A REPORT TO FACILITATE THE WORKING OF THE MARIKANA COMMISSION OF INQUIRY

A Report for the Legal Resources Centre (Johannesburg)

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III Weight of Commission Recommendations 55
EXECUTIVE SUMMARY

This project examines certain questions of law to facilitate the submissions of the Legal Resources Centre before the Marikana Commission of Inquiry (hereinafter ‘Marikana Commission’). The purpose of this report is to compare the working of commissions of inquiry in thirteen different legal systems (Australia, Canada, Ghana, India, Malaysia, Malawi, New Zealand, Pakistan, Singapore, South Africa, UK, UN Human Rights Council, USA) and on this basis, recommend the position the Marikana Commission should adopt on the following questions:

• What standard of proof should be employed by the Marikana Commission in making its findings? In particular:
  o In respect of individual responsibility for injuries and deaths, should the Commission adopt the standard applicable to civil proceedings (balance of probabilities) or criminal proceedings (beyond reasonable doubt)?
  o May the Commission ultimately apply the threshold of a \textit{prima facie} case for purposes of recommending further investigations/prosecution?
  o Does an onus of any sort rest on any party?

• What is the nature of recommendations that can be made by the Commission, including in relation to any criminal investigation and prosecution and more systemic matters of policing policy and practice?

• To what extent will the findings of the Commission be binding and/or have legal effect?

In brief, the comparative research conducted suggests that:

• The standard of proof employed by the Marikana Commission should not be as stringent as the ordinary civil or criminal standard;

• The Marikana Commission should make broad, policy-oriented recommendations regarding the systemic causes of the violence, and also recommend investigation and prosecution of individual actions where appropriate;

• The findings and recommendations of the Marikana Commission should be met with utmost seriousness by the government, and all those to whom they are addressed.

Such an approach would be consistent with the legal standards that have been used not just by commissions from South Africa, but also those in a significant number of other jurisdictions. A summary of findings from the jurisdictions which form the basis of these conclusions is tabulated below.
# TABLE 1: SUMMARY OF COUNTRY REPORTS

<table>
<thead>
<tr>
<th>Serial No.</th>
<th>Country</th>
<th>Standard of Proof</th>
<th>Type of Recommendations</th>
<th>Binding Nature of Recommendations</th>
</tr>
</thead>
</table>
| 1.         | Australia| 1. In general, the standard to be met is that of reasonable satisfaction (Briginshaw Test).  
2. The strength of evidence required increases with the seriousness of allegations though commissions usually do not examine individual responsibility.  
3. Commissions are usually not established with the aim of examining individual responsibility and therefore do not require the onus to be on a particular party. | Broad ranging, policy oriented; individual responsibility allocated where mandated. | Not binding but carry significant political weight. |
| 2.         | Canada   | 1. The standard of proof used is that of sufficiency of evidence.  
2. Commissions usually don’t examine | Broad ranging, policy oriented; individual responsibility allocated where mandated. | Not binding but carry significant political weight. |
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<td></td>
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<td>questions of individual responsibility.</td>
<td>3. <em>Dixon v Canada</em> suggests Commissions are not bound by</td>
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<td></td>
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<td>requirements of evidentiary law regarding onus; at any rate</td>
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<td>commissions do not examine individual responsibility so questions</td>
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<td></td>
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<td>of onus usually don’t arise.</td>
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<tr>
<td></td>
<td></td>
<td>3. Ghana Commissions are not bound by rules of evidence</td>
<td>Broad-ranging and policy oriented; individual responsibility</td>
<td></td>
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<tr>
<td></td>
<td></td>
<td>(Wuaku Commission), suggesting a low standard of proof and no</td>
<td>allocated where mandated.</td>
<td>Not binding but carry significant political weight.</td>
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<tr>
<td></td>
<td></td>
<td>rules regarding onus of proof.</td>
<td></td>
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<td></td>
<td>4.</td>
<td>India 1. Generally, a <em>prima facie</em> standard is applicable.</td>
<td>Broad-ranging and policy oriented; individual responsibility</td>
<td></td>
</tr>
<tr>
<td></td>
<td></td>
<td>2. The Law Commission has recommended adopting the standard of</td>
<td>allocated where mandated; suggestions for criminal prosecution</td>
<td>Not binding but carry significant political weight.</td>
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<td></td>
<td></td>
<td>preponderant probability while making adverse findings against</td>
<td>are also made.</td>
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<td>individuals but a lower standard still seems to be in operation.</td>
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<tr>
<td></td>
<td></td>
<td>3. No general trend in respect of onus though</td>
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<thead>
<tr>
<th></th>
<th>Country</th>
<th>Findings</th>
<th>Recommendations</th>
<th>Official Response</th>
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<tr>
<td>5.</td>
<td>Malawi</td>
<td>Commissions are not bound by rules of evidence, suggesting a low standard of proof and no rules regarding onus of proof.</td>
<td>Broad-ranging and policy oriented; suggestions for criminal prosecution are also made.</td>
<td>No evidence of any official response to reports.</td>
</tr>
<tr>
<td>6.</td>
<td>Malaysia</td>
<td>1. The standard used is either a reasonableness standard, or a civil law standard. 2. No significant discussion on onus.</td>
<td>Broad-ranging and policy oriented; adverse findings against individuals are common.</td>
<td>Not binding but carry significant political weight.</td>
</tr>
<tr>
<td>7.</td>
<td>New Zealand</td>
<td>1. Generally a standard of proof lower than either the civil or criminal law standard seems to have been adopted—this is a necessary concomitant of the exploratory nature of a commission (Lord Diplock). 2. No significant discussion on onus.</td>
<td>Broad-ranging and policy oriented; S 11(2) of the Inquiries Act 2013 indicates individual findings of fault are permissible.</td>
<td>Not binding but carry significant political weight.</td>
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<tr>
<td>8.</td>
<td>Pakistan</td>
<td>1. The Abbottabad Commission suggests a diluted version of the preponderant probabilities standard. 2. No significant discussion on onus.</td>
<td>Broad-ranging and policy oriented; individual responsibility allocated where mandated.</td>
<td>Not binding, and are often unmet with any response for the government.</td>
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<td>9.</td>
<td>Singapore</td>
<td>1. A standard of proof lower than either the civil or criminal standard is used, with findings sometimes being based on anecdotal evidence.</td>
<td>Broad-ranging and policy oriented.</td>
<td>Not binding, but carry significant political weight.</td>
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<tr>
<td></td>
<td></td>
<td>2. No significant discussion on onus.</td>
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<td>10.</td>
<td>South Africa</td>
<td>1. A prima facie or sufficiency standard is usually adopted.</td>
<td>Usually broad-ranging and policy oriented; blame is allocated to named individuals where apposite.</td>
<td>Not binding but carry significant political weight.</td>
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<td></td>
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<td>2. In case of individual responsibility, the standard remains low (Donen Commission), though the Hefer Commission used a preponderant probability standard.</td>
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<td></td>
<td></td>
<td>3. No significant discussion on onus, although there are some remote suggestions that there is a presumption of innocence.</td>
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<td>11.</td>
<td>UK*</td>
<td>1. There is no single standard of proof, though findings</td>
<td>Broad-ranging and policy oriented; individual</td>
<td>Not binding but carry significant political weight.</td>
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* The discussion for the UK is confined only to inquiries under the Inquiries Act 2005 which present a closer analogue to the Marikana Commission. It excludes inquests, and proceedings before the Independent Police Complaints Commission that are governed by an entirely different legal regime.
1. These Commissions are left to decide their own standard of proof but they mostly opt for a reasonableness standard of some kind.
2. No significant discussion on onus.

### UN Human Rights Council Commissions

- Broad-ranging and policy oriented.
- Not binding; are usually complied with by international institutions but not by national ones; often the highly politicised nature of these commissions means recommendations are not implemented.

### USA

1. The Commissions tend to use a sufficiency standard.
2. They usually don’t specify action against individuals.
3. No significant discussion on onus suggestions of a reverse onus (Christopher Commission).

- Broad-ranging and policy oriented; individual responsibility allocated where mandated.
- Not binding but carry significant political weight.
INTRODUCTION

1. Commissions of inquiry in South Africa are established by proclamations of the President under Section 84(2)(f) of the Constitution of South Africa 1996. They are also governed by the Commissions Act 1947. The mandate of each commission of inquiry is set out in its Terms of Reference, and the President appoints a distinguished person (usually a senior member of the judiciary) to lead the inquiry and act as its Chairperson.\(^2\) The Presidential proclamation can allow the commission to issue regulations detailing the procedures to be followed.\(^3\)

2. The Marikana Commission has been set up by the President to:

   investigate matters of public, national and international concern arising out of the tragic incidents at the Lonmin Mine in Marikana, in the North West Province from Saturday 11 August to Thursday 16 August, 2012 which led to the deaths of approximately 44 people, more than 70 persons being injured, approximately 250 people being arrested and damage and destruction to property.\(^4\)

3. The Legal Resources Centre (LRC), Johannesburg, will be making submissions to the Commission on behalf of the family of one of the deceased mineworkers, as well as the Bench Marks Foundation, an NGO that has done a lot of work on the underlying socio-economic factors that led to this unfortunate incident. The LRC has requested the OPBP to provide comparative research to determine the extent to which there is support in other jurisdictions for the propositions that:

   a. It is appropriate for the Commission to come to its conclusions even if neither the civil, nor the criminal standard of proof has been met.

   b. The Commission should regard its function as making a set of broad-ranging recommendations that must be taken seriously by the government.

4. This report considers the evidentiary rules of Commissions in twelve jurisdictions: Australia, Canada, Ghana, India, Malawi, Malaysia, New Zealand, Pakistan, Singapore, South Africa, the United Kingdom and the United States of America. It also considers the procedures of commissions under the UN Human Rights Council. The primary factor that was considered when selecting jurisdictions was the similarity of the legal system to South Africa, with the consequence that many Commonwealth countries were considered. Within these jurisdictions, only those jurisdictions where the final

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\(^3\) The Commissions Act 1947 s (1)(1)(b)(ii).

\(^4\) Proclamation by the President of the Republic of South Africa: Establishment of a Commission of Inquiry into the Tragic Incident at or near the Area Commonly Known as the Marikana Mine in Rustenburg, North West Province, South Africa 2012.
reports were available and published in English were considered. We focused only on commissions that have been set up by the Executive, since the South African President according to Section 83(a) of the Constitution of South Africa 1996, functions as the head of the Executive. In selecting which commissions to cover within a given jurisdiction, we looked for the most recent reports, and relied on older reports only where either the recent ones were unavailable, or the older ones were directly relevant to the subject matter of investigation before the Marikana Commission.

5. A reference to the ‘civil standard’ in this report should be taken to mean the standard of ‘balance of probabilities’; ‘criminal standard’ refers to a standard of proof of ‘beyond reasonable doubt.’

6. The following chapters each deal with a research question that the LRC asked us to examine, from the perspective of thirteen different legal systems. Based on this research, conclusions are thereafter presented.


A. STANDARD AND ONUS OF PROOF

I STANDARD OF PROOF

a) Australia

7. Royal Commissions and Commissions of Inquiry are appointed by the Australian Government under the provisions of the Royal Commissions Act 1902. Section 17 of this Act allows the Governor General to issue regulations for whatever is necessary or convenient to be prescribed for carrying out or giving effect to the statute.

8. In general the standard of proof to be met is that of reasonable satisfaction, though the strength of evidence required increases depending on a number of factors, including the seriousness of the allegation.

9. According to the Royal Commission into the Home Insulation Program, established following the death of four workers as a result of the failure to ensure their health and safety, the test to be followed is the ‘Briginshaw test.’ This mandates that there should be a state of reasonable satisfaction before a finding is made. It is articulated by Dixon J in Briginshaw v Briginshaw.

Reasonable satisfaction is not a state of mind that is attained or established independently of the nature and consequence of the fact or facts to be proved. The seriousness of an allegation made, the inherent unlikelihood of an occurrence of a given description, or the gravity of the consequences flowing from a particular finding are considerations which must affect the answer to the question whether the issue has been proved to the reasonable satisfaction of the tribunal. In such matters ‘reasonable satisfaction’ should not be produced by inexact proofs, indefinite testimony, or indirect inferences.

10. The Briginshaw test is a process of reasoning to be used in making findings of fact. The test does not establish an intermediate standard of proof between the civil and criminal standard and does not lay down a strict test to be applied to all allegations of a particular type. The graver the allegations, the more stringent the standard of proof and the more demanding the process by which reasonable satisfaction is attained.

