



**Transitional Justice in Africa: Policy implications of the African Union Transitional  
Justice Policy (AUTJP) for women and youth on the continent**

By

**Moyowabo David Kabwa**

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**MASTER OF Diplomatic Studies**

Department of Political Sciences,  
Faculty of Humanities, University of Pretoria

Supervisor:

**Dr Chenai Matshaka**

Co-Supervisor:

**Professor Cori Wielenga**

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## **DECLARATION OF ORIGINALITY**

Full name of student: Moyowabo David Kabwa

Student number: 16051892

Degree/Qualification: MA Diplomatic Studies

Title of Dissertation: Transitional Justice in African transitional justice: Policy implications of the African Union Transitional Justice Policy (AUTJP) for women and youth in mediation on the continent

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## **List of Abbreviations**

|             |   |
|-------------|---|
| ACHPR:      | African Commission on Human and Peoples' Rights                             |
| AFRC:       | Armed Forces Revolutionary Council  |
| ASF:        | Avocats Sans Frontières   |
| AU:         | African Union   |
| AUC:        | African Union Commission  |
| AUTJP:      | African Union Transitional Justice Policy                                   |
| CAR:        | Central African Republic  |
| CECORE:     | Centre for Conflict Resolution  |
| CDF:        | Civil Defence Force   |
| CVJRR:      | Truth, Justice, Reparation and Reconciliation Commission                    |
| DRC:        | Democratic Republic of Congo  |
| ESCRs:      | Economic, Social and Cultural Rights  |
| EU:         | European Union  |
| FIDA:       | Federation of Women's Lawyers   |
| FOCHI:      | Fondation Chirezi   |
| Isis-WICCE: | Isis Women's International Cross-Cultural Exchange                          |
| LRA:        | Lord's Resistance Army  |
| MINUSCA:    | United Nations Multidimensional Integrated Stabilisation Mission in the CAR |
| NSGJ:       | National Service of Gacaca Jurisdictions                                    |
| NRM:        | National Resistance Movement  |
| NTJP:       | National Transitional Justice Policy  |
| RCPCA:      | National Recovery and Peacebuilding Plan of the Central African Republic    |

REC: Regional Economic Community

RUF: Revolutionary United Front

RPF: Rwandan Patriotic Front

SCC: Special Criminal Court

TRC: Truth and Reconciliation Commission

UN: United Nations

UNIFEM: United Nations Development Fund for Women

UNSCR: United Nations Security Council

UWCP: Uganda Women's Coalition for Peace

UWONET: Uganda Women's Network

WVS: Witness and Victim Section

## **Abstract**

Women and Youth in Africa are disproportionately affected by conflict. Moreover, the role of women and youth in conflict has primarily been as victims in peace processes. The African Union Transitional justice policy seeks to encourage a more inclusive approach to conducting peace processes. There is therefore a need to better include women and youth in transitional justice processes. Therefore, this study seeks to answer the research question: “How does a restorative approach to transitional justice increase the inclusion and emancipation of women and youth in transitional justice processes?”

The position of this study is that a restorative approach to transitional justice is well-suited to increase both the inclusion and emancipation of women and youth in transitional justice processes. This study will make use of an emancipatory critical theory framework. Critical theory integrates several approaches that emphasise the notion of liberating people from the modern economic system and state. Critical theorists refer to this as emancipation. Therefore, from a critical emancipatory theory perspective, an emancipatory agenda is required throughout the entire process to ensure that the outcome of the transitional justice is emancipation for marginalised groups such as women and youth by using both formal mechanism and informal indigenous mechanism throughout the peace process. From a critical emancipatory theory approach, it is evident that a restorative justice approach to transitional justice has an effect on the inclusion and emancipation of marginalised groups such as women.

**Key Words: emancipation, emancipatory critical theory, inclusion, restorative justice, transitional justice.**

# Contents

|   |    |
|---|----|
| DECLARATION OF ORIGINALITY .....                                  | 2  |
| ACKNOWLEDGEMENTS.....   | 3  |
| List of Abbreviations .....                                       | 4  |
| Abstract.....   | 6  |
| Chapter One: Introduction.....                                    | 10 |
| 1.1 Introduction to the research theme .....                      | 10 |
| 1.2 Research problem .....  | 11 |
| 1.3 Research questions .....                                      | 12 |
| 1.4 Research aim and objectives .....                             | 12 |
| 1.5 Literature overview.....                                      | 12 |
| 1.5.1 Defining transitional justice .....                         | 13 |
| 1.5.2 Literature on restorative and retributive justice .....     | 14 |
| 1.5.3 Critical theory in transitional justice .....               | 15 |
| 1.5.4 Emancipation and the AUTJP.....                             | 16 |
| 1.5.5 Literature on women in transitional justice.....            | 17 |
| 1.5.6 Literature on youth in transitional justice in Africa ..... | 17 |
| 1.6 Theoretical framework .....                                   | 18 |
| 1.7 Research methodology .....                                    | 19 |
| 1.8 Limitations of the study .....                                | 21 |
| 1.9 Ethical considerations .....                                  | 21 |
| 1.10 Chapter outline .....  | 21 |
| Chapter two: theoretical framework .....                          | 22 |
| 2.1 Introduction .....  | 22 |
| 2.2 Emancipatory critical theory.....                             | 24 |
| 2.2.1 Critical theory thinkers.....                               | 24 |
| 2.2.2 Emancipatory critical theory and the AUTJP .....            | 25 |
| 2.2.3 Inclusivity and the AUTJP .....                             | 26 |
| 2.2.4 Obligations of member states.....                           | 27 |
| 2.2.5 Conflict transformation.....                                | 28 |
| 2.3 Positive peace .....  | 30 |
| 2.3.1 The AUTJP and peace processes .....                         | 31 |
| 2.4 Hybridity.....  | 33 |
| 2.5 African values.....   | 34 |
| 2.6 The emancipatory agenda .....                                 | 34 |

|  |    |
|--|----|
| 2.7 Conclusion.....  | 35 |
| Chapter 3: Retributive and restorative justice.....  | 37 |
| 3.1 Introduction .....   | 37 |
| 3.2 Genealogy of transitional justice .....  | 38 |
| 3.3 Retributive justice .....  | 39 |
| 3.4 The appeal of retributive justice.....   | 40 |
| 3.5 Restorative justice.....   | 41 |
| 3.6 Benefits of restorative justice .....  | 42 |
| 3.6.1 Benefits for victims .....   | 43 |
| 3.6.2 Benefits for the offenders.....  | 44 |
| 3.7 African shared values.....   | 44 |
| 3.7.1 African justice systems.....   | 45 |
| 3.7.2 Ubuntuism.....   | 47 |
| 3.8 Retributive and restorative justice .....  | 48 |
| 3.9 Conclusion.....  | 49 |
| Chapter 4: Case studies.....   | 51 |
| 4.1 Introduction .....   | 51 |
| 4.2 Thematic analysis of case studies .....  | 53 |
| 4.3 The Baraza peace courts of the DRC.....  | 54 |
| 4.3.1 Reintegration of child soldiers .....  | 55 |
| 4.3.2 The process of the court .....   | 56 |
| 4.3.3 Critique of the Baraza court.....  | 57 |
| 4.3.4. The Baraza peace court and restorative justice.....                                       | 57 |
| 4.4 The CVJRR of the Central African Republic .....  | 58 |
| 4.4.1 Capacity building through the National Recovery and Peacebuilding Plan of the CAR(RCPCA) . | 59 |
| 4.4.2 Critique of the CVJRR .....  | 60 |
| 4.4.3 Restorative justice and the CVJRR .....  | 61 |
| 4.5 The Gacaca court of Rwanda .....   | 61 |
| 4.5.1 Extension of the Gacaca court mandate.....   | 63 |
| 4.5.2 Participation in the Gacaca courts .....   | 63 |
| 4.5.3 Critique of the Gacaca court .....   | 64 |
| 4.5.4 Rebirth and renewal in the Gacaca courts of Rwanda and restorative justice .....           | 65 |
| 4.6 Transitional justice in Sierra Leone .....   | 65 |
| 4.6.1 The Special Court for Sierra Leone.....  | 66 |
| 4.6.2 Views women testifying before the court .....  | 67 |
| 4.6.3 The court and child soldiers.....  | 67 |



|  |           |
|--|-----------|
| 4.6.4 The Truth and Reconciliation Commission of Sierra Leone .....                    | 68        |
| 4.6.5 Sierra Leone and individual dignity.....   | 69        |
| 4.6.6 Critique of transitional justice process in Sierra Leone .....                   | 69        |
| 4.7 Transitional justice in Uganda.....  | 70        |
| 4.7.1 Transitional justice process in Uganda .....                                     | 70        |
| 4.7.2 National transitional justice policy .....                                       | 71        |
| 4.7.3 Cooperation and coherence towards the National Transitional Justice Policy ..... | 72        |
| 4.7.4 Critique of Transitional Justice in Uganda .....                                 | 72        |
| 4.8 An analysis of the themes emerging from the case studies .....                     | 73        |
| 4.9 Conclusion.....  | 76        |
| Chapter 5: Conclusion .....  | 80        |
| 5.1 Introduction .....   | 80        |
| 5.2 Emancipatory critical theory.....  | 80        |
| 5.3 Restorative and retributive justice .....  | 82        |
| 5.4 Transformation in transitional justice.....  | 83        |
| 5.5 Recommendations .....  | 86        |
| 5.6 Concluding remarks .....   | 86        |
| <b>6.1 Bibliography .....</b>  | <b>89</b> |

## **Chapter One: Introduction**

### **1.1 Introduction to the research theme**

Transitional justice efforts in Africa have resulted in agreements that have led to the cessation of violence and hostilities, but often leave the underlying factors of the conflict unaddressed (Murithi et al. 2018). These underlying factors reinforce a system of exclusion where victims are on the periphery of the process. Women and youth in Africa are disproportionately affected by conflict. This study will highlight some of the implications of conflict on women and youth, their various roles in the conflict space and the problematic exclusion of women and youth in transitional justice processes. The AUTJP describes the need to treat gender-based violence within transitional justice as operating within a continuum of the perpetual disproportionate victimisation of women (AUTJP 2019). This is further supported by a resolution of the United Nations Security Council in 2000 (UNSCR 1325). The African Union Transitional Justice Policy seeks to encourage a more inclusive approach to conducting peace processes. In terms of transitional justice, these supportive frameworks that align with a restorative approach to transitional justice will increase the inclusion and emancipation of women and youth in transitional justice processes. African transitional justice efforts often use indigenous approaches that consider both restorative justice and retributive justice. However, these efforts lean more towards restorative justice (International Peace Institute 2013). This study will explore the importance of including women and youth in transitional justice as part of peace processes according to the African Union Transitional Justice Policy (AUTJP 2019:44).

The main debate in transitional justice is whether a restorative or retributive approach to justice is more effective. The AUTJP emphasises a restorative approach. Retributive justice focuses on punishing offenders (Maculan & Gil 2020), while restorative justice seeks to include the multiple parties that are affected by the conflict (Maculan & Gil 2020). In the AUTJP, the approach to restorative justice that is outlined places weight on the importance of including the community in the transitional justice process for effective healing and reconciliation. This is because a retributive justice approach in transitional justice processes has often allowed the gender and generational dimensions of violations to continue by focusing on punishing the offenders instead of ensuring that the victims receive justice (Nesiah et al. 2006:3). These violations occur because marginalised groups such as women and youth have been excluded

from the process, which would often seek to penalise the offender without establishing a means to prevent these groups from becoming victims in the future (Williams 2004). The AUTJP highlights the importance of an inclusive peace process. This implies prioritising conflict transformation over conflict management or resolution as it entails shifting from a conflict-habituated system to a peace system (Botes 2003).

An emancipatory critical theory lens will be used to explore both restorative and retributive justice in relation to the establishment of transitional justice methods in a transitional justice process. This is because emancipation entails liberation. This study will also touch on how much of the literature on transitional justice speaks of liberating women and youth from their roles on the periphery of the process. Moreover, a critical theory perspective allows one to critically analyse the issue of exclusion that women and youth face (Seiler 2012). An emancipatory critical theory lens emphasises an emancipatory agenda that can be considered in a transitional justice context to ensure a greater focus on restorative justice for women and youth so that the peace processes may result in outcomes that allow communities to heal (Jones 2001:4). Furthermore, the critical theory lens will be used to determine whether the AUJTP is in fact emancipatory.

## **1.2 Research problem**

The research problem is that despite all the policy frameworks to support the inclusion of women and youth, they continue to be marginalised. It is important to note that although this is a societal problem, it also speaks to the academic problem of how transitional justice is conceptualised and understood (Brooks 2017: 123). If conceptualised in retributive terms, the emphasis is placed on punishment (Siangombe & Ngwazi 2013). However, if conceptualised in restorative terms, emancipation is more likely to occur (Scanlon & Muddell 2009). Emancipation is required to address the systemic issues that perpetuate marginalisation. Furthermore, emancipation through transitional justice entails that harm caused through systemic injustice should be repaired through facilitating an encounter between the clashing parties so that they may decide how to proceed together and fostering transformation by causing fundamental changes in individuals, communities and relations (Davis 2014). This is why the theme of emancipation is so important in transitional justice processes as systemic change is required for an inclusive transitional justice process.

Restorative justice seeks to facilitate a meeting between victims and offenders (Radzik et al. 2007:6). These meetings include community representatives. This is relevant to diplomatic studies, as the AUTJP sets the framework for transitional justice processes for AU member states. However, there has not been enough literature that speaks to the importance of restorative justice over retributive justice in the transitional justice processes (FeldmanHall et al. 2014). In cases where restorative justice has been emphasised, women and youth have not received enough attention, which is one of the leading contributing factors that has prevented women and youth from benefitting from the transitional justice process. The AUTJP emphasises the importance of relying on local structures in the affected communities that often carry greater legitimacy than formal structures such as a court of law.

### **1.3 Research questions**

This study will seek to answer the following research question: How does a restorative approach to transitional justice increase the inclusion and emancipation of women and youth in transitional justice processes? Following the primary question is the sub-question: How does the AUTJP support an emancipatory agenda?

### **1.4 Research aim and objectives**

Research Aim: This research sought to explore how a restorative justice approach to transitional justice will result in a process that is more inclusive of marginalised groups from an emancipatory critical theory perspective. The objectives of this study were to:

- Explain the importance of the AUTJP as the framework that provides the continental guideline for the transitional justice aspect of peace processes.
- Demonstrate the importance of greater emphasising restorative justice over retributive justice in the peace process.
- Demonstrate the importance of emancipation in transitional justice processes.

### **1.5 Literature overview**

The AUTJP indicates the importance of including these groups in the transitional justice process, as they encounter unique experiences in conflict situations (AUTJP 2019). Moreover, it emphasises the need to address their experiences and meet their unique needs. This entails

establishing enabling structures and allocating resources to address repression, conflict and violence without excluding these groups (AUTJP 2019). It is therefore important to consider literature that relates to transitional justice. This study will consider literature that looks at definitions of transitional justice, literature on restorative and retributive justice, critical theory in transitional justice, emancipation and AUTJP and literature on women and youth in transitional justice.

### **1.5.1 Defining transitional justice**

In most of the literature, transitional justice is widely defined as a response to systematic violations of human rights (Cahill-Ripley 2014). According to the AUTJP, transitional justice is both the formal and non-formal policy actions as well as the consultative process adopted to overcome previous violations, societal schisms and inequalities and the intention to create conditions for security, democratic and social transformation (AUTJP 2019).

Moreover, it indicates that transitional justice intends to help societies to deal with the legacies of violent conflict and systematic violations of human rights in their pursuit of achieving the transition to the future of justice approaches that emphasise conciliation, community input and restitution (AUTJP 2019; Eppel & Raftopoulos 2008; Domingo 2012). The AUTJP affirms the conception of transitional justice in most literature with the key similarities being focused on addressing systemic human rights violations and using approaches outside the normal justice processes. It can be noted that the contrast lies in the fact that the AUTJP emphasises a consultative, community-based approach in its informal actions, while most of the literature about transitional justice merely states that the informal processes must seek recognition for victims (AUTJP 2019; Kambala 2017; ICTJ 2009).

Transitional justice, as outlined in the AUTJP, is conceptualised to seek to address African concerns about violent conflict and impunity through a holistic policy that considers the gender, generational, socio-economic and development dimensions of peace and justice (AUTJP 2019). Further, the transitional justice process supported by the AUTJP aligns with traditional mechanisms in the African context. These traditional mechanisms are “open and inclusive, where all people could participate in the decision-making process” (ACCORD 2019). This conception of transitional justice is the official conception that is to be used by member states of the AU and will therefore serve as the conception adopted in this study.

The way in which the AUTJP defines and understands transitional justice differs considerably from the earlier frameworks of the United Nations and the European Union. According to the United Nations, transitional justice is the entire range of procedures and mechanisms associated with the attempt of a society to deal with a legacy of wide-scale abuses to enable accountability, ensure justice and achieve reconciliation (Secretary-General 2010). Furthermore, the United Nations views transitional justice as integral to strengthening the rule of law (Secretary-General 2010).

The European Union defines transitional justice as a set of judicial as well as non-judicial approaches that societies may apply to address the legacy of systemic human rights violations (Davis 2010). Furthermore, the European Union indicates that some aspects of transitional justice have been clearly delineated in international law (Davis 2010). These are aspects such as criminal prosecutions, such as those that are conducted through the International Criminal Court (Davis 2010).

It is important to note that although both the UN and EU recognise the importance of restorative justice, both emphasise the importance of retributive justice in the transitional justice process, according to international law. They also emphasise the legal aspects of transitional justice. The AUTJP, however fully embraces the restorative justice approach and emphasises transitional justice from an African perspective (AUTJP 2019), as the third chapter of this dissertation demonstrates.

### **1.5.2 Literature on restorative and retributive justice**

This study considers the debate between retributive and restorative justice. Retributive justice has often been regarded as the main form of justice in transitional justice because it has a more legalistic approach. This legalistic approach is based on human rights law and international law because few states have domestic laws that can apply to transitional justice in peace processes. Retributive justice focuses on the prosecution of the perpetrator and not necessarily supporting the victim (Hermann 2017). This is the greatest criticism of retributive justice. The literature concerning retributive justice outlines the process of retributive justice as seeking to enforce a punishment, restrict or impose some sort of deprivation on the offender (Bean 1981: 30). From a retributive justice perspective, it is widely accepted that crime is centred around the harm that is caused by the actions of the offenders (Morris 1994: 92). However, this does not imply that

penal legislation overlooks the effect of the action of the offender on the victims (Kilpatrick & Howley 1998).

The restorative justice process emphasises the harm that the victim encountered (Braithwaite 2002). Through the restorative justice process, the offender is encouraged to acknowledge and understand the consequence of their criminal action (Bazemore & Dooley 2001). The focus is on encouraging the offender to accept responsibility for the offence, agree to engage in remedial action to address the harm that was committed, provide a satisfactory indication of their remorse and assure the victim's safety in the future (Rodogno 2008; Jackson 2009; Harris et al. 2004).

