Letter of Support from Former Commissioners of the Truth and Reconciliation Commission for the prosecution of KBL and KBC for the crime of apartheid

27 August 2020

Dear Adv. Shamila Batohi,

We write this letter to you in our capacity former Commissioners of the Truth and Reconciliation Commission ("**TRC**"), committed to the goals of the South African Truth and Reconciliation Commission of justice and accountability for crimes committed during the Apartheid era. In this context we wish to express our support for the prosecution of two of the banks responsible for aiding and abetting the South African apartheid state in committing the crime of apartheid against South Africans and Southern Africans.

The two banks in question are Kredietbank Luxembourg (as of January 2020, the bank is now called Quintet Private Bank, referred to as "**KBL**") and Kredietbank (now KBC Group, referred to as "**KBC**"), who set up multi-billion Rand money-laundering systems intentionally aimed at violating a mandatory United Nations arms embargo against the South African apartheid state from the late 1970s to the early 1990s. The evidence presented by Open Secrets, an organisation (whose key focus is accountability for economic crimes and its consequent human rights violations), to the National Director of Public Prosecutions ("**NDPP**") shows how these criminal activities aided and abetted the officials and agents of the South African government in committing the crime of apartheid.

Without the support by these banks and other financial institutions of the South African government, the apartheid state would not have been able to procure the arms and weapons needed to enforce, maintain and implement its policy of apartheid, which constitutes a 'crime against humanity'. An important component of accountability is combating impunity and dismantling the networks and institutions responsible for corporate crime, as there is a link between the institutions who perpetrated these crimes in the past and those responsible for state capture today. Holding these instrumental actors to account, including through prosecution is a critical step to restoring the Rule of Law in our country today. In a *Judgment of the Nuremberg International Military Tribunal* 1946, the Tribunal said the following of business actors involved in crimes against humanity:

> *'Hitler could not make aggressive war by himself. He had to have the co-operation of statesmen, military leaders, diplomats and businessmen. When they, with knowledge of his aims, gave him their co-operation, they made themselves party to the plan he had initiated. They are not to be deemed innocent because Hitler made use of them, if they knew what they were doing.'*

The historic compromises made during our negotiations for a peaceful transition demand that justice be pursued for serious apartheid-era crimes. The constitutional and statutory design of the amnesty process specifically envisaged that criminal investigations, and where appropriate, prosecutions, would take place where perpetrators were refused amnesty or failed to apply for amnesty. This lay at the heart of the compact struck with victims. The compact required the State to take all reasonable steps to pursue justice where perpetrators

were not amnestied. The preamble to the Constitution recognises "the injustices of our past" and commits itself to the establishment of "a society based on democratic values, social justice and fundamental human rights" and "a united and democratic South Africa able to take its rightful place as a sovereign state in the family of nations".

The Truth and Reconciliation Commission's Report[1] came to some strong conclusions regarding the involvement of business in apartheid. It said:

> "*To the extent that business played a central role in helping to design and implement apartheid policies, it must be held accountable.*[2] […] *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*."[3]

In discussing the extent of corporate involvement, it stated:

> "*By the late 1960s, however, direct investment by multinational corporations began to grow, bringing technological expertise into the country and giving multinational corporations a stake in maintaining the apartheid system. By 1971, over 500 British firms had South African subsidiaries. This gave international businesses a direct interest in maintaining the* status quo."[4]

In particular, with regards to multinationals, we noted:

> "*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*."[5] […] "*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*."[6]

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[1] Truth and Reconciliation Commission of South Africa Report, Volume 4, *Institutional and Special Hearings* (29 October 1998). Found at http://www.justice.gov.za/trc/report/finalreport/Volume%204.pdf, last accessed July 2019.
[2] Truth and Reconciliation Commission of South Africa Report, Volume 4, *Institutional and Special Hearings* (29 October 1998) at 24, para 23. 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 36, para 75. Found at http://www.justice.gov.za/trc/report/finalreport/Volume%204.pdf, last accessed July 2019.
[4] Truth and Reconciliation Commission of South Africa Report, Volume 4, *Institutional and Special Hearings* (29 October 1998) at 51, para 132. Found at http://www.justice.gov.za/trc/report/finalreport/Volume%204.pdf, last accessed July 2019.
[5] 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.
[6] 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.