11. Similar language is used in the Equine Influenza Inquiry set up to investigate the August 2007 outbreak of equine influenza in Australia. The final report presents the analysis in terms of ‘the best explanation’ of the circumstances. It considers the escape of the

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6 Briginshaw v Briginshaw [1938] 60 CLR 336.
7 ibid 362.
8 Neat Holdings Pty Ltd v Karajan Holdings Pty Ltd [1992] 110 ALR 449 [449]-[450].
virus attributable to four ‘high probability’\textsuperscript{11} or ‘most likely’\textsuperscript{12} scenarios. The report proceeds to examine and assess each scenario based on whether they are the ‘likely cause’\textsuperscript{13} and concludes that the ‘most likely explanation’\textsuperscript{14} for the virus’ escape from infected horses at Eastern Creek was through contaminated persons or equipment leaving the Quarantine Station. However, it must be noted that the low standard of proof may result from the subject matter of the inquiry (more scientific, than social, civil or criminal). It differs in some obvious respects (such as the acceptance of anecdotal evidence) from \textit{Royal Commission into the Home Insulation Program},\textsuperscript{15} which was set up following the loss of human lives—possibly because the allegations are much more serious in the latter Commission.

12. The \textit{HIH Royal Commission} investigating the collapse of HIH Insurance endorses the Briginshaw Test,\textsuperscript{16} and the standard followed by the \textit{Royal Commission into the Building and Construction Industry} (‘Cole Commission’) is also ‘reasonable satisfaction’\textsuperscript{17}.

13. The \textit{Royal Commission into Aboriginal Deaths in Custody} expressly dissociates itself from a criminal standard of proof.\textsuperscript{18} The final report demonstrates a willingness to make findings as long as there is evidence of some probative value and adopts proportionality requirement akin to Briginshaw Test.\textsuperscript{19}

\textbf{b) Canada}

14. In Canada, commissions are appointed by the Governor General under the Inquiries Act 1985. They have no statutory power analogous to that of the South African commissions to regulate their own procedures. In each province, the Lieutenant General can similarly appoint commissions of inquiry under provincial legislation.

15. The Commissions in Canada follow a ‘sufficiency’ standard.

16. The \textit{Commission of Inquiry into the Deployment of Canadian Forces to Somalia}, for instance, refers to sufficient evidence\textsuperscript{20} and sufficient testimony.\textsuperscript{21} This Commission, like

\textsuperscript{11} ibid p xiv.
\textsuperscript{12} ibid p xv.
\textsuperscript{13} ibid p xv – xvii.
\textsuperscript{14} ibid p xvii.
\textsuperscript{15} Home Insulation Program Report (n 5) para 1.8.4.
\textsuperscript{16} HIH Royal Commission The Failure of HIH Insurance Volume 1 2003 paras 10 – 13.
\textsuperscript{18} Final Report of the Royal Commission into the Aboriginal Deaths in Custody 1991 para 3.5.6 (hereinafter Aboriginal Deaths Report).
\textsuperscript{19} ibid.
\textsuperscript{21} ibid p 38.
others\textsuperscript{22} before it, was regarded as investigative\textsuperscript{23} rather than adjudicative, indicating that using a civil or criminal standard might be inappropriate.

17. In other cases such as the \textit{Lesage Commission on the Police Complaints System in Ontario}, the references to what standard of proof is employed are sparse but the phraseology used (‘best judgement’\textsuperscript{24}) certainly points towards a lower standard of proof than either the civil or criminal standard. In fact, the mandate of the Commission (‘to examine’, ‘to review’, ‘to focus’)\textsuperscript{25} itself is an indication that a lower standard of proof was applied.

18. The \textit{Ipperwash Inquiry} involves police violence against a group of Aboriginal people protesting a land occupation. The facts present a close analogue to the Marikana situation (although only one person lost his life in this case). The standard of proof used is that of ‘sufficient evidence.’\textsuperscript{26}

19. In the \textit{Cornwall Inquiry}, set up to examine the institutional response of the justice system and public institutions to the historical abuse of young people in the Cornwall area, the beyond reasonable doubt standard is rejected.\textsuperscript{27} At many points, the Commissioner uses the words ‘In my view...’\textsuperscript{28} before making conclusions without adding any qualifications, suggesting a low standard of proof.

20. In all, the Canadian position is aptly summed up in the case of \textit{Dixon v. Canada}:\textsuperscript{29} Courts of law are designed, if civil, to settle disputes between opposing parties and, if criminal, to establish guilt or innocence. They must arrive at definitive conclusions; they cannot leave a problem aside for lack of evidence or absence of a clear solution ... Commissions of inquiry, be they investigative or merely advisory, are not, in any way, under the same duty. As investigative bodies, they, of course, are called upon to seek the truth, and no doubt they are ideally suited for uncovering facts that could not be discovered otherwise (precisely because they have broad investigative powers, they are inquisitorial, and they are not subject to the strict rules of evidence that apply to a court of law)...

c) Ghana

21. Chapter 23 of the Constitution of the Republic of Ghana 1992 deals with commissions of inquiry. Commissions are established state by the President, although she may be required to do so on the advice of the Council of State, or a resolution of the Parliament.\textsuperscript{30} The practices and procedures of all commissions of inquiry are

\begin{footnotesize}
\begin{itemize}
\item \textsuperscript{22} Report of the Internal Inquiry into the Actions of Canadian Officials in Relation to Abdullah Almalki, Ahmad Abou-Elmaati and Muayyed Nureddin p 29.
\item \textsuperscript{23} Somalia Report (n 20) pp 33, 43.
\item \textsuperscript{24} Report on the Police Complaints System in Ontario 2005 p 86 (hereinafter Lesage Report).
\item \textsuperscript{25} \textit{ibid} p 3, 88, 60.
\item \textsuperscript{26} Final Report of the Ipperwash Inquiry 2007 vol 1, p 633 (hereinafter Ipperwash Report).
\item \textsuperscript{27} Final Report of the Cornwall Public Inquiry 2009 p 186.
\item \textsuperscript{28} \textit{ibid} pp 18, 19, 24, 27
\item \textsuperscript{29} [1997] F.C.J. No. 985 (QL).
\item \textsuperscript{30} Constitution of the Republic of Ghana 1992 Art 278.
\end{itemize}
\end{footnotesize}
22. Final reports of commissions in Ghana were difficult to obtain, but in general it seems that investigative commissions do not consider themselves bound by either the civil or criminal standard. For instance, the Wuaku Commission which was set up to examine certain incidents of violence relaxes most other rules of evidence to the extent of even accepting hearsay evidence. Given this, it is highly doubtful that it considers itself bound by exacting requirements when it comes to the standard of proof.\(^{32}\)

**d) India**

23. According to Section 3 of the Commissions of Inquiry Act 1952, commissions are appointed by the union or state government, if a resolution to that effect has been passed in the relevant legislature. Section 8 of this Act specifies that the Commission is empowered to regulate its own procedure.

24. A *prima facie* standard operates in most cases, though the standard may be slightly higher where adverse findings are being made against a named individual. In general, proceedings before commissions are regarded as inquisitorial rather than accusatorial.\(^ {33}\)

25. The Law Commission recommends that a *prima facie* standard should be applied when making findings about rumours that gave rise to the inquiry, but a slightly higher balance of probabilities standard should be applied where addressing a person’s involvement in improper activities.\(^ {34}\)

26. Section 5A(5) of the Commission of Inquiry Act 1952 requires that the Commission shall ‘satisfy itself’ about the correctness of the facts stated and the conclusions, if any. Mere satisfaction about the correctness of facts suggests a low standard of proof. Notably, the Law Commission specifically recommends that no statutory provision on this point should be made because ‘such a rigid provision may defeat the very object of the Act, namely, to find out the truth.’\(^ {35}\)

27. The wording of the several reports that have been issued over the years indicates that the standard followed in fact is quite low. The Liberhan Commission, set up to investigate

\(^{31}\) *ibid* Art 281.


\(^{34}\) *ibid* paras 5-9.

\(^{35}\) LCI Report (n 33) p 11 para 13.
the demolition of the Ram Janmabhoomi Babri Masjid for electoral gains, indicates this ([a]s is evident from the evidence, the finances were channelled through various banks…)36; “[p]rognosis of the evidence leads to the conclusion that the mobilisation of the karsevaks … was neither spontaneous nor voluntary”37; ‘it is also established by the evidence on the record that Karsevaks attacked the media personnel…”38), even though it uses stronger language in other instances. The use of these multiple standards demonstrates that the evidence was more abundant than the standard of proof required, than that the standard of proof was high. This Commission uses a reasonableness standard at one point even where individual responsibility is being decided on.39

28. The Nanavati Shab Commission, established to investigate incidents of communal violence in Gujarat, seems to be aimed more at ruling out speculative evidence,40 and accepting all evidence that had no serious infirmities41—suggesting that the standard of proof was not very high, as long as the evidence was reliable.

29. The Joseph Commission, established to investigate incidents of communal violence in Kerala, does mention the preponderance of probabilities but it does so where there is conflicting evidence and the Commissioners are ‘not inclined to believe those words in the facts, evidence and circumstances stated above.”42

30. The Nanavati Commission, investigating the anti-Sikh riots of 1984, has focused throughout the report on establishing whether there is ‘enough’ evidence to support a particular allegation.43 The amount of corroborative evidence, as well as the quality of that evidence, establishes the probability of the matter being true (makes it ‘very probably’ true).44 The standard seems to be one of sufficiency,45 and the approach is quite similar to that adopted in Australia.

31. A close parallel to the Marikana Commission is also found in the report of the Srikrishna Commission established to examine the communal violence in Bombay in 1992-3. The Commission, among other things, was specifically asked to examine

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37 ibid p 917, para 158.9.
38 ibid p 956, para 170.8.
39 ibid p 922, para 160.4.
40 Report by the Commission of Inquiry Consisting of Mr. Justice G.T. Nanavati And Mr. Justice Akshay H. Mehta 2008 p 133, para 193.
41 ibid p 135, para 195.
44 ibid pp 153, 167.
45 ibid 159.
whether police firing resulting in loss of life was justified.\textsuperscript{46} While examining big picture, socio-economic causes of the riots, the language of the Commission clearly indicates a \textit{prima facie} standard of proof (‘no concrete proof’\textsuperscript{47}, ‘not inclined to give serious credence’\textsuperscript{48}). When it comes to individual responsibility, the phrase ‘preponderant probability’\textsuperscript{49} does make its way into the report, but there are also frequent references, even in this context simply to whether something is probable\textsuperscript{50} or improbable,\textsuperscript{51} without further qualification. At most, this seems like a diluted civil law standard.

e) Malawi

25. The President is empowered to appoint a commission of inquiry under Section 89(1)(7) of the Constitution of Malawi 1994. The working of these commissions is governed by the Commissions of Inquiry Chapter \[18:01\]. Section 9 of this Chapter allows commissioners to regulate proceedings on their own.

26. Commissions in Malawi are also free to depart from the framework mandated by the law of evidence,\textsuperscript{52} and the conduct of commissions indicates a low standard or proof.

27. The language of the \textit{Khoviwa Commission of Inquiry} (into the demonstrations, deaths, injuries, riots, looting, arson, public disorder and loss of property that took place in July 2001) suggests that facts must be ‘established’;\textsuperscript{53} though this is not very telling of the standard of proof deployed it does reveal that neither the civil or criminal standard are expected to be reached before a finding can be made.

28. Further, as regards the \textit{Singini Inquiry} on the cause of the death of President Mutharika and the following political transition, the Chairperson in an official statement deliberately distinguishes it from a criminal prosecution indicating the inappropriateness of a criminal standard of proof.\textsuperscript{54} The final report makes factual

\textsuperscript{47} \textit{ibid} vol 1 Chapter 2 para 1.25.
\textsuperscript{48} \textit{ibid} vol 1 Chapter 2, para 1.5–1.6.
\textsuperscript{49} \textit{ibid} vol 2, para 24.32.
\textsuperscript{50} \textit{ibid} para 11.56.
\textsuperscript{51} \textit{ibid} para 22.25.
\textsuperscript{52} Report of findings and recommendations of the Presidential Commission of Inquiry into the demonstrations, deaths, injuries, riots, looting, arson, public disorder and loss of property that took place on 20\textsuperscript{th} and 21\textsuperscript{st} July 2011 2012 p 11 (hereinafter Khoviwa Report).
\textsuperscript{53} \textit{ibid} p 10.
findings that are ‘most probably’\textsuperscript{55} true and often talks about facts being ‘established’\textsuperscript{56} without further elaboration. It is unlikely that a very stringent standard of proof was followed.

