

KBL EUROPEAN PRIVATE BANKERS

and

KBC GROUP BELGIUM

**Failure to comply with the OECD Guidelines for
Multinational Enterprises in respect of violations of UNSC
arms embargoes against apartheid South Africa during
1977 - 1994**

**Submission to the Luxembourg and Belgium National
Contact Points**

24 April 2018

Submitted by:

Open Secrets

Contact details:

Mr Hennie Van Vuuren, Director

Tel: +27 214472701

Email: hennievvuuren@opensecrets.org.za

Address: Community House, 41 Salt River Road, Salt River, Cape Town 7925, South Africa

AND

Centre for Applied Legal Studies

Contact details:

Lisa Chamberlain, Director

Tel: +27 11 717 8624

Email: lisa.chamberlain@wits.ac.za

Wandisa Phama, Head of Business and Human Rights Programme

Tel: +27 11 717 8608

Email: wandisa.phama@wits.ac.za

Professor Bonita Meyersfeld, Former Director of the Centre for Applied Legal Studies

Tel: +27 76 755 0257

Email: Bonita.Meyersfeld@wits.ac.za

Address: First Floor, DJ du Plessis Building, University of Witwatersrand, Braamfontein,

Johannesburg, 2050, South Africa

To:

Secrétaire du Point de Contact National

M. Christian Schuller

Ministère de l'Économie

Bureau du Ministre

19-21, Boulevard Royal

L-2449 Luxembourg

Tél: 247-84710

Email: christian.schuller@eco.etat.lu

And To:

Mr Cyril Liance

Potentiel Economique

Rue du Progrès 50

1210 Bruxelles

Tel: +32 (0) 2 277 81 63

Email: Cyril.Liance@economie.fgov.be

List of abbreviations

Arm Scor	Armaments Corporation of South Africa
BSL	Beverly Securities Limited
CALS	Centre for Applied Legal Studies
KBC	KBC Group
KBL epb	Kredietbank Luxembourg European Private Bankers
NCP	National Contact Point
SADF	South African Defence Force
UN	United Nations
UNSC	United Nations Security Council

Table of Contents

1. Summary	1
2. Complainants	3
3. The Respondents	5
4. Jurisdiction of the Belgium and Luxembourg NCP	7
5. Background to the complaint	9
5.1. The UN arms embargo	9
5.2. Apartheid era violations	12
5.3. Regional warfare.....	14
5.4. KBL and Sanctions busting.....	15
5.5. The relationship between Armscor and KBL	19
5.6. Kredietbank as a creditor to Armscor	23
6. Applicability of the 1976 OECD Guidelines for Multinational Enterprises	24
7. Substantive provisions of the 1976 OECD Guidelines contravened by KBL and KBC	26
7.1. Chapter (II)(1) General Policies: Duty to act in accordance with the	

general policy objectives of member states	26
7.2. Chapter (II)(9) Duty to abstain from improper involvement in local politics	28
7.3. Chapter (III) Duty To disclose information	31
8. Respondents' violation of international human rights law:	
Preamble of 1976 Guidelines	35
8.1. Complementarity between the Preamble of 1976 OECD Guidelines and KBL and KBC's internal policies	35
8.2. Complementarity between the Preamble of the 1976 OECD Guidelines and international human rights law instruments	37
a) Belgium and Luxembourg's international law obligations	38
b) KBL and KBC's complicity in committing apartheid	39
9. Application of the revised 2000 OECD Guidelines for Multinational Enterprises	42
9.1. Continuing effect and the Preamble of the 2000 OECD Guidelines.....	45
10. Substantive provisions of the 2000 OECD Guidelines contravened by KBL and KBC	47
10.1. (II) General Policies: Duty to act in accordance with the general policy objectives of member states	47
10.2 (III) Duty to disclose information	47
11. Complainants' expectations	48

1. Summary

1. This complaint examines breaches of the OECD Guidelines for Multinational Enterprises ('**OECD Guidelines**') by Kredietbank Luxembourg epb ('**KBL**') and Kredietbank (now called the KBC Group ('**KBC**')), in that KBL and Kredietbank facilitated a series of clandestine transactions to sell arms illegally to South Africa during the United Nations Security Council ('**UNSC**') arms embargo against the apartheid government in the 1970s and 1980s.
2. KBL's and Kredietbank's role in sanctions busting occurred during a time of global opposition to apartheid. In 1977 the UNSC adopted Resolution 418 of 1977¹ under Chapter VII of the United Nations Charter ('the UN Charter'). The 1977 Resolution made the arms embargo mandatory and was binding on all member states of the United Nations ('UN').² Following South Africa's continued militarisation, the 1977 embargo was fortified by Resolution 518 of 1986 that made state desistance with the provision of arms support in any form mandatory. Luxembourg, the state in which KBL is registered, and Belgium, KBC (and Kredietbank's) state of incorporation, ratified both mandatory arms embargoes.³
3. The complainants argue that the conduct of KBL and Kredietbank contravene the 1976 OECD Guidelines and, in addition, the revised 2000 OECD Guidelines on the following two main grounds:

¹ UN Security Council, *Resolution 418 (1977) Adopted by the Security Council at its 2046th meeting, on 4 November 1977*, 4 November 1977, S/Res/418 (1977).

² This is a unique power of the Security Council in terms of Chapter VII of the United Nations Charter. Its resolutions made in terms of this Chapter are always binding on member states.

³ The reply from Luxembourg to the Security Council is documented as S/12527. See 'Report of the Secretary-General on the Implementation of Resolution 418 (1977) on the Question Of South Africa Adopted by the Security Council at Its 2046th Meeting On 4 November 1978' at <http://www.aluka.org/stable/pdf/10.5555/al.sff.document.puuns1978002>.

3.1. The respondents' conduct constitutes a violation of substantive provisions of the 1976 and 2000 Guidelines as follows:

- a) Chapter II: General policies of the OECD Guidelines, in particular;
 - i) the duty of multinational enterprises to act in accordance with the general policy objectives of member countries;⁴ and
 - ii) the duty on multinational enterprises to abstain from improper involvement in local politics;⁵

- b) Chapter III: Duty on multinational enterprises to disclose information regarding factors materially relevant to an enterprise's areas of operation and their source and use of funds; and

3.2. The respondents' conduct constitutes a violation of the spirit, purport and objects of the Preamble of the 1976 and 2000 OECD Guidelines in that KBL and Kredietbank failed to act in accordance with their host state's international obligations that are incorporated into the Preamble of the Guidelines.⁶

4. The ways in which the aforementioned provisions of the Guidelines have been violated are discussed in further detail in sections 7-10 of this submission.

5. The complainants request the Luxembourg and Belgium NCPs to facilitate the recognition and accountability of KBL's and KBC's violation of the OECD

⁴ 1976 and 2000 OECD Guidelines, II(1), see sections 7.1 and 10.1 of the complaint.

⁵ 1976 and 2000 OECD Guidelines, II(9), see sections 7.2 and 10.1 of the complaint.

⁶ See sections 8 and 9.1 of the complaint.

Guidelines and their complicity in the violation of the UN arms embargo and the sustenance of apartheid rule in South Africa through their conduct detailed in this complaint.⁷

2. The Complainants⁸

Open Secrets

6. Open Secrets is an independent non-profit organisation registered in South Africa. Open Secrets' vision is to promote private sector accountability for economic crimes and related human rights violations in Southern Africa through the tools of investigation, advocacy and research.

7. An important area of work for Open Secrets is to expose and hold accountable corporations and governments whose actions during the apartheid era harmed, and continue to harm, South Africans. Since 2012, the director of Open Secrets has researched economic crimes during apartheid. This work culminated in the publishing of the book *Apartheid Guns & Money: A Tale of Profit* in May 2017.⁹ *Apartheid, Guns & Money* reveals the role played by corporations, governments and foreign banks in assisting the apartheid government to violate sanctions imposed by the UN against the sale and acquisition of arms by or to the apartheid government.

8. The post- apartheid Truth and Reconciliation Commission ('the TRC').did not address apartheid-era economic crimes. There has therefore been no investigation into, or accountability for those who committed economic crimes during apartheid and for those

⁷ See section 11 of the complaint.

⁸ Open Secrets and CALS wish to thank partners in civil society who have provided support in various ways during the process of drafting this complaint. In particular we wish to thank RAID (Rights and Accountability in Development) for their feedback.

⁹ H van Vuuren *Apartheid Guns and Money* (2017) Jacana Media (Pty) Ltd.

corporations whose conduct made them complicit in the crime of apartheid. In an attempt to remedy the resultant impunity of state and non-state actors, Open Secrets has been at the forefront of research and advocacy exposing systemic economic crimes committed by the apartheid regime.

Centre for Applied Legal Studies

9. The Centre for Applied Legal Studies ('CALs') is a civil society organisation and registered law clinic based at the University of Witwatersrand, Johannesburg. CALs was established in 1978 and from its inception was involved in crucial litigation that used the common law to fight the unfair practices of the apartheid government. CALs used its position as a university centre to conduct research into the government's policy and law, particularly in the area of security legislation and policing. This research informed extensive education programmes in the legal profession and beyond.

10. Today CALs practices human rights law in five intersecting programmes, namely, Gender, Basic Services, Business and Human Rights, Environmental Justice and Rule of Law. The tools of research, advocacy and strategic litigation are used to advance human rights in these fields.

11. CALs' vision is to contribute to the achievement of a socially, economically and politically just society, where repositories of power such as the state and private sector uphold human rights and are held accountable for their violations thereof. An integral part of realising this vision is working to deconstruct the legacy of apartheid by holding systems that perpetuate poverty to account.

12. In particular, CALS' Business and Human Rights Programme seeks to centre the private sector, in addition to the state, as an actor who bears obligations to protect and fulfil human rights. CALS' work aims to expose the role of corporations, investors and financial institutions in human rights violations and systemic injustices contributing to poverty amongst South Africans. CALS has been at the forefront of litigation that seeks to further private sector accountability for human rights violations and to secure their mandatory protection of human rights.

