approach to budgeting can be integrated both at the level of the process of national budgeting and at the level of the policies that governments adopt during the

budgeting process.¹¹⁵ Gender budgeting is mostly concerned with the government revenues and government expenditures and the extent to which they influence women's human rights.¹¹⁶ Gender budgeting has been considered as 'a repeating process of consultation, participation, planning, implementation and evaluation with a set of objectives, indicators and benchmarks'.¹¹⁷

As stated in chapter one, the current thesis does not analyse the revenue of the government for gender budgeting purposes.¹¹⁸ It rather assesses government's expenditures on plans and policies which contribute to the realisation of women's human rights. While so doing, it also takes into account those budgetary processes which involve the consultation and participation of relevant stakeholders during the budgeting process.

This section studies the gender budgeting process with the view of understanding the essential elements of the concept against which the SADC guidelines adopted in 2014 and the South African initiatives are assessed in chapter four. It further elaborates on the following in relation to the essential elements of gender budgeting: the objectives, the process, the stakeholders, the preparation of gender budgets, the tools for assessing gender budgeting, and the challenges.

3.7.1 Concept of gender budgeting

Gender budgeting was first adopted by Australia in 1984 when the government committed itself to have a gender sensitive analysis of the budget.¹¹⁹ Each government agency had to break down its expenditures in three, namely, woman-specific targeted expenditures, equal employment opportunity expenditures and mainstream expenditures.¹²⁰ The Australian gender budgeting had three main aims which were to 'raise awareness of the gendered impacts of the budget and the policies it funds', to 'make government accountable for their commitments to gender equality' and to change the budgeting landscape for issues that affect

¹¹⁵ Klatzer & Anor (n 107 above) 3.

¹¹⁶ As above.

¹¹⁷ As above.

¹¹⁸ Section 1.10 above.

¹¹⁹ Sharp & Anor (n 84 above).

¹²⁰ Bridge (n 73 above) 21.

women's human rights with the aim of achieving gender equality.¹²¹ Sharp and Broomhill have pointed out that the Australian gender budgeting initiatives, in its initial stages, faced limitations due to the conservative nature of the government.¹²² However, in a more recent study conducted in 2013, the same authors have highlighted the achievements of gender budgeting in Australia which include elaborate women's budget statements and gender considerations while developing programmes and policies.¹²³ Most countries that have adopted gender budgeting follow the Australian model, although it has been a challenge to assess the mainstream expenditures.¹²⁴ Gender budgeting initiatives around the world take different forms although their main aims are similar to the Australian model.

It is now recognised that macroeconomic policies, the national budget being one of them, have an important role on women's human rights.¹²⁵ The adoption of gender budgeting contributes to the broader integration of gender in macroeconomic policies.¹²⁶ Gender budgeting helps to identify inequalities in government budgets and allows for re-allocation of these resources to reduce the inequality gap.¹²⁷ Gender budgeting acknowledges the 'constraints' that women face in being treated equal and ensures that 'a greater share of resources' is allocated so that women's human rights can be realised.¹²⁸

Gender budgeting refers 'to a variety of processes and tools aimed at facilitating an assessment of the gendered impacts of government budgets'.¹²⁹ It is a process which can be used to ensure that the 'economic goals' of the government are consistent with its 'social commitments'.¹³⁰ Gender budgets are adopted because they contribute to¹³¹ 'economic efficiency', 'good governance', the realisation of the 'right to information', the will to realise

¹²¹ Sharp & Anor (n 84 above) 32.

¹²² Sharp & Anor (n 84 above) 42-43.

¹²³ R Sharp & R Broomhill 'A case of gender responsive budgeting in Australia' (2013).

¹²⁴ As above.

¹²⁵ Elson 2006 (n 114 above) 23.

¹²⁶ G Hewitt & T Mukhopadhyay 'Promoting gender equality through public expenditure' in D Budlender, et al (eds) *Gender budgets make cents: Understanding gender responsive budgets* (2002) 52.

¹²⁷ Bridge (n 73 above) 5.

¹²⁸ S Fredman 'Less equal than others – Equality and women's rights' in C Gearty & A Tomkins (eds) *Understanding human rights* (1996) 77.

¹²⁹ Budlender et al *How to do a gender-sensitive budget analysis: Contemporary research and practice* (1998) 5.

¹³⁰ Hewitt & Anor (n 126 above) 54.

¹³¹ See section 3.7.2 for the objectives of gender budgeting.

‘international development commitments and commonwealth mandates’, and ‘gender mainstreaming’.¹³²

Mumford has identified gender budgeting as an initiative that ‘explicitly addresses tax, the Budget and social welfare’.¹³³ As a result of the areas that gender budgeting addresses, it can, albeit ‘indirectly’, influence the government’s approach to women’s human rights issues. As such, gender budgeting is a government policy which, more often than not, positively impacts on expenditure for women’s human rights.¹³⁴

Gender budgeting provides for various opportunities.¹³⁵ For instance, it is a platform to calculate the actual amount allocated to women, men, boys and girls. It reveals the deficiencies that exist in the data concerning spending on men and women. Since the preparation of the gender budget involves different key stakeholders, it provides for an opportunity for government officials to understand the process through others. It finally reveals any discrepancies in terms of access to opportunities in the public sector by women and it has a positive impact on other social concerns.

3.7.2 Objectives of gender budgeting

The adoption of gender budgeting is done with the ultimate aim of realising women’s human rights. Gender budgeting has some objectives that contribute to the realisation of women’s human rights. The National Commission for the Promotion of Equality in Malta (NCPE) has expanded upon these objectives of gender budgeting and they are as follows:¹³⁶ Gender equality, and the respect of the principles of good governance including accountability, transparency and participation, and efficiency and effectiveness.

¹³² Hewitt & Anor (n 126 above) 55.

¹³³ A Mumford *Tax policy, women and the law: UK and comparative perspectives* (2010) 29.

¹³⁴ As above.

¹³⁵ Hewitt & Anor (n 126 above) 71-73.

¹³⁶ NCPE ‘Gender responsive budgeting: A study on GRB initiatives in Sweden, Switzerland, Italy, United Kingdom and France’ (2009) 15-17.

A Gender equality

Gender budgeting has been considered as a must to achieve gender equality.¹³⁷ Mumford has pointed out that an analysis of the impact of budgetary expenditure on women 'is likely to enable clear, policy-based articulation of the importance of gender equality'.¹³⁸ One of the aims of gender budgeting is the inclusion of gender equality in all the policies of the government.¹³⁹ It points out to those policies and programs that do not address gender inequalities and requires the government to allocate more resources to them. Gender budgeting highlights the discrimination and inequalities in a government's budget. The adoption of gender budgeting requires states to ensure that its expenditure does not accentuate the existing discrimination against women and gender inequalities and instead assess how it should allocate its expenditure to achieve gender equality. It therefore requires the government to adopt a budget which is inclusive of policies to reduce gender inequality.

B Good governance

Good governance implies that 'rules, processes and actions are established in order for power to be exerted with the right pressure and in the right direction'.¹⁴⁰ The adoption of gender budgeting will ensure that the government is abiding by the principle of good governance since gender budgeting incorporates components such as accountability, transparency and participation, and efficiency and effectiveness.

(i) Accountability

States often are parties to several international and regional instruments which impose an obligation on them to realise women's human rights. The Australian gender budgeting initiative recognised that the process will be a means to make 'government accountable for their gender equality commitments'.¹⁴¹ Assessing the government's expenditure to give effect to the rights of women is one avenue through which one can derive whether the

¹³⁷ R Nallari & B Griffith *Gender and macroeconomic policy* (2011) 40.

¹³⁸ Mumford (n 133 above) 30.

¹³⁹ NCPE (n 136 above) 15.

¹⁴⁰ NCPE (n 136 above) 17.

¹⁴¹ Sharp & Anor (n 84 above) 36.

government is giving effect to its international and regional obligations in relation to the realisation of women's human rights.

Gender budgeting is a means to review the manner in which the government is allocating its expenditure to realise women's human rights and this process is ignored in 'traditional government budgets'.¹⁴² Gender budgeting assesses the impact of government's expenditure on men and women, girls and boys and therefore it is indicative of whether the government is investing sufficient amount of resources to realise women's human rights.

In addition to the above, Mumford has also identified gender budgeting as a means to hold governments responsible for pre-existing commitments.¹⁴³ She highlighted that predecessors might have ratified treaties which might be ignored by governments. She pointed out that gender budgeting might be used as a mechanism to hold the government accountable for non-execution of treaty commitments by previous governments.

CSOs and the population can use the information contained in the gender budget to make the government explain its decisions through judicial or non-judicial avenues in the event the government is not allocating sufficient resources towards the realisation of women's human rights. Therefore, gender budgeting aims to provide the population with information which can be used to hold the governments responsible in the event they are not abiding by their obligations to realise women's human rights.

(ii) Transparency and participation

Access to information has been described as the 'lifeblood' of a democracy.¹⁴⁴ It provides for the benchmark against which the people can evaluate the job of their representatives. If there is no access to information, the whole election process is redundant since the citizens do not have any account of what their representatives have done for them. Thus, for a democracy to function there is a need for transparency.

¹⁴² As above.

¹⁴³ Mumford (n 133 above) 30.

¹⁴⁴ AM Florini 'Increasing transparency in government' 19 *International Journal of World Peace* (2002) 3 3.

Transparency, being 'key' to good governance, allows the curbing down of practices of representatives to take advantage of their position and to illegitimately benefit from the revenues that should be converted into public expenditure.¹⁴⁵ However, transparency is a controversial topic. As much as one would like to have access to all the files and documents of the government's undertaking, there is the issue of 'secrecy' where outsiders of the government are not supposed to have access to some types of information.¹⁴⁶

The budget of a country in this case provides for a means for transparency. CSOs analysing the budget from a gender perspective have times and again emphasised that governments should make information about the budget public.¹⁴⁷ African countries are usually characterised by weak transparency that 'undermine the possibility of planning and executing policies, notably those relating to structural transformation'.¹⁴⁸

Transparency being central to 'legitimate and effective governance' is important in the budget process since it demonstrates how the government, as the representative of the people, is investing the people's money for their benefit.¹⁴⁹ The human rights analysis of budgets has acted as a catalyst for governments to make the budget public,¹⁵⁰ thus making the process more transparent.

Gender budgeting necessitates the accuracy of government records which enables one to assess the expenditures. As a result, it has been considered as a 'monitoring tool and framework for objective comparison of the developmental achievements of governments gained through public expenditure'.¹⁵¹ Budget analysis is a very important tool in the hands of CSOs which concentrate on women's human rights. Since it provides for transparency, CSOs can assess the gender responsiveness of the budget and assess whether enough resources have been allocated to women's human rights. In the event they find that there are

¹⁴⁵ Florini (n 144 above) 3.

¹⁴⁶ Florini (n 144 above) 4.

¹⁴⁷ A Blyberg 'The case of the mislaid allocation: Economic and social rights and budget work' 11 *SUR-International Journal on Human Rights* (2009) 6 125.

¹⁴⁸ United Nations Economic Commission for Africa 'Measuring corruption in Africa: The international dimension matters' (2016) xiv available at http://www.uneca.org/sites/default/files/PublicationFiles/agr4_eng_fin_web.pdf (accessed on 25 May 2016).

¹⁴⁹ As above.

¹⁵⁰ Blyberg (n 147 above) 123.

¹⁵¹ Hewitt & Anor (n 126 above) 60.

available resources from other items of the budget which can be redirected towards the realisation of women's human rights, they can come up with a project that contains the policies and programmes that the government can adopt if it reallocates the resources.¹⁵²

(iii) Efficiency and effectiveness

The gender budgeting process is inclusive of assessing how government's allocations are contributing towards the realisation of women's human rights. A national budget without gender consideration tends to be inefficient and ineffective towards the realisation of women's human rights since it is ignorant of challenges that women and girls face.¹⁵³

Gender budgeting allows governments to take into account the challenges that women face and adopt policies to ensure that those challenges are minimised. For instance, a gender-neutral policy on access to contraceptives is not appreciative of the fact that some societies are still male dominated and women are subjected to the whims and caprices of their partners. The resources spent on this policy will be inefficient and ineffective since there will be no programs for the sensitisation of women and men about the use of contraceptives. Gender budgeting will be inclusive of the effect that the expenditure will have on women's human rights thereby making governments' policies more efficient and effective. Similarly, taking into consideration women's human rights while budgeting will enable the government to have more efficient and effective policies.

3.7.3 Stakeholders involved in gender budgeting

A country can ensure a better implementation of gender budgeting by firstly, ensuring that the different Ministries and CSOs interact with each other to work on a plan of action to integrate a gender perspective in the budget. Secondly, there needs to be the promotion of gender budgeting concepts while devising different means through which the concept can be included in the budget. Thirdly, parliament which approves of the budget has to ensure that the expenditures are gender sensitive. Finally, there is a need to allow women's

¹⁵² Hofbauer et al (n 39 above) 3.

¹⁵³ NCPE (n 136 above) 17.

organisations to voice their opinions about the allocation of resources to the different areas and their impacts on women.

In the whole process, the role of the Ministry of Finance or its equivalent is crucial since it is responsible for the preparation of the budget. It is imperative for the Ministry of Finance to have the will power to consult with other stakeholders in the preparation of the budget. To be able to translate their willpower into concrete action, they need the 'requisite technical expertise' and to lead the initiative to adopt gender budgeting.¹⁵⁴ Moreover, other ministries and government offices do have significant roles in the sense that states require them to prepare their departmental/ministerial budget to make a request to the Ministry of Finance. Additionally many countries have a multi-sectorial approach with the key stakeholders and all of them have to contribute to the preparation of the budget.¹⁵⁵

CSOs participate in the process by identifying the needs of women and assessing the budget's reaction to those needs.¹⁵⁶ They then use this analysis to lobby for the adoption of gender budgeting vis-à-vis the government. Sometimes, CSOs actively participate in the preparation of the budget so that they can have valuable input concerning the integration of a gender perspective.

The preparation of a budget is usually the function of the executive but it is also an initiative which should involve stakeholders from outside the government structure.¹⁵⁷ The Australian budget initiative was not very successful after 1996 because it was an initiative by feminists to bring about change in women's lives from within the governmental structure while excluding other potential stakeholders.¹⁵⁸ The South African government gender budgeting initiatives involved firstly interaction between the Parliament and CSOs, and then engagement with the executive and it gained more success than the Australian experience.¹⁵⁹

¹⁵⁴ Hewitt & Anor (n 126 above) 65.

¹⁵⁵ Budlender 2002 (n 151 above) 95.

¹⁵⁶ Hewitt & Anor (n 126 above) 68.

¹⁵⁷ Bridge (n 73 above) 33.

¹⁵⁸ As above.

¹⁵⁹ Section 4.2 below.

As demonstrated, the gender budgeting process is one that involves different stakeholders. It cannot be only a governmental initiative but must be inclusive of CSOs and parliamentarians. Gender budgets are the results of collaboration between all the stakeholders.

3.7.4 Preparing gender budgets

Gender budgeting can be approached from a gender-sensitive budget analysis (GSBA) approach or by adopting a gender-sensitive formulation of the budget (GSFB).¹⁶⁰ GSBA refers to an analysis of past and current budgets to assess whether they have allocated enough resources to satisfy the needs of men, women, boys and girls.¹⁶¹ GSFB is the consideration of the effect of a particular expenditure on men, women, boys and girls while preparing the budget.¹⁶² To have a GSFB, a state must first have a GSBA to understand what has been lacking in the previous allocation of resources. Bridge's report has revealed that most countries are still at the GSBA stage although some states have undertaken steps to have a GSFB.¹⁶³

The GSBA has three stages.¹⁶⁴ The first stage concerns an analysis of the budget from a gender lens. This is important to depict that men and women are differently affected by government expenditures. A report is prepared during the analysis containing sex disaggregated data demonstrating the extent to which the expenditures address the needs of women, the challenges that women still face due to inadequate resource allocation, the change in gender inequality as a result of government expenditure, the relationship between government expenditure and women's human rights and motivations as to why women should be given special attention during the allocation of resources.¹⁶⁵

¹⁶⁰ Bridge (n 73 above) 15.

¹⁶¹ As above.

¹⁶² As above.

¹⁶³ As above.

¹⁶⁴ S Quinn 'Gender budgeting: Practical implementation' (2008) 16 available at [https://www.coe.int/t/dghl/standardsetting/equality/03themes/gender-mainstreaming/CDEG\(2008\)15_en.pdf](https://www.coe.int/t/dghl/standardsetting/equality/03themes/gender-mainstreaming/CDEG(2008)15_en.pdf) (accessed on 8 September 2015).

¹⁶⁵ Quinn (n 164 above) 17-18.

The second stage is re-allocating resources based on the analysis of the budget. If an analysis of the budget from a gender lens demonstrates that the government has not allocated resources in a manner which reduces the gender inequality gap, the government needs to respond and amend the budget to meet its gender equality obligations.¹⁶⁶ Budget reconstruction may be in the form of positive or temporary measures on behalf of the government to ensure that the gender inequality gap is reduced.¹⁶⁷ As such, governments are required to take affirmative actions in their future budgets to ensure that resource allocation empowers women to achieve equality.

The third stage is integrating gender mainstreaming as a component during budgeting processes. The national budget is formulated using different information and this information in a non-gender budget is gender neutral.¹⁶⁸ Neutrality in gender budgets does not optimise government's resources to reduce gender inequality. This is why, once the second stage is completed, the government has to mainstream all the data that it gathers and has to assess all its future budgets from a gender lens.

The three stages described above form part of a GSBA. Nevertheless, the application of gender budgeting will not yield results if the process is not a repetitive one. Stage three of the gender budgeting process ensures that government applies GSFB. This ensures that there is no duplication of resources during future budgeting processes as governments will have already taken into account gender while preparing its initial budgets. The first stage's relevance still remains since then the analysis can provide for different more effective and efficient options for the government's expenditure.

3.7.5 Tools for assessing gender budgets

The mainstream expenditure can be assessed by using the following tools:¹⁶⁹ The public expenditure incidence analysis, budgetary institutions, gender-aware policy appraisal and women's or gender budget statement. In addition to the above tools, Hewitt expanded on

¹⁶⁶ Quinn (n 164 above) 20.

¹⁶⁷ As above.

¹⁶⁸ As above.

¹⁶⁹ Elson 2006 (n 114 above) 35.

gender disaggregated beneficiary assessment, gender-aware medium term macroeconomic policy framework as tools for assessing gender budgets and sex-disaggregated analysis of the impact of the budget on time use.¹⁷⁰

The main objective of the public expenditure analysis tool is to compare the expenditure for a given programme during a given time to assess how much has been spent on men and women separately.¹⁷¹ The public expenditure analysis is done in three steps.¹⁷² Firstly, there is the identification of the time period, the analytical framework, the budget item to be studied and the budget revenue for that item. The second step measures the amount spent on that budget item. For instance, how much was spent on equipment for child delivery out of the budget for health. The final step is a calculation of the redistribution of resources which would reflect a more effective expenditure. Concerning gender budgeting, the public expenditure incidence analysis can be used to assess the expenditure of the government through a gender lens by studying how much has been spent for women, men, girls and boys.¹⁷³ This tool highlights the relevance of gender disaggregated data which is important for analysis.

Budgeting institutions are 'the collection of the formal and informal rules and principles governing the budgeting process within the executive and the legislature'.¹⁷⁴ They basically provide for a break-down of the budget process highlighting the role of different actors at each step. Through the budgeting institutions one can derive how much is being allocated to the different ministries and the amount that is being spent on services that concern women.

¹⁷⁰ G Hewitt 'Gender responsive budget initiatives: Tools and methodology' in United Nations Development Fund for Women (ed) *Gender budgeting initiatives: Strategies, concepts and experiences* (2002) 31-34 available at <http://www2.unwomen.org/~media/headquarters/media/publications/unifem/genderbudgetinitiativesen.pdf?v=1&d=20140917T101011> (accessed on 26 July 2016).

¹⁷¹ NCPE (n 136 above) 27.

¹⁷² GC Ruggeri 'Public expenditure incidence analysis' in A Shah (ed) *Handbook on public sector performance reviews: Bringing civility in governance* (2003) Volume 3 1.2

¹⁷³ Elson 2006 (n 114 above) 35.

¹⁷⁴ JV Hagen 'Budgeting institutions for better fiscal performance' in A Shah (ed) *Budgeting and budgetary institutions: Public sector governance and accountability series* (2007) 29.

The most widely used gender budgeting tool is the gender-aware policy appraisal.¹⁷⁵ This tool stems from the fact that governments have committed to ensure that they achieve gender equality and as such their policies should reflect this commitment.¹⁷⁶ In this situation there is an analysis of the policies and programmes of the government. While so doing, special attention is paid to policies and programmes which concern gender issues. There needs to be an assessment of whether enough resources have been diverted to implement those programmes and policies. The purpose behind is to question the policies and programmes adopted and to assess how a restructuring of the resource allocation could better realise women's human rights.

A gender budget statement 'is a statement, or report, from each government portfolio on its audit of policies, programmes and related budget'.¹⁷⁷ The objective of this statement is to assess the impacts that the expenditure have on women.¹⁷⁸ It is a tool that can be applied to the other tools. Other relevant stakeholders can use the gender budget statement to analyse the expenditure and its impact on women and men.

The gender disaggregated beneficiary assessment offers an opportunity to the public to assess the expenditures of the government with the aim of seeing the extent to which the expenditures satisfy their needs.¹⁷⁹ The aim of this tool is to ensure that women have the opportunity to participate in the budgeting process and have a say in the manner in which the resources are being allocated. There is no direct involvement of the public in the budgeting process but instead, there are surveys which are conducted to obtain the views of the public.¹⁸⁰

The gender-aware medium term macroeconomic policy framework departs from the traditional review of budgets on an annual basis.¹⁸¹ It is based on the premise that the policies of the government have to be reviewed on a regular basis to assess its impact on the

¹⁷⁵ Budlender et al (n 129 above) 37.

¹⁷⁶ NCPE (n 136 above) 27.

¹⁷⁷ Budlender et al (n 129 above) 50.

¹⁷⁸ Elson 2006 (n 114 above) 37.

¹⁷⁹ NCPE (n 136 above) 27.

¹⁸⁰ As above.

¹⁸¹ NCPE (n 136 above) 28.

situation of women. While adopting policies, there is the need to specify a certain period of time during which the impact of the policies will be assessed. This tool is efficient as it creates deadlines during which the government has to achieve the policy goals and objectives.

The sex-disaggregated analysis of the impact of the budget on time use 'is a calculation of the link between budget allocations and their effect on how household members spend their time, using household time-use surveys'.¹⁸² This tool recognises that women are prone to staying at home to take care of children, the elderly, the sick or the disabled. It requires countries to conduct time use surveys to understand how women spend their time at home and to allocate a budget to compensate them for the services that they render within the domestic realm.

Once a gender budgeting tool is selected, one needs to have dialogues with the different key stakeholders to ensure that their views are taken into account.¹⁸³ Countries have mostly adopted the gender-aware policy appraisal. Nevertheless, it is to be noted that a country can adopt more than one tool for the assessment of gender budgets. For instance, the gender-aware policy appraisal can be merged with the gender-aware medium term macroeconomic policy framework. Countries can assess their expenditure from a gender lens and then adopt deadlines where the policies of the government will be assessed in relation to the realisation of women's human rights. Chapter four of this thesis provides for a combination of these tools while providing for the framework within which gender budgeting can be adopted.

3.7.6 Challenges in the adoption of gender budgeting

The previous sub-sections expanded on the concept of gender budgeting and highlighted the objectives of the process. Despite the fact that countries have been encouraged to adopt gender budgeting, countries have still not entirely integrated gender budgeting in their national budgeting processes. Some of the challenges in the adoption of gender budgeting can be due to the initiative being part of a human rights approach to public budgeting. As elaborated in section 3.4, the adoption of a human rights approach to public budgeting faces some challenges and these challenges apply to gender budgeting since the latter is a subset

¹⁸² Hewitt (n 170 above) 34.

¹⁸³ Elson 2006 (n 114 above) 42-43.

of the former. However, there are additional challenges that apply to gender budgeting. This sub-section identifies the challenges that governments face to adopt gender budgeting or to ensure that gender budgeting becomes a regular part of their national budgeting process.

Bridge has highlighted the challenges that developing countries face with budgeting.¹⁸⁴ Some of the reasons mentioned also have application to the adoption of gender budgeting. The relevant challenges which are of concern to gender budgeting are studied in this sub-section.

One of the major challenges identified is the lack of budget data and socio-economic statistics.¹⁸⁵ In many developing countries there is no updated gender-disaggregated data which enables budget framers or other relevant stakeholders to assess the impact of their expenditure.¹⁸⁶ Gender-disaggregated data is imperative for gender budgeting because it is the basis on which the relevant stakeholders assess the policies of the government and its impact on women's human rights. As such, the starting point is the identification of the type of information that is needed to analyse gender budgets and to embark on the collection of such data. This can act as a disincentive for the adoption of gender budgeting.

There is still a lack of accountability and transparency in the budgeting process.¹⁸⁷ The budgeting process has been categorised as a 'black box' which provides no access to citizens or to those who were not involved in the budgeting process.¹⁸⁸ Despite the fact that the budgeting process has now become more transparent, there are still limits on the information which is available to the public.¹⁸⁹ Legislation concerning access to information in budgets is still weak. Furthermore, there are still few female advocates for gender rights and as a result the laws are mostly gender neutral.¹⁹⁰ The lack of accountability can be linked to the poor adoption of gender budgeting since there are no mechanisms available through which stakeholders can request for information to analyse the budget from a gender lens. Moreover, there are certain line items in the budget such as the defence budget that are not

¹⁸⁴ Bridge (n 73 above) 11-14.

¹⁸⁵ Bridge (n 73 above) 11.

¹⁸⁶ As above.

¹⁸⁷ Bridge (n 73 above) 12.

¹⁸⁸ Bridge (n 73 above) 11.

¹⁸⁹ As above.

¹⁹⁰ Bridge (n 73 above) 12.

made public. The lack of transparency in the budgeting process can act as a challenge to the adoption of gender budgeting since it is impossible to do an accurate analysis of the budget from a gender lens in such a case.

In addition to the above, budgeting processes in some countries are still exclusive of the participation of the public or relevant stakeholders.¹⁹¹ This acts as a challenge for the adoption of gender budgeting since gender budgeting assumes that all relevant stakeholders are given the opportunity to participate and to contribute to the process. In some countries where gender budgeting is an initiative of CSOs, this requires the system to be participatory. CSOs need to be able to participate in the process and need to obtain information to analyse them and to produce reports which will be considered by the government. The non-participatory nature of the budgeting process in some countries acts as a hindrance for the adoption of gender budgeting.

One of the functions of gender budgeting is to assess the impact and the efficiency of government's expenditure on women's human rights. However, assessing the impact and efficiency of government's expenditure is a complex process. Bridge has highlighted that in most cases the efficiency of government expenditure can be measured only in financial terms without analysing how it has actually empowered women.¹⁹² For instance, an analysis of the expenditure on reproductive policies can be assessed by looking at sensitisation programs but the programs cannot be indicative of how influential it has been for women. As a result, relevant stakeholders face difficulties in assessing the impact and efficiency of government's expenditure.

Governments often do not have sufficient revenues, and are further pressurised by multilateral donors while formulating the budget.¹⁹³ The expenditure of the government is dependent on the revenue of the government. Most times the government does have sufficient revenue to adopt gender budgeting since it requires resources. Further, governments might have the political will but the lack of revenue pushes them to adopt social

¹⁹¹ As above.

¹⁹² As above.

¹⁹³ As above.

policies which benefit everyone instead of adopting different policies aimed at promoting gender equality. In addition to constraints due to government revenues, there are also pressures from multilateral donors who require governments to spend the aid received in a manner consistent with the donors' policies.

The last challenge identified by the Bridge report for the adoption of gender budgeting is decentralisation. In a country where there is decentralisation, the budget is prepared at the 'local level due to the proximity of the implementation of public policies'.¹⁹⁴ The local governments are dependent on the provision of resources from the national government. If the national government does not provide additional funds for the adoption of gender budgeting, it will be difficult for the local governments to adopt policies aimed at reducing gender inequality. Additionally, the previous challenges discussed in relation to the adoption of gender budgeting at the national level apply to the adoption of gender budgeting in local government budgets.

The process of gender budgeting is one that is complex and reliant on several other factors as highlighted in this sub-section. This can act as a disincentive for governments to adopt gender budgets. Nevertheless, governments have committed to allocate resources to realise women's human rights. Furthermore, it has been pointed out that gender budgeting embraces principles of good governance including efficient and effective expenditure.¹⁹⁵ Governments have to realise that development is not possible if women's human rights are still being violated and that they need to address this concern as far as it can and allocate their resources to that means.

3.8 Conclusion

The aim of this chapter was to understand the relationship between gender budgeting and the implementation of the obligation to provide resources to realise women's human rights. To do so, it studied the theory behind the allocation of budgetary resources to realise human

¹⁹⁴ Bridge (n 73 above) 13.

¹⁹⁵ Section 3.7.2(B) above.

rights, a human rights approach to public budgeting, the theories behind the adoption of gender budgeting and unpacked the process of gender budgeting.

The study of the theory of fiscal sociology revealed that states have to redistribute the income that they receive amongst the population. Waris' interpretation of the theory of fiscal sociology pointed out that the public budgeting process can be a means through which human rights generally can be realised. Although both the revenues and the expenditures of the government need to be compliant with human rights, for the purposes of the current research, only the expenditure of the government was relevant. It was highlighted that a human rights approach to budgeting does not necessarily ensure that women's human rights are realised since its gender neutrality may lead it to actually be gender blind.

As a result, feminism, more particularly, the feminist legal theory was analysed to demonstrate that international law which makes reference to budgetary resource allocation to realise women's human rights attempts to improve the situation of women. The Maputo Protocol was given as an example of a legal document that seeks transformative change through the allocation of sufficient budgetary resources.

Furthermore, the feminist democratic theory stated that there is the need to expressly address women's human rights in the budgeting process. Gender budgeting is a reflection of the feminist democratic theory as it is a means through which women can see government's commitments to allocate resources to realise women's human rights. The objectives of gender budgeting, including gender equality, accountability, transparency and participation, and efficiency and effectiveness is in line with governments' commitments to realise women's human rights through the allocation of resources.

Having established the rationale for the adoption of gender budgeting as a means to realise women's human rights, this chapter focused on the essential elements of gender budgeting. From the study it can be derived that the two stages of integrating gender in the expenditures are at the formulation stage or at the analysis stage. It can be noted that assessing the expenditures from a gender lens at the initial formulation stage is more effective since then there will not be duplication of resources to reformulate the budget. Most countries are at the GSBA stage where the budgeting expenditures are analysed to see its impact on girls and

women, and boys and men. Nevertheless, this is done once the national budget is made public. The current study proposes that, in addition to the GBSA, there should be the integration of a gender analysis of the expenditure even at the formulation stage of the budget and this process should be inclusive of all relevant stakeholders.