\textbf{f) Malaysia}

29. The Commission of Enquiry Act 1950 provides that the Yang di-Pertuan Agong (the elected monarch and head of State of Malaysia) may set up a Commission where it appears expedient to her to do so.\textsuperscript{57} The Yan di-Pertuan Agong prescribes how the Commission shall be executed.\textsuperscript{58}

30. The standard used is either a reasonableness standard or a civil law standard.

31. By way of illustration, the \textit{Commission of Inquiry into the Video Clip Recording} is satisfied of the authenticity of the relevant video clip because ‘it is not too difficult for any reasonable person to discount the rationality\textsuperscript{59} of this proposition. Even where something is regarded as an ‘irresistible inference’\textsuperscript{60}, or something the Commission is ‘constrained’ to come to,\textsuperscript{61} ultimately the conclusions seem to have been drawn based on a reasonableness standard.\textsuperscript{62} In contrast, the \textit{Commission of Inquiry into the Death of Teoh Beng Hock} (the TBH Commission) uses a civil standard.\textsuperscript{63}

\textbf{g) New Zealand}

32. According to Section 14 of the Inquiries Act 2013, inquiries have the right to govern their own procedure, subject to the constraints of the Act, and the Terms of Reference issued.

33. In keeping with the investigative role of commissions, a standard lower than either the civil or criminal law standard is applicable.

34. The \textit{Royal Commission on the Pike River Coal Mine Tragedy}, while examining the cause of the incident that led to the inquiry, talks about a ‘likely cause’.\textsuperscript{64} The \textit{Commission of Inquiry into Police Conduct} doesn’t seem to be aiming for a fixed standard of proof either (for example, the commission identifies conflicting interpretations of how a sexual harassment complaint was dealt with, but does not decide which of these interpretations is correct)\textsuperscript{65} but again, this may have been because the Commission is not dealing with questions of individual liability. In case of the \textit{Royal Commission on Ballantyne’s Fire}, the commission prefaces most findings with ‘in our opinion’\textsuperscript{66} without

\textsuperscript{55} Final Report of the Commission of Inquiry into the Death of the former President Ngwazi Professor Binguwa Mutharika and issues of the transition at Kamuzu Palace in Lilongwe 2012 para 6.7.1 (hereinafter Singini Report)

\textsuperscript{56} For instance \textit{ibid} Chapter 6.
adding any qualifications further showing that in all likelihood, a standard lower than either the civil or criminal standard is used.

35. It is useful to refer to the *Erebus Royal Commission* which specifically seeks to allocate blame in context of an accident during a sight-seeing trip to Antarctica where 257 people lost their lives. A statutory investigation had earlier been conducted and the report, the Chippendale Report, concluded that the pilot was responsible. The Royal Commission, delivering its report nine months later, reaches a very different conclusion: that the airline was responsible and neither the captain, the first officer, nor the flight engineers made any error which contributed to the disaster. Air New Zealand sought judicial review of the decision. In the Privy Council, Lord Diplock stresses that commissions of inquiry are investigative and that this is in marked contrast to civil litigation. These comments give a useful steer regarding the standard to be applied. Certainly, beyond reasonable doubt is not the standard. Balance of probabilities is closer, but it is probably a still lower standard, because something as rigid as ‘preponderant probability’ ignores the inevitably exploratory nature of inquiry by commissions.

h) Pakistan

36. In Pakistan, at federal level, commissions are appointed under the Pakistan Commission of Inquiry Act 1956, by the Ministry of Law, Justice and Parliamentary Affairs. There are similar statutes at the provincial level.

37. While there isn’t much discussion in the final reports about standard of proof, the applicable standard seems to be a diluted version of the ‘preponderant probabilities’ standard.
38. The *Abbotabad Commission of Inquiry,*\(^{70}\) set up to investigate the circumstances around Osama Bin Laden’s killing, expressly uses a balance of probabilities standard, although the elaboration of this standard almost seems to relax its rigour:

…Commission of Inquiry is not necessarily constrained by the lack of incontrovertible evidence if the balance of probability indicates a finding. Honesty of effort, due diligence and common sense are usually sufficient to get as close as possible to the truth, even in unhelpful circumstances. Where precise findings are not possible, because of lack of conclusive evidence, credible answers to questions are still possible on the basis of which conclusions can be drawn and recommendations made. \(^{71}\)

39. This Commission rejects the criminal standard of proof.\(^{72}\)

40. The *Commission of Inquiry into the Syed Saleem Shahzad Murder* was set up as concern arose that intelligence agencies might be responsible for the murder of a journalist. While the final report uses language that would indicate a higher, criminal standard of proof (‘the circumstances should be of the nature which are unexceptionable and which lead to no other inference or hypothesis, except the guilt of the accused and the commission of offence by him’\(^{73}\)), it rejects the notion that such an inquiry should operate along the same lines as a criminal trial.\(^{74}\)

i) Singapore

41. Inquiries in Singapore are governed by the Inquiries Act Chapter 139A (2007). They can be conducted through commissions (that tend to focus on issues relating to public services\(^{75}\)) or committees (that tend to focus on other events, occurrences or officers\(^{76}\). The President\(^{77}\) and the Minister for Law\(^{78}\) respectively are empowered to make Regulations for their conduct, though inquiries can decide on their own procedure under paragraph 13 of the Schedule to the Act.

42. The general trend seems to be to adopt a standard of proof below either the civil or criminal standard. The *Committee of Inquiry into the Little India Riot* goes to the extent of acknowledging that it has made factual findings

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\(^{70}\) The Report of this Commission was meant to be confidential but was leaked by Al Jazeera.


\(^{72}\) ibid at paras 747-748.


\(^{74}\) ibid p 84.

\(^{75}\) Inquiries Act 2007 s 3.

\(^{76}\) ibid s 9.

\(^{77}\) ibid s 15.

\(^{78}\) ibid s 16.
based on anecdotal evidence. For the Committee of Inquiry on the Escape of Detainees Jemaah Islamiyah and Mas Selamat Bin Kastari, from the Whitley Road Detention Center, only the presence or absence of evidence is mentioned, indicating a low standard of proof.

j) South Africa

43. The constitutional and statutory framework for commissions in South Africa is as outlined in the introductory chapter of this Report.

44. A *prima facie* or sufficiency standard is usually adopted.

45. The Khayelitsha Commission, set up to examine the breakdown of trust relations between the community and the police in Western Province, is quick to point out that its mandate is ‘investigative … not adjudicative’, thus specifically distinguishing itself from a criminal or civil trial, since its mandate was not to lay the foundation for any kind of civil or criminal responsibility. This distinguishes it somewhat from the Marikana Commission but it is still worth noting that the Khayelitsha Commission makes findings based on an assessment of all evidence before it, rather than aiming at a particular standard of proof: (for instance, ‘[t]he Commission concludes on the evidence before it that a majority of residents of Khayelitsha do not have confidence in SAPS’).

46. The Donen Commission of Enquiry into the Oil for Food Programme in Iraq issues caveats throughout the report that it was unable to collect adequate evidence during the course of its operation, but still makes some conclusions as to the liability of the four entities and two persons, suggesting a very low standard of proof, even in cases of individual responsibility. The language of the final report also suggests that this was the case:


81 ibid, pp 2, 3, 4.


83 Terms of Reference of the Commission of Inquiry into the Tragic Incidents at or near the Area Commonly Known as the Marikana Mine in Rustenburg, North West Province, South Africa 2012.

84 ibid p 404 para 9.


86 See ibid p 27 para 25; p 28 para 28; p 30 para 32; p 50 para 5; p 106 para 72; p 120-121 paras 47-49. See generally the conclusions where it states what it can conclude and what it is unable to conclude due to a lack of evidence: ibid p 136.
a. A finding that an advance surcharge was paid by Mr Majali for and on behalf of Imvume was described as ‘not improbable’;  

b. ‘Majali/Imvume may have perpetrated another fraud on the Republic of South Africa’;  

c. The ultimate conclusion regarding Mr Majali was that he ‘probably offered and attempted to pay the surcharges owed by Montega’;  

d. The ultimate conclusion with respect to certain payments allegedly made by Imvume Management was that they were ‘probable in the circumstances’ or ‘not improbable’;  

e. With respect to Omni Oil, the Commission’s conclusion was that it was ‘likely’ ‘in the circumstances’ that Omni Oil had made an advance surcharge payment, and that it was ‘not unlikely’ that Omni Oil would have paid the outstanding surcharge balance required by the Iraqis.  

47. The Khampepe Commission of Inquiry into the Mandate and Location of the Directorate of Special Operations (‘DSO’) also seems to have adopted a standard lower than either the civil or criminal standard (‘I am not persuaded that…’; ‘I am satisfied that…’; ‘I find that there is merit in the concern raised in evidence relating to…’; ‘I have been left with an impression that it is more than probable that…’) though there is no particular discussion regarding standard of proof.  

48. The Myburgh Commission was set up to investigate the rapid depreciation of the exchange rate of the rand. There are frequent references to findings being based on probabilities but no mention of preponderant probabilities, indicating that the standard actually adopted by the Commission was lower. Indeed, at other places there is a reference to ‘enough’ or ‘sufficient’ evidence.  

49. The Ellis Park Commission was established to inquire into an incident of overcrowding at a stadium which led to the deaths of 43 people. It seems that some sort of a prima facie standard was used, since findings are sourced simply to the presence of evidence.

87 ibid p 12 para 25.2.  
88 ibid p 30 para 32 (emphasis added).  
89 ibid p 138.  
90 ibid p 140.  
91 ibid pp 143–144.  
93 ibid p 42, para 12.3.  
94 ibid p 64, para 21.5.  
95 ibid p 75, para 24.15.  
97 ibid p 66, para 140.  
98 ibid p 59, para 127.
(for instance, ‘According to the evidence, by approximately 19:00 the roads …were congested…’\textsuperscript{99}; ‘Evidence also shows that due to crowd pressure at the “VIP” gate, the security personnel in charge decided to close it…’\textsuperscript{100}). In case of one hotly contested proposition,\textsuperscript{101} there is a mention of ‘probabilities’, but this does not seem to automatically import the civil law standard.\textsuperscript{102}

50. The \textit{Goldstone Commission} was appointed to investigate political violence and intimidation that occurred between July 1991 and the April 1994 general elections, including identifying persons responsible. It submitted multiple reports.\textsuperscript{103} In most reports, the standard used is that of sufficient\textsuperscript{104} or adequately substantiated evidence,\textsuperscript{105} or of a \textit{prima facie} case.\textsuperscript{106} Thus, even where the Commission states that there can be ‘no doubt’\textsuperscript{107} regarding its findings, it is unlikely that it considers itself bound by this standard. For instance, the \textit{Report on the Inquiry into the Events at the World Trade Centre} mentions clarity ‘beyond any doubt’\textsuperscript{108} or ‘beyond dispute’\textsuperscript{109} or that it has ‘no doubt’\textsuperscript{110} about the facts, but at another point, in respect of one submission it is said, ‘this submission is not only speculative but the converse is more probable,’\textsuperscript{111} suggesting a much lower standard of proof.

51. The \textit{Hefer Commission of Inquiry}, established to investigate allegations of spying against the National Director of Public Prosecutions, Mr B T Ngcuka, differs from the above commissions, in that it unambiguously adopts the standard of preponderant probabilities:

\begin{quote}
I can only act on relevant and acceptable evidence properly placed before me and on inferences which can, with due regard to the probabilities, justifiably be drawn therefrom\textsuperscript{112}…Naturally, I cannot take a decision by applying Mr Shaik’s low standard of persuasion. Whether or not Mr Ngcuka acted as a government agent before 1994 is a question of fact which has to be resolved, at the very least, upon a preponderance of probability which
\end{quote}

\begin{flushleft}
\textsuperscript{100} \textit{ibid} p 48, para 10.1.2.
\textsuperscript{101} \textit{ibid} p 58, para 10.5.1.
\textsuperscript{102} \textit{ibid} p 64, para 10.5.
\textsuperscript{105} \textit{ibid} para 7.3.
\textsuperscript{106} \textit{Report on the Preliminary Inquiry into the Attempted Purchase of Firearms by the KwaZulu Government from Eskom} 1994 para 8.4.
\textsuperscript{109} \textit{ibid} para 20.
\textsuperscript{110} \textit{ibid} para 27.
\textsuperscript{111} \textit{ibid} para 39.
\textsuperscript{112} Commission of Inquiry into Allegations of Spying Against the National Director of Public Prosecutions, Mr BT Ngcuka- First and Final Report 2004 p 11 (hereinafter Hefer Report).
\end{flushleft}
is the standard of proof regularly adopted by the courts in civil cases. What one has to do, is to weigh whatever probabilities there may be in favour of a conclusion that he was such an agent against those pointing the other way. I simply cannot believe as a matter of probability that he would have been treated in this way if he had been a government agent at the time; nor that he would have been amenable to become one after his ordeal. I have accordingly come to the conclusion that he probably never at any time before 1994 acted as an agent for a state security service.

