open secrets
power & profit | truth & justice

2nd Floor | Community House | 41 Salt River Road | Cape Town | 7925
www.opensecrets.org.za | +27 21 447 2701

Our reference: AB/DOC/2020

3 October 2020

TO: **ADVOCATE SHAMILA BATOHI**
National Director of Public Prosecutions
National Prosecuting Authority
Per: **Nonceba Monageng**
Per Email: NMonageng@npa.gov.za
ndpp@npa.gov.za

CC: **ADVOCATE HERMIONE CRONJE**
Head: Specialised Commercial Crime Unit
National Prosecuting Authority
Per Email: hcronje@capebar.co.za
hcronje@npa.gov.za

Dear Shamila Batohi,

CONSENT IN TERMS OF SECTION 5(1) OF THE IMPLEMENTATION OF THE ROME STATUTE OF THE INTERNATIONAL CRIMINAL COURT ACT OF 2011

---

1. Open Secrets is a not for profit company (NPC number: 2017/078276/08) dedicated to investigating and pursuing accountability for economic crimes and related human rights violations. Consequently, an important aspect of our work includes holding private actors accountable for human rights abuses.

2. In February 2017, Open Secrets published the book *Apartheid, Guns and Money: a tale of profit*, which was the result of a multi-year investigation. A sizeable portion of

the research findings stemming from this work implicates two banks, Kredietbank Luxembourg ("**KBL**", as of January 2020 Kredietbank Luxembourg changed its name to Quintet Private Bank) and Kredietbank (now KBC Group, "**KBC**"), in violating international law. In particular, it revealed how these banks facilitated the illicit flow of money between the apartheid state, through the Armaments Corporation of South Africa ("**Armscor**"), and arms dealers around the world in the 1970s and 1980s during the United Nations ("**UN**") mandatory arms embargo against South Africa. It is arguable that this assistance strengthened and prolonged the apartheid state.

3. The UN Security Council adopted several resolutions aimed at restricting the sale and purchase of arms used to implement racist policies in apartheid South Africa, as part of an arms embargo. Resolutions no. 181 and 182 of 1963 and Resolution no. 282 of 1970 were not mandatory on member States. However, Resolutions no. 418 and 421 in 1977 imposed a mandatory arms boycott against South Africa. These resolutions are hereinafter collectively referred to as the "**arms embargo**". A contravention of the arms embargo, both directly or by means of facilitating the violation, was unlawful under international law and deemed to constitute complicity with the apartheid system and its attendant gross human rights violations.

4. Acts of apartheid are considered crimes against humanity, and crimes against humanity are *erga omnes*, so too therefore is the crime of apartheid *erga omnes*. Thus, the crime of apartheid is accorded *jus cogens* status and therefore carries with it universal jurisdiction. Consequently, KBL and KBC were obliged to not perpetrate the crime of apartheid, either indirectly by aiding and abetting, or directly, because the crime of apartheid is a *jus cogens* norm. This is set out in more detail in a memorandum that Open Secrets will be submitting to the NDPP and Head of the SCCU ("**the Memorandum**") within twenty four hours of sending this letter.

5. KBL was established in 1949 as a subsidiary of Kredietbank (now known as KBC Group, referred to as "KBC" hereinunder). KBC was formed in Belgium in 1935 and was a subsidiary of its holding company, Almanij, as was KBL. It is alleged in the Memorandum that KBL and KBC laundered money for Armscor in order to assist Armscor in procuring arms in secret and in contravention of the UN's mandatory arms embargo. These arms were then used to enforce the South African government's apartheid laws and policies.

6. The findings in *Apartheid, Guns and Money* are drawn from evidence collected by Open Secrets from a variety of sources. These sources include declassified documents from numerous government archives, including the Department of Defence Archives and Department of International Relations and Cooperation archives. Open Secrets collected about 40 000 such declassified documents. The other source is court papers from ongoing legal attempts by Jorge Pinhol, a Portuguese arms dealer and sanctions buster, to sue Armscor for what Pinhol alleges is unpaid commission for acting as middleman for a deal to procure helicopters for the South African military during the UN arms embargo.

7. The importance of holding to account corporate actors that enabled and propped up the apartheid state cannot be overstated. Without these private actors who provided the infrastructure and financial systems used to violate the compulsory arms embargo, these human rights violations and crimes against humanity would arguably not have been possible. In this particular case, there is a wealth of evidence and expert opinions that confirm this fact, and confirm the case against KBL and KBC. The evidence and sources of evidence are expounded upon in more detail in the Memorandum. Further, the Memorandum is endorsed by over 20 civil society organisations, as well as fully and unequivocally supported by the Commissioners of the Truth and Reconciliation Commission, as well as Professor John Dugard, the leading international law expert on the crime of apartheid. These letters and endorsements are attached to the Memorandum.

