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Admissibility of evidence which predates the temporal jurisdiction of the court

Aaron Rodgers

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CASE WESTERN RESERVE
UNIVERSITY
SCHOOL OF LAW

MEMORANDUM FOR THE OFFICE OF THE PROSECUTOR

SPECIAL COURT FOR SIERRA LEONE

ISSUE: ADMISSIBILITY OF EVIDENCE WHICH PREDATES THE TEMPORAL JURISDICTION OF THE
COURT

Prepared by Aaron Rodgers

J.D. Candidate, May 2011

Fall Semester, 2009

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I. Introduction

A. Scope

This memorandum examines the admissibility of evidence which falls outside the temporal scope of the Special Court for Sierra Leone (SCSL).^{*} The Court was established to prosecute the war crimes which occurred in the country after 1996. While the temporal jurisdiction of the Court is limited to this date, evidence exists which may assist in the prosecution and conviction of those accused of atrocities which predates the established limiting date. This memorandum will also address the scope and interpretation of Rule 93(A) of the SCSL Rules of Procedure and Evidence.^{**} Evidence which would qualify for admission would illustrate patterns of the Accused's prior conduct. The answers to the above mentioned issues require an examination of the admission and consideration of such evidence and the application of pattern of conduct analysis by the SCSL as well as other Tribunals and International Courts.

^{*} Applicability of Evidence outside Tribunal's temporal jurisdiction: The Prosecution's case against Charles Taylor includes evidence which relates to Charles Taylor, the NPFL and the RUF amongst others, prior to the jurisdiction of the Tribunal and the Indictment period. A. To what extent can the Prosecution rely upon evidence relating to a period prior to the Indictment and prior to the Tribunal's jurisdiction? B. Can the Trial Chamber convict an Accused based upon such evidence? C. Can such evidence be used to prove issues such as credibility, propensity and intent of the accused?

^{**} Scope and interpretation of Rule 93(A) [evidence of a consistent pattern of conduct...]: Rule 93 of the SCSL Rules of Procedure and Evidence provides that "(A) Evidence of a consistent pattern of conduct relevant to the serious violations of international humanitarian law under the Statute may be admissible in the interests of justice." A. What is the scope of Rule 93(A)? B. How has Rule 93(A) been interpreted in the jurisprudence and Judgments of the SCSL and at the other international criminal tribunals?

B. Summary of conclusions

i. A classification of the crime, purpose of the evidence and an analysis of the timing of the crime must be considered when determining the admissibility of evidence which falls outside the scope of the Court's temporal jurisdiction.

The issue surrounding the admissibility of evidence which falls outside the temporal jurisdiction of the Court has been addressed by prior Tribunals. In making the appropriate determination, several issues call for examination. These issues include determining a classification of the crime as a continuing or non-continuing crime, establishing the purpose of the evidence and defining the actual time frame in which the crime occurred.

a. Rule 89(c) of the Rules of Procedure and Evidence allows for the admission of any evidence which may have a probative value and is considered relevant to the issue at hand.

When determining relevance, the Court will examine whether the materials relate in time and place to the alleged criminal conduct in the indictment. The Court will also ensure that there is a probative value to the evidence which is to be admitted, and will look for the existence of a relationship between the probative value and the reliability of the evidence. The ICTY stated that "there must be a connection or nexus between the two which makes it possible to infer the

existence of one from the existence of the other. One fact is not relevant to another if it does not have probative value to the latter.” The Court will also be able to consider evidence on the condition that the evidence presented is delivered in a manner which establishes a context for proving the crime which occurred within the Court’s temporal jurisdiction.

b. The Court will have difficulty convicting the accused solely based upon evidence that falls outside the scope of its temporal jurisdiction unless the crime accused is considered a continuing crime.