Moreover, people external to the department preparing the budget must have access to information in relation to the budget since the initial stages of the preparation so that they can provide their input as from then itself. CSOs must not be dependent on the final budget to do their analysis and instead, the government must organise meetings at regular intervals with the relevant stakeholders so that they can have their input on the national budget. This process will ensure gender budgeting achieves its purpose.

This chapter has established that gender budgeting is a process that can empower countries to allocate sufficient resources to realise women's human rights. It can be used as a tool by African states to guide them in the implementation of their obligation to provide resources to realise women's human rights as expanded upon in chapter two.

CHAPTER FOUR: THE ADOPTION OF GENDER BUDGETING: LEARNING FROM THE SOUTHERN AFRICAN DEVELOPMENT COMMUNITY GUIDELINES AND THE SOUTH AFRICAN INITIATIVES

4.1 Introduction

Chapter two studied the global, regional and sub-regional legal frameworks that require or recommend African states to provide sufficient resources to realise women's human rights. From the study of the various provisions of international, regional and sub-regional laws, it can be derived that African states that have ratified the Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa (Maputo Protocol) have the obligation to provide resources to realise women's human rights.¹ Chapter three further expanded on gender budgeting as a step to ensure that sufficient resources are allocated for women's human rights. International, regional and sub-regional organisations have recognised the role that gender budgeting has in the process of resource allocation and they have recommended states to adopt gender budgeting to abide by their obligations to allocate sufficient resources to realise women's human rights.²

Chapter three of this research highlighted the motivations for the adoption of gender budgeting and its relationship with the realisation of women's human rights. It pointed out the role of gender budgeting in ensuring that the government take into account the vulnerabilities that women face. However, the essential elements of gender budgeting studied in section 3.7 do not expand on the specific steps that states have to adopt to integrate gender budgeting.

This chapter's objective is to elaborate on the steps that African states have to take towards the adoption of gender budgeting in practice. It develops a framework on gender budgeting that the African Union (AU) can adopt in order to guide African states in their gender budgeting initiatives. To do so, the South African initiatives and the Southern African Development Community (SADC) guidelines on gender budgeting 2014 (SADC guidelines)

¹ Section 2.4.2(C) above.

² See chapter two generally.

are used as case studies. On the one hand, South Africa provides this research the data required to understand the manner in which gender budgeting has been adopted in countries. South Africa is the example of a country that adopted gender budgeting to address the vulnerabilities that women face through resource allocation.³ Nevertheless, the fact that South Africa did not continue with its gender budgeting processes implies that gender budgeting initiatives face challenges in practice. The re-introduction of gender budgeting in South Africa⁴ has to be mindful of the past gender budgeting experiences so that this time the government can adopt a recurrent practice which will continuously ensure that sufficient resources are allocated to realise women's human rights.

On the other hand, the SADC guidelines is the only document at the international, regional and sub-regional level which elaborates on the steps that states should adopt to integrate gender budgeting in its resource allocation processes. The SADC guidelines represent an existing framework for gender budgeting and as such, this thesis can use them as a starting point for a framework to be adopted at the AU level.

This chapter studies these two as case studies to develop a framework that can be adopted at the AU level to guide states on the steps they can take to adopt gender budgeting. This chapter focuses on a framework on gender budgeting to be adopted by the AU since as studied in chapter two, apart from the SADC Gender Protocol, the only document which makes reference to the obligation to allocate resources to realise women's human rights is the Maputo Protocol. Since the focus of this chapter is the adoption of gender budgeting to implement the obligation to provide resources to realise women's human rights in Africa, the proposed framework has to address Africa as a continent.

The chapter firstly provides a background to the gender budgeting process in South Africa. Secondly, the background to the SADC guidelines is studied. In the third place, the chapter assesses the SADC guidelines and the South African initiatives against the essential elements of gender budgeting to firstly, point out the aspects that the case studies cover in addition to the essential elements of gender budgeting and to, secondly, highlight the lessons learnt from

³ Section 1.8.1 above.

⁴ As above.

these two case studies to inform a potential framework to be adopted by the AU. Fourthly, the chapter studies some additional aspects of gender budgeting that need to be considered when adopting gender budgeting in practice with the view of minimising the challenges in the adoption of gender budgeting in practice. Before the conclusion, the chapter fifthly provides for an outline of issues to be considered in a potential framework to be adopted by the AU in order to guide states in their gender budgeting initiatives.

4.2 Background to gender budgeting initiatives in South Africa

The analysis of South Africa's previous gender budgeting experience requires a background on gender budgeting in South Africa. Such a background enables readers to understand the context within which gender budgeting was adopted in South Africa. This section studies the South African gender budgeting experiences. It firstly provides the basis for gender budgeting in South Africa. Secondly, it gives an overview of the gender budgeting initiatives since 1995. Thirdly, it expands on the impact that gender budgeting initiatives have had on women's human rights in South Africa to demonstrate the advantages of adopting gender budgeting in practice.

4.2.1 Basis for gender budgeting in South Africa

The Constitution of the Republic of South Africa, which is the 'supreme law' of the country,⁵ was adopted on 8 May 1996. The notion of equality is entrenched in several provisions of the Constitution. To emphasise on the importance of equality, article 1 of the Constitution considers '[h]uman dignity, the achievement of equality and the advancement of human rights and freedoms' as one of the core founding principles of the Constitution.⁶

South Africa has the obligation to 'respect, protect, promote and fulfil the rights in the Bill of Rights'.⁷ The Bill of Rights contains a panoply of rights, (civil, political, cultural, social and

⁵ Section 2 of the Constitution of South Africa: 'This Constitution is the supreme law of the Republic; law or conduct inconsistent with it is invalid, and the obligations imposed by it must be fulfilled'.

⁶ Section 1(a) of the Constitution of South Africa.

⁷ Section 7(2) of the Constitution of South Africa.

economic) most of which extend to everyone,⁸ but some of which are specific to particular groups such as children.

Section 9 of the Bill of Rights is of most relevance for this study since it creates the foundation for the enjoyment of the rights in the Bill of Rights by women. Section 9 provides for equality and states that everyone must benefit from equality before the law.⁹ It then stipulates that '[e]quality includes the full and equal enjoyment of all rights and freedoms'.¹⁰ Sections 9(3) and 9(4) of the Constitution further provide that the state or any other person must not 'unfairly' discriminate against anyone on several grounds, including on the ground of gender and sex.

Further, the Constitution makes reference to the adoption of 'legislative and other measures' to ensure that there is protection and advancement of the rights persons or categories of persons who have been subject of unfair discrimination with the view of achieving equality.¹¹ This section, which has been described as having 'enormous potential value to women',¹² requires the state to adopt affirmative actions to ensure that women are empowered to overcome the circumstances that perpetuate discrimination against them. The inclusion of affirmative action in the Constitution is reflective of the fact that the government is willing to take steps to address discrimination on the basis of sex and it also ensures that affirmative actions are not subject to constitutional challenges.¹³ Such an approach is in line with the feminist legal theory that requires states to take women's human rights into account while formulating their laws.

However, the mere inclusion of affirmative action in the Constitution is not enough. South Africa has to adopt measures to give effect to the rights therein that promote gender equality. This is reflective of the feminist democratic theory that requires states to reflect that it has

⁸ Sections 9-35 of the Constitution of South Africa.

⁹ Section 9(1) of the Constitution of South Africa.

¹⁰ Section 9(2) of the Constitution of South Africa.

¹¹ Section 9(2) of the Constitution of South Africa.

¹² PE Andrews 'From gender apartheid to non-sexism: The pursuit of women's rights in South Africa' 26 *North Carolina Journal of International Law and Commercial Regulation* (2001) 700.

¹³ PE Andrews 'Striking the rock: Confronting gender equality in South Africa' 3 *Michigan Journal of Race and Law* (1998) 329.

taken women's needs into account in its resource allocation process.¹⁴ The paragraphs below analyse the legal provisions of South Africa to assess whether they make reference to resource allocation as a means to address the vulnerabilities that women face.

Gender budgeting derives its legitimacy from the fact that the government has to allocate its resources to realise human rights as explained by the human rights approach to the theory of fiscal sociology.¹⁵ It is based upon the premises that the government distributes its revenues to government-related institutions so that they can implement their programmes and policies that benefit the population. It is therefore necessary to establish the budgeting obligations of the government of South Africa in order to advocate for gender budgeting. This section studies the provisions of the Constitution and the Public Finance Management Act 1999¹⁶ that provide for the government to allocate its revenues to different government related institutions.

The Constitution of South Africa, like most constitutions in Africa, contains provisions relating to government revenues and expenditures.¹⁷ Chapter 13 of the Constitution of South Africa provides for the financial matters of the government. It establishes a National Revenue Fund, which shall contain all the revenues of the government,¹⁸ except for those that have been excluded by an Act of Parliament.¹⁹ The allocation of revenue must be done after consultation between 'the provincial governments, organised local governments and the Financial and Fiscal Commission' and must take into account several factors including whether 'provinces and municipalities are able to provide basic services' or whether there has been consideration of temporary measures that need to be adopted.²⁰

¹⁴ Section 3.6.2 above.

¹⁵ Section 3.2.3 above.

¹⁶ Act 1 of 1999.

¹⁷ A Waris 'Delineating a rights-based fiscal social contract using African fiscal Constitutions' (undated) 3 http://www.academia.edu/21766421/Delineating_a_Rights-based_Fiscal_Social_Contract_Using_African_Fiscal_Constitutions (accessed on 16 August 2016).

¹⁸ Revenues of the government, as explained in section 3.2.1, can be any income received by the government. The Constitution makes reference to the collection of taxes as part of the revenue of the government: Section 228 and 229 of the Constitution provides for the modalities of tax collection at the provincial and municipal level.

¹⁹ Section 213(1) of the Constitution of South Africa.

²⁰ Section 214(2) of the Constitution of South Africa.

In addition to the above, the Constitution also provides for national, provincial and municipal budgets.²¹ The Constitution highlights that the budgeting process ‘must promote transparency, accountability and the effective financial management of the economy, debt and public sector’.²² It states that there is a need for national legislation which prescribes ‘the form of national, provincial and municipal budgets’,²³ ‘when national and provincial budgets must be tabled’,²⁴ and which requires the ‘budgets in each sphere of the government’ to ‘show the sources of revenue and the way in which proposed expenditure will comply with national legislation’.²⁵

The Constitution therefore establishes that the government has to allocate the revenue it collects to the different spheres of government. It also establishes that the way to do so is through the adoption of budgets. To expand upon these provisions of the Constitution, the Public Finance Management Act was adopted to, amongst others, ‘ensure that all revenue, expenditure, assets and liabilities of [the national and provincial] governments are managed efficiently and effectively’.²⁶ The Public Finance Management Act establishes a National Treasury²⁷ that is the institution responsible for the revenue and the expenditure of the government.

Chapter four of the Public Finance Management Act provides for national and provincial budgets. It states that in order to meet the needs of the state and different provinces, sufficient money must be made available during each financial year.²⁸ For the national budget, the Minister of Finance has the responsibility, on financial yearly basis, to present the national budget to the National Assembly.²⁹ This has to be done ‘before the start of that financial year or, in exceptional circumstances, on a date as soon as possible after the start of that financial year’.³⁰

²¹ Section 215 of the Constitution of South Africa.

²² Section 215(1) of the Constitution of South Africa.

²³ Section 215(2)(a) of the Constitution of South Africa.

²⁴ Section 215(2)(b) of the Constitution of South Africa.

²⁵ Section 215(2)(c) of the Constitution of South Africa.

²⁶ Introduction to the Public Finance Management Act of South Africa.

²⁷ Chapter 2 Part 1 of the Public Finance Management Act of South Africa.

²⁸ Section 26 of the Public Finance Management Act of South Africa.

²⁹ Section 27(1) of the Public Finance Management Act of South Africa.

³⁰ As above.

In addition to the annual national budget that contains the above items, the Minister of Finance has the responsibility to table a multi-year budget projection in the National Assembly on a yearly basis.³¹ This multi-year budget projection must indicate the ‘key macro-economic projections’ of the Minister of Finance³² and must be inclusive of estimates of ‘revenue expected to be raised during each year of the multi-year period’³³ and of ‘expenditure expected to be incurred per vote during each year of the multi-year period, differentiating between capital and current expenditure’.³⁴

The Public Finance Management Act provides for the framework of the preparation and adoption of the national budget. It also makes provision for circumstances where the national budget for a particular year was not adopted on time and for necessary adjustments to the national budget. As such, this legislation requires the government of South Africa to pass a budget for each financial year that projects the revenues and expenditures of the government. The Public Finance Management Act is the legal framework for the adoption of a national budget that includes expenditure for the public. This is important to establish that South Africa has to adopt a national budget for every financial year to different departments and provinces so that they can implement their programmes and policies. The information in this section is relevant in the preparation of the gender budget since it empowers the framers of the latter to understand the background of the process. It can also be used to emphasise that the government has the obligation to allocate its resources to realise the rights of its population, including women.

The above discussion reveals that the domestic laws in South Africa do not expressly mention the allocation of budgetary resources to address the vulnerabilities that women face. However, the provisions of the Constitution and the Public Finance Management Act of South Africa can be considered as the legal framework for budgeting for women’s human rights in South Africa. The Constitution establishes that the government has to adopt measures while taking into account the vulnerabilities that women face and that the

³¹ Section 28(1) of the Public Finance Management Act of South Africa.

³² Section 28(2) of the Public Finance Management Act of South Africa.

³³ Section 28(1)(a) of the Public Finance Management Act of South Africa.

³⁴ Section 28(1)(b) of the Public Finance Management Act of South Africa.

government has to adopt budgets to spend the revenue that it has towards satisfying the needs of its citizens. Using a combination of the theory of a human rights approach to fiscal sociology and the feminist democratic theory, the government of South Africa must be seen as eradicating the vulnerabilities that women face while allocating its budgetary expenditure.

4.2.2 Overview of gender budgeting initiatives in South Africa

Since its independence, South Africa has strived to adopt equality promotion programmes and it has been referred to as 'a beacon of good practice around the world'.³⁵ Gender budgeting in South Africa followed gender budgeting in Australia and it was initiated after a visit of 'gender specialists and human rights commissioners' to Australia in 1995.³⁶ The gender budgeting process of South Africa was concerned with the disadvantages that women face in society and proposed the allocation of resources to those areas to ensure that equality is achieved.³⁷ The objectives of the gender budgeting initiatives of South Africa were to adopt 'an alternative set of values and principles for prioritizing the socioeconomic needs of poor women', to empower government to adopt gender budget and to empower CSOs to be involved in the decision making process concerning allocation of resources.³⁸ The joint gender budgeting initiatives of CSOs and parliamentarians lasted consistently for eight years until funding stopped.³⁹ Consequently, the gender budgeting initiatives started becoming more sporadic.

In the same vein, gender budgeting initiatives within the departments were once-off initiatives without any consistency. In 1998, the government, in the form of the Department of Finance, initiated an analysis of government expenditure from a gender lens.⁴⁰ When there were propositions about the adoption of gender budgeting within the government, the

³⁵ JO Beall 'Decentralizing government and decentering gender: Lessons learnt from local government reform in South Africa' 33 *Politics and society* (2005) 254.

³⁶ R Sharp and R Broomhill 'Budgeting for equality: The Australian experience' 8 *Feminist economics* (2002) 1 27 and 28.

³⁷ D Budlender 'The political economy of women's budget in the South' 28 *World Development* (2000) 7 1366.

³⁸ JG Stotsky 'Gender budgeting' (2006) 13.

³⁹ D Budlender 'South Africa's experience in gender-responsive budgeting' (2012) 14.

⁴⁰ LS Chakraborty & A Bagchi 'Fiscal decentralisation and gender responsive budgeting in South Africa: An appraisal' (2007) 5.

concern was raised that it would just duplicate resources since there were already gender budgeting initiatives by CSOs and parliamentarians that were properly functioning.⁴¹ The answer to this question was that the initiatives of CSOs and parliamentarians and those of solely government have different functions.⁴²

Indeed, while the initiative within the government is supposed to highlight areas where the government has not been able to provide adequately for women's human rights, it is very improbable that the government will admit to its deficiencies.⁴³ As such, there is a need for independent views that are more critical and unbiased.⁴⁴ The government initiatives for gender budgeting would directly target a change in the resource allocation processes and a change in the structure of resource allocation in favour of women. In addition to the above, the initiatives of the CSOs and parliamentarians would point out the areas where the government has not taken into account women's needs.

As demonstrated by the above paragraphs, in South Africa, different stakeholders were involved in the different gender budgeting initiatives. Nevertheless, despite the fact that the earlier years of gender budgeting gained much attention, the initiatives started becoming rare. The undertaking by the then Minister of Women, Children and People with Disabilities in 2012⁴⁵ to re-introduce gender budgeting within the government might indicate that the previous gender budgeting initiatives of South Africa had a positive impact on women's human rights. The following sub-section analyses the impact of the past gender budgeting initiatives in South Africa to understand the benefits of adopting gender budgeting in practice.

4.2.3 Impact of gender budgeting initiatives in South Africa

Chapter three of this research presented gender budgeting as a step that can influence budgetary allocations for women's human rights. Indeed, the concept has been gaining

⁴¹ Budlender 2000 (n 37 above) 1367.

⁴² As above.

⁴³ Budlender 2000 (n 37 above) 1368.

⁴⁴ As above.

⁴⁵ South Africa.info 'Call for 'gender-responsive' budgeting' 3 August 2012 available at <http://www.southafrica.info/news/women-020812.htm#.VEYy7GeSyAk> (accessed on 21 October 2014).

momentum in the area of women's human rights. This sub-section analyses the impact that gender budgeting has in practice. It expands upon the positive impacts of the gender budgeting initiatives in South Africa. The fact that its Department of Women intends to adopt gender budgeting might imply that the previous gender budgeting initiatives had some positive impacts on women's human rights. The following paragraphs expand on those positive impacts.

The first Women's Budget Initiative⁴⁶ (WBI 1) indicated that its draft report was published before the budget speech to influence the latter.⁴⁷ One of the results of the draft report was the inclusion of some paragraphs in the budget speech concerning budgetary allocations to realise women's human rights in line with international commitments.⁴⁸ The WBI 1 has pointed out that the reference to budgetary allocations was the result of the draft report.

In addition to the above, Budlender has identified some impacts of the expenditure aspect of gender budgeting initiatives in South Africa which are as follows:⁴⁹

- Equalising the amount spent on prison rations for male and female prisoners
- An increase in the allocation by the Department of Trade and Industry for small, medium and micro-enterprise
- Publication of sex-disaggregated information on personal tax payers
- Generating demand for the time use survey done by Statistics South Africa in 2010.

Another substantial influence of the gender budgeting initiatives in South Africa is the child support grant.⁵⁰ According to Budlender, the child support grant is the most 'substantial' impact of the gender budgeting initiatives in South Africa.⁵¹ She highlighted that Francie Lund, who lead the chapter on Welfare in WBI 1, went on to head the 'Lund Committee, which was tasked to investigate the existing system of social welfare grants' in order to devise 'a

⁴⁶ See section 4.4 below for more information about the different WBIs in South Africa.

⁴⁷ D Budlender *The women's budget* (1996) 7.

⁴⁸ As above.

⁴⁹ Budlender 2012 (n 39 above).

⁵⁰ As above.

⁵¹ As above.

more equitable system, or provide the rationale for abolition of the existing, and inequitable, state maintenance grant'.⁵² Lund stated that her understanding of and approach to the topic was influenced by her work in WBI 1.⁵³ As a result, the budget spent on child support grant in the contemporary time was influenced by her involvement in gender budgeting initiatives.

These positive impacts of gender budgeting on women demonstrate that gender budgeting is a process that can positively influence resource allocation for women's human rights. The above impacts are those that Budlender has directly attributed to the WBIs. It is to be noted that the impacts highlighted by her did not make mention of only women but instead stated the benefit for both men and women, hence supporting that gender budgeting is not only a budget for women but for both men and women. For instance, reference to 'male', 'female' and 'sex-disaggregated data' implies that the government takes into account both men and women in its resource allocation process.

Moreover, this sub-section has identified relatively few impacts of gender budgeting initiatives. These impacts might be considered as being minimal compared to the focus given to gender budgeting initiatives. However, generally there have been strides in the area of women's human rights in South Africa since 1995. For instance, the Domestic Violence Act was adopted in 1998 after the second WBI (WBI 2) had referred to violence against women as an issue that affects women in South Africa irrespective of their background.⁵⁴ The focus on violence against women in the WBIs might have influenced the adoption of the Domestic Violence Act. Nevertheless, as highlighted by Budlender, it is difficult to assess the impact of gender budgeting since budgetary allocation has different motivations.⁵⁵ It can thus be derived that Budlender has singled out the impacts above due to the fact that their relationship with the gender budgeting initiatives can be established. Reference to these impacts does not mean that they are the only impacts of gender budgeting initiatives. It

⁵² As above.

⁵³ As above.

⁵⁴ D Walsh 'Party centralization and debate conditions in South Africa' in S Franceschet et al (eds) *The impact of gender quotas* (2012) 126.

⁵⁵ Budlender 2012 (n 39 above) 19.

rather aims to point out the specific impacts that have been attributed to gender budgeting in South Africa.

Additionally, some of the impacts highlighted above have manifested way after the first gender budgeting initiative was adopted in South Africa. As noted in section 3.7.4 above, the preparation of gender budgets is a process which is done in three different stages. This would imply that the impact of gender budgeting would take time to manifest. Learning from the South African experience, one can consider gender budgeting as an initiative that would eventually impact on women's human rights, even if one cannot see any immediate effect of such initiatives.

Recognising that gender budgeting impacts positively on women's human rights, the SADC has developed guidelines on gender budgeting to assist countries in their gender budgeting experiences. The following section studies those guidelines with the view of obtaining a background of the SADC guidelines.

4.3 Background to the SADC guidelines

The SADC guidelines were adopted by SADC's Secretariat in 2014 and their formulation were spearheaded by its Gender Unit.⁵⁶ They are a reaffirmation of SADC's commitment to require its member states to adopt gender budgeting in order to allocate sufficient resources to realise women's human rights.⁵⁷ It is a very detailed document that expands on the possible means of integrating gender budgeting in the budgeting process. This section studies the background to the SADC guidelines. It does not focus on the document's contents since section 4.4 below highlights the provisions of the same while assessing whether they cover all the essential elements of gender budgeting.

The SADC guidelines are the outcome of a decision that ministers responsible for gender and women's affairs took during a meeting in Windhoek, Namibia, on 2 June 2010 to direct the SADC Secretariat to develop guidelines on gender budgeting so that member states' efforts

⁵⁶ SADC guidelines 7.

⁵⁷ SADC guidelines 8.

in gender budgeting initiatives can be enhanced.⁵⁸ Following this decision, the SADC Gender Unit led the process of developing the guidelines on gender budgeting with the help of consultants.⁵⁹ In 2012, the SADC Secretariat convened a three day regional workshop in Johannesburg with member states to discuss the draft guidelines.⁶⁰ This workshop was possible through funding from the German development agency, GIZ.⁶¹ The feedback and comments received during this meeting were integrated into a second draft of the guidelines.⁶² The SADC Gender Unit then worked on the second draft and circulated the final draft to member states for finalisation.⁶³

Generally, the development of the guidelines on gender budgeting was funded by GIZ, the Swedish International Development Agency, and through contributions of the SADC member states.⁶⁴ The preparation of the SADC guidelines was also guided by gender budgeting experts from outside Africa, in addition to the different stakeholders.⁶⁵

The SADC guidelines highlight that gender budgeting is not only about budgetary allocations but it also concerns policies, programmes and plans of actions that inform the budgets.⁶⁶ The preface to the SADC guidelines by the SADC Executive Secretary, Dr Tax, pointed out to the fact that despite being in their 'early stages', most gender budgeting initiatives were 'successful'.⁶⁷ These successes were in the form of 'actual expenditure re-allocations' and more transparent budgets which promote accountability.⁶⁸ Dr Tax did not make reference to the actual countries that have made progress in resource allocation for women's human rights due to the adoption of gender budgeting. However, one can derive from the preface that her statement might have followed the meeting in Johannesburg where delegates from

⁵⁸ SADC guidelines 8.

⁵⁹ SADC guidelines 12.

⁶⁰ As above.

⁶¹ Draft record of the meeting of SADC ministers responsible for gender/women's affairs in Maputo, Mozambique on 14 February 2013 7.

⁶² As above.

⁶³ As above.

⁶⁴ SADC guidelines 7.

⁶⁵ As above.

⁶⁶ SADC guidelines 46.

⁶⁷ SADC guidelines 9.

⁶⁸ As above.

the different member states discussed the best practices of gender budgeting and from the gender budgeting examples given throughout the SADC guidelines.

It can therefore be inferred from the above that the SADC guidelines stemmed from the understanding that gender budgeting has a positive relationship on resource allocation for women's human rights. It can further be interpreted that the SADC guidelines were adopted to strengthen the existing budgeting initiatives by providing a framework within which states and other stakeholders have to operate during the resource allocation process. It is supposed to be a framework that facilitates the task of countries to allocate sufficient budgetary resources to reflect the commitments they have taken towards women's human rights.

While addressing a commemoration held in Botswana on the occasion of the 20th anniversary of the Beijing Declaration, and the 15th anniversary of the United Nations Resolution 1325 on Women, Dr Tax highlighted that the adoption of the SADC guidelines is a major achievement on behalf of SADC to ensure that gender equality is achieved.⁶⁹ One of the purposes of the SADC guidelines is as follows:⁷⁰

...to be a common reference framework for SADC Member States that can facilitate the development of good public finance management practice that ensures that national budgets are practically addressing gender equality priorities and commitments.

The SADC guidelines indicate that the SADC recognises that the implementation of the obligation to adopt gender budgeting to allocate sufficient resources to realise women's human rights faces challenges. They aim to provide a framework within which public financing addresses the vulnerabilities that women face. They were drafted bearing in mind the best practices and the challenges that the past gender budgeting experiences faced. They are relevant for the current study because they can be used as inspiration for drafting framework on gender budgeting at the AU level.

⁶⁹ Southern Times *Region committed to gender equality* 11 May 2015 available at <http://southernafrican.news/2015/05/11/region-committed-to-gender-equality/> (accessed on 8 February 2016).

⁷⁰ SADC guidelines 12.

However, one cannot assume that the SADC guidelines are the perfect framework. Consequently, this thesis assesses the SADC guidelines against the essential elements of gender budgeting set out in chapter three to highlight the aspects that the framework to be adopted by the AU can take into account.⁷¹ Additionally, the South African gender budgeting experiences are studied to point out the practical challenges that the application of gender budgeting faces. As a result, the proposed framework on gender budgeting to be adopted by the AU addresses these gaps and proposes a more comprehensive framework.

4.4 Gender budgeting in practice: The SADC guidelines and the South African initiatives

The aim of this chapter is to understand how African states can adopt gender budgeting in practice. It does so by assessing the SADC guidelines and the South African initiatives against the essential elements of gender budgeting. This is done with the view to, firstly, highlight the gaps in the SADC guidelines and the South African initiatives *vis-à-vis* the essential elements and to, secondly, identify additional aspects to be considered in the adoption of gender budgeting in practice. Inspired by the essential elements of gender budgeting studied in section 3.7 above, this section adopts a three-fold approach for the analysis that is as follows: the stakeholders involved, the preparation of gender budgets, and the tools for assessing gender budgets. The findings in this section partially inform the proposed framework on gender budgeting to be adopted by the AU.

4.4.1 Stakeholders involved

Section 3.7.3 above demonstrated that gender budgeting requires the involvement of all stakeholders, namely, the different ministries, CSOs, and parliamentarians. This sub-section analyses the SADC guidelines and the South African initiatives to assess whether they are inclusive of all of these stakeholders. It further studies the additional aspects that the framework to be adopted by the AU needs to consider in relation to stakeholders.

⁷¹ Section 4.4 below.

A The SADC guidelines

The SADC guidelines represent a comprehensive framework for the integration of gender budgeting in the public budgeting processes. They point out the different entry points for gender budgeting during the budgeting cycle. They elaborate on several entry points for gender budgeting through the different stakeholders ranging from ministries to CSOs to parliamentarians.

Similar to the essential elements of gender budgeting, the SADC guidelines lay emphasis on the role of the ministries responsible for finance or their equivalent.⁷² The SADC guidelines state that the ministries responsible for finance or their equivalent have to spearhead gender budgeting initiatives in a country since they are the ones who are responsible for the public budgeting process.⁷³ Being the ones responsible for the distribution of the revenues of the government, the ministries responsible for finance or their equivalent have been identified as a focal point for the adoption of gender budgeting.

The SADC guidelines further make reference to the important role that ministries responsible for gender or their equivalent have⁷⁴ before proceeding to the entry points at the level of sectoral ministries, departments, agencies and local governments.⁷⁵ While ministries responsible for finance or their equivalent have the responsibility to prepare budgets, the ministries responsible for gender or their equivalent have the responsibility to ensure that women's human rights are realised. Gender budgeting would therefore not be effective if the initiative is exclusive of the ministries responsible for women or their equivalent. The SADC gender budgeting guidelines confirm the above by expanding on steps that ministries responsible for women or their equivalent can adopt to ensure that gender budgeting is applied. They also expand on the different entry points for sectoral ministries, departments, agencies and local governments.

⁷² SADC guidelines 31-39.

⁷³ SADC guidelines 31.

⁷⁴ SADC guidelines 40-45.

⁷⁵ SADC guidelines 46-53.

The SADC guidelines also make reference to entry points related to CSOs and parliamentarians. Parliament has several entry points for gender budgeting at the formulation, enactment and monitoring stages.⁷⁶ Parliament plays an important role in gender budgeting since parliamentarians are the ones who have to approve the budget. The SADC guidelines state that this approval can be a tool in the hands of parliamentarians if they have enough capacity in terms of gender budgeting.

As for CSOs, they are key stakeholders concerning gender budgeting and they can function either independently or in collaboration with the government and/or parliamentarians.⁷⁷ CSOs usually conduct gender budgeting with the expertise of researchers and academicians. They can use this expertise to influence the gender budgeting landscape of a country. CSOs have been recommended to establish a good working relationship with ministries responsible for gender and those responsible for finance, to generate research based evidence to advocate for gender budgeting, to provide technical support to key ministries in gender budgeting, and to pursue gender budgeting as an on-going agenda.