3. The Respondents

KBL epb

13. KBL was established in 1949 as a subsidiary of Kredietbank. Kredietbank was formed in Belgium in 1935 and housed in the holding company, Almanij.
14. Headquartered in Antwerp, Kredietbank started as a finance house for Flemish farmers. Now trading under the name of the KBC Group, it is recognised as one of the top 300 public companies in the world with a market capitalisation of \$27.6 billion.¹⁰ In the 1970s and 1980s, at the time the non-adherence occurred, both Kredietbank Belgium and KBL were part of the Almanij group of companies.¹¹ Operating from Luxembourg, KBL's focus was international merchant and investment banking. As such, it specialised in facilitating international loans and trade finance for large multinational corporations. Over time, KBL expanded its operations throughout Europe, offering tailor-made private banking services to wealthy individuals and corporations.

¹⁰ Forbes Magazine 'The World's Biggest Public Companies' (2017) available at <https://www.forbes.com/companies/kbc-group/>.

¹¹ H van Vuuren *Apartheid Guns and Money* 161.

15. There is continuity in terms of KBL's structure from the 1970s to today. In 1986 KBL began investing in and purchasing private banks. The first investment was in Brown Shipley,¹² which coincided with the period in which KBL was drawing significant profit from its operations to assist the apartheid state, as described below. KBL's expansion continued into the 2000s. As discussed in paragraph 17 many of these banks remain part of the corporate structure of KBL today, confirming that the structure of KBL today is largely the same as its corporate structure at the time of the non-compliance.

16. In 2012 KBL was acquired by Precision Capital, a Luxembourg-based bank that is supervised by the European Central Bank and the Commission de Surveillance du Secteur Financier.¹³ Precision Capital represents the private interests of members of the Al-Thani family of Qatar. It holds 99.9% of KBL with the balance of the investment held by the Grand Duchy of Luxembourg.

17. Despite this purchase by Precision Capital, the structure and organisation of the bank remain intact. This is evidenced by the continued existence of KBL's subsidiaries and their operations. Members of the KBL group that were unchanged by the purchase by Precision Capital include Puilaetco Dewaay (Belgium), Merck Finck & Co. (Germany), Brown, Shipley & Co. (Great Britain), and Theodoor Gilissen Bankiers NV (The Netherlands). Therefore, the entity as it exists now represents and owns the profits made by KBL at the time of its conduct that is the subject of this complaint.

KBC Group

¹² KBL epb Through the Decades 'KBL invests abroad' available at: <http://www2.kbl.lu/common/timeline/index.html>.

¹³ KBL epb Through the Decades 'Precision capital acquires KBL epb' available at: <http://www2.kbl.lu/common/timeline/index.html>.

18. As mentioned in paragraph 11 above, Kredietbank Belgium was established in 1935 as a part of the holding company, Almanij. The bank continues to be headquartered in Antwerp, Belgium. From 1949 to 1998, Kredietbank operated as the parent company of its subsidiary in Luxembourg, KBL. In 1998, Kredietbank merged with two other Belgian entities to create KBC Bank. In 2005, KBC Bank merged with its holding company Almanij to form KBC Group.¹⁴ This means that there is a form of continuity between Kredietbank and the KBC Group today.
19. From the above timeline, it is important to note that as the parent company of KBL, Kredietbank exercised direct control and authority over the conduct of KBL between 1977 and 1994, that is, the period during which the complainants allege KBL facilitated the violation of UN arms embargoes against apartheid South Africa.
20. An organogram setting out the historic and current structure of KBL and Kredietbank is attached hereto as '**Annexure A**'.

4. Jurisdiction of Belgium and Luxembourg NCPs

21. The Belgian and Luxembourg NCPs have jurisdiction to hear this complaint. A complaint may be lodged at the NCP of a country where the alleged violations resulting from conduct of a multinational corporation occurred. In the event that such country is a non-OECD member, the complaint may be submitted to the NCP in the country where the offending multinational corporation has its headquarters.¹⁵ This complaint is therefore submitted to the Luxembourg and Belgian NCP on the following grounds:

¹⁴ KBC 'Our History' available at <https://www.kbc.com/en/brief-history-kbc-group>.

¹⁵ S Marshall 'OECD National Contact Points: Better Navigating Conflict to Provide Remedy to Vulnerable Communities' (2016) Monash University 12.

Luxembourg

22. KBL is presently headquartered in Luxembourg and served as the jurisdiction from which the impugned conduct of KBL was administered. The Luxembourg NCP thus has jurisdiction to hear this complaint both because of the location of KBL's head office and the location of the harmful conduct.

Belgium

23. Kredietbank was a parent company of its subsidiary, KBL, at the time of the alleged wrongful conduct of KBL. As argued later in the complaint, Kredietbank was aware, or should reasonably have been aware of KBL's conduct that stood in contravention to the OECD Guidelines and should have taken the necessary steps to prevent KBL's conduct. The OECD Guidelines themselves articulate their application to parent and local entities of a multinational enterprise according to the actual distribution of responsibilities amongst them.¹⁶ Further, the Guidelines call on OECD member countries in whose jurisdiction multinational corporations are headquartered and house a central part of the corporation's operations to cooperate with the OECD system.¹⁷ However, Kredietbank failed to fulfil its obligations under the OECD Guidelines to monitor and prevent the offending conduct of KBL.

24. The Belgian NCP is thus appealed to on the basis that KBC Group, as Kredietbank's successor, is head-quartered in Belgium and secondly, due to Kredietbank's wrongful conduct by act and/or omission having occurred in Belgium.

¹⁶ 1976 OECD Guidelines, Preamble, para 8.

¹⁷ 1976 OECD Guidelines, Preamble, para 2.

5. Background to the complaint

5.1. *The UN Arms Embargo*

25. The state-sanctioned system of apartheid in South Africa was initiated in 1948 by the National Party government. This system implemented legal segregation of racial groups in South Africa, advancing ideas of white supremacy and the political, economic and social oppression of black people, the details of which are described below. The sustainability and enforcement of apartheid depended on an autocratic government and oppressive security force that relied on propaganda and fear to repress those who opposed the system. On 29 March 1960, 69 black people were murdered and hundreds more injured by security forces outside a police station in Sharpeville while protesting the so-called pass laws. The Sharpeville massacre, as it came to be known, caused international outrage and prompted calls for sanctions against South Africa for the grave violations of human rights of victims of apartheid within its borders. It was at this time that the UN General Assembly adopted Resolution No. 134 of 1960 (attached hereto as **Annexure B**), urging South Africa to rescind the unlawful apartheid system.¹⁸ Contrary to this appeal, the apartheid government remained relentless in asserting its power and building its military potential.

26. The UN Security Council consequently adopted several resolutions aimed at restricting the sale and buying of arms used to implement racist policies in apartheid South Africa. These entailed Resolutions no. 181 and 182 of 1963 and Resolution no. 282 of 1970 (which were not mandatory on member States) and Resolutions no. 418 and 421 in 1977, which imposed a mandatory arms boycott against South Africa. These resolutions

¹⁸ United Nations Security Council Resolution 134 of 1960 on the Question Relating to the Situation in South Africa S/RES/134(1960).

are hereinafter collectively referred to as the 'arms embargo' (attached hereto as **Annexures C, D, E, F and G** respectively).

27. In particular, Resolution 418 of 1977 provided:

[The Security Council] acting therefore under Chapter VII of the Charter of the United Nations, decides that all States shall cease forthwith any provision to South Africa of arms and related material of all types, including the sale or transfer of weapons and ammunition, military vehicles and equipment, paramilitary police equipment, and spare parts for the aforementioned, and shall cease as well the provision of all types of equipment and supplies and grants of licensing arrangements for the manufacture or maintenance of the aforementioned.¹⁹

28. The 1977 Resolution made the embargo mandatory. It was therefore binding on all member states of the UN and was unanimously adopted by UN member states including Belgium and Luxembourg.²⁰ Luxembourg, the state in which KBL is registered, officially communicated its acceptance of the Resolution in 1978 (attached hereto as **Annexure H**).²¹ Belgium officially registered its acceptance of the Resolution in 1979.²²

29. To reiterate, the 1977 Resolution therefore precluded Luxembourg and Belgium from providing, selling, transferring, manufacturing, licensing or maintaining, a wide array of arms, including spare parts for such arms.

¹⁹ UNSC Resolution 418 of 1977 5.

²⁰ Chapter VII of the United Nations Charter.

²¹ The reply from Luxembourg to the Security Council is documented as S/12527. See 'Report of the Secretary-General on the Implementation of Resolution 418 (1977) on the Question of South Africa, adopted by the Security Council at Its 2046th Meeting on 4 November 1978' available at <http://www.aluka.org/stable/pdf/10.5555/al.sff.document.puuns1978002>.

²² United Nations Security Council 'Report of the Security Council Committee established by Resolutions 421 (1977) Concerning the question of South Africa' S/13721 (31December 1979).

30. In 1986, the Security Council adopted Resolution 591 (attached hereto as **Annexure I**),²³ which strengthened the embargo and clarified some of the terms and obligations under the 1977 Resolution. Resolution 591 of 1986, inter alia:

30.1. Required states to take measures to ensure that weapons did not reach South Africa through third countries;²⁴

30.2. Called on states to refrain from participating in any activities in South Africa which they have reason to believe might contribute to its military capacity;²⁵ and

30.3. Required states to investigate violations, prevent future circumventions, strengthen their 'machinery' for the implementation of the Embargo and introduce penalties for violations of the Embargo.²⁶

31. In 1987, Luxembourg once again officially communicated its acceptance of the 1986 Resolution to the Secretary-General.²⁷ Likewise, Belgium communicated its acceptance of Resolution 591 in 1987.²⁸

32. A contravention of the arms embargo, both directly or by means of facilitating the violation, was therefore unlawful under international law and deemed to constitute complicity with the apartheid system and its attendant gross human rights violations.

