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Establishing Admissibility at the International Criminal Court: Does the Buck Stop with the Prosecutor, Full Stop?

MEGAN A. FAIRLIE*

“No penalty follows the misplacement of the burden of proof, except the natural consequence that the assertion remains untested, and the audience therefore (if inquiring) unconvinced”¹

I. Introduction

Significant agreement with regard to the establishment of the International Criminal Court (ICC or Court) would likely have proved elusive were it not for the creation of complementarity. This principle requires that the Court defer jurisdiction to a national authority unless the concerned state is either unwilling or unable to genuinely investigate or prosecute a case.² In effect, the application of complementarity will render a case inadmissible before the ICC when the matter “is being appropriately dealt with by a national justice system.”³ The virtues of complementarity have been extolled time and again, as it is repeatedly referred to as pivotal, the foundation upon which the newly formed court rests, and, indeed, “the cornerstone of the ICC in world affairs.”⁴

The concept is pervasive throughout the statute that governs the Court: “linked to a network of inter-related articles,” it is a testament to the fact that the “[s]tatute’s adoption

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1. 9 JOHN HENRY WIGMORE, A TREATISE ON THE ANGLO-AMERICAN SYSTEM OF EVIDENCE IN TRIALS AT COMMON LAW 272 n.3 (3rd ed. 1940) (citing Professor Alfred Sidgwick, *Fallacies*, 163).

2. U.N. Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court, Rome, Italy, July 15-17, 1998, *Rome Statute of the International Criminal Court*, art. 17(1), U.N. Doc. A/CONF. 183/9 (July 17, 1998) [hereinafter ICC Statute].

3. WILLIAM A. SCHABAS, AN INTRODUCTION TO THE INTERNATIONAL CRIMINAL COURT 85 (2nd ed. 2004).

4. John M. Czarnetzky & Ronald J. Rychlak, *An Empire of Law?: Legalism and the International Criminal Court*, 79 NOTRE DAME L. REV. 55, 94 (2003).

was probably [one of] the most complex multilateral negotiation[s] ever undertaken.”⁵ Despite this fact, or perhaps because of it, the ICC statute, like the rules of procedure and evidence subsequently adopted for the new Court,⁶ leaves certain key complementarity questions unanswered. Specifically, neither instrument delineates the standard of proof that must be met in order for the Court to find that a state is unwilling or unable to carry out an investigation or prosecution. Further, neither the statute nor the rules expressly prescribes which party bears the burden of proof in this regard.

To date, uncertainties raised by this silence remain unaddressed by the practice of the Court, as the early days of the ICC have been accompanied by self-referrals and so-called “waivers of complementarity.”⁷ In effect, the issues surrounding admissibility—a one time hot topic—slipped entirely from the foreground. Consequently, it seemed fair to speculate that the Court might continue on in a similar vein, leaving complementarity questions on the shelf indefinitely.

Such queries, however, may soon require answers in light of Security Council Resolution 1593 that refers the situation in Darfur to the Court.⁸ Recognizing arguments to the contrary,⁹ this article takes the position that complementarity retains its potency in cases involving Security Council referrals, a perspective developed within the body of this paper.¹⁰ If the Court finds in accordance with this view, a legal battle may soon be waged over the principle, as the Sudanese government, which maintains the value of its own investigations, is clearly opposed to any prosecutions before the international court.¹¹

According to Sudan’s Ambassador to the United Nations (UN), the execution of Resolution 1593 will be fraught with procedural impediments.¹² This article considers one such possible hurdle: determining the manner in which complementarity—or a country’s genuine inability or unwillingness to investigate and/or prosecute matters—may be established so that a case may be deemed admissible before the ICC. It does so by looking at the issues of burdens and standards of proof both generally, and in relation to complementarity, considering the potential scenarios that may arise in relation to state referrals, *proprio motu*

5. Sharon A. Williams, *Article 17 Issues of Admissibility*, in COMMENTARY ON THE ROME STATUTE OF THE INTERNATIONAL CRIMINAL COURT: OBSERVERS’ NOTES, ARTICLE BY ARTICLE 383, 392 (Otto Triffterer, ed. 1999) [hereinafter COMMENTARY ON THE ROME STATUTE].

6. Assembly of State Parties to the Rome Statute of the International Criminal Court, pt. II-A, 1st Sess., ICC-ASP/1/3 (Sept. 3-10, 2002) [hereinafter ICC Rules].

7. See generally, Claus Kress, ‘Self-Referrals’ and ‘Waivers of Complementarity’: *Some Considerations in Law and Policy*, 2 J. INT’L CRIM. JUST. 944 (2004).

8. S.C. Res. 1593, U.N. SCOR, 60th Sess., 5158th mtg., U.N. Doc. S/RES/1593 (Mar. 31, 2005).

9. It has been asserted that “the fact that the Security Council brought this matter to the ICC implicitly indicates that the ICC has primacy in prosecuting the suspects.” *The Security Council refers the Darfur situation to the International Criminal Court*, INTERNATIONAL FEDERATION FOR HUMAN RIGHTS, Apr. 4, 2005, http://www.fidh.org/article.php3?id_article=2336#nh1.

10. For example, in the aftermath of a Security Council referral, the prosecutor may determine that there is no reasonable basis to proceed with an investigation if the case would be inadmissible. See ICC Statute, *supra* note 2, at art. 53.

11. The words of President Omar al-Bashir lead one to draw the conclusion that any attempt to proceed with an extraterritorial prosecution will be subject to a bitter battle; the country’s leader swore “thrice in the name of Almighty God that [he] shall never hand any Sudanese national to a foreign court.” Warren Hoge, *International War-Crimes Prosecutor Gets List of 51 Sudan Suspects*, N.Y. TIMES, Apr. 6, 2005, at A6.

12. Press Release, Security Council, Security Council Refers Situation in Darfur, Sudan to Prosecutor of International Criminal Court, U.N. Doc. SC/8351, (Mar. 31, 2005), available at <http://www.un.org/News/Press/docs/2005/sc8351.doc.htm> (attributing the same to the fact that Sudan is not a party to the Rome Statute).

investigations and the recent Security Council referral. Rather than provide definitive answers regarding the questions of applicable burdens and standards of proof, this article aims to contribute to the dialogue on these issues by drawing upon the experience of other courts operating in the international and municipal realms, including the practices of the UN ad hoc tribunals.

This piece recognizes that the Court's actions cannot and will not take place in a legal vacuum. It acknowledges that the ICC's judiciary will undoubtedly face the necessity of determining the path that ought to be followed in situations of political sensitivity. In so doing, it may be that the right legal answer may be one that is dead right in that it could prove fatal to the Court. As such, extra-legal matters that may seem inappropriate legal considerations cannot be dismissed out of hand—save at the risk of the very future of the Court. This work seeks neither to solve nor debate matters such as these, but to isolate specific proof concerns and to provide a suitable legal framework in which they may be considered.

II. Is there a need to Determine Proof Allocation?

At the outset, it is beneficial to acknowledge that some critics may be inclined to attribute error to the declaration that the ICC statute fails to prescribe a burden of proof with regard to complementarity. Indeed, in so doing, such commentators could point to any one of an ever-increasing number of academic pieces that adopts an alternative position, most of which allege that the statute creates a prosecutorial burden of proof. It is submitted, however, that such blanket assertions fail to take into consideration the variety of ways in which complementarity issues may come before the Court: the prosecutor is not invariably the only entity that may ask the Court to rule on admissibility.¹³ Moreover, even in those instances in which the onus of establishing admissibility seems to rest with the prosecution, it is arguably flawed to assume that there the burden lies, full stop. To be sure, such an approach might hold a certain amount of appeal, both politically and, owing to its straightforward nature, procedurally. But, as will be illustrated, using such a method could also conceivably hinder the Court's aim to make apt admissibility determinations and, significantly, the tactic does not find its basis in the ICC Statute.

As such, it is a worthwhile endeavor to turn to the statute itself, beginning with a review of complementarity's primary article: article 17 Issues of Admissibility. It is this section that has often been earmarked as one that establishes a prosecutorial burden of proof with regard to admissibility/complementarity determinations.¹⁴ Yet the article does not so dictate. Rather, article 17 simply sets forth those instances in which the Court shall deem a case inadmissible, as well as the considerations that must attend determinations of admissibility.¹⁵

13. For example, when a matter that has been referred either by a state or the Security Council has been deemed inadmissible by the prosecution, the referring body may request that the Pre-Trial Chamber review the prosecution's decision. ICC Statute, *supra* note 2, at arts. 53(2)(a)-(b).

14. See, e.g. Michael A. Newton, *Comparative Complementarity: Domestic Jurisdiction Consistent with the Rome Statute of the International Criminal Court*, 167 MIL. L. REV. 20, 65 (2001) (attributing the grounds for the assertion to art. 17(2)); Mohamed M. El Zeidy, *The Principle of Complementarity: A New Machinery to Implement International Criminal Law*, 23 MICH. J. INT'L L. 869, 899 (2002) (asserting authority for the position at art. 17 (1)); William Bradford, *Barbarians at the Gates: A Post-September 11th Proposal to Rationalize the Laws of War*, 73 MISS. L.J. 639, 666, n.68 (favorably citing El Zeidy).

15. ICC Statute, *supra* note 2, at art. 17.

Of note, the article does not affirmatively address the issue of the burden of proof with regard to admissibility determinations, nor does it, in and of itself, give rise to any particular course of procedure.¹⁶

Moreover, a thorough review of the ICC statute and its rules of procedure and evidence reveals that in no place is the issue of burden of proof with regard to admissibility affirmatively bestowed upon any one party. Accordingly, it is perhaps not surprising that the issue has given rise to uncertainty and criticism in several quarters. Some have recognized the matter as one for which there is no present answer,¹⁷ while others have made their own interpretations without explanation. For example, one critic avers that the burden of proving admissibility in one instance is to be borne by "the Court, the Prosecutor and the territorial State."¹⁸ Still others have alleged that the failure to reference the burden threatens to undermine the principle of complementarity as a whole.¹⁹

Perhaps this latter assertion reveals a common law bias. Indeed, is it to be assumed that the burden of proof ought to be allocated? While it is second nature for common law lawyers to answer this question in the affirmative, it is perhaps likewise for some continental lawyers to differ on the point. Allocating a burden of proof may be a seemingly unnecessary task in inquisitorial systems in which it is obligatory for the judges to investigate and, when necessary, to present evidence.²⁰ In such circumstances, the judiciary itself may take those steps necessary to arrive at its intimate conviction.

Similarly, one could point out that each ICC Chamber is authorized to call for any evidence that it deems "necessary for the determination of truth."²¹ Before embracing a no burden approach, however, one ought to consider the ramifications of not assigning a burden of proof in the sui generis system of the ICC. In so doing, a primary distinction between the Court and domestic systems of justice must be made; of particular relevance is the ICC's geographic separation from the area of the conflict, its outsider status and the resultant limits placed upon the Court's access to evidence. If no burden is established—and, consequently, no presumptions created—there may well be insufficient information upon which to render admissibility rulings. Such an approach has the potential to undermine the effectiveness of the Court, as there would be no impetus for states to share information

16. *Id.* The argument that article 17 tacitly confers the burden of proof upon the prosecutor is one that is addressed *infra* at note 50 and in the accompanying text.

