THE DUTY TO PROSECUTE AND THE STATUS OF AMNESTIES GRANTED FOR GROSS AND SYSTEMATIC HUMAN RIGHTS VIOLATIONS IN INTERNATIONAL LAW: TOWARDS A BALANCED APPROACH MODEL

by

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I declare that THE DUTY TO PROSECUTE AND THE STATUS OF AMNESTIES GRANTED FOR GROSS AND SYSTEMATIC HUMAN RIGHTS VIOLATIONS: TOWARDS A BALANCED APPROACH MODEL is my own work and that all sources that I have used or quoted have been indicated and acknowledged by means of complete references.

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Pheny Keiseng Rakate
DEDICATION

This work is dedicated to the African Child, Amantle Kgodumo, for whom the challenges of globalisation and a non-racial, non-sexist South Africa loom ahead;

and to my late sisters,

Ontiretse Rakate (1952 – 1978), and

Lemogang Rakate (1954 – 1997);

and to my late paternal grandparents,

Ramosai “Ramozele” Rakate (c.1870 – d.1945),

Mmamotswa “Mmasereiwa” Rakate (c. 1892 – d.1962)
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In many ways this work pays homage to the memory of my late mother, Mme Kedibone “Mmagokere” Akanyang Rakate (née Sefularo) (1927 –1980). Like the myth of Daedalus and his son, Icarus, in James Joyce’s A Portrait of the Artist as a Young Man, my mother,
believed that education supplies the wings that let us fly up and escape the labyrinth of King Minos. Unfortunately, she did not live long enough to see the fruits of her inspiration. This work was inspired by her unwavering character, and her unquestioning, high regard and love for education.

The last word is to the little man, Amantle Kgodumo, the African Child, who gave meaning to this work and kept me on the road. It was indeed a destiny, rich in nuances and enduring memories, captured in the rich poetry of Batho Baga-Malete:¹

Ke Mtho wa ga Mpotlo Nakadikgolo jang Mokgojwa  
Mpotlo wa ga Monageng  
Wa ga naka dikgolo-jang-ne-Mokgojwa  
O sema sema ka tsona ga di go inele  
Wa bo o le seganka Mokgojwa  
Wa gapa dikgomo marumo waa tlogela

Ke Mmamamona yo o Dipalapala  
Mmamamona yo mitlwa  
Yo a sekeng a bidiwa go ya go jewa  
A bidiwang fela fa thethela e retetse

Ke dirobaroba Mathhakola tsa ga Masodi-a-Mphela  
Di a robang fela disatla go a lala  
Ditsogang digopotse lelakola lengwe  
Dithlaolela nageng  
Di lebang ga Motonosi

O e tshabele mogothlong nare masuthla dikgwa  
Mutlwa ga o tsane lelerumo oa tlhomolwa  
Kgodumo ya lesele-sele  
Kgodumo e maboo maabe  
Go boa morago e a gabalala  
Ke Barwa pataola tsa mere  
Barwa mothlana o tlhokileng motsei  
Wa jewa ke manong wa jewa ke magakabe ke o lebile

Ke Mtho wa ga Malete –a-phoritha  
Mogobe o motona lepaipai  
Badisa ba ntse letheto ka dilepe

¹ The praise-poem is the story of a man named Swedi, son of Mphela (also known as Motonosi), a Malete of long ago, who captured a young buffalo bull, which he herded with his other cattle. When the young buffalo was old enough, Motonosi decided to kill all his other bulls in order to have a cross-breed between the buffalo and his calves. In the course of time he killed all his cattle, leaving only the cross-breeds. One day, while in the bush, the cross-breeds fled and joined other buffaloes and never returned. The last stanza of the poem alludes to the fact that a man must decide in good time which of his wife’s sisters he is going to marry, in case it is necessary, so that she and the children can be attached to him. It means that a man, in choosing the wrong seantlo (the sister of a man’s wife, whom he may marry), is looking for trouble, like Motonosi, by putting the buffalo bull in the midst of cows and in the end loses all its offspring. Kgodumo is a praise-name for the buffalo, a totem of the baga-Malete. The common name for a buffalo in Setswana is Nare. Batho-Baga-Malete are the descendents of Malete, son of Phatle, who is believed to have been their leader in 1585 and to whom he gave his name. Batho-ba-ga- Malete are an offshoot of the Ndebele who have lived for many centuries in what was then known as the Transvaal and have been influenced by the culture of Bahurushe in everything but name; for an historical account of Batho-Baga-Malete see Vivien Ellenberger, “Di Robaroba Mathhakolatsa ga Masodi-a-Mphela: History of the Ba-ga-Malete of Ramoutsa” XXV Transactions of the Royal Society of South Africa Part I, (1937) 1-72.
Ke Mphepu ee diketlana
E dikileng e paletse Bakwena
Bakwena ba-ga- Mmanepa-a-Tshokudu
Barile ba e laisa ka selei