Typically, African philosophical scholars suggest that value systems across the continent are more restorative in nature (Teleki & Kanga 2020). Some of the values in these systems are love, social harmony, tolerance and togetherness (Kanga 2018). In most instances of restorative justice, Africa was largely overlooked in the international law-making process, with the exception of Liberia and Ethiopia, which participated in League of Nations activities (Wallace-Bruce 1985). The AUTJP has been conceptualised to ensure that transitional justice peace processes on the continent ultimately seek to restore societal structures that have been marred by oppressive practices in AU member states. This is to be achieved through emancipation from legacies of violent conflict and systematic violations of human rights (AUTJP 2019). The AUJTP seeks to accomplish this by including victims in the restorative justice process at the grassroots level (AUTJP 2019). Including a grassroots approach allows for a hybrid approach to the peace process, as it allows for customary law to be considered along with conventional legislation.

### **1.5.3 Critical theory in transitional justice**

From a critical theory perspective, this study explored whether the AUTJP supports an emancipatory agenda. Emancipation emphasises liberating people from the modern economic system as well as addressing suppressive and repressive social injustices in the world today (Ferreira 2018:1; Bohman 2021; Sharp 2019). Further, emancipation from a critical theory perspective seeks to achieve transformation, including the transformation of conflict, by changing societal and systemic structures and challenging oppressive practices that stem from the historical process (Linklater 2007: 9).

The AUTJP indirectly speaks to this theme of liberation by indicating the need to deal with past systematic violations, inequalities and societal schisms to ensure socio-transformation (AUTJP 2019). Moreover, the emphasis that the AUTJP places on socio-transformation in the context of transitional justice is an instance of conflict transformation as it is a transformation that seeks to constructively alter social structures to address violence (Lederach 2000:4). Furthermore, the AUTJP speaks about ensuring conciliation, restitution and addressing concerns of impunity (AUTJP 2019). This is positive peace, as it seeks to address the driving factors that have contributed to the conflict (Galtung 1969:168). An emancipatory agenda is relevant because it guides the mandate of peace processes towards addressing the systemic violations that cause the exclusion of women and youth (Sikkink 2018). The AUTJP hints at being emancipatory in nature as it touches on the importance of liberation from systemic violations.

#### **1.5.4 Emancipation and the AUTJP**

The emphasis that the AUTJP places on uniting communities aligns with the view of Linklater (2007: 9), who stresses the fact that emancipation seeks to unite communities. Furthermore, the AUTJP speaks of transitional justice as the “various (formal and traditional or non-formal) policy measures and institutional mechanisms that societies, through an inclusive consultative process, adopt in order to overcome past violations, divisions, and inequalities and to create conditions for both security and democratic and socio-economic transformation” (AUTJP 2019). Critical theory includes a broad number of approaches that centre around the notion of liberating people from the modern economic system and state. According to Ferreira (2018), this is known as emancipation. Critical theory seeks to promote emancipation through the support of practices and notions that align with universalist principles of justice (Ferreira 2018). The notion of seeking to overcome past violations through the creation of societal policy measures and societal institutional mechanisms speaks to systemic transformation, which aligns with the notion of liberating people from modern economic and state systems. This systemic approach to overcoming past violations in the AUTJP speaks to the concept of emancipation.



### **1.5.5 Literature on women in transitional justice**

The AUTJP describes the need to treat gender-based violence within transitional justice as operating within a continuum of the perpetual disproportionate victimisation of women (AUTJP 2019). The United Nations Security Council Resolution 1325, on women, peace, and security, was adopted unanimously by the UN Security Council on 31 October 2000 and acknowledged the disproportionate and unique impact of armed conflict on women and girls (UNSCR 1325). According to the International Center for Transitional Justice, the experience of women and girls is often overlooked in transitional justice approaches (Nesiah et al. 2006:3). Moreover, the International Center for Transitional Justice indicates that political transitions can serve as good opportunities to enhance the access of women to justice, building momentum for important reform and regaining public space (Nesiah et al. 2006:4). According to Scanlon and Muddell (2009), addressing gender-based violence is a crucial part of women's struggle for human rights. This is one of the reasons why the AUTJP is important as the continental transitional justice guideline that emphasises gender inclusivity (Scanlon & Muddell 2009). Gender concerns range from high levels of gender-based violence to acknowledging the wide range of roles of women besides that of the victim (Mpeiwa 2020).

### **1.5.6 Literature on youth in transitional justice in Africa**

The literature on youth and transitional justice often highlights how youth are on the sidelines of the formulation and application of transitional justice processes (Kambala 2017). Young people's experiences of violations and abuse need to be central to the mechanisms to establish the truth, address impunity, pursue institutional reforms and enable reconciliation (AGA 2016). The literature concerning youth in transitional justice highlights the role that youth have played in instigating political, social and systemic change through organised youth groups and grassroots networks that confronted injustice, sought a vision for peace and demanded accountability (Ladisch 2018; Africa Youth Charter 2006). The United Nations Security Council (UNSC) Resolution 2250 on youth, peace and security, adopted in 2015, strongly encouraged the incorporation of youth in peace processes (UNSCR 2250). It is also important to note the frameworks that exist around youth participation. Among the most widely known programmes of youth participation is the "Ladder of Participation" (Hart 2008), which Hart derived from an earlier typology about adult agency that was theorised by Arnstein (1969).

This typology differentiates between adults and non-adults, youth and children. According to Hart (2008), youth participation is organised according to eight hierarchical levels. The ascension in this hierarchy is represented by the “rungs” of a ladder. In the bottom three rungs are manipulation, decoration and tokenism which are categorised as “non-participation”. The top five rungs consist of the following: “assigned but informed”, “consulted and informed”, “child-initiated and directed”, “adult-initiated, shared decisions with children” and “child-initiated, shared decisions with adults”. These rungs indicate more desired levels of participation. Another framework is that of Shier, which centres around openings, opportunities and obligations. This framework has been critiqued for its focus on structural and formal aspects of participation and for organising a sequence that is hierarchal and therefore does not allow enough room for youth participation (Malone & Hartung 2010). This hierarchy proposes a progression model that is reliant on adults that shift from allowing youth to express their views and listening to them to considering their views and involving them in the decision-making process and then finally sharing their power with them. These frameworks demonstrate the fact there is a need for youth participation in peace processes (Cahill & Dadvand 2018).

In 2017, the AU declared the Year of the Youth with the theme “Harnessing the Demographic Dividend through Investments in Youth” (United Nations 2015; AUC 2016). However, prior to the AUTJP, there were no prominent policy guidelines on ensuring youth involvement in transitional justice (Limo 2017). Kunama et al. (2017) provide a practical example of youth agency in transitional justice on the African continent by highlighting how this has occurred in the Democratic Republic of Congo, where Fondation Chirezi (FOCHI) set up “Baraza” courts where youth address minor conflicts and land issues in villages (Kunama et al. 2017). There are many examples of this across the continent that have not been documented or incorporated into formal transitional justice interventions.

## **1.6 Theoretical framework**

This study made use of an emancipatory critical theory framework. The critical theory integrates several approaches that emphasise the notion of liberating people from the modern economic system and state (Ferreira 2018: 1). Critical theorists refer to this as emancipation (Linklater 2007: 9). This study sought to apply an emancipatory critical theory perspective to investigate whether the AUJTP seeks to ensure an effective and inclusive transitional justice

process by ensuring that marginalised groups receive restorative justice by being emancipated from the conflict that has suppressed them, as well as from the fallout of that conflict through reconciliation. To achieve an emancipatory agenda in African transitional justice, conflict transformation is required. According to Lederach (2000: 4), “conflict transformation is to envision and respond to the ebb and flow of social conflict as life-giving opportunities for creating constructive change processes that reduce violence, increase justice in direct interaction and social structures, and respond to real-life problems in human relationships”. Conflict transformation aligns with the transformative nature of critical theory. Autesserre (2011: 157) builds upon this by indicating that conflict transformation seeks to achieve this transformation by understanding the underlying relational structural patterns while fostering relationships and building relationships.

From a critical theory perspective, it is therefore important to consider whether a given transitional justice effort has accomplished the emancipatory agenda. Galtung defines negative peace as the absence of war or violence and positive peace as the integration of human society (Galtung 1969: 168). The best way to ensure this is to emphasise a mandate of positive peace. Therefore, from a critical theory perspective, a successful transitional justice intervention must carry an emancipatory mandate that emphasises positive peace. Positive peace is achieved through integrating human society by understanding the underlying elements in a societal structure that contributes to the conflict. In the context of this study, the argument is made that this would mean ensuring that women, as well as youth, are an integral part of the peace process.

## **1.7 Research methodology**

The study was qualitative and made use of an inductive methodology. To fulfil the research objectives, a qualitative approach was used in this study. Qualitative research emphasises the recording the quality of a phenomenon (Walliman, 2006: 71). The phenomenon recorded in qualitative research cannot be measured and is therefore abstract. The phenomenon in this study is the effect of a restorative justice approach on the inclusion or exclusion of women and youth in transitional justice processes. Qualitative research pursues “the social world of research participants by learning about their social and material circumstances, their experiences, perspectives and histories” (Moriarty 2011: 2).

According to Miles and Huberman (1994: 25), a case study “is a phenomenon of some sort occurring in a bounded context... in effect, your unit of analysis”. A qualitative case study enables a researcher to address the “how” question by considering the influence of the context on an occurrence (Baxter & Jack 2008: 556). A case study is beneficial because although it is contextual, it also illustrates a common issue or occurrence (Crowe et al. 2011). This study made use of illustrative case studies. An illustrative case study is used to observe a familiar case with the intention of ensuring that the case is better understood. It is primarily descriptive in nature and is among the main types of case studies in research methodology. This type of case study makes use of two or more instances to highlight a particular occurrence (Tardi 2019).

A thematic analysis of the literature on transitional justice in Africa was undertaken. Moreover, the study relied on data from primary sources such as the AUTJP, African Youth Charter, UNSCR 1325 and UNSCR 2250. These are primary sources that are available in the public domain. Furthermore, the study undertook a content analysis of the AUTJP through a critical theory lens to explore whether it supports an emancipatory agenda. Moreover, this study also made use of secondary sources such as academic books, journal articles, and reports that are in the public domain that speak to topics concerning transitional justice, restorative and retributive justice, gender and the generational dimension of transitional justice.

Furthermore, this study made use of illustrative case studies, which are descriptive studies that use two or more instances of an event to demonstrate a situation (Becker et al. 2012). For this study, these case studies focused on the two actors: women and youth. These case studies were considered with the intention of exploring the consequences of inclusion and non-inclusion as well as the evidence of emancipation in peace processes. In relation to youth, the cases of the baraza courts of the Democratic Republic of Congo, which ensured that youth were trained in dialogue and transitional justice skills, the transitional justice processes of Uganda, which considered the role of youth and child soldiers, and post-conflict peace processes of the Central African Republic, where youth organisations took a leading role, were selected (Kunama et al. 2017; Luehe 2013). With regard to women, the cases of the Gacaca courts of Rwanda, where rape cases of women were transferred to these courts by the government, the TRC of Sierra Leone, which had a Special Court that focused on prosecuting gender crimes will be considered (Gyimah 2009; Melin 2016; Teale 2009). This study used a thematic analysis to analyse these case studies.

## **1.8 Limitations of the study**

The AUTJP identifies cross-cutting measures across five previously marginalised groups. These groups are women and girls, children and youth, persons with disabilities, internally displaced persons, refugees and stateless persons (AUTJP 2019). This study, however, only focused on women and youth. This is because a mini dissertation at a Master's level is not expansive enough to cover all five cross-cutting measures with due diligence.

## **1.9 Ethical considerations**

This study used literature from sources that are available within the public domain. These sources included sources legally accessible through the internet, the university library and bookstores. This limited ethical concerns. The sources used in this study were acknowledged and credited accordingly.

## **1.10 Chapter outline**

The first chapter introduced and discussed the importance and relevance of the research provided the research problem and questions, the research aim and objectives and the methodology of the study. The second chapter will outline the theoretical framework of the study. In the third chapter, this study will explore the importance of giving greater consideration to restorative justice, while still considering retributive justice, to have a more balanced transitional justice element of the peace process. The fourth chapter will consider illustrative case studies that both critique and support the argument made in this paper. The fifth chapter will conclude the study and demonstrate how all preceding chapters have answered the research question from a critical theory perspective.

## **Chapter two: theoretical framework**

### **2.1 Introduction**

This study made use of an emancipatory critical theory framework to determine whether the AUTJP creates a supportive framework that aligns with a restorative approach to transitional justice to increase the inclusion and emancipation of women and youth in transitional justice processes. The AUTJP was adopted on the 12<sup>th</sup> of February 2019 at the 32<sup>nd</sup> Ordinary Session of the Assembly of the African Union in Addis Ababa. This policy was adopted according to Article 4 (o) of the Constitutive Act of the African Union, which advocates for “peaceful resolution to conflicts, respect for the sanctity of human life, and the condemnation and rejection of impunity” (AUTJP 2019). This chapter will discuss emancipatory critical theory and use it to analyse the AUTJP. To accomplish this, this study will consider the definition of critical theory and pay attention to the emancipation aspect of critical theory. According to Ferreira (2018), critical theory is rooted in emancipation because it includes a broad number of approaches that centre around the notion of liberating people from the modern economic system and state.

This chapter will also consider critical theory thinkers that have shaped critical theory and influenced transitional justice. These are thinkers such as Jürgen Habermas, who theorised about the theory of communicative action, which emphasises the paradigm of communication in critical theory, dealing with patterns of rationality in human communication. Andrew Linklater has extrapolated this to international relations (Bohman 2005). The theory of communicative action gave rise to communicative justice, which is based on the equitable exchange between individuals to achieve a contractual obligation. According to Simpson (2007), victims should be able to engage their offenders in a Habermasian method of public democratic deliberation. By applying an emancipatory critical theory framework to a restorative justice approach in transitional justice in light of the AUTJP, this study will fill the gap left by Simpson. This gap is the fact that his positionality is Western-centric. In this chapter, this gap will be closed by considering the participatory facet of democratic engagement in an African context by considering the effect of restorative justice on the inclusion of women and youth in transitional justice processes.

Furthermore, this chapter will discuss the link between critical theory and the AUTJP. To do this, this chapter will examine how the AUTJP unpacks transformation and inclusivity. The AUTJP emphasises the importance of inclusive dialogues, which aligns with the need for open dialogue that Linklater identifies as being key to achieving emancipation according to critical theory. Among the principles in the AUTJP is “Inclusiveness, Equity and Non-Discrimination” (AUTJP 2019: 6). Conflict transformation is another important concept to consider when discussing emancipatory critical theory. This chapter will also consider how conflict transformation applies to the AUTJP. Conflict transformation entails establishing constructive processes that ebb the flow of violence while increasing justice in the engagement with social structures (Lederach 2000: 4). The engagement in these social structures determines the level of inclusion of marginalised groups such as women and youth. This chapter will also demonstrate how conflict transformation is a significant part of restorative justice and the effect of it on the inclusion of women and youth.

Positive peace is another important concept that this chapter will unpack. Restorative justice often entails reintegration and reconciliation. This aligns with positive peace, which seeks to ensure lasting peace. Lasting peace is necessary to ensure that women and youth receive emancipation in transitional justice processes. This chapter will do so by analysing the AUTJP and how it considers peace processes. Moreover, this chapter will discuss the importance of hybridity in critical emancipatory theory. Hybridity suggests that the peace process does not include a dynamic of external actors that bring new ideas to local societies, but is instead a local phenomenon. The AUTJP was written to serve as a guideline for transitional justice in peace processes that are meant to be applied in an African context and promote the use of African values. This chapter will discuss how the AUTJP considers African values. These are values such as a communalistic spirit, a sense of the sacred and of religions, and a sense of the sacredness of human life.

An emancipatory agenda will be required in the transitional justice process to ensure the inclusivity of marginalised groups such as women and youth. Therefore, this chapter will also discuss the importance of an emancipatory agenda. The AUTJP emphasises the importance of restoration for marginalised groups that suffered from recurring violence through reconciliation, active participation and inclusion in the peace process. This chapter will demonstrate how this restorative approach to transitional justice seeks to ensure the inclusion of marginalised groups such as women and youth in transitional justice processes.

## **2.2 Emancipatory critical theory**

This study seeks to analyse the AUTJP according to an emancipatory critical theory framework. Critical theory includes a broad number of approaches that centre around the notion of liberating people from the modern economic system and state. According to Ferreira (2018), this is known as emancipation. Critical theory seeks to promote emancipation through the support of practices and notions that align with universalist principles of justice (Ferreira 2018). Furthermore, critical theory seeks to critique oppressive institutions and practices that have repressed marginalised groups. This critique is transformative as it seeks to change national societies, the emerging global society and international relations.

### **2.2.1 Critical theory thinkers**

The transformative nature of this critique emanates from the alternative ideas of different thinkers. First are thinkers such as Antonio Gramsci and Robert Cox, with the paradigm of production (economic patterns related to the production of goods and their social and political relations). Second are thinkers from the Frankfurt school, who theorised that a “critical” theory is different from a “traditional” theory according to a particular objective. The particular objective is that a theory is critical to the degree that it pursues “emancipation from slavery” and serves as a “liberating... influence” that aims “to create a world which satisfies the needs and powers of” human beings (Horkheimer 1992: 246).

Thinkers from the Frankfurt school, such as Jürgen Habermas (1987), emphasise the paradigm of communication (patterns of rationality in human communication and their ethical principles). Habermas (1987) formulated the theory of communicative action, which frames human beings as rational arguers. This theory of communicative action was extrapolated to the communication paradigm, which was applied to international relations by Andrew Linklater (Bohman 2005). The theory of communicative action gives rise to communicative justice according to Simpson (2007). Communicative justice is predicated on the notion that justice is contingent on the relations between individuals, with particular respect to an equitable exchange to fulfil a contractual obligation. Simpson (2007) further argues that in post-conflict



societies, victims should be able to engage with their offenders in a Habermasian process of public democratic engagement. The gap in the argument presented by Simpson is that it is Western-centric due to his positionality. This study will close this gap by considering the participatory aspect of democratic deliberation within an African context. In relation to transitional justice, communicative justice can help to ensure that there is a legitimate truth recovery that acknowledges the trauma of the victim while still scrutinising offender narratives of political violence and subjecting them to rational deconstruction. There are two common threads in both these approaches. First, they use emancipation as a principle to offer a criticism of society and the world political order. The second common thread is that they both identify the possibility of emancipation to developing in historical processes. However, they do not regard it as an inevitability.

Therefore, emancipation is rooted in processes of open engagement concerning who can legitimately be excluded from certain political arrangements and what entitles these people to these rights (Sharp 2015). According to Linklater (2007), emancipation stresses that global interactions must be directed by inclusive and transparent dialogue that is free from coercion and that centres around the common ties that unite communities. Further, this applies to the obligations of individuals who are insiders and whether it is fair to place restrictions on the rights of outsiders. Critical theory, therefore, plays an active role in the improvement of human affairs according to the possibility for freedom that is innate in modernity and seeks out alternatives in society to bring about that freedom.

### **2.2.2 Emancipatory critical theory and the AUTJP**

According to the AUTJP (2019), Africa has been plagued by political strife, socio-economic transformation, and the pursuit of liberation. This strife and transformation speak to the fight against apartheid and colonialism, conflict with military authoritarian regimes and the struggle for human rights, democratic governance, the rule of law and constitutionalism. The following sections will unpack this struggle by considering transformation and inclusivity in light of the AUTJP. These efforts result in transitional justice programmes such as national truth and reconciliation commissions, national dialogues, and national reparations funds (AUTJP 2019; Lucey & Knoope 2021).