17. Adrian T. Delmont, *The International Criminal Court: The United States Should Ratify the Rome Statute Despite Its Objections*, 27 J. LEGIS. 335, 348 (2001) (referring to the application of article 17 as mysterious and noting that the Rome statute addresses neither allocation of the burden of proof nor the standard of proof: "must states defend their jurisdictional claims, or must the Prosecutor prove inability or unwillingness?"); Leila Nadya Sadat & S. Richard Carden, *The New International Criminal Court: An Uneasy Revolution*, 88 GEO. L.J. 381, 394 (2000) (observing that the framers of the Rome statute decided to confer the final word as to the interpretation of admissibility upon the Court).

18. Jimmy Gurulé, *United States Opposition to the 1998 Rome Statute Establishing an International Criminal Court: Is the Court's Jurisdiction Truly Complementary to National Criminal Jurisdictions?*, 35 CORNELL INT'L L.J. 1, 25 (2001-02) (asserting such an allocation to article 17 (2)(b) wherein unwillingness to prosecute may be established as a result of an unjustified delay in prosecution).

19. Delmont, *supra* note 17, at 348 (including the statute's failure to dictate an applicable standard of proof as part of the problem).

20. JULIANE KOKOTT, *THE BURDEN OF PROOF IN COMPARATIVE AND INTERNATIONAL HUMAN RIGHTS LAW* 10 (1998).

21. ICC Statute, *supra* note 2, at art. 69(3). Article 69 applies in proceedings before all chambers. ICC Rules, *supra* note 6, at R.63(1).

with the Pre-Trial Chamber regarding their investigations and prosecutions and, concurrently, limited impetus for states to conduct their internal procedures as they ought. Likewise, in admissibility actions that take place before the Trial Chamber, the Court may find that states require some type of incentive to comply with orders to produce certain types of evidence.²² Thus, rules regarding burden allocation and consequent presumptions may well prove useful.

In addition to the Court's limited access to evidence and the need to create an impetus for state cooperation, one must also bear in mind the manner in which complementarity questions will tend to arise before the Court.²³ More often than not, there will be an adversarial aspect inherent in the process that precedes complementarity determinations; even in those instances wherein the Court avails of its authority to make a *sua sponte* admissibility decision, it is reasonable to anticipate a dispute of some kind, otherwise, the process will be little more than *pro forma*. In this regard, it is perhaps useful to consider the first procedural mechanisms relating to admissibility contained in the Rome Statute.

III. Article 18 Prosecutorial Requests for Authorization to Investigate

Article 18 of the ICC statute gives rise to procedures that fall outside of the Darfur example, as the article applies solely to state referrals and *proprio motu* prosecutorial investigations.²⁴ When one of these two types of investigation has begun, the article requires that the prosecutor so inform "all States Parties and those States which, taking into account the information available, would normally exercise jurisdiction over the crimes concerned."²⁵ A state having jurisdiction may then inform the Court that it is investigating, or has investigated, the acts concerned and may thus request that the prosecutor defer to the state's investigation.²⁶ Such deferral is required; nevertheless, the prosecutor may then apply to the Pre-Trial Chamber for authorization to investigate (an article 18(2) application).²⁷

In determining the outcome of the application, the Court is given much leeway. Aside from requiring that the information provided by the state regarding its investigation be shared with the prosecutor, and that article 18(2) applications be submitted in writing and contain the basis upon which they are made,²⁸ the procedure that then applies remains

22. It has rightly been observed that cooperation and judicial assistance at international criminal tribunals generally do not, and are not likely to, mirror that found in international courts formed by consensual jurisdiction. See, e.g., Jacob Katz Cogan, *International Criminal Courts and Fair Trials: Difficulties and Prospects*, 27 YALE J. INT'L L. 111, 120 (2002) (noting, at note 45, that this is true of the ICC even with regard to states parties to the Rome statute).

23. "[B]urden of proof problems in international law are influenced by the character of the proceeding, whether predominantly adversarial or investigatory." KOKOTT, *supra* note 20, at 144.

24. ICC Statute, *supra* note 2, at art. 18(1).

25. *Id.*

26. The request must be made in writing and must provide information about the state's investigation. ICC Rules, *supra* note 6, at R.53 (providing, also, that the prosecutor may seek additional information from the state).

27. ICC Statute, *supra* note 2, at art. 18(2). "In as much as the Prosecutor has no choice in the matter but to comply, the 'request' is really not a request. It is a demand or an assertion by the State of its right to primacy." Daniel D. Ntanda Nsereko, *Article 18 Preliminary Rulings Regarding Admissibility*, in COMMENTARY ON THE ROME STATUTE, *supra* note 5, at 395, 401.

28. ICC Rules, *supra* note 6, at R.54.

indeterminate. The power to establish the process that follows an application is bestowed entirely upon the Pre-Trial Chamber.²⁹ Of relevance to the complementarity question, although the statute does not delineate those factors that may create the basis for the prosecution's request, the grounds specified in article 17 would undoubtedly support a petition to so proceed.³⁰

A. WHO WILL BEAR THE BURDEN OF PROOF?

In order to answer this question, it is necessary to first establish what is meant by burden of proof; the phrase is a generic term that includes both the burden of production (or the duty of producing evidence) and the burden of persuasion (or the risk of non-persuasion).³¹ The former involves a duty to put forth evidence as to a specific fact in issue; the latter is the obligation of a party to convince the fact finder of a specific fact in issue.³² Normally, the party that has the burden of persuasion will also bear, at least initially, the burden of production. While both of these distinct but related concepts will play a role concerning admissibility determinations, it is the burden of persuasion that is under consideration here.

In its failure to affirmatively allocate the burden of persuasion with regard to admissibility, the ICC statute is not singular in its construction. Rather, this is common practice in the domestic sphere, in particular in common law jurisdictions where most statutes do not address burden allocation.³³ In such instances, as Wigmore dictates (and as the U.S. Supreme Court has endorsed), there is not and cannot be a general solvent for all cases. It "is merely a question of policy and fairness based on experience in the different situations."³⁴ Accordingly, numerous rules exist regarding such allocation determinations and are employed in both national and international regimes.

Before considering these rules, however, it is first necessary to ascertain their relevance to this inquiry, giving due regard to the general principle of law that acts are presumed to be regular and valid.³⁵ This rule of law, which applies with even greater force to acts performed by a government, bestows upon the party alleging an exception to it the burden of establishing the irregularity. "Recalling that it is the duty of every State to exercise its criminal jurisdiction over those responsible for international crimes,"³⁶ and noting that Bin

29. As to such applications, the rules provide that "[t]he Pre-Trial Chamber shall decide on the procedure to be followed and may take appropriate measures for the proper conduct of the proceedings. It may hold a hearing." *Id.* at R.55(1).

30. Ntanda Nsereko, *supra* note 27, at 401.

31. Wigmore refers to this as "the peculiar double aspect of the burden of proof." WIGMORE, *supra* note 1, § 2483.

32. CROSS & TAPPER ON EVIDENCE 133-34 (Colin Tapper ed. 10th ed. 2004).

33. Leo P. Martinez, *Tax Collection and Populist Rhetoric: Shifting the Burden of Proof in Tax Cases*, 39 HASTINGS L.J. 239, 254 (1987) (remarking that this is true of the United States).

34. *Keyes v. School Dist. No. 1*, 413 U.S. 189, 209 (1973) (citing WIGMORE, *supra* note 1, § 2486). This approach also has its roots in continental procedure. For example, section 177 of the Dutch Code of Civil Procedure provides that "[t]he party which invokes legal consequences of facts or rights stated by it must prove such facts or rights, unless a different distribution of the burden of proof follows from a special rule or from requirements of *reasonableness and fairness*." Cited in Heleen E.M. Velthuyse & Francine M. Schlingmann, *Prospectus Liability in the Netherlands*, 10 J. INT'L BANKING L. 229, 230 (1995) (emphasis added).

35. BIN CHENG, *GENERAL PRINCIPLES OF LAW AS APPLIED BY INTERNATIONAL COURTS AND TRIBUNALS* 305 (1953).

36. ICC Statute, *supra* note 2, at preamble, ¶ 6.

Cheng, no doubt a reputable authority, avows that the presumption³⁷ of regularity and validity trumps allocation rules,³⁸ the pertinence of such rules, at first blush, appears tenuous at best.

Invoking the presumption of regularity and validity means that it will be assumed that matters are being appropriately dealt with by national justice systems. Thus, Cheng's approach seems to dictate that the burden of persuasion regarding establishing admissibility before the ICC will initially rest, without exception, upon the party³⁹ (in the context of article 18(2) applications, the prosecutor) that asserts inability or unwillingness. Before embracing this position as one that provides a universal answer to the question of complementarity burden allocation, however, it makes sense to look closely at the factors that gave rise Cheng's position.

Cheng's international law universe did not include a body similar to the ICC, but rather involved tribunal activity where states were party to the proceedings. Part and parcel of Cheng's assessment of the presumption of regularity and validity of acts is the fact that the international responsibility of a state is not to be presumed and, accordingly, that the burden of proof rests with a party asserting a violation of international law that gives rise to international responsibility.⁴⁰ Seen in this light, one can comprehend his decision to deem such a presumption superior to allocation rules: the scenarios envisaged by him were those in which the "presumption in favour of every State[] correspond[s] very nearly to the presumption in favour of the innocence of every individual in municipal law."⁴¹ It is, in effect, an element of due process for states in the realm of international adjudication and, as a result, ought to dictate the assignment of the burden of persuasion.

Yet in complementarity proceedings before the ICC, the territorial state is not a party to the litigation and, upon an adverse finding, incurs no international responsibility.⁴² Therefore, it seems fair to ask whether this general principle continues to reign supreme over allocation rules when it is stripped of its parallel to the presumption of innocence. It

37. The use here of the word presumption and derivatives thereof remains true to the manner in which the principle is generally referred. However, it may give rise to confusion, particularly when considered alongside actual legal presumptions. True legal presumptions, discussed in detail *infra*, at III.B.3.a, are legal rules which require that a particular inference be drawn when certain evidence has been adduced. The presumption of regularity, on the other hand, requires no evidentiary showing as a precursor to its applicability. In this sense, it is submitted that the presumption of regularity is as much of a misnomer as the presumption of innocence. "The [latter] phrase is probably better called the 'assumption of innocence' in that it describes our assumption that, in the absence of contrary facts, it is to be assumed that any person's conduct upon a given occasion was lawful." KENNETH S. BROWN ET. AL., MCCORMICK ON EVIDENCE § 342 (John W. Strong, ed., 5th ed. 1999) (noting that assignments of burdens of proof prior to trial are not based on presumptions).

38. CHENG, *supra* note 35, at 334-35.

39. For ease of reference, the term party will be used throughout. It is important to note, however, that entities involved in complementarity questions may not actually be parties to the ICC proceeding, as relevant applications, challenges, and appeals may be made by, for example, concerned states and by the Security Council.

