

**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

PHENYO TSHENOLO KEISENG RAKATE

Submitted in accordance with the requirements

for the degree of

DOCTOR OF LAWS

in the subject

PUBLIC INTERNATIONAL LAW

at the

UNIVERSITY OF SOUTH AFRICA

PROMOTER: PROF. NEVILLE BOTHA

NOVEMBER 2004

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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Phenyo Keiseng Rakate

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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 “Ramosale” Rakate (c.1870 – d.1945),

Mmamotswa “Mmasereiwa” Rakate (c. 1892 – d.1962)

ACKNOWLEDGEMENTS

In writing this work I have incurred many debts. Along the way, I made friends, family and colleagues whom it is befitting to acknowledge here. First of all, I am indebted to my promoter and Head of the Department of Constitutional, International and Indigenous Law, at the University of South Africa (UNISA), Prof. Neville Botha, for being such a good academic pastor. He tirelessly assisted in shaping my ideas, which resulted in this work. In my culture we say *Le kamoso!*

A large part of this research was conducted at the Max-Planck Institute for International and Comparative Public Law in Heidelberg, Federal Republic of Germany, with a generous grant from the Max-Planck Society in 2000 and, again, in 2004. During these periods the Institute provided me with an office and access to its unsurpassed bibliographical collection. My thanks go to the two directors of the Institute, Prof. Armin von Bogdandy and Prof. Rüdiger Wolfrum, including the professional research staff, for their kindness and willingness to share ideas with me. Thanks are also due to my Ethiopian brother in Heidelberg, Assefa Fiseha, who introduced me to the *Ge'ez* civilisation and the *Fetha Nagast* (Law of the Kings) of the Aksumite Empire of Menelik I of Ethiopia – a unique country in Africa, and perhaps the world, that was Christian when the Anglo-Saxons were prostrating themselves before pagan gods.

I also benefited from the library of the Buchmann Faculty of Law of the University of Tel-Aviv, Israel. Thanks to the Dean of the Law Faculty, Prof. Daphne Barak-Eraz, who invited me as a Visiting Elga Gegla Scholar in December 2001. Discussions with students (at Tel-Aviv University and the Hebrew University of Jerusalem, Jerusalem, where I lectured on the reconciliation process in South Africa) opened my eyes to the nuances of contemporary armed conflicts, particularly in the Middle East. The people I interacted with, both in Palestine and in Israel, taught me “in the Middle East, if you are not invited for dinner you are the food!” As the saying goes, to go out of your country is to come back and appreciate it for the first time. Equally, I benefited from the libraries of the Aristotle University of Thessaloniki, Greece in 2000, and the Library of the United Nations, in Geneva, Switzerland during 2001. My interlocutors in Sierra Leone and elsewhere, some are not mentioned here by name, provided invaluable materials that I used for my research.

I am also grateful to the following individuals who assisted me in one way or another, encouraged me, kept me sane and solvent: Naledi Modibedi, Mokgweetsi Rakate, Masego Rakate, Kgalalelo Rakate, Kofi Yakpo and Advocate Michael Osborne. I would like to express my special gratitude to my former colleague at the South African Human Rights Commission, *Mme* Lesedi Sojane, for always reminding me to “eat my carrots before they get cold.” To my host and “adopted” parents in Heidelberg, Germany, Mr & Mrs Cora Yakpo-Wetzel and family who provided an intellectual home and gave me the necessary push I needed to complete this work. As always, I am indebted to Mama Cora for introducing me to the literary works of Camara Laye (Guinea), Nuruddin Farah (Somalia), Naguib Mahfouz (Egypt) and Joseph Conrad. My indebtedness to the Wetzel family is so great that even sages in the mountains cannot describe it adequately. This work could not have seen the light of day without the editorial assistance of my good friend, Vusi Tshabalala, and Karen Breckon, Law Librarian at the UNISA Library.

In many ways this work pays homage to the memory of my late mother, *Mme* Kedibone “Mmagokere” Akanyang Rakate (*nèe* 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 Motho 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 imele
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 Matlhakola tsa ga Masodi-a-Mphela
Di a robang fela disatla go a lala
Ditsogang digopotse lethlakola lengwe
Dithlaolela nageng
Di lebang ga Motonosi*

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

*Ke Motho wa ga Malete –a-phoritlha
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 *Molete* 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. What it means is 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 descendants 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- Balete* 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 Matlhakola-tsa 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 kwena ntseele ngwana ke tla tsala yo mongwe
Bana ba ga seantlo se batlwa go sale gale
Bana бага 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.