It has already been established that the critique inherent in critical theory is transformative in nature. The importance that the AUTJP places on transformation aligns with the transformative nature of critical theory. Furthermore, the emphasis that the AUTJP places on unifying communities aligns with the view of Linklater, who stresses the fact that emancipation seeks to unite communities. Furthermore, the AUTJP speaks of transitional justice as the “various (formal and traditional or non-formal) policy measures and institutional mechanisms that societies, through an inclusive consultative process, adopt in order to overcome past violations, divisions, and inequalities and to create conditions for both security and democratic and socio-economic transformation” (AUTJP 2019; Lucey & Knoope 2021). The notion of seeking to overcome past violations through the creation of societal policy measures and societal institutional mechanisms speaks to systemic transformation, which aligns with the notion of liberating people from modern economic and state systems. This systemic approach to overcoming past violations in the AUTJP speaks to the concept of emancipation. Therefore, one can regard the AUTJP as being emancipatory in nature.

### **2.2.3 Inclusivity and the AUTJP**

Furthermore, the emphasis that the AUTJP places on inclusive dialogue aligns with the transparent and open dialogue that Linklater identifies as being essential to emancipation according to critical theory. Moreover, the conception that the AUTJP gives of transitional justice as “a necessary step in moving from a divided and painful past to a commonly shared and developed future” has a “liberating ... influence” (Horkheimer 1992: 246) on the transitional justice effort in peace processes. Therefore, the AUTJP seeks to make liberation a key facet of the agenda in peace processes. From a critical theory perspective, the AUTJP has an emancipatory agenda. This entails ensuring emancipation, which entails more than mere conflict resolution. It is evident that the AUTJP seeks to ensure effective and inclusive transitional justice by ensuring that marginalised groups are part of the peace process. This is evident in the third principle of the AUTJP, which is “Inclusiveness, Equity and Non-Discrimination” (AUTJP 2019: 6). To this end, the AUTJP indicates the importance of addressing the root causes of conflict by ensuring that “TJ processes promote the participation and address the needs of marginalised and vulnerable groups such as women and girls, the elderly, disabled and youth (especially child soldiers)” (AUTJP 2019: 6).

As stated previously, this study will focus on the marginalised groups of women and youth. Furthermore, the AUTJP has an emancipatory agenda as it seeks to address the systems that have perpetuated the exclusion of these marginalised groups by ensuring that they receive restorative justice through reconciliation. This is evident in the sixth principle of the AUTJP, which is “Synergizing, Sequencing and Balancing TJ Elements” (AUTJP 2019: 7). In this regard, the AUTJP speaks about the importance of the “formulation of accountability and reconciliation measures should be approached, both conceptually and procedurally, in an integrated manner and imbued with restorative and responsibility elements respectively” (AUTJP 2019: 7).

#### **2.2.4 Obligations of member states**

It is important to note that AUTJP has assigned responsibility to member states to ensure its effective implementation in an inclusive manner. These responsibilities occur at a national, regional, and continental level. At a national level, the AUTJP indicates that it is the responsibility of states to ensure that they pursue transitional justice processes by ensuring that there are no social or political impediments to the process and to guarantee that there is a safe and inclusive space for the advocacy of transitional justice, and to mobilise all sections of society across political lines (AUTJP 2019).

An example of this is Uganda, which created a national transitional justice policy based on the AUTJP according to its own context (NTJP 2019). To this end, the AUTJP indicates that the “success of the TJP will be determined by the political commitment, leadership and capacity of national and local actors in the country concerned” (AUTJP 2019). Furthermore, the AUTJP encourages national ownership as well as a wide consultative process that includes the important stakeholders to ensure inclusivity (AUTJP 2019). The policy stresses the need for collective leadership at a national level to ensure that the transitional justice process reflects an inclusive national vision where the division of labour, role and responsibilities of each stakeholder are clearly delineated (AUTJP 2019). A further obligation for states indicated in the AUTJP is resource mobilisation. The AUTJP indicates that the “national ownership, allocations of funds should be made in national budgets for the implementation of national TJ policies and programmes” (AUTJP 2019). It is important to note that a major challenge that is facing the region which is largely attributed to a severe lack of financial resources dedicated towards matters of transitional justice (Kagame 2017).

At a regional level, the obligations indicated by the AUTJP are solidarity and resource mobilisation. The obligations at a subregional level are the cooperation of neighbouring states and the relevant Regional Economic Community (REC) (AUTJP 2019). An example of this is evident in the SADC Strategy on Women, Peace and Security (2018-2022) which indicates that women must be regarded as “actors and empower them to participate in creating more sustainable peace and security for all” or the ECOWAS regional plan of action which states that ” ECOWAS shall recognise, encourage and support the role of women in its initiatives for conflict prevention, management, resolution, peacekeeping and security “(ECOWAS 2010). In addition to this, the AUTJP advocates for sharing lessons learnt as well as best practices, making the relevant expertise and technical support available. At a continental level, the AUTJP indicates that the Chairperson of the African Union Commission (AUC) may establish an African Transitional Justice Fund to ensure that there are resources available and encourage interventions as well as resource mobilisation activities such as organising pledging conferences for affected states with both state and non-state actors, developing a database of expertise and funding the deployment of these experts from the database that supports national transitional justice processes (AUTJP 2019).

These obligations have been indicated by the AUTJP to ensure that there is a practical element that will guarantee the inclusion of marginalised groups by indicating what is expected of AU member states to ensure that this inclusivity is a reality. These obligations serve to transform transitional justice processes at a national, regional and continental level in order to ensure that emancipation is achieved.

### **2.2.5 Conflict transformation**

As previously stated, conflict transformation is necessary to achieve an emancipatory agenda. Conflict transformation entails establishing constructive processes that stem the flow of violence while increasing justice in the engagement with social structures (Lederach 2000: 4). Therefore, the change that occurs must be beneficial to those that have been oppressed by the violence of the system that has perpetuated their repression. Autesserre (2011: 157) further states that conflict transformation entails understanding the relational structural components of a conflict to achieve transformation that promotes building relationships. This is the case in the

Democratic Republic of Congo, where the baraza courts were established with sub-structures that centred around women and youth to address the structural components of the violence that had marginalised them (Poole 2013). This will be discussed more in the fourth chapter of this study.

Furthermore, conflict transformation refers to the shift from conflict-habituated systems to peace systems (Botes 2003). This shift differs from the more widely used term of conflict resolution because it emphasises systems change. Deeply rooted social conflicts require systemic change because the conflict has resulted in patterns that have become ingrained in the social system (Lederach 1997). The social system itself is the main unit of analysis, and therefore the use of the term “resolution” becomes less apt in this context. Transforming deeply ingrained conflict is only part of the ambit of “resolving” the conflict (Miall 2004). The core issue is seeking systemic change. This is because systems cannot be “resolved”, but they may experience transformation, hence the use of the term “conflict transformation” (Notter & Diamond 1996).

According to Diamond (1996), conflict transformation is a continuous process. Transformationalists such as Rupesinghe (1995), Schwerin (1995), and Spencer and Spencer (1995) regard conflict transformation as more effective than conflict resolution, as well as conflict prevention and conflict management. This is because conflict resolution may resolve the immediate conflict but leave the system that has been perpetuating that conflict untouched, conflict prevention seeks to neutralise the triggers for conflict but does not address those triggers and conflict management seeks to merely minimise the negative aspects of a conflict as opposed to ensuring that the causal factors behind those negative aspects are dealt with. Therefore, the underlying causes of the conflict would remain in all three instances. On the other hand, conflict transformation holds social change as its primary aim. Moreover, conflict transformation differs from conflict resolution that results in a more practical end state, as it has a more open-ended ongoing process to address conflict. Some scholars including Galtung (1996), Väyrynen (1991), and Lederach (1997) have implied that conflict transformation is an ongoing process. This implies that the conflict does not end when the violence stops but rather when the systemic issues that caused the conflict are addressed.

Conflict transformation is also a way to establish “new social relations, institutions, and visions” (Väyrynen 1999: 151). Social relations are also important in restorative justice

approaches. This means that conflict transformation seeks to ensure systemic change by establishing a better relationship between actors in a community and adjusting the system to benefit these members so that conflict does not re-emerge in the future (Wils 2006). It can therefore be stated that conflict transformation seeks to liberate those who are oppressed by systemic conflict by establishing systems with these new institutions and social relations that centre around peace. This notion of liberation aligns with an emancipatory agenda such as that in the AUTJP. Transformation is required for liberation to take place. The AUTJP highlights the importance of transformation as it states: “The overall objective of the AUTJP is to provide the policy parameters on holistic and transformational TJ in Africa” (AUTJP 2019). Furthermore, the AUTJP encourages states, regional actors and non-state actors to engage in the peace process to achieve conflict transformation. The AUTJP also encourages states to make use of local and indigenous actors to achieve systemic change (AUTJP 2019). The AUTJP, through its cross-cutting issues, identifies participants in the peace process that have been excluded in the transitional justice effort. Among these participants are women and youth. Conflict transformation creates room for these participants by advocating for systemic change that can be applied through a restorative justice approach. By changing the system that excluded these participants to become more inclusive, women and youth can be better included in the transitional justice effort through conflict transformation.

### **2.3 Positive peace**

Positive peace is another important aspect of achieving an emancipatory agenda as it indicates that conflict transformation has occurred (Bond 2014). As previously stated, positive peace is the integration of human society, while negative peace is the absence of war (Galtung 1969:168). Conflict transformation seeks to overcome systemic conflict by building new institutions and social relations with a focus on peace. To achieve that peace, these social relations entail integrating human society. Therefore, it can be stated that conflict transformation seeks to ensure that a society is transformed at a systemic level to achieve positive peace. In contrast, it can be stated that conflict resolution seeks to facilitate a peaceful ending of conflict and retribution to achieve negative peace. Therefore, it can be stated that conflict transformation is better suited to an emancipatory agenda because it seeks to ensure systemic liberation with a focus on the human element.

According to Sharp (2015), negative peace is narrow because it does not emphasise the importance of sustainability of peace: it simply seeks to end the conflict. Further, Sharp (2015) argues that this narrow view of peace is evident in the work of Ruti Teitel, who is considered to be one of the leading scholars on the genealogy of transitional justice. According to Sharp, Teitel indicates concern that transitional justice mechanisms have become linked to nation-building, which will result in transitioning societies having to give up on “ambitious goals of establishing the rule of law and democracy” (Teitel 2003). Sharp indicates the importance of positive peace, as it entails not only the absence of hot conflict but also the absence of indirect violence such as structural violence, which manifests itself in the form of corruption, poverty, social, civil and political inequalities as well as other social injustices. Sharp (2015) further indicates that positive peace is more far-reaching than the traditional goals of transitional justice, which include setting up democracies and bolstering the rule of law. Sharp (2015) argues that without using the term “positive peace”, transitional justice advocates for a form of accountability that will result in a type of positive peace. This type of positive peace is a “lasting peace” where the peace goes beyond achieving an amnesty agreement. According to Sharp, transitional justice will set into effect economic and social development that will result in positive peace. Sharp’s view on positive peace being underpinned by lasting peace is supported by Boraine (2006), who states: “[t]he overall aim [of transitional justice] should be to ensure a sustainable peace, which will encourage and make possible social and economic development”. Transitional justice requires positive peace to prevent the causal factors that have sparked conflict from repeating conflict in the future (Sharp 2019).

### **2.3.1 The AUTJP and peace processes**

The AUTJP emphasises the importance of establishing a mechanism for the peacebuilding element in peace negotiations. This mechanism entails the process of negotiation and reaching an agreement. Furthermore, this mechanism must consider transitional justice in the peace process to ensure a positive influence on the resolution of all the dimensions of the conflict. Resolving a conflict in all dimensions entails addressing the conflict beyond the dimension of simply reaching an agreement. Furthermore, the AUTJP identifies benchmarks for these peace processes. Among these benchmarks is the adoption of procedures that put an end to continual violence while ensuring the protection of civilians, with distinct considerations for women and

youth (AUTJP 2019). This entails liberating women and youth from a cycle of violence that is prevalent during conflict and is therefore emancipatory in nature. Lucey and Knoope have highlighted the importance of this stating that “a victim centred approach and broad outreach strategy will be paramount, while building on past efforts to document and analyse cycles of violence” (Lucey & Knoope 2021).

Moreover, further benchmarks include re-establishing law and order by reinvigorating and reconfiguring local administrations and institutions, ensuring mechanisms that increase the participation of civilians, such as women and youth, in peace processes and ensuring their inclusion in wide-ranging peace agreements (AUTJP 2019; Lucey & Knoope 2021). The reconfiguration of institutions and administrations along with the establishment of inclusive mechanisms speaks to liberating previously excluded groups such as women and youth from violence through systemic change. Therefore, the benchmarks of the AUTJP align with an emancipatory agenda.

The AUTJP acknowledges the need for conflict resolution to bring about negative peace. Furthermore, it emphasises the need for systemic change through the reinvigoration and reconfiguration of institutions. This is an indication that the AUTJP places a strong emphasis on bringing about positive peace through conflict transformation. Galtung’s definition of peace seeks to be beneficial to most of the population as it seeks to integrate human society. This is similar to popular peace, in which the preferences of the population are recognised “beyond narrow liberal confines” (Sharp 2015).

These narrow liberal confines speak to the dominant liberal peace paradigm, which is understood as the absence of violence in most contexts. Therefore, the similarity between positive peace and popular peace is that they both entail peace beyond the absence of violence. Peace that seeks to integrate human society will likely consider the preferences of the population (Montoya & Tellez 2020). Therefore, positive peace and popular peace are not mutually exclusive. Peacebuilding processes that do not consider the lived reality of post-conflict contexts create counterproductive friction and struggles. This is why emancipation is such a key element of peacebuilding.



## 2.4 Hybridity

From an emancipatory critical theory perspective, hybridity is another important concept to consider. This is because hybridity allows us to question the engagement between the “top-down” and “bottom-up” processes in liberal international peacebuilding. Hybridity suggests that the peace process does not entail a dynamic of external actors that brings new ideas and practices to stagnant local societies but is a local phenomenon. Furthermore, hybridity allows one to evaluate liberalism in transitional justice without the assumption that it is an all-encompassing theoretical approach to peace processes (Sharp 2015). In addition to this, hybridity shifts the aim from efficiency through conflict resolution to fostering local legitimacy in transitional justice processes.

Therefore, hybridity reinforces the transformative nature of transitional justice as espoused by the AUTJP. This further entails a shift from a primarily elite-level analysis and giving greater consideration to non-elites. The non-elites in the transitional justice process are the marginalised groups such as women and youth who have often been relegated to the sidelines of the transitional justice process. In addition to this, liberal international peacebuilding emphasises nation-building, where states have been the main unit of analysis (Teitel 2003). This state-centred approach is informed by the Westphalian narrative which regards Western states as the elite (Kayaoglu 2010).

Therefore, the non-elites can also refer to non-Western states which would include AU member states. Due to critiques of liberal international peacebuilding, it would be imprudent to assume that transitional justice as peacebuilding would holistically reflect the concept of peacebuilding. These critiques come from scholars such as Sharp (2015), who purports that the issue with liberal international peacebuilding is that it has neocolonial undertones and inappropriateness. In addition to this Sharp (2015) indicates that liberal international peacebuilding isolates transitional justice from the needs of the local population because there is a low likelihood of these needs being addressed. From a critical theory perspective, it is important to consider marginalised groups such as women and youth as part of transitional justice because it is a repressive system that has perpetuated their marginality. To transform such systems, these marginalised groups must be included in the peace process to reform and revitalise the system to become more inclusive as well as liberate the repressed within it. In the

following section, this chapter will consider African values and their effect on transitional justice systems in relation to the inclusion of marginalised groups.

## **2.5 African values**

Transitional justice in the AUTJP is described as an “inclusive consultative process” (AUTJP 2019). The AUTJP further outlines examples of these processes in the African context. These are “traditional adjudicative processes such as clan or customary courts and community-based dialogue” (AUTJP 2019). As previously mentioned, Africa has been greatly overlooked by entities that purported to be liberal international organisations, such as the League of Nations, in the international law-making process (Wallace-Bruce 1985). This is why it is important to note that the emphasis that the AUTJP places on making use of indigenous values to facilitate better inclusion of marginalised groups such as women and youth is crucial. Among the principles of the AUTJP is “Providing institutional space for integrating into and making use of indigenous values and socio-political practices, including through empowering traditional and religious leaders and community-based organizations” (AUTJP 2019). By considering indigenous values such as a communalistic spirit, a sense of the sacred and of religions, and a sense of the sacredness of human life, participants in the transitional justice effort will be better equipped to grasp the contextual reality of marginalised groups in the conflict (Njiofor 2018). This, in turn, will better enable conflict transformation as systemic change and human integration to occur in a much more seamless manner, thereby ensuring that the transitional justice mandate carries an emancipatory agenda.

## **2.6 The emancipatory agenda**

An emancipatory agenda is a plan that is conceptualised with the purpose of ensuring that the marginalised receive social and political rights and freedoms (Nkoane 2012). In the context of transitional justice, it is a plan that seeks to ensure that the mandate behind the transitional justice process is directed towards liberating marginalised groups such as women and youth that have largely been consigned to the periphery of peace processes in the role of victims. An emancipatory agenda, therefore, seeks to ensure that the transitional justice process achieves its mandate through the emancipation of marginalised groups such as women and youth from

systemic ostracization in peace processes. Therefore, ensuring that the transitional justice process holds an emancipatory agenda can ensure that women and youth are better positioned to be included in peace processes.

Throughout the AUTJP, the ideals of transformation throughout the peace process are espoused. This transformation is geared towards ensuring that marginalised groups receive restoration and reconciliation and are therefore liberated from the repressive system that has perpetuated the conflict (AUTJP 2019). This notion of liberation demonstrates that the AUTJP recognises the importance of emancipation. Therefore, from an emancipatory critical theory perspective, one can analyse the AUTJP as it seeks to revitalise post-conflict systems through giving greater consideration to restorative justice as opposed to solely focusing on retributive justice as many traditional sources have done. The restoration that AUTJP propagates is for marginalised groups that have suffered recurrent violence through reconciliation, active participation and inclusion in the peace process. Therefore, this restoration seeks the emancipation of these groups from the cycle of violence that occurs in conflict situations (AUTJP 2019). From a critical theory perspective, it is evident that the AUTJP aligns with an emancipatory agenda.

## **2.7 Conclusion**

Critical emancipatory theory places a heavy emphasis on the importance of emancipation. Critical theory thinkers such as Antonio Gramsci and Robert Cox support the critical the paradigm of production, while thinkers from the Frankfurt school emphasise how crucial liberation is to ensure that emancipation takes place. Liberation further entails freeing the marginalised from systemic oppression. From an emancipatory critical theory perspective, the AUTJP seeks to ensure that this liberation occurs by serving as a guideline by which African states can uphold human rights and constitutionalism by transforming the system to be more inclusive of marginalised groups by acknowledging systemic mechanisms that will accomplish this such as truth and reconciliation commissions, national dialogues, and national reparations funds.