40. CHENG, *supra* note 35, at 305-06.

41. Corfu Channel (Merits), 1949 I.C.J. 119 (Apr. 9) (Ecer, J., dissenting). Judge Ecer's deduction is the result of a similar analysis: he draws the above conclusion after referencing the work of Schwarzenberger that notes the presumption of state conformity with international law. *Id.*

42. It may be that a violation of international law has been alleged in order to establish complementarity, for instance, a betrayal of *aut dedere aut judicare* in instances where genocide or grave breaches have been alleged. Such a violation, however, would be incidental to the prosecution at hand and the Court would have no jurisdiction to hold the state responsible for it.

is submitted that it does not; rather the presumption of regularity will then be subsumed into the "wider principle that what exists as a general rule will be presumed"⁴³ The end result, then, is nothing more than an allocation rule: the burden of persuasion may be assigned to the party alleging the least likely state of affairs.⁴⁴

This possibility must, however, be considered alongside numerous other rules as "[t]here are no hard and fast standards governing the allocation of the burden of proof in every situation."⁴⁵ Among other possibilities, the burden may be apportioned to one asserting an affirmative allegation, one who is to prove a negative assertion, the party to whose case a fact is essential, or one who has a peculiar means of knowledge to prove a fact's falsity.⁴⁶ In short, burden allocation may turn upon any one of a number of factors such as policy considerations, convenience, fairness, judicial estimate of the probabilities and the tendency to place the burden on the party desiring change.⁴⁷

In addition to the aforementioned, virtually every legal system recognizes the rule of *actori incumbit probatio* or, the party putting forth the claim is required to establish its requisite elements of law and fact.⁴⁸ This has become "the broad basic rule with respect to the allocation of the burden of proof in international procedure,"⁴⁹ not unlike domestic systems wherein "[t]he pleadings . . . provide the common guide for apportioning the burdens of proof."⁵⁰

Regarding article 18(2) applications, there does not appear to be any compelling reason to depart from this broad basic rule. In addition to the argument that the doctrine of assigning the burden of proof to the party with unique knowledge should not be overemphasized,⁵¹ the end result of applying the basic rule in this case comports with the Rome statute's suggestion in favor of inadmissibility.⁵² Thus, applying the rule here denotes a prosecutorial burden of persuasion.⁵³ Simply put, in order to succeed in its request of the Court, the prosecution must substantiate the assertions that form the basis of its application. This conclusion then raises the question as to what ought to be the relevant standard of

43. CHENG, *supra* note 35, at 306. Here again it could be asserted that this wider rule is a presumption that trumps rules of allocation, but the argument against this is the same as that raised with regard to the presumption of regularity. One needs to develop an appreciation for the context in which Cheng's conclusions were drawn in order to appreciate their relevance in other frameworks, particularly with regard to jurisdictions of a sui generis character such as the ICC.

44. "The risk of failure of proof may be placed upon the party who contends that the more unusual event has occurred." MCCORMICK, *supra* note 37, § 337 (noting that this is a frequent consideration in fixing burdens of proof).

45. *Keyes*, 413 U.S. at 209.

46. See generally WIGMORE, *supra* note 1, § 2486.

47. MCCORMICK, *supra* note 37, § 337.

48. See, e.g., MOJTABA KAZAZI, BURDEN OF PROOF AND RELATED ISSUES: A STUDY ON EVIDENCE BEFORE INTERNATIONAL TRIBUNALS 54-66 (1996) (tracing the history of the rule and noting its applicability in Islamic law and common and civil law jurisdictions).

49. *Id.* at 116. Kazazi notes the rule is recognized in virtually all of the world's legal systems and that, despite different spins in application, "the essence of the rule remains the same. . . ." *Id.* at 116-17.

50. MCCORMICK, *supra* note 37, § 337.

51. *Id.*

52. ICC Statute, *supra* note 2, at art. 17(1). "[T]he Court shall determine that a case is inadmissible where:" This statutory hint could affect the judicial estimate of the probabilities such that, applying this allocation rule, admissibility may be deemed an unusual event which its proponent must prove.

53. Ntanda Nsereko allocates the burden of proof regarding article 18(2) applications upon the Prosecutor "[i]n accord with the principle that he who asserts must prove. . . ." Ntanda Nsereko, *supra* note 27, at 401.

proof and, within this inquiry, whether the prosecutor ought to be the sole bearer of the burden of persuasion.

B. WHAT IS THE APPLICABLE STANDARD OF PROOF?

The absence of an express standard of proof for admissibility/complementarity determinations may be seen by some as an effort to mirror the approach generally employed by the ICC's international counterparts. By and large, "[t]he international regime appears to reflect the civil law system, in which all that is needed is that the court be persuaded, without reference to a specific standard."⁵⁴ An inherent feature of this chosen method is the principle of flexibility, a commonly endorsed approach in the international legal realm. Indeed, it has been argued that it is the latitude obtained as a result of not being tied to a specific standard that enables the relevant court or tribunal to accomplish what it ought.⁵⁵ It is in this vein that one observer embraces a somewhat fluid approach for the new Court, maintaining that "[t]he ICC has a better chance of developing into a functional institution if it retains a degree of flexibility concerning the implementation of complementarity."⁵⁶

Consequently, the temptation may be strong for the ICC to refrain from articulating an applicable standard of proof when encountering and addressing the issue of complementarity/admissibility. Yet, before doing so, the Court ought to bear in mind that such an approach, though widespread, is far from universally endorsed.⁵⁷ Further, if employed by the ICC, it will inevitably encounter its fair share of criticism. Amongst the complaints will be its unpredictability: by employing such a method, there is "little to help parties appearing before the Court . . . [to know] what is likely to satisfy the Court."⁵⁸ Regardless of the ICC's determination in this regard, however, the fact remains that the Court will, in fact, apply some type of standard when making admissibility determinations.

To date, academic commentary regarding the applicable standard of proof for ICC admissibility determinations is far from settled and has tended not to address the requisite level of proof in terms of specific and known standards.⁵⁹ Rather, commentators have run the gamut from the use of cautiously neutral terminology⁶⁰ to language that implies the use

54. Eduardo Valencia-Ospina, *Evidence Before the International Court of Justice*, 1 INT'L L.F. 202, 203 (1999) (observing that the "concept of an identifiable or quantifiable standard of proof emanates from common law systems . . .").

55. See, e.g., *Maritime Delimitation and Territorial Questions Between Qatar and Bahrain* (Qatar v. Bahrain), 1995 I.C.J. 6, 63 (Feb. 15) (dissenting opinion of Judge Shahabuddeen, (averring that "the standard of proof varies with the character of the particular issue of fact [and that a] higher than ordinary standard may, for example, be required in the case of a charge of 'exceptional gravity against a State'") (internal citation omitted)).

56. Bartram S. Brown, *Primacy or Complementarity: Reconciling the Jurisdiction of National Courts and International Criminal Tribunals*, 23 YALE J. INT'L L. 383, 433 (1998).

57. "[T]he fact that the standard of proof is usually not discussed by international tribunals is not justifiable." KAZAZI, *supra* note 48, at 325.

58. *Oil Platforms* (Iran v. U.S.), 42 I.L.M. 1334 (Nov. 6, 2003) (separate opinion of Judge Higgins, ¶ 33) (noting also, at ¶ 30, that "in a case in which so very much turns on evidence, it [is] to be expected that the Court would clearly . . . state[] the standard of evidence . . . necessary for a party to . . . discharge[] its burden of proof").

59. Ntanda Nsereko represents an exception to this observation. Ntanda Nsereko, *supra* note 27, at 401-02 (ascribing a preponderance of the evidence standard to two admissibility scenarios).

60. See, e.g., Helen Duffy, *National Constitutional Compatibility and the International Criminal Court*, 11 DUKE J. COMP. & INT'L L. 5, 19 (2001) (using the term satisfy). The term satisfy is deemed to "provide a neutral formulation of the standard of proof." Report of the Working Group on Arbitration on the work of the thirty-ninth session (Vienna, 10-14 November 2003), ¶ 28, United Nations Commission on International Trade Law, UN Doc. A/CN.9/545*(2003).

of a strict standard.⁶¹ In assessing the prospective standards of proof that may be applied by the Court when making its article 18(2) determination, it is arguably beneficial to look to the approach employed by other international courts and tribunals regarding jurisdiction. Such an approach does not deny that there is a difference between jurisdiction and admissibility,⁶² but indeed focuses on the functional effect of complementarity, as it “concerns the allocation of jurisdiction between domestic courts and the ICC.”⁶³

1. *Beyond a Reasonable Doubt*

In international jurisprudence, one finds support for the use of a number of different standards in determining jurisdiction, including the standard of beyond a reasonable doubt. According to a dissenting opinion of the International Court of Justice (ICJ), that Court must be “conclusively satisfied—satisfied beyond a reasonable doubt—that jurisdiction does exist.”⁶⁴ Whether this is, in fact, the standard employed by the ICJ, however, is far from clear. Majority opinions of the ICJ state, citing the jurisprudence of the Permanent Court of International Justice, that the arguments in favor of jurisdiction must be preponderant.⁶⁵ According to one judge, “the real concern of the two Courts has been to verify whether or not it was the intention of [the states] to submit their disputes to the Court”⁶⁶

Regardless of the actual standard employed by the ICJ, the question remains whether the beyond a reasonable doubt benchmark makes sense in the context of jurisdictional (and, by analogy, quasi-jurisdictional) determinations. Many would contend that it does not, citing the fact that jurisdictional elements need not be proved in the same manner as the material elements of a criminal charge.⁶⁷ Indeed, “the standard of proof beyond a reasonable doubt belongs to criminal prosecutions only, where the conventional policy holds that the evil of convicting an innocent person is by far greater than that of a guilty person escaping conviction.”⁶⁸ This sentiment is echoed in the case law of the International Criminal Tribunal for the Former Yugoslavia (ICTY). In the *Celebici* judgment, the ICTY noted that the standard of proof in criminal cases is that of beyond a reasonable doubt; however, it also stated that “the burden is different . . . when the allegation made by the prosecutor is

61. See, e.g., John T. Holmes, *Complementarity: National Courts versus the ICC*, in 1 *THE ROME STATUTE OF THE INTERNATIONAL CRIMINAL COURT: A COMMENTARY* 667, 675 (Cassese, Gaeta & Jones, eds., 2002) (averring that the standards that must be met in order to have a case declared admissible are undoubtedly high).

62. “[T]he question of admissibility arises at a subsequent stage [to jurisdiction] and seeks to establish whether matters over which the Court *properly has jurisdiction* should be litigated before it.” SCHABAS, *supra* note 3, at 68 (emphasis added).

63. Jeffrey L. Bleich, *Complementarity*, 25 *DENV. J. INT’L L. & POL’Y* 281, 281 (1997); see also Comments of Leila Sadat Wexler, Panel Discussion, *Association of American Law Schools Panel on the International Criminal Court*, 36 *AM. CRIM. L. REV.* 223, 248-49 (1999) (dubbing complementarity quasi-jurisdictional). It is on this basis that the analogical value of jurisdictional jurisprudence rests.