8. The importance of cases like this has also been documented and expressed by the Truth and Reconciliation Commission ("**the TRC**"). In particular, the TRC commented on corporate involvement in the armaments industry:

> "*[…] The moral case against the armaments industry is essentially that business willingly (and for profit) involved itself in manufacturing products that it knew would be used to facilitate human rights abuses domestically and abroad.*" [1]

9. And regarding the financial industry, the TRC states:

[1] Truth and Reconciliation Commission of South Africa Report, Volume 4, *Institutional and Special Hearings* (29 October 1998) at 36, para 75. Found at http://www.justice.gov.za/trc/report/finalreport/Volume%204.pdf, last accessed July 2019.

"*The costs of maintaining apartheid began to mount, however, and from the late 1970s, the government and parastatal organisations began turning to the international banks for help*."[2] […] "*Following international efforts to impose formal sanctions, overseas investors developed a new tactic of forming partnerships with South African parastatal organisations. They reduced their profile, but relinquished any pretence of autonomy and served the economic priorities of the apartheid state*."[3]

10. The TRC's recommendations carry weight and clearly indicate the necessity, desirability and obligation to prosecute those who aided and abetted the apartheid government, and particularly those who did not participate in the amnesty hearings, like KBL and KBC.

11. In addition to this sentiment being expressed by the TRC in 1998, this view continues to be held by the TRC Commissions as evidenced by their letter of support of the case against KBL and KBC (attached to the Memorandum).

12. The essence of the Memorandum's arguments are as follows:

12.1. The South African National Prosecuting Authority ("**the NPA**") has a duty to prosecute KBL and KBC in both South African domestic law and international law-

12.1.1. In South African domestic law, section 232 of the Constitution of the Republic of South Africa [4] ("**the Constitution**") states that customary international law is South African law, unless it is inconsistent with the Constitution. Further, the *AZAPO*[5] case confirmed that the State can prosecute grave crimes without the enactment of domestic legislation. Importantly, the Preamble of the Constitution recognises "the injustices of the past" and commits itself to building "a society based on democratic values, social justice and fundamental human rights".

12.1.2. There is an international customary law obligation on states to investigate, prosecute and, consequent upon a finding of guilt, punish crimes against humanity, which are not subject to a statute of limitations.

[2] Truth and Reconciliation Commission of South Africa Report, Volume 4, *Institutional and Special Hearings* (29 October 1998) at 51, para 133. Found at http://www.justice.gov.za/trc/report/finalreport/Volume%204.pdf, last accessed July 2019.
[3] Truth and Reconciliation Commission of South Africa Report, Volume 4, *Institutional and Special Hearings* (29 October 1998), at 51, para 134. Found at http://www.justice.gov.za/trc/report/finalreport/Volume%204.pdf, last accessed July 2019.
[4] Act 108 of 1996.
[5] *Azanian People's Organization (AZAPO) and Others v President of the Republic of South Africa and Others* 1996 (4) SA 672.

12.2. KBL's and KBC's conduct is reprehensible and consisted of the following-

12.2.1. It took place between 1977 and 1994, during the height of international condemnation of the crime of apartheid, including the mandatory UN arms embargo. The violation of the arms embargo was essential to the continuation of apartheid in South Africa.

12.2.2. The relevant conduct consisted of (a) money-laundering, and (b) this money-laundering assisted the apartheid government to violate the UN arms embargo.

12.2.3. The money-laundering consisted of-

12.2.3.1. KBL setting up shell companies, including the appointment of nominee directors, used for obscuring arms transactions and exchange between Armscor and global arms companies;

12.2.3.2. KBL providing multitudes of numbered bank accounts to Armscor and its shell companies to facilitate the concealment of illicit flows of money used to purchase arms by Armscor;

12.2.3.3. KBC opening and maintaining bank accounts for Armscor, which were part of this money-laundering system, as well as providing capital loans to Armscor and the apartheid government; and

12.2.3.4. KBC holding and or facilitating business relationships between KBL, Armscor and apartheid government officials in support of the apartheid agenda.

12.3. KBL and KBC aided and abetted the apartheid state in the crime of apartheid, which is a crime against humanity. They did so in the following ways:

12.3.1. The South African state committed the crime of apartheid, and there was a duty on KBL and KBC not to aid and abet the apartheid state-

12.3.1.1. The UN arms embargo was binding on Luxembourg and Belgium, and therefore arguably also on KBL and KBC.

12.3.1.2. The crime of apartheid is a crime against humanity and was such at all relevant times. As such it is a *jus cogens* norm, which gives rise to an obligation *erga omnes*. The crime of apartheid is therefore capable of being committed by both state and non-state actors. Consequently, KBL and KBC were obliged not to aid and abet the apartheid state in committing the crime of apartheid.