In addition to emphasising the need for transformation, the AUTJP highlights the importance of inclusivity. The systemic root causes of conflict are what perpetuate a system of exclusion.

Therefore, the AUTJP touches on the importance of addressing the root causes of a conflict to ensure that there is inclusivity. Another reason why the AUTJP emphasises the importance of addressing the root causes is to achieve conflict transformation. This is because most transitional justice efforts seek solely to end the conflict through conflict resolution. If the root causes remain unaddressed, it may result in the same offenses reoccurring in the future. This is why the transitional justice effort must go beyond conflict resolution and seek conflict transformation to prevent the same issues from causing conflict in the future. Ensuring conflict transformation will bring about positive peace, which will bring about human integration and go beyond the mere absence of violence. Positive peace aligns with an emancipatory agenda as people are both freed from violence and are better integrated into society. The peace that is achieved is sustainable. The integration of previously marginalised groups demonstrates a systemic transformation. The AUTJP emphasises how breaking cyclical violence should be the driving force of the peace process.

Therefore, ensuring that better human integration in the peace process takes place can transform oppressive systems that have perpetuated cyclical violence. The AUTJP also emphasises conducting the peace process by considering the context of Africa and promotes African values such as a communalistic spirit, a sense of the sacred and of religions, and a sense of the sacredness of human life to ensure that indigenous mechanisms are used within the peace process. Making use of indigenous mechanisms achieves hybridity by fostering legitimacy in local transitional justice processes. Therefore, from a critical emancipatory theory perspective, an emancipatory agenda is required throughout the entire process to ensure that the outcome of transitional justice processes is emancipation for marginalised groups such as women and youth by using both formal and informal indigenous mechanisms throughout the peace process. From a critical emancipatory theory approach, it is evident that a restorative justice approach to transitional justice influences the inclusion and emancipation of marginalised groups such as women and youth.

## **Chapter 3: Retributive and restorative justice**

### **3.1 Introduction**

This chapter will explore the debate between retributive and restorative justice and consider these two approaches to transitional justice according to the AUTJP. This will demonstrate how the restorative justice approach to transitional justice affects the inclusion and emancipation of women and youth in the transitional justice process by juxtaposing restorative justice with retributive justice. This chapter will conduct an in-depth examination of retributive justice and how it aligns with the genealogy of transitional justice. In this regard, this chapter will discuss the three phases of the genealogy of transitional justice.

Phase 1: Post-World War II transitional justice characterised by the Nuremberg trials. It is largely associated with different states cooperating to punish the German state. In Phase 2, the focus is placed on post-Cold War transitional justice, which is characterised by accelerated democratisation and political fragmentation (Teitel 2003). In Phase 3, the focus is on steady-state transitional justice. This phase is marked by the *fin de siècle* (end of the century) hastening of transitional justice phenomena linked to globalisation and characterised by growing political unrest and violence (Teitel 2003). From the precedent set by the transitional justice process in the Nuremberg trials, it is evident that the genealogy of transitional justice has largely been characterised by a retributive justice approach.

This chapter will also consider the appeal of retributive justice. The appeal of retributive justice emanates from the intuitive support that it garners based on the notion that it gives a good account of when a punishment is justified and the fact that it aligns with arguments that link it to deeper moral principles. Moreover, this chapter will also discuss restorative justice and its link to African shared values of transitional justice by considering ubuntuism and African justice mechanisms. African justice systems that follow the principles of ubuntu and restorative justice systems emphasise dignity and respect, with the overarching goal being the restoration of the victims and reintegrating the offenders back into society (Skelton 2007). Lastly, this chapter will make a case for restorative justice according to the AUTJP by detailing some of the benefits of restorative justice. The AUTJP speaks of how “balancing entails achieving a compromise between the demand for retributive criminal justice and the need for society to

achieve reconciliation and rapid transition to a shared democratic future.” This balance seeks to ensure that retributive justice mechanisms are still considered a necessity in transitional justice peace processes in Africa while ensuring that restorative justice is given recognition as a crucial approach in the pursuit of positive peace. Moreover, this chapter will discuss how AUTJP encourages the use of African justice mechanisms that employ a restorative justice approach to transitional justice to increase the inclusion and emancipation of women and youth in transitional justice processes.

### **3.2 Genealogy of transitional justice**

According to Teitel (2003), the genealogy of transitional justice can be divided into three phases. Phase 1: Post-World War II transitional justice characterised by the Nuremberg trials. It is largely associated with different states cooperating to punish the German state. This phase began in 1945 when the allied powers held these trials with the sole intention of punishing key officials from the Nazi regime for their actions during the course of the war. Additional punishments included sanctions and war crime trials, with the most prominent of these being the Allied-run Nuremberg trials. The transitional justice that took place in this instance was directed towards setting a new global precedent as states moved into the post-World War II period based on a moral compass that opposes human rights abuses. Phase 2 consisted of post-Cold War transitional justice, which was characterised by accelerated democratisation and political fragmentation (Teitel 2003). The downfall of the Soviet Union resulted in several parallel transitions worldwide. With the collapse of the support from the Soviet Union, many military-led regimes throughout South America also collapsed. Similar collapses occurred throughout Eastern Europe, Central America and Africa.

Phase 3 is steady-state transitional justice. This phase is marked by the *fin de siècle* (end of the century) hastening of transitional justice phenomena linked to globalisation and characterised by growing political unrest and violence (Teitel 2003). In this phase, transitional jurisprudence normalises a growing discourse of the law of war, as evident by the upsurge of humanitarian law (Teitel 2003). The upsurge of humanitarian law allows for the recognition of inconsistencies in state action. However, this has enforced state respect for human rights. This indicates the potential to shift from a normalised transitional justice theory to a campaign against terrorism that is intended to punish those who commit human rights violations (Teitel 2003). It is evident that the genealogy of transitional justice is of Western origin and further

rooted in Westernised conceptions of justice, with the focus on punishing offenders. It draws primarily from Western states and the experience of Western states in the post-war era. Therefore, the genealogy of transitional justice is rooted in retributive justice, which reflects Western approaches to transitional justice. This point is also highlighted by Sharp (2015), as we have seen in the second chapter.

### **3.3 Retributive justice**

Retributive justice considers the atrocities committed during conflict as a crime against the state (Heller 1987) and seeks to ensure behavioural change through the threat of punishment to deter crime. Punishment is considered as the mechanism to hold the offender accountable. The retributive justice process focuses on establishing guilt or blame (Hart 1968). This can result in the victims being sidelined in the justice process, and the community is considered peripheral to the process of justice. As evident from the genealogy of transitional justice, retributive justice is rooted in law where punishment is commensurate with the offence committed and the rule of law is applied (Brooks 2017). Rehabilitation is not always the main objective but rather to see that justice is served. The absence of the community results in a permanent stigma in the life of the offender: there is no opportunity for reconciliation, as the retributive justice system does not encourage forgiveness from the victims nor repentance on the side of the offender. Retributive justice has largely been understood as a form of justice that is committed to three principles (Walan 2020). The first principle is that those who participate in wrongful activities and paradigmatically serious crimes justly deserve to face a proportionate punishment. Second, there is an intrinsic good in having some legitimate punisher punish offenders according to what they deserve. The third principle is that it is morally reprehensible to punish the innocent or punish offenders in a disproportionate manner.

The idea of retributive justice has been at the forefront of theorising about punishment. This has been evident in the first phase of transitional justice as identified by Teitel (2003), who indicated that the Nuremberg trials set the precedent for transitional justice being characterised by punishment through a retributive justice approach in international law. Common Article 49/50/129 and 149 to the Geneva Convention urges all contracting parties (most states in the international community) to enact criminal legislation for all individuals that were ordered to or committed crimes that count as “grave breaches” under the Convention. In relation to these individuals, the Conventions indicate “each High Contracting Party shall be under the obligation to search for (them) and shall bring such persons, regardless of their nationality,

before its own courts.” Therefore, states have received the responsibility to uphold and enforce the principle of individual criminal responsibility for “grave breaches” of International Human Rights in international armed conflicts (Wouters 2005). This precedent is reflected through the Rome Statute of the International Criminal Court which established the view that states have the “obligation to prosecute” in international law (Wouters 2005).

### **3.4 The appeal of retributive justice**

The appeal of retributive justice emanates from the intuitive support that it garners based on the notion that it gives a good account of when a punishment is justified and the fact that it aligns with arguments that link it to deeper moral principles. There is a wide consensus that the perpetrators of criminal activities must be punished, even though the only benefit of that punishment would be that it achieves retribution against the offender (Moore 1997: 98–101).

According to retributive justice, punishment must enforce a hardship on the offender or remove a benefit that the offender would enjoy. This is often referred to as “hard treatment”. This hard treatment is intentionally imposed on the offender because of their wrongdoing. The hardship that the offender faces is imposed as a direct response to an action that they have taken. Retributive justice does not entail punishing individuals for facts over which they had no control (Mabbott 1939). This is why those that are punished are referred to as “offenders” because they have committed some kind of offence. Retributive justice considers it immoral to punish offenders over traits that they cannot help having, such as their physical appearance, race or ethnicity. Therefore, retributive justice subscribes to making use of a traditional legal system that is generally considered to have been designed to punish wrongful acts against the state and avoid intentionally punishing acts that are not wrongful (Duff 2018). Another appeal of retributive justice is that it serves as a way of communicating a censure for what is believed to be a wrongful act (Feinberg 1970). This means of communication is normative, as it indicates what should be done in relation to wrongdoing with the purpose of deterring wrongful behaviour by imposing suffering on offenders that have committed the wrongdoing. Retributive justice is meant to communicate that the wrongful actions of offenders are indeed wrong and their punishment is a morally justifiable response to their wrong (Duff 2018: 295).

According to retributive justice, individuals are rational by nature and therefore possess the capacity to make informed decisions. This means that any individual that breaks the rules do



so through a conscious decision. Proponents of retributive justice subscribe to an “offence-based tariff”, which is “a set of punishments of varying severity which are matched to crimes of differing seriousness: minor punishments for minor crimes, more severe punishments for more serious offences” (Cavadino & Dignan 2005).

Critics of retributive justice question how to rank offences. It has been argued that punishing individuals does not address the underlying factors and systemic conditions that have resulted in the criminal offence and that restoration is required through a rehabilitative approach (Hudson 2003; Zedner 2016). Retributive justice further subscribes to incapacitation. Incapacitation assumes that it is the duty of the state to oversee the protection of the populace from harm through the removal of harmful elements from society through incapacitation or incarceration. According to this view, future crime is prevented by restricting the liberty of the offender. These restrictions include imprisonment, disqualification from civil action, strict monitoring and curfews and the death penalty in extreme cases. Deterrence is another aspect of retributive justice. Punishment is imposed on criminal action with the purpose of discouraging that criminal action from repeating itself in the future (Heller 1987).

### **3.5 Restorative justice**

Restorative justice views crime as an action against a fellow human being as well as the community (Murhula & Tolla 2021). Further, restorative justice espouses the view that punishment alone is not effective and that it may cause harm to both the victim and the community. Restorative justice further holds the view that the accountability of the offender occurs through the offender assuming responsibility and having a full grasp of the impact of their offense, taking steps to repair the harm that they have caused and attempting to atone for their wrongdoing. Victims play a central role in the justice process in restorative justice (Achilles & Zehr 2001). The focus of restorative justice lies in problem-solving and obligations related to problem-solving. To this end, the community is central to the problem-solving effort in restorative justice. There is also the belief that the stigma of the crime can be erased from the offender’s life through restorative action. Restorative justice functions according to a system that encourages repentance and forgiveness.

It is believed that restorative justice can serve as a catalyst for transitional justice through the formation of new community bonds and reinforcing the bonds that are already there (Murhula & Tolla 2021). Restorative justice can also be used to strengthen the participatory aspect of transitional justice mechanisms by involving participants such as women and youth that have been alienated from the conventional legal institutions and processes.

Sullivan et al. (1998) argue that the communicative conception of law is “a dyadic process that facilitates dialogue between community and transgressor”, which creates an opportunity for communities to recognise their differences and detect transgressions as disputes among its members. Restorative justice mechanisms are not the sole method of facilitating such communication. However, in comparison to traditional criminal justice processes, restorative justice maximises the potential for a meaningful engagement and dialogue between the victims, the offenders and the community (Gabbay 2005). By creating this new space for communication, restorative justice may serve as a social catalyst for wider intercommunal reconciliation.

### **3.6 Benefits of restorative justice**

In comparison to retributive justice, restorative justice provides a more constructive and positive approach to restoring the relationship between the victim of the wrongdoing, the offender that committed the wrongdoing and the community as a whole. Restorative justice fosters compassion and encourages a more sensitive approach to the individuals and communities that have suffered from a crime (Roach 2000; Cario 2003).

Restorative justice promotes values such as community input, fraternity, forgiveness and accountability. According to Roach (2000), it is the alternative to retributive justice and serves as an antidote to punitive policies (Roach 2000). The goal of restorative justice is to ensure that the victims have a more prominent role. Therefore, marginalised groups such as women and youth would be able to meet their need for information, regain their power and independence and obtain symbolic compensation (Roach 2000). Furthermore, restorative justice is intended to have a positive effect on offenders by ensuring that they take accountability for their actions and giving them the chance to repair the harm that they have caused to the victims and seek a solution to the problems that were caused (Fattah 1998; Umbreit et al.2004).

### **3.6.1 Benefits for victims**

According to Kurki (2003), victims that took part in family conferences described the processes as fair and enabled them to reduce their fear of crime and the resentment and anger that they felt towards the offenders and may increase the likelihood of the offender seeking to right the wrongs that they have done. Both victims and offenders are given the opportunity to confront their problems and seek constructive solutions.

Many experts, such as Achilles and Zehr (2001), have argued that restorative justice enables one to “cast a wider penal net” in spaces that are outside of the jurisdiction of formal processes, such as that of the courts, which would otherwise be detrimental to disadvantaged groups such as women and youth. The “punishment” in this penal area encourages the offender to take actions to atone (Fattah 1998; Roach 2000; Cario 2003). Furthermore, restorative justice can alleviate the weight carried by an overloaded retributive justice system that follows formal mechanisms such as the courts, and provide an alternate method to solve the problem of dead-end classifications where punishments are issued but the system remains and produces more offenders.

There are several benefits associated with restorative justice, such as empowering individuals and cost-saving for communities. The benefits to the community are evident in reduced recidivism. Restorative justice can reduce repeat offences (Weitekamp 1999). When a community reintegrates a member after the harm has been repaired, this decreases the probability of recidivism. Offenders can right their wrongs and learn the process so that they do not repeat the same offence. Other benefits are increased safety, reduced recidivism which results in a safer community and the cost-effectiveness of restorative justice, as the state does not spend funding that would have been spent on preventing individuals from becoming part of the criminal justice system (Furman 2012). Another benefit is that restorative justice encourages active citizenship. This in turn results in a stronger community, as the community will become more cohesive and increase social networks. Strength in unity is another core tenet of African justice systems.

Furthermore, there are also many benefits for the victims. Victims receive the opportunity to enter a safe space and a facilitated dialogue with the offender. They are therefore provided empowerment through the process (Tsai & Robins 2021). The needs of the victim are considered and acknowledged. This can give them a voice in an impersonal system. Another benefit is the fact that the victim is allowed the opportunity to give an account of how they were harmed and receive answers for their questions and indicate to the offender what actions they can take to make amends. Another benefit is that many victims are afforded the opportunity to regain what was taken from them or receive some form of compensation. However, it is important to note that in many instances the process of compensation or the actual compensations themselves may not equate to the level of loss that the victim has experienced. Restorative justice is the approach where victims are most likely to receive compensation, compared to retributive justice.

### **3.6.2 Benefits for the offenders**

There are also benefits for the offenders, as they are provided with the opportunity to demonstrate remorse for their actions. Furthermore, offenders are afforded the opportunity to make amends and move on and return to their communities once the matter is settled. Another benefit is that the restorative justice approach is quicker than formal criminal justice, which allows offenders to rapidly make an impactful change in their lives (Marshall & Merry 1990). Furthermore, restorative justice has a high rate of compliance, as it is a voluntary process and non-coercive in nature.

### **3.7 African shared values**

The AUJTP speaks of African shared values (AUTJP 2019). According to the AUTJP, transitional justice processes are “premised on the African shared values relating to peace and security, justice or non-impunity, reconciliation and human and peoples’ rights elaborated in various AU instruments” (AUTJP 2019). It speaks of the importance of considering an African context concerning justice in transitional justice processes. According to Schoeman (2013), Africa has always presented a way of justice that is diametrically opposed to traditional Western philosophies of justice. African conceptions of justice have traditionally used concepts

such as ubuntu, community, indigenous justice and restoration, which are geared at the restoration of victims and rehabilitation and reintegration of offenders back within the community. Indigenous African traditional justice systems refer to the mechanism that communities in Africa have used to resolve disputes and have passed on for generations. According to Kariuki (2007), traditional justice systems in Africa make use of terms such as traditional, informal, indigenous and community. Kariuki (2007) further goes on to state that these concepts have been employed interchangeably in the literature that speaks to local African conflict resolution mechanisms. Similar values that are prevalent in restorative justice are also found in indigenous African interpretations of justice.

### **3.7.1 African justice systems**

According to Braithwaite (2002), we are yet to discover a culture that does not have some deep-rooted restorative traditions. It is therefore key to acknowledge that restorative justice theory and practice have been enhanced by learning from indigenous practices (Tshehla 2004).

Restorative justice is negotiative in nature and therefore empowers the community to make use of transitional justice during conflict resolution (Elechi 2004). Involving the community allows the process to zero in on the systemic issues that have initially caused the conflict. This in turn allows conflict transformation to take place. Restorative justice and ubuntu follow an interactive process that encourages engagement between the victim, the offender and the community. It encourages community ownership in the process as well as participation from the affected members in the community. African justice systems that follow the principles of ubuntu and restorative justice systems emphasise dignity and respect, with the overarching goal being the restoration of the victims and reintegrating the offenders back into society (Skelton 2007). The process is therefore centred around the victim and acknowledges their need for vindication, information, social support and validation (Elechi 2004). Another key aspect in African justice systems is the healing, support and guidance of the offender in order for them to grasp the impact of their offence and take responsibility for their wrongdoing. The overall purpose is to ensure restoration through healing and reconciliation between the community, the victim and the perpetrator. Therefore, it can be stated that African justice systems prioritise restorative justice.

African justice systems also incorporate mechanisms that exist in the community, such as indigenous dialogue spaces, courts and tribunals. These mechanisms are often presided over by traditional leaders and community elders. In the modern world, most African states have adopted a justice system that is rooted in retributive justice. These structures are largely derived from Westernised legal systems. However, many communities in Africa maintain mechanisms that employ restorative justice, albeit in a more informal manifestation. It is important to take note that the caveat with African justice mechanisms is that they are not homogeneous, particularly along a geographical spread. Many states in Africa also incorporate restorative justice in their approaches. This is evident in the African Charter on Human and People's Rights, which encourages human rights that are relevant to Africa. The Charter emphasises the protection of national communal rights as opposed to only that of the individual. The AUTJP further highlights the charter as one of its motivating documents (AUTJP 2019). Another example can be found in the Constitution of the Republic of South Africa (Act 108 of 1996) as well as the South African Traditional Courts Bill of 2008. Both pieces of legislation demonstrate the effort to introduce customary law in adjudication. Further examples will be discussed in the next chapter. From a critical emancipatory theory perspective, making use of both these formal and informal processes is crucial to ensuring that victims that are affected by conflict can participate in the peace process in a manner that will ensure that there is a restoration that brings about not only conflict resolution but also conflict transformation so that healing can take place. Marginalised groups such as women and youth should be included in the process, whether in a formal or informal manner. This is because in Africa consensus building is used to balance the relationship between community members (Murithi 2006). Lengthy discussions are held where participants are allowed an equal opportunity to speak.