64. *South West Africa Cases (Ethiopia v. South Africa; Liberia v. South Africa)*, 1962 ICJ 319, 473 (Dec. 21) (dissenting opinion of Judges Spender & Fitzmaurice).

65. See, e.g., *Fisheries Jurisdiction Case (Spain v. Canada)* 1998 ICJ 432, ¶ 38 (Dec. 4).

66. *Aegean Sea Continental Shelf Case (Greece v. Turkey)*, 1978 ICJ 3, 71 (dissenting opinion of Judge De Castro) (Dec. 19). *But see*, Dissenting Opinion of Judge Shahabuddeen, *supra* note 55, at 63-64 (indicating that the jurisdiction of the Court implies a heightened standard to what is deemed preponderant).

67. See, e.g., *Stuber v. Hill*, 170 F. Supp. 2d 1146, 1154 (2001) (noting that proof beyond a reasonable doubt is necessary to prove “every fact necessary to constitute the crime . . . charged . . . [but that] subject matter jurisdiction is not an element of the crime that must be proved beyond a reasonable doubt”).

68. M. Aghahosseini, *Evidence Before the Iran-United States Claims Tribunal*, 1 *INT’L L.F.* 208, 213 (1999).

not an essential element of the charges in the indictment."⁶⁹ In such instances, the ICTY informs, the relevant standard of proof is that of a civil case: that is to say by the preponderance of the evidence or, in the words of the ICTY, on "the balance of probabilities."⁷⁰

2. *Preponderance of the Evidence*

One commentator has embraced the balance of probabilities standard, thereby deeming that the beyond a reasonable doubt criterion is inapplicable to article 18(2) decisions. According to Ntanda Nsereko, "the Prosecutor bears the evidentiary and legal burden to prove on a preponderance of [the] evidence that valid grounds exist to justify the Pre-Trial Chamber granting him or her authority to carry out the investigations."⁷¹ Undoubtedly, international jurisprudence is replete with support for this determination. "With respect to the standard of proof, it is generally accepted that the preponderance of the evidence is predominantly applicable in international procedure."⁷²

An endorsement of the standard can also be gleaned, a bit closer to home, in Bassiouni's work on the ICTY. As is commonly discussed, the ICTY and its sister tribunal, the International Criminal for Rwanda (ICTR), enjoy a relationship with domestic courts that is opposite to that which was adopted for the ICC. The two tribunals have concurrent jurisdiction with domestic courts, yet each has the benefit of primacy, meaning each may request that a domestic court defer to its competence.⁷³ However, similar to the ICC prosecutor's article 18(2) application, the prosecutor of the relevant tribunal must also obtain court approval in order for a formal deferral request to be issued. Also akin to the ICC complementarity/admissibility conundrum, the tribunals' statute and rules do not "contain the objective legal criteria and standard of proof to be used in deciding deferral."⁷⁴ To remedy this defect, Bassiouni proposed that, in instances wherein the concerned state is informed of the prosecutor's request for deferral and fails to answer or appear, the Chamber would then "hold a hearing and decide by a preponderance of the evidence presented by the prosecutor whether there are grounds for pre-emption."⁷⁵

In practice, both the ICTY and ICTR have held hearings on the issue of deferral, sometimes in the absence of the concerned state. A review of the relevant decisions reveals that the ad hoc tribunals have followed the lead of their international counterparts and have refrained from referring to a specific standard of proof. Rather, the tribunals tend to employ neutral terminology, such as that of satisfaction.⁷⁶ However, this does not mean that one

69. Prosecutor v. Delalic, Case No. IT-96-21-T, Judgment, ¶¶ 601-02, (Nov. 16, 1998).

70. *Id.* ¶ 603.

71. Ntanda Nsereko, *supra* note 27, at 401.

72. Mojtaba Kazazi & Bette E. Shifman, *Evidence before International Tribunals—Introduction*, 1 INT'L L.F. 193, 195 (1999).

73. The Secretary-General, *Report of the Secretary-General Pursuant to Paragraph 2 of Security Council Resolution 808* (1993), annex, *Statute of the International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the Former Yugoslavia Since 1991*, art. 9, U.N. Doc. S/25704, (May 3, 1993); S.C. Res. 955, annex, *Statute of the International Criminal Tribunal for Rwanda*, art.8, U.N. Doc. S/RES/955 (Nov. 8, 1994).

74. M. CHERIF BASSIOUNI & PETER MANIKAS, *THE LAW OF THE INTERNATIONAL CRIMINAL TRIBUNAL FOR THE FORMER YUGOSLAVIA*, 318 (1996).

75. *Id.* at 318-19.

76. See, e.g., Prosecutor v. Karadzic, Case No. IT-95-5-D, Decision on the Bosnian Serb Leadership Deferral Proposal, ¶¶ 20 & 27, (May 16, 1995); In re The Republic of Macedonia, Case No. IT-02-55-MISC.6, Decision on the Prosecutor's Request for Deferral and Motion for Order to the Former Yugoslavia Republic of Macedonia, ¶¶ 30, 41, & 44 (Oct. 2, 2002).

cannot discern something about the level of proof required by the tribunals with regard to these deferral requests.

Although not every deferral request has been made on the basis that the matter in issue may have implications for investigations or prosecutions before the ICTY or ICTR (one of the three bases upon which a request can be made)⁷⁷ all of the tribunals' decisions have turned on this condition.⁷⁸ Accordingly, the approach of the two tribunals has been consistent in that each requires its prosecutor to establish three things: that national investigations or criminal proceedings have been instituted regarding an individual or incident; that the prosecutor is currently conducting an investigation into similar crimes; and that the national investigations or proceedings relate to or involve factual or legal questions that may have implications for tribunal investigations or prosecutions.⁷⁹

In each case, the prosecution has made affirmative representations as to the existence of all three factors (national activity, prosecutorial activity, and implications for same). Occasionally, the prosecution has buttressed these claims with documentary backing, either as to the existence of a national investigation or prosecution,⁸⁰ or in support of the fact that the national activity may have implications for tribunal investigations.⁸¹ Requests granted in less substantiated cases have either not been disputed by the relevant state, been accompanied by the state's approval (sometimes tacit), or included no position on the part of the state other than a blanket willingness to comply with the tribunal decision.⁸²

With regard to those cases falling into the latter category, one may argue that the prosecutorial showing was not such as would meet the standard of preponderance of the evidence. This would seem to be the case with regard to the deferral request in the matter of *Radio Television Libre des Milles Collines Sarl (RTL)*, in which the decision notes only that the prosecution furnished facts that the Kingdom of Belgium was in the process of investigating persons associated with the RTL.⁸³ These facts appear to be little more than unrefuted allegations, yet coupled with statements averring the existence of the remaining two factors and the prosecution's representation that Belgium was not opposed to deferring

77. International Tribunal for the Prosecution of the Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the Former Yugoslavia since 1991: Rules of Procedure and Evidence, R.9, UN Doc. IT/2 (1994) [hereinafter ICTY RPE], available at <http://www.un.org/icty/>; International Criminal Tribunal for Rwanda, Rules of Procedure and Evidence, R. 9, UN Doc. ITR/1 (1996), available at <http://www.ictt.org>.

78. JOHN R.W.D. JONES & STEVEN POWLES, *INTERNATIONAL CRIMINAL PRACTICE* 381-82 (3d ed. 2003) (noting that, with regard to the *Vukovar Three*, the prosecution based its deferral request on a lack of impartiality or independence in the courts of the requested state (R.9(ii) of the ICTY RPE), but that the request was granted per the overlap with investigations or proceedings before the Yugoslav Tribunal (R.9(iii), ICTY RPE).

79. See, e.g., *Prosecutor v. Tadic*, Case No. IT-94-1-T, Decision of the Trial Chamber on the Application by the Prosecutor for a Formal Request for Deferral, annex, ¶ 11, (Nov. 8, 1994), available at <http://www.ejil.org/journal/Vol6/No1/art11.html>; *Prosecutor v. Bagosora*, Case No. ICTR-96-7-D, Decision of the Trial Chamber on the Application by the Prosecutor for a Formal Request for Deferral ¶ 9, (May 17, 1996).

80. *Prosecutor v. Bagosora*, Case No. ICTR-96-7-D ¶ 10; *Prosecutor v. Karadzic*, Case No. IT-95-5-D ¶¶ 2-3; *Prosecutor v. Musema*, Case No. ICTR-96-5-D, Decision of the Trial Chamber on the Application by the Prosecutor for a Formal Request for Deferral ¶ 9, (Mar. 12, 1996).

81. *Prosecutor v. Tadic*, Case No. IT-94-1-T ¶ 14.

82. See, e.g., *In re The Republic of Macedonia*, Case No. IT-02-55-MISC.6 ¶ 18; *Prosecutor v. Radio Television Libre des Milles Collines Sarl*, Case No. ICTR-96-6-D, Decision of the Trial Chamber on the Application by the Prosecutor for a Formal Request for Deferral, ¶ 13, (Mar. 12, 1996).

83. *Prosecutor v. Radio Television Libre des Milles Collines Sarl*, Case No. ICTR-96-6-D ¶ 3.

its investigations to the competence of the Tribunal,⁸⁴ the prosecutorial showing was deemed sufficient for the Trial Chamber to grant the motion. This type of approach suggests the possibility that some of the tribunals' affirmative rulings on prosecutorial requests for deferral may in fact have been made on the basis of *prima facie* evidence.

3. *Prima Facie Evidence*

According to one source, *prima facie* evidence is evidence "which, unexplained or uncontradicted is sufficient to maintain the proposition affirmed."⁸⁵ For most lawyers, the term *prima facie* evidence will instantly call to mind a low threshold.⁸⁶ Despite this, such evidence, "if unrebutted, is usually an acceptable standard of proof before international tribunals."⁸⁷ Indeed, contrary to the sentiment expressed by certain ICJ judges, this has even been the case with regard to jurisdictional determinations. One such example can be found in the jurisprudence of the Iran-United States Claims Tribunal in which that tribunal held that *prima facie* evidence was sufficient to establish corporate nationality, a requirement for jurisdiction.⁸⁸

In support of this approach, the tribunal turned to the work of other international bodies, including that of the Mexican-United States General Claims Commission. Notably, that entity asserted, "when the claimant has established a *prima facie* case and the respondent has offered no evidence in rebuttal the latter may not insist that the former pile up evidence to establish its allegations beyond a reasonable doubt without pointing out some reason for doubting."⁸⁹ In line with this rationale, *prima facie* evidence, once established, operates to shift the earlier noted burden of production from the party that holds the burden of persuasion to the other party.⁹⁰

Considering the aforementioned in the context of article 18(2) applications, some will likely argue that a showing of *prima facie* evidence is too lenient a standard by which to establish admissibility. On the other hand, such an approach could conceivably have a place within the proceedings. For example, the use of a lesser burden may help to lessen the divide between rich and poor states before the ICC. It has been noted that it may be easy to prove that the justice system in an impoverished state is unable to investigate or prosecute a case, but that "the difficulties involved in challenging a State with a sophisticated and functional justice system would be virtually insurmountable."⁹¹ A lesser burden on behalf of the prosecution in instances wherein unwillingness to carry out an investigation or prosecution is alleged thus may serve to level the playing field for all states.