²³ UN Security Council, *Resolution 591 (1986) Adopted by the Security Council at its 2723rd meeting, on 28 November 1986, 28 November 1986, S/RES/591 (1986)*, available at: <http://www.refworld.org/docid/3b00efa017.html>.

²⁴ Resolution 591, Art 1.

²⁵ Resolution 591, Art 9.

²⁶ Resolution 591, Art 11.

²⁷ The reply from Luxembourg to the Security Council is documented as S/18961/Add.2. See 'Report of the Secretary-General on the Implementation of Security Council Resolution 591 (1986) Addendum' available at http://repository.un.org/bitstream/handle/11176/60830/S_18961_Add.2-EN.pdf?sequence=3&isAllowed=y.

²⁸ Substantive replies received from States in the *Report of the Secretary-General on the Implementation of Security Council Resolution 591 (1986)*, S/18961/Add.3, 26 August 1987.

33. There are several groups of victims who suffered because of apartheid, which was sustained and strengthened as a result of South Africa's increasing military strength. The actors who enabled the evasion of the compulsory arms embargo facilitated this militarisation. These factors cannot be separated from violations of the UN arms embargo, specifically designed by the international community, through the UN, to bring about a swift end to the crime of apartheid. Any actor that aided and abetted in the evasion of arms sanctions by act or omission, therefore aided and abetted the crime of apartheid.

5.2. Apartheid Era Violations

34. The apartheid policy of racial segregation gave rise to a miscellany of human rights violations. Black South Africans were largely politically disenfranchised and dispossessed of their land. A wide range of repressive laws prevented or limited property ownership. Black South Africans were subject to the inferior system of 'Bantu Education',²⁹ which was premised on the view that black children should be equipped for a life of manual labour alone. Higher education was also segregated, with historically black universities receiving little funding and providing poorer levels of education. Black South Africans were denied adequate health care, access to water and sanitation, housing and basic services. The creation of 'Bantustans' territories meant that black South Africans had no freedom of movement in South Africa.

35. The Group Areas Act designated zones in which Black South Africans could live.³⁰ These townships were, and still are affected by overcrowding and the absence of basic services such as water, sanitation, refuse removal, electricity or roads. In some areas

²⁹ This educational system was operationalised through the Bantu Education Act 47 of 1953. For a further synopsis see <http://overcomingapartheid.msu.edu/sidebar.php?id=65-258-2&page=1>.

³⁰ Group Areas Act 41 of 1950.

flooding is frequent and homes are constructed of corrugated iron and plastic materials to make *ad hoc* structures in which families live. Black South Africans had to get permission to be in white areas and were required to carry passes (a form of identity document) to authorise their presence in 'White Only' areas. There were restrictions on the type of employment available to black South Africans and oppression of trade unions. Black South Africans were not allowed to gather in large numbers, had to sit on 'Black Only' benches in parks, were denied access to 'White Only' beaches and were prohibited from eating in 'White Only' restaurants. Apartheid penetrated the most intimate part of people's lives, prohibiting sexual relations between black and white people and allocating racial identities to people with the result that children were not allowed to live with their parents if they were classified as a different race.

36. Activists, particularly the leaders of domestic and exiled liberation movements who opposed apartheid and sought to redress these injustices, suffered the brunt of political violence. This included imprisonment, detention without trial, torture, disappearances and the use of bombs, including the notorious letter bomb, to kill and maim dissidents.

37. The South African security forces used military arms and ammunition to perpetuate these violations. For example, Professor Laurie Nathan documents how the South African military, predominantly through the South African Defence Force ('**SADF**'), was deployed throughout South African townships to bolster the police's ability to control and repress black communities during apartheid.³¹ In 1985, 35 372 troops were deployed across 96 different townships in South Africa to combat protest in clashes described by South Africa's own Minister of Law and Order as 'war, plain and simple'.³²

³¹ L Nathan 'Troops in the Townships: 1984 – 1987' *War and Society: the Militarisation of South Africa* ed J Cock and L Nathan (1989) 67.

³² Nathan 'Troops in Townships: 1984 – 1987' 70.

5.3. Regional Warfare

38. An integral part of the apartheid state's survival strategy was to wage war and engage in military destabilisation of neighbouring states. South Africa illegally occupied Namibia (formerly South West Africa) and provided military and financial support to civil wars in Angola and Mozambique during the 1970s and 1980s. The military fought against the liberation forces seeking independence from its South African occupiers.³³
39. The war in Angola recorded significant casualties. UNICEF estimated that between 1980 and 1985 over 100,000 Angolans died, largely as a result of war-related famine.³⁴ There is little doubt that the war would not have continued for as long as it did were it not for its foreign backers, which included South Africa, the United States, Cuba, Russia and a host of other countries which all gave covert support to various warring parties.
40. Similarly, the war in Mozambique recorded millions of victims affected by the war either through murder, starvation, maiming and displacement.
41. The continuation and consequences of these conflicts can be materially attributed to South Africa's continued ability to purchase and transfer weaponry. A senior apartheid era military intelligence official confirms that the predominant demand for weapons, particularly small arms, bombs and mines, on the part of the SADF in the late 1970s and 1980s was based on their need to provide weapons to forces allied to the apartheid state in Angola and Mozambique.³⁵ The official confirms that it was not plausible for the South African military to use South African weapons for this purpose. Hence, a significant

³³ P Holden and H van Vuuren *The Devil in the Detail: How the Arms Deal Changed Everything* (2011) 27.

³⁴ Holden and van Vuuren *The Devil in the Detail: How the Arms Deal Changed Everything* 28.

³⁵ Interview with Chris Thirion, former Chief of Apartheid Military Intelligence, 11 December 2015, as quoted in van Vuuren, *Apartheid Guns and Money* 393.

amount of foreign weapons purchases, necessarily in contravention of the arms embargo, were used to support these conflicts.

42. In addition to the SADF's involvement in these wars, the South African Security Forces conducted military raids into the neighbouring territories of Botswana, Lesotho, Swaziland and Zimbabwe, particularly in the period between 1980 until 1994. These raids targeted anti-apartheid activists, often resulting in their deaths. In this way, the raids were designed to destabilise South African liberation movements whose members were largely exiled in these neighbouring states.

5.4. KBL and Sanctions Busting

43. As the UN embargo intensified, South Africa's state-owned arms procurement and production company, the Armaments Corporation of South Africa ('**Armcor**'), sought ways to circumvent the arms embargo and continue acquiring arms. Armcor and the South African military were able to leverage relationships around the world to secure offers for weapons and weapons technology.³⁶ Their primary challenge was to ensure clandestine payments for arms transfers and purchases. A simple and direct transfer of money would be easily traceable and would reveal clear evidence of the evasion of the embargo. A secret and obscure payment system was required.

44. KBL was the institution that provided a solution to this problem. After 1977, KBL assisted the apartheid government in establishing a money-laundering network that would allow Armcor to pay for weapons without it being apparent that Armcor was the buyer. This was done in two ways.

³⁶ van Vuuren, *Apartheid Guns and Money* 160 – 172.

- 44.1. The first was the establishment of shell companies registered in Panama and Liberia.³⁷ The transactions between Armscor and the arms suppliers were channelled through these shell companies. KBL arranged for the appointment of the named directors of these companies. Sometimes Armscor's own employees played this role.³⁸
- 44.2. The second was the provision of hundreds of numbered bank accounts, some for Armscor itself and some attached to the shell companies, to facilitate the movement of the money for the unlawful purchase of arms. Most of the shell companies' bank accounts were with Luxembourg banks, and were predominantly KBL accounts. For example, 76 front companies identified in Liberia operated 198 accounts at KBL.³⁹ This meant that while a front company in Liberia may be listed as a party to the transaction, the cash would still flow to their KBL account in Luxembourg.
45. This architecture allowed for the following kind of transaction: if Armscor needed to pay a French arms company for a new missile system, it would not make any direct monetary transfer to the company. Rather, the money that left South Africa (with state authorisation) was routed through a series of different 'numbered' (as opposed to named) bank accounts before arriving in the account of the front company (controlled by Armscor), usually held at KBL itself. The 'numbered' accounts allowed the identity of the ultimate beneficiary or owner of the account to be withheld, with only a series of digits identifying the account. This made tracking the funds impossible.⁴⁰ With the cash reassembled in Luxembourg, Armscor officials could direct the bank to make payment

³⁷ A shell company (also front company) has no significant assets nor undertakes business activities itself, but can be used by others to undertake a transaction without it being traceable to that party. They are usually, as is the case here, registered in jurisdictions that allow for secrecy in ownership, are low in taxation, and do not require extensive reporting.

³⁸ van Vuuren, *Apartheid Guns and Money* 177.

³⁹ van Vuuren *Apartheid Guns and Money* 177.

⁴⁰ van Vuuren *Apartheid Guns and Money* 190 – 194.

from these Luxembourg accounts to the weapons suppliers, without the instruction appearing to come from Armscor. The series of bank accounts and inclusion of front companies broke the audit trail, ensuring that the transactions could not be linked directly to Armscor.

46. This secrecy was essential for Armscor to evade the embargo on a sustained basis without coming under more pressure from the organised anti-apartheid movement that was investigating arms transactions and attempting to enforce the embargo. The secrecy provided by KBL's network of accounts made such investigations nearly impossible.

47. The scale of the contribution is also highly significant. South African records show that the military spent, in today's value, approximately R500 billion (€33 billion) on secret weapons purchased between 1977 and 1994.⁴¹ As elaborated below, former Armscor officials involved in managing the payment system say that KBL handled 70% of their transactions in this period. This information is contained in ex – Armscor official Martin Steynberg's further statement (attached hereto as **Annexure J**).⁴²

48. KBL's payment architecture facilitated a range of sales between 1977 and 1994. An example of this clandestine payment architecture is the sale/purchase agreements between Armscor and the French company Aérospatiale. The agreement involved the upgrading and expansion of South Africa's existing fleet of Puma Search and Rescue Helicopters.⁴³ This agreement is referenced in a series of memos of the SADF attached hereto as **Annexure K**. In order to bypass the embargo, payment for the helicopter parts was made via a Portuguese military intermediary. This was codenamed Project Adenia. The Portuguese intermediary was run by an arms dealer, Jorge Pinhol of Beverly

⁴¹ Review by the Auditor General of the Secret Funds for the Period 1960– 1994, Report to the Truth and Reconciliation Commission, 17 July 1998.