However, it is important to note that in many instances, these spaces have not been inclusive due to traditional norms such as patriarchy and the norm that youth must remain subordinate to community elders and therefore cannot engage them on equal footing. Therefore, the AUTJP identifies marginalised groups such as women and youth as critical participants in the peace process (AUTJP 2019). It is imperative to have all affected parties involved in the peace process to address the causal factors in the system that has resulted in the conflict. As retributive justice centres more around using formal processes to punish offenders, involving these marginalised groups such as women and youth will require restorative justice mechanisms that often take on a more informal manifestation.

An example of African justice mechanisms are spaces such as a *legothlas*, which follow processes that are aligned with those used in restorative circles of transitional justice. The final outcome of these agreements is signified by *amani* (peace), *umoja* (oneness), *obulala* (together) and *simunye* which translates to “togetherness is strength” (Nafukho 2006). These terms signify more than simply ending conflict. They speak about unity and togetherness, post-conflict, which requires engagement with the underlying factors that have initially caused the conflict. This entails seeking restoration with the outcome of positive peace. The AUJTP emphasises the importance of incorporating African transitional justice mechanisms (AUTJP 2019). To this end, AUTJP states that it “recognizes TJ mechanisms as playing an important role in TJ... These should be adapted and used alongside the formal mechanisms to address justice, peace, accountability, social cohesion, reconciliation and healing” (AUTJP 2019).

### **3.7.2 Ubuntuism**

The African philosophy of ubuntu considers the humanity of individuals as interconnected with the humanity of others (Mabovula 2011). Restoration after harm has been done is key to ubuntu justice, as well as the principle that the interconnectivity of humans is what will allow restoration and healing to occur. Although principles of ubuntu remain entrenched in African conceptions of justice, colonisation and globalisation have caused a shift more towards retributive justice in many justice systems.

Most scholarship regarding justice has focused on retributive justice, which has resulted in many of the core elements that are prevalent in restorative justice being overlooked in favour of ensuring that there is retribution against the offender (Branham 2021).

Ubuntuism emphasises communal needs for all the members of that community over the needs of an individual. This is also reflected in African conceptions of justice. African conceptions of justice are humanistic in nature, which is evident in the maxim “umuntu ngumuntu ngabantu” which roughly translates to “a person is a person because of other people” (Nafukho 2006: 409). Other maxims included the Venda saying “muthu u bebelwa munwe”, which means that “a person is born for the other” (Nussbaum 2003). Western-centric and pro-colonialist opinion suggests that it was Europeans that established criminal justice in Africa (Dalgeish 2005). However, this has been proven inaccurate by data found in criminal justice systems in pre-colonial Africa and Britain during the same time frame (Shoeman 2013). Traditional justice

in Africa has always been restorative in nature, as evident in the philosophy of ubuntu, which is prevalent in many African communities. In Africa, the ubuntu philosophy was largely used to maintain law and order and ensure that there was justice on the continent. Colonisation introduced a Western-based criminal justice system that leaned heavily towards retributive justice (Omale 2006).

Retributive justice processes often contradict traditional African perceptions of justice because they focus on punishment and not restoration through reconciliation and the righting of wrongs (Okafo 2006). However, this does not mean that there is no retributive justice in African perceptions. According to Salacuse (1965), “Native law and custom is unwritten, indigenous law; the only law which existed in the land now known as Nigeria before the coming of the British”. This means that there are instances of African traditional conceptions of justice where punishment is initiated but is not codified as it is in international law (Azogu 1991).

Traditional African conceptions of justice are also founded on dignity and harmony rooted in the interest of sustaining a communal system that is rooted in mutual caring. These conceptions of justice align with a restorative justice approach. A criminal offence is therefore regarded as a breach of the relationship between the individual and the community. This is a breach that must be corrected to restore justice in the community. Offenders are therefore not ostracised but instead encouraged to seek atonement for their offense and ensure they accept responsibility for their wrongdoings to encourage reconciliation between the perpetrator, victim and the community. Although measures such as temporary exile and fines as well as imprisonment are part of the adjudication process, the overall goal is the restoration of the community through healing.

### **3.8 Retributive and restorative justice**

The AUTJP indicates that it “covers both redistributive and restorative elements of transitional justice, and will be of great assistance to countries in addressing the challenges of reconciliation, social cohesion and nation-building more effectively, all of which are central to peacebuilding and sustainable human development” (AUTJP 2019). It further states that it serves as a guideline to provide comprehensive transitional justice strategies for particular actions that will bring empowerment to affected states to take the leading role in the process of providing restorative and transformational justice in relation to conflicts and violations, the



deficits of governance and developmental challenges (AUTJP 2019). From a critical emancipatory perspective, it is evident that the AUTJP's focus on ensuring restorative justice by seeking to do more than end the conflict indicates that it is aligned with positive peace.

A key aspect of the AUTJP is its "inclusion of benchmarks" for the various approaches to transitional justice, which allows African states to make use of African justice systems, and mechanisms that will provide reference points to states, nonstate actors and mediators to apply the policy in their own context (AUTJP 2019). The AUTJP further states that the "formulation of accountability and reconciliation measures should be approached, both conceptually and procedurally, in an integrated manner and imbued with restorative and responsibility elements respectively" (AUTJP 2019). It is evident that the AUTJP leans more towards a restorative than retributive justice approach.

### **3.9 Conclusion**

Retributive justice prioritises the state and not the victim. This results in a situation where the victim is marginalised because the focus is on punishing the offender as opposed to ensuring that the victim has been able to recover. Marginalised groups such as women and youth have been disadvantaged by this. The criminal justice system in most formal processes such as courts makes use of the retributive justice approach. From the genealogy of transitional justice, it is evident that this approach is of Western origin and has greatly impacted the justice mechanisms that are used today.

The AUTJP does not negate the importance of retributive justice but rather recognises its significance while promoting restorative justice. African shared values such as a communalistic spirit, a sense of the sacred and of religions and a sense of the sacredness of human life greatly influence why the AUTJP pivots more towards restorative justice. Concepts such as ubuntuism encourage a shared notion of humanity that is predicated on mutual respect and communal growth and restoration. To this end, African justice mechanisms seek to ensure that the wider community is involved in the peace process. This includes key participants such as women and youth. The AUTJP supports the use of formal justice mechanisms alongside informal mechanisms that would enable healing and reconciliation. In supporting restorative justice, the

AUTJP demonstrates that peace processes and their transitional justice efforts must seek more than just conflict resolution that can be brought about by retributive justice. From a critical emancipatory perspective, it is evident that the AUTJP supports restorative justice to ensure that conflict transformation takes place to achieve positive peace where the underlying factors that have caused the conflict are addressed at a systemic level.

## **Chapter 4: Case studies**

### **4.1 Introduction**

Through illustrative case studies, this chapter will explore whether transitional justice as understood by the AUTJP supports a restorative justice approach to including women and youth. The AUTJP is a framework that provides “guidelines to translate comprehensive strategies for TJ into specific actions that empower affected countries to take the lead in the process of providing restorative and transformational justice concerning not only the legacies of conflicts and violations but also governance deficits and developmental challenges” (AUTJP 2019). Therefore, the AUTJP encourages a restorative justice approach to transitional justice to be applied according to the specific context of a particular AU-member state. This chapter will explore examples of indigenous, informal and formal transitional justice processes and whether or not they applied a restorative justice approach and the effect that this had on the participation of women and youth.

To accomplish this, this chapter will consider five case studies where restorative approaches to transitional justice have shaped the response to violence and instability on the African continent. These case studies are relevant because in the cases of the Democratic Republic of the Congo, the Central Africa Republic, Rwanda and Sierra Leone where, arguably, a restorative justice approach to transitional justice was used in a way that reflects what is outlined in the AUTJP. Although transitional justice processes occurred in these cases before the adoption of the AUTJP, they demonstrate that the AUTJP reflects realities, values and practices on the continent. The case of Uganda is unique among these five cases as the transitional justice process unfolded based directly on the guidelines of the AUTJP.

The Baraza courts, which were established in 2010, will also be discussed because they sought to achieve restoration in the community by reintegrating child soldiers into the community and teaching them vocational skills to function adequately and had a youth substructure functioning as part of its structure. The Baraza court also has a substructure comprised of women that sought the inclusion and emancipation of women. The case study of the Baraza courts of the DRC will give a clear indication as to whether the restorative justice approach to transitional justice in the DRC increased the inclusion of women and youth in the transitional justice process in the DRC.

The case of the Truth, Justice, Reparation and Reconciliation Commission (CVJRR) of the Central African Republic (CAR) will also be considered. This case is important as it made use of the restorative justice approach to transitional justice, while still considering retributive justice, as it promoted the inclusion and emancipation of youth through its National Recovery and Peacebuilding Plan of the Central African Republic (RCPCA).

The Gacaca courts of Rwanda, where the court as a traditional structure had the mandate of its scope expanded to deal with matters of genocide, is the fourth case study that will be considered. After the Gacaca court was expanded, the scope of participants in the transitional justice process was also expanded. This meant that the decision-makers in the peace process (*inyangamugayo*) could now include women and youth. The case study of Rwanda is an important case study to consider as it will indicate how a traditional justice mechanism can use a restorative justice approach to transitional justice to increase the involvement and emancipation of women and youth.

Furthermore, this chapter will consider the case of Sierra Leone, which had both a TRC and a Special Court. The case of Sierra Leone is important to consider because it has significance in the development of international gender justice through a hybrid tribunal in its Special Court that emanated from an agreement between the government of Sierra Leone and the United Nations. The Special Court placed a special emphasis on offences relating to gender-based violence, while the TRC focused on a wider scope, such as the reintegration of child soldiers and allowing the platform for victims such as women and youth to come forward and share their experiences. This case study will assist in determining whether a restorative justice approach in the context of international gender-based violence in transitional justice has an influence on the increase of the involvement of women and youth in transitional justice processes.

Another important case study that this chapter will consider is the transitional justice process in Uganda. Initially, women were not included in the process and had to initiate their own inclusion through the creation of entities such as the Uganda Women's Coalition for Peace (UWCP). It was during the development of the National Transitional Justice Policy that great consideration was given to the inclusion of women and youth through a restorative justice approach.

This case study will be important to consider because Uganda developed a National Transitional Justice Policy that was modelled after the AUTJP. These case studies are key to

understanding the relationship between applying a restorative justice approach to transitional justice and the inclusion and emancipation of marginalised groups such as women and youth in the transitional justice process.

## **4.2 Thematic analysis of case studies**

The methodology used to identify the theme for the analysis in this chapter was identifying the most prevalent theme in the AUTJP, namely transformation, which has also manifested in the case studies in different ways. The theme of transformation is prevalent throughout the AUTJP. This is evident in its objective, as it states that the “overall objective of the AUTJP is to provide the policy parameters on holistic and transformational TJ in Africa” (AUTJP 2019). Furthermore, the AUTJP indicates that it seeks to define the “policy agenda for holistic and inclusive socio-economic transformation and development of societies emerging out of periods of conflict, serious human rights and humanitarian law violations, legacies of exclusion and historical injustices” (AUTJP 2019).

This chapter will also identify sub-themes of transformation that were prevalent in the different case studies. These sub-themes indicate how the AUTJP seeks to achieve transformation in the transitional justice process. These sub-themes are reintegration, cooperation and coherence, capacity-building, rebirth and renewal, and individual dignity. In relation to reintegration, the AUTJP states that support should be provided for “women and youth as victims to ensure their physical and psychosocial rehabilitation and social reintegration” (AUTJP 2019). In relation to the sub-theme of cooperation and coherence, the AUTJP states the following: “Cooperation and coherence clarify and define roles and responsibilities in ways that guarantee national ownership, African leadership, legitimacy and accountability” (AUTJP 2019). In relation to capacity-building, the AUTJP indicates the following: “All TJ processes need to have a capacity-building component that strengthens the capabilities of the society to support and legitimize national processes” (AUTJP 2019). With regards to the sub-theme of rebirth and renewal, the AUTJP addresses this through its emphasis on the need for reformation. The AUTJP indicates that “TJ commissions should outline institutional responsibility for crimes and make recommendations to reform institutions, laws, policies and practices” (AUTJP 2019). Reforming these institutions would require transformation through rebirth and renewal. In relation to the sub-theme of individual dignity, the AUTJP indicates that “programmes should be transformative and promote equality, non-discrimination and participation of victims and

other stakeholders. They should build solidarity across victim communities, restore dignity, be fair and just and tailored in their form to the needs of different categories of victims” (AUTJP 2019). This chapter will conduct a thematic analysis of the case studies in this study according to the sub-themes of transformation in line with the AUTJP.

### **4.3 The Baraza peace courts of the DRC**

As indicated in the introduction, the Baraza peace courts in the Democratic Republic of Congo are an example of what is possible when youth are included in the peace process. For nearly two decades (1996-2015), the DRC has encountered an ongoing cycle of violence that manifested through armed conflict and aggression; human rights violations and the marginalisation of vulnerable groups such as women and youth (Tunamsifu 2015). In the third chapter, this study highlighted how many African justice mechanisms are informal in nature. These informal mechanisms often use a grassroots approach to be more inclusive of marginalised groups such as youth and the wider community. "Baraza" translates to "local gatherings" in Swahili (Poole 2013). Therefore, the Baraza peace courts are a grassroots approach to transitional justice where community leaders seek to ensure fair, accessible and non-retributive justice in communities within the DRC where conflict can escalate to violence very quickly (Poole 2013).

The Baraza courts were promoted by Foundation Chirezi (FOCHI) which is a local peacebuilding organisation that seeks to empower communities through training and research regarding human rights and conflict resolution as well as services such as food and education for marginalised groups (Bourne 2011). According to Poole (2013), there were nine Baraza courts that were established which have had a positive impact on the communities in which they operate. This positive impact is the reduced violence and the restoration of trust between local leaders, local ex-rebel fighters and communities.

It is also important to consider the composition of the Baraza court. The court is comprised of four different groups that meet on a weekly basis. The first group is comprised of five people who serve as a democratically elected main committee (Poole 2013). Second, is a group of youth comprised of ten people and third, is a group of women which is also comprised of ten people (Poole 2013). The remaining members of the court are community members and former combatants. It is evident that the Baraza courts were structured with the intention of including marginalised groups such as women and youth (Tunda 2017).

FOCHI provides training in conflict resolution and transitional justice (Tunda 2017). For the local authorities, FOCI served as a communication link between the court and the community (Peace Direct 2014). In addition to this, FOCI assisted in raising awareness of the priorities of the community which assisted the court in gaining the support of the community (Peace Direct 2014). Women's groups have also set up female peace courts to address issues such as marital rape where the discussions are held in the absence of men (Poole 2013). In the absence of a resolution, the cases are presented to the main Baraza court. It is therefore evident that the Baraza court has sparked sub-structures that seek to bolster its efforts in conflict resolution and achieve conflict transformation.

#### **4.3.1 Reintegration of child soldiers**

An important aspect of addressing the marginalisation of youth in peace processes is to focus on reintegrating child soldiers back into the communities. Child soldiers are largely made to be the proponents of conflict. However, they have often been overlooked in the transitional justice process (Honwana 2011). The Baraza courts sought to address this by reintegrating child soldiers back into the community (Poole 2013). This scheme was carried out in the town of Kiliba with roughly fifty former child soldiers from the Uvira territory of South Kivu (Brown 2010). Within the Baraza courts, negotiations were held with militant groups to secure the release of some child soldiers. Further negotiations were held with the children's communities to encourage their reintegration and secure the required government documents for their reinsertion (Poole 2013). The community was then encouraged to assist the children to reassimilate into the community. Further, FOCI sought to provide these children with vocational skills such as sewing and carpentry to ensure that they are economically self-sufficient. According to Floribert Kazingufu, founder of FOCI, all are equal within the Baraza court and the community participates to ensure that the judgements are both equal and fair (Poole 2013). According to Peace Direct (2014), the Baraza Court was a very sustainable and cost-effective model. The Baraza Court was predicated on the values of truth, accountability, reparation and reconciliation (Mekonnen 2010). These values align with the African shared values that were discussed in the previous chapter. By focusing on values such as reconciliation, it can be stated that the Baraza Court is emancipatory in nature as it seeks to ensure the effective reconciliation between offenders such as the child soldiers and the wider community by equipping the child soldiers to better contribute to the community.

It is apparent that the Baraza Peace Court valued the importance of reintegration as through the efforts that the court made to reintegrate child soldiers back into the community. The emphasis that the court places on ensuring that former child soldiers are reintegrated back into the community as functioning members further demonstrates that the reintegration through the Baraza court is intended to prevent further ostracization as well as ensure that these former child soldiers are not tempted to relapse towards violence thereby breaking cyclical violence (Kiyala 2019). Lastly, the emphasis that the court places on receiving a public or private apology from the offender towards the victim is meant to facilitate a reintegration where there is no malice that remains among parties to prevent future conflict.

#### **4.3.2 The process of the court**

The process followed within the Baraza courts seeks to ensure that restorative justice occurs. Each party in a conflict is invited to share their side of the story. After this, the committee will meet to hold fact-finding investigations and thereafter relay the results to all parties (Poole 2013). What follows can be a public apology, private apology or reparations through work or payment (Dunn 2013). Should all parties agree with the decision of the judges, a reconciliation ceremony is held where the resolution between all parties is declared.

Should one of the parties disagree, time is allowed to consider the decision. Should the disagreement remain, the disagreeing party is allowed the opportunity to appeal. It is important to note that once the Baraza court has made its decision, it is largely regarded as the community decision. Should the decision still not be accepted then the matter is taken to a government magistrate where a FOCHI lawyer represents the party at a local tribunal. The Baraza courts seek conflict resolution in a manner that is nonviolent with an emphasis on dialogue and reconciliation instead of the retributive justice mechanisms that are often present in the normal penal justice system (Dunn 2013). This allows conflict that would have ended through harsh punishments are instead ended through a collaborative effort that results in a mutually-beneficial peaceful solution. According to Alana Poole (2013), seventeen cases were successfully resolved with one that had rebounded and another that was transferred from the Baraza court in Luvungi to the tribunal Uvira where FOCHI provided a lawyer.

According to FOCHI the sources of conflict are robbery, land rights, injury to a person, accusations of sorcery, damage to property, public insult, aggression, domestic violence, adultery, issues of heritage, the lending and borrowing of money and the spreading of rumours



(Poole 2013). These conflicts are relevant as they are by-products of the cyclical violence that has been occurring in the DRC (Tunamsifu 2015). Resolving these conflicts has often created a heavy load on traditional justice mechanisms. Due to this load, many states are turning to Truth and Reconciliation Commissions to address injustices.