84. *Id.* ¶ 13.

85. KAZAZI, *supra* note 48, at 328 (citing *Kling (USA) v. United Mexican States*, 4 R. Int'l Arb, Awards 585) (averring that *prima facie* evidence, though a widely known term, is essentially difficult to define).

86. "Starting from the lowest degree of proof which could easily be described as insufficient evidence and moving upwards, the first notable stage is the one which in legal literature is referred to as *prima facie* evidence." *Id.*

87. *Id.* at 336-37.

88. *Flexi-Van Leasing, Inc. v. The Islamic Republic of Iran*, 1 IRAN-U.S. C.T.R. 455 (1982).

89. *Id.* (quoting the *Parker Case*, 4 R. Int'l Arb. Awards 39 (1926)). The tribunal also found support in the jurisprudence of the ICJ. "[S]ome *prima facie* distribution of the burden of proof there must be. . . . The degree of burden of proof thus to be adduced ought not to be so stringent as to render the proof unduly exacting." *Id.* (citing the *Case Concerning Certain Norwegian Loans*, 1957 ICJ 39-40).

90. KAZAZI, *supra* note 48, at 332.

91. SCHABAS, *supra* note 3, at 86 (attributing this argument to Louise Arbour).

An additional consideration revolves around the impetus for implementing a *prima facie* standard. It has been established that less conclusive proof may be acceptable "where proof of a fact presents extreme difficulty."⁹² Arguably, this will be the case when it is incumbent upon the prosecution to prove the unwillingness of a state,⁹³ as the state "will have most of the information relevant to the determination in [its] possession."⁹⁴ In light of this fact, one might assert that it is appropriate to employ a mechanism that would shift the burden of producing evidence onto the state that asserts superior jurisdiction.

Further, one could argue that the ICC statute and rules are, in fact, amenable to such an approach. For example, the Statute singles out three factors for the Court to consider in determining whether a state is unwilling to investigate or prosecute; including whether "[t]here has been an *unjustified* delay in the proceedings"⁹⁵ Thus, the very wording of this provision anticipates rebuttal on behalf of the concerned state.⁹⁶ In addition, rule 51 provides that, in making determinations regarding complementarity, the Court may consider information previously provided by the state, along with any additional information it may choose to present to the Court.⁹⁷ It has been argued that this provision will create the expectation that a state challenging the jurisdiction of the Court will offer information regarding its national proceedings and that "the absence of [such] information may make the Prosecutor's burden much easier."⁹⁸ Such an interpretation is arguably compatible with a *prima facie* standard.

Should the Court embrace such an approach with regard to allegations of unwillingness, two things need to be kept in mind. The first is that the standard may be desirable, insofar as its encouragement of state input may enhance the merit of the Court's ultimate determination—access to more evidence and the best evidence "will likely result in a more informed decision."⁹⁹ Equally important, however, is that the standard not be applied too loosely, and regardless of whether the concerned state rebuts the *prima facie* showing, the Court must remain convinced that admissibility has been established.¹⁰⁰

a. Beyond *Prima Facie*: A Place for Presumptions?

An alternative approach may be employed once a *prima facie* case has been made in that the Court may decide to then utilize a legal presumption. Presumptions of law are judge-

92. CHENG, *supra* note 35, at 325.

93. "It is not an easy matter to prove the existence of bad faith, because it is concerned with a matter belonging to the inner psychological process, particularly in a case concerning a decision by a State organ." Case Concerning The Barcelona Traction, Light and Power Company, Limited (Belg. v. Spain) 1970 ICJ 3, 159 (Feb. 5).

94. Christopher K. Hall, *Article 19, Challenges to the jurisdiction of the Court or the admissibility of a case*, in COMMENTARY ON THE ROME STATUTE, *supra* note 5, 405, 409.

95. ICC Statute, *supra* note 2, at art. 17(2)(b) (emphasis added).

96. See, e.g., Williams, *supra* note 5, at 391 (stating that, in choosing the word *unjustified*, "it was implicit that a State [sic] would have the right to in fact justify its actions in delaying proceedings domestically before the Court could determine that [the] case was indeed admissible") (emphasis added); see also Holmes, *supra* note 61, at 676. Holmes appears to take his interpretation a step further, arguing that "proceedings which exceed the usual national practice and which are not convincingly explained may constitute an unjustified delay or even a shielding of the person from criminal responsibility." (emphasis added).

97. ICC Rules, *supra* note 6, at R.51.

98. Holmes, *supra* note 61, at 677.

99. Bleich, *supra* note 63, at 291.

100. In this regard, *prima facie* evidence does not simply mean some evidence. See, e.g., KAZAZI, *supra* note 48, at 337 (cautioning that standard of proof may not be taken lightly and that unconvincing evidence may not be accepted as *prima facie* evidence).

made (or statutory) rules, which require, once certain factual foundations have been laid, that particular conclusions are drawn.¹⁰¹ Generally, there exists an inferential relationship between the factual foundation and the conclusion, but the key issue that defines legal presumptions is not this relationship. Rather the fact finder will always be free to draw such inferences in the absence of any legal rules.¹⁰² What is of import, then, is the effect of a presumption: once operational, it requires that a particular conclusion be drawn, absent a showing to the contrary. Therefore, the application of a presumption makes it incumbent upon the party against whom it operates to make an evidentiary showing lest it suffer an adverse ruling.¹⁰³

The application of a legal presumption upon a *prima facie* prosecutorial showing in article 18(2) applications, therefore, offers several distinct differences to the use of a *prima facie* standard alone. First, for those dissatisfied with the application of the lesser standard, the operation of a presumption may be seen to augment the standard of proof.¹⁰⁴ Moreover, the application of presumptions involves a greater element of certainty. Both parties will be in a better position to ascertain, at least initially, the level of proof necessary to satisfy the Court. In addition, it provides a heightened prospect for correct decision making on the basis of more and better evidence. Whereas under the *prima facie* standard the state may choose to take its chances and remain silent, when a presumption is in operation there is an unequivocal impetus for the territorial state (in this scenario, the party against whom it operates) to rebut the presumed fact.

The argument that presumptions result in more and better evidence, however, is dependent upon the Court's determination as to the type of evidence necessary to undo the effect of presumptions. Indeed, the merit of employing presumptions could easily be called into question if one subscribes to the theory that what needs to be produced is simply some evidence dispelling the presumed fact.¹⁰⁵ Should the Court adopt this bursting bubble theory,¹⁰⁶ requiring that the opponent (here, the state asserting jurisdiction) simply adduce some amount of positive evidence, credible or otherwise—this would hardly assist in the goal of achieving a proper outcome. The validity of this can be seen when one considers the rationale that supports the use of a presumption in this case, namely the state's unique

101. CROSS & TAPPER, *supra* note 32, at 148.

102. WIGMORE, *supra* note 1, § 2491.

103. "If the presumption is mandatory, the court must direct a verdict against the silent opponent." Note, *A Survey of Procedural Presumptions in the District of Columbia Part I*, 45. GEO. L.J. 410, 422 (1956-57) [hereinafter, *A Survey of Procedural Presumptions*].

104. In a distinct but related manner, Cheng notes that when *prima facie* evidence has been established, the non-production of available counter-evidence may give rise to an adverse presumption "sufficient to create a moral conviction as to the truth of an allegation." CHENG, *supra* note 35, at 325; see also Edmund M. Morgan, *Some Observations Concerning Presumptions*, 44 HARV. L. REV. 906, 908 (1930-31) (noting that in a substantial number of jurisdictions, presumptions are declared to be evidence and have probative value).

105. Wigmore ascribes to this view with regard to dispelling presumptions. WIGMORE, *supra* note 1, § 2491.

106. This is embodied in (U.S) Federal Rule of Evidence 301 despite the fact that that accompanying commentary from the Advisory Committee expresses a rejection of the Thayerian bursting bubble theory that provides that the presumption vanishes (bursts) upon the introduction of evidence that would support a finding of the non-existence of the presumed fact, whether believed or not. The Advisory Committee commentary was written to accompany a proposed rule regarding presumptions that was subsequently rejected by Congress. G. Michael Fenner, *Presumptions: 350 Years of Confusion and It Has Come to This*, 25 CREIGHTON L. REV. 383, 385, n.7 (1992).

control over or singular access to relevant evidence.¹⁰⁷ For a state asserting jurisdiction in an admissibility proceeding, "[s]uch control and knowledge present too fruitful opportunities for fabrication to permit the mere introduction of uncredited testimony to destroy the presumption."¹⁰⁸

This observation, however, raises both legal and political questions. Requiring the concerned state to disprove admissibility (the presumed fact), may be seen as shifting the burden of persuasion from the prosecutor to the state. This flies in the face of extensive legal authorities, municipal and international, which espouse the principle that the burden of persuasion never shifts.¹⁰⁹ This concept is so pervasive that in both legal writings and jurisprudence it is alleged to have "a soporific effect upon the mental processes of even the greatest judges."¹¹⁰ As a result, perhaps the assertion ought to be questioned rather than taken at face value simply because it has been oft-repeated. Upon consideration, the principle clearly produces the possibility that the rationale behind the creation of a presumption may, no matter how lofty or valuable, easily be undermined.¹¹¹ Of even greater import, however, the theory is defied by the practice of domestic and international courts.¹¹²

In this regard, it is perhaps beneficial to review the approaches employed in the jurisprudence of the Human Rights Committee (HRC) and the European Court of Human Rights (ECHR) in matters involving evidence that lies wholly, or in large part, within the exclusive knowledge of a state. While the jurisprudence of the HRC seems to speak of burden sharing,¹¹³ a close examination of its relevant case law reveals that what is at issue is most like burden shifting. In numerous instances, upon a showing of corroborated allegations, the HRC has considered the allegations "as substantiated in the absence of satisfactory evidence and explanations to the contrary submitted by the State party."¹¹⁴ This suggests that a legal presumption is in operation upon the showing of supported allegations; moreover, the requirement that the presumed fact must be refuted by satisfactory evidence, in conjunction with the HRC's assertion that the burden of proof cannot rest on the author alone, supports the idea of a burden shift.

107. "[T]he generally accepted reasons for creating presumptions correspond to a large degree with the considerations determining the allocation of the burden of persuasion." Morgan, *supra* note 104, at 929.

108. *Id.* at 927.

109. See, e.g., WIGMORE, *supra* note 1, § 2489 (asserting that "no fixed rule of law can be said to shift"); KAZAZI, *supra* note 48, at 36 (averring that "the burden of proof as a fundamental obligation does not shift, and remains on the party that bears it throughout the proceedings").