Both the essential elements of gender budgeting and the SADC guidelines emphasise on collaboration in gender budgeting initiatives. The SADC guidelines gave the examples of Zimbabwe and Tanzania where the government hired the CSOs that have expertise on gender budgeting to be central to their gender budgeting initiatives.⁷⁸ The Zimbabwe Women's Resource Centre and Network, which had expertise in gender budgeting, worked in collaboration with the government to build the capacity of government officials around the issue of gender budgeting.⁷⁹ Furthermore, the Ministry of Finance in Tanzania recruited the Tanzania Gender Network Programme to be the main consultant for its gender budgeting initiative.

Nevertheless, the SADC guidelines do not elaborate on the different types of collaboration between all the stakeholders. Furthermore, the SADC guidelines recognise the role of

⁷⁶ SADC guidelines 54-56.

⁷⁷ SADC guidelines 57-63.

⁷⁸ SADC guidelines 16-17.

⁷⁹ D Adebajo 'Gender budgeting: Case study of the Zimbabwe experience' undated available at file:///C:/Users/User.CREATEK2012/Downloads/Gender%20Budgeting%20Case%20Study%20of%20the%20Zimbabwe%20Experience%20(2).pdf (accessed on 9 February 2016).

academics and researchers in the adoption of gender budgeting. However, they do not demonstrate how academics and researchers can be used as entry points for gender budgeting initiatives.

B The South African initiatives

The South African gender budgeting initiatives, as stated in section 4.2.2 above, started with CSOs and parliamentarians in 1995 in the guise of WBIs. The initiative by CSOs and the Parliament in South Africa has been considered as the ‘stronger’ of the two initiatives.⁸⁰ The WBI 1 targeted a variety of stakeholders including ‘politicians, policy makers, civil servants, others responsible for the implementation of policies and programmes, women’s groups, and sectoral interest groups’.⁸¹ Not only the WBIs in South Africa have been categorised as ‘the most substantial and long-lasting’ initiative of gender budgeting in South Africa, it also had a longer lifetime than other budgeting initiatives in most other countries.⁸² The WBIs were published in the form of five books and subsequent online publications.

Following the introduction of the WBIs, different departments, including the Department of Finance,⁸³ the Department of Justice and Constitutional Development,⁸⁴ and the Department of Women, Children and Persons with Disabilities engaged in gender budgeting initiatives.⁸⁵ However, unlike the initiatives by the CSOs, the initiatives within the departments were not continuous.

In line with the essential elements of gender budgeting, the past government’s gender budgeting initiatives in South Africa were inclusive of the experiences of experts as a reflection of collaboration. For instance, the initiatives at the level of ministries in South Africa were inclusive of the expertise of CSOs. This is so because CSOs might have the expertise that the government does not have to assess the impact of the government’s

⁸⁰ Budlender 2000 (n 37 above) 1368.

⁸¹ Budlender 1996 (n 47 above) 8.

⁸² Budlender 2012 (n 39 above) 8.

⁸³ Chakraborty & Anor (n 40 above) 5.

⁸⁴ Department of Justice and Constitutional Development ‘Gender mainstreaming-Assessment report’ (2004) available at http://www.gov.za/sites/www.gov.za/files/gender_mainstreaming_0.pdf (accessed on 23 February 2016).

⁸⁵ Budlender 2012 (n 39 above) 19-20.

expenditure on issues relating to women and are sometimes more capable of conducting gender budgeting. Several CSOs working on violence against women in South Africa have been able to use the national budget to draw the attention of the government concerning a lack of budgetary allocation to address this phenomenon.⁸⁶

The WBIs were intended to be simple so that the contents could be understood but there were still technical words being used. Consequently, there was a requirement for education to understand the book. Accordingly, there was the publication of a series of books with the title 'money matters' and these books were in simple English and used photographic illustrations.⁸⁷ One book chapter that concentrated on customs and excise was even translated in three indigenous languages in 2001 and was popularised amongst trade unions that had an interest in the subject.⁸⁸ Despite the fact that the 'money matters' series gained more popularity than the series of 'the women's budget', the initiative was still not attaining the required audience.⁸⁹ Government officials and the public were still not conversant with the concept of gender budgeting.

With the view of informing more stakeholders about the WBIs, the gender budgeting initiative partnered with the Gender Education and Training Network, an organisation that provided for gender training.⁹⁰ This partnership was intended to produce workshop materials which would enable people to 'understand the concepts, approach and findings' of the gender budgeting initiative.⁹¹ This partnership also included other stakeholders such as 'adult educators, materials developers and some of the researchers' from the gender budgeting initiatives.⁹² The result of this partnership was the publication of a folder with three modules also called 'money matters'.⁹³ The modules contained the number of sessions and all information pertinent to those sessions. The folder's contents were intended to be

⁸⁶ D Budlender 'Expectations versus realities in gender-responsive budget initiatives' (2005) 8.

⁸⁷ As above.

⁸⁸ As above.

⁸⁹ As above.

⁹⁰ D Budlender et al 'South Africa: Expanding into diverse initiatives' in D Budlender & G Hewitt *Gender budgets make more cents: Country studies and good practice* (2002) 155.

⁹¹ As above.

⁹² As above.

⁹³ As above.

used by CSOs who could use them as advocacy tools to train civil servants.⁹⁴ The partnership of the WBIs with other stakeholders such as educators and material developers demonstrates that the South African gender budgeting initiatives went a step further than the collaboration mentioned in the essential elements of gender budgeting and the SADC guidelines to lay emphasis on unconventional stakeholders outside the budgeting process.

Other stakeholders involved in the gender budgeting initiatives were academics and researchers. The South African CSOs and parliamentarians' gender budgeting initiatives, in its first three years, came up with an analysis of each ministry and also on topics such as 'public service employment, taxation, the budget process, and intergovernmental fiscal relations'.⁹⁵ Members from the academia or other NGOs conducted this research.⁹⁶ The motivations for seeking the expertise of those who did not form part of the proponents of the initiative were that those people were more versed in the area of gender budgeting and to create awareness about the gender budgeting process for other stakeholders.⁹⁷ This had a domino effect on other relevant stakeholders who got more interested in the process of gender budgeting and started to be more involved in the process.⁹⁸ Thus, people in academia and researchers had a major role to play in gender budgeting experiences.

Moreover, the first gender budgeting initiative in South Africa was inclusive of the participation of parliament. Parliament participated in the WBIs by collaborating with CSOs.⁹⁹ During the course of time, the Joint Monitoring Committee on the Improvement of the Quality of Life and Status of Women (Joint Monitoring Committee) was established, which had the WBI as one of its responsibilities. The Joint Monitoring Committee had as chairperson a member of parliament, namely Pregs Govender. The Joint Monitoring Committee was then transformed into a Committee that would oversee the Department of Women, Children and People with Disabilities. The Committee had a 'recurring focus' on three main issues that were poverty, human immunodeficiency virus infection and acquired

⁹⁴ As above.

⁹⁵ Budlender 2005 (n 86 above) 27.

⁹⁶ Budlender 2005 (n 86 above) 27.

⁹⁷ Budlender 2005 (n 86 above) 28.

⁹⁸ Budlender 2005 (n 86 above) 28.

⁹⁹ Budlender 2012 (n 39 above) 17.

immune deficiency syndrome (HIV/AIDS) and gender-based violence.¹⁰⁰ The Parliamentary Committee evolved into the Committee on Women, Children and People with Disabilities and in 2010 and 2011, this Committee was funded by the Heinrich Böll Foundation to hold workshops on budgeting for women. Currently, it is the Multi-Party Women's Caucus¹⁰¹ and the Portfolio Committee on Women in the Presidency¹⁰² that oversee issues relating to women's human rights in the parliament.

Additionally, the parliament of South Africa has a Public Accounts Committee that is mandated to oversee the manner in which 'taxpayers' money is being spent'.¹⁰³ The auditor-general submits a report every year on the financial activities of each department and government institution, and the heads of the latter are often 'called by this committee to report and account for expenditure'.¹⁰⁴ The parliament of South Africa can use this committee as an entry point for gender budgeting.

Assessing the SADC guidelines against the South African gender budgeting experience, it can be noted that the former does not recommend a committee on gender budgeting within the parliament as an entry point. The CSOs and parliament's gender budgeting initiatives in South Africa provided an opportunity for those outside the executive and the legislature to have a say in the resource allocation process.¹⁰⁵ This initiative concerned mostly the reallocation of government's resources in different sectors to ensure a better realisation of women's human rights.¹⁰⁶ Such an approach promotes a participatory budgeting system. The framework to be adopted by the AU needs to recommend the creation of a parliamentary committee on gender budgeting that would oversee the gender budgeting initiatives of all the departments. In the event an additional parliamentary committee on gender budgeting cannot be created,

¹⁰⁰ Budlender 2012 (n 39 above) 17.

¹⁰¹ Website of the parliament of South Africa available at http://www.parliament.gov.za/live/content.php?Item_ID=215&CommitteeID=130 (accessed on 14 August 2016).

¹⁰² Website of the parliament of South Africa available at http://www.parliament.gov.za/live/content.php?Item_ID=215&CommitteeID=113 (accessed on 14 August 2016).

¹⁰³ Website of the parliament of South Africa available at http://www.parliament.gov.za/live/content.php?Category_ID=28 (accessed on 14 August 2016).

¹⁰⁴ As above.

¹⁰⁵ Budlender 2000 (n 37 above) 1367.

¹⁰⁶ Budlender 2000 (n 37 above) 1369.

states can also integrate gender budgeting as part of the mandate of an existing parliamentary committee.

In relation to collaboration between the different stakeholders, the South African gender budgeting initiatives were exclusive of collaboration between all stakeholders during one budgeting cycle. For example, the WBIs started as collaboration between parliamentarians and CSOs, without including the different departments. Furthermore, the initiatives by the government sought the expertise of experts from the CSOs but that was the extent of the collaboration between the initiatives of the government and those of the CSOs and parliamentarians.

Moreover, neither the Minister of Finance nor the Minister of Women in South Africa had a focal point that would coordinate the gender budgeting initiatives. The initiatives in South Africa seemed independent of each other and therefore could not have much influence. The absence of a gender focal point led to no effective programme coordination between the different initiatives. As a result, each would embark on one's own gender budgeting initiative without taking into account the previous research that had already been done by the other. For instance, the government's initiatives came after the joint initiatives of the CSOs and parliamentarians but the government's initiatives did not use the extensive research done by the initiatives of the CSOs and parliamentarians. It seemed as though the research done by CSOs and parliamentarians was used only to sensitise the government about the issue of gender budgeting without aiming to be used by the government in their gender budgeting initiatives. Effective programme coordination would ensure that the subsequent initiatives make use of the findings of the previous initiatives.

C The role of judiciary in gender budgeting

A government usually has three arms namely the executive, the legislature and the judiciary.¹⁰⁷ Both the essential elements on gender budgeting and the SADC guidelines have elaborated on the steps that the executive (the different ministries) and legislature (the Parliament) can adopt to integrate gender budgeting in states' budgeting processes.

¹⁰⁷ House of Lords' Select Committee on the Constitution's sixth Report of Session 2006-07 'Relations between the executive, the judiciary and parliament: Report with evidence' (2007) 9.

However, they overlooked the role of the judiciary in gender budgeting processes. This might give the impression that the concept of gender budgeting and the SADC guidelines do not consider resource allocation for women's human rights as a right. This is in contradiction with the legal instruments of the SADC and of the AU that require states to adopt gender budgeting to allocate sufficient budgetary resources to realise women's human rights. It would therefore be controversial to conclude that the non-inclusion of the role of the judiciary in the SADC guidelines is due to the fact that the SADC does not consider budgetary resource allocation to realise women's human rights as a human right.

Such exclusion might have been due to the doctrine of separation of powers. Since the country case study of this research is South Africa, this section uses South Africa to demonstrate how the doctrine of separation of powers undermines the role of the judiciary in gender budgeting. The Constitution of South Africa identifies the rule of law as one of its founding values. According to Allan, the inclusion of rule of law in a Constitution implies that there is a 'division of governmental powers or functions that inhibits the exercise of arbitrary state power'.¹⁰⁸ The above interpretation implies that the inclusion of rule of law as one of the founding values of the Constitution indicates that South Africa has to implement separation of powers between the legislature, the executive and the judiciary.

It is to be noted that the Constitution does not make express use of the term 'separation of powers' but the design is such that it makes a distinction between the three organs. Section 8(1) of the Constitution makes reference to the legislature, executive and judiciary and all organs of the state concerning the application of the Bill of Rights. Furthermore, chapters 4 to 8 of the Constitution provides for 'a clear separation of powers between three spheres of government'. Mojapelo cited the cases of *Glenister v President of the Republic of South Africa* and *South African Association of Personal Injury Lawyers v Health* where the judges stated that the Constitution is inclusive of the notion of separation of powers.¹⁰⁹

¹⁰⁸ TRS Allan *Constitutional justice: A liberal theory of the rule of law* (2003) 31.

¹⁰⁹ PM Mojapelo 'The doctrine of separation of powers: A South African perspective' (2012) presented during the Middle Temple South African Conference

A pure separation of powers between the three arms of government implies that they are completely independent from each other without any overlap in their functions. However, in reality, the doctrine of separation of powers is not always strictly applied. There is an overlap in the functions of the different institutions and this creates a system of checks and balances that ensures 'that state power is not abused'. This was stated in the South Africa case of *Ex parte Chairperson of the Constitutional Assembly of the Republic of South Africa* where the court stated the following:

The principle of separation of powers, on the one hand, recognises the functional independence of branches of government. On the other hand, the principle of checks and balances focuses on the desirability of ensuring that the constitutional order, as a totality, prevents the branches of government from usurping power from one another. In this sense it anticipates the necessity or unavoidable intrusion of one branch on the terrain of another. No constitutional scheme can reflect a complete separation of powers...

The above demonstrates that there is no absolute separation of powers in South Africa and that there is a system of checks and balances that exists to ensure that no branch usurps its power.

Traditionally, resource allocation process is the function of the executive and of the legislature. The executive prepares the budget and the legislature adopts it. The judiciary is left out of the resource allocation process. However, the judiciary, being the organ that oversees the implementation of the law, must have jurisdiction in cases of budgetary allocation. Despite being reluctant, national courts have the duty to intervene in the event insufficient budgetary resources are leading to violation of fundamental human rights.¹¹⁰ Such a decision was taken in the Ugandan case of *Centre for Health, Human Rights and Development & Others versus the Attorney General*¹¹¹ where the Supreme Court decided that separation of powers is not absolute. It also stated that the Constitutional Court has the jurisdiction to hear petitions alleging insufficient budgetary allocation in the event the latter is preventing the realisation of fundamental rights and freedoms.

Similarly, the South African Constitutional Court has intervened in cases of budgetary allocation that concerned the right to housing and the right to health. The case of *Grootboom*

¹¹⁰ W Kaguongo 'Resource allocation towards socio-economic rights: Lessons from domestic courts' 13 *Human Rights Review* (2012) 1 101.

¹¹¹ Supreme Court of Uganda 2015.

is very relevant since the Court in this case held that the state was not fulfilling its obligation to realise the right to housing within its available resources although it did not give any orders relating to restructuring of budgetary allocations.¹¹²

Furthermore, in the case of *Minister of Health v Treatment Action Campaign*,¹¹³ the Constitutional Court was approached since the government had not set up sites for the provision of nevirapine to all pregnant women with HIV. Instead the government had set up a few pilot sites. The Constitutional Court, in this instance, decided that the government has the obligation to ensure that all pregnant women with HIV have access to nevirapine.

These two cases of the Constitutional Court of South Africa demonstrate that the judiciary has a role when it comes to budgetary allocation. The judiciary can intervene where the budgetary allocation is unreasonable¹¹⁴ and is infringing upon human rights and freedoms.

However, the Court will not always intervene in a case that concerns resource allocation. This was reiterated in the case of *Magidiwana v President of South Africa*.¹¹⁵ The Court, in this case, stated that '[t]he duty of determining how public resources are to be drawn upon and re-ordered lies in the heartland of executive function and domain' and that it would not interfere with the powers of the executive.¹¹⁶ As such, the intervention of judiciary in resource allocation matters is limited.

From the three South African cases discussed, it seems that the Court will intervene if the budgetary resource allocation is unreasonable. Gender budgeting initiatives can benefit from interventions on behalf of the judiciary. For instance, if a country has allocated \$1 million to the right to health without assessing how the amount is to affect women and men, this might result to the budget being gender blind. Such an allocation of resources does not take into account the fact that women have different reproductive and sexual health needs than men.

¹¹² *The Government of the Republic of South Africa & Ors v Grootboom* 2000 CCT 11/00.

¹¹³ *Minister of Health and Others v Treatment Action Campaign and Others* (No 1) (CCT9/02) [2002] ZACC 16

¹¹⁴ The concept of reasonableness was discussed in the case of *Grootboom*.

¹¹⁵ 2013 CCT 100/13 para 10.

¹¹⁶ For a more detailed discussion of the reluctance of the judiciary to interfere with budgetary allocations, please refer to M Swart 'Should constitutional courts decide on questions of resource allocation' (undated) available at <https://www.jus.uio.no/english/research/news-and-events/events/conferences/2014/wccl-cmdc/wccl/papers/ws4/w4-swart.pdf> (accessed on 18 February 2016).

The judiciary could then be approached in this instance for the court to re-allocate its expenditure or to take into account the different needs of men and women in future resource allocation processes. Such a step would be in favour of gender budgeting since the latter already analyses the impact of budgetary allocations on men and women.

In a nutshell, the SADC Gender Protocol and the Maputo Protocol considers the allocation of sufficient budgetary resources as a right. As a result, a gender budgeting framework must take into account the remedies available in the instance that right is not respected. The SADC guidelines on gender budgeting is lacking in that it does not include the judiciary as one of the entry points for gender budgeting.

D Lessons learnt for the proposed framework to be adopted by the African Union

The essential elements of gender budgeting, the SADC guidelines and the South African gender budgeting initiatives make reference to different ministries, CSOs and parliament as relevant stakeholders in the gender budgeting process. Collaboration between the different stakeholders is considered as an essential element and this is further emphasised by the SADC guidelines. Such collaboration was also seen in the South African initiatives, although there was no collaboration between all relevant stakeholders during one budgeting cycle.

The absence of strong institutions in South Africa that can coordinate the gender budgeting initiatives might explain the lack of collaboration between the different stakeholders. The SADC guidelines make reference to gender budget cells within ministries¹¹⁷ and to collaboration between CSOs and different ministries¹¹⁸ but do not mention a gender budgeting team that includes representatives of all relevant stakeholders.

To overcome this shortcoming, governments in Africa can create inter-departmental/ministerial institutions to coordinate gender budgeting initiatives. For instance, inspired by the models of Mauritius and the Netherlands, the government can create an inter-departmental working group with persons in high positions in the different departments to make sure that gender is mainstreamed in the expenditure of the different

¹¹⁷ SADC guidelines 31-32.

¹¹⁸ SADC guidelines 57.

departments.¹¹⁹ Commissions for gender equality can be the focal point of the inter-departmental working group.

In addition to the inter-departmental working group, commissions for gender equality can generally play a greater role: for instance, in the Philippines, gender budgeting is spearheaded by the National Commission on the Role of Filipino Women, which is the national gender machinery.¹²⁰ Inspired by the Philippines model, committees within the commissions for gender equality set up for gender budgeting must attend the meetings by the Ministry of Finance and the different ministries in relation to budgetary allocations. In addition to making suggestions, they should also be more assertive and intervene when allocations do not sufficiently address women's needs.¹²¹ Therefore, commissions for gender equality can be one of the institutions responsible for gender budgeting.

The South African gender budgeting initiatives have demonstrated that parliamentary committees have a major role in gender budgeting. Although the SADC guidelines do make reference to parliament as an entry point, they do not expand on parliamentary committees. It is therefore recommended that the proposed AU framework on gender budgeting require countries to either establish parliamentary committees on gender budgeting or to include gender budgeting in the mandate of an existing parliamentary committee.

Furthermore, academics and researchers are included as part of CSOs in the SADC guidelines and in the South African gender budgeting initiatives. As demonstrated by the gender budgeting initiatives in South Africa, academics and researchers have a major role in gender budgeting initiatives since they are experts in the area. The inclusion of academics and researchers in the umbrella term of CSOs might undermine their role in gender budgeting processes. As such, it is recommended that the proposed framework to be adopted by the AU consider academics and researchers as key stakeholders in the gender budgeting process.

¹¹⁹ UNDP 'Gender responsive budgeting: Manual for trainers' (2005): The Netherlands gender budgeting initiative included an Interdepartmental Working Party on Mainstreaming which was made up of directors-general; and UNDP 'Case-study: Gender-responsive budgeting in Mauritius' (2009) 4-5.

¹²⁰ UNDP 2005 (n 119 above) 19.

¹²¹ As above.

Additionally, as highlighted in section 4.4.1(C) above, the proposed framework must also take into account the role of the judiciary in the gender budgeting process. Therefore, it is recommended that the proposed framework at the AU level includes five key stakeholders in the gender budgeting process which are the ministries, the parliament, the judiciary, NGOs, and academics and researchers.

4.4.2 Preparing gender budgets

Section 3.7.4 above elaborated on the gender-sensitive budget analysis (GSBA) and gender-sensitive budget formulation (GSFB) approaches for preparing gender budgets. Summarily, GSBA requires the different stakeholders to analyse the previous budgets to assess whether enough resources have been allocated to realise women's human rights whereas GSFB requires stakeholders to ensure that enough resources are being allocated to realise women's human rights while formulating the budget.

A The SADC guidelines on gender budgeting

The SADC guidelines provide for both a GSBA and a GSFB approach, implying that the SADC has identified that gender budgeting can have entry points at both the formulation stage and the analysis stage. The SADC guidelines indicate that the adoption of gender budgeting requires different ministries to include gender budgeting in their agenda.

The SADC guidelines recommend ministries responsible for finance or their equivalent, the ministries responsible for gender or their equivalent, and sectoral ministries to mainstream gender into their policies, programmes and plans, and to take gender equality into account when preparing their budgets. It further recommends them to ensure that local plans and budgets are gender sensitive. Such steps reflect the GSFB approach.

Moreover, the SADC guidelines state that parliamentarians must have input at the pre-budget phase, at the budget approval phase and at the post-budget phase.¹²² The involvement of parliamentarians at these different stages indicates that the SADC guidelines

¹²² SADC guidelines 54-57.

expect parliamentarians to have inputs both at the budget formulation phase and at the budget analysis stage.

The SADC guidelines also recommend CSOs to collaborate with ministries at the budget formulation stage and to be 'reactive' to the budget.¹²³ Such provisions imply that the SADC guidelines recommend CSOs to adopt both a GSBA and a GSFb approach.

The SADC guidelines require all stakeholders involved to adopt both approaches. However, concerning the different ministries, the SADC guidelines focus on the adoption of gender budgets at the GSFb stage although they do elaborate on steps that the different ministries can take to have a GSBA. This lays emphasis on the fact that different ministries, especially the ministries responsible for finance or their equivalent and the ministries responsible for gender and their equivalent, are expected to formulate gender sensitive budgets.

B The South African initiatives

The South African initiatives were also inclusive of both the GSBA and the GSFb approach. The following paragraphs study the initiatives of the different departments before elaborating on the initiatives of the CSOs and parliament with the view of assessing whether these initiatives had a GSBA or a GSFb approach.

(i) Initiatives within departments

The gender budgeting initiative within the government in South Africa, which started in 1998,¹²⁴ deals with mainly 'management and accountability'.¹²⁵ This initiative was started within the Department of Finance. The government initiative concentrated on awareness raising amidst government about its obligations to allocate resources to realise women's human rights.

¹²³ SADC guidelines 57-58.

¹²⁴ Chakraborty & Anor (n 40 above) 5.

¹²⁵ Budlender 2000 (n 37 above) 1367.

In addition to the above, the Department of Justice and Constitutional Development published a report that focused on gender mainstreaming and gender budgeting in 2004¹²⁶ as part of gender budget analysis of the department's budgetary allocation. This publication was with the view of sensitising those who have the decision-making powers about the contribution of gender mainstreaming and gender budgeting towards the eradication of discrimination against women.

Following the above publication, in 2006, the Department of Justice and Constitutional Development produced a series of publications on gender mainstreaming and one of them concentrated on gender budgeting.¹²⁷ This publication provided guidelines on gender budgeting and highlighted the positive relationship between gender budgeting and equality. Despite the fact that this initiative did not produce any significant analysis of the budget from a gender lens, it reiterated that governments have to adopt gender budgeting as a step to abide by their obligations to allocate resources to realise women's human rights. This publication also explained the steps that departments have to take to adopt gender budgeting. This was done with the view of highlighting the importance of mainstreaming gender into policies, programmes and plans.

In the years 2005 to 2007, a workshop was held within the Office of the Status of Women, People with Disabilities, Youth and Children located within the Presidency to assess the budgets for the three focus areas, namely, poverty, HIV/AIDS and gender-based violence.¹²⁸ Moreover, in 2007, a workshop was held with budget officers from other national departments and the budget officers were required to identify and make a mini budget statement about a sub-programme that promoted gender equality.¹²⁹

¹²⁶ Department of Justice and Constitutional Development 'Gender mainstreaming-Assessment report' (2004) available at http://www.gov.za/sites/www.gov.za/files/gender_mainstreaming_0.pdf (accessed on 23 February 2016).

¹²⁷ Department of Justice and Constitutional Development 'Gender Responsive Guidelines' Vol 6 (2006) available at http://www.justice.gov.za/docs/other-docs/2006gmreports/Gender%20Mainstreaming_Vol%2006_Budgeting%20Guidelines.pdf (accessed on 4 February 2016).

¹²⁸ Budlender 2012 (n 39 above) 19-20.

¹²⁹ Budlender 2012 (n 39 above) 20.

Following the commitment of the then Minister of Women, Children and People with Disabilities in 2012 to re-introduce gender budgeting in South Africa,¹³⁰ the then Ministry of Women, Children and People with Disabilities, in collaboration with Motsepe Foundation, did a gender budget analysis of the budgetary allocations for 2012/2013 for the Departments of Health, Agriculture, Forestry and Fisheries, Energy, and Trade and Energy.¹³¹ This publication firstly studied the policies of the above departmental budgets, including their gender implications. Secondly it analysed the different budgetary allocations to the different programmes of the departments identified and, thirdly, it provided for recommendations that could improve the gendered impact of government expenditure. Most of the recommendations were in the form of adoption of policies that specifically target women or in the form of more allocation of resources to the different programmes.

The different initiatives within the different departments in South Africa reflect both a GSBA and a GSFB approach. While some of them targeted an analysis of the budget from a gender lens, the others focused on the formulation of the budget from a gender lens. However, one can note that most of these initiatives were adopted with the view of finally achieving a GSFB.

(ii) Joint initiatives of CSOs and parliamentarians

The most consistent initiatives in South Africa were the WBIs. The WBIs were a reflection of the GSBA approach. The WBIs were published in the form of five books and subsequent online publications.

The WBI 1 highlighted the main issues for the sectors identified, assessed how the government was involved in those sectors both during and post-apartheid, and finally provided for restructuring and reprioritisation, with cost estimates where possible.¹³² The recommendations of reallocation of expenditure were based on reallocations within particular votes.¹³³ This was motivated by the fact that the WBI 1 concentrated only on a few

¹³⁰ South Africa.info (n 45 above)

¹³¹ Motsepe Foundation 'Doing more with less: A South African gender budget analysis for health, agriculture, forestry and fisheries, energy and trade and industry' (2012) available at [http://www.women.gov.za/attachments/article/14/GRB%20-%202013%20Report%20\(Final\).pdf](http://www.women.gov.za/attachments/article/14/GRB%20-%202013%20Report%20(Final).pdf) (accessed on 4 February 2016).

¹³² Budlender 1996 (n 47 above).

¹³³ Budlender 1996 (n 47 above) 6.

departments and in such an instance reallocations between votes would be unfeasible.¹³⁴ Thus, the WBI 1 concentrated on reprioritisation rather than more allocation of money since at the government level, recommendations for reprioritisation would be taken more 'seriously' than the demand for more money because of the resources constraints that the new government would be facing.¹³⁵

The second WBI (WBI 2) was a continuation of WBI 1 and it analysed the budget of 'Health, Land Affairs, Agriculture, Safety and Security, Justice, Correctional Services, Transport, Energy, Home Affairs, Foreign Affairs and the area of Budget Reform'.¹³⁶ The introduction part of the WBI 2 highlighted that the WBI 1 was the start of a project that should be built upon gradually so that in the long run South Africa could devise ways to analyse the budget from a gender perspective.¹³⁷ It then proceeded to highlight the major changes that have occurred since the previous year in relation to gender issues in the government, parliament, budgeting processes, and at the level of the central statistics service. The developments that happened within the different sectors studied in WBI 1 were summarised and Budlender stated that the reason for not studying the sectors identified in WBI 1 was that the previous study was expected to 'lay a foundation' for interested stakeholders to build upon.¹³⁸

Violence against women was identified as an issue which affects women from all spheres of the society and which could bring together women to advocate for the allocation of resources to combat the phenomenon.¹³⁹ As such, the second year of the gender budgeting initiative assessed the budgetary allocations for the departments of police and prisons to determine how much resources are being allocated to address the issue.¹⁴⁰ This initiative also analysed the existing Domestic Violence Act and concluded that it was still lacking in the protection of women's human rights.¹⁴¹

¹³⁴ Budlender 2012 (n 39 above) 10.

¹³⁵ Budlender 2012 (n 39 above) 10.

¹³⁶ D Budlender *The second women's budget* (1997).

¹³⁷ D Budlender 'Introduction' in Budlender 1997 (n 136 above) 8.

¹³⁸ Budlender 1997 (n 136 above) 24.

¹³⁹ E Villagomez 'Gender responsive budgets: Issues, good practices and policy options' (2004) 20.

¹⁴⁰ Budlender 1997 (n 136 above).

¹⁴¹ Budlender 1997 (n 136 above).

The third WBI (WBI 3) studied the remaining departments of the government thereby completing the analysis of the different ministries and themes that receive an allocation from the budget.¹⁴² The introduction focused 'on what has changed, and what has been confirmed and accentuated'.¹⁴³ It expanded on the in-government initiative to adopt gender budgeting and this included the Commonwealth initiative, the medium-term expenditure framework (MTEFs), and the budget review. The WBI 3 was structured in such a way that the remaining departments that had not been studied before would be covered, even if a chapter would concentrate on more than one department.

The remaining sectors studied in the WBI 3 were the Parliament, Offices of the President and Deputy President, South African Communication Service, and Premiers' votes, the Department of Arts, Culture, Science and Technology, the Department of Sports and Recreation, the Department of Finance, the Department of State Expenditure, the South African Revenue Services, the Central Statistics Services, the Department of Constitutional Development, the Defence Force, the Department of Water Affairs and Forestry, the Department of Environmental Affairs and Tourism, the Department of Public Works, the Office for Public Enterprises, the Department of Communications, inter-government fiscal relations.