The admission of evidence which falls outside of the Court’s temporal jurisdiction is allowed to be considered as a contextual background to the charges of the indictment, and as such the judges will apply the appropriate probative weight to the evidence accordingly. In such an instance, the Court will not convict solely on the evidence. The Court may however, convict based solely on such evidence if the accused has been charged with an ongoing crime, such as genocide or enforced disappearance. In the case of a continuing crime, the crime commences with an initial action but continues to the end of the crime.

c. Evidence which falls outside the scope of temporal jurisdiction can be admitted and considered when it provides a historical context.

The Prosecution may rely upon such evidence to prove credibility, propensity and intent of the Accused. While the Prosecution will not be able to charge or convict for the commission of crimes which fall outside the jurisdiction of the Court, such crimes may be used as evidence to prove the commission of charged crimes that do fall within the Court’s jurisdiction.

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ii. The inclusion of Rule 93(a) in the Rules of Procedure and Evidence ensures the ability of the Court to consider patterns of conduct that fall outside the temporal jurisdiction of the Court.

While the rule specifically authorizes the Court to consider such evidence, it is also significant to acknowledge that previous Courts and Tribunals have allowed the introduction of such evidence in the absence of such a rule.

a. The scope of Rule 93 allows for the consideration of patterns of conduct as evidence of a crime committed within the scope of the Court's temporal jurisdiction.

While the rule permits actions which fall outside the Court's temporal jurisdiction to be considered as evidence presenting a contextual background, it does not allow the Court to punish the actions of the Accused if the actions are independent of the charges which do fall within the Court's temporal jurisdiction.

b. Pattern of conduct evidence has been admitted by other Courts and Tribunals and appropriate probative weight was applied to the evidence by the judges.

Both the ICTR and the Inter-American Court of Human Rights have admitted pattern of conduct evidence for consideration. Generally, the international Courts are lenient with the introduction of such evidence, as it is the judges who will apply the appropriate probative weight

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to the evidence; however the Courts still mandate a finding of relevancy in addition to probative weight under Rule 89(c).

II. Background (Admissibility Generally)

Rule 89 of the Rules of Procedure and Evidence

Rule 89 establishes the guidelines for admitting evidence. The rule states that the Court will not follow national rules of evidence, will allow the admission of evidence not provided for in the rules that favors a fair determination and specifically in subsection (c) allows the Court to admit any relevant evidence.¹ The SCSL has held that it has broad discretion in the admission of evidence and on numerous occasions has stated that there should be a flexible approach to the admission of evidence² and that the determination of weight to be given to the evidence should be left for the end of the trial and taken in “the totality of the circumstance.”³ While the rule appears to be a catch-all for allowing in evidence which might otherwise have been disallowed, there have been specific rulings on the definition of relevant evidence both in the SCSL and other international Courts and Tribunals.

¹ Rules of Procedure and Evidence of the Special Court for Sierra Leone, 27 May 2008 [reproduced in accompanying notebook at Tab 22].

² *Prosecutor v. Norman, Fofana, Kondewa*, Fofana- Appeal Against Decision Refusing Bail, SCSL-04-14-AR65, 11 March 2005 [reproduced in accompanying notebook at Tab 2].

³ *Prosecutor v. Norman, Fofana, Kondewa*, Decision on Fofana Request to Admit Evidence Pursuant to Rule 92bis, SCSL-04-14-T, ¶15, 9 October 2006 [reproduced in accompanying notebook at Tab 3].

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In the International Criminal Tribunal for the Former Yugoslavia (ICTY), the court suggested that when admitting evidence into Court, it was important that the “threshold standard for the admission of evidence... should not be set excessively high,”⁴ and that many times evidence is presented which is offered not as “ultimate proof of guilt or innocence, but to provide a context and complete picture.”⁵ The ultimate determination of the weight to be given to evidence was determined by the judge, and therefore, evidence is admissible when it can be determined that it is relevant. When determining relevancy, the Court reasoned that relevant information must satisfy two conditions: the evidence must relate directly in time and place to the event, and must concern the matter at hand.⁶ Accordingly, in this case the ICTY considered logs of communication between officers and soldiers that had been intercepted and transcribed relevant, as they concerned the attack on Srebrenica⁷ and were created during the Indictment periods of 1995 and occurred in the proper municipalities.⁸

⁴ *Prosecutor v. Zejnil Delalić et al.*, Decision on the Motion of the Prosecution for the Admissibility of Evidence, ¶ 20, IT-96-21-T, 19 January 1998 [reproduced in accompanying notebook at Tab 5].