110. Morgan, *supra* note 104, at 927, n.34 (referring to the same as a false formula).

111. *Id.*

112. See, e.g., Keyes, 413 U.S. at 189 (shifting the burden of proving that segregated schools were not the result of intentionally segregative actions to the defendants upon a prima facie showing that a meaningful portion of a school system was created as part of an unlawful segregative design); *Yeager v. Islamic Republic of Iran*, 17 IRAN-U.S. C.T.R. 92, 104, ¶¶ 43-44 (finding sufficient evidence to establish a presumption that revolutionary guards were acting on behalf of the government and noting that the Iranian government (the respondent) failed to offer satisfactory evidence to the contrary); see also Karen Mills, *Corruption and Other Illegality in the Formation and Performance of Contracts and in the Conduct of Arbitration Relating Thereto* 5 INT'L ARB. L. REV. 126, 130 (calling for a shift in the burden of proof (persuasion) upon a reasonable indication of corruption to disprove the same on the basis that the opposing party has unique access to the evidence).

113. "[T]he burden of proof . . . cannot rest alone on the author of the communication." *Bleier v. Uruguay*, Comm. No. R.7/30, ¶ 13.3, U.N. Doc. Supp. No. 40 A/37/40 (Mar. 29, 1982).

114. *Id.*; see also *Almeida v. Uruguay*, Comm. No. 107/1981, ¶ 11, U.N. Doc. CCPR/C/19/D/107/1981, (Jul. 21, 1983); UNHRC 16 (Jul. 21, 1983); *Romero v. Uruguay*, Comm. No. 85/1981, U.N. Doc. Supp. No. 40 A/39/40 at 159 (Jul. 22, 1984).

Similarly, while ECHR case law at times refers to "strong presumptions of fact,"¹¹⁵ it also seems to employ legal presumptions. For example, upon a showing that an individual was taken into custody in good health yet was injured upon release, the Court has held that "it is incumbent on the state to provide a plausible explanation of how those injuries were caused."¹¹⁶ In the absence of such an explanation, the presumed fact is that the injuries were caused by the treatment the individual received in custody.¹¹⁷ Proffering a 'plausible' explanation does not seem to correlate with a high standard, however, and one might then argue that the use of presumptions at the ECHR does not result in a burden shift. However, in practice, the ECHR has rejected explanations as unconvincing,¹¹⁸ and has avowed that, with regard to injuries or death occurring in detention, "the burden of proof may be regarded as resting on the authorities to provide a satisfactory and convincing explanation."¹¹⁹

Therefore, while not universally endorsed, the possibility of shifting the burden of persuasion is one for which there exists academic and jurisprudential support. Returning to the issue of complementarity, one must confront the political issues that may attend a determination to employ this approach. For obvious reasons, the idea of a shifting burden may be one that might not enjoy great popularity amongst states parties.¹²⁰ Yet perhaps it goes without saying that, should the Court choose to employ a legal presumption in the context of article 18(2) applications, it ought to employ it in a manner that will enhance its decision making. Therefore, in light of the aforementioned political considerations, the Court will likely have to walk a fine line between some evidence and a standard that has the effect of shifting the burden of persuasion as to the concerned state.

4. Conclusion

Thus, this consideration of article 18(2) applications has brought to bear many of the issues that will generally arise with regard to complementarity determinations, such as the interplay between the presumption of regularity and allocation rules, relevant standards of proof, and the use of legal presumptions. As such, it serves to provide a partial framework for other instances in which complementarity determinations may arise. Not all issues have been covered; for example, the bearer of the burden of persuasion remains to be seen in complementarity determinations made pursuant to a state challenge or when the Court, on its own motion, decides to determine admissibility. These issues will be considered in the following section in the context of the Darfur referral.

IV. Complementarity and Security Council Referrals

As an initial matter, the pertinence of complementarity in relation to the Darfur situation must be established. It has been argued that the ICC statute, in particular article 19 that provides for a number of admissibility challenges, is ambiguous with regard to the rela-

115. *Avsar v. Turkey*, 37 Eur. Ct. H.R. 53 ¶ H13 (2003).

116. *Timurta v. Turkey*, 33 Eur. Ct. H.R. 6 ¶ H20 (2001).

117. *Ribitsch v. Austria*, 21 Eur. Ct. H.R. 573 ¶ H34 (1996).

118. *Id.*

119. *Avsar v. Turkey* 37 Eur. Ct. H.R. 53 ¶ H13 (2003).

120. See, e.g., Ruth B. Philips, *The International Criminal Court Statute: Jurisdiction and Admissibility*, 10 CRIM. L.F. 61, 66 (1999) (noting that while the principal of complementarity enjoyed universal support, "[i]ts interpretation and implementation were highly contested . . . underscoring the abundance of sovereignty issues, including . . . how best to articulate complementarity criteria to ensure their impartial application . . .").

tionship between complementarity and Security Council referrals.¹²¹ One relevant provision to this issue is found in the aforementioned article 18. Article 18(7) provides that, in those cases in which the prosecution has been successful in its article 18(2) application and the concerned state has launched an unsuccessful appeal to same, additional significant facts or a significant change in circumstances must accompany any subsequent admissibility challenge made by the state pursuant to article 19. Thus, the argument against article 19 creating a possibility for admissibility challenges to Security Council referrals is based upon an interpretation of this provision as requiring an article 18 challenge by a state as a mandatory prerequisite to the state's article 19 challenge.¹²²

It is argued, however, that such an interpretation is erroneous¹²³ and contrary to numerous rules of statutory interpretation. First, the plain language of article 18(7) makes no such reference and, on its face, does nothing more than place a limit upon unnecessary challenges,¹²⁴ a procedure commonplace in municipal jurisdictions.¹²⁵ Moreover, because the language of article 18 affirmatively and unequivocally limits its provisions to proprio motu investigations and state referrals, and because article 19 is completely void of any language of limitation, it is fair to infer that the same restrictions do not apply to the latter. In addition, even if article 18(7) were to be so construed, this would not affect the right of an accused to mount an admissibility challenge in the case of a Security Council referral, or the ability of the Court to, on its own motion, determine admissibility.¹²⁶

In the alternative, it has been argued that the Rome Statute only ostensibly preserves the complementarity principle, as the UN Charter dictates that its members comply with Security Council decisions.¹²⁷ This conclusion, however, inflates the operation of such decisions. Consider Resolution 1593—it does not mandate prosecutions or order the prosecutor to take any particular course of action, nor does it preclude Sudan from investigating or prosecuting matters that may be considered by the ICC prosecutor. The resolution simply refers the situation in Darfur to the prosecutor of the ICC.¹²⁸ The rules of the Court will then apply, giving rise to the possibility of no prosecution at all, as the prosecutor may determine that there is no reasonable basis, owing to inadmissibility or other factors, to proceed under the Statute.¹²⁹

121. See, e.g., *id.* at 64; Sadat & Carden, *supra* note 17, at 417.

122. Philips, *supra* note 120, at 81-82. As we have seen, article 18 applies solely to proprio motu investigations and state referrals and, as such, is inapplicable with regards to Security Council referrals.

123. In this regard, the author endorses the position espoused by Holmes: "Even where the Security Council has referred a situation and a case emerges, it is still subject to Article 19." Holmes, *supra* note 61, at 683.

124. See, e.g., Hall, *supra* note 94, at 408 (noting that article 18(7) will limit the possibilities of frivolous challenges).

125. In addition, a parallel can be drawn to article 18(3): mirroring the language of article 18(7), the provision allows the prosecution to review a deferral to a State "at any time when there has been a *significant change of circumstances* based on the State's unwillingness or inability genuinely to carry out an investigation." ICC Statute, *supra* note 2, at art. 18(3) (emphasis added).

126. *Id.* at arts. 19(1) & (2)(b).

127. Newton, *supra* note 14, at 49; see also U.N. Charter art. 25, para. 1.

128. "The Security Council . . . [a]cting under Chapter VII of the United Nations . . . [d]ecides to refer the situation in Darfur since 1 July 2002 to the Prosecutor of the International Criminal Court." S.C. Res. 1593, *supra* note 8, ¶ 1.

129. ICC Statute, *supra* note 2, at art. 53. "Before starting an investigation, I am required under the Statute to assess factors including crimes and admissibility." Press Release, Luis Moreno-Ocampo, ICC Chief Prosecutor, Security Council refers situation in Darfur to ICC Prosecutor, (Apr. 1, 2005), *available at* <http://www.icc->

Additionally, one must consider the recent Report of the International Commission of Inquiry on Darfur in which the relevance of complementarity vis-à-vis Security Council referrals was essentially sidelined by the Commission. According to the report, which was issued prior to the first ever Security Council referral, a referral "is normally based on the assumption that the territorial State is not administering justice because it is unwilling or unable to do so."¹³⁰ The Commission's caveat to this, however, is that "the final decision in this regard remains that of the ICC Prosecutor."¹³¹ The report then deduces that "complementarity will not usually be invoked *in casu* with regard to [the] State [not administering justice]."¹³²

These contentions do not stand up to close scrutiny. First, it is unclear as to how the International Commission of Inquiry could comment as to the normal assumption that gives rise to Security Council referrals when, at the time the report was written, no such referral had ever been made. Second, the logic involved implies that the ICC should abandon not only the preeminence but rather the entire application of one of its core principles, based upon an undefined assumption of a political body.¹³³ Moreover, the acknowledgement that the final decision regarding complementarity lies with the ICC prosecutor is only partially correct. This will only be the case if the prosecutor determines at the outset that the case is or would be inadmissible under article 17. In such instances, while the Security Council may request that the Pre-Trial Chamber review such a decision, upon review, the Chamber may only request that the prosecutor reconsider the decision.¹³⁴ Should the matter proceed to trial, however, it is the Court that may make the final decision with regards to complementarity pursuant to any one of the mechanisms provided for in article 19.

A final thought ought to be noted regarding the applicability of article 19 challenges to Security Council referrals before some of the article's mechanisms are considered. There will likely be those who maintain that to allow admissibility challenges in the case of Security Council referrals would not comport with legislative intent. This argument finds its roots in the position that admissibility issues were the intended mechanisms by which to curb the *proprio motu* powers of the prosecutor.

This may well be the case. However, it is also a matter that likely ought to have little bearing in light of the ultimate wording of the Statute. Article 19 clearly bestows upon the Court the right to make *sua sponte* determinations regarding the admissibility of a case and

cpi.int/pressrelease_details&id=98.html; see also Holmes, *supra* note 61, at 683 (noting that, even if a Council decision includes a determination that the state(s) concerned is unwilling or unable to investigate or prosecute, the Court as an independent body will not be bound by such a determination, though it will likely be given great weight in the context of admissibility challenges).

130. International Commission of Inquiry on Darfur, *Report of the International Commission of Inquiry on Darfur to the United Nations Secretary-General Pursuant to Security Council Resolution 1564 of 18 September 2004*, ¶ 608 (Jan. 25, 2005).

131. *Id.* ¶ 608, n.220.

132. *Id.* ¶ 608.

133. See, e.g., El Zeidy, *supra* note 14, at 959 (averring that allowing the Security Council to determine admissibility issues would be a clear interference with the ICC's authority and independence).