The increase in Truth and Reconciliation Commissions indicates an increase in the recognition of the importance of confession, truth-telling, remorse and the righting of wrongs in transitional justice processes. The difference lies in how highly restorative justice is regarded as an important part of the reconciliation process. In the case of the Baraza peace course, the goal is to resolve conflict before they become violent (Kiyala 2019). This is to ensure that not only is violence directly prevented but non-retributive approaches become part of the peace process to prevent cyclical violence from continuing. Applying this approach requires systemic change which is emancipatory in nature (Tunamsifu 2015).

#### **4.3.3 Critique of the Baraza court**

The critique of the Baraza court is that it can empower local actors in the community to gain a monopoly over the predominant rule of law. This is considered to be problematic as it extends to sub-groups in the community such as women and youth. The result of this monopoly is considered dangerous as it creates a situation where community-led structures such as the Baraza court become arenas where those with the most power are able to act on an ad hoc basis and dispense subjective views of transitional justice.

Moreover, it causes the risk that perpetrators may operate with impunity as a result of their money, family ties or debt. (Allen & Macdonald 2013). This reaffirms existing power relations to the disadvantage of marginalised groups such as women and youth. Sen describes this as the “justice of fish” where the larger fish can eat the smaller fish with impunity (Sen 2009:20).

#### **4.3.4. The Baraza peace court and restorative justice**

It is evident The Baraza peace courts make use of the restorative justice approach to transitional justice which focuses on reconciliation and reintegration. This is clear through its goal of addressing conflicts before they become violent making use of non-retributive methods to do so. Further, it is a traditional court that operates at a local level. This aligns with the mandate

of the AUTJP to address transitional justice in a manner that incorporates local traditional structures (AUTJP 2019).

The transitional justice process of the court seeks to conclude with a public apology, or private apology, or reparations in a bid to re-integrate the offender back into the community and prevent disputes from escalating into violent conflict (Poole 2013). This preventative tactic seeks to ensure that the system that would propagate the violence no longer functions. Seeking a systemic change brings about conflict transformation in addition to conflict resolution. Therefore, the Baraza peace courts are emancipatory in nature as it sought systemic change by reintegrating child soldiers to prevent them from engaging in conflict in the future.

The emancipatory nature of the Baraza courts seeks to ensure the inclusion of marginalised groups such as youth by both involving them in the peace process and ensuring that they benefit from the reintegration of offenders such as child soldiers (Poole 2013). This also applies to women through the female peace courts. The restorative justice approach of the Baraza peace courts, therefore, is increasing the inclusion of women and youth in peace processes in the DRC while promoting their emancipation also.

#### **4.4 The CVJRR of the Central African Republic**

The transitional justice process in the Central African Republic began with the national forum set up by the transitional government known as the "Bangui National Forum" (De Carvalho & Lucey 2016). This resulted in the creation of Truth Justice Reparations and Reconciliation (TJRRC). The commission became known as the CVJRR which is its French acronym. The CVJRR had the mandate to investigate the truth and find those responsible for national events that had occurred since the disappearance of President Founder Barthélémy. In order to fulfil this mandate, the CVJRR set up several dialogues with the goal of facilitating an inclusive platform for victims to come forward and engage (Lucey & Knoope 2021). The United Nations Multidimensional Integrated Stabilisation Mission in the CAR (MINUSCA) also supported the establishment of these dialogues. It is important to note MINUSCA is a peacekeeping mission from the UN that began in 2014. The Séléka militia staged a rebellion in 2013 that led to the end of François Bozizé's regime in the Central African Republic. It was a conflict that evolved

from a government resistance into a religious conflict. MINUSCA was established to protect civilians in the CAR according to Chapter VII of the UN Charter.

Peace and reconciliation committees were set up and played a pivotal role in encouraging members of the community that had left to return back to the wider community. Furthermore, these dialogues had stemmed the flow of youth into armed militias (Tunda 2017). Staff members of the CVJRR also participated in activities that were set up to train youth in vocational skills that would allow them to generate income.

In addition to this, MINUSCA set up a Special Criminal Court (SCC) in Bangui to address international crimes committed in the state since 2015. The SCC had the mandate to prosecute and investigate "grave violations of human rights and international humanitarian law committed on the territory of the Central African Republic since January 1st, 2003, [...] notably the crimes of genocide, crimes against humanity and war crimes." The SCC is a hybrid court that is comprised of three organs. These organs are the prosecutor's office (parquet), the chambers and the registry.

In addition to this, SCC has a judicial police unit and the Corps Spécial d'Avocats which are a group of legal representatives (Birjandian 2020). The SCC has ten international and eleven national judges, a national and international registrar and an international prosecutor and a national deputy prosecutor. The SCC had the jurisdiction to investigate, judge and prosecute offenders that have committed human rights violations in the CAR since January 2003 (Birjandian 2020).

#### **4.4.1 Capacity building through the National Recovery and Peacebuilding Plan of the CAR(RCPCA)**

In addition to transitional justice mechanisms of the CVJRR and the SCC, an amount of two billion dollars was pledged to raise funds for sustainable capacity-building through the National Recovery and Peacebuilding Plan of the Central African Republic (RCPCA).

During the conference, one of the cross-cutting objectives that were prioritised was the promotion of youth inclusion as a key action to address the causal factors of conflict and violence (Andrianasy 2022). The RCPCA has three core pillars which are renewing the social contract between the state and the population, promoting peace security and reconciliation and facilitating the economic and productive sector recovery. It was observed by the Centre for the

Study of Violence and Reconciliation that marginalising youth in transitional justice processes undermines stability and peace (Kambala 2017). This is because youth that are not involved in the transitional justice process are prone to “instrumentalisation” which means that they are at risk of taking up negative roles in the conflict (Kambala 2017).

The AU has encouraged member states to invest in youth and indicated that the youth are key stakeholders in developing peace processes on the continent. Moreover, the AU Youth Charter makes the recommendation that states are to increase the capacity of young people and youth organisations to be included in conflict prevention, peacebuilding and conflict (Kunama et al. 2017). This is also reflected in the AUTJP. In the CAR youth were being included in the transitional justice process by receiving training through peacebuilding programmes. Organisations such as the ONG Vitalité Plus provided a number of peacebuilding programmes. ONG Vitalité Plus set up thirteen committees in six different cities throughout the CAR. These committees trained over 2860 youth in the areas of conflict transformation and peace education (Kunama et al. 2017). In addition to this, youth were also trained in vocational activities to generate such as mechanics, electricity, brickmaking and carpentry (Tunda 2017). These youth also received training in negotiation and transitional justice skills in order to manage conflicts in their communities.

#### **4.4.2 Critique of the CVJRR**

A critique of the CVJRR has been its focus on the “post-conflict” context of transitional justice. This critique emanates from the fact that the interventions that were initiated under the CVJRR were only brought about years after the armed conflict (Daly & Immarigeon 1998). The violence in the CAR erupted in 2012 when the Muslim Seleka rebels ousted President Bozize. After this conflict, the crisis was deepened when the Christian anti-Balaka movement took action in retaliation. The conflict continued after a ceasefire was signed in 2014. It is believed that more action could have occurred to prevent the violence and that the CVJRR was established as a political tool to bolster efforts made towards stability (Koko 2021).

Further, there were those that believe that no reconciliation and peace could occur without criminal justice. It was believed that a lack of criminal justice in the transitional justice process would criminalize the political class, contribute to poor governance and aggravate the reoccurring crisis in the state (Koko 2021).

#### **4.4.3 Restorative justice and the CVJRR**

The CVJRR and the processes that it set in motion resulted in an increase in the inclusion and emancipation of marginalised groups such as youth. This is evident in the fact that the establishment of the CVJRR set in motion supplementary measures such as RCPCA which enabled organisations such as ONG Vitalité Plus to increase the scope of inclusion of youth while simultaneously seeking emancipation by advocating for systemic change through its three core pillars (Tunda 2017). Further, it is important to note that the transitional justice process in the CAR gave greater priority to restorative justice but did not neglect retributive justice through the SCC which had the jurisdiction to prosecute offenders.

#### **4.5 The Gacaca court of Rwanda**

The word Gacaca stems from a Kinyarwanda word that can be translated as “on the grass” (Human Rights Watch 2011). This is in reference to the manner in which hearings were held in open places with the aim of finding resolutions to small conflicts within society and achieving reconciliation among the conflicting parties (Haberstock 2014). This aim sought to ensure that restorative justice was achieved and that the community could heal (Daly 2001). After the Rwandan Civil War, the Gacaca courts were used to deal with crimes that were committed during the genocide (Magnarella 2005). This is because the abuses were so numerous that the formal judicial system was overburdened in seeking to address these wrongdoings (Magnarella 2005). The transitional justice process of the Gacaca courts began in June 2002 and ended in June 2012.

During this period proceedings were conducted in conjunction with the National Service of Gacaca jurisdictions (NSGJ) which is an agency that falls under the ministry of justice. The Gacaca courts operated in different phases. The first phase looked into facts related to the genocide such as the crimes that were committed, victims and offenders in each cell through confessions as well as accusations (Human Rights Watch 2011).

This was the investigative phase. After the investigative phase, the lay judges would categorise the suspects. This was followed by trials in the pilot jurisdictions. The next phase was the trial phase where information that was gathered was used to conduct trials of the offenders as well as those that had to confess (Human Rights Watch 2011). After the genocide, an international genocide conference was held which was followed by what became known as the "Saturday Debates" (Karekezi 2004). The Saturday Debates were a series of meetings with leading figures that advocated for an adjustment to be made to the traditional Gacaca system in order to address genocide criminal proceedings (Ingelaere 2008). These debates were held at the Urugwiro presidential offices. They were attended by members of state institutions, the army and the police as well as political party representatives and members of the judiciary. It is important to note that initially, the Gacaca system rejected human rights bodies and intelligence under the belief that there would be no justice under a system that favoured restoration over retribution (Human Rights Watch 2011).

In line with the traditional mechanism of conflict resolution, the government used the Gacaca courts to try low-level genocide suspects. The traditional mechanism originated in Rwanda when the state was comprised of various smaller territories that were ruled by kings (Abami). The king was viewed as the embodiment of justice and was assisted by the abiru (guardians of tradition). Before matters were brought before the king, they were presented to community elders known as inyangamugayo (Clark 2010).

The inyangamugayo would listen to the contributions of the conflicting parties and come up with solutions. Marginalised groups such as women and youth were only allowed to participate as defendants and witnesses. To use Hart's "Ladder of Participation", this means that these marginalised groups were "consulted and informed" but were not part of the decision-making process (Hart 2008). The matters that were dealt with by the inyangamugayo were family disputes, land use, fighting, property damage, theft, marriage, inheritance and adultery. The goal of the Gacaca courts was to address a violation of the rules that were shared by the community in order to reconcile the conflicting parties and achieve restoration within the community.

Traditionally, after receiving word from the inyangamugayo, offenders would confess their crimes and ask for forgiveness from those that they have wronged. The Gacaca judges would then demand that the offenders right their wrongs by providing restitution to victims (Clark 2010). This process would end with a celebratory ceremony to indicate that the offenders were

being reintegrated into the society and that the community was restored. In instances where the offenders were unable to pay the restitution that they owed; community members would often contribute to ensuring that victims received restitution.

#### **4.5.1 Extension of the Gacaca court mandate**

The Gacaca courts originally dealt with civil and property disputes (Gasabo et al. 2020). Due to the volume of offences that were prevalent after the genocide, they also began to deal with the prosecution of genocide and crimes against humanity perpetrated between 1 October 1990 and 31 December 1994. It is important to note that in this period, the scope of the *inyangamugayo* was transformed to be more inclusive (Karekezi 2004). This transformation meant that the requirements to serve as an *inyangamugayo* were updated. The *inyangamugayo* has to be a Rwandan national above the age of twenty-one, trustworthy, free from the spirit of denominationalism, must not have any previous criminal charges and must not be considered a genocide suspect. In this regard, the decision-making process became open to women and youth as the term "Rwandan national" meant that there were no gender constraints imposed an age limit of twenty-one years old meant that the role was not exclusively reserved for community elders (Karekezi 2004). Although simply including women and youth in the process itself is not emancipatory, it does create the opportunity for them to have more agency to move away from their traditional roles on the periphery of the transitional justice process where being victims was the extent of their involvement.

#### **4.5.2 Participation in the Gacaca courts**

The Gacaca courts made use of popular participation that sought to involve the community in all activities of the institution (Gasabo et al. 2020). They focused on reconciliation, punishment and the involvement of the population. Therefore, the offenders were encouraged to confess before they had been accused so that they had received a reduced sentence (Schabas 2005). Victims in turn are encouraged to forgive their perpetrators. Gacaca judges could impose imprisonment, payment of reparations and community service. Proceedings began with a summons that was issued to the concerned parties. After this, the court would read the provision of Gacaca law that states the following: "Any person who committed the offence of genocide and other crimes against humanity committed between 1 October 1990 and December 31, 1994,

may confess, plead guilty, repent and ask for forgiveness before a duly constituted competent bench" (Organic Law No. 16/2004 of 19 June 2004).

If offenders chose not to plead guilty, the judges will describe the offence and invite witnesses to testify. The offender is then allowed the opportunity to defend themselves. After this, the floor is opened for the general assembly to give their views regarding the trial. The average trial lasts for eight hours in an open space that is accessible to the wider community. In instances where the case was not concluded in a day, the court would appoint another day. The final decision would rest with the *inyangamugayo* who would make the final decision by a majority decision (Karekezi 2004).

Generally, trials would last around eight hours in open spaces in full view of the community and in certain instances, a case would take the whole day, from morning to evening and, if it was not complete, then, it would proceed on another day determined by the court, until the case was concluded (Doughty 2016). Once the court found that enough information had been obtained, the president of the court asked the secretaries, who were also among the lay judges, to read to the audience what had been written during the day (Karekezi 2004). If there was a complaint about precision or missing information, the secretaries made the relevant correction and asked parties and witnesses to sign what they had said. Everything said and done during the Gacaca session was recorded in the notebook of activities.

#### **4.5.3 Critique of the Gacaca court**

A critique of the Gacaca courts is that it operates with a lack of due process for the accused as defendants do not have a legal counsel and any convictions are not predicated on physical evidence but instead on the testimony of witnesses (Haberstock 2014). It is further believed this allows for false witnesses to be accused. As a result of this, it is believed that the accused may wrongfully confess to crimes that they did not commit in exchange for reduced sentences (Haberstock 2014). Further, it is believed that many perpetrators may easily flee prosecution because Gacaca courts operate in rural areas.

Another critique of the Gacaca system emanates from the Hutu criticism. This critique states that crimes committed by the Rwandan Patriotic Front (RPF) against Hutus before and after the genocide were overlooked because the focus was only on crimes committed during the



genocide (Haberstock 2014). This critique accuses the Gacaca system of reinforcing ethnic divides instead of reconciling them (Keith 2009)

#### **4.5.4 Rebirth and renewal in the Gacaca courts of Rwanda and restorative justice**

The Gacaca courts of Rwanda are an example of how a traditional platform has been updated to be more inclusive of previously marginalised groups such as women and youth. This was made possible through the restorative justice approach to transitional justice that it used after it expanded its scope of issues to encompass dealing with the offences that occurred because of the genocide (Nyseth et al. 2020).

This was made possible by the rebirth and renewal of the Gacaca courts in order to address the need that arose from the volume of injustices that occurred during the genocide. The rebirth and renewal allowed for women and youth to be part of the process in a manner that was not previously available. This enabled them to be liberated from their status of being relegated solely to the periphery of the participation process in the transitional justice process (Gasabo et al. 2020).

Before the Gacaca courts were expanded to deal with matters surrounding the genocide, it was the king or the *inyangamugayo* (both of whom were male elders) that were involved in the transitional justice process. After the court was expanded, it allowed for women and youth to join the *inyangamugayo* and become part of the transitional justice process. From an emancipatory critical theory perspective, their involvement also enables an emancipatory agenda in the Gacaca courts because it enables positive peace as it allows women and youth to be better integrated into society. Therefore, it can be stated that the Gacaca courts of Rwanda use a restorative justice approach that increases the involvement of women and youth in the transitional justice process in a manner that enables them to promote emancipation.

#### **4.6 Transitional justice in Sierra Leone**

The transitional justice process in Sierra Leone has had several developments that have been important for international gender justice (Teale 2009). The conflict in Sierra Leone spanned over eleven years and displaced millions of people. Furthermore, women were the victims of

sexual violence on a mass scale. In 1999, the Lomé Peace Accord resulted in the creation of the Sierra Leone Truth Commission (Teale 2009). After this, the UN Security Council set up a Special Court to prosecute the offenders that had committed the most egregious wrongdoings. There were atrocities that were suffered by both men and women. These were atrocities such as theft, pillaging, torture and killing. In addition to this, women were explicitly targeted through forced marriage, sexual slavery and rape (Sierra Leone TRC 2004). Three groups were identified as the primary offenders: the Armed Forces Revolutionary Council (AFRC), Revolutionary United Front (RUF) and the Civil Defence Force (CDF). The Special Court for Sierra Leone and the Truth and Reconciliation Commission (TRC) focused on seeking transitional justice in the post-conflict period (Teale 2009).

#### **4.6.1 The Special Court for Sierra Leone**

The Special Court consisted of three organs. Namely: the Registry, the Chambers and the Office of the Prosecutor. According to Kofi Annan, gender-based violence was a priority at the highest level of the Special Court (Secretary-General 2000). This court was regarded as a "hybrid tribunal" as it was established by an agreement between the Government of Sierra Leone and the United Nations. The court sought to ensure that transitional justice was relevant to Sierra Leone while also being relevant to international justice. The court was based in Sierra Leone and used made use of both local as well intentional staff.

In addition to this, the laws used in the court were a mixture of local and international laws. The Office of Prosecutor placed a particular emphasis on investigating and prosecuting gender crimes and addressing them with the required sensitivity (Interview with Special Court employee 2008). The Court had also set an international legal precedent that recognised forced marriage as a crime against humanity as "another inhuman act" (Musafiri 2020). This precedent made great strides towards recognising the entirety of women's experience in forced marriage instead of only regarding it as a matter of sexual identity.

Although the Special Court has greatly assisted the argument for the inclusion of women in the transitional justice process by recognising the unique plight that they suffer, there have also been several instances where the court has fallen short (Gyimah 2009). An instance of this was when the Trial Chamber Judges did not allow evidence of sexual violence to be present against a member of the CDF. The CDF was a militia group that was not believed to have participated in sexual violence such as touching women as they believed that it would invalidate the special

protection that they had received from traditional healers (Teale 2009). Decisions such as this one demonstrate a lack of sensitivity among many judges indicating a lack of sensitivity that seems to oppose the approach of the judges. This has therefore made the precedent of trying gender-based violence before international criminal tribunals have mixed results. (Kendall & Staggs 2005).

#### **4.6.2 Views women testifying before the court**

In the Special Court, the Prosecution was set to demonstrate charges of gender-based violence through the testimony of the victims. According to (Teale 2009), the victims found the exercise of testifying to be a less terrifying experience than they had initially anticipated. According to the Witness and Victim Section (WVS), the difficulty that witnesses in the Special Court experienced was not remarkably different from other kinds of witnesses due to the support that they received from the WVS section (Horn et al 2008). This was supporting such as medical treatment as well as counselling (Horn et al. 2008). According to Kelsall and Stepakoff (2007), witnesses that were not afforded the opportunity to testify of their experiences regarding gender-based violence experienced psychological distress which could undermine the intention of the court to bring justice to the victims of the conflict. (Kelsall and Stepakoff 2007).