A workshop was held before the fourth WBI (WBI 4) where the participants highlighted that despite the analysis of all government departments in the previous WBIs, budget analysis from a gendered lens still had a long way to go.¹⁴⁴ The WBI 4, instead of going back to the different departments, did a gender analysis of local government budgets with five municipalities, and studied employment and funding at the national level. However, different departments were studied in the section on employment.

The WBI 4 firstly gave a background of the role that local government play in women's lives. It secondly studied the role that the budget allocated to the different projects of the five identified municipalities play in women's lives in those municipalities. It then assessed why

¹⁴² P Govender 'Foreword' in D Budlender *The third women's budget* (1998) 1.

¹⁴³ D Budlender 'Introduction' Budlender 1998 (n 142 above) 11.

¹⁴⁴ Budlender 'Introduction' in D Budlender *The fourth women's budget* (1999) 4.

funding is important for the improvement of women's situation. The WBI 4 revealed that analysing budgets at the local level is subject to the limitation of non-availability of information and the researchers had to combine the different findings to get the budget of the different municipalities. This implies that few data is available to be analysed and what the municipalities should do is to incorporate a gender lens while allocating resources for different projects.

The fifth WBI (WBI 5) was different from the other WBIs since it was published not as a book but as separate papers that could be accessed by the public in electronic form.¹⁴⁵ The focus was on different spheres namely revenue which included three papers on taxation, local government, customs and excise respectively. The part on revenue focused on the sources of revenue of municipalities and how the revenues from the different sources had an effect on men and women¹⁴⁶ whereas the part on customs and excise studied the role that customs and excise had in collecting revenue and how these impacted on men and women.¹⁴⁷ The sphere on revenue also included a paper on women and taxation and this paper intended to highlight the ways in which the then gender-neutral taxation system perpetuated discrimination against women.¹⁴⁸ The research then conducted a case study of health and how the three levels of government make decisions with regard to policy.

In its sixth year, there was a publication on an investigation into government support to non-profit organisations providing services to women experiencing violence.¹⁴⁹ In the same year, a book was written for the women's budget initiative to assess the *Grootboom* case in the context of availability of resources and women's right to housing.¹⁵⁰ This research gave a background of the *Grootboom* case while highlighting the right to housing in the Constitution. It then expanded on the implications that budgeting for housing has on women and focused on the Western Cape provincial government and the city of Cape Town. It also pointed out to

¹⁴⁵ D Budlender 'Introduction the fifth women's budget' in D Budlender *The women's budget series: Issue 5* (2000) 67.

¹⁴⁶ S Coopoo 'Women and local government expenditure' in Budlender 2000a (n 145 above) 72.

¹⁴⁷ T Goldman 'Customs and excise' in Budlender 2000a (n 145 above) 104.

¹⁴⁸ T Smith 'Women and tax in South Africa' in Budlender 2000a (n 145 above) 131.

¹⁴⁹ L Vetten & Z Khan 'An investigation into government support to non-profit organisations providing services to women experiencing violence' (2002).

¹⁵⁰ D Budlender & S Liebenberg *Rights, roles and resources: An analysis of women's housing rights - Implications of the Grootboom case* (2002).

the fact that there is a lack of gender perspective in the budget for housing. Finally it provided the recommendations that were mostly in terms of adopting gender-specific housing programmes instead of gender-neutral ones.

In mid-2001, a workshop was organised by the Joint Monitoring Committee that had as participants parliamentarians and members of the parliamentary legislatures.¹⁵¹ Following this meeting, parliamentarians requested for a booklet that could be used by them to brief women about the programmes and policies that the government is funding for them.¹⁵² This was motivated by the fact that not all women in different constituencies are aware of the ways in which they could benefit from government spending and that the parliamentarians would use this booklet to inform them of what is available for them. As a result, the WBI identified researchers to produce a booklet for parliamentarians to use. The research for this publication concentrated on the spending of KwaZulu-Natal and of the National Treasury and it was published in 2003. It studied the different departments and how their grants can be beneficial for women while also highlighting the grants that are available at the KwaZulu-Natal provincial level.

In 2004, another research of the same nature as ‘what’s available’ was published but this time, with focus on all the nine provinces. It completed the study of what is available to women in forms of grants in all the provinces in the different sectors. In the same year, there were four different studies which were conducted with the view of assessing what had changed for women in the sectors of social development, labour, justice and police since the first women’s budget initiative was adopted.¹⁵³

The South African initiatives were also a combination of the GSBA and the GSFB. Both the initiatives within the different departments and the initiatives by the CSOs and the parliament targeted a gender sensitive formulation of the budget and an analysis of the budget from a gender lens. Nevertheless, apart from the initiative which was done in

¹⁵¹ Women’s Budget Initiative ‘What’s available? A guide to government grants and other support available to individuals and community groups’ (2003) 4 available at <http://www.internationalbudget.org/wp-content/uploads/What%E2%80%99s-Available-A-Guide-to-Government-Grants-and-other-Support-Available-to-Individuals-and-Community-Groups.pdf> (accessed on 8 February 2016).

¹⁵² As above.

¹⁵³ Budlender 2012 (n 39 above) 15.

collaboration with Motsepe Foundation in 2012, most of the initiatives within the different departments focused on sensitising government departments about the GSFB. Thus, similar to the SADC guidelines, the South African departmental initiatives gave importance to the GSFB.

Contrary to the departmental initiatives in South Africa, the initiatives by the CSOs and parliament adopted the GSBA approach. Most of the WBIs focused on analysing the budgetary allocations and their impact on women's human rights. They assessed how a re-prioritisation of resources might have better addressed the vulnerabilities that women face. Nevertheless, CSOs provided technical assistance in the form of expertise when different departments were engaging in their gender budgeting initiatives.

C The responsibility of each stakeholder

The gender budgeting process studied in section 3.7.4 above requires states to adopt the GSBA in three phases and then adopt a GSFB.¹⁵⁴ It also depicts that there is an overlap between the third stage of the GSBA and the GSFB.¹⁵⁵ However, it does not elaborate on which stakeholder has the responsibility for the different approaches. Furthermore, the SADC guidelines do not establish the responsibility of each stakeholder in the preparation of gender budgets. This thesis expands on the responsibility of each stakeholder by assessing the SADC guidelines and the South African initiatives.

Both the SADC guidelines and the South African initiatives mention the different departments, more specifically, the Department of Finance when it concerns the GSFB approach. This might imply that, in practice, although government departments are recommended to adopt the GSBA approach, their focus should be on the GSFB. CSOs and parliamentarians can be considered as having importance in both the GSBA approach and the GSFB approach. However, the South African initiatives demonstrate that CSOs and parliamentarians' initiatives to analyse the budget from a gender lens was stronger than their involvement with departmental initiatives to have a GSFB.

¹⁵⁴ Section 3.7.4 above.

¹⁵⁵ As above.

Most of the times, government departments are recommended to adopt a GSFb whereas CSOs and the parliament are encouraged to have a GSBA. This finding can be included in the proposed framework to be adopted by the AU since it can provide the basis for determining which stakeholder has to take leadership role in which type of gender budget.

D Lessons learnt for the proposed framework to be adopted by the African Union

Concerning the preparation of gender budgets, it is recommended that the proposed framework on gender budgeting elaborate on the approach each stakeholder must adopt. However, this section must be mindful that there will be overlaps between the different approaches by different stakeholders. For instance, while NGOs will analyse the budget from a gender lens, they will also be expected to assist the government in the formulation of the budget through their expertise.

Defining the parameters within which each stakeholder must operate will lead to non-duplication of gender budgeting initiatives. As mentioned in section 4.4.1 D above, it is proposed that there is the creation of a gender budgeting team with representatives from all relevant stakeholders. This gender budgeting team can manage the different initiatives and determine the approach to be adopted by each stakeholder. It is proposed that the framework to be adopted by the AU, similar to the SADC guidelines, lay emphasis on GSFb approach at the ministerial level, on GSFb and GSBA approaches at the parliament and NGO level.

Additionally, since the proposed framework recognises the judiciary, and academics and researchers as stakeholders, it is recommended that it elaborates on the approaches that they should adopt. Since the judiciary will be involved only after the formulation of the budget, they can adopt a GSBA approach and analyse the expenditure from a gender lens when confronted with a case concerning budgetary allocation of resources to realise women's human rights. As for academics and researchers, they can adopt both a GSFb and a GSBA approach: the different ministries can seek their expertise when formulating the budgets and they can also analyse the budget from a gender lens independent of any ministry.

It can be noted from the South African initiatives that few departments have adopted gender-specific programmes which would assist them in the preparation of gender budgets. It is recommended that each department adopt gender-specific programme so that the future gender budgeting initiatives can directly assess how the allocations are influencing women's situation.

The different departments can inspire themselves from the Department of Justice and Constitutional Development which adopted a Gender Policy Statement in 1998.¹⁵⁶ The Gender Policy Statement was adopted since it was acknowledged that broad strategic frameworks 'cannot provide adequate guidance on specific issues such as gender equality...'.¹⁵⁷ The aim of the Gender Policy Statement was to 'ensure that all decision-making and all practices in the Department of Justice and allied institutions, are informed by gender equality analysis'.¹⁵⁸ Inspired by the experience of the Department of Justice and Constitutional Development, the framework for gender budgeting to be adopted by the AU must recommend the different departments/ministries in African countries to adopt gender policy statements which would engender all their decisions and practices.

4.4.3 Tools for assessing gender budgets

The essential elements for gender budgeting in section 3.7.5 above has expanded on the following tools for assessing gender budgets: The public expenditure incidence analysis, budgetary institutions, gender-aware policy appraisal and women's or gender budget statement, gender disaggregated beneficiary assessment, gender-aware medium term macroeconomic policy framework, and sex-disaggregated analysis of the impact of the budget on time use. This section assesses the SADC guidelines and the South African initiatives to analyse whether they have used the above tools.

¹⁵⁶ Website of the Department of Justice and Constitutional Development available at <http://www.justice.gov.za/policy/gender/genderPOL.htm> (accessed on 23 February 2016).

¹⁵⁷ Foreword to the Gender Policy Framework available at http://www.justice.gov.za/policy/gender/1999_GenderPolicy_CHP00a.pdf (accessed on 23 February 2016).

¹⁵⁸ Introduction to the Gender Policy Framework available at http://www.justice.gov.za/policy/gender/1999_GenderPolicy_CHP01.pdf (accessed on 23 February 2016).

A The SADC guidelines on gender budgeting

The SADC guidelines adopt some of the tools of gender budgeting. They have a section that provides for tools that the stakeholders can make use of during monitoring and evaluation of gender budgets.¹⁵⁹ These tools include sex-disaggregated public expenditure incidence analysis, gender aware beneficiary assessment, gender sensitive public expenditure tracking surveys, gender-aware citizen report cards, gender-responsive public expenditure reviews, and gender budget statements or gender reports.¹⁶⁰ Additionally, the SADC guidelines require the ministries responsible for finance to consider gender budgeting at the planning and programming stage, in the MTEF¹⁶¹ and macroeconomic models, in their call circulars,¹⁶² in their budget speeches, and in performance contracts.

One important aspect of the SADC guidelines is that they require the creation of gender focal points at different ministerial levels. India was used as an example where they have gender budget cells that coordinate gender budgeting initiatives within and across ministries.¹⁶³ Similarly, in Tanzania, the Ministry of Finance and Economic Affairs of Tanzania, with the support of UN Women, has established the gender responsive budgeting core team that coordinates gender budgeting at the planning and programming stage in different ministries.¹⁶⁴ Such budgeting institutions have also been considered as tools for the assessment of gender budgets by the essential elements of gender budgeting.¹⁶⁵ Therefore, the SADC guidelines on gender budgeting guide state in the practical implementation of the tools of gender budgeting.

¹⁵⁹ Part 8 of the SADC guidelines.

¹⁶⁰ See section 3.7.5 for more details on these tools.

¹⁶¹ C Obidegwu 'The medium-term expenditure framework-The challenges of budget integration in SSA countries' (2005) 6: MTEFs have been defined as 'a conceptual framework that aims to integrate the elements of good budget practice into an operational process' available at http://www-wds.worldbank.org/external/default/WDSContentServer/WDSP/IB/2005/10/12/000090341_20051012135537/Rendered/PDF/336080PAPER0wp82.pdf (accessed on 9 February 2016).

¹⁶² E Klatzer 'Integrating gender equality, women's rights and participation in the budget process: A survey of entry points and practical examples' in C Ng (ed) *Gender responsive and participatory budgeting: Imperatives for equitable public expenditure* (2016) 102: A budget call circular is 'an official notice issued by the Department or Ministry of Finance at the beginning of budget preparations'

¹⁶³ SADC guidelines 32.

¹⁶⁴ As above.

¹⁶⁵ Section 3.7.5 above.

B The South African initiatives

Section 28(1) of the Public Finance Management Act of South Africa requires the Minister of Finance to table a multi-year budget. As a means to reflect the multi-year budgetary projections, South Africa adopted the MTEFs in 1998 when the government adopted a 3 year rolling expenditure plans so that there is reinforcement of 'the link between Government's policy choices on the budget and the delivery of services, which serves to strengthen political decision making and accountability'.¹⁶⁶ Building up to the adoption of MTEFs in 1998, a workshop was held in 1996 where members of the WBIs were invited to address the participants and to sensitise them about the consideration of expenditure on women in the MTEFs.¹⁶⁷ This could be indicative of the fact that the Ministry of Finance was willing to integrate gender issues in the MTEFs. However, despite the interaction with the members of the WBIs, the MTEFs did not integrate gender considerations immediately after its adoption. It was only in 2010 that the MTEFs took into consideration women's issues. Nevertheless, the inclusion of women in the MTEFs was in relation to the department and the MTEFs were not gender mainstreamed. This was still the case in the expenditure estimates of the 2015 MTEFs that contained a line item for the Department of Women, instead of mainstreaming expenditure on women.¹⁶⁸

The non-mainstreaming of expenditure on women might be explained by the fact that the gender budgeting initiatives of the CSOs and Parliament focused mostly on the yearly budgeted expenditure instead of the MTEFs during its analysis of the budgets of the different departments. The CSOs and Parliament initiatives for gender budgeting gained considerable attention in South Africa and it sensitised the government about the use of gender budgeting to allocate sufficient resources to realise women's human rights. Extensive use of MTEFs in

¹⁶⁶ S Robinson 'South Africa's medium term expenditure framework – Effective expenditure for development' paper presented at the Malawi Poverty Monitoring System Workshop (24-26 July 2002) 2.

¹⁶⁷ Annex to D Budlender et al *Gender budgets make cents: Understanding gender responsive budgets* (2002) 46.

¹⁶⁸ Website of the National Treasury available at <http://www.treasury.gov.za/documents/mtbps/2015/default.aspx> (accessed on 17 February 2016): The Medium Term Budget Policy Statements of the National Treasury have been including a line item for expenditure women since 2010.

the gender analysis would have, in the same manner, sensitised the government about a more extensive use of MTEFs for gender budgeting.

The South African government has also adopted gender-aware policies that can be used as tools for gender budgeting. For instance, the strategic plan of 2015-2020 of the Department of Women, while stating its strategic outcomes-orientated goals of the different programmes, made reference to budgets. Programme two which relates to social, political, and economic participation and empowerment of women has as its goal statement the acceleration and enhancement of 'intervention plans, programmes and budgets for women's socio-economic empowerment and gender equality'.¹⁶⁹ The development of gender budgeting has been identified as a key performance indicator as part of programme two.¹⁷⁰ As for programme four which concerns monitoring, evaluation and outreach, one of its outcomes is to 'assess the impact of ... budgets on women's socio-economic empowerment and gender equality'.¹⁷¹ The objective statement of the research programme under programme three¹⁷² of the Department of Women reiterates that its aim is to provide research to inform budgeting amongst others.¹⁷³ The sub-programme on policy analysis and coordination of programme three highlighted that there was no gender budgeting being done at that time and that one of its objective is to ensure that the policies and programmes are gender responsive due to the fact that gender budgeting contributes to 'women's socio-economic empowerment and gender equality'.¹⁷⁴

Moreover, the National Policy Framework for Women's Empowerment and Gender Equality 2000 of South Africa (National Gender Policy) makes mention of budgets and recognises the need for budgetary re-allocation or re-prioritisation so that expenditure for women is mainstreamed.¹⁷⁵ The National Gender Policy requires other ministers to adopt policies that promote gender equality. It further states that other departments have to '[p]rovide access

¹⁶⁹ Department of Women 'Strategic Plan 2015-2020' (2015) 13 available at <http://www.women.gov.za/attachments/article/66/Strategic%20Plan%202015%20-%202020.pdf> (accessed on 11 February 2016).

¹⁷⁰ Department of Women 2015 (n 169 above) 19.

¹⁷¹ Department of Women 2015 (n 169 above) 13.

¹⁷² Programme 3 concerns research, policy coordination and knowledge management.

¹⁷³ Department of Women 2015 (n 169 above) 22.

¹⁷⁴ Department of Women 2015 (n 169 above) 23.

¹⁷⁵ National Gender Policy South Africa 26, 42, 43, 51 & 55.

to information, including documentation, on budgetary measures with specific reference to its implication on gender'.¹⁷⁶ The strategic plan of 2015-2020 of the Department of Women has acknowledged that there is a need for gender budgeting to ensure that gender equality is achieved. Nevertheless, there is no indication whether the allocations to the different programmes do actually conduct a gender sensitive analysis.

Furthermore, the gender budgeting initiatives within the departments in South Africa included discussion that concerned gender issues in the documents that were presented on the budget day in 1998 and 1999.¹⁷⁷ The main publications on budget at that time were estimates of national expenditure that contained budget tables, and budget review which gave the report of the expenditure. The gender issues were discussed in boxes in the budget review as a key topic. These text boxes on gender provided for statistics on gender and pointed out to the issues which have to be addressed so that gender equality is achieved. Most of these text boxes were authored by Debbie Budlender who was a pioneer of the gender budgeting initiative by the CSO and Parliament.¹⁷⁸ The inclusion of gender analysis on the budget publications, rather than a separate document on gender, was considered as mainstreaming. Another motivation for the inclusion of gender in the government budget publications was that the information would touch a larger audience whereas a separate document on gender might be ignored by those who were not interested in the topic.¹⁷⁹

The SADC guidelines emphasise the use of budget statements towards the adoption of gender budgeting.¹⁸⁰ Despite the fact that the Minister responsible for women in South Africa expressed the intention to adopt gender budgeting in 2012, the budget speeches of 2013, 2014, 2015 and 2016 of South Africa did not make mention of the state's commitment to realise women's human rights through the allocation of sufficient resources.¹⁸¹ Before these years, the budget speech of 2012 emphasised that financial institutions have to recognise the important role that women play in the economy and that the progress of women in this field

¹⁷⁶ National Gender Policy South Africa 27.

¹⁷⁷ Budlender 2000 (n 37 above) 1369.

¹⁷⁸ Budlender 2012 (n 39 above) 22.

¹⁷⁹ Budlender 2012 (n 39 above) 19.

¹⁸⁰ Section 3.7.5 above.

¹⁸¹ Website of the National Treasury available at <http://www.treasury.gov.za/documents/national%20budget/default.aspx> (accessed on 10 February 2016).

needs more transparent reporting.¹⁸² It can therefore be noted that despite the adoption of the SADC guidelines, South Africa have not applied the guidelines when it comes to budget speech even if women were mentioned in the budget speech of 2012.

Section 3.7.5 above has expanded time-use gender disaggregated data as a tool for gender budgeting. South Africa has adopted gender-disaggregated data and has conducted time-use studies that could be used in gender budgeting initiatives. Nevertheless, the gender budgeting initiatives in South Africa did not make use of these data as gender budgeting tools.

C Lessons learnt for the proposed framework to be adopted by the African Union

The SADC guidelines made reference to most of the gender budgeting tools expanded upon in section 3.7.5 above. They can therefore be considered as a benchmark for the adoption of gender budgeting tools in practice. However, the South African initiatives faced some challenges in the adoption of these tools and this section studies these challenges with the view of drawing lessons for the proposed framework on gender budgeting to be adopted by the AU.

(i) Lack of transparency

Budlender has identified lack of transparency as a challenge for gender budgeting in South Africa.¹⁸³ The budget structure was such that one could not derive how the different expenditures of the government are affecting women. Indeed, taking the example of the 2016 budget, despite the fact that some departmental budgets made reference to specific expenditure on women,¹⁸⁴ the majority of the budget was silent on the share that is being

¹⁸² Ministry of Finance '2012 Budget Speech' (2012) 29 available at <http://www.treasury.gov.za/documents/national%20budget/2012/speech/speech.pdf> (accessed on 10 February 2016).

¹⁸³ Budlender 2012 (n 39 above).

¹⁸⁴ National Treasury '2016 budget: Estimates of national expenditure – Health' (2016) available at <http://www.treasury.gov.za/documents/national%20budget/2016/enebooklets/Vote%2016%20Health.pdf> (accessed on 15 August 2016): The budget for health had a line item on women's maternal and reproductive health; National Treasury '2016 budget: Estimates of national expenditure – Social development' (2016) available at <http://www.treasury.gov.za/documents/national%20budget/2016/enebooklets/Vote%2017%20Social%20Development.pdf>: The budget made reference to donor funding which affected women; National Treasury '2016 budget: Estimates of national expenditure – Small business development' (2016) available at

used to address the vulnerabilities that women face. For instance, the budgets on basic education,¹⁸⁵ higher education and training,¹⁸⁶ and correctional services,¹⁸⁷ amongst others, did not have any gender considerations. Therefore, the current budgetary classification, except for the budget of the Department of Women and the departments that have line items which affect women, does not clearly provide information to analyse the budget with the view of determining how the policies and expenditure are affecting the lives of women.¹⁸⁸ This lack of information makes it difficult for stakeholders outside the budgetary process to analyse the expenditure from a gender lens.

The gender budgeting initiatives in South Africa faced the challenge of budgetary allocations not being transparent. As a result, there was a lack of information during the analysis of the budget from a gender lens since it was difficult to determine the direct impact that the different departments' budgetary allocations had on women. The non-transparent nature of the budgeting process acts as a hindrance to apply the tools to assess gender budgets since they do not provide the relevant stakeholders with the required information. Therefore, the proposed framework on gender budgeting has to recommend states to adopt a transparent budgeting process towards the adoption of gender budgeting. Such transparency must extend to the specific expenditures on women in the different departments.

<http://www.treasury.gov.za/documents/national%20budget/2016/enebooklets/Vote%2031%20Small%20Business%20Development.pdf> (accessed on 15 August 2016): The budget made reference to the Isivande Women's Fund and to the South African Women Entrepreneurs Network; and National Treasury '2016 budget: Estimates of national expenditure – Trade and industry' (2016) available at <http://www.treasury.gov.za/documents/national%20budget/2016/enebooklets/Vote%2034%20Trade%20and%20Industry.pdf> (accessed on 15 August 2016): The budget contained a line item on Women's Empowerment Fund.

¹⁸⁵ National Treasury '2016 budget: Estimates of national expenditure – Basic education' (2016) available at <http://www.treasury.gov.za/documents/national%20budget/2016/enebooklets/Vote%2014%20Basic%20Education.pdf> (accessed on 15 August 2016)

¹⁸⁶ National Treasury '2016 budget: Estimates of national expenditure – Higher education and training' (2016) available at <http://www.treasury.gov.za/documents/national%20budget/2016/enebooklets/Vote%2015%20Higher%20Education%20and%20Training.pdf> (accessed on 15 August 2016).

¹⁸⁷ National Treasury '2016 budget: Estimates of national expenditure – Correctional services' (2016) available at <http://www.treasury.gov.za/documents/national%20budget/2016/enebooklets/Vote%2018%20Correctional%20Services.pdf> (accessed on 15 August 2016).

¹⁸⁸ F Sarraf 'Gender-responsive government budgeting' (2003) 13.

(ii) The non-use of output

The gender budgeting initiatives of South Africa produced several outputs. For instance, the women's budget initiatives produced publications of the analysis of the different departments and recommended what the relevant stakeholders must do in terms of policy re-formulation and budgetary re-prioritisation and re-allocation.¹⁸⁹ The initiative of the government also produced budget documents upon the presentation of the budget which included the gender impacts of the expenditure.¹⁹⁰ Moreover, the publication from the workshop in mid-2001 was intended to be used by parliamentarians to popularise the programmes, policies and funding opportunities that women can benefit from. This was proposed since ignorance on behalf of women was identified as a challenge for them to access to the spending of the government.¹⁹¹

The above are examples of the output of gender budgeting initiatives. However, analysing the past gender budgeting initiatives, it can be noted that none of these outputs were used in future gender budgeting initiatives. The women's budget initiatives publications were intended for use by the government while allocating its resources or for CSOs to advocate for a restructuring in the manner the government allocates its resources. Nevertheless, the government continued their budgeting exercise without taking into account the publications. The same applies to the publication from the mid-2001 workshop. Parliamentarians specifically requested for a document they could use but did not use them, thereby wasting resources.¹⁹²

This study proposes a synergy between different stakeholders concerning gender budgeting initiatives. Such a synergy would require some levels of stakeholders to rely on the gender budgeting initiatives of others. For instance, NGOs would be responsible for analysing the budget from a gender lens whereas the different departments would refer to these analyses in their resource allocation process. As such, the different stakeholders are required to make use of the output of gender budgeting initiatives to avoid duplication of resources.

¹⁸⁹ Section 4.2.2 above.

¹⁹⁰ Section 4.3.3(B) above.

¹⁹¹ Section 4.4.2(B)(ii) above.

¹⁹² Budlender 2012 (n 39 above).

(iii) Commitment on behalf of the government

The most successful gender budgeting initiatives in South Africa were those of the CSOs. Despite the fact that the different ministries in the government have showed interest to adopt gender budgeting and have adopted once-off gender budgeting initiatives, none of them have been able to continuously integrate gender budgeting in the public budgeting process. The Minister for Women has highlighted the influence that gender budgeting has on women's human rights but there is still no comprehensive plan to integrate gender budgeting in the budgeting processes. Neither the Minister for Women nor the Minister of Finance in South Africa have taken steps to ensure that gender budgeting becomes integral to the budgeting process.

As noted by the SADC guidelines, the Minister of Finance has the primary responsibility to ensure that gender budgeting is adopted in the resource allocation processes.¹⁹³ Budget preparation and budgetary allocation fall within the scope of the Ministry of Finance and the latter can influence gender budgeting initiatives of other departments/ministries. The Department of Finance in South Africa has not engaged in consistent gender budgeting initiatives and has not made use the gender budgeting tools.

The SADC guidelines further identify entry points for the ministry/department responsible for women and other sectoral ministries/departments. They therefore require commitments on behalf of all departments/ministries for gender budgeting initiatives. However, in South Africa there was no consistent commitment on behalf of the different departments/ministries. This lack of commitment acted as a challenge for the adoption of gender budgeting in South Africa.

(iv) Lack of sex-disaggregated, gender-sensitive and time use data

Sex-disaggregated data is integral to gender budgeting since it provides for the basis of the analysis. Although there are sex-disaggregated data that have been published in South Africa, not all departments publish sex-disaggregated data to demonstrate the reach of their programmes and policies. This acted as a hindrance to the previous gender budgeting

¹⁹³ Section 4.4.1 above.

initiatives. Therefore, learning from the previous gender budgeting initiatives and from the SADC guidelines, it is recommended that each department publish sex-disaggregated data on how the different programmes and policies benefit men and women. Moreover, the future gender budgeting initiatives have to make use of the time-use survey.

Statistics South Africa has published few such data: some statistics on gender were published in 2011.¹⁹⁴ These statistics included data on women across different sectors namely population, families and households, living arrangements of children and parents, childcare facilities, living conditions, education, literacy, health, work, and household income. Statistics South Africa has stated that it is gender-sensitive while collecting its statistics and also highlighted that the gender statistics are not the only statistics available for women within the government.¹⁹⁵ In addition, Statistics South Africa has also conducted time use surveys.¹⁹⁶ These time use surveys could have been used in the context of gender budgeting but this has not been done yet.

For future gender budgeting initiatives to be successful, the proposed guidelines on gender budgeting must lay emphasis on sex-disaggregated, on gender-sensitive and on time-use data. The publication of gender-disaggregated and time-use data will facilitate the application of the tools for assessing gender budgeting. This thesis recognises that African countries have challenges such as 'lack of capacity and resources and even absence of clear strategic planning in the development of statistics'.¹⁹⁷ Consequently, it is recommended that African countries make use of international organisations such as the UN Economic Commission for Africa when they are embarking on data collection.

(v) Lack of resources

The adoption of gender budgeting and the application of the tools have cost implications which might lead to its non-adoption by countries. For instance, undertaking sex-

¹⁹⁴ Statistics South Africa 'Gender statistics in South Africa-2011' (2012) available at <http://www.statssa.gov.za/publications/Report-03-10-05/Report-03-10-052011.pdf> (accessed on 18 February 2016).

¹⁹⁵ Statistics South Africa vi.

¹⁹⁶ Section 4.2.3 above.

¹⁹⁷ Website of the UN Economic Commission for Africa available at <http://www.uneca.org/acs/pages/demographic-and-social-statistics> (accessed on 15 August 2016).

disaggregated, gender-sensitive and time use surveys is time-consuming and costly. This might act as a challenge for relevant stakeholders.

For example, CSOs in South Africa have been very pro-active in their gender budgeting initiatives as demonstrated by the WBIs and subsequent initiatives. However, it seems that CSOs in South Africa focused on gender budgeting initiatives only in its initial years. Moreover, although the WBIs had outcome for 8 years, IDASA, a NGO involved in the WBIs, stopped producing books after the fifth year.¹⁹⁸ The reason for stopping the publication of books was that they were 'expensive'.¹⁹⁹ Similarly, most of the gender budgeting initiatives within the different departments in South Africa were donor funded and they stopped as soon as funding stopped.²⁰⁰ This demonstrates that the government has not allocated any resources to adopt gender budgeting.

African states have committed to allocate budgetary resources to realise women's human rights by virtue of the Maputo Protocol. Hence, the proposed framework can require them to allocate resources to, in the first instance, adopt gender budgeting, and, in the second instance, to realise women's human rights. The proposed framework must highlight that the adoption of gender budgeting is the responsibility of the state and that they should not rely on donor funding for the same. Section 4.4.1 D above proposed the creation of a gender budgeting team which consists of all stakeholders. It is proposed that states allocate a budget to the gender budgeting team which would then apportion the amount to different stakeholders. Such an amount would mostly be used for the analysis of the budget and for the facilitation of the creation of the gender budgeting tools. Therefore, this budget would not be used for allocation of resources to women's issues. The government should separately allocate resources to realise women's human rights.

(vi) Lack of awareness

The previous gender budgeting initiatives in South Africa demonstrated that officials who prepare the budgets lack awareness. To overcome this challenge, the government has to

¹⁹⁸ Budlender 2012 (n 39 above) 14.