12.3.2. Despite this obligation, KBL and KBC, through their wilful financing and facilitating of arms purchases by the apartheid state, aided and abetted the apartheid state in the commission of the crime of apartheid. They aided and abetted in the following ways:

12.3.2.1. The *actus reus* or objective legal requirement of aiding and abetting consisted of 'practical and material assistance' and/or moral assistance to the apartheid state. This had a substantial effect or contribution to the commission of the crime of apartheid:

12.3.2.1.1. KBL's practical assistance to the apartheid state in setting up shell companies, and facilitating transactions that allowed the apartheid state to violate the arms embargo and continue to commit the crime of apartheid; and

12.3.2.1.2. KBC's loans to Armscor enabled Armscor to procure arms to be used in South Africa and regionally, in the implementation of the state's apartheid agenda.

12.3.2.2. The *mens rea* of aiding and abetting is in the form of KBL's and/or KBC's knowledge that their actions assist, contribute, encourage and/or lend moral support to the commission of the crime of apartheid. There was widespread knowledge that the South African government was committing the crime of apartheid in South Africa and regionally. It was well documented and media coverage was extensive at the relevant time. By assisting and providing practical support to Armscor in setting up the financial architecture that allowed the South African government to procure arms, in contravention to the arms embargo and international law, KBL could only have known that this was in furtherance of the crime of apartheid. Likewise, KBC knew that, in lending money to Armscor, they were providing financial assistance to the apartheid state to enable it to procure arms for the implementation of apartheid.

12.4. The above is expounded on in more detail, with corresponding evidence, in the Memorandum.

13. In light of the above, the National Prosecuting Authority ("**the NPA**") has the power to prosecute KBL and KBC:

13.1. The role of the NPA is to prosecute on behalf of the state, and therefore on behalf of South Africans, in the interests of the administration of justice, including, *inter alia*, to prosecute against the 'injustices of the past'[6].

13.2. Sections 20(1), 22(3) and (4) of the NPA Act[7] give the NPA the power to institute and conduct prosecutions.

13.3. The National Director of Public Prosecutions ("**the NDPP**") can decide whether it is in the interest of the administration of justice that an offence, committed as a whole or partially within the jurisdiction of one Director of Public Prosecutions ("**DPP**") be investigated and tried within the jurisdiction of another DPP.[8] It is therefore the NDPP who determines which DPP will be in charge of prosecuting a case. In the current circumstances, considering the alleged perpetrators and the nature of the offence, Open Secrets submits that this should be the Head of the Specialised Commercial Crimes Unit ("**SCCU**").

13.4. The NDPP can take recommendations, etc. regarding the prosecuting authority (for instance, regarding prosecutions) from any source.[9] This could include recommendations from the public and civil society to prosecute particular cases. This has in fact been done previously in regard to similar crimes.[10]

13.5. In criminal cases, the prosecution has *dominus litis*, which means that the prosecution can do all that is legally permissible to set criminal proceedings in motion. This would include, for example, petitioning the cooperation of other states in order to bring accused before South African courts.

14. Written authorisation is needed for the prosecution of certain offences, including crimes against humanity.[11] However, the content of this Memorandum concerns prosecution of crimes against humanity under *jus cogens* norms of customary international law, not directly under the Implementation Act. Were the requirement of authorisation of the NDPP in the Implementation Act[12] to be interpreted expansively, the NDPP would, upon written authorisation to prosecute, set out the jurisdiction, the offence(s) and the court in which the prosecution is to take place.[13]

[6] Preamble of the Constitution of the Republic of South Africa Act 108 of 1996.
[7] National Prosecuting Authority Act 32 of 1998.
[8] Section 22(3) of the National Prosecuting Authority Act 32 of 1998.
[9] Section 22(4)(c) of the National Prosecuting Authority Act 32 of 1998.
[10] *National Commissioner of the South African Police Service v Southern African Human Rights Litigation Centre and Another* [2014] ZACC 30 at para 11.
[11] Section 5(1) of the National Prosecuting Authority Act 32 of 1998, read with section 5(1) and Part 2 of Schedule 1 of Implementation of the Rome Statute of the International Criminal Court Act 27 of 2002.
[12] Implementation of the Rome Statute of the International Criminal Court Act 27 of 2002.
[13] Sections 20(5) and (6) of the National Prosecuting Authority Act 32 of 1998.