⁵ *Id.* at ¶ 20.

⁶ *Prosecutor v. Vidoje Blagojević and Dragan Jokić*, Decision on the Admission into Evidence of Intercept-Related Materials ¶ 19, IT-02-60-T, 18 December 2003 [reproduced in accompanying notebook at Tab 4].

⁷ *Id.* at ¶ 4.

⁸ *Id.* at ¶ 19.

While the Court was able to determine the relevancy of the evidence, the need to address the reliability and probative value⁹ of the evidence still existed. The ICTY Trial Chamber discussed the importance of reliability and determined that when establishing the reliability, all indicia of the evidence should be examined, to include the content of the evidence and the surrounding circumstances in which the evidence came to exist.¹⁰ In the *Blagojević* case, the court determined that the evidence was reliable because of the lengths to which the interceptors went to accurately transcribe the communications. The Court pointed out that in instances where there were inconsistencies, or where the communication could not be deciphered, the communication which could not be understood was replaced with a “...” and left off the record. In contrast however, the Court found testimony presented as evidence in the form of an alibi unreliable in the *Lukić* case. In this instance, the witness was provided payment in exchange for what the Court determined to be false testimony, thereby calling into question the conditions in which the evidence arose and completely invalidating any reliability the testimony may otherwise have had.¹¹

The ICTY has continued the analysis of evidence which may be admitted pursuant to Rule 89 (c) by stating that once relevance and probative value have been established, a

⁹ *Prosecutor v. Milan Lukić and Sredoje Lukić*, Judgment, IT-98-32/1-T 20 July 2009 [reproduced in accompanying notebook at Tab 6].

¹⁰ *Prosecutor v. Vidoje Blagojević and Dragan Jokić*, Decision on the Admission into Evidence of Intercept-Related Materials ¶ 15, IT-02-60-T, 18 December 2003 [reproduced in accompanying notebook at Tab 4].

¹¹ *Prosecutor v. Milan Lukić and Sredoje Lukić*, Judgment, ¶ 215, IT-98-32/1-T 20 July 2009 [reproduced in accompanying notebook at Tab 6].

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relationship must be demonstrated between the two. In *Tadić*, the Court discussed the “connection or nexus between the two which makes it possible to infer the existence of one from the existence of the other.”¹²In essence, the Court was explaining that without the probative value, value which would either prove or disprove something,¹³then the relevancy of the evidence would not matter.

The International Criminal Tribunal for Rwanda (ICTR) has applied a similar interpretation as the ICTY when determining the relevancy of evidence. In *Prosecutor v. Aloys Simba*¹⁴, the Court analyzed the transcript of testimony offered at another trial as evidence. The Court applied the relevancy test¹⁵, and pointed to the fact that in the transcript, the Accused in mentioned only in a passing reference. The evidence which the prosecution wished to submit was also lacking relevancy, as it did not directly apply to the Accused’s prior conduct or acts, but was to be applied as “broad historical evidence” in support of the prosecution’s overall case.¹⁶ In this instance, the Court not only struggled with finding relevancy because of only a brief mention of the Accused, but also could not find that the evidence would provide any probative value. The

¹² *Prosecutor v. Duško Tadić*, Decision on Defence Motion on Hearsay, ¶ 8, IT-94-1-T, 5 August 1996 [reproduced in accompanying notebook at Tab 7].

¹³ Black’s Law Dictionary, *probative*, 8th ed., 2004 [reproduced in accompanying notebook at Tab 30].

¹⁴ *Prosecutor v. Aloys Simba*, Decision on Prosecutor’s Motion for Admission of Testimony of an Expert Witness, ICTR-01-76-I, 14 July 2004 [reproduced in accompanying notebook at Tab 12].