⁴² Supplementary statement by Martin Steynberg, 8 April 2006 para 15.

⁴³ Memorandum from Chief of the South African Air Force on Project Adenia, 15 September 1986, DOD/SANDF (CSF, GP 3, Box 793, 302/6/A160, SAW Proj: Proj Adenia, 1, 22/07/1985).

Securities Limited ('BSL'), in collaboration with the Portuguese military. This intermediary became known as the Portuguese Channel. It was through the Portuguese Channel that hundreds of financial transactions took place to mask the payment by Armscor to Aérospatiale for the parts ('**the transactions**'). According to an affidavit provided in the Pinhol litigation⁴⁴ by the former chairperson of OECD Working Group on Bribery (1990-2013), Professor Mark Pieth, the total value of the transactions is estimated to be over US\$3 billion (Professor Pieth's affidavit is attached as **Annexure L**).⁴⁵ As with much of the above-described conduct, these Armscor transactions were in violation of the arms embargo.

49. The bank that facilitated the transactions was KBL. Both BSL and Armscor were clients of KBL. Based on the documentation described below, it is clear that KBL had full knowledge of its clients' identities and the arrangement between Armscor and Aérospatiale. In a further statement given in relation to the Pinhol litigation by banking expert Mr Christian Weyer (attached hereto '**Annexure M**'), it can be verified that KBL also had knowledge of the Portuguese Channel, facilitated by Pinhol.⁴⁶

50. KBL actively facilitated multiple similar transactions by setting up a multitude of accounts globally through which the monies were processed.

51. During the period of the transactions, the capitalisation and annual revenues of KBL increased substantially, transforming it from a relatively small bank to one of Europe's

⁴⁴ Pinhol is engaged in ongoing civil litigation in Portugal whereby he seeks to claim an unpaid commission for this role in facilitating this deal.

⁴⁵ Affidavit by Mark Pieth dated 2 August 2007 6 .

⁴⁶ This is confirmed by banking and finance expert Mr Christian Weyer at paras 18-19 of his statement 7 March 2007 ('the Weyer Statement').

largest banking actors.⁴⁷ This rapid growth was characteristic of banks that undertook sensitive and high-risk transactions to grow their business.⁴⁸

5.5. The Relationship between Armscor and KBL

52. Armscor's banking relationship with KBL was managed by Armscor officials out of Armscor's secret office in the South African embassy in Paris ('the Armscor Paris office'). The Armscor Paris office managed the majority of Armscor's procurement projects in Europe at the time, identifying weapons providers and then directing the payment via instructions to KBL. A former senior official at Armscor, Martin Steynberg, who worked closely with KBL and managed the payment system, stated in an affidavit (**Annexure J**) that KBL was pivotal in the vast majority of the transactions managed from the Armscor Paris office. As intimated in paragraph 45, Steynberg confirms that the KBL network of accounts handled about 70% of their activities and received written instructions from officials who worked with him in the Armscor Paris Office. Steynberg also confirms that KBL would purchase the front companies for Armscor in jurisdictions such as Panama and Liberia, as well as assist in the provision of nominee directors for those front companies.⁴⁹

53. It is clear from the above that the respondent was an active and knowing actor in sanctions busting through (i) acquiring offshore companies in Panama and Liberia and (ii) providing 'Front Directors' for those companies. The bank received instructions regarding these illegal transactions directly from the Armscor Paris Office.

54. A former Armscor official, Daniel Loubser, who worked from the Armscor Paris office, confirms that Armscor had frequent interactions with KBL in the Armscor Paris office,

⁴⁷ The forensic analysis of the banking itself is described in detail in the Weyer Statement.

⁴⁸ Weyer Statement, para 6.

⁴⁹ Supplementary statement by Martin Steynberg, para 16.

including weekly visits, usually on a Wednesday. Instead of any telephone communication, all instructions to KBL, were delivered through diplomatic pouches carried to/from the Wednesday meetings by Armscor officials. The use of diplomatic pouches, reserved for official diplomatic business of the South African state, is further evidence that KBL and its officials were inevitably aware that the source of the transactions was ultimately the South African government. According to Loubser, the pouches carried the fully completed instructions to the bank for the week in question. Later, KBL and the Armscor Paris office would develop a coded telex system for urgent communications.⁵⁰

55. Loubser states that Armscor was a 'privileged and very special client' of KBL:

The internal name "le Group Special" was given to Armscor by personnel working in the bank. During the visits to Paris, he [Loubser] went for lunch a couple of times with [Kredietbank official] Germain (Dick) Menager. They would lunch at a banker's club in Luxembourg. Prior to that, Menager's predecessor, Mergand, sometimes also took him to have lunch at that club. A good working relationship prevailed between the bank and our company in the light of its importance to the bank. Indeed, it appeared that KBL's management would go out of their way to do our bidding... Hiding the payment trails for the foreign military procurement projects could not have been done without the full knowledge and blessing of the very top managements of both Armscor and the banks involved. This was due to the volumes of money being channelled and the sensitivity of the activities associated with the transfers.⁵¹

56. The intimate relationship between Armscor and KBL illustrated above dispels any argument that KBL was unaware of the true and exact nature of the bank accounts with

⁵⁰ H van Vuuren, *Apartheid Guns and Money*, 189

⁵¹ H van Vuuren, *Apartheid Guns and Money*, 189.

Armcor, and the purpose that they served. Providing financial services to the weapons arm of the South African government by definition constituted a violation of the UN arms embargo. KBL's conduct goes beyond the negligent or careless contribution to a distant crime. Rather, the evidence shows that KBL deliberately and knowingly acted unlawfully in assisting the South African government in contravening the arms embargo.

57. Professor Mark Pieth, in providing expert evidence in Pinhol's litigation against Armcor, inspected the documents in the complainants' possession. Professor Pieth served as chairperson of the OECD's Working Group on Bribery in International Business Transactions for almost two decades and was appointed by the UN Secretary General to act as a member of the Independent Inquiry Committee into the Oil-for-Food Program of the UN in Iraq in the mid -2000s.

58. In an affidavit (**Annexure L**) Professor Pieth states that if KBL did indeed serve as a deliberate conduit for Armcor's arms busting operations, it 'would be one of the most serious forms of sanctions violation registered by far.' Pieth argues that busting an embargo is not just done by those selling the goods or those that facilitate clandestine routes for the goods, but also by those that facilitate the movement of money in the transaction. He contends that 'the financial channel [was] a fundamental part of the conspiracy to subvert the UN Security Council Resolution 418'.⁵² Pieth reminds us that not only was the conduct 'clearly illegal according to international law (Chapter VII of the UN Charter)' but that it was also a clear violation of the norms and standards associated with professional banking: 'A bank that deliberately channels billions of dollars of then undoubtedly illegal payments through its system does not offer the requirements of an "honourable" and "experienced" professional. This is an obvious offence against the rule of "fit and proper conduct"'.⁵³

⁵² Pieth's affidavit, para 31.

⁵³ Pieth's affidavit, para 30.

59. Professor Pieth unequivocally critiqued the conduct of KBL, which he found to have fallen far short of the professional conduct expected of such an institution, regardless of the specific codified laws of the period. He argued that rules against the conduct in question were in place long before they were formerly codified, and were well known by both banks and regulators. He says:

running hundreds of shell corporations at clandestine accounts to subvert the sanctions was clearly not what one would call professional behaviour of a serious financial institution. Although Luxembourg only codified the considerations of "fit and proper conduct" for bankers in 1993, these rules were in place long before. Under these circumstances, if the supervisory authorities would have known of the behaviour of KBL, they would or should have intervened with the strictest of measures available.⁵⁴

60. Another expert opinion in the possession of the complainants was compiled by Phillippe Mortge, an experienced Swiss forensic accountant (the opinion is attached hereto as '**Annexure N**'). Upon analysis of a sample of 4000 transactions made by Armscor with the assistance of KBL, Mortge concluded that KBL must have had detailed insight into all Armscor operations involving movements of money through and by that bank.

61. A third expert to review the transactions and records in question was Christian Weyer, a banker with over 35 years' experience, including as President of Banque Paribas (see '**Annexure M**'). Weyer concurred that senior management of the respondent was aware of the transactions and their purpose, namely to circumvent the arms embargo to allow for the continued supply of weapons to the apartheid regime.

⁵⁴ Pieth's affidavit, para 46.

62. The evidence presented above shows that this was not simply a case of KBL failing to determine the identity and risk factors associated with Armscor as a client. It clearly knew both the identity of the client and the illicit purpose of the accounts. KBL's willingness to assist Armscor in the creation of hundreds of numbered accounts as well as the front companies for the purposes of their transactions, coupled with the regular meetings between senior officials at the bank and Armscor officials, leaves KBL's knowledge of the purpose of these transactions beyond any doubt.

5.6. Kredietbank as a Creditor to Armscor

63. It is important to mention that the systematic circumvention of the UN arms embargo was not the only assistance that the respondents provided to the apartheid military establishment. Kredietbank Belgium was also a primary creditor to Armscor. A minute of an Armscor board meeting from 1980 ('**Annexure O**') reveals the full Armscor overseas loan portfolio in the year 1980 (three years after the implementation of the arms embargo). At this time, Kredietbank Belgium had provided loans to Armscor totalling R56 916 210 (over 2.3 Billion Belgian Francs). In today's terms, this is over R1 billion (€64 million). At the time in September 1980, these loans from Kredietbank Belgium made up 25% of Armscor's foreign loan portfolio. Kredietbank was also the single biggest source of loans to Armscor in this period. Thus, Kredietbank was a crucial supplier of the capital required by apartheid South Africa's state-owned arms purchaser at a time when it was contrary to international law to sell any weapons or weapons technology to the apartheid regime. As such, this conduct on the part of the Kredietbank also violated the arms embargo.