**k) UK**

52. A Minister may cause an inquiry to be held under Section 1 of the Inquiries Act 2005. As per Section 17(1), the chairperson of the inquiry determines the procedure to be followed by the inquiry.

53. There is no single standard of proof operable in the UK, although the strength of evidence does sometimes determine the firmness of the finding.

54. The *Azelle Rodney Inquiry Report* on the police shooting and killing of Azelle Rodney addresses the point quite succinctly: Given the essential nature of an inquiry, I see my task as inquisitorial and unfettered by any fixed burden or standard of proof. That said, when making a finding that does not reflect common ground, I will record the degree of confidence behind the finding [...][we are] not concerned – as would be the case in adversarial litigation – with burden and standard of proof. I must simply find the facts [...]

55. In fact, in determining whether the police firing was made in reaction to a suspicious movement by the victim, the Commission actually holds different facts established to different extents against multiple standards of proof:

In the event, I am satisfied on balance of probability that the recording does feature an exchange between A1 and A10, in its turn contributing to Anna Bartle’s analysis. For the rest, I discern a possibility (but no higher than that) that there was a concurrent contribution by E7, as the only person in a position to see whether Azelle Rodney held up a gun [...] As it seems to me, once the probability has been identified and found as such, anything arising as an apparent concurrent overlay can claim no more than the ‘possibility’ status I accord to it.

56. This approach is in keeping with the investigative context of the inquiry.

57. The *Patrick Finucane Review*, set up to investigate the murder of Patrick Finucane, also reflects similar flexibility when it comes to standard of proof:

I have not adopted a uniform standard of proof... I have adopted a flexible approach and have indicated where appropriate the degree to which I am persuaded by credible evidence.

58. The *Baha Mousa Inquiry* was conducted to investigate allegations into the alleged misconduct by British Forces towards detainees in Basra. This inquiry uses a similar

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113 *ibid* 51, para 71.
114 *ibid* 52, para 71; see also p 54, para 74 for another reference to ‘probabilities’.
116 *ibid* para 19.2.
117 *ibid* p 50 para 17.8.
approach to the above two, but seems to regard the civil standard as its lowest threshold:

It is right...to adopt the civil standard of proof in relations to findings of facts, but indicating where appropriate where I am sure of a finding.\textsuperscript{119}

59. However, even where some factual scenarios remain possibilities unproved against the civil law standard, they have still been recorded:

The incidents which I have just described above are not sufficient in quantity or quality to demonstrate that Mendonça knew that his Battlegroup was prone to incidents of gratuitous violence. In reaching this conclusion I am not to be taken as finding that there were no such incidents.\textsuperscript{120}

60. The \textit{Stephen Lawrence Inquiry} was set up to investigate the killing of a black teenager by a gang of five white youths, and the inadequate police investigation that followed. While exploring allegations of institutional racism in the police service, the civil standard is followed but while examining if there was any collusion between the perpetrators and the police, a criminal standard is considered apposite.\textsuperscript{121} Note however, the Commissions observation that:

\begin{quotation}
\ldots we are entitled to reach conclusions upon a balance of probability; and we are entitled also to voice suspicions should they be found validly to exist. The standard of proof is not so rigid that we cannot make findings. \textsuperscript{122}
\end{quotation}

I) UN Human Rights Council Commissions

61. These commissions are all set up under different UN resolutions, and are entitled to decide their own standard of proof. They usually steer clear of working with a very high standard, adhering to some kind of a ‘reasonableness’ standard.

62. The \textit{International Commission of Inquiry in Darfur} decides that it will not follow the criminal standard of proof ‘beyond reasonable doubt’.\textsuperscript{123} The standard of proof opted for is one of reasonableness (\ldots ‘reasonably be suspected of being involved in the commission of a crime’).\textsuperscript{124} The \textit{Independent International Commission of Inquiry into the Syrian Arab Republic} adopts the ‘reasonable suspicion’ standard, as the Commission’s primary role is of a fact-finding body.\textsuperscript{125} It is not clear what standard the \textit{Commission of Inquiry on Lebanon} adopts but considering that the Commission describes itself as a

\textsuperscript{120} \textit{ibid} para 2.1598.
\textsuperscript{122} \textit{ibid} para 8.5.
\textsuperscript{124} \textit{ibid}.
‘fact-finding body’,\textsuperscript{126} it is probably a low standard of proof. The *Commission of Inquiry on Human Rights in the Democratic People's Republic of Korea* also uses ‘reasonable grounds’\textsuperscript{127} as its standard.

**m) USA**

63. In the USA each commission is established under the specific relevant statute, read with the general Executive authority of the President, derived from Article II of the United States Constitution 1789.

64. The USA commissions tend to use a sufficiency standard.

65. The *Robb Silberman Commission on the Intelligence Capabilities of the US on Weapons of Mass Destruction*\textsuperscript{128} relies on the standard of ‘substantial evidence.’\textsuperscript{129}

66. The *9/11 Commission* also seems to use a very low standard of proof (sometimes simply citing ‘available’ evidence\textsuperscript{130} or ‘several bits of evidence’\textsuperscript{131}), although it refuses to make findings based on mere possibility.\textsuperscript{132} In general conclusions are drawn even when evidence is sometimes thin:

In sum, although the evidence is thin as to specific motivations, our overall impression is that soon after arriving in California, Hazmi and Mihdhar sought out and found a group of young and ideologically like-minded Muslims (…). They managed to avoid attracting much attention.\textsuperscript{133}

67. It appears that the strength of evidence relied on is directly linked with the firmness of the finding, and the breadth of the recommendation:

In sum, there is strong evidence that Iran facilitated the transit of al Qaeda members into and out of Afghanistan before 9/11, and that some of these were future 9/11 hijackers. There also is circumstantial evidence that senior Hezbollah operatives were closely tracking the travel of some of these future muscle hijackers into Iran in Novembers 2000. However, we cannot rule out the possibility of a remarkable coincidence - that is, that Hezbollah was actually focusing on some other group of individuals traveling from Saudi Arabia during this same time frame, rather than the future hijackers. We have found no evidence that Iran or Hezbollah was aware of the planning for what later became the 9/11 attack. (…) After 9/11, Iran and Hezbollah wished to conceal any past evidence of cooperation with Sunni terrorists associated with Al Qaeda. (…) We believe this topic requires further investigation by the U.S. Government.’ (emphasis supplied)\textsuperscript{134}


\textsuperscript{128} Only the unclassified version of this Report is publicly available.


\textsuperscript{131} ibid p 249.

\textsuperscript{132} ibid p 217.

\textsuperscript{133} ibid p 221.

\textsuperscript{134} ibid p 241.
68. The *Guardians Revisited* Report on police practices and civil rights seems to be based on a standard of sufficient reliability, and ‘legal sufficiency reviews’. A legal sufficiency review will render a finding sustainable unless there is no evidence whatsoever to sustain it. The final test for legal sufficiency must always be whether the evidence at trial would enable reasonable and fair-minded people to reach the verdict under review, suggesting a low standard of review.

### II ONUS OF PROOF

**a) Australia**

69. The concept of ‘onus’ is regarded as the wrong lens through which to view proceedings before a commission. The *Cole Commission* aptly summarises the Australian position:

> I do not regard the concept of the onus of proof as applicable in the context of a Royal Commission. That is because, in leading evidence during hearings of the Commission, Counsel Assisting were not putting a case. They were participants in an investigation. If, in accordance with the approach I have just outlined, I was reasonably satisfied that certain events had occurred, then I found that they had occurred. If I did not reach that level of satisfaction, I did not make that finding. That was, however, as a result of the application of the relevant standard of proof. It was not because Counsel Assisting had failed to discharge any onus.'

**b) Canada**

70. There isn’t much discussion on onus of proof, but *Dixon v Canada* seems to indicate that usual laws of evidence are not followed in case of commissions of inquiry, indicating that the onus of proof does not rest on any particular party.

**c) Ghana**

71. There isn’t much discussion on onus of proof, but the *Wuaku Commission* seems to indicate that the usual laws of evidence are not followed in case of commissions of inquiry, indicating that the onus of proof does not rest on any particular party.

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136 ibid p 136.
137 A ‘Legal Sufficiency’ ground is a reason for which a jury’s verdict can be overturned. A ‘no evidence’ challenge may only be sustained when: 1) there is a complete lack of evidence of some fact on which either a claim or defense is based, in whole or in part; 2) the evidence that was offered at trial is inadmissible under the governing rules of evidence and thus can be given no evidentiary value on appeal; 3) there was no more than a “mere scintilla” of evidence to prove some essential fact in either a claim or defense; or 4) the evidence adduced actually demonstrates conclusively that the essential factual predicate cannot be shown: Lonny S. Hoffman, ‘Harmar and the Ever-Expanding Scope of Legal Sufficiency Review’ South Texas Law Review, Vol. 49 (3), Spring 2008.
138 City of Keller v. Wilson, 168 S.W.3d 827 (Tex. 2005).
d) India

72. The statutory scheme is such that commissions are absolved from adhering to traditional rules of evidence, suggesting that ordinary rules of onus do not apply to proceedings before the Commission.

73. However, in case of the Liberhan Commission, a reverse onus actually seems to rest on the alleged perpetrators (‘[t]hese leaders cannot be given the benefit of the doubt and exonerated of culpability’). Similar is the case with the Srikirshna Commission:

...[s]ince he did not care to offer any explanation despite service of a notice under Section 8B, the Commission has no reason not to accept the testimony of public witnesses and conclude that Sub–Inspector Kapse is not only guilty of unjustified firing, but also of inhuman and brutal behaviour during the incident.

74. This position is contrasted with the working of the Joseph Commission where the person impugning police conduct is expected to adduce some sort of evidence first, though this would, at most impose an evidentiary burden on the party making an allegation:

As regards the performance of police after the massacre on 2-5-2003 in the matter of prevention of spreading violence, there is no serious case for any of the parries (sic) before the Commission that there was any failure.

75. It is safe to conclude that there is no general trend, and that any conclusions would be based on an overall consideration of the evidence, rather than the onus resting on a particular party.

e) Malawi

76. There is no significant discussion relating to the burden of proof in the Malawi reports.

f) Malaysia

77. There is no significant discussion relating to the burden of proof in the Malaysia reports.

g) New Zealand

78. There is no significant discussion relating to the burden of proof in the New Zealand reports.

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141 Wuaku Commission Petition (n 32).
142 LCI Report (n 33) p 5.
143 Liberhan Report (n 36) p 943 para 166.11.
144 Srikirshna Report (n 46) para 24.23.
145 The evidential burden under the common law, is not really a burden of proof in the true sense; rather it refers to the requirement of putting an issue into play by reference to evidence before the court: R v Schwartz (1988) 66 CR (3d) 251, 270.
147 Nanavati Report (n 43) p 155.
reports.

h) Pakistan
79. There is no significant discussion relating to the burden of proof in the Pakistan reports.

i) Singapore
80. There is no significant discussion relating to the burden of proof in the Singapore reports.

j) South Africa
81. There is no significant discussion relating to the burden of proof in the South African reports. However, the Hefer Commission suggests that it sees the presumption of innocence applying generally:

On this, the Commissioner stated that ‘[i]n a country such as ours were human dignity is a basic constitutional value and every person is presumed to be innocent until he or she is found guilty, this is wholly unacceptable’.148

82. Perhaps something similar can be inferred from the final report of the Goldstone Commission:

There is no conclusive proof that the ANC, its Alliance or MK is following a national policy aimed at carrying out attacks against police officers.149

83. Any such conclusion remains largely extrapolative.

k) UK
84. In the UK too, the findings seem to be based on a holistic analysis rather than taking recourse to a particular standard of proof, though there seem to be some indications that the presumption of innocence must be respected.