¹⁹⁹ As above.

²⁰⁰ Budlender 2012 (n 39 above).

undertake initiatives to sensitise its officials on gender budgeting. This can be done in collaboration with the Department/Ministry of Finance or CSOs which have expertise in gender and the implications of gender budgeting. The Ministry responsible for women in Mauritius has undertaken the initiative to train officials from other ministries and as a result of this training, some ministries now have gender policies. The proposed framework can learn from the Mauritian experience and it can recommend gender equality commissions, in collaboration with the department/ministry of women and CSOs, to undertake training workshops with officials responsible for budget preparation of each department. These trainings have to be continuous to yield the expected results.

In addition to the officials responsible for budget preparation, the awareness-raising campaign can also target persons in high positions. This is so because they can influence the policies and budgetary allocations of the department. The awareness-raising campaign can also target members of the CSOs which can then conduct analysis of the budget from a gender lens to advocate for gender budgeting.

It is to be noted that the responsibility to create awareness is not only that of the government but also of the CSOs. The past gender budgeting initiatives of South Africa were witness to the positive role that CSOs played to raise awareness about gender budgeting. As such, independent of any government's initiatives to raise awareness about gender budgeting, CSOs have to undertake steps to sensitise all stakeholders about gender budgeting.

(vii) Lack of gender knowledge and expertise

The Department of the National Treasury within the Ministry of Finance is responsible for the preparation of budgets in South Africa. The persons who prepare the budgets are often economists who lack gender knowledge and expertise and who do not understand the link between gender and economic issues.²⁰¹ For them, gender issues are only within the ambit of the Ministry of Women and it has nothing to do with the fiscal policy of the government.

Nevertheless, gender budgeting requires those who are framing the budget to understand the link between gender and economic issues. This has been highlighted by the SADC

²⁰¹ D Budlender et al (n 167 above) 74.

guidelines that clearly state that the Ministries responsible for finance have a major role to play in gender budgeting.²⁰² Indeed, the first initiatives on gender budgeting in South Africa were within the Department of Finance, the objective of which was to ensure that gender issues are highlighted in budget publications.²⁰³ However, this was done with the help of an expert from the CSOs who was involved in the CSOs and parliamentarians gender budgeting initiatives. It can therefore be derived that there was no gender knowledge and expertise within the Ministry of Finance when the government started its initiative for gender budgeting. The SADC guidelines make reference to the expertise of local consultants to enable budget framers to incorporate gender budgeting at the planning and formulation stage.²⁰⁴

However, the government initiative on South Africa concentrated only on producing budget documents that were sensitive to gender issues. This initiative did not concentrate on training the officials who were engaged in budget preparations and as such, the planning and formulation stage of the budget within the Department of Finance was exclusive of gender budgeting after the two years that the consultant assisted them.

Thus, it is recommended that the proposed framework consider the lack of gender knowledge as a hurdle in the adoption of gender budgeting. The proposed framework must include a section to recommend states to train the officials from the department/ministries responsible of finance on gender issues and on the importance of a gender formulation of the budget.

4.5 Additional aspects to be considered while developing a framework on gender budgeting to be adopted by the African Union

The above sections pointed out the issues that the proposed framework on gender budgeting to be adopted by the AU must take into consideration. The SADC guidelines and the South African initiatives informed the formulation of such issues. The current section elaborates

²⁰² Section 4.4.1 above.

²⁰³ Section 4.4.1 above.

²⁰⁴ 4.4.1 above.

on the additional aspects to be considered in the development of a gender budgeting framework to be adopted by the AU. These aspects are inspired by the above analysis, by examples around the world, and by existing literature.

4.5.1 Key stakeholders

Section 4.4.1 above analysed the SADC guidelines and the South African initiatives concerning the stakeholders involved in the gender budgeting process. This analysis revealed that gender budgeting does not take into account the judiciary which is a crucial arm of the government and which can assist in analysing the budget from a gender lens.²⁰⁵ Furthermore, it was noted that integrating academics and researchers in the umbrella term of CSOs undermine their role in gender budgeting processes. Therefore, it is recommended that the proposed framework on gender budgeting to be adopted by the AU reconsider the key stakeholders. The proposed key stakeholders in gender budgeting processes are as follows:

- The different departments/ministries
- The parliament
- The judiciary
- NGOs
- Academics and researchers

4.5.2 The approach each stakeholder must adopt in the preparation of gender budgets

As discussed in section 4.4.2 C above, neither the concept of gender budgeting nor the SADC guidelines elaborate on the approach that each stakeholder must adopt in the preparation of gender budgets. After analysing the SADC guidelines and the South African initiatives, it is recommended that the proposed framework on gender budgeting to be adopted by the AU clearly establishes the approach each stakeholder must adopt. The responsibility of each stakeholder can be as follows:

²⁰⁵ Section 4.4.1 C above.

- The different departments/ministries: GSFb since they are the ones responsible for budgetary allocation. They can rely on the analysis done by NGOs, academics and researchers in their resource allocation process. Before the gender budgeting process, the different departments/ministries also have the responsibility to take steps to facilitate the use of the tools to assess gender budgets.
- The parliament: Parliamentarians can have inputs at the GSFb since they are involved in the process of the adoption of the budget. They can further work in collaboration with CSOs to conduct a GSBA.
- The judiciary can adopt a GSBA when approached with a case of budgetary allocation for women.
- NGOs: NGOs have the primary responsibility to analyse the budget from a gender lens and to make recommendations to the government. Additionally, they can also adopt a GSFb when it concerns providing technical/expert support to different ministries/departments.
- Academics and researchers are recommended to undertake research on the topic of gender budgeting. Such research will encompass both a GSFb and a GSBA approach. Furthermore, academics and researchers can assist the different ministries/departments in a GSFb.

4.5.3 Inclusion of budgetary allocation for women's human rights in the laws

The SADC guidelines do not make reference to domestic laws in relation to gender budgeting. Similarly, gender budgeting is not included in the laws in South Africa despite the fact that it makes reference to affirmative actions.²⁰⁶ The feminist legal theory, as discussed in chapter three of this research, has established that states have to adopt laws to give effect to women's human rights. As a reflection of this theory, African states adopted the Maputo Protocol and included budgetary allocation of resources to realise women's human rights as a right. Nevertheless, despite the fact that the Maputo Protocol recognises the allocation of budgetary resources as a right, no African country has adopted a law to require the state to provide budgetary resources to realise women's human rights. At the global level, Austria's

²⁰⁶ Section 4.2.1 above.

Constitution provides that the government has 'to aim at the equal status of women and men in the budgeting'.²⁰⁷ Such a provision in the Constitution, which is the supreme law, indicates that the state considers budgetary allocation for women's human rights as a right that deserves constitutional protection.

The proposed framework on gender budgeting to be adopted by the AU can require states to adopt resource allocation for women's human rights in the laws and more specifically the Constitution. Such an inclusion will give the basis for gender budgeting.

4.5.4 Requiring different departments to allocate a minimum percentage of its expenditure to women

The SADC guidelines and the South African initiatives acknowledge that women are in a more disadvantaged position and that resource allocation has to address the vulnerabilities that women face. However, none of them made reference to a minimum percentage of the budget to be allocated to women's human rights. Learning from the experiences of countries like Philippines where in line with the promotion of gender equality, each government agency must allocate at least 5% of their budget for gender and development,²⁰⁸ African states must be recommended to require its different departments/ministries/agencies to allocate a certain percentage of their budget to women's issues.

4.5.5 Appointment of women in high positions

It has been noted that the active involvement of women in high positions such as permanent secretary, deputy minister or Minister within the Ministry of Finance can be influential on the gender budgeting process.²⁰⁹ The Australian gender budgeting initiatives were initiated by women in high positions.²¹⁰ The Minister for Women in South Africa is a woman²¹¹ and she has been making calls for gender budgeting. Similarly, at the time the Department of

²⁰⁷ Article 13(3) of the Constitution of Austria 1920, reinstated in 1945 and revised in 2009.

²⁰⁸ Philippines Commission on Women Memorandum (2012) available at <http://www.dole.gov.ph/fndr/bong/files/Preparation%20of%202014%20GAD%20Plan%20and%20Budget.pdf> (accessed on 15 August 2016).

²⁰⁹ Budlender 2000 (n 37 above) 1370.

²¹⁰ Section 1.5.3 above.

²¹¹ Website of the Department of Women in South Africa available at <http://www.women.gov.za/> (accessed on 25 May 2016).

Justice and Constitutional Development had its gender budgeting initiatives, it was led by a woman.²¹² However, currently, South Africa neither has a minister or a deputy minister of finance who is a woman, which represents a challenge for gender budgeting despite the fact that about 42.4% of the permanent seats in Parliament are occupied by women²¹³ and that 41% of the cabinet are headed by female ministers.²¹⁴

The Department of Justice and Constitutional Development has pointed out to the fact that there is a challenge to attract women to high positions.²¹⁵ It was highlighted that despite adverts that give preference to women, very few women do apply for positions within departments. However, positions such as minister or deputy minister require presidential appointments and are therefore not dependent on women applying for them. Therefore, governments must be recommended to nominate women in positions such as ministers or deputy ministers to influence the gender budgeting process.

This section highlighted some practical aspects of the adoption of gender budgeting which were not revealed in the analysis in section 4.4 above. It provides for additional aspects that the proposed framework on gender budgeting to be adopted by the AU could take into consideration. This chapter has as objective to elaborate on the steps that African states can adopt towards the integration of gender budgeting in their public budgeting process. Since the Maputo Protocol is an African document, this chapter analysed the SADC guidelines and the South African initiatives with the view of informing a framework to be adopted by the AU. African states can then model their gender budgeting initiatives against this framework. Having analysed the SADC guidelines and the South African initiatives to point out the issues that the framework to be adopted by the AU must take into account, this chapter now elaborates on the proposed framework on gender budgeting to be adopted by the AU.

²¹² Website of the Republic of South Africa available at <http://www.gov.za/about-government/leaders/profile/1035> (accessed on 15 August 2016).

²¹³ Website of Inter-Parliamentary Union available at <http://www.ipu.org/wmn-e/classif.htm> (accessed on 29 July 2016): The figure is as at 1 June 2016.

²¹⁴ Website of the Republic of South Africa available at <http://www.gov.za/2016WomensMonth> (accessed on 15 August 2016).

²¹⁵ Department of justice and Constitutional Development 'Strategic Plan for the period 2011-2016: Annual review 2011/12' (2011) 26 available at http://www.gov.za/sites/www.gov.za/files/mtsf_0.pdf (accessed on 23 February 2016).

4.6 Proposed framework on gender budgeting to be adopted by the African Union

This section provides an outline of the framework on gender budgeting to be adopted by the AU. It does not elaborate on the content of the different headings because they are covered either in the SADC guidelines or throughout this chapter.

1 Building a favourable environment for gender budgeting

- 1.1 Inclusion of gender budgeting in the laws
- 1.2 Adoption of laws in favour of transparent budgeting process
- 1.3 Allocation of a minimum percentage of the budget to women's issues
- 1.4 Appointment/nomination of women in high positions
- 1.5 Gender-specific programmes

2 Creation of strong institutions

- 2.1 Gender budget cells within ministries
- 2.2 Inter-ministerial/departmental committees
- 2.3 Parliamentary committees
- 2.4 Gender budgeting team with all relevant stakeholders

3 Stakeholders

- 3.1 Ministries/departments
 - 3.1.1 Ministries/departments responsible for finance
 - 3.1.2 Ministries/departments responsible for women
 - 3.1.3 Other sectoral ministries/departments
- 3.2 Parliament
- 3.3 Judiciary
- 3.4 Non-governmental organisations
- 3.5 Academics and researchers

The framework above is very concise and therefore in the event it is being developed further by the AU, the framers have to make reference to this chapter and to the SADC guidelines.

4.7 Conclusion

This chapter's objective was to elaborate on the steps that African states can take to adopt gender budgeting in practice. To do so, it analysed the SADC guidelines on gender budgeting and the South African initiatives. These two were used as references with the view to inform a gender budgeting framework to be adopted by the AU. As elaborated upon in section 4.1 above, this chapter focuses on a framework to be adopted by the AU since this study is legitimised by the provisions of the Maputo Protocol and hence, the AU is the body that has the responsibility to guide African states in the implementation of the obligations therein.

Chapter three elaborated on gender budgeting as a means to implement the obligation to provide resources to realise women's human rights. However, it did not expand on the practical side of gender budgeting, which was done in the current chapter by making reference to the SADC guidelines and the South African initiatives. The current chapter's analysis, inspired by the essential elements of gender budgeting, assessed the SADC guidelines on gender budgeting and the South African initiatives against three aspects, namely, the stakeholders involved, the preparation of gender budgets, and the tools for assessing gender budgets.

While analysing the SADC guidelines and the South African initiatives, it was revealed that the adoption of gender budgeting in practice is faced with certain challenges. This chapter advances some additional aspects that the framework to be adopted by the AU might take into consideration in order to minimise the challenges in the adoption of gender budgeting. These additional aspects are elaborated upon in section 4.5 above and they concern the key stakeholders, the approach to be adopted by each stakeholder, the inclusion of budgetary allocation of resources to realise women's human rights in the laws, appropriating a minimum percentage of the budget to women, and the appointment of women in high positions.

Taking these additional aspects into consideration, the chapter then provides an outline of the proposed framework to be adopted by the AU. This proposed framework can guide African states in their gender budgeting initiatives since it is comprehensive and attempts to cover all aspects of gender budgeting.

Having provided the outline of the framework to be adopted by the AU, this thesis now studies the way in which the AU and the SADC can integrate this framework to ensure that African states adopt gender budgeting as a means to implement their obligation to provide resources to realise women's human rights.

CHAPTER FIVE: THE ROLE OF THE AFRICAN UNION AND THE SOUTHERN AFRICAN DEVELOPMENT COMMUNITY TO ENSURE THAT AFRICAN STATES ADOPT GENDER BUDGETING

5.1 Introduction

Chapter four analysed the SADC guidelines and the South African initiatives to understand the steps that African states can take to integrate gender budgeting in their public budgeting process. It highlighted that the previous gender budgeting initiatives in South Africa were not structured and that they could be improved by bearing in mind the recommendations in the chapter. Furthermore, it was pointed out that gender budgeting initiatives had to be structured and provided a framework that could guide African states in their gender budgeting initiatives.

This chapter expands on the role of the African Union (AU) and the Southern African Development Community (SADC) in ensuring that African states like South Africa adopt sustainable and effective gender budgeting process in line with their obligations to provide sufficient resources to realise women's human rights. This chapter does not study the United Nations (UN) in line with chapter two of this research that pointed out that the UN does not expressly provide for the obligation to allocate sufficient budgetary resources to realise women's human rights. That chapter expanded on the UN, the AU and sub-regional organisations. It was noted that at the level of the AU, the SADC and the East African Community (EAC), there are express provisions which require states to adopt budgetary measures to realise women's human rights whereas at the UN level, treaties do not make specific reference to budgetary measures to realise women's human rights.

Taking into consideration that there is no express provision at the international level which imposes an obligation on states to allocate sufficient resources to realise women's human rights, this chapter concentrates on those organs of the AU and the SADC that can influence the implementation of the legal provisions which make reference to budgetary allocations for women's human rights. Furthermore, although the EAC does have provisions concerning budgetary allocations to realise women's human rights, this thesis does not focus on the EAC. It rather focuses on the SADC that already has guidelines on gender budgeting.

5.2 The African Union

Many organs set up under the AU can, to some extent, influence the realisation of human rights in Africa,¹ including women's human rights. This section concentrates on those institutions of the AU which can influence the adoption of gender budgeting in African countries as a means to allocate sufficient resources to realise women's human rights. In addition to the study of the judicial and human rights institutions, there is an analysis of the roles that the AU Commission, the Economic, Social and Cultural Council (ECOSOCC), the Pan-African Parliament, and the African Peer Review Mechanism (APRM) have in influencing gender budgeting processes in African countries. It further analyses how the AU institutions can collaborate with other relevant stakeholders to ensure that gender budgeting become integral to the budgeting processes.

5.1.1 Judicial and human rights institutions

The judicial and human rights institutions of the AU comprise of the African Commission on Human and Peoples' Rights (African Commission), the African Court on Human and Peoples' Rights (African Court) and the African Committee of Experts on the Rights and Welfare of the Child (African Children's Committee).² For the purposes of this chapter, focus is on the African Commission and the African Court. The African Children's Committee is not studied since, as demonstrated in chapter two,³ the African Charter on the Rights and Welfare of the Child (African Children's Charter) does not expressly provide for budgetary allocations to realise the rights provided therein. The Protocol to the African Charter on the Rights of Women in Africa (Maputo Protocol) is the only treaty at the AU level which makes reference to the provision of budgetary resources to realise women's human rights. Since the Maputo Protocol did not create 'new mechanisms or procedures to improve implementation',⁴ the existing judicial and human rights institutions, namely the African Commission and the African Court have the responsibility to oversee the implementation of the rights therein.

¹ F Viljoen *International human rights law in Africa* (2012) 169.

² AU 'Judicial and human rights institutions' available at <http://www.au.int/en/organs/cj> (accessed on 22 May 2016).

³ Section 2.4.1(B) above.

⁴ Viljoen 2012 (n 1 above) 257.

The African Charter expands on the mandates and functions of the African Commission which enables the institution to achieve its purpose. The provisions of the Maputo Protocol fall within the scope of the African Commission because the former was adopted as a supplement to the African Charter in terms of article 66 of the African Charter.⁵ As such, the African Commission is mandated to ensure the protection of the rights provided by the Maputo Protocol.

The African Court was established in 2004 by virtue of article 1 of the Protocol to the African Charter on the Establishment of an African Court on Human and Peoples' Rights (African Court Protocol).⁶ The African Court was established to 'enhance the efficiency of the African Commission'⁷ and to 'complement the protective mandate'⁸ of the latter. The African Court has jurisdiction in cases and disputes to interpret and apply the African Charter, the African Court Protocol and 'any other [h]uman [r]ights instrument ratified by the States concerned'.⁹ The Maputo Protocol falls within the jurisdiction of the African Court by virtue of article 3 of the African Court Protocol.

Both the African Commission and the African Court have to ensure that the rights in the Maputo Protocol are protected. Chapter two of this research elaborated on the provisions of the Maputo Protocol which expressly require states to allocate sufficient budgetary resources to realise women's human rights.¹⁰ Consequently, the African Commission and the African Court are mandated to ensure that countries allocate sufficient budgetary resources to realise women's human rights. Chapter three elaborated on gender budgeting as a means to do so and chapter four provided a framework for the adoption of gender budgeting. This section analyses the role of the African Commission and the African Court in the adoption of gender budgeting as a means to provide sufficient budgetary resources to realise women's human rights.

⁵ Article 66 of the African Charter 'Special protocols or agreements may, if necessary, supplement the provisions of the present Charter.'

⁶ Website of the African Court available at <http://en.african-court.org/index.php/12-homepage1/1-welcome-to-the-african-court> (accessed on 28 March 2016).

⁷ Preamble of the African Court Protocol.

⁸ Article 2 of the African Court Protocol.

⁹ Article 3 of the African Court Protocol.

¹⁰ Section 2.4.2 above.

A Litigation

The African Commission and the African Court are mandated to receive cases that relate to violations of the provisions of the African Charter¹¹ and, by extension, those of the Maputo Protocol as explained in the previous paragraphs. The African Court can further give advisory opinions ‘on any legal matter’ relating to the above-mentioned instruments, ‘provided the subject matter is not related to a matter being examined by the Commission’.¹² Since the Maputo Protocol is a legal instrument that requires states to provide resources to realise women’s human rights, both the African Commission and the African Court have jurisdiction in such disputes. Additionally, the African Court can give advisory opinions related to the provisions of the Maputo Protocol that refer to the allocation of sufficient budgetary resources to realise women’s human rights.

An analysis of the case database of the African Court¹³ reveals that as at 1 August 2016, the African Court has not dealt with any case that relates to the Maputo Protocol. Additionally, the African Court has not made reference to budgetary allocation of resources to realise human rights in its other cases. This demonstrates that African states, organs of the AU and NGOs¹⁴ have not used this platform to either advance women’s human rights or to require states to allocate sufficient budgetary resources to realise human rights generally.

Contrary to the African Court, the African Commission has made findings with respect to budgetary allocations and has required states to allocate resources more efficiently to address human rights violations, some of which are as follows: In the case of *Sudan Human*

¹¹ Articles 47 to 59 of the African Charter: In the event a state has violated the provisions of the African Charter, another state or individuals or organisations can submit a communication to the African Charter alleging such violations.

¹² Article 4 of the African Court Protocol.

¹³ Website of the African Court available at <http://www.african-court.org/en/index.php/2012-03-04-06-06-00/cases-status1> (accessed on 28 March 2016).

¹⁴ Article 5 of the African Court Protocol lists the parties which are entitled to submit cases to the African Court: ‘1. The following are entitled to submit cases to the Court a. The Commission b. The State Party which has lodged a complaint to the Commission c. The State Party against which the complaint has been lodged at the Commission d. The State Party whose citizen is a victim of human rights violation e. African Intergovernmental Organizations 2. When a State Party has an interest in a case, it may submit a request to the Court to be permitted to join. 3. The Court may entitle relevant Non-Governmental Organizations (NGOs) with observer status before the Commission, and individuals to institute cases directly before it, in accordance with article 34 (6) of this Protocol.

Rights Organisation & Centre on Housing Rights and Evictions (COHRE) v Sudan,¹⁵ the African Commission recommended Sudan to provide sufficient resources to various provinces to address the long-term sources of conflicts; in *Purohit and Moore v the Gambia*, the Gambia was recommended to take concrete steps, including 'taking full advantage of its available resources, to ensure that the right to health is fully realised in all its aspects without discrimination of any kind'.¹⁶ Despite the fact that the above decisions make reference to budgetary allocations, they do not assess the budget of the state concerned to determine what would be sufficient budgetary resources.

The lack of such an analysis at the African Commission level and the lack of cases which deal with budgetary allocations before the African Court might be a combination of different factors. These factors are studied in the following sub-sections.

(i) State sovereignty

Usually allocation of resources is a function of the 'executive and legislative arms of government'.¹⁷ Budgetary allocation provisions in the African Charter or the Maputo Protocol can be viewed as impeding upon the sovereignty of the state. Max Huber, arbitrator in the *Island of Palmas* case compared state sovereignty to independence,¹⁸ implying that interfering in the way a state is performing its functions is equivalent to impeding upon its independence. However, global, regional and sub-regional laws, such as the Maputo Protocol have provisions that influence a state's behaviour.

The clash between state sovereignty and international human rights law has led to the question as to whether international law, as it is, is the proper channel through which there can be protection of human rights at the domestic level.¹⁹ Many countries have used state

¹⁵ 279/03-296/05 paragraph 229(6).

¹⁶ 241/01 paragraph 84.

¹⁷ A Ntanjana 'Millennium Development Goals (MDGs) and Women- The implementation of article 10(3) of the Protocol on the Rights of Women in South Africa' (2011) 9 LLM Dissertation available at http://repository.up.ac.za/bitstream/handle/2263/18621/Ntanjana_Millennium%282011%29.pdf?sequence=1 (accessed on 10 August 2014).

¹⁸ *Island of Palmas* case 2 RIAA 838.

¹⁹ C Chinkin 'International law and human rights' in T Evans (ed) *Human rights fifty years on: A reappraisal* (1998) 106.

sovereignty as a shield from attacks concerning human rights violations in their territory.²⁰ Reisman took a new angle to sovereignty when he proposed that international law does not protect state sovereignty but extends to the protection of the sovereignty of the people inside the territory.²¹ Reisman's argument can be interpreted to mean that a state's sovereignty can be limited through treaties if it is for the protection of the sovereignty of the people inside the territory. Applying this reasoning to the different provisions of the Maputo Protocol that concern budgetary allocations to realise women's human rights, it can be extrapolated that a state's sovereignty can be limited in the area of budgetary allocations if it is in line with empowering the women of that state.

Furthermore, as highlighted in article 26 of the Vienna Convention on the Law of Treaties 1969 (Vienna Convention), states should perform the obligations set out in treaties in good faith.²² The principle of *pacta sunt servanda* that is considered as the 'heart' of the Vienna Convention is of application 'without exception to every treaty including its annexes and appendices'.²³ Additionally, by ratifying a treaty, it is presumed that states oblige themselves to respect the provisions therein. Simmons' theory of commitment has identified three types of ratifiers:²⁴ the sincere ratifier, the false negatives and the strategic ratifiers.²⁵ It can be argued that treaty ratification is the result of campaigns on behalf of civil society organisations (CSOs) and that such ratifications are just strategic ratifiers. Nevertheless, states are believed to be 'rationally expressive' when they are ratifying a treaty: they usually sign treaties they intend to comply with²⁶ and they can thus be considered as sincere ratifiers. Governments are believed to commit themselves to treaties because they

²⁰ F Ougergouz *The African Charter on Human and Peoples' Rights: A comprehensive agenda for human dignity and sustainable democracy in Africa* (2003) 2.

²¹ WM Reisman 'Sovereignty and human rights in contemporary international law' 84 *The American Journal of International Law* 4 (1990) 869.

²² Article 26 of the Vienna Convention: 'Every treaty in force is binding upon the parties to it and must be performed by them in good faith'.

²³ ME Villiger *Commentary on the 1969 Vienna Convention on the Law of Treaties* (2009) 365.

²⁴ BA Simmons *Mobilizing for human rights: International law in domestic politics* (2009) 58.

²⁵ EM Hafner-Burton & K Tsutsui 'Human rights in a globalizing world: The paradox of empty promises' 110 *American Journal of Sociology* 5 (2005) 1373: Sincere ratifiers are those who sign the treaties in good faith and who intend to implement the provisions of the treaty. False negatives are not ratifiers of a treaty despite the fact that their domestic laws provide for the protection of the rights provided therein. Finally, the strategic ratifiers are those who ratify just to go with the flow and to avoid criticisms. They do not really understand the long term implication of the ratification.

²⁶ Simmons (n 24 above) 64.

'genuinely support the content of those treaties'.²⁷ This is so because states participate in the negotiation process of a treaty and most of the provisions reflect the will and preferences of the states. Despite the fact that CSOs influence the drafting of a treaty, there still needs to be a minimum number of states that have to sign for a treaty to be adopted or to enter into force.²⁸ Furthermore, states can enter into reservations to a treaty in the event they do not intend to comply with some specific provisions in terms of section 2 of the Vienna Convention on the Law of Treaties.

Therefore, when a state is ratifying a treaty, it has to abide by the obligations therein in good faith and cannot make reference to state sovereignty when they are not abiding by such obligations. Similarly, when a state ratifies any treaty that provides for budgetary allocations to realise women's human rights, they have the obligation to structure their budget in a manner that gives effect to such provisions.

In addition to the above argument, ratification of treaties can be considered as states giving the international community 'whips to flagellate themselves with'.²⁹ As such, by ratifying the Maputo Protocol and other global, regional and sub-regional instruments that provide for budgetary allocations for human rights, a state is giving up its absolute state sovereignty and allowing the global, regional and sub-regional institutions to hold it responsible when it is not abiding by its obligations.

The above arguments establish that the African Commission and the African Court must not hesitate to intervene in cases of budgetary allocations of resources to realise women's human rights. Once a country has ratified the Maputo Protocol, it has agreed to have an oversight on its budgetary allocations for the realisation of women's human rights.

(ii) Exhaustion of local remedies

Both the African Commission and the African Court have the exhaustion of local remedies requirement before receiving a case. Articles 50 and 56(5) of the African Charter provide

²⁷ As above.

²⁸ Articles 9 and 24 of the Vienna Convention on the Law of Treaties.

²⁹ AM Clark *Diplomacy of conscience: Amnesty international and changing human rights norms* (2001) 4: Nigel Rodley, former legal adviser of Amnesty International and (at the time of writing) UN Special Rapporteur on Torture 1993: 'Why do states give us these whips to flagellate themselves with.'

that a communication is admissible before the African Commission if it is 'sent after exhausting local remedies, if any, unless it is obvious that this procedure is unduly prolonged'. Concerning disputes to be received by the African Court, article 6 of the African Court Protocol refers to the conditions in article 56 of the African Charter. Consequently, the African Court Protocol also requires parties to exhaust local remedies before approaching the African Court.

A local remedy has been defined as 'any domestic legal action that may lead to the resolution of complaint at the local or national level'.³⁰ The exhaustion of local remedies is the most 'contested' conditions for a communication to be admissible before the African Commission.³¹ The rule of exhaustion of local remedies is part of customary law and ensures that states are afforded an opportunity to hear the dispute before it is brought at the international level.³² Such a procedure ensures that the domestic and international jurisprudence do not contradict with each other.³³

As such, the African Commission and the African Court cannot hear a case about budgetary allocation of resources for women's human rights unless local remedies have been exhausted. As demonstrated in chapter four of this research, the judiciary is usually reluctant to interfere in cases of budgetary allocations due to the doctrine of separation of powers.³⁴ However, chapter four also elaborated on cases where the judiciary did not hesitate to intervene in the event budgetary allocations were not sufficient to realise human rights. It further recommended courts across Africa to adopt a progressive interpretation of the laws to include provision of sufficient budgetary resources to realise human rights.

Therefore, courts across Africa are recommended to intervene in cases of insufficient budgetary allocation of resources. If either the African Court or the African Commission is seized with a case concerning budgetary allocation of resources for women's human rights and that the domestic courts have refused to intervene due to the doctrine of separation of

³⁰ *Constitutional Rights Project [CRP] v. Nigeria*, Communication No. 60/91

³¹ NJ Udombana 'So Far, So Fair: The Local Remedies Rule in the Jurisprudence of the African Commission on Human and Peoples' Rights' (2003) 1 97 *The American Journal of International Law* 2.

³² *Interhandel (Switzerland v US)*, Preliminary Objections ICJ (21 March 1959) ICJ Reports 6 27.

³³ *SERAC v. Nigeria*, Communication No. 155/96, para 37.

³⁴ Section 4.1.1(C) above.

powers, the formers are recommended to consider the local remedies unavailable, ineffective and inadequate.³⁵ Such an approach will ensure that the exhaustion of local remedies rule does not become an impediment for women across the continent to benefit from sufficient budgetary resources to realise their rights.

Having established that the African Court and the African Commission can intervene in cases of budgetary resource allocation to realise women's human rights, the research now studies the steps that these two institutions can take during litigation to ensure that African countries adopt gender budgeting.