We go on to say that business could not have been unaware of the use of the arms industry in South Africa once the army was deployed into townships in the 1980s.[7] It found:

> "*Business failed in the hearings to take responsibility for its involvement in state security initiatives specifically designed to sustain apartheid rule. This included involvement in the National Security Management System. Several businesses, in turn, benefited directly from their involvement in the complex web that constituted the military industry*."[8]

In our Final Report released on 21 March 2003 we stressed that the amnesty should not be seen as promoting impunity. We highlighted the imperative of "a bold prosecution policy" in those cases not amnestied to avoid any suggestion of impunity or of South Africa contravening its obligations in terms of international law, notably the obligations concerning the prosecution of crimes against humanity, like the crime of apartheid. Most victims accepted the necessary and harsh compromises that had to be made to cross the historic bridge from apartheid to democracy. They did so on the basis that there would be a genuine follow-up of those offenders who spurned the process and those who were refused amnesty.

However, the NPA has failed to date, to hold those who committed the crime of apartheid to account, and this is particularly stark when it comes to corporations. There has, to date, not been a single prosecution of a corporation for aiding and abetting the apartheid regime.[9] We have also witnessed a number of cases that have contributed to an emerging norm that corporations can and should be held liable for violations of international criminal law. These cases not only put companies on notice that their actions are subject to increased scrutiny but also provide innovative ways to provide justice to victims of international crimes.[10] For example, the government of France has under its special unit "The specialized War Crimes and Crimes Against Humanity Unit of the Paris *Tribunal de Grande Instance"* opened a number of ongoing cases addressing corporate accountability, which the NPA could reference.[11]

The prosecution of individuals has also stalled for over twenty years since the birth of South Africa's constitutional democracy, despite our recommendation of over 300 cases brought before it that the NPA should investigate and prosecute. The TRC's recommendations nonetheless carry weight and clearly indicate the necessity, desirability and obligation to prosecute those who aided and abetted the apartheid government, and who did not participate in the amnesty hearings, which were seen as a type of remedy for this devastating time in South Africa.

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[7] Truth and Reconciliation Commission of South Africa Report, Volume 4, *Institutional and Special Hearings* (29 October 1998), at 37, para 78. Found at http://www.justice.gov.za/trc/report/finalreport/Volume%204.pdf, last accessed July 2019.

[8] Truth and Reconciliation Commission of South Africa Report, Volume 4, *Institutional and Special Hearings* (29 October 1998), at 58, para 166. Found at http://www.justice.gov.za/trc/report/finalreport/Volume%204.pdf, last accessed July 2019.

[9] Upon request, Open Secrets can approach former TRC Commissioners for support and or confirmatory affidavits.

[10] https://www.justsecurity.org/47452/corporate-criminal-accountability-international-crimes/

[11] Ibid

Even though we handed over a list of several hundred cases to the NPA with the recommendation that they be investigated further, virtually all of them were abandoned. All these cases involved gross human rights violations such as torture, murder and enforced disappearances in which amnesty was either denied or not applied for ("**the TRC cases**").

The UN Principles to Combat Impunity came about with an awareness that there can be no just and lasting reconciliation unless the need for justice is effectively satisfied. Principle 1 states-

> '*Impunity arises from a failure by States to meet their obligations to investigate violations; to take appropriate measures in respect of the perpetrators, particularly in the area of justice, by ensuring that those suspected of criminal responsibility are prosecuted, tried and duly punished; to provide victims with effective remedies and to ensure that they receive reparation for the injuries suffered; to ensure the inalienable right to know the truth about violations; and to take other necessary steps to prevent a recurrence of violations*.'