85. A reference to Lord Salmon’s ‘six cardinal principles’ canvassed in 1966150 is apposite. In 1993, Lord Bingham recognised that the principles were not on statutory footing, but nonetheless explained that ‘the rationale of the six cardinal principles in undoubtedly sound and anyone conducting an inquiry of this kind is well advised to have regard to them.’151 Lord Macpherson does so in the Stephen Lawrence inquiry.152

86. Those principles are reproduced in summary here:

148 Hefer Report (n 112) para 78.
149 SAPS Report (n 104) para 10.1.
152 ibid.
a. Before any person becomes involved in an inquiry, the Tribunal must be satisfied that there are circumstances which affect her and which the Tribunal proposes to investigate;

b. Before any person who is involved in an inquiry is called as a witness she should be informed of any allegations which are made against her and the substance of the evidence in support of them;

c. She should be given adequate opportunity of preparing his case and being assisted by legal adviser paid out of public funds;

d. She should have the opportunity of being examine by her own lawyer and of stating her case in public at the inquiry;

e. Any material witnesses she wishes called at the inquiry should be heard;

f. She should have the opportunity of testing by cross-examination conducted by her own lawyer any evidence which may affect her.

87. From the above it seems as if the presumption of innocence is impliedly factored into the operation of commissions.

88. However, as in the Patrick Finucane Inquiry, findings are usually based on a holistic review of the evidence, rather than an undischarged burden and the Commission attempts to ‘satisfy [itself] that findings were soundly based in the light of the entirety of the evidence now before it.’

l) UN Human Rights Council

89. There is no significant discussion relating to the burden of proof in the UN Human Rights Council reports.

m) USA

90. There is no significant discussion relating to the burden of proof in the USA reports, although the Christopher Commission on the Los Angeles Police Department, set up in the wake of the Rodney King incident, at one point seems to suggest a reverse onus: The commanding officers often failed to offer any credible explanation of how the injuries might otherwise have occurred.

153 Patrick Finucane Report (n 118) para 1.31.
B. THE NATURE OF FINDINGS AND RECOMMENDATIONS PRESENTED

a) Australia

91. The focus is on making broad, policy-oriented recommendations.

92. For instance in the Royal Commission into the Home Insulations Program recommendations range from delineating the role of public servants in giving frank and fearless advice to the political executive,\textsuperscript{155} to communicating with the public in clear language.\textsuperscript{156} Similarly, the Equine Influenza Inquiry makes policy-oriented recommendations, including the appointment of a senior officer in the department to be responsible and accountable for the importation of horses into Australia, and upgrading facilities at the Melbourne and Sydney International Airports.\textsuperscript{157} The Inquiry into Certain Australian Companies in Relation to the UN Oil-For-Food Programme also points towards large scale statutory reform, but is rare in that it recommends prosecutions in at least twelve different cases.\textsuperscript{158} The Cole Commission issues a sum total of 212 recommendations calling for urgent structural and cultural reform—including close monitoring of the relevant industries by an independent body, but also an attitudinal change of participants regarding management of building and construction projects.\textsuperscript{159}

93. The recommendations and findings of the Royal Commission on Aboriginal Deaths in Custody are particularly pertinent in that it deals with the operation of the police force and its impact on a politically disempowered people. The final report makes ‘immediate’ recommendations for reforming the criminal justice system, but also more ‘remote’ ones addressing factors of systemic disempowerment of the Aboriginal people.\textsuperscript{160}

b) Canada

94. In Canada as well, it is common for commissions to make recommendations for structural and policy reform.

95. The Commission of Inquiry into the Matters relating to the Death of Neil Stonechild concludes that there was police incompetence in the investigation of the custodial death of a

\textsuperscript{155}Home Insulations Program Report (n 5) para 14.6.

\textsuperscript{156}ibid para 14.8.2.


\textsuperscript{158}Donen Report (n 85) pp lxxx-i-xxxv.

\textsuperscript{159}Cole Commission Report (n 17) pp 4-5.

\textsuperscript{160}Aboriginal Deaths Report (n 18) para 1.6.1.
member of the First Nations. Keeping in mind the cultural context within which the police force in Canada operates, the final report therefore recommends detailed police reform, including reworking the recruitment practices of the police force, and providing training to sensitise the force to the needs of people from the First Nations.\textsuperscript{161} Similarly, in the final report of the Lesage Commission on the Police Complaints System in Ontario, recommendations made include not just improving the complaints system in respect of the police, but, in light of the historical relationship between the police and the public, working on trust building with the people.\textsuperscript{162} The Braidwood Commission on Conducted Energy Weapon Use recommends not just limiting the use of the weapons being investigated but also improving training for police officers, as well as conducting more research on the impact of these weapons.

96. The Ipperwash Inquiry is instructive in how to deal with instances of police violence. It recommends\textsuperscript{163} police sensitisation to Aboriginal people in the time of land occupations, requires an apology to be issued to people against whom excessive force was used, mandates mainstreaming of Aboriginal perspectives in primary and secondary education, and requires respect to be given to burial practices of Aboriginal cultures.

97. The report of the Commission of Inquiry into the Actions of Canadian Officials in Relation to Maher Arar is also uninhibited in issuing recommendations which are directed at the training of,\textsuperscript{164} and the management of information by,\textsuperscript{165} the RCMP (Royal Canadian Mounted Police). Notably, this Commission states that inquiries ‘should not be turned into a fault-finding exercise’,\textsuperscript{166} but since fault-finding is expressly contemplated by the Terms of Reference of the Marikana Commission, this observation is of limited impact for us.

c) Ghana

98. Recommendations tend to encompass large areas of policy reform, although there is no hesitation in also attributing specific responsibility.

\textsuperscript{162} Lesage Report (n 24) p 57.
\textsuperscript{163} Ipperwash Report (n 26) 693.
\textsuperscript{164} Report of the Commission of Inquiry into the Actions of Canadian Officials in Relation to Maher Arar, 2006 p 325.
\textsuperscript{165} ibid, pp 314, 319.
\textsuperscript{166} ibid, p 12.
99. The *Wuaku Commission* is a good example of this approach, where recommendations include charging people responsible for various criminal offences, but also suggestions for legislative reform. In the case of the *Okudzeto Commission* (set up following the Accra Stadium disaster where many members of the audience of a football game lost their lives) it is found that the police was fully responsible for the events and the report recommends the prosecution of a number of police officers. Further, the *Presidential Commission on the Ghana Police Service* (Archer Report) makes recommendations across the spectrum, including on the problem of outsourcing various projects, violations of regulations regarding arms, violations of regulations regarding maintenance of police vehicles, and issues with expenditure levels in general.

**d) India**

100. As in many other jurisdictions, recommendations made are often extensive and quite detailed. Commissions also freely recommend specific actions in case of individual wrongdoing.

101. The *Liberhan Commission* sets its recommendations in the context of the dangers of mixing religion and politics and recommends criminalisation of divisive politics. In addition to some structural reforms, the report recommends improvements to existing areas, such as recruitment into the civil and police services, restrictions on activities after retirement from the civil service, riot control, and intelligence agencies.

102. The *Rangantha Misra Commission on Religious and Linguistic Minorities* makes holistic recommendations on education and employment policy for minorities, though

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168 ibid.


171 Liberhan Report (n 36) p 963 paras 172.1-172.2.

172 ibid p 964 para 172.7.

173 ibid p 964 para 172.8.

174 ibid p 971 para 173.13.

175 ibid p 971 para 173.15.

176 ibid pp 972-974.

177 ibid p 975 para 174.

perhaps the breadth of these recommendations arises from the nature of the wide mandate of this Commission.

103. In contrast, the main finding of the *Joseph Commission* is a recommendation for investigation by the Central Bureau of Investigation to delineate individual responsibility.\(^\text{179}\) This Commission does not hesitate to point out police laxity where it exists—much of the report focuses on the finding that ‘there was only a symbolic presence of the police at Marad Beach’\(^\text{180}\) and that ‘circumstances indicated lethargic attitude on the part of AW32 and FW2 and the local police’\(^\text{181}\).

104. Again, the *Nanavati Commission* recommendations are geared towards making the police force more independent,\(^\text{182}\) but specific investigations against particular individuals responsible directly or indirectly for the violence are also recommended.\(^\text{183}\)

105. The *Srikrishna Commission*, while examining the proportionality of police firings makes the following observations:

The police firing was, on several occasions, ineffective and large number of rounds are said to have been fired without producing any visible effect. The police firing at least on two occasions appears to be unjustified, excessive and resulted in killing innocent citizens … The ensuing deaths on these two occasions were not justified at all.\(^\text{184}\)

106. This Commission also recommends comprehensive reforms on the police sector, including improving the quality of investigations,\(^\text{185}\) and working on reducing corruption.\(^\text{186}\)

e) Malawi

107. Recommendations include initiation of action to be taken against individuals, but also adopting policies to transform socio-economic conditions.

108. The *Khoviwa Commission* specifically finds that the police bore a large part of the responsibility for the violence being investigated, and used disproportionate force in dealing with the protesters.\(^\text{187}\) The Commission also finds media persons, demonstrators and political leaders responsible, but ensures that these findings are viewed against the general backdrop of socio-economic hardships being faced by the

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\(^{179}\) Joseph Report (n 42) p 77 para 41.

\(^{180}\) *ibid* p 78 para 42.

\(^{181}\) *ibid* p 74 para 33.

\(^{182}\) Nanavati Report (n 43) p 183.

\(^{183}\) See, eg, *ibid* pp 147, 153.

\(^{184}\) Srikrishna Report (n 46) Chapter VI para 1.19.

\(^{185}\) *ibid* ch V para 1.3–1.6.

\(^{186}\) *ibid* ch V para 1.7.

\(^{187}\) Khoviwa Report (n 52) p 1.
demonstrators, and the resultant xenophobia.\textsuperscript{188} Recommendations\textsuperscript{189} include altering the government’s approach to foreign investment to reduce xenophobia, to initiate prosecutions against responsible police officers and to compensate the victims of violence.\textsuperscript{190}

109. Recommendations\textsuperscript{191} of the \textit{Singini Commission} are also quite elaborate—they range from improving the medical infrastructure of the country\textsuperscript{192} to creating a culture where public servants can operate impartially to prevent the political situation from degenerating in times of crisis.\textsuperscript{193} Additionally, the report names particular people responsible for concealing the fact of the President’s death, and also lays blame, in general, on the ‘leadership of the Executive.’\textsuperscript{194}

f) Malaysia

110. Recommendations are quite wide-ranging, though commissions do not shy away from finding individual responsibility.

111. In fact, the \textit{Commission of Inquiry to Enhance the Operation and Management of the Royal Malaysian Police} in spite of the more general nature of its mandate, still makes specific adverse findings against the Malaysian police (examples include findings that a child and a woman had been abused in police custody,\textsuperscript{195} as well as systematic failures in relation to the deaths of named individuals in police custody.\textsuperscript{196})

112. The \textit{TBH Commission} recommends significant overhaul of the Malaysian Anti-Corruption Commission [MACC] not only in terms of its practices, but its overall training procedures and attitude,\textsuperscript{197} while at the same time positing stinging criticisms of named individuals implicated in the inquiry (for example, one member of the MACC is recognised as being ‘prepared to go to great lengths to lie’ when his professed ignorance of the assault TBH had been subjected to was ‘exposed with startling clarity.’\textsuperscript{198})

\begin{footnotes}
\footnotetext{188 ibid p 2.}
\footnotetext{189 ibid pp 7 – 12.}
\footnotetext{190 ibid p 8.}
\footnotetext{191 Singini Report (n 55) Chapter 7.}
\footnotetext{192 ibid para 7.2.}
\footnotetext{193 ibid para 7.6.}
\footnotetext{194 ibid para 6.5.3.}
\footnotetext{195 Report of the Royal Commission to Enhance the Operation and Management of the Royal Malaysia Police 2005 para 341.}
\footnotetext{196 ibid Annex 3D.}
\footnotetext{197 “We wish to stress our concern over the cavalier attitude exhibited by the MACC officers in disregarding the intention of parliament…”: TBH Report (n 63) para 245.}
\footnotetext{198 ibid para 336.}
\end{footnotes}
In case of the Commission of Inquiry into the Video Clip Recording, the Terms of Reference seem to indicate only the attribution of individual responsibility, but this does not preclude the Commission from suggesting extensive judicial reform, and getting to the root causes of what led to the particular incidents under investigation.

**g) New Zealand**

In the past, commissions have suggested thorough reform of extant policies. Notably, an inquiry has no power to determine the civil, criminal, or disciplinary liability of any person. However, Section 11(2) of the Inquiries Act 2013 specifies that inquiries are still free to make findings of fault and recommendations that further steps be taken to determine liability (akin to indicating that a *prima facie* case could be established by a commission).