(iii) Using litigation to influence the adoption of gender budgeting

The above sub-sections have demonstrated that there are challenges to litigate issues concerning the provision of budgetary resources to realise women's human rights before the African Commission and the African Court. They have nevertheless demonstrated that these challenges can be overcome if the African Commission or the African Court adopt a progressive interpretation of the law and relax the rule of exhaustion of local remedies concerning cases of budgetary allocations. The focus of this research is the adoption of gender budgeting as a step to allocate sufficient budgetary resources to realise women's human rights. Having established that the African Commission and the African Court can intervene in cases of budgetary resource allocations, this sub-section studies the ways in which these institutions can influence the adoption of gender budgeting during the litigation process.

To begin with, different parties, including CSOs, are recommended to seize either the African Court or the African Commission with cases against countries where women's human rights are violated due to insufficient budgetary resources. The African Court or the African Commission, when deciding on the case, can require states to adopt gender budgeting as a means to allocate sufficient budgetary resources to realise women's human rights. Such a step will act as a precedent to demonstrate that the institution considers gender budgeting as a means to provide sufficient budgetary resources to realise women's human rights.

³⁵ *Jawara v The Gambia* (2000) AHRLR 107 (ACHPR 2000) para 32: 'only domestic remedies that are available, effective, and adequate ... need to be exhausted'.

Bearing this decision in mind, African states will try to include gender budgeting in its gender budgeting process in order to avoid litigation before the African Court or the African Commission on the ground that they have not considered women's human rights in the resource allocation process.

Furthermore, relevant parties can act under article 4 of the African Court Protocol and request for an advisory opinion in relation to those articles of the Maputo Protocol which make reference to budgetary allocations. They can request the African Court to decide whether those articles implicitly require states to adopt gender budgeting to provide sufficient resources to realise women's human rights. The African Court is then recommended to have a purposive interpretation of the provisions of the Maputo Protocol to include gender budgeting as part of the obligations of its articles which require budgetary allocations to realise women's human rights.

In addition to the above, the African Court and the African Commission can introduce a gender lens while dealing with cases of human rights violations. This gender lens will allow them to do an analysis of whether sufficient budgetary resources have been allocated to realise women's rights. Such a practice will ensure that gender issues are mainstreamed in the jurisprudence of the African Commission or the African Court and that states consistently apply gender budgeting to demonstrate that they have taken women's human rights into account in the resource allocation process.

Therefore, the African Court and the African Commission are both recommended to adopt a gender lens in their decision making processes. They have to flex the rules of state sovereignty and exhaustion of local remedies in cases concerning budgetary allocation of resources for women's human rights for the reasons explained in this sub-section. They are also recommended to make constant reference to the adoption of gender budgeting as a means to allocate sufficient budgetary resources to realise women's human rights across Africa.

B State reports

Article 62 of the African Charter imposes an obligation on states to submit a report to the African Commission every two years on the 'legislative or other measures' adopted to realise the rights therein. The state reporting procedure is a 'forum for constructive dialogue' where the African Commission can 'monitor implementation' of the African Charter and 'identify challenges' which arise in the implementation of the provisions of the African Charter.³⁶ The African Commission formulates concluding observations after considering the state reports³⁷ which are 'recommendations to guide improvements' of a state's performance.³⁸

The African Commission can ensure the adoption of gender budgeting through the state reporting process.³⁹ In execution of the mandate of the Special Rapporteur on the Rights of Women in Africa (Special Rapporteur) to 'define guidelines for State reporting in order to bring Member States to address adequately women's rights issues in their periodic and/or initial reports submitted to the African Commission',⁴⁰ the African Commission, with the support of the Centre for Human Rights of the University of Pretoria, issued guidelines on state reporting under the Maputo Protocol in 2009 (guidelines on state reporting).⁴¹

In addition to a brief background on the budgetary steps to give effects to the rights in the Maputo Protocol, the guidelines on state reporting require the state to give information about gender budgeting initiatives in the country. Furthermore, countries have to elaborate on the administrative measures they have taken, including budgetary allocations, to implement specific provisions of the Maputo Protocol.⁴²

These provisions demonstrate that the African Commission has recognised the importance of gender budgeting as a means to provide resources to realise women's human rights. States

³⁶ Website of the African Commission 'State reporting' available at <http://www.achpr.org/states/> (accessed on 12 May 2016).

³⁷ Rule 77 of the Rules of Procedure of the African Commission.

³⁸ Viljoen 2012 (n 1 above) 365.

³⁹ Article 26(1) of the Maputo Protocol; and article 62 of the African Charter.

⁴⁰ Website of the African Commission available at <http://www.achpr.org/mechanisms/rights-of-women/about/> (accessed on 23 March 2016).

⁴¹ Website of the Centre for Human Rights available at http://www.chr.up.ac.za/images/files/research/gender/documents/gender_expert_meeting_state_reporting_guidelines.pdf (accessed on 23 March 2016).

⁴² Guidelines on state reporting 2.

therefore have to expand upon the steps they have taken to integrate gender budgeting in their budgeting processes. Recently, South Africa presented its second periodic report covering the period 2003-2014 to the 58th ordinary session of the African Commission held on 6-20 April 2016.⁴³ This report made reference to the past WBIs and to the initiatives by the Fiscal and Financial Commission in South Africa in 2012 to analyse the gender responsiveness of local budgets.⁴⁴ The Fiscal and Financial Commission analysed the Integrated Development Plans of 30 municipalities from a gender perspective and evaluated the gender sensitiveness of seven local government budgets.⁴⁵

However, Namibia's report⁴⁶ and Mali's report,⁴⁷ also submitted for consideration during the 58th ordinary session of the African Commission, did not mention the gender budgeting initiatives in the different countries. Similarly, previous reports submitted to the African Commission subsequent to the entry into force of the Maputo Protocol do not elaborate on the steps taken to give effect to the provisions concerning the provision of budgetary allocation.⁴⁸ Nevertheless, some of the reports do mention the budgetary allocations towards areas such as health, education and women empowerment.⁴⁹

The African Commission has, in its concluding observations, made reference to the adoption of budgetary measures to realise women's human rights. In relation to areas of 'practices such as harmful traditional practices, birth registration, child labour, refugee children and

⁴³ Website of the African Commission available at <http://www.achpr.org/states/south-africa/> (accessed on 25 May 2016).

⁴⁴ Republic of South Africa's second periodic report to the African Commission 151 available at http://www.achpr.org/files/sessions/58th/state-reports/2nd-2002-2015/staterep2_southafrica_2003_2014_eng.pdf (accessed on 25 May 2016).

⁴⁵ As above.

⁴⁶ Namibia's sixth periodic report (2011-2014).

⁴⁷ Mali's periodic report (2001-2011).

⁴⁸ All the reports submitted to the African Commission can be accessible on the African Commission's website at <http://www.achpr.org/states/reports-and-concluding-observations/> (accessed on 22 May 2016).

⁴⁹ Algeria's fifth and sixth periodic reports (2010-2014); Republic of Angola's second periodic report (1999-2010); Burundi's second periodic report (2001-2010); Burkina Faso's third and fourth periodic report (2011-2015); Cameroon's third periodic report (2008-2011); Côte d'Ivoire's initial and combined reports (1994-2012); Djibouti's initial and combined reports (1993-2013); Ethiopia's fifth and sixth periodic report (2008-2013); Kenya's combined eighth-eleventh periodic report (2008-2014); Second and combined periodic reports of Niger (2003-2014); Nigeria's fifth periodic report (2011-2014); Senegal's combined periodic report (2004-2013); Sierra Leone's initial and combined reports (1983-2013); and Zimbabwe's seventh to tenth periodic report (1996-2006).

juvenile justice',⁵⁰ the African Commission has recommended Ethiopia to 'take the necessary steps' to adopt legislative measures to address 'concerns regarding resources allocation' to prevent such practices.⁵¹ This implies that the state is recommended to allocate budgetary resources to realise human rights.

State reports to the African Commission need to highlight other measures apart from legislative measures adopted by states to give effect to the rights provided by the African Charter.⁵² States need to illustrate the 'practical steps' adopted to implement the laws.⁵³ They are required to take affirmative actions⁵⁴ and to ensure that there is a gender dimension in all the 'programmes, structures and activities' they are adopting.⁵⁵ These steps and actions can be interpreted to include budgetary resource allocation.

Concerning the promotion and protection of human and peoples' rights provided by the African Charter, the African Commission has recommended that states provide 'adequate and comprehensive statistical information and disaggregated data in relation to various assertions made'.⁵⁶ A similar concern was raised in the concluding observations for Togo where the African Commission highlighted that the state report does not provide any 'sufficient gender disaggregated data'.⁵⁷ Emphasising on gender-disaggregation, the African

⁵⁰ African Commission concluding observations on the initial, second, third and fourth report of Ethiopia adopted during its 47th ordinary session (12 -26 May 2010) paragraph 71.

⁵¹ As above.

⁵² African Commission concluding observations on the third and fourth periodic reports of Algeria adopted during its 42nd ordinary session (14-28 November 2007) paragraph 16; African Commission concluding observations on the second to 10th periodic reports of Tanzania adopted during its 43rd ordinary session (7 – 22 May 2008) paragraph 5.

⁵³ African Commission concluding observations on the consolidated periodic report of Tunisia adopted during its 42nd ordinary session (14 -28 November 2007) paragraphs 16 and 27.

⁵⁴ African Commission concluding observations on the initial and combined reports of Gabon adopted during its 15th extraordinary session (7 – 12 March 2014) paragraph 66(xvii).

⁵⁵ African Commission concluding observations on the second periodic report of Sudan adopted during its 35th ordinary session (21 May – 4 June 2004) paragraph 25; African Commission concluding observations on the seventh periodic report of Rwanda adopted during its 36th ordinary session (23 November – 7 December 2004) paragraph 27; African Commission concluding observations on the initial report of Niger adopted during its 35th ordinary session (21 May – 4 June 2004) paragraph 23; African Commission concluding observations on the third periodic report of Libya adopted during its 39th ordinary session (11 – 25 May 2006) paragraph 18.

⁵⁶ African Commission concluding observations made on the fourth periodic report of Uganda adopted during its 49th ordinary session (28 April to 28 May 2011) paragraph 15(xvii).

⁵⁷ African Commission concluding observations on the third, fourth and fifth periodic reports of Togo adopted during its 51st ordinary session (18 April – 2 May 2012) paragraph 40; African Commission concluding observations on the fourth and fifth periodic reports of Sudan adopted during its 12th extra-ordinary session (29 July – 4 August 2012) paragraphs 35 and 71; African Commission concluding observations on the initial

Commission has commended Nigeria since it had provided gender-disaggregated data in its state report.⁵⁸

The African Commission analyses the information provided in the budget of a country to derive whether the state is committed towards the realisation of the rights protected by the African Charter.⁵⁹ For instance, it expressed concern about the drop in the percentage of allocation to the health budget in its concluding observations for Angola.⁶⁰ Thus, the African Commission has required state reports to be inclusive of figures concerning budgetary allocations for the realisation of human rights.

References to budgetary allocations in state reports imply that states traditionally do consider budgetary allocations as measures to implement the rights in the African Charter or the Maputo Protocol. Nevertheless, they have not given details about budgetary allocations for women's human rights. There is thus a need for the African Commission to draw more attention to the provisions of the guidelines on state reporting which require states to adopt gender budgeting. In the past ordinary sessions of the African Commission, the Special Rapporteur, in collaboration with the Centre for Human Rights, have been holding side sessions to popularise the guidelines on state reporting. These side sessions focus on the popularisation of the guidelines without going in details in any particular provisions. The Special Rapporteur can use this platform to highlight the importance of gender budgeting initiatives in the state report.

Moreover, the African Commission can seek clarifications on gender budgeting initiatives during the state reporting process under rule 75(3) of the Rules of Procedure of the African Commission.⁶¹ This will act as a precedent that the African Commission expects states to

and combined periodic reports of Gabon adopted during its 15th extraordinary session (7 – 12 March 2014) paragraph 65.

⁵⁸ African Commission concluding observations made on the fifth periodic report of the Federal Republic of Nigeria adopted during its 57th ordinary session (4-18 November 2015) 3.

⁵⁹ African Commission concluding observations on the third periodic report of Cameroon adopted during its 15th extraordinary session (7 – 14 March 2014) paragraph 23.

⁶⁰ African Commission concluding observations on the second, third, fourth and fifth periodic reports of Angola adopted during its 12th extraordinary session (30 July – 4 August 2012) paragraph 32.

⁶¹ Rule 75(3) of the Rules of Procedure of the African Commission: 'Representatives of States Parties shall respond to the questions prepared by the Commission, and questions of the members of the Commission and provide when necessary, any other information requested during or after the session'.

elaborate on their gender budgeting initiatives in their state reports and will act as an incentive for states to adopt gender budgeting.

Additionally, in the context of gender budgeting, the African Commission may apply Rule 74(3) of the Rules of Procedure of the African Commission where the Secretary may 'invite specific institutions to submit information [on gender budgeting] relating to the state report'. This can supplement the state report and provide for challenges that gender budgeting face in the state under review thus enabling the African Commission to formulate questions to the state on gender budgeting initiatives. Furthermore, CSOs are encouraged to submit shadow reports under Rule 74(2) of the Rules of Procedure of the African Commission. Such shadow reports must point out the challenges the state is facing concerning the adoption of gender budgeting and can formulate questions and recommendations that the African Commission may transmit to the state being considered.

The African Commission can raise more awareness around the concept of gender budgeting in its concluding observations. The African Commission has made reference to budgetary allocations in its concluding observations without express mention of gender budgeting. It is recommended that the African Commission does so in the future while making reference to the proposed framework on gender budgeting developed in chapter four of this thesis.⁶² The Special Rapporteur, who is the focal point for women's human rights in Africa, has to ensure that gender budgeting is included as a means to allocate sufficient budgetary resources to realise women's human rights in the concluding observations of the African Commission. The African Commission must also do regular follow-ups of the concluding observations to ensure that states implement the recommendations concerning gender budgeting.⁶³

C Investigations, studies and research

Article 45(1)(a) of the African Charter provides that the African Commission has the following function:

To collect documents, undertake studies and researches on African problems in the field of human and peoples' rights, organize seminars, symposia and conferences, disseminate information,

⁶² Section 4.6 above.

⁶³ Rule 78 of the Rules of Procedure of the African Commission.

encourage national and local institutions concerned with human and peoples' rights, and should the case arise, give its views or make recommendations to Governments.

As such, the African Commission has to undertake studies and research in the area of human rights. This article can be applied for studies and research for women's human rights. For instance, during the 16th extraordinary session of the African Commission, there was a resolution passed to the effect that a study would be conducted by the African Commission on child marriage, the report of which would be adopted during its 57th ordinary session.⁶⁴

The African Commission can act under this article to undertake studies and research in relation to gender budgeting. These studies and research will be based on the articles of the Maputo Protocol which provide for budgetary allocations to realise women's human rights. Furthermore, the African Commission has to popularise the concept of gender budgeting and has to give its views and recommendations to governments about the adoption of gender budgeting.

Moreover, the African Commission can carry investigations under article 46 of the African Charter. The African Charter does not define the scope and different methods of investigation⁶⁵ but the Rules of Procedure of the African Commission adopted in 2010 (Rules of Procedure) state that the African Commission may invite 'specialized agencies, intergovernmental organisations and United Nations bodies' to 'submit reports on the implementation of the African Charter in areas of common concern'.⁶⁶ As highlighted above, the Maputo Protocol falls within the scope of the African Charter and as such, the African Commission may conduct investigations on the provisions of the Maputo Protocol, including its articles which make reference to budgetary allocations for women's human rights.

Such investigations, studies and research must elaborate on the concept of gender budgeting and the positive relationship that it shares with the realisation of women's human rights.

⁶⁴ African Commission 'Resolution on the need to conduct a study on child marriage in Africa' adopted during the 16th extraordinary session of the African Commission (20-29 July 2014).

⁶⁵ CA Odinkalu & C Christensen 'The African Commission on Human and Peoples' Rights: The development of its non-state communication procedures' 20 (1998) *Human Rights Quarterly* 2 242.

⁶⁶ Rule 65(3) of the Rules of Procedure

Additionally, they can make reference to the framework on gender budgeting in chapter four⁶⁷ to guide African states in their gender budgeting initiatives.

D Resolutions, general comments and guidelines

Article 45(1)(b) of the African Charter mandates the African Commission to ‘formulate and lay down, principles and rules aimed at solving legal problems relating to human and peoples’ rights and fundamental freedoms upon which African Governments may base their legislations’. The African Commission has executed this mandate by adopting guidelines, resolutions and general comments on different human rights issues, including women’s human rights.

In the first instance, it is recommended that the African Commission make reference to gender budgeting as a means to realise women’s human rights in their resolutions and general comments which concern women’s human rights. Secondly, the African Commission can adopt a resolution on the adoption of gender budgeting as a means to comply with the obligation to allocate sufficient budgetary resources to realise women’s human rights in Africa. This resolution will bring focus on the issue of allocation of financial resources to realise women’s human rights.

Thirdly, the African Commission can adopt general comments under articles 4(2)(i), 10(3) and 26 of the Maputo Protocol to expand upon the nature and scope of these articles. This will assist African states in understanding their obligations under those articles. This general comment can elaborate on the specific steps that states are required to take to ensure there is sufficient budgetary allocation to realise women’s human rights, including the adoption of gender budgeting.

Fourth, it is recommended that the African Commission adopt guidelines on gender budgeting to give effect to the general comments adopted on budgetary allocation to realise women’s human rights. These guidelines can be inspired from the framework proposed in section 4.6 of this research, which is inspired by the analysis of the SADC guidelines and the South African initiatives. As it is, the SADC gender budgeting guidelines are the only

⁶⁷ Section 4.6 above.

framework that guide SADC states in the adoption of gender budgeting. However, they apply to only SADC member states and although the African Commission inspire itself from the SADC guidelines,⁶⁸ chapter four has demonstrated that they are not lacking in some aspects. The guidelines to be adopted by the African Commission have to be comprehensive and elaborate on the steps to be taken by states in order to be effective. As such, they have to tackle the shortcomings of the SADC guidelines. Since the framework proposed in section 4.6 above already addresses these challenges, the guidelines to be adopted by the African Commission can be modelled after it.

E The Special Rapporteur on the Rights of Women in Africa

The African Commission established the special mechanism of the Special Rapporteur in 1999 to ensure that women's human rights receive sufficient attention while it is exercising its functions under article 45(1)(a) of the African Commission.⁶⁹ The following paragraphs analyse the role of the Special Rapporteur in ensuring that countries adopt gender budgeting with the view of realising their obligations to allocate sufficient resources to realise women's human rights.

The Special Rapporteur's mandates concentrate on the realisation of women's human rights in Africa. The Special Rapporteur has to 'assist African governments in the development and implementation of their policies of promotion and protection of the rights of women in Africa, particularly in line with the domestication' of the Maputo Protocol and 'the general harmonization of national legislation to the rights guaranteed' therein.⁷⁰ The Special Rapporteur must further 'undertake promotional and fact finding missions' in African

⁶⁸ Article 60 of the African Charter: 'The Commission shall draw inspiration from international law on human and peoples' rights, particularly from the provisions of various African instruments on human and peoples' rights, the Charter of the United Nations, the Charter of the Organization of African Unity, the Universal Declaration of Human Rights, other instruments adopted by the United Nations and by African countries in the field of human and peoples' rights as well as from the provisions of various instruments adopted within the Specialized Agencies of the United Nations of which the parties to the present Charter are members.'

⁶⁹ African Commission 'Resolution on the Designation of the Special Rapporteur on the Rights of Women in Africa' ACHPR/res.38 (XXV) 99 (1999) paragraph 4: 'Referring to the provisions of article 45.1(a) of the African Charter on Human and Peoples' Rights'.

⁷⁰ Website of the African Commission available at <http://www.achpr.org/mechanisms/rights-of-women/about/> (accessed on 17 March 2016).

countries⁷¹ to ‘disseminate’ the provisions of the Maputo Protocol and to ‘investigate on the situation of women’s rights’.⁷²

Being a Commissioner of the African Commission, the Special Rapporteur usually takes part in the fact-finding or promotion mission of the African Commission without undertaking the mission on its own. For instance, from 25 to 31 May 2015, the Special Rapporteur participated in a joint human rights promotion mission to Djibouti with the then Commissioner who was responsible for the country and the mechanism of the Special Rapporteur on Refugees.⁷³ Additionally, from 15 to 23 July 2015, the Special Rapporteur conducted a joint human rights promotion mission to Cape Verde with the then Commissioner responsible for human rights of the country.⁷⁴ The report of these missions is not public although the inter-session activity report of the Special Rapporteur highlights the issues discussed. Budgetary allocation of resources was not part of the main issues discussed during those missions.

The previous reports of promotional and fact finding missions that are public are those of Sudan, Angola, Djibouti, Nigeria and Côte d’Ivoire.⁷⁵ All these missions were done prior to the entry into force of the Maputo Protocol. Nevertheless the mission reports made reference to budgetary allocations. For instance, the Angolan government was recommended to ‘prepare annual pro-gender budget’⁷⁶ and the government of Sudan was recommended to ‘[e]ncourage and provide financial assistance to NGOs working in the field of the fight against FGM’.⁷⁷ These recommendations demonstrate that even prior to the entry into force of the

⁷¹ See the activity reports of the Special Rapporteur for information about the missions undertaken available at <http://www.achpr.org/mechanisms/rights-of-women/> (accessed on 17 March 2016).

⁷² As above.

⁷³ Inter-session report by the Special Rapporteur to the 57th ordinary session of the African Commission (4-18 November 2016) 3.

⁷⁴ As above 3-4.

⁷⁵ See the activity reports of the Special Rapporteur for information about the missions undertaken available at <http://www.achpr.org/mechanisms/rights-of-women/>

⁷⁶ African Commission ‘Report of the mission to the Republic of Angola by Commissioner Angela Melo, Special Rapporteur on the Rights of Women in Africa’ (27 September-2 October 2002) ACHPR/37/OS/11/440/Draft 22 available at http://www.achpr.org/files/sessions/38th/mission-reports/angola/achpr38_misrep_specmec_women_angola_2005_eng.pdf (accessed on 23 May 2016).

⁷⁷ African Commission ‘Promotional mission report of Commissioner Angela Melo, Special Rapporteur on the Rights of Women in Africa in the Republic of Sudan’ (30 March-4 April 2003) 27 available at http://www.achpr.org/files/sessions/38th/mission-reports/sudan/achpr38_misrep_specmec_women_sudan_2003_eng.pdf (accessed on 23 May 2016)

Maputo Protocol, the Special Rapporteur recognised insufficient budgetary allocations as a challenge to realise women's human rights.

The intersession reports presented to the African Commission by the Special Rapporteur indicate that the latter has made reference to budgetary allocation of resources for women's human rights during her interventions on several occasions. Some of them are as follows: African states were recommended to 'allocate financial resources' required for the implementation of conflict prevention programmes and activities';⁷⁸ States parties to the Maputo Protocol were recommended to allocate sufficient financial resources to ensure that women and girls have greater access to education;⁷⁹ On the occasion of the 100th anniversary of the international women's day in 2011, states were reminded to 'allocate more financial resources to national and regional programmes being implemented to promote the greater access of Women and Girls to Education, Science and Technology';⁸⁰ and in the context of the African Women Decade 2010-2020, states were recommended to ensure 'that sufficient budgetary resources are allocated to significantly reduce gaps in the implementation of laws, programs, policies, and development and national plans of actions'.⁸¹ Recently, in the activity report presented to the 58th ordinary session of the African Commission states were

⁷⁸ Intersession report presented during the 57th Ordinary Session of the African Commission (n 73 above) 12; Intersession report of the Special Rapporteur on the Rights of Women in Africa presented during the 56th Ordinary Session of the African Commission 21 April-7 May 2015 12 available at http://www.achpr.org/files/sessions/56th/inter-act-reps/223/56os_intersession_report_rights_of_women_comm_maiga_en.pdf (accessed on 21 March 2016); and Intersession report of the Special Rapporteur on the Rights of Women in Africa presented during the 55th Ordinary Session of the African Commission 28 April-12 May 2014) available at <http://www.achpr.org/sessions/55th/intersession-activity-reports/rights-of-women/> (accessed on 21 March 2016).

⁷⁹ Intersession report of the Special Rapporteur on the Rights of Women in Africa presented during the 52nd Ordinary Session of the African Commission 9-22 October 2012 17 available at http://www.achpr.org/files/sessions/52nd/inter-act-reps/187/activity_report_sp_women_rights_eng.pdf (accessed on 21 March 2016).

⁸⁰ Intersession report presented during the 49th Ordinary Session of the African Commission 28 April-12 May 2011 9 available at http://www.achpr.org/files/sessions/49th/inter-act-reps/soyata-maiga/achpr49_comrep_2011_maiga_eng.pdf (accessed on 21 March 2016).

⁸¹ Intersession report of the Special Rapporteur on the Rights of Women in Africa presented during the 48th Ordinary Session of the African Commission (November 2010) 13 available at http://www.achpr.org/files/sessions/48th/inter-act-reps/soyata-maiga/achpr48_comrep_2010_maiga_eng.pdf (accessed on 21 March 2016).

generally recommended to '[p]rovide adequate budgetary allocations to address women's human rights violations'.⁸²

The Special Rapporteur has also collaborated with other institutions in the area of women's human rights.⁸³ For instance, from 14 to 24 March 2016, the Special Rapporteur on the Rights of Women in Africa, Commissioner Lucy Asuagbor, participated in the 60th session of the Commission on the Status of Women⁸⁴ at the Headquarters of the United Nations in New York.⁸⁵ During that meeting, she made presentations on 'African women changing the narrative: Celebrating Africa year for women 2016' and on 'the status of implementation of the Maputo Protocol'. From the activity report of the Special Rapporteur it seems like no mention was made of budgetary allocations. It is recommended that the Special Rapporteur use these platforms to present gender budgeting as a means to allocate sufficient budgetary resources to realise women's human rights.

Moreover, the Special Rapporteur may undertake comparative studies on different women's human rights issues across the continent. In line with this mandate, the Special Rapporteur finalised a regional study on 'Sexo-specific discriminatory provisions and gaps in terms of Gender Equality in the national legislations of ECOWAS member States' in 2009.⁸⁶ This study found that women lack sufficient budgetary resources aimed at satisfying 'their specific needs'.⁸⁷ The mechanism of the Special Rapporteur can use these avenues to recommend

⁸² Report to the 58th ordinary session 12.

⁸³ Article 45(1)(c) of the African Charter requires the African Commission to '[c]o-operate with other African and international institutions concerned with the promotion and protection of human and peoples' rights'

⁸⁴ Website of UN Women available at <http://www.unwomen.org/en/csw> (accessed on 22 March 2016): The CSW 'is the principal global intergovernmental body exclusively dedicated to the promotion of gender equality and the empowerment of women. A functional commission of the Economic and Social Council (ECOSOC), it was established by Council resolution 11(II) of 21 June 1946. The CSW is instrumental in promoting women's rights, documenting the reality of women's lives throughout the world, and shaping global standards on gender equality and the empowerment of women.

⁸⁵ Intersession report of the Special Rapporteur on the Rights of Women in Africa presented during the 58th Ordinary Session of the African Commission (6-20 April 2016) 6-7.

⁸⁶ Intersession report of the Special Rapporteur on the Rights of Women in Africa presented during the 46th Ordinary Session of the African Commission paragraphs 39-48 available at http://www.achpr.org/files/sessions/46th/inter-act-reps/132/achpr46_specmec_women_actrep_2009_eng.pdf (accessed on 21 March 2016).

⁸⁷ As above.

countries to adopt gender budgeting as a means to allocate sufficient budgetary resources to realise women's human rights.

The Special Rapporteur has to further collaborate with other stakeholders in the dissemination of the provisions of the Maputo Protocol. On many occasions the Special Rapporteur has made reference to budgetary allocations to realise women's human rights in her interventions with other stakeholders. For instance, during a discussion panel on 'Sexual and reproductive rights and gender equality', the then Special Rapporteur urged member states to include sufficient financial resources in their national budgets' to realise the sexual and reproductive rights of women across Africa.⁸⁸ Furthermore, during a consultative dialogue with CSOs on the AU campaign to end child marriage, countries were recommended to 'provide adequate resources to strengthen programmes for the sensitization and training of legal practitioners and community and religious leaders on women's rights'.⁸⁹

The above examples demonstrate that the Special Rapporteur on the Rights of Women has emphasised the allocation of sufficient financial resources to realise women's human rights during the budgeting process. However, references to the allocation of sufficient financial resources were mostly made in the context of the realisation of other rights provided in the Maputo Protocol and not with specific focus on the obligation to allocate sufficient financial resources. This gives the impression that the obligation to provide sufficient financial resources to realise women's human rights is secondary since it is most of the times referred to in the context of a specific right in the Maputo Protocol.

The Special Rapporteur therefore has to put the provision of budgetary resources on the forefront to ensure that states do so while targeting women's human rights generally and not only in the context of specific rights. The following paragraphs elaborate on the steps that the Special Rapporteur on the Rights of Women can adopt in favour of the adoption of gender budgeting.

⁸⁸ Intersession report of the Special Rapporteur on the Rights of Women in Africa presented during the 57th Ordinary Session of the African Commission 4-18 November 2015 6 available at http://www.achpr.org/files/sessions/57th/inter-act-reps/234/57os_intersession_report_women_eng.pdf (accessed on 17 March 2016).

⁸⁹ Activity report presented during the 57th Ordinary Session of the African Commission (n 73 above) 8.

From the intersession reports, it seems that the Special Rapporteur has not undertaken any promotional or fact-finding mission in relation to solely the mechanism after the entry into force of the Maputo Protocol. It is recommended that in line with its mandate, the Special Rapporteur undertake promotional and fact-finding missions to different African countries where the importance of the allocation of sufficient financial resources will be highlighted. In this vein, the Special Rapporteur can engage states on gender budgeting initiatives and emphasise on the role that gender budgeting has in ensuring that sufficient financial resources are provided to realise women's human rights.

Moreover, it is recommended that the Special Rapporteur undertake studies and prepare reports on the adoption of gender budgeting as a means to comply with the obligation to provide financial resources to realise women's human rights. These studies and reports must be addressed to states, the African Commission and other relevant stakeholders and must elaborate on steps that have to be undertaken to ensure that gender budgeting becomes integral to the budgeting process.

Finally, the Special Rapporteur, while collaborating with other relevant stakeholders in the dissemination of the provisions of the Maputo Protocol, can highlight the articles therein which relate to the provision of budgetary resources to realise women's human rights. It can present gender budgeting as a means to realise this obligation while making reference to the link between gender budgeting and the realisation of women's human rights. Furthermore, the mechanism of Special Rapporteur can ensure that other relevant stakeholders include gender budgeting as one of their agenda by recommending those with focus on gender budgeting to donors and financial partners. This will act as a motivation for other stakeholders to integrate gender budgeting as one of their objectives.