15. The NPA has the duty to investigate and the power to prosecute where there is a *prima facie* case. There is a *prima facie* case where:
    15.1. The allegations (supported by evidence available to the prosecution) are of such a nature that if proved in a court of law by the prosecution on the basis of admissible evidence, the court should convict. In other words, there are reasonable prospects of success, and a reasonable and probable cause for prosecution.
    15.2. The prosecution is able to furnish proof to meet the threshold of 'beyond a reasonable doubt'.

16. Once satisfied that there is sufficient evidence to provide reasonable prospects of a conviction, prosecution should follow unless 'public interest demands otherwise'.[14] Factors to be considered in deciding whether it is in the interests of justice, are as follows:
    16.1. The serious nature of the offence;
    16.2. The interests of the victims and broader community; and
    16.3. Whether there are no other alternatives to prosecution.

17. If the above is considered, the NPA has the power and duty to prosecute crimes against humanity, including the crime of apartheid, in both domestic and international law.
    17.1. The crime of apartheid took place within South Africa and therefore South African courts have jurisdiction to prosecute these crimes.
    17.2. This letter and the Memorandum provide a recommendation that KBL and KBC are culpable for aiding and abetting the crime of apartheid, and such Memorandum provides sufficient evidence of a *prima facie* case against both banks (KBL and KBC). The leading expert on the crime of apartheid and the TRC Commissioners are also in support of this recommendation.
    17.3. Moreover, it is in the interests of justice to prosecute KBL and KBC, in that the crime of apartheid is a serious offence, being classified as a 'grave crime' in international law. It is also in the interests of victims of apartheid and the broader community, in South Africa and internationally, that KBL and KBC be prosecuted, both as an exercise of 'truth-finding' and in order to end the impunity with which corporate actors have thus far operated. In addition, it is likely that a prosecution will have a deterrent effect on future crimes, including money-laundering, that

[14]Paragraph 4(c) of Prosecution Policy (issued by the NDPP in terms of section 21(1)(a) of the NPA Act.

accompanies the perpetration of crimes against humanity. Lastly, there are no alternatives to prosecution: Open Secrets and the Centre for Applied Legal Studies have attempted to use 'soft mechanisms' such as the Organisation for Economic Cooperation and Development's National Contact Point mechanism,[15] without success.

18. Upon investigation, and to the extent that the NDPP's authorisation may be required, the SCCU should make this request, in terms of section 5(1) and (4) of the Implementation of the Rome Statute of the International Criminal Court Act 27 of 2002. The following should form the basis for consent:

18.1. Those responsible for the atrocities committed by the apartheid state need to be brought before a court of law in the interests of transparency and truth-finding, in the interests of justice and holding to account those responsible for aiding and abetting grave crimes committed against the people of southern Africa and South Africa;

18.2. Private actors be held accountable for the purpose of ending the impunity of corporate actors and deter such future criminal acts; and

18.3. On grounds of law and public policy, as outlined above, favour a decision to prosecute.

19. Open Secrets therefore requests:

19.1. That those responsible for the atrocities committed by the apartheid state be brought before a court of law in the interests of transparency and truth-finding, in the interests of justice and holding to account those responsible for aiding and abetting grave crimes committed against the people of South and southern Africa;

19.2. That private actors be held accountable for the purpose of ending the impunity of corporate actors and deter such future criminal acts; and

19.3. In terms of section 5(1) and (4) of the Implementation of the Rome Statute of the International Criminal Court Act 27 of 2002, the consent of the NDPP to submit the Memorandum to the Head of the Special Commercial Crimes Unit of the NPA.

[15] See https://www.opensecrets.org.za/oecd/the-complaint/ for Open Secrets and CALS' complaint (last accessed September 2019). See https://www.opensecrets.org.za/the-initial-assessment/ for the NCPs' initial assessments and our response (last accessed September 2019). See https://www.opensecrets.org.za/european-authorities-refuse-to-investigate-apartheids-banks/ for a critique of the process, as well as the issue of the conflict of interest in the Belgian NCP and the willful ignoring of evidence, including the *amicus* submission by UN Independent Expert Juan Publo Bohoslavsky (last accessed September 2019). See also OECD Watch's (the independent NCP monitoring organisation/stakeholder) write up of the cases against KBL (https://complaints.oecdwatch.org/cases/Case_516) and KBC (https://complaints.oecdwatch.org/cases/Case_519) (last accessed October 2019).

20. Kindly confirm receipt.

Yours sincerely,

_____

Hennie van Vuuren
Director: Open Secrets
Tel: +27 82 902 1303
Email: hvanvuuren@opensecrets.org.za

open secrets
power & profit | truth & justice