To illustrate, the *Royal Commission on the Pike River Coal Mine Tragedy* recommends changes to the regulatory framework, emergency management, the industry, and the regulators. The *Commission of Inquiry into Police Conduct* makes 60 recommendations, many relating to police codes of conduct and to the processing of lodging sexual assault complaints. The recommendations of the *Royal Commission on Ballantyne’s Fire* include, among other recommendations, changes to New Zealand’s building bylaws and greater instruction of staff in fire prevention.

**h) Pakistan**

Broad, policy oriented recommendations are more common, though commissions will also lay blame on specific individuals where apposite.

The *Abbotabad Commission’s* report unambiguously finds ‘culpable negligence and incompetence at almost all levels of government’ in pinning responsibility for Bin Laden’s continued presence in Pakistan, and then killing by the military of a foreign country. It attributes to the intelligence and security agencies a ‘comprehensive and sustained failure’ to detect leads or abnormalities such as the suspicious shape of the house or the lack of visitors for years. The responsibility is placed on the failure of political, intelligence, and bureaucratic leadership for the state and quality of

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200 ibid Chapter 2 para 104.
201 ibid Chapter 4 Appendix para 20.37.
202 Inquiries Act 2013 s 11(1).
203 Pike River Report (n 64) p 29.
204 Police Conduct Report (n 65) p 15.
governance, policy planning, and implementation.\textsuperscript{208} The Commission makes wide-ranging recommendations addressed largely at systemic problems impacting both the environment and substantive operations of national security and even covered tangential areas such as visa controls.\textsuperscript{209}

118. In the \textit{Saleem Shahzad Inquiry} as well, a substantial part of the recommendations is geared towards fixing the systemic causes of tension between the intelligence agencies and the media.\textsuperscript{210} The \textit{Gojra Incident Inquiry}, set up to investigate communal riots, attributes individual responsibility, but then goes on to suggest additional improvements to the intelligence and crime prevention branches, and recommends structural reforms to the police.\textsuperscript{211}

\textbf{i) Singapore}

119. It is common for committees of inquiry to recommend systemic changes.

120. The recommendations of the \textit{Committee of Inquiry into the Little India Riot} include the improvement of the Singapore Police Force communications and command.\textsuperscript{212} As regards the \textit{Committee of Inquiry into the December 2011 Breakdowns}, set up to investigate the disruption on train services in Singapore, the majority of the recommendations can be classified as technical modifications to be made to the Singapore Mass Rapid Transit trains services – e.g. enhanced inspections, better detection and rectification of defects.\textsuperscript{213} For the \textit{Committee of Inquiry on the Escape of Detainees Jemaah Islamiyah and Mas Selamat Bin Kastari, from the Whitley Road Detention Center}, recommendations include changing the control and administration of the Detention Centre.\textsuperscript{214}

\textsuperscript{206} Abbotabad Report (n 71) para 703.
\textsuperscript{207} \textit{ibid} paras 674-675, 692.
\textsuperscript{208} \textit{ibid} at para 742.
\textsuperscript{209} \textit{ibid} p 301 Chapter 36.
\textsuperscript{210} Saleem Shahzad Report (n 73) p 127.
\textsuperscript{211} Gojra Incident Report 2009 Chapter D.
\textsuperscript{212} Little India Riot Report (n 79) p 54.
\textsuperscript{213} Report of the Committee of the Inquiry into the Disruption of MRT Train Services on 15 and 17 December 2011 2012 p 49.
\textsuperscript{214} Whitley Road Detention Centre Report (n 80) pp 5, 6.
j) South Africa

121. In general the Commissions go to the root cause of the problem and recommend large scale changes in policy in addition to examining the immediate events under investigation. Blame is allocated to named individuals where apposite.

122. The Khayelitsha Commission gives 20 recommendations which focus on improving relations between the community and the police, improved monitoring of police efficiency progress, and improved handling of complaints by police. There are no named individuals in this report, since such was its mandate.²¹⁵ Contrast this with the Donen Commission of Enquiry into the Oil for Food Programme in Iraq that makes adverse findings against South African persons and entities named: Majali, Al-Khafaji, Hacking, Montega, Imvune, Mocoh, Omni, Ape Pumps, and Falcon.²¹⁶ This difference in part arises from the different motivations behind setting up both Commissions but is illustrative of the many different kinds of recommendations which have been made by South African commissions in the past.

123. The types of recommendations put forward by the Khampepe Commission revolve around the mandate of the DSO. It recommends that the rationale of the DSO was still valid at that time, and so the DSO should not be abolished. It is also recommends that a proper audit be done to address the duplication of resources among the intelligence agencies and the DSO.²¹⁷ The Khampepe Commission makes recommendations on the structure of the DSO,²¹⁸ regulatory oversight,²¹⁹ reprimands to be made by the President²²⁰ and suggested legislative amendments.²²¹

124. The Myburgh Commission also issues very comprehensive recommendations, inter alia, on foreign direct investment in South Africa,²²² South African political policy,²²³ South African macro-economic policy,²²⁴ dispute resolution,²²⁵ and better monitoring of speculation.²²⁶ Similarly, the Ellis Park Commission makes a whole host of recommendations including those on preventive measures (including the training²²⁷

²¹⁵ Khayelitsha Report (n 82) para 9 pp xxv-xxvi; see also Chapter 15 p 439.
²¹⁷ Khampepe Report (n 92) p 12.
²¹⁸ ibid p 44, para 13.2.
²¹⁹ ibid p 61, para 19.1.
²²⁰ ibid p 50, para 16.1.
²²¹ ibid p 62, para 19.4.
²²³ ibid p 73, paras 158.
²²⁴ ibid p 73–6, para 159.
²²⁵ ibid p 80, para 163.
²²⁶ ibid p 80, para 164.
and dress-code of security companies), as well as management and engagement of sub-contracted private security companies, and the presence of the police or defence forces where sports are classified as high risk.

125. With respect to the Goldstone Commission, the recommendations are quite detailed. For instance, in one report the criminalisation of wearing disguises in public gatherings is suggested. Additionally, having an ‘efficient and more sensitive leadership’ for the police force is recommended, and the Commission iterates the requirement that media-persons report responsibly and accurately in volatile situations. The fact and perception that the police support only certain segments of society is recorded as a matter of great concern. At several points, the historical and political context is emphasised. There is a constant attempt to link the specific problem of violence against the police, with the larger climate of political intolerance in the country.

k) UK

126. Recommendations tend to be broad-ranging and policy-oriented, though individual responsibility is attributed where mandated.

127. Recommendations from the Azelle Rodney Inquiry include how the police should respond to incidents involving the death of civilians following police action, as well as the establishment of ‘a protocol for the future conduct in the event of a shooting by a police officer.’

128. The Baha Mousa Inquiry is uninhibited about naming the particular individuals involved, and finds that there was a failure of moral courage within the Army ranks in failing to speak up for Mr Mousa, as well as a ‘corporate failure [within the Ministry of Defence] to give proper attention to interrogation policy and doctrine.’

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228 ibid p 101, para 15.
229 ibid p 115, para 55.
230 World Trade Report (n 108) para 41.3.
232 ibid para 3.2.5.
233 ibid para 3.1.5.
236 Azelle Rodney Report (n 115) p 26, para 23.20.
237 ibid, para 23.19.
238 Baha Mousa Report (n 119) para 2.480. However, a number of those named had already been prosecuted and found guilty, so the inquiry was not necessarily the body attributing responsibility.
239 ibid para 2.1331.
240 ibid para 5.143.
Recommendations\textsuperscript{241} aim at providing greater accountability for and scrutiny of detention procedures, and greater protection to whistleblowers.

129. The \textit{Zahid Mubarek Inquiry} was set up when Zahid Mubarek was beaten into an irreversible coma by his cellmate. While discussing institutional religious intolerance, it is notable that this Inquiry is willing to make recommendations even without establishing against a set standard of proof, the existence of such intolerance: Without suggesting in any way that the Prison Service should be regarded as institutionally infected with religious intolerance, thought should be given by the Home Office to recognizing the concept of institutional religious intolerance, along the lines of the definition of institutional racism adopted by the Stephen Lawrence Inquiry.\textsuperscript{242}

\textbf{l) UN}

130. The recommendations tend to be broad-ranging and addressed to several national and international authorities and institutions.

131. The \textit{Darfur Commission} makes recommendations to the Security Council, Sudanese authorities, and the International Criminal Court (ICC) on measures to address human rights violations in Darfur.\textsuperscript{243} It recommends the prosecution of the perpetrators before the ICC.\textsuperscript{244} The Commission also pays particular attention to the victims, suggesting the establishment of an International Compensation Commission.\textsuperscript{245}

132. The \textit{Lebanon Commission} makes appeals to the Human Rights Council\textsuperscript{246} and the international community in general,\textsuperscript{247} but also to Israel in particular since Israel is found to be responsible for a number of the human rights violations being investigated by the Commission. The report of the Commission makes particular reference to children as one of the most vulnerable group affected by Israeli actions.\textsuperscript{248}

\textbf{m) USA}

133. Commissions of inquiry in the USA recommend systemic reform, as well as pointing out individual responsibility where required to do so.

134. The \textit{Robb Silberman Report}, for instance, recommends major structural reform of the operation of intelligence services by way of 74 different recommendations: it recommends giving the Director of National Intelligence powers to match his

\textsuperscript{241} \textit{ibid} p 1267.

\textsuperscript{242} Report of the Inquiry into the death of Zahid Mubarek para 62.29.

\textsuperscript{243} Darfur Report (n 123) pp 162, 163, 164.

\textsuperscript{244} \textit{ibid} p 161.

\textsuperscript{245} \textit{ibid} p 163.

\textsuperscript{246} Lebanon Report (n 126) p 76.

\textsuperscript{247} \textit{ibid}.

\textsuperscript{248} \textit{ibid}.
responsibilities, bringing the FBI all the way into the Intelligence Community, demanding more of the Intelligence Community and rethinking the President’s Daily Brief.\textsuperscript{249} Similarly, the recommendations made by the \textit{9/11 Commission} include unifying strategic intelligence and operational planning against Islamist terrorists, unifying the intelligence community with a new director and strengthening the FBI and homeland defenders.\textsuperscript{250} The \textit{Aspin Brown Commission on the Intelligence Community} recommends integration of the political and intelligence communities, and introducing a greater element of efficiency and cohesion into the operation of the intelligence community, particularly in times of war.\textsuperscript{251} The \textit{Moynihan Commission on Government Secrecy} suggests a reorientation of the government’s policy on secrecy\textsuperscript{252} and recommends that the process of declassification of government records become more focused, disciplined, cost-effective, and well-managed.\textsuperscript{253}

135. The \textit{Guardians Revisited Report} focuses exclusively on the police and lays down a whole plethora of recommendations to improve the civil rights record of the police: implementation of the model of community policing, improvement of police officer training, and the elimination of racial profiling.\textsuperscript{254} Members of the Commission consider it necessary to increase diversity at every level of law enforcement agencies, and to revise recruitment and selection methods.\textsuperscript{255} Moreover, internally the policy on the use of deadly force has to be improved, and disciplinary procedures has to be examined more regularly.\textsuperscript{256} The Commission encourages officials of city government to make an effort to eliminate police misconduct with external oversight devices.\textsuperscript{257}

136. Specific wrongdoing is also pointed out by commissions. For example, the \textit{Financial Crisis Inquiry Report} states that where the Commission finds potential violations, it refers these matters to the appropriate authorities.\textsuperscript{258}

137. Notably, the \textit{Christopher Commission} suggests that even in the absence of conclusive proof, recommendations for reform can be made:

While the evidence is not conclusive regarding inadequate attention to violence and overemphasis on sexual conduct, the Commission believes that the LAPD should adopt auditing procedures designed to improve the process in the future.\textsuperscript{259}

\textsuperscript{249} Intelligence Capabilities Report (n 129) p 17 onwards.
\textsuperscript{250} \textit{9/11 Report} (n 130) pp 399-400.
\textsuperscript{252} Report of the Moynihan Commission on Government Secrecy 1997 ch 1 p 16.
\textsuperscript{253} \textit{ibid} p 72.
\textsuperscript{254} Guardian Revisited Report (n 130) p 4.
\textsuperscript{255} \textit{ibid} p 5.
\textsuperscript{256} \textit{ibid} p 6.
\textsuperscript{257} \textit{ibid} pp 6-7.
\textsuperscript{258} The Financial Crisis Inquiry Report 2011 p xi.
138. An analysis of the *Kerner Commission’s Report on Civil Disorders*, set up to examine the race riots of the 1960s also indicates that commissions are liberal in their elaboration of socio-economic conditions (such as pervasive unemployment) that provide the breeding ground for violent incidents, where they deem it to be relevant. The Commission factors these into their conclusions, while recommending measures to mitigate the sense of failure and frustration engendered by these conditions.
C. BINDING NATURE OF RECOMMENDATIONS

a) Australia

139. Recommendations are not binding but seem to carry significant political weight.

140. For instance, the establishment of the Royal Commission on the Home Insulation Program was an electoral commitment that bolstered the Abbott Government’s election to power.\(^{263}\) Prime Minister Tony Abbott, in the recent tabling of the report in Parliament, pledged to consider its finding and recommendations, provide a preliminary response by the end of September 2014, and a final response by the end of the year.\(^{264}\) Similarly, in response to the Equine Influenza Inquiry the independent expert, Professor Peter Shergold AC, engaged by the Government to report on the proper implementation of the recommendations has advised that the Department has continued to make good progress and that its work had been of a high standard.\(^{265}\)

141. There were no criminal prosecutions following the Cole Inquiry, contrary to its recommendations,\(^{266}\) but the decision of the Australian Federal Police to discontinue the investigation faced much media scrutiny,\(^{267}\) forcing the release of a statement in defence.\(^{268}\) A Senate inquiry has also been announced into claims that Federal Police Officer Ross Fusca, was allegedly offered a promotion in return for terminating the investigation.\(^{269}\)

142. In response to the Cole Commission report, the Government passed the Building and Construction Industry Improvement Act 2005, enabling the establishment of an independent statutory authority, the Office of the Australian Building and


\(^{264}\)ibid.