This sub-section has studied the means through which the judicial and human rights institutions of the AU can influence the adoption of gender budgeting in different African countries. It focused on institutions such as the African Court and the African Commission. It further analysed the role of state reports, investigations, studies and research, resolutions, general comments and guidelines, and the Special Rapporteur in the adoption of gender budgeting.

5.1.2 The African Union Commission

The AU Commission is the Secretariat of the AU⁹⁰ and operates as its 'functional heart'.⁹¹ It is responsible for its 'day-to-day management' of the AU and in addition to its different functions, it has to ensure that gender is mainstreamed in all 'programmes and activities' of the AU.⁹² The AU Commission has undertaken several steps to ensure that the programmes and activities of the AU are mainstreamed.

One such instance is the first African Girls Summit on ending child marriage in Africa,⁹³ in collaboration with the Government of the Republic of Zambia in November 2015. Apart from reference to '[d]evelop multi-sectoral partnerships to mobilise resources for national and community level initiatives to eliminate child marriage' the outcome statement of the summit did not make any mention of resource allocations in the budget to eliminate child marriage.⁹⁴

Furthermore, paragraph 12 of the Declaration on Gender Equality requires states to submit an annual report to the Chairperson of the AU Commission who will transfer the report to the AU Summit.⁹⁵ Paragraph 13 of the Declaration on Gender Equality requires the Chairperson of the AU Commission to present the annual report to the Executive Council of the AU on the measures taken to give effect to the provisions of the Declaration on Gender Equality. The report of the Chairperson of the AU of 2012⁹⁶ concluded that there are not enough resources which are being allocated to give effect to 'gender equality programmes'.⁹⁷

⁹⁰ Article 20 of the Constitutive Act of the AU.

⁹¹ Viljoen 2012 (n 1 above) 191.

⁹² Website of the AU 'AU in a nutshell' available at <http://www.au.int/en/about/nutshell> (accessed on 29 March 2016).

⁹³ Website of the AU 'First African girls' summit on ending child marriage in Africa' available at <http://www.au.int/en/newsevents/19343/first-african-girls%E2%80%99-summit-ending-child-marriage-africa> (accessed on 30 March 2016).

⁹⁴ Outcome statement of the first African girls' summit on ending child marriage in Africa (2015) available at http://pages.au.int/sites/default/files/Outcome%20Statement%20in%20English_0.pdf (accessed on 30 March 2016).

⁹⁵ Guidelines for reporting on the AU Solemn Declaration on Gender Equality in Africa have been adopted by the First AU Conference of Ministers responsible for women and gender in 2005 which expands upon the requirements of paragraph 12 of the Solemn Declaration on Gender Equality.

⁹⁶ Executive Council of the AU 'Report of the Chairperson on the implementation of the Solemn Declaration on Gender Equality in Africa' adopted during its 21st ordinary session (9-13 July 2012) EX.CL/729(XXI).

⁹⁷ Report of the Chairperson of the AU Commission 2012 (n 96 above) paragraph 108.

The Chairperson of the AU Commission has therefore pointed out to the fact that resource allocations are imperative for the realisation of the provisions of the Solemn Declaration on Gender Equality.

The AU Commission has established a Directorate of Women, Gender and Development (AU Gender Directorate), which has as objective the promotion of 'gender equality in Africa' in 2003.⁹⁸ The AU Gender Directorate 'oversees the implementation of the AU Gender Architecture' which consists of the AU Constitutive Act, the Maputo Protocol, the Solemn Declaration on Gender Equality in Africa, the 2009 AU Gender Policy, the 2010 African Women's Decade, and the Fund for African Women.⁹⁹

To achieve the above objectives, the AU Gender Directorate has several functions which are to: 'champion, advocate for, support and facilitate the incorporation of gender perspectives into all the work of member states'; 'promote policies and activities to strengthen women's rights and empower women economically, politically, socially and otherwise'; 'conduct gender-related training and capacity building for' member states'; and to 'undertake advocacy for gender equality, outreach campaigns, partnership building and networking to promote gender equality and women's rights and empowerment'.¹⁰⁰

In execution of its functions, the AU Gender Directorate has organised several conferences and has issued press releases.¹⁰¹ Some of these activities have made reference to the allocation of sufficient budgetary resources or to the adoption of gender budgeting to realise women's human rights. For instance, during a press release African states were recommended to adopt laws 'to ensure gender-responsive budgeting on education'.¹⁰²

⁹⁸ Website of the AU 'Women, gender and development' available at <http://www.au.int/en/wgd> (accessed on 8 May 2016).

⁹⁹ Available on file with the author.

¹⁰⁰ Available on file with the author.

¹⁰¹ Website of the AU available at <http://au.int/en/happening/76> (accessed on 23 May 2016).

¹⁰² Press release of the AU Gender Directorate "A gender responsive education system is key for Africa's emergence" urged experts (16 December 2015) available at <http://au.int/en/pressreleases/19493/%E2%80%9C-gender-responsive-education-system-key-africa%E2%80%99s-emergence%E2%80%9D-urged-experts> (accessed on 23 May 2016).

The Solemn Declaration on Gender Equality is within the scope of the AU Gender Directorate.¹⁰³ Consequently, the AU Gender Directorate has organised several meetings concerning the implementation of the document. For instance, in 2013, it held a ‘workshop to assess’ how member states have implemented the Solemn Declaration on Gender Equality¹⁰⁴ and a capacity building workshop for countries which had not yet reported on how they had given effect to the Solemn Declaration in Gender Equality.¹⁰⁵ Such a capacity building workshop was also held in 2011.¹⁰⁶ Concerning the Maputo Protocol, in 2013, in collaboration with other stakeholders, the AU Commission organised a meeting which focused on ‘domestication and implementation’ of the document.¹⁰⁷

The above examples demonstrate that the AU Commission has placed emphasis on the implementation of the normative framework that relate to women’s human rights in Africa. However, such interventions did not focus on the provision of budgetary resources to realise women’s human rights. The AU Commission can influence the adoption of gender budgeting in African countries by constantly highlighting that a lack of budgetary resources acts as a challenge to implement women’s human rights. Consequently, it can recommend states to adopt gender budgeting to give effect to the provisions of the documents that make reference to the allocation of budgetary resources to realise women’s human rights. The AU Commission has to constantly refer to the adoption of gender budgeting in its interaction with different African states, in its annual report to the Executive Council of the AU, in its press releases, meetings and workshops.

It can even develop a new focus area that is the adoption of gender budgeting to allocate sufficient budgetary resources to realise women’s human rights. Such a focus will ensure that the concept of gender budgeting is on the forefront of women’s human rights protection. It

¹⁰³ Website of the AU available at <http://au.int/en/wgd> (accessed on 23 May 2016).

¹⁰⁴ Website of the AU available at <http://au.int/en/newsevents/14736/auc-holds-workshop-assess-implementation-solemn-declaration-gender-equality-africa> (accessed on 23 May 2016).

¹⁰⁵ Website of the AU available at <http://www.au.int/en/newsevents/14733/capacity-building-workshop-countries-are-yet-report-implementation-solemn> (accessed on 23 May 2016).

¹⁰⁶ Website of the AU available at <http://au.int/en/newsevents/14724/capacity-builing-workshop-au-member-states-have-not-reported-implementation-solemn> (accessed on 23 May 2016).

¹⁰⁷ Website of the AU available at <http://au.int/en/newsevents/14734/joint-review-and-prioritization-actions-implementation-au-protocol-women%E2%80%99s-rights> (accessed on 23 May 2016).

can have press releases, meetings, workshops, and high-level discussions with gender budgeting as focus.

5.1.3 The Economic, Social and Cultural Council

The Economic, Social and Cultural Council (ECOSOCC) of the AU is 'an advisory organ composed of different social and professional groups' from member states of the AU.¹⁰⁸ Established in 2004, the objective of the ECOSOCC is for CSOs to collaborate with the AU. The ECOSOCC comprises of 150 CSOs working on different human rights issues, including women's human rights.¹⁰⁹

The ECOSOCC has different functions which include, amongst others, contribution to the translation of AU's objectives into concrete programmes, studies and recommendations to organs of the AU, 'sharing of best practices' of undertakings towards the realisation of the AU's objectives and vision, and contribution to gender equality.¹¹⁰ The ECOSOCC can exercise these functions to influence the organs of the AU to include gender budgeting in their agenda.

For instance, given the focus on women's human rights within the AU at the moment, the ECOSOCC can prepare a report that highlights the link between poor resource allocation and non-realisation of women's human rights. This report can start by popularising the feminist democratic theory and then focus on gender budgeting as a means to allocate sufficient resources to realise women's human rights. Since one of the functions of the ECOSOCC is to share best practices, the report can adopt a gender budgeting framework based on the modified version of the SADC guidelines as assessed in chapter four of this research. This report can also point out African countries that have made progress in resource allocation for women's human rights as a result of the adoption of gender budgeting. This report can be presented to either the Assembly as a general report on gender budgeting or to different organs of the AU with specific recommendations. These recommendations can be inclusive

¹⁰⁸ Article 22 of the Constitutive Act.

¹⁰⁹ Website of the AU available at <http://www.au.int/en/organs/ecosocc> (accessed on 29 March 2016).

¹¹⁰ Website of the AU 'Economic, Social and Cultural Council' available at <http://pages.au.int/ECOSOCC/functions> (accessed on 29 March 2016).

of the steps that each organ can take to ensure that gender budgeting becomes central to national budgeting processes in African countries.

5.1.4 The Pan-African Parliament

The Pan-African Parliament was established in 2001 by the Protocol to the Treaty Establishing the African Economic Community relating to the Pan-African Parliament in 2001. This treaty was replaced by the Protocol to the Constitutive Act of the AU relating to the Pan-African Parliament (Pan-African Parliament Protocol) in 2014. The preamble of the Pan-African Parliament Protocol makes reference to the promotion and protection of the rights in the African Charter and 'other relevant human rights instrument'.¹¹¹ Such a provision reaffirms the human rights mandate of the Pan-African Parliament.¹¹² Furthermore, the objectives of the Pan-African Parliament are, amongst others, to 'facilitate the effective implementation of the policies and objectives of the AU',¹¹³ and to 'promote the principles of human and peoples' rights ... in Africa'.¹¹⁴ Thus, gender equality, which is an objective of the AU and part of human rights, fall within the ambit of the Pan-African Parliament.

The Pan-African Parliament has several committees, some of which concern women's human rights. They are the Committee on Gender, Family, Youth and People with Disability, the Committee on Justice and Human Rights, and the Committee on Health, Labour and Social Affairs.¹¹⁵ The Committee on Gender, Family, Youth and People with Disability is mandated to, amongst others, specifically '[c]onsider issues relating to the promotion of gender equality'.¹¹⁶ Additionally, these committees have to generally ensure that African states adopt strategies to harmonise domestic laws concerning human and peoples' rights. Since

¹¹¹ Preamble of the Pan-African Parliament Protocol.

¹¹² Viljoen 2012 (n 1 above) 174-175.

¹¹³ Article 3(b) of the Pan-African Parliament Protocol.

¹¹⁴ Article 3(c) of the Pan-African Parliament Protocol.

¹¹⁵ Website of the Pan-African Parliament available at <http://panafricanparliament.org/about-committees> (accessed on 23 May 2016).

¹¹⁶ Website of the Pan-African Parliament available at <http://panafricanparliament.org/about-committees/gender-family-youth-and-people-with-disability> (accessed on 23 May 2016).

human and peoples' rights comprise of women's human rights, it can be derived that the mandates of these committees include women's issues.

Indeed, while executing its mandates, the Pan-African Parliament has taken women's human rights into account. The Hansard documents of the sessions of the Pan-African Parliament in May 2015, October 2015 and May 2016 indicate that the vulnerabilities that women face were discussed during several instances.¹¹⁷ However, there was no focus on budgetary resource allocation to realise women's human rights.

The Pan-African Parliament attempts to democratise the projects of the AU.¹¹⁸ The functions of the Pan-African Parliament are listed in article 8 of the Pan-African Parliament Protocol. It is recommended that the Pan-African Parliament adopt the agenda of gender budgeting as a means to allocate sufficient budgetary resources to women's human rights. Subsequently, the Pan-African Parliament is recommended to integrate the agenda of gender budgeting in the execution of its functions.

5.1.5 The African Peer Review Mechanism

The APRM was established in 2003 by the 'AU in the framework of the implementation of the New Partnership for Africa's Development'.¹¹⁹ The APRM is 'a self-monitoring instrument'¹²⁰ that members of the AU voluntarily accepted and its objectives are 'to foster the adoption of policies, standards and practices'¹²¹ of African countries in specific areas by 'experience sharing and reinforcement of successful and best practices, including identifying deficiencies and assessment of requirements for capacity building'.¹²²

The APRM has four thematic areas, two of which, namely, democracy and political governance, and socio-economic governance have objectives which relate to the realisation

¹¹⁷ Website of the Pan-African Parliament available at <http://www.panafricanparliament.org/hansard> (accessed on 23 May 2016).

¹¹⁸ J Cilliers & P Mashele 'The Pan-African Parliament: A plenary of parliamentarians' (2004) 13 *African Security Review* 78.

¹¹⁹ Website of the APRM available at <http://aprm-au.org/about-us> (accessed on 30 March 2016).

¹²⁰ International Institute for Democracy and Electoral Assistance 'The African Union's mechanisms to foster gender mainstreaming and ensure women's political participation and representation' (2013) 10.

¹²¹ Website of the APRM available at <http://aprm-au.org/pages?pageId=history> (accessed on 30 March 2016).

¹²² As at August 2016, the APRM had 33 member states: Website of the APRM available at <http://aprm-au.org/map> (accessed on 15 August 2016).

of women's human rights: to promote and protect the rights of women in the area of democracy and political governance; and to ensure 'progress towards gender equality, particularly equal access to education for girls at all levels'.¹²³ The review of the states often makes reference to gender equality. For instance, the country review report for Mozambique of 2010 makes several references to issues that concern women such as women in politics, pregnant women, and violence against women.¹²⁴ In 2015 Corrigan studied the socio-economic problems in Africa while drawing insights from 6 APRM country review reports. He pointed out that these reports made reference to gender discrimination as one of the concerns raised during the APRM.¹²⁵ Nevertheless, these reports did not make reference to the adoption of gender budgeting.

As such, the APRM takes into account the extent to which women's rights have been realised in the assessment. As stated in several instances in this research, realisation of rights is dependent on the allocation of resources and therefore, the APRM has to emphasise on resource allocation for the realisation of women's rights. During the process, it can make reference to good practices such as the SADC guidelines and recommend states to adopt gender budgeting as a means to implement their obligation to provide resources to realise women's human rights. Furthermore, states can, on a regular basis assess whether different states have made progress in the adoption of gender budgeting and point out the issue every time the country is under review. Such a step by their peers might lead African states to reconsider their current budgeting framework and to adopt gender budgeting.

5.1.6 Collaboration with other stakeholders

The above sections elaborated on the roles that some organs of the AU can play towards the adoption of gender budgeting. However, other relevant stakeholders have to work in collaboration with the AU to ensure that African states actually integrate gender budgeting

¹²³ Website of the APRM available at <http://aprm-au.org/socio-economic-governance> (accessed on 4 April 2016).

¹²⁴ APRM Country review report 11 Mozambique (2010) available at https://www.issafrica.org/uploads/APRM_Mozambique.pdf (accessed on 25 May 2016).

¹²⁵ T Corrigan 'Socio-economic problems facing Africa: Insights from six APRM country review reports' (2015) available at <http://www.aprm-au.org/blog/socio-economic-problems-facing-africa-insights-from-six-aprm-country-review-reports/> (accessed on 25 May 2016).

in their budgeting processes. The above sections have already given some examples of such collaboration. The following sections study some of the existing endeavours of the AU to collaborate with other stakeholders and assess how the former can influence the adoption of gender budgeting at the national levels through collaboration with other stakeholders. For the purposes of this sub-section, only the AU Gender Pre-Summits and the Organisation of African First Ladies are studied. The thesis acknowledges that there are other forms of collaboration where gender budgeting can be introduced but uses these two as examples.

A African Union Gender Pre-Summits

The AU Commission has been holding gender pre-summits in collaboration with other stakeholders such as Gender Is My Agenda Campaign (GIMAC) and AU partners on the margins of AU summits. The objective of these gender pre-summits is to consult different stakeholders on women's human rights issues and to come up with a document which contains key challenges and recommendations for the realisation of women's human rights to be submitted for consideration and adoption by AU Heads of States and Governments.¹²⁶

The eighth AU Gender Pre-Summit was held in Ethiopia from 17-21 January 2016. The eighth Gender Pre-Summit was held under the Presidency of the AU Commission Chairperson and was organised jointly by AU Commission Directorate of Women, Gender and Development, GIMAC, and AU partners.¹²⁷ This Gender Pre-Summit had as overall objective to collect 'voices of key actors in the gender equality and women's empowerment arena, to update and discuss critical developments in the field, assess the extent of implementation of commitments' and to 'identify future priority areas of action ... and call for greater acceleration in the effective implementation of commitments on gender equality and women's empowerment'.¹²⁸ As a means to achieve the overall objective, all participating

¹²⁶ Website of the AU available at <http://au.int/en/newsevents/19536/8th-african-union-gender-pre-summit-2016-african-year-human-rights> (accessed on 30 March 2016).

¹²⁷ As above.

¹²⁸ As above.

stakeholders, including member states, pledged to strengthen gender budgeting processes at the national levels.¹²⁹

The above pledge demonstrates that the participants of the AU Gender Pre-Summits have acknowledged the importance of gender budgeting in providing sufficient resources to realise women's human rights. It is recommended that these pledges are reflected in the presentation that these institutions make before the AU Heads of State and Government. These presentations must also include the concrete steps that governments can take in line with the adoption of gender budgeting.

The most recent AU Gender Pre-Summit took place in Rwanda on 8 and 9 July 2016 and took the form of an AU High Level Panel on Gender Equality and Women's Empowerment (High Level Panel).¹³⁰ It was organised by the AU Gender Directorate and the AU Leadership Academy and its theme was 'The Contributions of the Maputo Protocol on Women's Rights in Achieving Gender Equality in Africa: Stocktaking, opportunities and accountability'.¹³¹ The GIMAC convened a CSOs meeting within the ambit of the High Level Panel on 11 and 12 July 2016.¹³² An analysis of the documents of these meetings available on the AU website demonstrates that there was little emphasis on gender budgeting. For instance, it was only the speech of the Speaker of the Chamber of Deputies of Rwanda that made reference to gender budgeting to realise women's human rights in the Maputo Protocol.¹³³ The speeches of AU Commission Chairperson and that of the AU Director for Political Affairs did not make reference to gender budgeting. The Maputo Protocol being the document on the continent which advocates for the provision of budgetary resources to realise women's human rights, this thesis finds that the lack of focus on resource allocation to realise women's human rights in such meetings represents a missed opportunity to advocate for gender budgeting. As such,

¹²⁹ Paragraph 13 of the Communique of the eighth AU Gender Pre-Summit on the margins of the 26th AU Summit 17-21 January 2016 available at <http://www.tralac.org/images/docs/9184/8th-african-union-gender-pre-summit-on-the-margins-of-the-26th-au-summit-communique-january-2016.pdf> (accessed on 9 March 2016).

¹³⁰ Website of the AU available at http://au.int/ar/sites/default/files/31064-media_advisory_gender_high_level_panel.pdf (accessed on 23 August 2016).

¹³¹ As above.

¹³² As above.

¹³³ Website of the AU available at <http://www.au.int/en/newsevents/31064/3rd-au-high-level-panel-gender-equality-women-s-empowerment-kigali-republic-rwanda> (accessed on 23 August 2016).

this thesis recommends that the AU Commission takes into account resource allocation to realise women's human rights while collaborating with other partners.

Furthermore, it is recommended that future AU Gender Pre-Summits have sessions which focus on gender budgeting so that experts on gender budgeting can engage stakeholders on the steps that states have to take to make sure that gender budgeting becomes integral to national budgeting processes. In addition to raising awareness on the topic, these sessions will also provide for a platform for clarifications about how to proceed with gender budgeting processes.

B Organisation of African First Ladies against HIV/AIDS

The AU Commission is one of the partners of the Organisation of African First Ladies against HIV/AIDS (OAFLA), alongside with UNAIDS, UNFPA, and the International Planned Parenthood Federation.¹³⁴ The mission of the OAFLA is to 'advocate for effective policies and strategies towards the elimination of HIV and AIDS, reduction of maternal and child mortality and the empowerment of women and children'.¹³⁵ They developed strategic directions towards this mission which are, amongst others, to contribute to national efforts in the concerned fields, and to 'ensure program and financial sustainability'.¹³⁶

The General Assembly of the OAFLA convenes in the margin of AU Summits.¹³⁷ In this vein, the 16th General Assembly of the OAFLA was held in Ethiopia from 30 to 31 January 2016 and it adopted a communiqué calling upon relevant stakeholders to 'unite and ensure healthy lives and promote the well-being of all the people of Africa, irrespective of age, sex and geographical location'¹³⁸ This demonstrates that the OAFLA advocates for non-discrimination on the basis of sex while implementing its mission.

¹³⁴ Website of OAFLA available at <http://www.oafla.org/index.php/en/> (accessed on 30 March 2016).

¹³⁵ Website of OAFLA available at <http://www.oafla.org/index.php/en/2014-04-29-13-44-56> (accessed on 30 March 2016).

¹³⁶ Website of the OAFLA (n 134 above).

¹³⁷ Section 3 of the Rules of Procedure of OAFLA available at <file:///C:/Users/User.CREATEK2012/Downloads/Rules%20of%20Procedure%20as%20per%20GH%20final%20240614.pdf> (accessed on 30 March 2016).

¹³⁸ Website of the AU 'Organization of African First Ladies against HIV/AIDS calls upon all stakeholders to unite and ensure healthy lives for all the people of Africa' available at

Although the OAFLA has specific focus areas, it deals with issues which affect women to a great extent. Governments have to allocate sufficient resources at the domestic level to ensure that these issues are tackled. As such, gender budgeting can assist the agenda of the OAFLA.

It is recommended that the AU Commission use this collaboration as a means to introduce gender budgeting within the OAFLA. This can influence the strategies of the OAFLA with the First Ladies highlighting gender budgeting as a means to allocate sufficient resources to realise women's human rights. The First Ladies can also influence gender budgeting processes by advocating for the topic at the domestic level and by appealing to the relevant ministries to integrate gender budgeting in their budgeting processes. Moreover, the First Ladies could share their knowledge about gender budgeting obtained through the OAFLA to their husbands who can in turn commit to gender budgeting initiatives.¹³⁹

These collaborations demonstrate that the AU, on its own, cannot ensure that gender budgeting becomes integral to the budgeting process. There is a need to take other stakeholders on board. This will ensure that there is advocacy and sensitisation about the concept of gender budgeting.

5.2 The Southern African Development Community

Having studied the role of the AU in influencing the adoption of gender budgeting in African countries, this section assesses the role of the SADC in ensuring that the SADC guidelines is adopted in SADC member states. Being the first sub-region in Africa to have elaborated on gender budgeting processes, this research assesses how its institutions can ensure that gender budgeting is adopted in its member states with the view of complying with the obligation to provide sufficient resources to realise women's human rights. This analysis is

<http://au.int/en/pressreleases/19674/organization-african-first-ladies-against-hiv-aids-calls-upon-all-stakeholders> (accessed on 30 March 2016).

¹³⁹ Website of Women in International Politics '2016, women and political leadership –female heads of state and heads of government' (22 February 2016) available at <https://firstladies.international/2016/02/22/2016-women-and-political-leadership-female-heads-of-state-and-heads-of-government/> (accessed on 23 August 2016): There are only two sitting female presidents in Africa as at August 2016. Consequently, the OAFLA is mainly for first ladies who can introduce their husbands to the concept of gender budgeting.

done in two-fold. The study analyses the manner in which the SADC can popularise the guidelines and ensure that SADC member states make reference to the guidelines while adopting gender budgeting.

5.2.1 Inclusion of gender budgeting as an agenda

In order to ensure that SADC member states implement the SADC guidelines, each organ of the SADC has to include gender budgeting as one of their agenda and to lay emphasis on the adoption of gender budgeting. The SADC Gender Unit has taken several steps to include gender budgeting as part of its agenda. For example, the SADC Gender Policy of 2009 made reference to budgetary allocations for gender mainstreaming in several of its provisions.¹⁴⁰ Moreover, the SADC Framework for Achieving Gender Parity in Political and Decision-Making Positions by 2015 also made express reference to the adoption of gender budgeting.¹⁴¹ In addition to the above, there was the adoption of gender monitors¹⁴² in order to track different provisions of the SADC Gender Protocol and these gender monitors also made reference to challenges in realising different provisions of the SADC Gender Protocol due to insufficient resource allocation.

Furthermore, the SADC Parliamentary Forum, established under article 9(2) of the SADC Treaty as an 'autonomous institution of SADC',¹⁴³ can lay emphasis on gender budgeting as part of women's human rights. The SADC Parliamentary Forum was established under articles 9(2)¹⁴⁴ and 10(6)¹⁴⁵ of the SADC Treaty¹⁴⁶ in 1997 and it is composed of members of Parliaments of SADC member states.¹⁴⁷ The SADC Parliamentary Forum has several

¹⁴⁰ Paragraphs 4.5, 4.7, 4.9(a), 5, 5.2, 5.3, and 5.5 of the SADC Gender Policy.

¹⁴¹ Paragraphs 4.2 and 13.2.1.3.

¹⁴² Website of the SADC available at <http://www.sadc.int/sadc-secretariat/directorates/office-executive-secretary/gender-unit/> (accessed on 5 April 2016).

¹⁴³ Website of the SADC Parliamentary Forum available at http://www.sadcpf.org/index.php?option=com_content&view=article&id=71&Itemid=89 (accessed on 15 August 2015).

¹⁴⁴ Article 9(2) of the SADC Treaty: 'Other institutions may be established as necessary'.

¹⁴⁵ Article 10(6) of the SADC Treaty: 'The Summit shall decide on the creation of Commissions, other institutions, committees and organs as need arises'.

¹⁴⁶ Article 3(2) of the SADC Parliamentary Forum Constitution: 'The SADC Parliamentary Forum is established in accordance with Article 9(2) or Article 10(6) of the Treaty'.

¹⁴⁷ Article 6(1) of the SADC Parliamentary Forum Constitution.

objectives, which include the involvement of parliamentarians in SADC to,¹⁴⁸ amongst others ‘facilitate the effective implementation of SADC policies and projects’,¹⁴⁹ ‘to promote the principles of human rights, gender equality and democracy within the SADC region’,¹⁵⁰ and to ‘promote peace, democracy, security and stability on the basis of gender equality, human rights...’.¹⁵¹ The policies and projects of the SADC consist of the adoption of gender budgeting by SADC member states. Therefore, the SADC Parliamentary Forum has the responsibility to facilitate gender budgeting to ensure that gender equality is achieved across the region.

In line with its responsibility to achieve gender equality, the SADC Parliamentary Forum has a Programme on Gender Equality and Empowerment.¹⁵² This programme concerns various issues which affect women’s human rights and the SADC Parliamentary Forum has, within the ambit of these programmes, promoted increased allocation of budgetary resources. For instance, the SADC Parliamentary Forum urged SADC member states to allocate more budgetary resources to the health sector, ‘particularly funding to HIV/AIDS’ during its 34th Plenary Assembly Session in 2013.¹⁵³

However, it is to be noted that the SADC Parliamentary Forum has not laid emphasis on the adoption of gender budgeting in member states. Chapter four of this research has demonstrated the role that parliamentarians in South Africa had in gender budgeting initiatives. Moreover, the SADC guidelines also highlight the importance of parliamentarians in gender budgeting initiatives. The SADC Parliamentary Forum, being composed of parliamentarians from different member states, can influence the adoption of gender budgeting in member states.

It is therefore recommended that the SADC Parliamentary Forum include a cluster in the Programme on Gender Equality and Empowerment which concentrates on gender

¹⁴⁸ Article 5(a) of the SADC Parliamentary Forum Constitution.

¹⁴⁹ Article 5(b) of the SADC Parliamentary Forum Constitution.

¹⁵⁰ Article 5(c) of the SADC Parliamentary Forum Constitution.

¹⁵¹ Article 5(g) of the SADC Parliamentary Forum Constitution.

¹⁵² Website of the SADC Parliamentary Forum available at <http://www.sadcpf.org/gender/> (accessed on 11 April 2016).

¹⁵³ SADC Parliamentary Forum ‘Communiqué of the 34th Plenary Assembly Session’ (14-24 October 2013) available at http://www.sadcpf.org/index.php?option=com_content&view=article&id=130%3Acommuniqu%C3%A9-34th-plenary-assembly-session-of-the-sadc-parliamentary-forum-arusha-tanzania-14th-24th-october-2013&catid=125%3Anews-a-events&Itemid=1 (accessed on 11 April 2016).

budgeting. This cluster can have as objectives the popularisation of gender budgeting and the SADC guidelines and to highlight the role of parliamentarians in the adoption of gender budgeting. In view of the above, the SADC Parliamentary Forum can hold regular training sessions with its members who are inclusive of gender budgeting experts, parliamentarians and former parliamentarians who have been involved in gender budgeting initiatives. This will ensure that the members of the SADC Parliamentary Forum learn from the experience of those who have lived gender budgeting experiences and provide them with an opportunity to discuss the challenges and the possible solutions.

SADC National Committees can also adopt gender budgeting as an agenda. Article 9(1)(h) of the SADC Treaty provides for the establishment SADC National Committees with key stakeholders¹⁵⁴ within each member state. The SADC National Committees have several responsibilities which include, amongst others, to ‘coordinate and oversee, at the national level, implementation of SADC programmes of action’.¹⁵⁵ In the context of gender budgeting, the SADC National Committees have to oversee and implement the provisions of the SADC Treaty and the SADC Gender Protocol and the revised SADC guidelines. The key stakeholders comprise of members from the government, and CSOs, amongst others. CSOs can use the SADC National Committees as a platform to monitor the progress in the national gender budgeting processes in line with its mandate. It is recommended that the different SADC National Committees include gender budgeting in their agenda and oversee, on a constant basis, the progress of the integration of gender budgeting in the member state.

Additionally the Troika system that was established by article 9A of the SADC Treaty and it applies to the Summit, the Organ, the Council, the Sectorial and Cluster Ministerial Committees, and the Standing Committee of Officials can adopt gender budgeting as one of its agenda. The Troika, being more ‘permanent’ than the institution it steers, has to ensure that member states adopt gender budgeting as a means to allocate sufficient resources to realise women’s human rights. The Troika can do so by adopting a gender perspective while

¹⁵⁴ Article 16A(13) of the SADC Treaty: ‘For the purposes of this article, key stakeholders include: (a) government; (b) private sector; (c) civil society; (d) non-governmental organizations; and (d) workers and employers organization’.