¹⁵ *Id.* at ¶ 5.

¹⁶ *Id.* at ¶ 6.

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Court stated that the Court was not convinced that the proposed evidence had “any value in the proving of the charges against the Accused.”¹⁷

With reference to reliability, the ICTR quoted the ICTY when discussing the importance of reliability in the admissibility of evidence by stating that reliability “is the invisible golden thread which runs through all components of admissibility.”¹⁸ The ICTR concurred with this interpretation of reliability, and further explained its belief that the reliability of evidence does not necessarily constitute a separate element and consideration of admissibility, but rather “provides a basis for the findings of relevance and probative value,”¹⁹ which is required under the Rules of Procedure and Evidence.

The SCSL’s determination of admissibility under rule 89(c) is crucial to the admission of evidence which may fall outside the scope of the Court’s temporal jurisdiction. If the Court finds the evidence lacking after evaluating the relevant and probative elements, then the evidence will not be allowed.²⁰ If the Court does determine that the evidence may be admitted pursuant to this

¹⁷ *Id.* at ¶ 6.

¹⁸ *Prosecutor v. Alfred Musema*, Judgment and Sentence, ¶ 36, ICTR-96-13-A, 27 January 2000 (quoting *Prosecutor v. Zejnil Delalic, Zdravko Mucic a/k/a “Pavo”, Hazim Delic and Esad Landzo a/k/a “Zenga”*, Decision on the Prosecution’s Oral Requests for the Admission of Exhibit 155 into Evidence and for an Order to Compel the Accused, Zdravko Mucic, to Provide a Handwriting Sample, IT-96-21-T, 21 January 1998) [reproduced in accompanying notebook at Tab 8].

¹⁹ *Prosecutor v. Alfred Musema*, Judgment and Sentence, ¶ 37, ICTR-96-13-A, 27 January 2000 [reproduced in accompanying notebook at Tab 9].

²⁰ *Aloys Simba v. Prosecutor*, Decision on Interlocutory Appeal Regarding Temporal Jurisdiction, ICTR-01-76-AR72.2, 29 July 2004 (quoting *Ngeze and Nahimana v. Prosecutor*,

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rule, then the Prosecution may demonstrate the appropriateness of considering evidence which predates the temporal jurisdiction as discussed below.

III. Legal Analysis of the Main Issue (Temporal Jurisdiction)

A. The Court is restricted to crimes occurring since 1996, and therefore when considering whether evidence may be admitted the Court will look towards timing issues.

The SCSL's temporal jurisdiction has been limited to crimes which have occurred since 1996.²¹ This date was agreed upon by the U.N. and the government of Sierra Leone when establishing the Court, and any crimes which occurred prior to November 30, 1996 were consciously excluded from being tried in front of the Court. The purpose of the limitation was to prevent the Prosecutor from becoming overburdened²², but it has been argued that the restriction grants a sort of amnesty for heinous crimes that have been committed within the country, particularly a large portion of the recruitment of children to serve as soldiers²³. While these crimes may not be able to be prosecuted within the Court, the question exists whether evidence of such conduct occurring outside of the temporal jurisdiction may still be admitted before the Court in order to facilitate a conviction.

Decision on the Interlocutory Appeals, pp.4-5, ICTR 96-11- AR72, 5 September 2000) [reproduced in accompanying notebook at Tab 13].

²¹ *Statute of the Special Court for Sierra Leone*, 16 January 2002 [reproduced in accompanying notebook at Tab 23].

²² *The Jurisdiction of the Special Court for Sierra Leone*, Student Memorandum for the Office of the Prosecutor of the Special Court for Sierra Leone, Case Western Reserve University School of Law, pg. 33, Fall 2003 [reproduced in accompanying notebook at Tab 27].

²³ *Id.* at pg. 33.