\(^{265}\)ibid.


Construction Commissioner. The agency was abolished in 2012 and replaced by Fair Work Building & Construction.

The Royal Commission into Aboriginal Deaths in Custody was also positively received, and its recommendations remain a blue-print for reforming key aspects of the criminal justice system. The recommendations are still cited when suggestions are made or policies are introduced which target the overrepresentation of indigenous people in custody, and a number of judges have referred to the recommendations when making decisions about sentencing Indigenous offenders. The Australian state governments gave their commitment to develop a national response to the recommendations in consultation with Indigenous communities and subsequently, annual reports on the implementation progress were published up to 1996-97. Today, the Federal Government continues to issue annual reports on Aboriginal deaths in custody through the Australian Institute on Criminology.

b) Canada

Again, in Canada, while recommendations are not expressly binding, they are taken very seriously by the government, and met with carefully considered responses.

For instance, after the Commission of Inquiry into the Deployment of Canadian Forces to Somalia released its final report, a period of government scrutiny and guidance regarding military conduct started and lasted until 2003. During this time, policies were put in place ‘to ensure nothing similar to the Somalia Affair could happen again’. Likewise, following from the Lesage Commission on the Police Complaints System, an Office of the Independent Police Review Director (OIPRD) opened in 2009 in Ontario. Considering the responsibilities and structure of such office, one can conclude that the Lesage Commission’s Report has been well implemented. The Commission of Inquiry into the Actions of Canadian Officials in Relation to Maher Arar is another case in point: following the release of the factual inquiry recommendations, a

\[\text{References:}\]


271 ibid p 105.


Committee on Public Safety and National Security was put into place to review and evaluate the implementation of the recommendations.276 Along the same lines, statistics show that the ‘staser use by police in B.C. is down 87 per cent since Robert Dziekanski died’,277 which is the incident and issue that triggered the setting up of the Braidwood Commission on Conducted Energy Weapon Use. The government has introduced amendments in the Police Act regarding the use of such weapons as a response to the Braidwood Report.278 In addition, there are reports that in context of the Ipperwash Report, ‘most of the report’s recommendations have been carried out or are in the process of being addressed’.279

In cases where implementation of final reports of an investigative commission has been slow, there has been heavy criticism of the lack of an effective response. 280

c) Ghana

147. While recommendations may not be technically binding, they are taken very seriously by the government. The issuing of a White Paper within six months of the Report being made is a requirement in the Constitution of Ghana,281 although sometimes there can be significant delay (as was the case in the Archer Report).282 In some circumstances, the Constitution requires that the adverse findings made by a commission be deemed to be a High Court judgment, and therefore be treated as binding. This happens if six months have passed after the finding is made and announced to the public, or the government issues a statement in the gazette and in the national media that it does not intend to issue a White Paper on the report of the commission, whichever is earlier.

279 Ipperwash Report (n 26).
In case of the Wuaku Commission, the government accepted the majority of the findings and recommendations of the Commission, issued a White Paper, and also acted upon the principal recommendation by prosecuting for murder two of the people responsible for the events. In some other cases, the government believed there was need for further investigation and stated that it would use the findings of the Commission as the basis of such investigation. Even where the government denied the recommendation of the Commission, it stated that it would find a suitable punishment for the offender. Recommendations concerning problems that the government needs to tackle were generally accepted and it indicated that it would act upon them to the best of its ability.

In general, the police force has undergone a lot of reform and restructuring as a result of the commissions of inquiry that have been set up in Ghana.

d) India

Recommendations are not binding, but carry significant political weight.

The Law Commission stated that ‘no findings recorded by a Commission can be enforced proprio vigore’. Moreover, the Supreme Court case of Ram Krishna Dalmia v Mr Justice Tendolkar and others confirmed that commissions of inquiry could only be recommendatory. However, reports are typically met with utmost seriousness.

In case of the Liberhan Commission, the Home Minister in Parliament tabled a ‘Memorandum of Action Taken’ (or ATR) which outlines the official response of government to the Commission’s recommendations. According to the ATR, many of the recommendations were either accepted or noted. One of the proposed responses was the introduction of the Communal Violence (Prevention, Control and

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284 ibid.
285 ibid.
286 ibid.
289 [1959] SCR 279. See also LCI Report (n 33) p 17, para 24(c).
Rehabilitation of Victims) Bill, though as of 2014 this has still been deferred.\textsuperscript{291} In case of the \textit{Nanavati Shah Commission}, the report was relied upon heavily in a subsequent trial court judgment, leading to the conviction of 31 people.\textsuperscript{292} The \textit{Srikrishna Commission} was followed by the release of the Government’s Memorandum of Action Taken (ATN) soon after the publication of the report, and it appears on the face of the ATN that most of the recommendations were accepted.\textsuperscript{293}

In rare cases, such as the \textit{Joseph Commission}, recommendations remain entirely unaddressed, but this is probably not a representative example—in fact, similar recommendations as were made in the Commission’s final report were also issued by a High Court judgment, but the government has chosen not to act upon either the Commission’s report, or on the High Court judgment.\textsuperscript{294} In case of the \textit{Nanavati Commission} also, while no action against anyone implicated in the report was taken, the Government felt the need to justify this on grounds of insufficient evidence.\textsuperscript{295} One of the key politicians implicated, Jagdish Tytler, resigned from the Union Cabinet on 10 August 2005, following the report’s release.

e) Malawi

We could find no official responses from the Malawi government in respect of these reports, although they seem to have been received favourably by most other quarters.\textsuperscript{296}


\textsuperscript{293} Memorandum of action to be taken (ATN) by Government on the report of the commission of inquiry Appointed for making enquiries into the incidents of communal riots which occurred in the police commissionerate of Mumbai area during December 1992 and January 1993 And serial bomb blasts which occurred on 12th March 1993 1998.


f) Malaysia

155. It seems quite clear that findings of Commissions are not binding. Nonetheless, they are taken seriously and responded to by the government of the day.

156. In the 2011 case of Members of a Commission of Enquiry v Tun Dato Seri Ahmad Fairuz Sheikh Abdul Halim, the Federal Court stated that, although the relevant commission had made ‘strong findings’ including a recommendation that an individual be prosecuted, ‘such findings remain mere findings’ and they do not affect the legal rights of the respondents. Moreover, the court states:

   The Commission merely investigates and does not decide. Its findings and recommendations are not binding on anybody, not even the government.  

157. Nonetheless, the Abdul Halim case emphasises the importance of the findings of a commission. In the words of the Court:

   If the proceedings of the Commission are allowed to be challenged [by judicial review], its purpose will come to naught. It will make the setting up of the Commission a meaningless exercise.

158. It also recognized the importance of the Commission in discerning ‘the truth of the matter’ and ‘[making] the necessary recommendations for the betterment of the judiciary.  


g) New Zealand

159. Recommendations are not binding, but carry significant political weight.

160. The recommendations of the Royal Commission on the Pike River Coal Mine Tragedy were treated as significant though not formally binding. The government committed to implementing all the recommendations: it has consulted on them, is implementing them at present, and has appointed an Expert Reference Group to provide expert subject matter and independent scrutiny of their implementation.

161. The recommendations of the Commission of Inquiry into Police Conduct were also taken very seriously: 47 recommendations were to the police, 12 to the independent Police Conduct authority and one for the Government. The Commissioner of Police fully accepted the Commission’s findings and committed to implementing the recommendations made by the Commission. Cabinet directed that a ten year


298 ibid.

299 ibid para 43.

300 ibid para 44.

monitoring and reporting regime should be set up (from 2007 to 2017). Quarterly progress reports are made, Change Management Programme reviews are conducted, and there is external monitoring by the Office of the Auditor-General.\footnote{Commission of Inquiry into Police Conduct (NZ Police, 2013) <http://www.police.govt.nz/about-us/nz-police/commission-inquiry> accessed 23 September 2014.}


h) Pakistan

163. Recommendations are not binding, and are often not met with any kind of response from the government.

164. The Saleem Shabzad Murder Inquiry itself recognises that the its recommendations are not binding:

Ultimately, however, the Commission’s recommendations should be considered only as well-considered and research-based suggestions. Ultimately, all organs of the state will have to effectively play their role if we are to achieve the goal stated in the preamble of the Constitution.\footnote{Saleem Shahzad Report (n 73) at p 7.}

165. At another point, it is noted:

[The Report] is being submitted to the Government of Pakistan in the hope that its findings would be shared with all concerned and that its recommendations would be considered honestly and seriously.\footnote{ibid p 1.}

i) Singapore

166. The recommendations are not binding, but carry significant political weight.

167. For example, the government’s response to the report of the Committee of Inquiry into the Little India Riot was positive. In July 2014, it listed the measures that already been put in place to improve Command, Control and Communications of the SPF as well as the
measures which would be implemented in the next few months.\textsuperscript{308} The Land Transport Authority worked to implement the recommendations of the \textit{Committee of Inquiry into the December 2011 Breakdowns} and put in place a team responsible for ‘reducing disruptions and increasing the reliability’\textsuperscript{309} of the train system. The \textit{Committee of Inquiry on the Escape of Detainees Jemaah Islamiyah and Mas Selamat Bin Kastari, from the Whitley Road Detention Center} also draws attention to the need for periodic reviews during the implementation of the report.\textsuperscript{310} The Home Affairs Minister stated in an address to the Parliament that many people found to be responsible by this Committee were replaced in the days that followed.\textsuperscript{311}

\textbf{j) South Africa}

168. The recommendations of South African Commissions are not binding, but they do carry significant political weight.

169. The commissioners themselves seem cognisant of the non-binding nature of their recommendations. The \textit{Ellis Park Report} states:

> While it is not for the Commission to prescribe to the police as to how to contain a situation, it is nonetheless clear that on this occasion they deployed the raizor (sic) wire too late; a timeous deployment could certainly have helped stem the tide.\textsuperscript{312}

170. In spite of this, following the publication of the Ellis Park Report, senior league officials offered assurances that a system based on centralised command and greater accountability was being put into effect. The Premier Soccer League also introduced a policy of advance ticket sales and launched a Safety Committee in line with the recommendations.\textsuperscript{313} In 2010, legislation on soccer safety was introduced.\textsuperscript{314}

171. The \textit{Khayelitsha Commission} also wished only that its findings and recommendations be ‘debated’\textsuperscript{315} in relevant quarters, indicating that they were not meant to be binding. Still, the response from the Western Cape government has been quite heartening: On 15 September 2014 the Western Cape Minister of Community Safety announced an implementation plan. The provincial government began by stating that “[m]ost of the recommendations are specific to the South African Police Service (SAPS), which the SAPS are expected to manage themselves”.\textsuperscript{316} However, the government agreed to


\textsuperscript{310} Whitley Detention Centre Report (n 80) pp 5-6.

implement those of the recommendations set out in the report, that it was its responsibility to implement.\textsuperscript{317} In terms of monitoring, the provincial government firstly noted that it has constitutional oversight over SAPS in general.\textsuperscript{318} It then stated that the implementation of recommendations will additionally be monitored via the oversight team on which a Department of Community Safety (DOCS) official will be appointed. This would be in accordance with Recommendation 3 in the report.\textsuperscript{319}

172. Former President Mbeki decided against releasing the Donen Report pending advice from the Chief State Law advisor.\textsuperscript{320} The Donen Report itself suggested that the adverse findings made against certain subjects of the inquiry not be made public until they have been able to comment.\textsuperscript{321} It was ultimately released in 2011 as a response to challenge by the media.\textsuperscript{322} This whole exercise seems to indicate that even if reports are not binding, they still present an exceedingly important source of information for state actors, as well as the public. President Zuma’s spokesperson did state at a later stage that the President had asked Justice and Constitutional Development Minister Jeff Radebe to consider passing the relevant legislation to rectify any shortcomings in domestic law, as pointed out in the report.\textsuperscript{323}

173. The Khampepe Report was not released to the public until two years after the Commission was concluded. This was stated to be due to national intelligence concerns.\textsuperscript{324} In April 2008, the General Law Amendment Bill was adopted by Cabinet
with new proposals on the integrated and specialised unit dedicated to fighting high-
impact organised crime, and by May 2008 it was waiting to be tabled in Parliament.
The President stated that this was the correct time to release the report. He stated that
the Khampepe Report ‘assisted the government in refining proposals on how best to
organise state entities responsible for fighting organised crime more decisively and in
an integrated manner’. However, against the recommendations of the Khampepe Report,
the government abolished the DSO in late 2008.