¹⁵⁵ Article 16A(4)(b) of the SADC Treaty.

executing its functions. Furthermore, the Troika can put forward gender perspectives in issues being discussed during the sessions of the organ it represents. It can then present gender budgeting as one of the means through which these gender issues can be tackled.

5.2.2 Communiqués, media releases and reports

The SADC can make use of communiqués, media releases and reports to ensure the implementation of the revised SADC guidelines. For instance, in exercising its functions, the SADC Gender Unit has made reference to gender budgeting in its reports. It published a Gender Mainstreaming Resource Kit in 2009¹⁵⁶ to, amongst others, ‘provide guidance at Member State level’ by stating how the SADC Secretariat is engaging in gender mainstreaming.¹⁵⁷ This Gender Mainstreaming Resource Kit gives a background of gender budgeting and its link with gender mainstreaming.

Furthermore, the communiqués issued by the different institutions of the SADC can make reference to gender budgeting and the SADC guidelines. These communiqués can also urge member states to adopt gender budgeting. For instance, the Summit can highlight the issue of gender budgeting obligations of SADC member states through communiqués after the summit, during media releases and through the adoption of technical and thematic reports.

5.2.3 Meetings focusing on gender budgeting

The SADC has to provide platforms where member states can meet to discuss the topic of gender budgeting. For instance, the SADC National Committees can provide a platform for constructive dialogue between different stakeholders since it has both representatives from the government, and the CSOs and NGOs.

It is further recommended that the SADC Secretariat collaborate with national stakeholders and devise strategies to implement gender budgeting. This collaboration can be in the form of the provision of external experts in gender budgeting to assist different ministries in the

¹⁵⁶ SADC Secretariat ‘SADC gender mainstreaming resource kit’ (2009) available at http://www.sadc.int/files/2114/0558/6128/SADC_GENDER_MAINSTREAMING_RESOURCE_KIT.pdf (accessed on 5 APRIL 2016).

¹⁵⁷ SADC Secretariat (n 156 above) 3.

formulation of their budgets. The SADC Secretariat can also facilitate workshops on gender budgeting in different member states that target budget framers in the different ministries

In addition to workshops in different member states, the SADC Secretariat can organise a SADC workshop on gender budgeting that will have as participants government officials, CSOs and experts working in the area of gender budgeting from different SADC member states. This workshop will enable budget framers to interact with each other and share their experiences in relation to gender budgeting. This workshop will complement the meetings of the Council of Ministers or Sectoral and Cluster Ministers in that it will go beyond ministers and their representatives and get the involvement of the persons who are actually preparing the budget.

In line with the adoption of guidelines on gender budgeting, the Council of Ministers or the Sectoral and Cluster Ministers can require different ministries from different member states to make presentations on the steps that have been taken to apply the guidelines on gender budgeting during their meetings. This exercise will enable different member states to share their experiences and learn from one another without feeling the pressure of obligations and accountability. It will provide a platform where different ministries can constructively discuss about their best practices and challenges. This exercise must be integral to the meetings of the Council of Ministers or the Sectoral and Cluster Ministers in order to ensure that the progress of gender budgeting in different member states is assessed on a regular basis.

Moreover, it is recommended that the Summit holds a session on the theme of resource allocation for women's human rights. This session can have as aim the emphasis on the gender budgeting obligations of SADC member states by virtue of the SADC Gender Protocol. It can further assess the progress made by different member states in the adoption of gender budgeting since the coming into force of the SADC Gender Protocol. Moreover, this session can analyse how different member states have incorporated the guidelines in their gender budgeting processes. This session can also renew the commitment of SADC member states to adopt gender budgeting to realise the rights in the SADC Gender Protocol.

The SADC can also provide funds to different member states to conduct meetings on gender budgeting. One such instance is the provision of funds, through the Secretariat of SADC, to Swaziland to conduct a workshop on mainstreaming and gender budgeting.¹⁵⁸

5.3 Conclusion

This chapter has demonstrated that Africa as a continent has to adopt initiatives to ensure that gender budgeting is adopted at the domestic level in African states. The Maputo Protocol, which is the main instrument for the protection of women's human rights on the continent, imposes an obligation on states to allocate sufficient resources to realise women's human rights. It was adopted by organs of the AU and therefore, this chapter elaborated on the different measures that the organs of the AU have adopted to ensure that African countries adopt gender budgeting to abide by the obligation in the Maputo Protocol to allocate sufficient budgetary resources to realise women's human rights. The section which studied the role of different organs of the AU in the adoption of gender budgeting has demonstrated that there are existing initiatives to influence the adoption of gender budgeting at the AU level. However, these initiatives could be supplemented by different other steps as elaborated upon in the chapter.

In addition to the AU, the role of the SADC in ensuring that its member states adopt gender budgeting was also studied. It provided for recommendations relating to the role of the different SADC institutions in influencing the gender budgeting processes of its member states. It assessed communiqués, media releases and reports by the different organs of the SADC as a means to popularise gender budgeting and the revised SADC guidelines. It also elaborated on different meetings that the organs of the SADC can convene with focus on the gender budgeting the SADC guidelines.

This chapter pointed out that the AU and the SADC have to pro-actively refer to the adoption of gender budgeting as a means to implement the obligation to provide budgetary resources

¹⁵⁸ Report of Office of the Deputy Prime Minister of Swaziland-Gender and Family Issues Unit 'Gender responsive planning and budgeting workshop' (2012) available at file:///C:/Users/User.CREATEK2012/Downloads/17004_swaziland_gendertrainingandcostingworkshopreport_mmm_022013%20(1).pdf (accessed on 8 February 2016) 3.

to realise women's human rights. As it is, the AU does not lay emphasis on the provisions of the Maputo Protocol which require states to provide budgetary resources and on gender budgeting. The recommendations in this chapter, if implemented, will enable the AU and the SADC to integrate a gender budgeting agenda with the view of ensuring that African states are guided in the implementation of their obligation concerning budgetary allocation.

CHAPTER SIX: CONCLUSION AND RECOMMENDATIONS

6.1 Introduction

This thesis sought to assess the role of gender budgeting in implementing the obligation to provide budgetary resources to realise women's human rights in Africa. The SADC guidelines on gender budgeting 2014 (SADC guidelines) and the South African initiatives were considered as case studies. This chapter now synthesises the findings of the different chapters to provide responses to the main research question.

Firstly, the key findings are identified and secondly, this thesis gives recommendations for the adoption of gender budgeting to implement the obligation to provide budgetary resources to realise women's human rights in Africa. Thirdly and finally, this chapter gives suggestions for further research.

6.2 Key findings

This thesis consisted of different chapters that studied different sub-questions towards answering the main research question. Each chapter had its findings that led to the development of the next chapter. This section merges all these findings with the aim of coherently presenting the answers to the research question.

6.2.1 Global, regional and sub-regional laws, and the provision of resources to realise women's rights in Africa

The adoption of gender budgeting is with the view of implementing the obligation to provide budgetary resources to realise women's rights. Therefore, the thesis had to establish that African states have the obligation to provide resources to realise women's human rights. In that vein, there was a study of global, regional and sub-regional laws to assess whether they impose an obligation on states to allocate sufficient budgetary resources to realise women's human rights.¹

This study revealed that although there were soft laws at the United Nations (UN) level that made reference to budgetary allocation of resources to realise human rights generally or to

¹ Chapter 2.

women's human rights, there was no treaty provision that made express reference to the provision of budgetary resources.² Contrary to the global level, the regional and sub-regional human rights framework expressly provide for the obligation to allocate budgetary resources to realise women's human rights. The most important document studied was the Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa (Maputo Protocol) because it is a document that concerns women's human rights and it expressly provides for budgetary allocations in three of its articles.³

The inclusion of the provisions on budgetary allocation in the Maputo Protocol is reflective of the African Union's (AU) commitment to realise women's human rights. The AU has recognised budgetary allocation of resources as a right. However, the Maputo Protocol does not elaborate on the steps that states must adopt in the implementation of the obligation to provide budgetary resources to realise women's human rights. This thesis proposes gender budgeting to guide states in the implementation of this obligation.

In addition to the AU, the Southern African Development Community (SADC) has been very explicit about financial resources to give effects to the rights protected by the SADC Gender Protocol and it even requires member states to adopt gender budgeting at micro and macro levels. Similarly, the East African Community (EAC) Gender Framework recommends member states to adopt gender budgeting towards achievement of gender equality. However, the SADC has laid more emphasis on gender budgeting and has even developed guidelines for countries to adopt the same.⁴ These guidelines were used as a case study to develop a framework on gender budgeting at the AU level.

This analysis revealed that the AU, the SADC and the EAC consider the provision of budgetary resources as a right. As such, states have to adopt steps to give effect to that right.

6.2.2 Theory behind gender budgeting

Chapter three studied the theory behind gender budgeting. Klatzer and Mader have identified the output category of the feminist democratic theory as the pillar of such an

² Section 2.6 above.

³ Section 2.4.2 above.

⁴ Section 2.5.1 above.

initiative.⁵ However, they do not study the legitimacy of requiring governments to provide budgetary resources to realise women's human rights. This thesis went to the roots of the theory on public budgeting to demonstrate the motivation for requiring governments to provide resources to realise human rights.

The theory of fiscal sociology proposed by Goldscheid and expanded upon by Schumpeter was identified as the pioneer theory for requiring the state to re-distribute the taxes it collects for goods and services to be consumed by its people.⁶ However, this theory did not make reference to human rights. Waris extrapolated human rights from the theory of fiscal sociology.⁷ According to her, states have the obligation to realise the rights in international human rights instruments through the allocation of resources and as such, the resource allocation process must consider human rights. The combined works of Goldscheid, Schumpeter and Waris can be summarised to imply that states have to allocate their resources to realise the human rights of its people.⁸

The human rights approach to the theory of fiscal sociology therefore provides legitimacy for requiring states to allocate resources to realise human rights. However, this theory does not require states to pay specific attention to women during the public budgeting process and thus could not be referred to on its own for gender budgeting. To fill in the gap of the human rights approach to the theory of fiscal sociology, this thesis studied feminist theories.⁹

This research made reference to the feminist legal theory.¹⁰ This theory explained the rationale behind the adoption of laws to realise women's human rights. It further proposed the Maputo Protocol as a reflection of the feminist legal theory since it contains laws for the realisation of women's human rights in Africa. The inclusion of budgetary provisions in the Maputo Protocol implies that African states recognise allocation of resources as a right. It

⁵ Section 3.6.2 above.

⁶ Section 3.2.2 above.

⁷ Section 3.2.3 above.

⁸ Section 3.8 above.

⁹ Section 3.6 above.

¹⁰ Section 3.6.1 above.

presented gender budgeting as a reflection of the feminist legal theory since it is a concept that aims to give effect to the laws that make reference to budgetary allocation of resources.

Despite the fact that gender budgeting can be considered as part of the feminist legal theory, it is not directly linked to the latter in the event gender budgeting itself has not been included in the laws. Consequently, the thesis studied the feminist democratic theory.¹¹ Klatzer and Mader have studied the theories behind the adoption of gender budgeting and identified the output category of the feminist democratic theory. However, this thesis, in section 3.6.2, considered all the categories of the feminist democratic theory as the basis for gender budgeting as the process considers women's vulnerabilities in the formulation of policies, in their execution and in the resource allocation process of the government.

The main finding of this analysis was that one cannot make reference to only one theory in the case of gender budgeting. Although the feminist democratic theory directly explains the motivations behind the adoption of gender budgeting, it does not provide the rationale for requiring governments to allocate their resources for women's human rights and for the adoption of laws concerning resource allocation. This thesis therefore proposes a combined consideration of the human rights approach to the theory of fiscal sociology, the feminist legal theory and the feminist democratic theory when providing the rationale for gender budgeting.

The combined reading of the different theories studied contributed to answering the main research question of this thesis. The thesis sought to study the role of gender budgeting in the implementation of the obligation to provide budgetary resources to realise women's human rights. The theoretical frameworks studied establish that gender budgeting leads to a more efficient and effective allocation of resources towards women's issues. Consequently, such allocations have a positive impact on women's human rights. Therefore, gender budgeting, while taking into account the vulnerabilities that women face, ensures a better realisation of women's human rights.

¹¹ Section 3.6.2 above.

6.2.3 Gender budgeting and the realisation of women's human rights

The thesis also pointed out the challenges of integrating a human rights approach to the public budget that are generic to a women's human rights approach to the public budget.¹² It then emphasised on the gender blindness of the resource allocation process before studying the concept of gender budgeting.¹³ Gender budgeting was described as a process that takes into account the needs of men and women, and boys and girls during the resource allocation process.¹⁴ As a result, the resource allocation process recognises that women and girls face more vulnerabilities than men and boys and need more budgetary resources.

The study of gender budgeting pointed out that states have been encouraged to adopt gender budgeting since it ensures that the resource allocation process addresses the vulnerabilities that women face. Gender budgeting has objectives such as gender equality and good governance that promote resource allocation for women.¹⁵ It was also highlighted that the process is a complex one and that its adoption is dependent on several factors that can lead to its non-adoption.¹⁶ However, states have committed to the realisation of women's human rights and without resource allocation such a realisation is not possible. Gender budgeting ensures that the resource allocation process take into account the vulnerabilities that women face. Reducing the vulnerabilities that women face is in line with the realisation of women's human rights. As such, gender budgeting has a positive relationship with the provision of resources to realise women's human rights.

6.2.4 The adoption gender budgeting in practice

To guide African states in the adoption of gender budgeting, this thesis analysed the SADC guidelines and the South African initiatives to highlight the best practices and the challenges in the adoption of gender budgeting.¹⁷ The thesis noted that since the most important document that is of concern to this study is the Maputo Protocol, there was a need for the AU

¹² Section 3.4 above.

¹³ Section 3.5 above.

¹⁴ Section 3.7.1 above.

¹⁵ Section 3.7.2 above.

¹⁶ Section 3.7.6 above.

¹⁷ Chapter 4.

to adopt a framework on gender budgeting that could guide African states in their initiatives. Consequently, the thesis developed a framework based on the analysis of the SADC guidelines and the South African initiatives.¹⁸ The AU could have adopted the SADC guidelines in integral. However, as was noted in chapter four, due to the proposed changes in certain aspects of the SADC guidelines, it was recommended to consider the adoption of a modified version.

The analysis of the SADC guidelines and the South African initiatives demonstrated that the framework to be adopted by the AU has to take into account some additional aspects for it to be more comprehensive and to minimise the challenges.¹⁹ For instance, it was noted that the framework to be adopted by the AU has to consider the judiciary, and academics and researchers as key stakeholders, in addition to the different departments/ministries, the parliament and NGOs. This section also highlighted that the proposed framework to be adopted by the AU must elaborate on the gender budgeting approach each stakeholder must adopt. Additionally, the framework must consider aspects such as the inclusion of budgetary allocation of resources for women, requiring different departments to allocate a minimum percentage of their budget towards women's issues and the appointment of women in high positions.

6.2.5 The role of the African Union and the Southern African Development Community

The thesis then analysed the role of the AU and the SADC to ensure that African countries adopt gender budgeting with the view of implementing their obligation to provide resources to realise women's human rights.²⁰ It was found that the Maputo Protocol did not create any new overseeing body and as a result, the African Commission on Human and Peoples' Rights (African Commission) and the African Court on Human and Peoples' Rights (African Court) have to oversee its implementation.²¹ The thesis highlighted that the institutions of the AU do not lay emphasis on gender budgeting as a means to implement the obligation to provide

¹⁸ Section 4.6 above.

¹⁹ Section 4.5 above.

²⁰ Chapter 5.

²¹ Section 5.1.1 above.

budgetary resources to realise women's human rights. Consequently, the thesis assessed the ways in which the AU's organs can integrate gender budgeting in their agendas. Similarly, it was found that the SADC, which has already adopted guidelines on gender budgeting, has not extensively engaged its member states on gender budgeting.

6.3 Recommendations

This thesis elaborated on gender budgeting and its role in the realisation of women's human rights. It provided for the basis to motivate for gender budgeting to implement the obligation to provide resources to realise women's human rights in Africa. It was found that gender budgeting influences resource allocation for women's human rights and in turn contributes to the realisation of women's human rights. This thesis now proposes some recommendations to ensure that African states adopt gender budgeting to implement their obligation to provide resources to realise women's human rights. These recommendations are made to African states generally, to key stakeholders, to the AU, and to the SADC.

6.3.1 Recommendations to African states

As a starting point, it is recommended that African states that have not ratified the Maputo Protocol do so to ensure a better protection for women's human rights in their territory. Furthermore, governments in Africa have to show a strong commitment towards gender budgeting. This thesis has noted the lack of political will as one of the challenges in the adoption of gender budgeting.²² African governments have to consider the adoption of gender budgeting as a means to implement the obligation to provide resources to realise women's human rights in Africa. They are recommended to consider resource allocation for the realisation of women's human rights as a right. In that vein, African governments are recommended to adopt a law concerning the budgetary allocation of resources to realise women's human rights. This law can even go a step further and provide for the adoption of gender budgeting to implement the obligation to provide resources to realise women's human rights.

²² Section 4.4.3(C)(iii).

Additionally, African states can adopt laws and policies which are in favour of a transparent budgeting process. For instance, the government can enact legislation concerning access to information that will enable the relevant stakeholders to request information concerning the budgetary process. Furthermore, African states can adopt policies which ensure the participation of relevant stakeholders in the budgeting process. African states can further devise a budgeting process that provides comprehensive and detailed information about budgetary allocations.

Having adopted laws that require states to provide budgetary resources to realise women's human rights and that are in favour of a transparent budgeting process, African states must adopt national policies, programmes and plans of action which make reference to the adoption of gender budgeting. Such national policies, programmes and plans of action can require different departments/ministries to allocate a minimum percentage of their budget to women's issues and to adopt gender-specific programmes. They can also provide for the creation of institutions such as gender budget cells within ministries, inter-ministerial/departmental committees, parliamentary committees, and gender budgeting team as elaborated upon in chapter four. Moreover, these national policies, programmes and plans of actions can consider training relevant government officials and parliamentarians on gender budgeting.

African states are also recommended to appoint/nominate women in high positions. As pointed out in section 4.5.5 above, the appointment/nomination of women in high positions can positively influence the adoption of gender budgeting.

Finally, from the case study of South Africa, it seems that most gender budgeting initiatives were donor-funded. African states are required to allocate budgetary resources to facilitate the adoption of gender budgeting through, for instance, the training of government officials, the conduct of sex-disaggregated, gender-sensitive and time use surveys, and the creation of strong institutions for gender budgeting.

6.3.2 Recommendations to key stakeholders

This thesis also provides recommendations to the key stakeholders in the gender budgeting process. As analysed in chapter four, the thesis proposes five key stakeholders in the gender budgeting process which are the government departments/ministries, the parliament, the judiciary, non-governmental organisations (NGOs), and academics and researchers.²³ In addition to the recommendations below, one crucial recommendation to all the key stakeholders is that they have to work in collaboration with other stakeholders in their gender budgeting initiatives through the proposed gender budgeting institutions in section 4.6 of this thesis.

A Government departments/ministries

Chapter four studied the SADC guidelines and noted that the government departments/ministries were classified into three namely: the departments/ministries responsible for finance; the department/ministries responsible for women; and sectoral ministries, departments, agencies and local governments. The different ministries/departments are recommended to adopt the steps that are elaborated in the SADC guidelines with the view of integrating gender budgeting in the public budgeting process. They are further recommended to focus on a gender-sensitive formulation of the budget (GSFB) approach as expanded upon in section 4.5.2 above.

The ministries/departments responsible for finance and the department/ministries responsible for women were singled out because of their role in the budgeting process and in the realisation of women's human rights respectively. Being the ministry/department responsible for the realisation of women's human rights, the ministries/departments responsible for women are further recommended to ensure that the different departments are mainstreaming gender into their expenditure. As for the ministries/departments responsible for finance, they are recommended to adopt the tools mentioned in the SADC guidelines to ensure that sectoral departments, ministries and agencies have a gender consideration while preparing their proposed budgets.

²³ Section 4.5.1 above.

B Parliament

Parliaments in Africa are recommended to adopt both a GSFB and a gender-sensitive analysis of the budget (GSBA) approach. They can adopt a GSFB approach at the formulation and enactment stage. Since they are the ones that have to approve the budget, it is recommended that parliamentarians lay emphasis on a gender sensitive resource allocation. They can require the minister responsible for finance to elaborate on the gender sensitivity of the resource allocation in the public budget.

Furthermore, learning from the South African experience, parliaments in Africa are recommended to adopt a GSBA and to work in collaboration with NGOs, and academics and researchers in their gender budgeting initiatives.

C Judiciary

The inclusion of the judiciary as one of the key stakeholders of gender budgeting is one of the propositions of this thesis.²⁴ The judiciary, being an arm of the government, and being responsible for overseeing the implementation of the law, has an important role to play in cases concerning resource allocation for the realisation of women's human rights. The judiciaries in African states are recommended to adopt a budgetary lens when dealing with cases concerning violations of women's human rights. They are recommended to assess whether such violations are as a result of insufficient budgetary resources.

D Non-governmental organisations

The concept of gender budgeting and the SADC guidelines use the term civil society organisations but this thesis has proposed that academics and researchers be separate from NGOs since these two have different influences on gender budgeting initiatives.²⁵ The South African experience and the other countries studied in chapter four have demonstrated that NGOs' initiatives create awareness around the issue of gender budgeting. NGOs in different African states are firstly recommended to analyse the budget of their country from a gender lens and to publish such analysis. To ensure that these initiatives achieve their purposes, the

²⁴ Section 4.5.1 above.

²⁵ As above.

publications on gender budgeting have to be distributed on a large scale and have to be in simple language so that a lay person can understand the challenges in the realisation of women's human rights in the country due to insufficient resource allocation. This will create awareness around the concept of gender budgeting and will trigger the interest of other stakeholders.

Secondly, NGOs in African countries are recommended to sensitise governments about gender budgeting. This can be done by organising national workshops on gender budgeting with different government officials to introduce the topic to them and to train them on the adoption of gender budgeting. Such workshops can also be regional and bring together government representatives from different African states. This will provide a platform for them to discuss the challenges and the best practices concerning the adoption of gender budgeting. NGOs can further organise side sessions during the African Commission's sessions and make presentations on gender budgeting to member states.

Thirdly, NGOs are recommended to assist states in their gender budgeting processes. Such assistance can be through the provision of technical experts. As noted in chapter four, most of the gender budgeting initiatives in South Africa were donor-funded and they stopped as soon as funding stopped. To accelerate the gender budgeting processes of different African countries, NGOs are recommended to seek funds to sponsor technical experts to assist governments in their gender budgeting initiatives.

Fourth, NGOs are recommended to approach either national courts or the African Court or the African Commission with cases concerning violations of women's human rights as a result of insufficient budgetary allocation of resources. Such cases, if decided in favour of the victims and NGOs, will set precedents that states have to provide budgetary resources to realise women's human rights. This will act as a trigger for the adoption of gender budgeting since such a step will allow states to demonstrate that they have efficiently allocated their budgetary resources towards the realisation of women's human rights.

Finally, NGOs are recommended to mention gender budgeting in their shadow reports to the African Commission. NGOs can either make mention of gender budgeting while submitting a shadow report under the different articles of the Maputo Protocol or they can prepare

shadow reports on the three articles of the Maputo Protocol that impose an obligation on African states to provide budgetary resources to realise the rights therein.

E Academics and researchers

Academics and researchers will have the same role as NGOs concerning the analysis of the budget from a gender lens. Additionally, they are recommended to research on gender budgeting as a means to implement the obligation to provide sufficient resources to realise women's human rights. This might be done with the view of furthering this research.

Furthermore, it is recommended that academics use the platform available to them to advocate for gender budgeting as a means to implement the obligation to provide resources to realise women's human rights. This thesis is the first academic writing that links gender budgeting to the articles of the Maputo Protocol which provides for budgetary allocations. Academics are recommended to popularise the use of gender budgeting as a means to implement the obligation to provide budgetary resources while addressing audiences.

6.3.3 Recommendations to the African Union and the Southern African Development Community

The AU and the SADC are recommended to take the steps elaborated upon in chapter five of this thesis. While the AU will focus on the whole of Africa, the SADC will focus on its member states. These steps will ensure that gender budgeting is seen as integral to the obligation to provide budgetary resources to realise women's human rights.

Moreover, it is recommended that the AU establish a Committee on the Rights of Women in Africa. The African Commission has the mandate to oversee the implementation of all the rights in the African Charter and other related instruments. Consequently, women's human rights is one of their many responsibilities. The Maputo Protocol is a comprehensive document that contains several provisions for the realisation of women's human rights. Given the workload of the African Commission, it might not have the capacity to focus on all the articles of the Maputo Protocol. Despite the fact that there is the mechanism of the Special Rapporteur on the Rights of Women in Africa, the latter is also a Commissioner of the African Commission and has to participate in the activities of the African Commission, thus sharing

her focus. The provision of budgetary resources to realise women's human rights is an important part of the Maputo Protocol. It is an innovative provision and states might not know how to go about to implement them. As such, it is the duty of the African Commission to guide states concerning the implementation of the obligation to provide resources to realise women's human rights. However, apart from mentioning gender budgeting in their concluding observations,²⁶ the African Commission has not elaborated on the steps that states must adopt to integrate gender budgeting in their resource allocation process. As a result, it is recommended that the AU considers the creation of a Committee on the Rights of Women in Africa which would have similar functions as the African Children's Committee. The creation of such a Committee will ensure that there is a body at the regional level with the sole aim of overseeing the implementation of the Maputo Protocol. Since the Maputo Protocol will be the focus of this Committee, it can adopt a framework concerning gender budgeting for the implementation of the obligation to provide resources to realise women's human rights in Africa.

6.4 Suggestions for further research

Although there is much literature on gender budgeting, there is little focus on the use of gender budgeting in the implementation of the obligation to provide resources to realise women's human rights in Africa. This thesis was a first attempt to academically present gender budgeting as a framework for the implementation of the obligation to provide resources to realise women's human rights in Africa.

During the course of this research, there were interesting points that were raised that could be suggestions for further research. Firstly, the research focused on the SADC and the AU concerning gender budgeting. However, as discussed in chapter two, the EAC also imposes an obligation on member states to provide resources to realise women's human rights. Therefore, it is suggested that future research analyses this provision and the manner in which it can be implemented.

²⁶ Section 5.1.1(B).

Secondly, this thesis focused on gender budgeting from an expenditure lens. However, gender budgeting can also be adopted from a revenue lens. Revenue policies have an impact on women's human rights and this research did not elaborate on such policies. It is recommended that further research is done concerning the revenue aspect of gender budgeting.

Thirdly, this thesis elaborated on gender budgeting at the national level and did not focus on gender budgeting at the municipal or provincial level. The latter have different dynamics and are influenced by different factors. Hence, it is suggested that further research is done concerning the adoption of gender budgeting at the municipal and provincial level.

Fourth, this study did not elaborate on the adoption of gender budgeting at the level of the UN. This was due to the fact that there is no express provision in the treaties of the UN that require states to provide resources to realise women's human rights. It is suggested that deeper research are conducted concerning the obligation to provide resources to realise women's human rights at the level of the UN. Such a study will enable the UN to require countries to adopt gender budgeting.

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LIST OF GLOBAL, REGIONAL AND SUB-REGIONAL INSTRUMENTS

1 United Nations

1.1 Treaties

Convention on the Elimination of All forms of Discrimination Against Women 1979

Convention on the Rights of the Child 1989

International Covenant on Civil and Political Rights 1966

International Covenant on Economic, Social and Cultural Rights 1966

Universal Declaration on Human Rights 1948

Vienna Convention on the Law of Treaties 1969

1.2 Primary Soft law

Beijing Platform for Action for Equality, Development and Peace 1995

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1.3 Secondary soft law

1.3.1 Committee on Economic, Social and Cultural Rights

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General Comment 4 'The right to adequate housing' adopted during its sixth session in 1991 E/1992/23

General Comment 5 'Persons with disabilities' adopted during its 11th session in 1994 E/1995/22

General Comment 6 ‘The economic, social and cultural rights of older persons’ adopted during its 13th session in 1995 E/1996/22

General Comment 12 ‘The right to adequate food’ adopted during its 20th session in 1999 E/C.12/199/5

General Comment 13 ‘The right to education’ adopted during its 21st session in 1999 E/C.12/1999/10

General Comment 14 ‘The right to the highest attainable standard of health’ adopted during its 22nd session in 2000 E/C.12/2000/4

General Comment 15 ‘The right to water’ adopted during its 29th session in 2003 E/C.12/2002/11

General Comment 16 ‘The equal right of men and women to the enjoyment of all economic, social and cultural rights’ adopted during its 34th session in 2005 E/C.12/2005/4

General Comment 17 ‘The right of everyone to benefit from the protection of the moral and material interests resulting from any scientific, literary or artistic production of which he or she is the author’ adopted during its 35th session in 2005 E/C.12/GC/17

General Comment 18 ‘The right to work’ adopted during its 35th session in 2005 E/C.12/GC/18

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General Recommendation 28 'The core obligations of states parties' adopted during its 47th session in 2010 CEDAW/C/GC/28

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1.3.3 Committee on the Rights of the Child

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General Comment 2 'The role of independent human rights institutions in the promotion and protection of the rights of the child' adopted during its 32nd session in 2002 CRC/GC/2002/2

General Comment 3 'HIV/AIDS and the rights of the child' adopted during its 32nd session in 2003 CRC/GC/2003/3

General Comment 5 'General measures of implementation of the Convention on the Rights of the Child' adopted at its 34th session in 2003 CRC/GC/2003/5

General Comment 9 'The rights of children with disabilities' adopted at its 43rd session in 2007 CRC/C/GC/9

General Comment 11 'Indigenous children and their rights under the Convention' adopted during its 50th session in 2009 CRC/C/GC/11

General Comment 13 'The right of the child to freedom from all forms of violence' adopted during its 46th session in 2011 CRC/C/GC/13

General Comment 15 'The right of the child to the enjoyment of the highest attainable standard of health' adopted during its 62nd session in 2013 CRC/C/GC/15

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1.3.4 Human Rights Committee

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2 African Union

2.1 Treaties

African Charter on Human and Peoples’ Rights 1981

African Charter on the Rights and Welfare of the Child 1990

Constitutive Act of the African Union 2000

Protocol to the African Charter on Human and Peoples’ Rights on the Rights of Women in Africa 2003

Protocol to the African Charter on the Establishment of an African Court on Human and Peoples’ Rights 2004

Protocol to the Constitutive Act of the African Union Relating to the Pan-African Parliament 2014

2.2 Primary soft laws

Abuja Declaration on HIV/AIDS, tuberculosis and other related infectious diseases 2001

Solemn Declaration on Gender Equality in Africa 2004

2.3 Secondary soft law

2.3.1 African Commission on Human and Peoples' Rights

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