6. Applicability of the 1976 OECD Guidelines for Multinational Enterprises

64. The conduct in question in this complaint took place between 1977 and 1994 during the period that South Africa was subject to the compulsory UN arms embargo. It was during this period that the respondent banks provided the essential assistance to the South African government in order to violate that embargo.

65. The OECD Guidelines in force at the time of the conduct were contained in the Declaration on International Investment and Multinational Enterprises (**'Declaration on MNEs'**)⁵⁵, promulgated on 21 June 1976. These Guidelines contained requirements for the conduct of multinational enterprises which were breached by KBL and Kredietbank in terms of its assistance to Armscor and the South African government between 1977 and 1994.

66. The purpose of this section is to detail the substantive provisions of the 1976 Guidelines violated by the above-described conduct of KBL and Kredietbank. Section 6.1 of this complaint enunciates the substantive provisions of the 1976 Guidelines breached by the respondents' conduct. Section 6.2 of the complaint sets out the relevant provisions of international human rights law violated by KBL and Kredietbank by showing the connection between the Preamble, international human rights law instruments and internal corporate standards of KBL and KBC.

67. To summarise section 5 above, the impugned conduct of KBL argued to contravene the OECD provisions relates to:

⁵⁵ OECD *Declaration on International Investment and Multinational Enterprises* (1976).

- 67.1. Intentionally establishing shell companies in foreign jurisdictions, including the appointment of directors, for the channelling of arms transactions and arms delivery between Armscor and global arms companies;
 - 67.2. Intentionally providing multitudes of numbered bank accounts to Armscor and shell companies to facilitate the concealed movement of money for illegal arms purchases by Armscor; and
 - 67.3. KBL's failure to take reasonable measures to comply with appropriate business ethics and the national law to which it was subject at the time of its conduct.
68. The conduct of Kredietbank argued to contravene the OECD provisions relates to:
- 68.1. Kredietbank's wilful instruction and/or support in relation to its subsidiary company KBL's unlawful conduct during its business relationship with the apartheid government and Armscor. This occurred through Kredietbank or its employees holding and/or facilitating business relationships between KBL, Armscor and apartheid government officials;
 - 68.2. Kredietbank's wilful provision of financial loans to the apartheid government;
 - 68.3. Kredietbank's failure to exercise reasonable and adequate due diligence and monitoring of KBL's operations as the parent company of the KBL; and
 - 68.4. Kredietbank's failure to take reasonable measures to ensure that both its own and KBL's conduct was in conformity with business and ethical standards as well as applicable national law at the time of the impugned conduct.

7. Substantive provisions of the 1976 OECD Guidelines contravened by KBL and KBC

7.1. Chapter II(1) General Policies: Duty to act in accordance with general policy objectives of member countries

66. Paragraph 1 of the 1976 OECD Guidelines' General Policies requires that all multinational enterprises should "take fully into account established general policy objectives of the member countries in which they operate". Paragraph 2 states that this requirement should "in particular give due consideration to those countries' aims and priorities with regard to economic and social progress".

67. The OECD identifies its mission as being to promote policies that will improve the economic and social well-being of not just citizens of member countries, but of peoples around the world. Echoing its preamble, Article 2 of the OECD Convention states that member countries agree to contribute to the economic development of member and non-member countries.⁵⁶ The Convention further reveals that the OECD members view their cooperation in regard to general economic development as being "a vital contribution to peaceful and harmonious relations among the people of the world".⁵⁷

68. As such, taking the OECD itself as a starting point for the analysis, its member states' 'general policy objectives' should be read to include social and economic development outside of their borders. This is particularly the case when read with paragraph 3 of the preamble to the 1976 Guidelines, which requires all countries to "give their full support to efforts undertaken in cooperation with non-member countries, and in particular with developing countries, with a view to improving the welfare and living standards of all

⁵⁶ Article 2(e) of the OECD Convention (1960).

⁵⁷ Preamble to the OECD Convention.

people both by encouraging the positive contributions which MNEs can make and by minimising and resolving the problems which may arise in connection with their activities”.⁵⁸

69. Read together, the OECD Convention and the 1976 Guidelines imply that MNEs had a responsibility to consider the priorities of economic and social progress where their conduct had the potential to have a significant impact, not just in member states, but in developing countries.

70. Yet, it is clear that the apartheid regime was a system designed and enforced with the assistance of a militarised state in order to cripple the social and economic progress of the majority of its citizens. As canvassed in section 5.2, apartheid South Africa substantially and materially violated the civil, political and social and economic rights of all black South Africans.

71. Apartheid reaped socio-economic devastation on several generations of black South Africans. The systemic dispossession, disenfranchisement and restricted rights of millions of black South Africans in this period have had severe socio-economic consequences that have far outlived the formal end of apartheid.⁵⁹ In 2015, 25% of black South Africans experienced food poverty, having inadequate resources to meet their food needs. Nearly half the population (47%) are unable to attain essentials without forgoing food.⁶⁰ These rates are grossly disproportionate to poverty levels for other racial groups, indicating the continued cost of violations under apartheid to black

⁵⁸ Paragraph 3 of the Preamble to the 1976 *Declaration on International Investment and Multinational Enterprises*.

⁵⁹ Statistics South Africa, 2017, 'Poverty Trends in South Africa: An examination of Absolute Poverty – 2006-2015', Available Online: <http://www.statssa.gov.za/publications/Report-03-10-06/Report-03-10-062015.pdf>

⁶⁰ Statistics South Africa, 2017, 'Poverty Trends in South Africa: An examination of Absolute Poverty – 2006-2015', Available Online: <http://www.statssa.gov.za/publications/Report-03-10-06/Report-03-10-062015.pdf>

South Africans.⁶¹ Additionally, similar magnitudes of socio-economic consequences were imposed on neighbouring countries through South Africa's acts of regional warfare.⁶²

72. The international community, through the UNSC, recognised these threats to international peace and security by adopting mandatory embargoes in Resolution 418 and 591. As such, any conduct that assisted the apartheid regime in violating the embargo was in aid of a regime that was recognised as a threat to international peace and security, and that had systematically undermined stability and development in the region.

73. Hence, any assistance to such a regime was contrary to the stated policy objectives of all OECD members to promote development and economic progress in developing countries. It is common cause that war and the instability that surrounds it has been a major obstacle to growth and development wherever it occurs. In addition, such conduct clearly also violated the stated objective of the OECD Convention to assist in making a "vital contribution to peaceful and harmonious relations among the people of the world".⁶³

7.2. Chapter II(9): Duty to abstain from improper involvement in local politics

74. Under the 1976 Guidelines 'General Policies', Paragraph 9 requires MNEs to "abstain from any improper involvement in local political activities". This requirement should be read together with Paragraph 8 that precludes contributions to political candidates, parties and other political organisations.

⁶¹ It must be noted that black South Africans were not the only racial group persecuted by apartheid. However these statistics portray the continued disadvantage suffered by the majority of those persecuted under Apartheid.

⁶² See section 5.3 of the complaint.

⁶³ OECD Convention, Preamble.

75. When read together, it is likely that 'improper involvement' in local politics should be understood to include material or logistical support to a particular political group, faction or institution inside a country in which the corporation is operating, made for a partisan political purpose. The most reasonable interpretation of this requirement is that an MNE should not engage in material support for a specific political ideology or agenda in a country where it operates, particularly if such support is given outside of a legally sanctioned framework.

76. At the time of the respondents' conduct, the fundamental political question in South Africa was the question of apartheid which had been declared a crime against humanity in international law. The fundamental political contestation between different political actors (both formal legal actors at the time such as political parties, and the banned liberation movements) was whether to abolish or maintain the racist apartheid state.

77. It is undeniable that senior executives of both Kredietbank and KBL were aware of this political contestation. Not only this, but they were aware of the crucial role of the UN sanctions in trying to bring about a swift end to apartheid. This evidence can be found in both public and private documents relating to André Vlerick. For over two decades, Vlerick filled several senior management positions at Kredietbank, first as deputy chairman from 1974 to 1980 and then as chairman of the board from 1980 to 1989.⁶⁴ Shortly before his death in 1990 he was appointed honorary chairman. He was also central to the establishment of KBL as a Kredietbank subsidiary.

78. In the period in question, Vlerick not only spoke publicly in praise of the apartheid state, going so far as to propose it as a model for a Belgian state, but crucially dedicated time and resources to fight against the compulsory sanctions in place against Apartheid. For

⁶⁴ Terry Gourvish (ed.) *Business and Politics in Europe: 1900-1970* (2003).

example, **Annexure P** attached hereto presents a set of pro-apartheid posters financed and published by Vlerick. He did so primarily through a lobby group, *Protea*, that he founded in Belgium, and a pan-European lobby group, Eurosa, which was in part funded by the South African government.⁶⁵ His 'anti-sanctions' work eventually led the apartheid government to award him the highest political honour for foreigners for his "service to the Republic of South Africa".⁶⁶

79. This long-standing support for the apartheid state led Vlerick to form close relationships with the conservative political and military elite in South Africa that staunchly aimed to perpetuate apartheid. This claim is supported by the evidence of visits and meetings between Vlerick and senior National Party politicians, including then State President PW Botha who oversaw a vicious clampdown of domestic political opponents. Botha also led South Africa's militarisation and was a staunch defender of apartheid in the context of growing resistance at home and abroad.⁶⁷

80. As pointed out in section 5.5 above KBL, Kredietbank and Armscor officials had a direct relationship with each other for purposes of facilitating clandestine arms transfers. These officials thus had intimate knowledge of the purpose of the transactions they oversaw, as well as the political interests in South Africa that they served. Not only were the respondents acutely aware of the implications of their conduct, they also substantially interfered in South Africa's domestic affairs, facilitating a quantifiable 70% of Armscor's procurement transactions.⁶⁸

⁶⁵ Letter from André Vlerick to SA Ambassador, Brussels, 13 March 1980, KADOC, Archief André Vlerick (Diverse engagement en persoonlijke stukken, Zuid-Afrika, 9.1.1.8, *Protea/Eurosa*, 1979–1982) quoted in van Vuuren, *Apartheid Guns and Money*.