Principle 35 states-

> *'States shall ensure that victims do not again have to endure violations of their rights. To this end, States must undertake institutional reforms and other measures necessary to ensure respect for the rule of law, foster and sustain a culture of respect for human rights, and restore or establish public trust in government institutions…'*

The four pillars of transitional justice underlie these principles, which are:

1. Truth: establishing and acknowledging the truth on the violations. All parties to the human rights violations, and most importantly victims and their families, have the right to make their voice heard and their questions answered. Society at large has the right to know the truth about past events and the perpetration of heinous crimes. This is pivotal to address – and punish – past abuses, but it also to prevent the recurrence of similar violations in the future.
2. Justice: the identification and prosecution of perpetrators of gross human rights violations and international crimes is crucial, as it serves both a preventive and reparative purpose. Strong accountability mechanisms show that atrocities do not go unpunished, thereby deterring future abuses.
3. Reparation: victims of gross human rights violations have the right to receive adequate reparation for the harm suffered. Measures of reparation go well beyond economic compensation, and may also include symbolic gestures, such as public apologies and the building of memorials, and measures aiming at improving the life of victims and their families.
4. Guarantees of non-recurrence: in learning from past mistakes, all efforts must be made to prevent gross human rights violations in the future. This includes mainly institutional reforms reinforcing accountability, transparency and fairness.

Without truth-finding investigations and prosecution, these and similar crimes go unpunished and those responsible continue to act with impunity. We have witnessed this in the controversial and publicly condemned "Arms Deal" of the late 1990's in South Africa, where arms companies were able to loot the South African coffers as a result of the connections made by the apartheid government with arms dealers.

This call is in the context of previous calls by us and others, for the prosecution of the TRC cases. The 2015 legal proceedings launched by Thembi Nkadimeng who sought to compel the NPA to make a prosecutorial decision in the 1983 murder of her sister, Nokuthula Simelane, by Security Branch officers, brought to light some of the reasons for the absence of prosecutions. This application disclosed evidence of gross political interference in the operations of the NPA, as per the supporting affidavits of former NDPP, Adv. Vusi Pikoli and Anton Ackermann SC, former Special Director of Public Prosecutions in the Office of the NDPP and former head of the PCLU. The aforesaid NPA officials were instructed and pressurized by cabinet ministers and the then Commissioner of the SAPS to stop all work on the TRC cases. The decision to act independently and begin prosecutions of the TRC matters led to the suspension of the then head of the NDPP Vusi Pikoli in September 2007.

We note with alarm that the real decision makers behind the atrocities committed have not been investigated and prosecuted. Indeed, individuals, such as Eugene de Kock and those indicted in the Nokuthula Simelane case, were mere foot soldiers. While junior officers must face justice, they acted at the behest of the generals and politicians who remain shielded from accountability. The failure to pursue those most responsible speaks volumes about the captured state of our criminal justice system.

The failure to investigate and prosecute those who were not amnestied represents a deep betrayal of all those who participated in good faith in the TRC process. The failure is wholly inconsistent with the spirit and purpose of South Africa's constitutional and statutory design in dealing with crimes of the past. No expression of regret, remorse or apology has been offered by anybody in authority for the deep betrayal of victims of past atrocities.

Based on these principles and precepts of transitional justice, it is in the public interest for the NPA to investigate and prosecute the actions of KBL and KBC in aiding and abetting in the crime of apartheid, both in terms of their culpability for the past, but also in order to ensure non-recurrence, and for truth-finding and justice in the present. The new NDPP, Shamila Batohi, has promised a departure from this past practice and the dawning of a new NPA, which seeks justice without fear, favour or prejudice.

We therefore respectfully call on the NDPP to prosecute KBL and KBC for their role in aiding and abetting the crime of apartheid in South Africa.

Yours faithfully,

Yasmin Sooka

On behalf of the Commissioners who have endorsed this letter:

Yasmin Sooka

Adv. Dumisa Ntsebeza SC

Ms. Mary Burton

Ms. Glenda Wildschut

Dr. Fazel Randera

Mr. Richard Lyster

Dr. Wendy Orr

Desmond and Leah Tutu Legacy Foundation on behalf of Archbishop Emeritus Desmond Mpilo Tutu

Former Committee Members
Dr. Russell Ally

Prof. Piet Meiring

Ms. Joyce Seroke