#### **4.6.3 The court and child soldiers**

There was also much deliberation concerning whether the Special Court was expected to try child soldiers. The Secretary-General's report at the time noted that some of the child soldiers that had committed the wrong-doings were acting under duress. To this end, his recommendation was to try them with safeguards such as separate trials from adults, provisional release pending trial and additional protective measures. He further went on to state that children must be regarded with "dignity and a sense of worth, taking into account his or her young age and the desirability of promoting his or her rehabilitation, reintegration into and assumption of a constructive role in society" (Secretary General 2000).

In response to this, the Security Council had indicated that "the Truth and Reconciliation Commission will have a major role to play in the case of juvenile offenders, and the members of the Security Council encourage the Government of Sierra Leone and the United Nations to develop suitable institutions, including specific provisions related to children, to this end"

(Secretary General 2000). Therefore, the Special Court focused on matters relating to sexual and gender-based violence against women while the TRC considered a broader scope of matters.

#### **4.6.4 The Truth and Reconciliation Commission of Sierra Leone**

The TRC emanated from the Lomé Peace Agreement of 1999 and was established by the TRC Act of 2000. The TRC compiled statements and conducted hearings from December 2002 to September 2003. It concentrated on ensuring transitional justice in a different way from the court. In some instances, it was to supplement prosecutions and place a greater focus on the victim in comparison to the court. The goal of the commission was to provide an unbiased historical record, address the matter of impunity, promote reconciliation and integration, address the needs of victims and prevent the same atrocities from repeating themselves (Sierra Leone TRC Act 2000).

The TRC also gave attention to addressing violations committed against women. This was also reflected in the mandate of the TRC (Sierra Leone TRC Act 2000). Various measures were taken to avoid triggering re-traumatisation that could prevent victims from testifying. The Commission included sessions that centred around the testimonies on sexual violence, and counselling, held themed hearings on women and ensure that female statement-takers were used in all districts. Other thematic hearings focused on the legal profession, the media, corruption and governance.

Further, the TRC also worked with civil society groups and international agencies. Most notable among these was the United Nations Development Fund for Women (UNIFEM). Sensitivity to the needs of the victim was a key element of the hearings. In each district, a day of closed sessions was held for victims of sexual violence, children, ex-militants and offenders who opted not to have a public hearing (Teale 2009). The final report of the Commission was presented to the public in 2005. This report included the following recommendations to assist victims of the conflict. These recommendations were the following: providing education; reparations in the form of pensions; free healthcare for amputees, victims of sexual violence and those who were wounded. The government was required by law to implement these recommendations.

The recommendations that focused on women were intended to address the driving factors that caused the violence as well as the background conditions within the system that allowed these violations to occur. The report was viewed as providing a detailed framework to be used to improve the lives of women. A critique of the report was that it was nothing new and the women were simply making use of the TRC to vent their pre-existent frustrations (Teale 2009). Despite this, the fact that women had a platform that they could use to vent their frustrations was regarded as a step in the right direction and positive development.

#### **4.6.5 Sierra Leone and individual dignity**

It can therefore be stated that both the Special Court and TRC of Sierra Leone demonstrated the need to involve women in the transitional justice process. The fact that the hybrid nature of the Special Court of Sierra Leone was the first of its kind is an indication in relation to matters of gender-based violence that there was a need to involve women in the transitional justice process in a dignified manner. This is also reflected in the AUTJP which indicates the following: "Given the gendered dimension of violence, criminal investigations and national and local processes for truth and reconciliation should give particular attention to sexual and gender-based violence" (AUTJP 2019). Further, the special consideration given to former child soldiers in the TRC is an indication that emancipation can only occur when marginalised groups such as these youth that were previously child soldiers are included in the transitional justice process. This indicates that the transitional justice process of Sierra Leone considered the individual dignity of women and youth through restorative justice in order to better include them in the transitional justice process.

#### **4.6.6 Critique of transitional justice process in Sierra Leone**

A critique of the transitional justice process in Sierra Leone is that many initiatives have failed to engage the root causes of conflict because the focus is on truth-seeking or criminal justice. This is because the Truth Commission of Sierra Leone focused greatly on establishing a historical record or achieving some sort of justice for the victims without looking at the driving factors of the conflict (Franssen 2015).

According to Fraser (2007), the failure of justice stems from the pursuit of justice of redistribution as separate from the justice of recognition. Based on this, the failure of

transitional justice mechanisms in Sierra Leone is rooted in the separation and pursuit of justice against greed (Franssen 2015). Another critique of the transitional justice process in Sierra Leone is that it focused solely on the dichotomies that are intrinsic to transitional justice. These are dichotomies such as guilt or innocence and victim and perpetrator and therefore does not recognise injustices that disallow “challenges to institutionalized patterns of inequality discrimination and oppression” (Stanley 2005). Another critique is that the international focus of the Special Court is that the international focus side-lined local populations.

#### **4.7 Transitional justice in Uganda**

Uganda has experienced extrajudicial killings and human rights violations during periods of militarism that were carried out with impunity. Women had suffered from violations of human rights that were perpetrated through gender-based violence (Nabukeera-Musoke 2009). The youth had also suffered as many were forced to become child soldiers and forced to commit violations such as raping and killing family members (Allen & Vlassenroot, 2010). These violations can be traced to the rebellion by the Lord's Resistance Army against the National Resistance Movement (NRM) government (Allen & Vlassenroot, 2010). This rebellion began in 1987 and was predicated on the LRA establishing a theocratic state (Flock 2011). In this rebellion, roughly 25 000 children were abducted and forced to serve as child soldiers, sex slaves or porters (Otunnu 2002).

Furthermore, this conflict became infamous for large-scale sexual and gender-based violence that took the form of reproductive violence, the use of sex slaves and gang rape (Otunnu 2002). In addition to this, women were also exposed to anti-personnel mines during the course of their daily activities. The long-term effect of the conflict was the systematisation of gender-based violence and the stigmatisation of women who were victims and children that were previously child soldiers (Nabukeera-Musoke 2009). In addition to this, victims did not come forward out of fear of retaliation from offenders. This in turn had inculcated a culture of impunity.

##### **4.7.1 Transitional justice process in Uganda**

In 2006, the LRA and the government engaged in the Juba Peace Talks to resolve the conflict. These engagements concluded in 2008 without any formalised agreement. Despite the absence of an agreement, the Juba Agreement resulted in significant developments (ICTJ 2022). As part

of the Juba Agreement on Accountability and Reconciliation there was a truth-seeking process, formal criminal procedures as well as civil procedures against perpetrators and reparations (ICTJ 2022).

The formal peace negotiation process in Uganda began in 2006 after nearly twenty years of armed conflict through the rebellion. The transitional justice process between the Government of Uganda and LRA occurred in Juba, Southern Sudan with the support of both the United Nations and the South Sudanese Government. Women were not included in the peace process which prompted civil society groups and non-governmental and community-based organisations to form the Uganda Women's Coalition for Peace (UWCP).

The UWCP was formed to engender a process to make certain that the needs and concerns of women were reflected in the peace agreement and the budget process that was to follow (Nabukeera-Musoke 2009). Groups involved in the UWCP were the Uganda Women's Network (UWONET), the Centre for Conflict Resolution (CECORE), the Isis Women's International Cross-Cultural Exchange (Isis-WICCE) which collected information regarding the priorities of women in relation to peace and the Federation of Women's Lawyers (FIDA) who provided a legal perspective to the process (Nabukeera-Musoke 2009). The Isis-WICCE made use of its networks at a grassroots level to mobilise women activists to participate in consultations (Nabukeera-Musoke 2009). It is evident that the transitional justice process in Uganda needs to evolve in order to increase the inclusion of women and youth as well as achieve their emancipation.

#### **4.7.2 National transitional justice policy**

In 2008, the Transitional Justice Working Group under the Justice Law and Order Sector (JLOS). This group was mandated to oversee the operationalisation of the transitional justice process that was outlined in the Juba agreement. The result was multiple drafts of a national transitional justice policy that combined transitional justice measures to ensure accountability for offences perpetrated during conflict, promote national reconciliation and ensure redress for the victims. In 2019, ten years after the peace talks had concluded, the Ugandan cabinet approved the National Transitional Justice Policy.

The transitional justice process in Uganda has since evolved as it has now developed a National Transitional Justice Policy that was based on the Juba Agreement on Accountability Reconciliation (2007). What made the Juba Agreement unique was the fact that it placed special emphasis on the rights and participation of victims and pay special attention to women and youth who were affected by the conflict as well as advocating for a more holistic approach to justice in a manner that achieves harmony in the restorative justice approach to transitional justice and allows for both formal and informal mechanisms.

#### **4.7.3 Cooperation and coherence towards the National Transitional Justice Policy**

The National Transitional Justice Policy of Uganda demonstrates the importance of cooperation in a coherent manner (Macdonald 2019). This is because it was through the cooperation of the state and civil society groups such as the UWCP and NGO's such as Avocats Sans Frontières (ASF). It is further evident that AU also played a role as the regional entity as the National Transitional Policy indicates that it began exploring transitional justice in compliance with the AU Constitutive Act. It is important to note that the National Transitional Justice Policy of Uganda was modelled after the AUTJP (Kasande 2019). This is why it acknowledges the importance of retributive justice but promotes restorative justice in seeking to increase the inclusion of women and youth in the transitional justice process as part of its cross-cutting measures. Uganda was the first AU Member state to adopt a Transitional Justice Policy modelled after the AUTJP.

#### **4.7.4 Critique of Transitional Justice in Uganda**

This critique is that the engagement around transitional justice during the development of the National Transitional Justice Policy did not explore enough discussions concerning the violations of the protection of economic, social and cultural rights (ESCRs) (Mugero 2018). According to Mugero (2018), the absence of a full account of the causes of conflict will prevent a holistic development of transitional justice measures and result in reoccurrence. Although the policy was predicated on the AUTJP, there was still concern that not enough consultations occurred with stakeholder groups in Uganda. If excluded in the development of a transitional justice platform, the inclusion and participation of women and youth in the process is



undermined (Kasande 2019). This is because a solution is prescribed to them as opposed to them being part of the solution. Therefore, their inclusion would not be substantive.

#### **4.8 An analysis of the themes emerging from the case studies**

The significance of the theme of transformation in the AUTJP is that many transitional justice processes simply sought to ensure conflict resolution as opposed to conflict transformation.

The case study of the Baraza Peace court of the DRC demonstrated the importance of the sub-theme of transformation: reintegration. This theme is also prevalent in the AUTJP as it states that “TJ processes should envisage special measures of support for women and youth as victims to ensure their physical and psychosocial rehabilitation and social reintegration”. The Baraza peace court of the DRC applied a restorative justice approach to ensure the reintegration of marginalised groups such as women and youth. This was evident through the programme that was run in the town of Kiliba where an estimated fifty former child soldiers were reintegrated back into the community in the Uvira territory of South Kivu. Two of the committees in the Baraza courts were a group of youth and women respectively.

They were trained on how to be involved in the transitional justice process. As stated in the previous chapter, these trained groups were part of negotiations that were held with the communities of these children in an effort to encourage their reintegration and receive the necessary documents to ensure that the reintegration was smooth. As part of the reintegration process, the community was encouraged to reassimilate the children back into the community. Moreover, these children were taught important vocational skills such as sewing and carpentry to ensure that they were economically sufficient after being reintegrated. Furthermore, the Baraza peace court set up female peace courts to address marital issues such as rape to ensure that women received closure before being reintegrated back into the community. By focusing on reintegration, the Baraza courts transformed the transitional justice process by focusing on more than just reaching an agreement.

Another theme of transformation that was prevalent in the case studies of the preceding chapter was prevalent in the case study of the CAR. This sub-theme was capacity-building which is also apparent in the AUTJP. In this regard, the AUTJP indicates the following: “All TJ processes need to have a capacity-building component that strengthens the capabilities of the

society to support and legitimize national processes” (AUTJP 2019). In the case study of the CAR, the process that is applied seeks to make use of a restorative justice approach to transform transitional justice to be more inclusive of previously marginalised groups such as women and youth through its capacity-building programmes. These programmes were reflected in the National Recovery and Peacebuilding Plan of the Central African Republic (RCPCA). The RCPCA was therefore conceptualised to bolster the ownership and responsiveness of social, political and economic institutions to contribute to the long-term sustainability and accountability of activities through the continual transfer of responsibility from local implementation partners to the government (NRPP 2016). Further, RCPCA has three core pillars renewing the social contract between the state and the population, promoting peace security and reconciliation and facilitating the economic and productive sector recovery. It was observed that marginalising youth in transitional justice processes undermines stability and peace.

In relation to the sub-theme of rebirth and renewal, this is evident in the AUTJP as it speaks of the importance of reform. The AUTJP states that transitional justice commissions “should outline institutional responsibility for crimes and make recommendations to reform institutions, laws, policies and practices that enabled abuses to occur” (AUTJP 2019). In the case study of the Gacaca courts, the court underwent a transformation in the form of a reform through the rebirth and renewal of its mandate. This is because prior to the genocide, the court dealt with civil and property disputes. Due to the sheer volume of cases that arose from the genocide, the court received a rebirth and renewal of its mandate that empowered it to deal with matters related to the genocide. With the rebirth and renewal of the Gacaca courts came an update of the requirements to serve as in the *inyangamugayo*. The requirements were updated to indicate that the *inyangamugayo* must be any Rwandan national above the age of twenty-one, trustworthy, free from the spirit of denominationalism, must not have any previous criminal charges and must not be considered a genocide suspect. This opened the process and allowed women and youth the opportunity to serve in the transitional justice process. This rebirth and renewal indicate a systemic change which is emancipatory in nature as the systemic has been changed to be more inclusive of previously marginalised groups such as women and youth.

With regard to the sub-theme of individual dignity, the AUTJP indicates that “Political and institutional reform should ensure respect for the dignity of all members of society based on their inclusion and effective participation in decision-making processes.” (AUTJP 2019). This

sub-theme is evident in the case study of the transitional justice process of Sierra Leone. Previously groups such as women and youth were not regarded with an adequate amount of dignity because they were not previously central to the transitional justice process. The Special Court and TRC of Sierra Leone demonstrated the need to involve women in the transitional justice process. The fact that the hybrid nature of the Special Court of Sierra Leone was the first of its kind is an indication in relation to matters of gender-based violence that there was a need to involve women in the transitional justice process in a manner that preserved their dignity.

This is also reflected in the AUTJP which indicates the following: "Given the gendered dimension of violence, criminal investigations and national and local processes for truth and reconciliation should give particular attention to sexual and gender-based violence" (AUTJP 2019). Moreover, the dignity of former child soldiers was also evident in the special consideration given to former child soldiers in the TRC. As they were tried with safeguards such as separate trials from adults, provisional release pending trial and additional protective measures. This indicates that the transitional justice process of Sierra Leone considered the individual dignity of women and youth through restorative justice in order to better include them in the transitional justice process.

In the case study of Uganda, the theme of cooperation and coherence was prevalent. This aligns with the AUTJP which states that "The complex challenges of TJ, the pressure to deliver peace, justice and accountability dividends, and the presence of many actors require cooperation and coherence to ensure that all actors and processes respond to the needs and priorities of the affected country and peoples" (AUTJP 2019). As indicated in the previous chapter women in the transitional justice process in Uganda sought transformation through cooperation and coherence which resulted in the UWCP which was formed to engender a process to make certain that the needs and concerns of women were reflected in the peace agreement and the budget process that was to follow (Nabukeera-Musoke 2009). Groups involved in the UWCP were the Uganda Women's Network (UWONET), the Centre for Conflict Resolution (CECORE), the Isis Women's International Cross-Cultural Exchange (Isis-WICCE) which collected information regarding the priorities of women in relation to peace and the Federation of Women's Lawyers (FIDA). The cooperation and coherence of the UWCP coalesced with the state and NGO's such as ASF to develop the National Transitional Justice Policy of Uganda which was based on the AUTJP and therefore also aligned with the cross-cutting measure of

the AUTJP that advocated for the involvement of women and youth in the transitional justice process.

In this regard, the AUTJP states the importance of transformation as it speaks of contributing to “conflict transformation goals that go beyond an exclusive focus on prosecutions” (AUTJP 2019). By focusing on only resolving conflict instead of addressing the driving factors that have resulted in the conflict, victims have often been relegated to the periphery of many transitional justice efforts (Umbriet et al.2000). As a result, marginalised groups such as women and youth have been overlooked as both participants and victims. The AUTJP speaks of the importance of having women and youth included in the process as it mentions “TJ processes promote the participation and address the needs of marginalised and vulnerable groups such as women and girls, the elderly, disabled and youth (especially child soldiers)” (AUTJP 2019). Therefore, the AUTJP speaks of transforming transitional justice processes to include previously marginalised groups by using a restorative justice approach. Including previously marginalised groups such as women and youth would require systemic change to ensure their emancipation. This is because restorative justice is more victim-centred and therefore a more plausible approach to ensuring that women and youth are involved in the transitional justice process. Making use of a restorative justice approach is better suited to transforming a transitional justice effort than retributive justice which seeks to punish the offender (Carlsmith & Darley 2008).

#### **4.9 Conclusion**

It is evident that the cases in this chapter indicated that a restorative justice approach to transitional justice does influence the level of inclusion of women and youth. In the case of the Democratic Republic of Congo, the Baraza courts demonstrated that a restorative justice approach allowed for more youth and women to be included in the transitional justice process and achieve a level of emancipation. This has been evident through the negotiations within the courts that resulted in the release of child soldiers and organising for them to learn vocational skills so that they could be constructively reintegrated into the community. Another example of this increased inclusion of youth and women through the Baraza courts was that one of the four groups of which the court was comprised was a youth group and another of these groups was a group comprised of women which conducted a female court held in the absence of men

in order to promote the emancipation of women. Therefore, in the case of the Baraza peace courts of the DRC, it is evident that the restorative justice approach of the court resulted in an increase in the inclusion and emancipation of women and youth.

In relation to the Transitional Justice process in Uganda. It is evident that there was a need to evolve the restorative justice approach to transitional justice that is used in order to align more with the cross-cutting measures of the AUTJP in order to provide a supportive framework to increase the inclusion and emancipation of marginalised groups such as women and youth in transitional justice processes. The Government of Uganda established a National Transitional Justice Policy based on the AUTJP in alignment with the Juba Agreement to accomplish this.

In relation to the case of the CVJRR of the CAR, it is evident that a restorative approach was prioritised while still giving consideration to the retributive justice approach. This can be seen through its RCPCA which applied that restorative justice approach that enabled groups such as ONG Vitalité Plus that advocated for youth involvement and emancipation as well as its SCC which carried the mandate to prosecute offenders. In relation to the Gacaca courts of Rwanda, it can be stated that the courts made use of a restorative justice approach to increase the involvement of women and youth in the transitional justice process. This manifested in the restrictions for the selection of inyangamugayo being loosened as the requirements were now that they must be a Rwanda national above the age of twenty-one, trustworthy, free from the spirit of denominationalism, must not have any previous criminal charges and must not be considered a genocide suspect. Youth above the age of twenty-one could now serve and as there was no restriction on gender, this enabled women to participate also. There was an increase in the participation of youth and women and a greater emphasis on ensuring that they achieve a greater level of emancipation in Rwanda.