⁶⁶ The award was called 'The Order of Good Hope' and was awarded to Vlerick in 1987. Found in 'SA Vereer Belg met hoogste orde' *Die Beeld* (14 December 1987) quoted in H van Vuuren, *Apartheid Guns and Money* 165.

⁶⁷ H van Vuuren, *Apartheid Guns and Money* 28.

⁶⁸ Supplementary statement by Steynberg, para 15.

81. When we put together the knowledge of both banks' senior management and employees, with the extensive lengths that KBL went to to hide a large volume of transactions, there is a strong indication that the bank provided significant material assistance to a particular political grouping within South Africa's political and military elite, via Armscor, and at that political elite's direction, in order to protect and promote the political and ideological agenda of that grouping. Put simply, their material assistance to Armscor appears to have been at least in part a political decision to support and perpetuate the apartheid regime.

82. By any reasonable reading, this material and deliberate assistance by Kredietbank and KBL should be considered improper involvement in local political activities. While the assistance was international in nature, its fundamental effect was to entrench and strengthen a conservative political grouping in South Africa by undermining international efforts to bring an end to the apartheid regime. This is a clear breach by Kredietbank and KBL of their duty in terms of Chapter II Paragraph 9 of the 1976 Guidelines.

7.3. Chapter III: Duty to Disclose Information

83. Chapter 3 of the 1976 Guidelines lays down a series of detailed requirements in terms of the disclosure of information that is required from multinational enterprises. Particularly relevant is provision 3(b) that demands that all multinational enterprises should, "having due regard to their nature and relative size in the economic context of their operations... publish in a form suited to improve public understanding a sufficient body of factual information... relating to the enterprise as a whole, comprising in particular... the geographic areas where operations are carried out and the principal

activities carried on therein by the parent company and main affiliates”.⁶⁹ Paragraph 3(e) requires the disclosure of information to also include “a statement of the sources and uses of funds by the enterprise as a whole”.⁷⁰

84. According to the OECD’s commentary on the 1976 Guidelines, the requirement for enterprises to disclose information should be seen as having the general objective of creating greater transparency and knowledge around the activities, structures and policies of the enterprise, including its subsidiaries. An important aspect of this, as specified in paragraph (e) of the Guidelines is that the disclosure should include information on the sources and uses of funds by the enterprise in question. Read with section 3(b), this should include sufficient information about both the geographic area and nature of the enterprise’s activities.

85. It may well be that this Guideline was centrally motivated by a concern for shareholders and others with an interest in the financial standing of the enterprise in question. In fact, a criticism of the disclosure of information requirement in the Guidelines has been that it was limited to “information that may materially affect the performance of the company”.⁷¹ As such, this requirement in the Guidelines was focussed centrally on ensuring that shareholders and other stakeholders were aware of the risks that the enterprise may face, particularly based on the nature and location of its activities and where its income was coming from. This was particularly relevant in the context of MNEs, whose often complex structures and widespread operations may obscure such information from shareholders and other interested parties.

⁶⁹ 1976 OECD Guidelines, Chapter III.

⁷⁰ 1976 OECD Guidelines para 3(e).

⁷¹ R Lake (Traidcraft), *Social Accountability, the OECD Guidelines for Multinational Enterprises and the OECD Principles of Corporate Governance*, OECD Conference (1999).

86. The foregoing analysis in this complaint shows that the relationship between Armscor and KBL was extensive and lucrative for KBL and Kredietbank. Yet the material extent of the transactions, and the fact that they were necessarily illicit – as evidenced by the bank’s assistance in creating a deliberately obfuscatory architecture to hide this illicit nature - means that they should have been disclosed in KBL’s public statements and disclosures, as well as in Kredietbank’s statements as the holding company of KBL.

87. The conduct in question here consisted of transactions worth billions of euros of that were facilitated and undertaken by the respondents with the intent of obscuring the underlying weapons transfers which contravened international law. The sheer scale and value of the transactions suggest that they were likely of significant value to the bank and constituted an important source of revenue and profit. In addition, the activities were highly risky given their illicit nature. In the context of the time, particularly the precarious and unstable nature of the South African state and the significant global pressure to end the regime, there was a material risk inherent in both the possibility of the illicit activity being exposed, and in it being ended.

88. Reverting to Mr Weyer’s expert statement, he argues that KBL’s behavior is typical of small to mid-sized banks that engaged in generating profit aggressively. He says:

In my professional experience, small and mid-sized banks would often attempt to grow by engaging in sensitive or marginal business areas, where the possibility of gain for the bank was greater... Such small and mid-sized banks could also grow by accepting more sensitive types of business. It was recognized that assisting clients to achieve certain corporate endeavours, including for example tax reduction or avoidance of currency exchange

restrictions, could carry risks for the bank and its officers as well as for the clients.⁷²

89. It is precisely the high reward and potential risk in engaging in more 'marginal' or 'risky' business that makes the requirement of disclosure more important. As such, both Kredietbank and KBL had a clear obligation under the Guidelines to fully disclose the nature of their assistance to Armscor and the South African government, including the service of setting up hundreds of accounts and associated front companies to which bank employees acted as directors. In addition, the enterprises should have fully disclosed the volume and proportion of their income and profits drawn from these activities.

90. Without such disclosure by these entities, shareholders could not have adequate clarity on the activities, structure and income sources of the banks in question. This undermines the central objective behind the detailed disclosure provisions in the 1976 Guidelines.

91. There is no evidence that either entity fulfilled this requirement. In fact, the very nature of these activities, namely to assist the apartheid regime in violating the arms embargo, required the banks to assure secrecy to their client. To fully disclose the nature of these activities would inevitably have led to significant pressure to halt them immediately, given their violation of a compulsory UN arms embargo.

92. In conclusion, such an extensive, risky and lucrative relationship with the apartheid state-owned arms company should necessarily have been disclosed by both

⁷² Weyer Statement, 'Annexure M', para 7.

Kredietbank and KBL as envisioned by the 1976 Guidelines. Both entities failed to do so.

8. Respondents' violation of international human rights law: the Preamble of the 1976 Guidelines

93. The Declaration on Multinational Enterprises recognises that the primary motivation for OECD states collaboration to regulate the conduct of multinational enterprises (MNEs) is the significant opportunity for MNEs to both positively and adversely affect economic and social development through their global operations.⁷³ The OECD Guidelines is a framework to foster collaboration between states and MNEs and to hold MNEs to account for their operations. As described in the following paragraphs, the Guidelines do not seek to achieve this aim in isolation and instead either expressly or implicitly incorporate other normative and ethical frameworks, including general principles of international law.

8.1. Complementarity between the 1976 Guidelines and KBL's and KBC's internal policies

94. The Guidelines encourage MNEs to positively contribute to and promote the economic and social progress in both member and non-member countries,⁷⁴ particularly developing countries, so as to improve the living standards of *all* people.⁷⁵ To this end, both KBL and KBC have espoused overarching values governing their trade conduct and have adopted codes of conduct, anti-money laundering, anti-bribery and corruption, human rights and whistle-blower policies.

⁷³ Declaration on MNEs, Preamble.

⁷⁴ Preamble of the 1976 Guidelines, paras 1 and 2.

⁷⁵ Preamble of the 1976 Guidelines para 3.

95. Explicit values informing the work of KBL are integrity, professionalism and respecting business ethics and the rule of law. KBL's Anti-Corruption and Bribery Policy indicates the company's firm opposition to bribery and corruption and recognises the link between these activities and money-laundering, which it also denounces.⁷⁶ KBL adopts a zero-tolerance approach to staff, consultants or KBL representatives, including those acting on the instruction or suggestion of senior staff members engaging in corrupt, collusive, fraudulent or coercive practices. The receiving of gifts or donations and making of 'facilitation payments' also constitute sanctionable conduct.⁷⁷

96. KBC Group has shown enhanced commitment to responsible and accountable corporate conduct by, amongst others, adopting the Equator Principles on environmental and social risk management, the OECD Guidelines, the United Nations Guiding Principles on Business and Human Rights as well as the principles of the Universal Declaration of Human Rights.⁷⁸ Further, KBC's Anti-Money Laundering Policy explains its high anti-money laundering standards imposed on all its staff and management. This anti-money laundering policy is implemented through the 'Know Your Customer' principle, which requires the bank to conduct due diligence on each customer before entering into a business relationship with them, and the 'Know Your Transactions' principle, which entails constant monitoring of transactions to deter unlawful conduct.⁷⁹ The Group's Anti-Corruption and Bribery Policy⁸⁰ adopts a zero-tolerance approach to managers and staff involved in fraud, collusion, bribery and coercive practices. In its Human Rights Policy, KBC pledges allegiance to the Universal Declaration of Human Rights, other international and regional treaties covering business standards and the laws of each of its host countries. KBC acknowledges the direct and indirect human rights impact of its

⁷⁶ KBL epb Group 'Anti-Corruption and Bribery Policy' (date of adoption unknown) 1 available at <https://www.kbl.lu/en/legal-information/regulatory-affairs/>.

⁷⁷ KBL Anti-Corruption and Bribery Policy 3, 5.

⁷⁸ For a full list of KBC's partners and undertakings in corporate sustainability and responsibility see <https://www.kbc.com/en/signatories>.

⁷⁹ KBC Group 'Anti-money laundering Policy' (2015) 1 -3 available at <https://www.kbc.com/en/policies>.