134. ICC Statute, *supra* note 2, at art. 53(3)(a). This differs from the procedure that may follow a prosecutorial decision not to investigate or prosecute a matter due to his determination that an investigation or prosecution would not serve the interests of justice. In such cases, the Pre-Trial Chamber may opt not to confirm the decision and may then require that the Prosecutor proceed with the investigation or prosecution. ICC Rules, *supra* note 6, at R.110.

does not limit this right to proprio motu investigations.¹³⁵ In a like manner, the article confers upon the accused and a state which has jurisdiction the right to challenge the admissibility of a case; it also grants the prosecutor the ability to seek a ruling from the Court regarding admissibility.¹³⁶ Consider then the politically sensitive matter of the Darfur referral. Should a relevant case come before the Trial Chamber, the Sudanese government will likely seek to avail of the plain language of article 19(2)(b) and assert its right to contest admissibility.

Indeed, it seems indisputable that the government is now arming itself for such a challenge. The country recently created a special court aimed at prosecuting individuals suspected of perpetrating crimes in Darfur and is quite mindful of the prospective effect of the prosecutions. A recent statement released by the Sudanese Ministry of Justice regarding the new judicial institution notes that "ICC article 17 stipulates that it can refuse to look into any case if investigations and trials can be carried out in the countries concerned except if they are unwilling to carry out the prosecutions."¹³⁷ When faced with this argument and the language of article 19, can the Court say with any credibility that the ability to challenge the admissibility of a case does not exist because that is not what was originally meant by the ICC drafters?¹³⁸ It is submitted that it cannot and that the ensuing analysis is necessary, as the Court must live with the language that it has been given.

V. Article 19 Challenges to Admissibility

As stated, article 19 contains numerous provisions addressing jurisdiction and admissibility. Of concern here is that it creates the possibility for an accused person, or a state that has jurisdiction, to challenge the admissibility of a case.¹³⁹ With limited exceptions, both the accused person and the concerned state may only make such a challenge once and prior to the commencement of the trial.¹⁴⁰ Not unlike article 18(2) applications, the relevant rule articulates that the procedure to be followed with regard to such challenges remains a matter for the Court to decide.¹⁴¹ Accordingly, should it so choose, the Court will be in a position to assign the burden of proof with regard to admissibility challenges.

135. ICC Statute, *supra* note 2, at art. 19(1).

136. *Id.* at arts. 19(2)(a)-(b) & 19(3).

137. Wim van Cappellen, *Sudan: Judiciary Challenges ICC over Darfur Cases*, Integrated Regional Info. Networks, June 24, 2005 (noting that the Sudanese Council of Ministers avowed a total rejection of Security Council Resolution 1593 and that Sudan's Justice Minister, Ali Mohamed Osman Yassin, has been quoted by local media as stating that the new domestic institution would be a substitute to the International Criminal Court).

138. The politics involved here mean that the issue is not one of statutory interpretation (originalism versus textualism), but rather the perceived integrity and objectivity of the Court in light of the plain language in the statute.

139. ICC Statute, *supra* note 2, at arts. 19(2)(a)-(b).

140. *Id.* at art. 19(4) (providing also that, in exceptional circumstances, a challenge may be made more than once and/or after the trial has begun).

141. The relevant Chamber "shall decide on the procedure to be followed and may take appropriate measures for the proper conduct of the proceedings [and] . . . may hold a hearing." ICC Rules, *supra* note 6, at R.58(2). The statute provides that admissibility challenges made prior to the confirmation of charges remain within the purview of the Pre-Trial Chamber and, thereafter, enter the domain of the Trial Chamber. ICC Statute, *supra* note 2, at art. 19(6).

A. WHO WILL BEAR THE BURDEN OF PROOF?

Our starting point, perhaps quite naturally, is that of the broad, basic rule governing burden allocation: *actori incumbit probatio*. It could be argued that the application of this allocation rule is endorsed by the applicable rule governing admissibility challenges. Rule 58(1) places a particular onus upon the state or individual challenging admissibility, in that it requires that such a challenge be submitted in writing and contain the basis upon which it is made. However, this does not provide a clear answer to the burden of persuasion question. The rule does not reference the level of specificity required with regard to those bases cited, nor does it indicate that the applicant must prove or even support the reasons asserted for the challenge.

Nevertheless, the Court may find that, as the accused individual or the concerned state is advancing the claim that a case is inadmissible, the accused or the relevant state ought to be required to establish its claim.¹⁴² For some, this proposition may seem inappropriate, particularly when admissibility/complementarity is considered in a manner that is akin to jurisdiction (as has been the case here). Indeed, one can find examples in the international realm that ascribe to the position that it is incumbent upon the party bringing an action to discharge the burden of establishing jurisdiction.¹⁴³ In this regard, however, it is remarkable that there is no consensus on this issue amongst the international regimes; according to the ICJ "there is no burden of proof to be discharged in the matter of jurisdiction."¹⁴⁴

In addition, in terms of article 19, it is submitted that the difference between admissibility and jurisdiction ought to be recognized in the context of challenges made. This would correspond to the article's clear distinction between jurisdiction and admissibility, in that it requires the Court to satisfy itself that it has jurisdiction, yet only provides for the possibility that the Court may, on its own motion, determine the admissibility of a case.¹⁴⁵

Setting aside, for the moment, the aforementioned ICJ position, consider why the burden of proof as to jurisdiction normally lies with the party bringing a claim. Essentially, this approach is based upon the principle of fairness. Indeed, it seems unreasonable to impose an evidentiary burden upon a party who has been hailed into a court or tribunal that has no jurisdiction over it; the injustice in such a scenario is great. A parallel, however, cannot be drawn from such an individual challenging the jurisdiction of the relevant court or tribunal and an individual or state challenging the admissibility of a case before the ICC. "The question of admissibility . . . seeks to establish whether matters over which the Court properly has jurisdiction should be litigated before it."¹⁴⁶

142. Hall endorses this approach: "[t]he burden of proof of demonstrating . . . the inadmissibility of a case [naturally] falls on the person or State making the challenge." Hall, *supra* note 94, at 409.

143. See, e.g., Jurisdiction of the ICAO Council (India v. Pakistan), 1972 ICJ 46, 171 (dissenting opinion of Judge Nagendra Singh) (Aug. 18) (asserting that an applicant state must establish the jurisdiction of the Council conclusively). The approach is also recognized in municipal jurisdictions. "[W]here . . . jurisdictional facts are challenged, the party asserting jurisdiction must support those facts with 'competent proof' and 'justify [its] allegations beyond a preponderance of the evidence.'" N. Am. Thought Combine, Inc. v. Kelly, 249 F. Supp. 2d 283, 286 (S.D.N.Y. 2003) (interpreting 28 U.S.C. § 1332).

144. Fisheries Jurisdiction Case (Spain v. Canada) 1998 ICJ 432 ¶ 38. For more on this issue, see *infra* 5.1.

145. ICC Statute, *supra* note 2, at art. 19(1); see also Hall, *supra* note 94, at 408 (remarking that the Court has a duty to determine jurisdiction, but determinations as to admissibility are discretionary). The ICC Rules, likewise, make a distinction between the two. See ICC Rules, *supra* note 6, at R.58(4) (rightly providing that a challenge or question regarding jurisdiction be considered prior to any challenge or question of admissibility).

146. SCHABAS, *supra* note 3, at 68.

In so considering admissibility, one confronts the shortcomings inherent in drawing an analogy to jurisdictional challenges with regard to the issue of the burden of proof. What is actually being alleged when admissibility is challenged is that, although the Court has jurisdiction over the relevant event(s) (and therefore, the relevant individuals), it is prohibited from exercising that jurisdiction. Accordingly, it may be that a closer parallel lies in the internationally recognized doctrine of preclusion.¹⁴⁷ In a like manner, when a party asserts preclusion, it does not attack the jurisdiction of the relevant court or tribunal, but rather avers that based upon legal action taken elsewhere the court or tribunal is prevented from acting upon a matter. The doctrine is considered an affirmative defense;¹⁴⁸ as such, the party who asserts it bears the burden of proving it.

Yet while the burden of persuasion will normally rest on the party raising an issue, there may be reasons that justify a deviation from this rule.¹⁴⁹ Bearing in mind that burden allocation is a question of policy and fairness, it makes sense to consider the policy embodied in the Rome statute. As established, article 17, though silent as to the issue of burden of proof, contains a suggestion of inadmissibility. Thus, in considering article 19 challenges made by an accused or a state, the question that arises is whether this statutory hint, coupled with the acknowledged subsidiary nature of the Court, ought to result in a departure from the application of the broad basic rule of burden allocation.

Should the Court come to the conclusion that a departure is justified, it will need to devise a workable process that takes into consideration all relevant factors, including access to evidence. For example, the Court may decide that a naked assertion (i.e., a mere reference to one of the grounds delineated in article 17) is insufficient to require that the prosecution establish inability or unwillingness. As the Court shall decide on the procedure to be followed once an admissibility challenge has been made, it may call upon the challenger to substantiate its assertion before conducting proceedings and assigning the burden of proof.

Considering the forgoing, the example of the Darfur referral presents a most interesting test case. Were the same to be determined in a vacuum, it is likely that the idea that Sudan ought to bear the burden of proof and establish the genuine nature of its own investigations and prosecutions would enjoy universal support. But even accounting for ongoing flexibility with regard to procedure, there is no denying that the Court's approach will have an element of precedent-setting about it. Accordingly, the Court may seek some type of middle ground such as requiring Sudan to corroborate the bases cited for its challenge before requiring that the prosecution establish admissibility. In this way, the Court will not leave itself open to criticism that it employs a two tiered system with regards to its respect for the sovereignty of states and its own subsidiarity. In short, the Court will need to begin as it means to go

147. "[T]he Tribunal is in no doubt that the doctrine of preclusion, whether based upon concepts of acquiescence, estoppel, or waiver, is available as a general principle of law . . ." Phillips Petroleum Co. Iran v. The Islamic Republic of Iran, Case no. 39, Award no. 425-39-2, ¶ 197 (1989). "The principle of preclusion has a long history in international arbitration." *Id.* ¶ 198 (noting, also, that preclusion "has been recognized as a 'general principle of law recognized by civilized nations'" (internal citation omitted)).

148. Panel Report, *Chile—Price Band System and Safeguard Measures Relating to Certain Agricultural Products*, WT/DS207/R (May 3, 2002).

149. An example lies in a contract action in which a defendant may be required to plead the non-existence of a condition precedent to the performance of the contract; it does not follow from such a pleading that it will be incumbent upon the defendant to prove the non-existence of the condition. McCORMICK, *supra* note 37, § 37, n.16.

on. This is an issue that is relevant not only to the allocation of the burden of proof, but also as to the standard of proof that must be met.

B. THE APPLICABLE STANDARD OF PROOF

For obvious reasons, in the case of Darfur, the Court will not want to base its admissibility finding at a threshold that may be perceived as too high, as this will frustrate the Court's aim to put an end to impunity and may also result in the Court being seen as ineffectual. At the same time, a particularly meager threshold would also prove unworkable. While the international community may have little difficulty with the Court running roughshod over Sudan's sovereignty, states parties would no doubt have a keen interest in assuring that the complementarity cornerstone retain its potency. Bearing both of these factors in mind, what standard of proof ought to be employed?