Ba ga kwenan tseele ngwana ke tla tsele yo mongwe
Bana ba ga seantlo se batiwa go sale gale
Bana baga makgolokwe-a-menwe-a-tau
Batho ba ngapanang ka dinala ka modilo ba lebana fela.
‘I DO NOT KNOW THE DANCES OF WHITE PEOPLE’

IT IS TRUE
I AM IGNORANT OF THE DANCES OF
FOREIGNERS
AND HOW THEY DRESS
I DO NOT KNOW.
THEIR GAMES
I CANNOT PLAY,
I ONLY KNOW THE DANCES OF OUR
PEOPLE
WHEN THE DRUMS ARE THROBBING
AND THE BLACK YOUTHS
HAVE RAISED MUCH DUST
YOU DANCE WITH VIGOUR AND
HEALTH
YOU DANCE NAUGHTILY WITH PRIDE
YOU DANCE WITH SPIRIT,
YOU COMPETE, YOU INSULT, YOU
PROVOKE.

JANE OKOT p’ BITEK, SONG OF LAWINO (1966)
Executive Summary

This thesis examines the status of amnesties and the duty to prosecute gross and systematic human rights violations in international law. The thesis begins by distinguishing amnesty from other related concepts, such as impunity, pardon and statutes of limitations and so on. Unlike these related concepts, amnesty aims to address major social or political crises in society, such as to resolve an armed conflict, allow the return of political refugees or bring about peaceful political transition. Amnesty is linked to the duty to prosecute, because it is so often in direct conflict with international law norms and standards on the duty to prosecute and to compensate victims of human rights violations.

Before the First World War, amnesty was a well-established customary practice. Even where a peace treaty was silent on the matter, amnesty was implied. Compensation was also part of the regime of peace treaties, but not followed as consistently as amnesty. This practice changed dramatically after the First and Second World Wars, because, in a break with the past, the victors did not consider themselves to be on the same level as the vanquished. This resulted in the abolition of the traditional practice of granting amnesty and the demand rather that those responsible for aggression be prosecuted and compelled to pay compensation, as was the case with Germany. Since 1948, with the adoption of the United Nations’ Charter, and other international human rights treaties, the power of states to grant amnesty gradually became constrained by the obligation to prosecute perpetrators of gross human rights violations and to pay compensation to the victims of war crimes. Nevertheless, this phenomenon did not put an end to the practice of states granting amnesty for gross human rights violations. Internal armed conflicts during and after the end of the Cold War, with no victors and no vanquished, made amnesty an inevitable option. A considerable number of states continue to utilise amnesty as a device for peace and reconciliation, and they have granted amnesty for war crimes, genocide and crimes against humanity. In customary international law, there is a gap between the actual state practice and the existence of the customary norm creating a duty to prosecute. As a result, the status of the so-called “palatable amnesties” (à la South Africa), often granted as part of a truth and reconciliation process, still remains unclear in international law. This is further exacerbated by the inconsistent practice of the United Nations as the main depository and sponsor of human rights instruments. South Africa and Sierra Leone are used as case studies to illustrate this inconsistency in both state and UN practice on the status of amnesties in international law.

As a result, the study proposes a balanced approach model, which is an attempt to strike a balance between accountability, political transformation and social stability in transitional democracies. The balanced approach model proceeds from the premise that the international criminal justice system is not flawless and, therefore, it is important to acknowledge its limitations, such as the lack of enforcement agencies, difficulties in the collection of reliable evidence and a lack of resources to prosecute. In terms of the model, consideration is given to (i) the need to respect the legitimacy of the political process that gives rise to the granting of amnesty; (ii) the amnesty must be proportional to the crimes committed and must be rationally connected to the aims of achieving peace and national reconciliation, the interests of justice, compensation for victims; and finally (iii) the general commitment of the state that grants amnesty to respect international law obligations, which includes the implementation of international obligations as part of municipal law and treaty monitoring obligations as preconditions for the amnesty to pass muster in the balanced approach model.

In conclusion, the study proposes model Policy Guidelines on Amnesties Granted for Gross and Systematic Human Rights Violations in International Law for the Assembly of States.
of the International Criminal Court (ICC) to take note of, and to commend to states and international courts and tribunals, leaving its content to be taken up in the normal processes of the application and development of international law. The status of the Guidelines is that of a code of conduct or guide to practice. In that sense, the Guidelines do not have the character of a binding legal instrument and will serve as the basis for the development of sound principles of international law on amnesties.
Keywords: Amnesty; Human Rights Violations; Duty to Prosecute; International Law; United Nations; Rome Statute; Transitional Democracies; Truth and Reconciliation Commission; Balanced-Approach Model; Policy Guidelines.