⁸⁰ KBC Group 'Anti-Corruption and Bribery Policy' (2010) 1 -2 available at <https://www.kbc.com/en/policies>.

operations and commits to abstaining from commercial relationships with companies not compliant with necessary regulatory standards.⁸¹ Finally, and perhaps most notably in relation to this complaint, KBC's policy on Arms-Related Activities provides that KBC is strictly only willing to finance arms companies under conditions where it is clear that no deliveries are made to countries under the UN, EU or US embargo.⁸²

97. The litany of policies adopted by the respondents and human rights standards espoused by them, albeit in more recent years, evidences KBL and KBC's commitment to the promotion of responsible economic and social development.

98. The companies' values and policies intersect with and reinforce the tenets of the Guidelines in respect of accountability and the promotion of responsible business and investment conduct. Given this overlap, and both companies' commitment to the values of integrity and ethical business conduct, KBL and KBC Group should welcome the application of the 1976 Guidelines to their historic conduct and operations. Committing to this OECD process should therefore be non-contentious and stand to evidence KBL and KBC's commitment to integrity by accounting for their historic conduct that may well have contributed to their expansion and concomitantly obtained reputation today.

8.2. Complementarity between the Preamble of 1976 Guidelines and international human rights law instruments

99. In the Declaration, adhering governments expressly recommend MNEs operating in their territories to observe the Guidelines 'having regard to the considerations and understandings which introduce the Guidelines and are an integral part of them'.⁸³ From the Preamble, and for the purposes of this complaint, two pivotal considerations appear

⁸¹ KBC Group 'Policy on Human Rights' (2016), 1, available at <https://www.kbc.com/en/policies>.

⁸² KBC Group 'Policy on Arms-Related Activities' (2016), 1, available at <https://www.kbc.com/en/policies>.

⁸³ Declaration on MNEs para I.

to inform the adoption of the Guidelines. The first is that member states encourage the positive contributions MNEs make to economic and social progress and wish to minimise and resolve the difficulties their operations may give rise to.⁸⁴ The second consideration is that member states seek to ensure that MNEs operating in their jurisdiction operate in harmony with the host state's national laws and policies, international law adopted by the state and international contractual agreements to which the host state has subscribed.⁸⁵

100. While the discussion below is prefaced by the complainants' recognition of the fact that states, and not corporations, are the main subjects of international law, an argument is made that the express incorporation of international law in the OECD Guidelines obliges MNEs to comply with international law obligations undertaken by the MNEs host state. Following this principle, KBL's and Kredietbank's operations were required to be in conformity with the domestic and international obligations of their host states, Luxembourg and Belgium. Failure to act in accordance with these obligations translates to the respondents contravening the spirit and objects of the OECD Guidelines codified in its Preamble.

a) Belgium and Luxembourg's international law obligations to which KBL's and Kredietbank's operations were subject:⁸⁶

101. Both KBL's and Kredietbank's conduct is contrary to the UNSC Resolutions and provisions of the UN Charter adopted by Luxembourg and Belgium. Read together, the

⁸⁴ Preamble of the 1976 Guidelines para 1, 2, and 3.

⁸⁵ Preamble of the 1976 Guidelines, para 6, 7, 1 and the final paragraph of the Preamble. See also paragraph II of the Declaration on MNEs which recommends the 'National Treatment' of Foreign Controlled Enterprises. This provision requires that foreign controlled enterprises operating in a host state be treated according to the same standards as domestic MNEs, namely, in line with the host country's need to maintain public order, protect essential security interests and fulfil commitments relating to international peace and security. This further elucidates the standards to which KBL and Kredietbank had to align their operations to.

⁸⁶ Preamble of the 1976 Guidelines para 6 and 7.

objective of these instruments was to ensure international peace and security through collective action aimed at suffocating the South African government's military capacity that sustained the system of Apartheid.⁸⁷ The ultimate end of the collective action was to promote peace, respect for human rights and higher standards of living for the South African people.⁸⁸

102. Contrary to the international obligations of their host states, KBL's and Kredietbank's conduct in financing and facilitating South Africa's military capability materially contributed to apartheid's sustained threat to international peace and security and denied thousands of people fundamental freedoms and the enjoyment of human rights on discriminatory grounds.

103. In so doing, KBL and Kredietbank contravened the OECD Guidelines' objective to harmonise the conduct of MNEs with its host state's legal obligations⁸⁹ and to use the respondents' operations to improve social and economic welfare while reducing their adverse social impact.⁹⁰

b) KBL and KBC's complicity in the commission of the crime of Apartheid

103. The International Convention on the Suppression and Punishment of the Crime of Apartheid ('Convention on Apartheid') declared apartheid a crime against humanity capable of being committed by both state and non-state actors.⁹¹ Article 3 of the

⁸⁷ Articles 1(1) and 56 of the Charter of the United Nations read with paras 1, 8, 9 and 11 of Resolution 518 of 1989.

⁸⁸ UN Charter, art 55.

⁸⁹ Preamble of the 1976 OECD Guidelines paras 6 and 7.

⁹⁰ Preamble of the 1976 OECD Guidelines paras 1, 2 and 3.

⁹¹ UN General Assembly, International Convention on the Suppression and Punishment of the Crime of Apartheid (1976), Resolution 3068 of 30 November 1973, art 1(1) and 3.

Convention on Apartheid imposes international criminal responsibility on *any entity* when they:

(a) commit, participate in, directly incite or conspire in the commission of the acts mentioned in Article 2;⁹² and

(b) directly abet, encourage or co-operate in the commission of the crime of apartheid⁹³

in order to establish and maintain a system of domination of one racial group over another in order to systematically oppress the latter racial group.⁹⁴

104. Without repeating the arguments set out above, the complainants submit that the facilitative nature of KBL's and Kredietbank's conduct detailed in section 5 above fall squarely within the ambit of aiding and abetting the crime of Apartheid in Article 3. In this instance, KBL and Kredietbank, through their own unlawful acts, contributed to the commission of the crime of apartheid by the apartheid government (through Armscor).

105. While neither Belgium nor Luxembourg adopted the Convention on Apartheid, the complainants argue that the respondents were bound to the provisions of the Convention as a result of the crime of apartheid having acquired the status of a *jus cogens* norm.

106. *Jus cogens* or peremptory norms are rules of international law held to possess a universal character from which states may not derogate and to which they are bound

⁹² Convention on Apartheid Art 3 (a).

⁹³ Convention on Apartheid, Art 3(b).

⁹⁴ Convention on Apartheid, Art 2.

irrespective of whether they consent to the norm or not.⁹⁵ Contrastingly, rules of customary international law refer to rules that have, as a result of state practice, been generally accepted and practiced in international law. Based on a form of consent, states may derogate from customary international law.⁹⁶

107. With reference to a range of international human rights treaties and UNSC Resolutions that have repeatedly condemned racial discrimination and apartheid, Dugard and Reynolds argue that apartheid has reached the status of customary international law.⁹⁷ More importantly, scholars argue that apartheid is a *jus cogens* norm that gives rise to obligations *erga omnes*, or put differently, it creates a right that is enforceable against anybody, including non-state actors.⁹⁸

108. The status of apartheid as a *jus cogens* norm is attributed to two findings. First, the International Law Commission has stipulated that apartheid constitutes a peremptory norm of international law by virtue of the ‘widespread agreement’ amongst states that without exception, apartheid is prohibited in widely ratified international treaties and conventions.⁹⁹ Secondly, the elevation of the prohibition against racial discrimination to a *jus cogens* norm,¹⁰⁰ with racial discrimination itself being a foundational element of apartheid, could be extrapolated to mean that heightened discrimination perpetrated by apartheid also constitutes a peremptory norm.¹⁰¹

⁹⁵ WE Conklin ‘The Peremptory norms of the international community’ *European Journal of International Law* (2012) 23(2) 838.

⁹⁶ Buerghenthal, *International Human Rights in a Nutshell* (1988) 245.

⁹⁷ J Dugard and J Reynolds ‘Apartheid, International Law and the Occupied Palestinian Territory’ *European Journal of International Law* (2013) 24(3) 867–913. The authors refer to the Convention on the Elimination of all forms of Racial Discrimination (1969) and the Convention on the Non-Applicability of Statutory Limitations to War Crimes and Crimes against Humanity that recognises apartheid as a crime against humanity. The authors additionally refer to the numerous UNSC arms sanctions against South Africa.

⁹⁸ Dugard and Reynolds ‘Apartheid, International Law and the Occupied Palestinian Territory’ 867–913.

⁹⁹ International Law Commission, ‘Draft Articles on Responsibility of States for Internationally Wrongful Acts, with commentaries’ (2001) II(2) Yearbook of the International Law Commission 31, 62.

¹⁰⁰ *Case Concerning the Barcelona Traction, Light and Power Company (Belgium v. Spain)*, Limited Second Phase, Final Judgment [1970] ICJ Rep 3 at 32 paras 33–34

¹⁰¹ Dugard and Reynolds *Apartheid, International Law and the Occupied Palestinian Territory* 883.

109. This argument is supported by Carola Lingaas who stresses that it should not be forgotten that of all discrimination, apartheid developed a unique dynamic: this was because in addition to being listed in several international legal instruments described above, it is also subject of two international treaties, proscribed with individual criminality, accorded *jus cogens* status and universal jurisdiction, not to mention finding its way into the Rome Statute.¹⁰²

110. In light of the above, the complainants submit that despite the fact that Belgium and Luxembourg did not ratify the Convention on Apartheid, KBL and Kredietbank were obliged to not perpetrate the crime of apartheid either indirectly or directly by the fact that apartheid had acquired the status of a *jus cogens* norm. Contrary to these dictates, KBL and Kredietbank, through their willful financing and facilitating of arms purchases by the apartheid government, were complicit in the commission of the crime of apartheid.

9. Applicability of the 2000 OECD Guidelines for Multinational Enterprises

111. In addition to the arguments posited above for the application on the 1976 Guidelines to the conduct of the KBL and Kredietbank, the complainants argue that the revised 2000 Guidelines apply retrospectively to the conduct of the respondents. This argument is premised on the continuing effect of the respondents' conduct on South Africans subsequent to the democratic transition.