The answer to this question will, to a certain extent, depend upon the allocation of the burden of proof. If the Court places the burden upon the state, it is submitted that the preponderance of the evidence would be the most appropriate standard. Such an approach would be in accord with the precedent set by the vast majority of the Court's international counterparts.¹⁵⁰ Further, in light of the fact that the state would naturally have access to the information necessary to meet its burden, the standard would be sufficient and yet not too exacting.

One might ask whether the accused, in making an admissibility challenge, should be held to the same standard or whether he might be entitled to a lesser standard of proof (i.e., a *prima facie* showing). The answer to that question remains to be seen and may depend on the circumstances of the individual case. Accepting the analogy between admissibility challenges and the defense of preclusion, one might be inclined to embrace the theory that the accused ought to be, like a concerned state, required to prove his admissibility challenge by a preponderance of the evidence. Certainly this comports with the generally accepted approach that when an accused is required to prove an issue, a lesser standard of proof than that of beyond a reasonable doubt will suffice.¹⁵¹

There remains the possibility, however, that a rigid application of the preponderance standard to admissibility challenges may prove unjust to an accused. Quite like the prosecution, charged individuals may have limited access to information regarding criminal proceedings in a concerned state. In the case of an unpopular accused, it is possible that he might be prevented access to materials relevant to an admissibility challenge, such as evidence that the conduct at issue has already served as the basis of a trial in the concerned state.¹⁵² Though such cases will likely be rare, the Court may deem that when/if they appear an accused should be entitled to make a lesser showing.

Finally, should the Court decide that the burden of establishing inability or unwillingness ought to rest with the prosecution, the issues referenced above with regard to article 18(2) applications would be relevant, at least with regard to article 19 challenges made by a state. Disparate access to evidence may make the use of a lesser (*prima facie*) standard, or the employment of a legal presumption upon a *prima facie* showing, attractive options.

150. See, Kazazi & Shifman, *supra* note 72 and accompanying text.

151. See, e.g., Prosecutor v. Delalic, Case No. IT-96-21-T ¶ 603.

152. ICC Statute, *supra* note 2, at art. 17(1)(c).

VI. Article 19 Admissibility Determinations made Pursuant to the Court's own Motion

As noted earlier, article 19 provides that "[t]he Court may, on its own motion, determine the admissibility of a case in accordance with article 17."¹⁵³ The manner in which such determinations ought to be addressed is not part of the Statute. In accord with the admissibility determinations thus far considered, the rules bestow upon the Court the authority to determine the appropriate procedure to be followed.¹⁵⁴

A. WHO BEARS THE BURDEN OF PROOF AS TO ADMISSIBILITY?

Here one makes an instant distinction between the present motion under review and the admissibility considerations thus far addressed. Indeed, in the absence of any claim, there is no place for the broad, basic rule of *actori incumbit probatio*. Accordingly, it is possible that the Court may opt against assigning the burden at all. In choosing this path, the Court would have the precedent set by the ICJ with regard to the burden of proof in jurisdictional determinations. According to that court, no party bears the burden of proof with regard to jurisdiction. "Rather, it is for the Court to determine from all the facts and taking into account all the arguments advanced by the Parties, 'whether the force of the arguments militating in favour of jurisdiction is preponderant . . .'"¹⁵⁵ This type of approach may appear to have a certain amount of appeal, as it creates the possibility of an open debate and invites the presentation of more and better evidence that in turn could set the stage for more accurate decisions.

Moreover, it may be argued that a failure to allocate the burden of proof will not have any great practical effect. When the Court determines admissibility on its own motion, neither the concerned state nor the accused will be required to make any showing with regard to admissibility. This contrasts sharply with the prosecutor's position. At the end of the day, in order to find in the affirmative as to its *sua sponte* determination, the Court will need to be satisfied that a state is either unwilling or unable to investigate or prosecute the matter at hand. Accordingly, even without expressly conferring this burden upon the prosecutor, it will be incumbent upon him to produce evidence of the same that is persuasive to the Court.¹⁵⁶

Yet one must consider the issue that has been consistently raised thus far with regard to complementarity—that of access to evidence. Ordinarily, the relevant state will have unique and singular access to evidence of its investigations and prosecutions. Accordingly, it may be that the prosecution is not in a position to satisfy the Court as to a state's genuine unwillingness. Should this put an end to the matter, should the Court decide that it has

153. *Id.* at art. 19(1) (providing that such a determination be made in accordance with article 17).

154. ICC Rules, *supra* note 6, at R.58(2).

155. Fisheries Jurisdiction Case (Spain v. Canada) 1998 ICJ 432 ¶ 37 (citing Border and Transborder Armed Actions (Nicaragua v. Honduras), Jurisdiction and Admissibility, Judgment, 1988 ICJ 76, ¶ 16 and Factory at Chorzow, Jurisdiction, Judgment No.8, 1927 PCIJ Series A, No. 9, 32).

156. It appears that the Prosecutor may be assisted in this regard by submissions of *amici curiae*, such as a referring state, who may be permitted to lodge observations with the Court as to admissibility. ICC Rules, *supra* note 6, at R.103. Such assistance may be of restricted value, as "Rule 103 seems to limit the role of *amici curiae* to the submission of observations rather than an active participation in proceedings." SCHABAS, *supra* note 3, at 148, n.24.

insufficient evidence before it to render an admissibility determination—this could largely neutralize the Court and thwart its efforts to end impunity.

One can easily anticipate such an outcome with regard to the Darfur referral given Sudan's reticence to share information with the International Commission of Inquiry, as evidenced in the Commission's recent report.¹⁵⁷ While it is true that the ICC prosecutor will have certain investigatory powers not bestowed upon the Commission¹⁵⁸ and that the Security Council has called upon the Sudanese government to cooperate with the Court and the prosecutor,¹⁵⁹ this by no means ensures compliance. In those instances of non-compliance, it would behoove the Court to fashion its own remedy rather than relying upon an external and therefore, arguably less efficient, mechanism of control. Accordingly, an approach that mirrors the burden allocation set out with regard to article 18(2) applications may provide a workable solution.¹⁶⁰

B. THE STANDARD OF PROOF

Should the Court adopt such an approach, the issues surrounding the relevant standard of proof will mirror those articulated in the context of article 18(2) applications.¹⁶¹ It ought to be noted, however, that should the Court choose to adopt a no burden approach, establishing a standard of proof ought to remain an imperative. By so assigning a standard, a safeguard will be in place to protect against a noted side-effect of the failure to allocate the burden of proof. When not accompanied by a particular standard, a burden-free approach may result in a scenario wherein evidence adduced is considered in relation to that which has or has not been adduced by the opposing party. In this vein, the party adducing the greatest amount of evidence, no matter how little and/or unpersuasive it may be, wins.¹⁶² Certainly, the application of this type of standard would be unsupportable.

VII. Conclusion

The three illustrations that have been considered here by no means constitute the complete universe of complementarity. They serve well, however, as a representative class as they establish a basis for discussion relating to applicable burdens and standards of proof in instances when admissibility is a concern. Consider, for example, that complementarity issues may also arise when the prosecutor is required to assess the admissibility of a case prior to submitting a request for authorization of a *proprio motu* investigation.¹⁶³ In turn, it will then be incumbent upon the Pre-Trial Chamber to address the admissibility factor

157. See, e.g., Report of the International Commission, *supra* note 130, ¶ 428.

158. See, *id.* ¶ 6.

159. Res. 1593, *supra* note 8, ¶ 2.

160. See *id.*, ¶ 2.1.

161. See *id.*, ¶ 2.2.

162. CROSS & TAPPER, *supra* note 32, at 153 (discussing this as an unsatisfactory effect with regard to a provision in the English Employment Rights Act of 1996 that fails to allocate the burden of proof).

163. The Prosecutor must conclude that there is a reasonable basis to proceed with an investigation before requesting authorization to proceed from the Pre-Trial Chamber. ICC Statute, *supra* note 2, at art. 15(3). In so doing, the Rules specifically provide that, amongst other things, admissibility is a relevant factor in determining reasonable basis. *Id.* at arts. 53(a)(b) & 17; ICC Rules *supra* note 6, at R.48.

before it may authorize such a request.¹⁶⁴ It is logical to conclude that, in assessing such requests, the Court will not be inclined to impose a higher standard of proof than that which it deems applicable to the article 18(2) applications that follow a state request for deferral. Accordingly, if the Court determines in the latter instance to apply a preponderance of the evidence standard, a higher standard should not be applied to an article 15 request. In effect, the greater informs the lesser.

Likewise, there are additional instances in which the Court will address the issue of admissibility that have not been examined here. For example, the prosecutor may seek a ruling from the Court regarding admissibility¹⁶⁵ or, upon a prosecutorial determination that a referred case is inadmissible, the referring state or the Security Council may request that the Pre-Trial Chamber review the decision.¹⁶⁶ In the case of the former, the analysis of applicable burdens and standards of proof regarding sua sponte admissibility determinations will prove relevant with arguably little or no variation. As to the latter, the burden of proof might be addressed with the now familiar rule of *actori incumbit probatio*, as might the theory that there ought not to be a burden of proof. Like the three examples reviewed thus far, it will fall upon the Court to determine the applicable procedure in these situations.

The Court's possession of this authority will likely prove bittersweet. On the one hand, it is a state of affairs that may well be envied by other judges: the Court has been provided with the opportunity to develop the processes that it deems most effectual and its position in the trenches makes it arguably the superior entity for so determining. Moreover, the Court has been given the additional award of flexibility in that it will not be tied to any one approach it employs. This will enable the ICC's judiciary to tinker with procedures that prove lacking as well as to tailor its approach to suit new and different scenarios.

Legally speaking however, this can prove an irksome task that admits of no one, clear answer. For all of the comparisons that may be drawn, complementarity proves frustrating with regard to analogical reasoning. It welcomes and yet defies comparison. In order to capitalize upon the benefit that learned legal practice provides, the Court must be able to recognize those alterations necessary to yield fruitful results on an entirely new plane. Domestic and indeed even international practice will not provide answers in full, though no doubt much can be gleaned by studying the dialogue of the nearly analogous.

In addition to these legal challenges, the Court's activity will not take place in a vacuum. By virtue of the ICC statute and rules, it is the judiciary that bears the burden of forging new ground in this potentially politically sensitive area. The right legal solution may prove wrong when viewed through a political lens and while such extra-legal considerations may seem inappropriate to a legal purist, there will be times when such concerns cannot be overlooked lest the credibility, viability, and purpose of the Court be undermined. The aim of this work has not been to solve or debate such issues, but rather to isolate a specific area and provide a suitable legal framework in which it can be considered. Bearing all relevant factors in mind, it will be incumbent upon the ICC to create a workable solution in the wake of constructive ambiguity.

164. In its examination of a request for authorization of a proprio motu investigation, the Pre-Trial Chamber must "consider[] that there is a reasonable basis to proceed with [the] investigation" ICC Statute, *supra* note 2, at art. 15(4).

165. *Id.* at art. 19(3).

166. See *id.* at arts. 53(2)(b) & 53(3)(a); see also ICC Rules, *supra* note 6, at R.107 (detailing the applicable procedure for such requests for review).