The Hefer Report’s findings were accepted in full by the Government and no action was
taken against Ngcuka.

The Myburgh Report has been unusual in that even a year after its release, none of the
commission’s recommendations had been commented on by the South African
Reserve Bank or the Treasury, and none had been formally implemented. One
scholar describes the Myburgh Commission as follows: ‘the Myburgh probe
nonetheless ultimately came down – at least in the minds of most sophisticated
analysts and economists – to no more than a tiresome parenthesis within the serious
business of policy formation in SA’. It is clear that the rand rose strongly from 2002
onwards, and so perhaps it was thought that these recommendations were no longer
needed. In any case, this Commission presents the exception rather than the rule.

The Goldstone Commission, for most of its recommendations, uses normative terms like
‘should’. This re-affirms that the recommendations are not binding. Even so, 23
senior South African Defence Force officers were dismissed in response to these
reports. Most likely as a result of the Goldstone Commission revelations, the elected
ANC-led government committed itself to the formation of a ‘truth commission’ to

325 ‘The presidency on release of Khampepe Report’ (Office of the Presidency, 5 May 2008)
accessed 20 September 2014. Note that the original link on the Presidency website has expired.
accessed 20 September 2014.
328 Helmo Preuss, ‘SA needs stability now’ (Fin24, 8 May 2003) http://www.fin24.com/Economy/SA-needs-
stability-now-20030508 accessed 21 September 2014.
329 Raymond Parsons, ‘Setting the Scene’ in Raymond Parsons (ed) Manuel, Markets and Money: Essays in Appraisal
330 ibid p 12.
331 See for example SAPS Report (n 104) para 16.3.
establish the extent of state and security forces’ illicit activities with respect to resistance movements.\textsuperscript{333}

\textbf{k) UK}

177. Recommendations are not binding, but carry significant political weight.

178. The Inquiries Act 2005 expressly stipulates that an inquiry panel is not to rule on, and has no power to determine, any person’s civil or criminal liability.\textsuperscript{334} To that extent, therefore, the findings of an inquiry are not legally binding. However, this does not mean that there are without effect. On the contrary, there are situations where the right to life, enshrined in Art 2 of the European Convention on Human Rights, requires the Home Secretary to set up an inquiry. In such cases, the inquiry is seen as an opportunity for ‘independent, effective’ investigation with an ‘element of public scrutiny so that its results may secure accountability in practice.’\textsuperscript{335}

179. Thus, in case of the Azelle Rodney Inquiry, the Metropolitan Police stated that ‘[w]e keep our firearms tactics constantly under review and have accepted the recommendations made by the public inquiry into Azelle Rodney's death.’\textsuperscript{336} Following the inquiry, the Crown Prosecution Service has decided to initiate prosecutions.\textsuperscript{337} This is clearly an indication of how seriously the findings were taken, although, consistent with the fact that it makes no findings of criminal or civil liability, the inquiry did not actually recommend prosecution. Similarly, after the release of the Patrick Finucane Report, Northern Ireland Chief Constable Matt Baggott offered an ‘absolute’ apology to the family of deceased and ‘fully accepted the findings of the report.’\textsuperscript{338}

180. The Baba Mousa Inquiry’s findings were also received well. In an address to the House of Commons, Defence Secretary Liam Fox accepted the findings that the death was ‘avoidable and preventable’ and criticized the ‘perverted sense of loyalty that turns a blind eye to wrongdoing’\textsuperscript{339} The Head of the Army, General Sir Peter Wall, further explained that moves to introduce recommendations of the report were ‘well

\textsuperscript{333} ibid p 65.

\textsuperscript{334} ibid p 2.

\textsuperscript{335} R (Lin) v Secretary of State for Transport [2006] EWHC 2575 (Admin) [27] (Moses LJ). See also Jordan v United Kingdom [2003] 37 EHRR 2 [105] to [109]; R (Amin) v Secretary of State for the Home Department [2004] 1 AC 653 [32].


\textsuperscript{339} HC Deb 8 September 2011, col 573 available at http://www.publications.parliament.uk/pa/cm201011/cmhansrd/cm110908/debtext/110908-0002.htm accessed 1 October 2014 (hereinafter Hansard Debates).
advanced’. In addition, the Prime Minister responded to the inquiry by stating that ‘[i]f there is further evidence that comes out of this inquiry that requires action to be taken, it should be taken.’ The doctor responsible for Baha Mousa was struck off by the General Medical Council for failing to carry out his duties and lying on oath. All but one of the recommendations were implemented.

The recommendations of the *Stephen Lawrence Inquiry* are considered tremendously important for criminal law in the UK. Following the Inquiry’s criticism of the double jeopardy laws that prevented the retrial of the Mr Dobson and Mr Norris acquitted in 1996, Parliament substantially revised the law of *antrefois acquit*. In 2011 the Court of Appeal quashed the acquittals of two suspected murderers, paving the way for the successful prosecution of Mr Dobson and Mr Norris in 2012 for the murder of Stephen Lawrence.

I) UN

Given the role of the UN in general, and the heightened impact of geo-political realities when it comes to international institutions, compliance with these recommendations is based entirely on the willingness of whoever they are directed against.

In case of the *Darfur Commission*, the recommendations addressed to the Security Council and the ICC were readily complied with but the Sudanese government has remained largely uncooperative. In case of the *Syrian Commission*, prosecution before the ICC was recommended, but the Security Council resolution that could have

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343 The blanket ban against harshing, a verbal non-physical interrogation technique, was not accepted. Its use is, however, now clearly prescribed: “I share some of Sir William’s concerns, however, so I have asked the Chief of the Defence Staff to ensure that that approach is used only by defined people in defined circumstances.”: Hansard Debates (n 331).


348 *ibid.*
triggered this was blocked by Russia and China, allies of Syria.\textsuperscript{349} Similarly, given the adverse findings of the \textit{Lebanon Commission} against Israel, it is hardly surprising that its findings have not been respected by Israel.\textsuperscript{350} The recommendations of the \textit{Korean Commission} have not been implemented by the Korean government on grounds that the actions under investigation might have been in contravention of national laws, but are in compliance with national law.\textsuperscript{351}

\textbf{m) USA}

184. Recommendations are not binding but they carry significant political weight.

185. The findings of the \textit{Financial Crisis Inquiry Report} helped inform at least one major regulatory enforcement action against Goldman Sachs. This case was settled for $550 million with the Securities and Exchange Commission for misleading investors.\textsuperscript{352} The \textit{Robb Silberman Commission} sparked a variety of important reforms. Security Advisor Frances Fragos Townsend had to implement each commission proposal.\textsuperscript{353} The majority of the recommendations had been implemented by the President Bush Administration.\textsuperscript{354} The 9/11 Report led to regulation to improve security at US ports,\textsuperscript{355} and plans to expand the Privacy and Civil Liberties Board.\textsuperscript{356} Most of the declassification proposals of the Moynihan Commission were also approved and adopted.\textsuperscript{357}

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\textsuperscript{351} \textit{ibid}.


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The implementation of recommendations from the earlier Commissions
(Kerner\textsuperscript{358} and Aspin Brown\textsuperscript{359}) has been quite poor, leading to the inference
that perhaps commissions of inquiry have come to be taken more seriously
with time.

\textsuperscript{358} Gene Schlickman, ‘The Kerner Commission and the Search for Answers’ (\textit{The Chicago Tribune}, 11 May 1992)
commission-illinois-national-guard accessed 1 October 2014.

\textsuperscript{359} Robert David Steele, \textit{On Intelligence: Spies and Secrecy in an Open World} (Afcea International Press 2000) p ii.
ANALYSIS AND CONCLUSION

187. Having regard to the basic principles of common law systems, and reports of previous commissions of inquiry in South Africa and other jurisdictions, the following conclusions can be presented.

I STANDARD OF PROOF

188. None out of the thirteen jurisdictions surveyed use a criminal standard of proof in the context of commissions of inquiry. Seven out of the thirteen jurisdictions surveyed consistently use a standard lower than the civil law standard (Australia, Canada, New Zealand, Singapore, UK, UN Human Rights Council, USA) which they varyingly refer to as a ‘prima facie’, ‘sufficiency’ or ‘reasonableness’ standard. Two jurisdictions (Malawi and Ghana) don't mention any standard at all, but given the general scheme of regulation, probably use a standard of proof lower than the civil law standard. Of the remaining four that mention preponderant probability, in India, South Africa and Malaysia, the use of this standard seems like a one-off incident, and in Pakistan, a very diluted version of the civil law standard is actually in operation.

In any case, the question of testing facts against a higher standard arises only if adverse findings are being made against an individual. If at all, the Marikana Commission seeks a higher standard than that suggested above (a prima facie, reasonableness or sufficiency standard), it should only be in context of individual wrongdoing. Even then, while the standard may be higher than that which is used in other cases, based on the foregoing analysis, it is still unlikely to be as high as ‘balance of probabilities.’

Conclusion One: The comparative research conducted suggests that the standard of proof employed by the Marikana Commission should be below the ordinary civil or criminal standard.

II ONUS OF PROOF

189. Given the investigative nature of commissions of inquiry, it is submitted that (in line with nine out of the thirteen jurisdictions surveyed) operating based on any onus of proof is the wrong lens through which to view proceedings before the Marikana Commission. Of the remaining jurisdictions, India and the UK are not consistent in their approach. Only one of the USA commissions suggests a reverse presumption, and the scant references to the presumption before the South African commissions are too vague to flesh out any concrete conclusion.
III NATURE OF RECOMMENDATIONS PRESENTED

190. *All* 13 jurisdictions surveyed demonstrate that commissions typically investigate the root causes of the pertinent events and recommend far-reaching measures to address institutional, political or even economic problems. They also either make adverse findings, or recommend further investigation and prosecution in the case of individual wrongdoers (or absolve them of blame). There is persuasive precedent for the Marikana Commission to follow suit.

191. However, more importantly it should be noted that the Terms of Reference of the Marikana Commission itself require it to take into consideration the Constitution and other relevant legislation, policies and guidelines. Further, they expressly contemplate recommending further investigation and prosecution where appropriate.

**Conclusion Two:** The comparative research conducted suggests that the Marikana Commission should make broad, policy-oriented recommendations regarding the systemic causes of the violence, and also recommend investigation and prosecution of individual actions where appropriate.

III WEIGHT OF COMMISSION RECOMMENDATIONS

192. In eleven out of thirteen jurisdictions, it was found that recommendations, although not binding, carry **tremendous political weight**. They are mostly accepted, and in many instances their implementation is closely monitored. Where they are not accepted, the government usually issues some sort of a response explaining why this is the case. When none of these measures are taken, there is a loss in faith in the government in power, for which there might be political costs. Admittedly, implementation can be a protracted process, but the importance of such recommendations must not be underestimated on this ground.

193. Of the remaining two jurisdictions, the lack of compliance with the recommendations of the UN Human Rights Council Inquiries is partial, and is generally the product of geo-political realities that play a heightened role in the international legal order. The only aberrant from the general trend seems to be Pakistan.

**Conclusion Three:** The comparative research conducted suggests that the findings and recommendations of the Marikana Commission should be met with utmost seriousness by the government, and all those to whom they are addressed.