¹⁰² C Lingaas 'The Crime against Humanity of Apartheid in a Post-Apartheid World' *Oslo Law Review* (2015) 3 114.

112. It has been decided by the United Kingdom NCP, in a case brought by the non-profit organisation RAID against Anglo American, that the 2000 Guidelines can be retrospectively applied to conduct from before their adoption.¹⁰³ The decision was informed in part by advice sought from the OECD Committee on International Investment and Multinational Enterprises (CIME). Both CIME and the UK NCP agreed that it was legitimate to apply the 2000 Guidelines retrospectively which were sufficiently flexible to accommodate this.¹⁰⁴ They further agreed that NCPs should apply the Guidelines in such a way that best resulted in a proper assessment and resolution of the complaint, including by way of retrospective application.

113. We submit that the argument for retrospective application of the 2000 Guidelines is strengthened by the complementary principle of ‘continuing effect’, implying that if the prior conduct (before a set of Guidelines) of an enterprise has a continuing effect upon those affected by its actions, and which has lasted beyond the adoption of the revised Guidelines, then such prior conduct should also be considered under the provisions of the revised Guidelines.

114. The commentary to Article 14 of the Draft Articles on State Responsibility (‘Draft Articles’)¹⁰⁵ discusses the characteristics of conduct that has a continuing effect. Conduct that has a continuing effect refers to conduct that constituted a breach of international law at the moment that the act was performed, but which, upon completion of the act, no longer constitutes a violation of international law even if its distributive effects

¹⁰³ Statement by the United Kingdom National Contact Point for OECD Guidelines for Multinational Enterprises (NCP): Anglo American (May 2008).

¹⁰⁴ Letter from Marinus Sikkel, Chair of CIME, to the United Kingdom National Contact Point, 13 April 2004, Paris.

¹⁰⁵ International Labour Organisation Draft Articles on Responsibility of States for Internationally Wrongful Acts, with commentaries (2001).

continue.¹⁰⁶ In other words, effects or consequences of an internationally wrongful act that continue after the commission of the act do not themselves necessarily mean that the initial wrongful act continues. Instead, the continuing effect of the act are factors that trigger the offending country's reparatory obligations under the Draft Articles.¹⁰⁷ The nature of the consequences and the prolonged effects thereof are important considerations in determining the nature and extent of reparations that the offending state has to effect through restitution, compensation and/or satisfaction.¹⁰⁸

115. The continuing effects of apartheid are well documented and prevail in South Africa to this day. The systematic and structural oppression of black South Africans under apartheid resulted in racialised and gendered poverty that is manifested through disproportionate economic distribution between black people and other racial groups (as well as between men and women at a further layer), and affects the social power, autonomy and decision-making power of black persons and women in South Africa today.¹⁰⁹ Subsequent to the democratic transition the number of people living on incomes of less than \$1 a day increasing by 1.8 million over 1995 – 2000.¹¹⁰

116. In 2011 more than 9 out of 10 (94,2%) poor people living in South Africa were black Africans.¹¹¹ Even up to 2015, data collected by Statistics South Africa depicts the slow progression of development and recuperation by the South Africa population. Compared to the 28.4% of the country found to be living in in extreme poverty in 2004, this figure

¹⁰⁶ Draft Articles on State Responsibility Art 14 Commentary para (2) and (3). Conduct with a continuing effect should be distinguished from conduct that constitutes a continuing *violation*, also detailed in Art 14 of the Draft Articles.

¹⁰⁷ Draft Articles, Art 14, para (6).

¹⁰⁸ Draft Articles, Art 14, para (6).

¹⁰⁹ Modiri M 'Law' Poverty' *Potchefstroom Electronic Law* (2015) 18(2) 228 – 229.

¹¹⁰ van den Burg *et al* 'Trends in Poverty and Inequality since the Political Transition' *Annual Forum 2005* 5 <http://www.tips.org.za/files/782.pdf> .

¹¹¹ Statistics South Africa 'Poverty Trends in South Africa: an examination of absolute poverty between 2006 and 2011' 27.

only declined to 25.2% by 2015.¹¹² Further, still half of South Africa's black population live below the lower-bound line of poverty compared to only the 1% of white South Africans below this line. Both the historic, racialised legacy of apartheid and current policy and political failures have resulted in the above figures and state of affairs.

117. A final consideration lending itself to the continued effect of the crime of apartheid was the indebtedness of the democratic South African government to financial institutions that had continued to loan money to the Apartheid regime. In the decade following the first democratic election in 1994, the new government had to repay the historic debt resulting in a significant diversion of funds from vital domestic spending. This debt amounted to 325 billion rand in today's terms (22 billion Euros). In line with the 'odious debt doctrine'¹¹³ these repayments were made against loans to which the majority of South Africans neither consented to nor benefitted from. In fact, the opposite was true given the role of this capital in financing oppression and prolonging a system that was considered a crime against humanity. These repayments also impeded the socio-economic development of South Africa. Both KBL and Kredietbank not only supported apartheid through the conduct described in this complaint, but were prominent lenders to the apartheid state and its institutions.

9.1. Continuing effect and the Preamble of the revised 2000 Guidelines

118. Paragraphs 1, 5 and 10 of the 2000 Guidelines now expressly include 'contribution to sustainable development' as one of the main objectives for MNEs in terms of the OECD Guidelines. As of September 2000, states adopted the United Nations Millennium

¹¹² Statistics South Africa 'Poverty on the rise in South Africa' (2017) <http://www.statssa.gov.za/?p=10334> .

¹¹³ Sharp, Dustin N, The Significance of Human Rights for the Debt of Countries in Transition, 2014, in Making Sovereign Financing and Human Rights Work, ed. by Juan Pablo Bohoslavsky and Jernej Cernic (Oxford: Hart Publishing, 2014), pp. 47–59.

Declaration that set out strategic global sustainable development goals that states would work together to achieve. These sustainable development goals included eradicating extreme poverty and hunger, developing a global partnership for development and promoting gender equality and women empowerment.¹¹⁴ The Declaration in particular speaks to the member states' commitment to taking all efforts necessary to free fellow humans from dehumanizing conditions of extreme poverty and to making the right to development a reality for everyone.¹¹⁵

119. Read with the 2000 Guidelines' express incorporation of the human rights standards from the Universal Declaration of Human Rights and the ILO Declaration on Fundamental Principles and Rights at Work, adhering to the human rights and sustainable developments framework becomes a pertinent obligation of MNEs under the OECD Guidelines.

120. The continued racialized inequality in South Africa that exists as a legacy of the apartheid system to which KBL and Kredietbank contributed, stands in direct contrast to the objects of sustainable development, the universal human rights framework and ultimately, the OECD Guidelines. The continued effects that KBL and Kredietbank have contributed to thus justify the retrospective application of the 2000 Guidelines. Supporting this retrospective application are the progressive principles of the 2000 Guidelines which, amongst others, behove OECD member states to deter from using the Guidelines for protectionist purposes or in a way that calls into question the comparative advantage of any country where MNEs invest.¹¹⁶

¹¹⁴ United Nations Development Programme 'The 8 Millennium Development Goals' http://www.undp.org/content/undp/en/home/sdgooverview/mdg_goals.html .

¹¹⁵ United Nations General Assembly 'United Nations Millennium Declaration' (2000) Resolution 55/2.

¹¹⁶ Revised 2000 Guidelines, Art I(2). See also para I(10).

121. The following section details breaches of the substantive provisions of the 2000 Guidelines by KBL and Kredietbank.

10. Substantive provisions of the 2000 OECD Guidelines contravened by KBL KBC

10.1. Chapter II General Policies: Duty to act in accordance with general policy objectives of member countries

122. The unlawful conduct of KBL and Kredietbank constitute an infringement of the following obligations of MNEs under Part II of the 2000 Guidelines:

- i) the duty of MNEs to contribute to economic, social and environmental progress with a view to achieving sustainable development;¹¹⁷
- ii) respect the human rights of those affected by their activities consistent with the host government's international obligations and commitments;¹¹⁸
- iii) support and uphold good corporate governance principles and develop and apply the same;¹¹⁹ and
- iv) Abstain from improper involvement in local politics.¹²⁰

10.2. (III) Duty to disclose information

¹¹⁷ Revised 2000 Guidelines, Art II(1).

¹¹⁸ Revised 2000 Guidelines, Art II(2).

¹¹⁹ Revised 200 Guidelines, Art II(6).

¹²⁰ The arguments delineated in paragraphs section 7.2 above are incorporated *mutatis mutandis* herein.

123. The wording of the revised 2000 Guidelines on the obligation of MNEs is strikingly similar to the provisions under the 1976 Guidelines. The complainants rely on substantially the same grounds as submitted in section 7.3 above to indicate the duty of KBL and Kredietbank to disclose relevant information regarding their activities, structure and financial situation for the enterprise as a whole including geographical areas of operation.¹²¹ For the purposes of the respondents' obligations under Part III, articles 1, 4 and 5 of the revised 2000 Guidelines, the claimants expressly and fully incorporate their arguments under section 7.3 above.

124. In light of the above contraventions of the 1976 and 2000 OECD Guidelines, in the next section, the complainants set out the relief requested from the Belgian and Luxembourg NCPs.

11. Complainants' Expectations

125. In light of the above submission, the complainants request the Belgian and Luxembourg NCP to:

125.1. Recommend that KBL and KBC Group issue an apology to South Africans and the South African government for its complicity in supporting the apartheid regime and violating the arms embargo during apartheid;

125.2. Recommend that the Luxembourg and Belgian authorities investigate the extent to which there should be punitive action taken against KBL and the KBC Group as a result of their operations during apartheid;

¹²¹ Revised 2000 OECD Guidelines, art 3(1).

- 125.3. Subject to the finding of the NCP that KBL and/or the KBC Group were in violation of the OECD Guidelines, issue a statement to the effect that KBL and KBC's conduct violated the relevant Guidelines;
- 125.4. Recommend that the European banking community establish an oversight and accountability mechanism to ensure that financial institutions are not complicit in human rights violations as a result of their business activities.