In relation to the case of the Special Court and TRC of Sierra Leone, it is evident that the Special Court demonstrated the importance of including women in the transitional justice process to adequately address gender-based violence at the international level. Furthermore, the fact that the matter of re-integrating child soldiers was considered in the special court but ultimately carried out in the TRC of Sierra Leone demonstrates the importance of youth in the transitional justice process as the matter of child soldiers was considered in the TRC in order to ensure that the children were treated with the required sensitivity in the transitional justice process. Furthermore, the TRC ensured the involvement of women that centred around the testimonies on sexual violence, and counselling held themed hearings on women and ensured

that female statement-takers were used in all districts. It can therefore be stated that in the case of the Special Court and TRC of Sierra Leone, the restorative justice approach that was used enabled greater involvement of women and youth and promoted the emancipation of women at an international level.

The AUTJP also supports the traditional and complementary justice mechanisms which are the local processes, including rituals that the communities apply in the adjudication process for disputes and “restoring the loss caused through violence in accordance with established community-based norms and practices” (AUTJP 2019). Again, it is evident that the AUTJP values a restorative justice approach to transitional justice to be applied according to the traditional justice mechanisms that are prevalent in the specific context of African states. In addition to this, the AUTJP encourages the use of customary or clan courts and community-based dialogue. The rationale of the AUTJP indicates the importance of using traditional mechanisms along with formal mechanisms. Further, the rationale of the AUTJP indicates that these mechanisms must be aligned with the Protocol to the African Charter on Human and Peoples’ Rights on the Rights of Women in Africa Rights and ACHPR to ensure that marginalised groups such as women and youth are better included in the transitional justice process. In its benchmarks and standards, the AUTJP speaks of “Restoring constitutional and legal rights to sections of society... such as women, youth” (AUTJP 2019). To this effect, the AUTJP indicates that society may emphasise the reconciliation and justice dimension of a combination of transitional justice measures “through inclusive consultative processes” (AUTJP 2019). From these case studies, it is evident that applying a restorative justice approach to transitional justice is likely to increase the inclusion and emancipation of women and youth in transitional justice. However, these case studies have demonstrated that it is only possible when giving consideration to women and youth is a priority in the transitional justice process as indicated in the cross-cutting measures of the AUTJP. Therefore, restorative justice allows for a more substantive inclusion of marginalised groups in transitional justice processes. The higher the level of priority afforded to women and youth is, the more substantive their inclusion will be. In the case of Baraza court, this was evident as the youth were prioritised and therefore participated in the negotiations that resulted in the reintegration of child soldiers. With regards to Uganda, women and youth were only given consideration when the national policy was formulated, therefore their involvement was less substantive in the beginning of the process and gradually became more substantive as time progressed. In the case of the CAR, women and youth were prioritised in the CVJRR which was later reflected in the RCPCA. With

regards to the Gacaca Courts of Rwanda, it is evident that women and youth were afforded the opportunity for more substantive inclusion as they were now eligible to serve in the as inyangamugayo as opposed to only being included as victims. In relation to Sierra Leone, women were prioritised in the Hybrid Court which resulted in women being given higher priority in the gender-based violence aspect of transitional justice.

## **Chapter 5: Conclusion**

### **5.1 Introduction**

This chapter concludes the dissertation by bringing together and highlighting the key findings and arguments made. This was done by determining whether the AUTJP supported an emancipatory agenda, demonstrating that the AUTJP creates a supportive framework that leans more towards restorative justice and discussing illustrative case studies where a restorative justice approach to transitional justice was used to increase the inclusion and emancipation of women and youth.

To accomplish this, this chapter will discuss the findings of previous chapters concerning the AUTJP. This chapter will discuss whether the findings in this study have demonstrated whether the AUTJP carries an emancipatory mandate from an emancipatory critical theory perspective. In this regard, this chapter will discuss the AUTJP in relation to the concepts of conflict transformation, positive peace and hybridity. Moreover, this chapter will discuss whether this study has demonstrated the importance of a restorative justice approach when compared to a retributive justice approach. This study has demonstrated how African shared values of transitional justice largely align with a restorative justice approach. Furthermore, this study demonstrated how many African justice mechanisms align to use a restorative justice approach. This chapter will also discuss how the illustrative case studies used in this study demonstrate the effect of a restorative justice approach to transitional justice on the inclusion and emancipation of women and youth in transitional justice processes.

### **5.2 Emancipatory critical theory**

In the second chapter, this study discussed emancipatory critical theory as a theoretical framework. This theoretical framework analysed the AUTJP as a supportive framework that leaned towards a restorative approach to transitional justice. The restorative justice approach to transitional justice increases the inclusion and emancipation of women and youth in transitional justice processes. This study also outlined an emancipatory agenda. The AUTJP indicates the importance of reconciliation and social cohesion (AUTJP 2019). It indicates that social cohesion requires healing that considers the suffering of victims in conflicts, assisting



them to come to terms with what happened, promoting a shared truth and creating a shared narrative of the past injustice and the need to restore a sense of security and overcoming a sense of victimisation (AUTJP 2019). The second chapter indicated the importance of social cohesion to encourage emancipation through participation (Spies 2020), which aligns with the AUTJP.

Furthermore, the AUTJP defines justice as the provision of judicial and non-judicial measures that ensure the accountability of offenders. In addition to this, the AUTJP indicates that justice needs to redress individuals and communities that have suffered violations (AUTJP 2019) and that justice entails “the availability of fair institutional, social and economic systems of governance and inclusive development” (AUTJP 2019). The second chapter discussed how critical theory includes a broad number of approaches that centre around the notion of liberating people from the modern economic system and state (Ferreira 2018). The AUTJP speaks of systemic change as being important to justice. As this study discussed in the second chapter, systemic change is required for emancipation to take place. From a critical emancipatory perspective, it is evident that the AUTJP has emancipatory undertones.

The second chapter touched on the obligations of member states to ensure that they pursue transitional justice processes by ensuring that there are no social or political impediments to the process. This guarantees a safe and inclusive space for the advocacy of transitional justice and mobilises all sections of society across political lines (AUTJP 2019). From an emancipatory critical theory perspective, it is evident that the AUTJP supports the notion of emancipation, as it advocates for systemic change in the form of reforms. The AUTJP states that “Political and institutional reform should ensure respect for the dignity of all members of society based on their inclusion and effective participation in decision-making processes” (AUTJP 2019). Furthermore, the AUTJP speaks of the importance of the participation of women and youth through policy measures and law reforms that address patterns of discrimination and inequality.

From an emancipatory critical theory perspective, it is evident that the AUTJP values a restorative justice approach that values inclusivity. The AUTJP speaks of synergising, sequencing and balancing transitional justice elements. In this section, the AUTJP speaks of ensuring “inclusive development” and formulating measures in an “integrated manner and imbued with restorative and responsibility elements respectively” (AUTJP 2019). The second chapter of this study outlined how from an emancipatory critical theory perspective the AUTJP seeks to ensure that this liberation occurs by serving as a guideline by which African states can

uphold human rights and constitutionalism. This is done by the AUTJP transforming the system to be more inclusive of marginalised groups by acknowledging systemic mechanisms that will accomplish this such as truth and reconciliation commissions, national dialogues, and national reparations funds. In addition to emphasising the need for transformation, the AUTJP highlights the importance of inclusivity. The systemic root causes of conflict are what perpetuate systemic exclusion.

Therefore, from a critical emancipatory theory perspective, an emancipatory agenda is required throughout the entire process to ensure that the outcome of transitional justice is emancipation for marginalised groups such as women and youth by using both formal mechanisms and informal indigenous mechanisms throughout the peace process. From a critical emancipatory theory approach, it is evident that a restorative justice approach to transitional justice affects the inclusion and emancipation of marginalised groups such as women and youth.

### **5.3 Restorative and retributive justice**

The third chapter juxtaposed restorative justice with retributive justice and demonstrated how many African justice mechanisms informally use a restorative justice approach to better include marginalised groups such as women and youth. The chapter also considered how retributive justice often uses formal mechanisms that did not accommodate marginalised groups such as women and youth, and how the AUTJP encourages the use of informal traditional African justice mechanisms to better incorporate women and youth in the transitional justice process. According to the AUTJP, transitional justice is the “various (formal and traditional or non-formal) policy measures and institutional mechanisms that societies, through an inclusive consultative process” (AUTJP 2019). Furthermore, the AUTJP indicates that considering informal traditional mechanisms is necessary to overcome past violations, divisions and inequalities to foster conditions for socio-economic transformation.

The third chapter of this study demonstrated that, to a large extent, retributive justice prioritises the state and not the victim. This results in a situation where the victim is marginalised because the focus is on punishing the offender as opposed to ensuring that the victim has been able to recover. Marginalised groups such as women and youth have been disadvantaged by this. In most formal processes, such as courts, the criminal justice system makes use of the retributive justice approach, which focuses on punitive measures. From the genealogy of transitional justice, it is evident that this approach is of Western origin and has greatly impacted the justice

mechanisms that are used today. However, many African justice mechanisms make use of a restorative justice approach. The third chapter demonstrated that AUTJP does not negate the importance of retributive justice, but rather recognises its significance while promoting restorative justice. These African justice mechanisms are based on African shared values.

African shared values greatly influence why the AUTJP pivots more towards restorative justice. These are values such as a communalistic spirit, a sense of the sacred and of religions, and a sense of the sacredness of human life. Moreover, African concepts such as ubuntuism encourage a shared notion of humanity that is predicated on mutual respect and communal growth and restoration. To this end, African justice mechanisms seek to ensure that the wider community is involved in the peace process. This includes key participants such as women and youth. The AUTJP supports the use of formal justice mechanisms alongside informal mechanisms that would enable healing and reconciliation. In supporting restorative justice, the AUTJP demonstrates that peace processes and their transitional justice efforts must seek more than just conflict resolution that can be brought about by retributive justice. The AUTJP supports conflict transformation through systemic change that comes about through an inclusive process and provides a platform for marginalised groups such as women and youth. From a critical emancipatory perspective, it is evident that the AUTJP supports restorative justice to ensure that conflict transformation takes place to achieve positive peace where the underlying factors that have caused the conflict are addressed at a structural level.

#### **5.4 Transformation in transitional justice**

In the fourth chapter, this study explored different case studies centred around traditional African justice mechanisms that make use of a restorative justice approach to achieve transformation in transitional justice processes on the continent. The chapter focused on how these transitional justice approaches affect women and youth. According to the AUTJP, it is a framework that provides “guidelines to translate comprehensive strategies for TJ into specific actions that empower affected countries to take the lead in the process of providing restorative and transformational justice concerning not only the legacies of conflicts and violations but also governance deficits and developmental challenges” (AUTJP 2019). Therefore, the AUTJP encourages a restorative justice approach to transitional justice to be applied according to the specific context of a particular AU-member state. As discussed earlier, the overall objective of the AUTJP is “to provide the policy parameters on holistic and transformational TJ in Africa”.

The fourth chapter explored indigenous, informal and formal transitional justice processes and how they demonstrated an aspect of the theme of transformation. These aspects of transformation are reintegration, cooperation and coherence, capacity-building, rebirth and renewal and individual dignity.

The case study of the Baraza peace courts of the DRC demonstrated the importance of the sub-theme of transformation: reintegration. This theme is also prevalent in the AUTJP, as it states that “TJ processes should envisage special measures of support for women and youth as victims to ensure their physical and psychosocial rehabilitation and social reintegration”. The Baraza peace courts of the DRC applied a restorative justice approach to ensure the reintegration of marginalised groups such as women and youth. This was evident through the programme that was run in the town of Kiliba, where an estimated fifty former child soldiers were reintegrated back into the community in the Uvira territory of South Kivu.

Another theme of transformation that was prevalent in the case studies of the preceding chapter was prevalent in the case study of the CAR. This sub-theme was capacity-building, which is also apparent in the AUTJP. In this regard, the AUTJP indicates the following: “All TJ processes need to have a capacity-building component that strengthens the capabilities of the society to support and legitimize national processes” (AUTJP 2019). In the case study of the CAR, the process that is applied seeks to make use of a restorative justice approach to transform the transitional justice process to be more inclusive of previously marginalised groups such as women and youth through its capacity-building programmes. These programmes were reflected in the National Recovery and Peacebuilding Plan of the Central African Republic (RCPCA).

In relation to the sub-theme of rebirth and renewal, the AUTJP speaks of the importance of reform. The AUTJP states that transitional justice commissions “should outline institutional responsibility for crimes and make recommendations to reform institutions, laws, policies and practices that enabled abuses to occur” (AUTJP 2019). In the case study of the Gacaca courts, the court underwent a transformation in the form of a reform through the rebirth and renewal of its mandate. This is because prior to the genocide, the court dealt with civil and property disputes. Due to the sheer volume of cases that arose from the genocide, the court received a rebirth and renewal of its mandate that empowered it to deal with matters related to the genocide. With the rebirth and renewal of the Gacaca courts came an update of the requirements to serve in the *inyangamugayo*.

With regard to the transformation sub-theme of individual dignity, the AUTJP indicates that “Political and institutional reform should ensure respect for the dignity of all members of society based on their inclusion and effective participation in decision-making processes.” (AUTJP 2019). This sub-theme is evident in the case study of the transitional justice process of Sierra Leone. Previously, groups such as women and youth were not regarded with an adequate amount of dignity because they were not previously central to the transitional justice process. The Special Court and TRC of Sierra Leone demonstrated the need to involve women in the transitional justice process. Moreover, the fact that the hybrid nature of the Special Court of Sierra Leone was the first of its kind is an indication that there was a need to involve women in the transitional justice process in a manner that preserved their dignity. This is also reflected in the AUTJP, which indicates the following: “Given the gendered dimension of violence, criminal investigations and national and local processes for truth and reconciliation should give particular attention to sexual and gender-based violence” (AUTJP 2019).

In the case study of Uganda, the theme of cooperation and coherence was prevalent. This aligns with the AUTJP, which states that “The complex challenges of TJ, the pressure to deliver peace, justice and accountability dividends, and the presence of many actors require cooperation and coherence to ensure that all actors and processes respond to the needs and priorities of the affected country and peoples” (AUTJP 2019). As indicated in the previous chapter, women in the transitional justice process in Uganda sought transformation through cooperation and coherence, which resulted in the UWCP, which was formed to engender a process to ensure that the needs and concerns of women were reflected in the peace agreement and budget process that was to follow (Nabukeera-Musoke 2009). Groups involved in the UWCP were the Uganda Women’s Network (UWONET), the Centre for Conflict Resolution (CECORE), the Isis Women’s International Cross-Cultural Exchange (Isis-WICCE), which collected information regarding the priorities of women in relation to peace, and the Federation of Women’s Lawyers (FIDA). The cooperation and coherence of the UWCP coalesced with the state and NGOs such as ASF to develop the National Transitional Justice Policy of Uganda, which was based on the AUTJP and therefore also aligned with the cross-cutting measure of the AUTJP, which advocated for the involvement of women and youth in the transitional justice process.

## **5.5 Recommendations**

It is important to note that African justice mechanisms are not homogenous as they differ from one culture to another. Therefore, it is recommended that more research takes place when considering African justice mechanisms in transitional justice to better include women and youth.

Furthermore, it is recommended that a more proactive approach be taken when with regard to resource mobilisation. This is an important factor that must be taken into account for conflict transformation to take place that will result in the emancipation of women and youth

The AUTJP indicates that the legislation that sets up transitional justice commissions in different states should address the recommendations of the commissions through public consultations, written responses, engagements with civil society and parliamentary debates on these recommendations (AUTJP 2019). It is therefore recommended that states apply these recommendations not only in relation to truth commissions but also the entire ambit of the transitional just process.

It is also recommended that the cyclical nature of violence that has resulted in marginalisation of women and youth be addressed. Women and youth have been victims of conflict. This is because they are often the targets of sexual violence, verbal and physical abuse and are blocked from accessing basic resources and having their basic human rights violated (Peled et al. 1995). Empowering women and youth by having them more actively included in peace processes in roles other than that of the victim will contribute to breaking the cycle of violence. In this regard, the AUTJP emphasises the need to “break such cycles of violence and ensure their well-being and stability as they are reintegrated into society” when referring to marginalised groups (AUTJP 2019).

## **5.6 Concluding remarks**

In conclusion, the AUTJP is a supportive framework that leans towards a restorative approach to transitional justice to increase the inclusion and emancipation of women and youth in transitional justice processes. This study has demonstrated this by applying an emancipatory critical theory framework to analyse the AUTJP. To this end, this study demonstrated how

critical theory seeks to promote emancipation through the support of practices and notions that align with universalist principles of justice.

Moreover, this study showed how from an emancipatory critical theory perspective emancipation requires systemic change at a structural level. To this end, this study demonstrated how the AUTJP supports systemic transformation, which aligns with Ferreira's notion of liberating people from modern economic and state systems. This study also demonstrated how the AUTJP values the inclusivity of previously marginalised groups such as women and youth, as indicated in its third principle.

Furthermore, this study demonstrated how from an emancipatory critical theory perspective, conflict transformation is important to achieve greater inclusivity and emancipation. This is because conflict transformation entails a shift from conflict-habituated systems to peace systems through systemic change to prevent future conflict. To this end, this study demonstrated that this systemic change is required from structures in peace processes to be more inclusive of women and youth as well as ensure their emancipation. This study demonstrated how conflict transformation is necessary to achieve positive peace that lasts beyond the absence of violence. In addition to this, this study demonstrated the importance of hybridity, which shifts the aim of transitional justice from efficiency through conflict resolution to fostering local legitimacy in transitional justice processes. From an emancipatory critical theory perspective, it is evident that the AUTJP carries an emancipatory mandate, as it supports systemic transformation for greater inclusivity through conflict transformation to achieve positive peace with a focus on hybridity.

This study has also demonstrated that although the AUTJP recognises the importance of retributive justice, it leans more towards a restorative justice approach to transitional justice. In this regard, this study has demonstrated that the genealogy of transitional justice is largely retributive and based on a Western-centric positionality.

Moreover, this study demonstrated that retributive justice focused on how the state would punish the victim while restorative justice focuses on restoring the community by focusing on victims and seeking reconciliation and healing. Furthermore, this study indicated how African shared values regarding transitional justice were largely restorative. These were values such as ubuntu, community, indigenous justice and restoration, which are geared at the restoration of victims and rehabilitation and reintegration of offenders back within the community.

This study demonstrated how this aligns with the AUTJP, which indicates that it is “premised on the African shared values relating to peace and security”. These African shared values were the premise of African traditional justice mechanisms such as *legothlas* that follow processes that are aligned with those used in restorative circles and transitional justice. This study demonstrated how the outcome of these agreements is signified by *amani* (peace), *umoja* (oneness), *obulala* (together) and *simunye*, which translates to “togetherness is strength”. Therefore, this study has demonstrated that a restorative justice approach to transitional justice is more likely to be more inclusive of marginalised groups such as women and youth when compared to retributive justice. This is because restorative justice has a community-based and consultative approach that also allows for a greater likelihood of systemic change and is, therefore, more suited toward the emancipation of marginalised groups such as women and youth.



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