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Timing plays a crucial role in the determination of whether crimes, or evidence of the crimes, may be admitted into the Court. In the context of the Rome Statute²⁴, when analyzing the timing element, there are two specific elements which need to be explored: the timing of the conduct, and also “when the prohibition of the conduct took place.”²⁵ The prohibition of the conduct timing issue is important because the Court does not have the authority to go back in time and criminalize and activity which was not illegal when it was committed.²⁶ The element of the timing of the conduct becomes an issue the Court may explore when determining when the prohibited conduct actually occurred.²⁷ This timing of the conduct element requires the classification of the crime which is being analyzed into one of two separate and distinct categories; continuing and non-continuing crimes.

In the case of the SCSL, the Court will need to evaluate the timing issues that are presented in its unique situation. The Court will not have difficulty in establishing that the conduct that took place within Sierra Leone since 1996 was previously prohibited. The difficulty

²⁴ Rome Statute of the International Criminal Court, 17 July 1998 (established the creation of the International Criminal Court and placed several restrictions of the jurisdictional limits of the Court, including limitation on its temporal jurisdiction.) [reproduced in accompanying notebook at Tab 21].

²⁵ Nissel, Alan, *Continuing Crimes in the Rome Statute*, pg. 653-702. 25 Mich. J. Int'l L. 653 Spring 2004. [reproduced in accompanying notebook at Tab 25].

²⁶ *Id.* at pg. 660.

²⁷ *Id.* at pg. 660.

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will lie in evaluating the timing of the conduct, particularly considering that there was a buildup of violence and conflict within the country prior to 1996.²⁸

B. The classification of the crime as continuing or non-continuing (instantaneous) is crucial in determining whether the conduct occurred within the temporal restrictions of the Court.

If a crime that is committed is completed prior to the temporal jurisdiction of the Court, the Court will not be able to convict the Accused for the commission of that crime.²⁹ This concept was clearly stated at Nuremberg, where in *Josef Altstotter*, the Court struck down a conspiracy charge that was charged as a “separate substantive crime,” outside the jurisdictional reach of the court.³⁰ A crime is completed when the final act of its commission has been carried out. A completed crime is referred to as a non-continuing or in some cases, an instantaneous crime.³¹ An example of a completed crime, for instance, is the act of murder. Murder becomes a

²⁸ *Id.* at pg.661.

²⁹ *Id.* at pg. 661.

³⁰ *Josef Altstotter and Others*, Liability for War Crimes, Crimes against Humanity and Membership of Criminal Organisations of German Judges, Prosecutors and Officials of the Reich Ministry of Justice, ¶ 3, United States Military Tribunal, Nuremberg, Case No. 35, 17 February- 4 December 1947 [reproduced in accompanying notebook at Tab 15].

³¹ *Id.* at pg. 654.

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completed crime once the individual ceases to be alive.³² At this point, there is no part of the crime left to commit, and the crime ceases to continue through time. If this incident were to occur prior to 1996 in the case of the SCSL, then the Court would be limited by its temporal jurisdiction from actually trying the case.

A crime however, may be found to be a continuing crime. A continuing crime is one in which the commission of a crime begins with an act, but does not end immediately. This is the point in which the analysis of the timing element becomes crucial. Returning to the murder example, suppose that the individual was not killed, but rather kept alive and tortured. The torture of the individual begins with the act of committing the torture but does not end until the torture ceases. Obviously, there is a longer time span for the commission of this crime as opposed to murder, and if the torture were to begin prior to the beginning of the temporal limitation, but cease shortly after the imposed jurisdiction of the Court, then the crime would have been committed by the Accused during the period in which the Court may convict.

The timeframe illustrated by the torture example is elastic, and can be too narrow to appropriately fall within the jurisdiction, especially if the incident occurred only one time. Another example of a continuing crime, one that may continue in time for years or even indefinitely, is the crime of enforced disappearance.³³ This crime may begin with abduction, yet it will not come to an end until the person is returned. Even if an individual were to be murdered

³² *Id.* at pg. 661.

³³ Nissel, Alan, *Continuing Crimes In The Rome Statute*, pg. 664, 25 Mich. J. Int'l L. 653, Spring 2004. [reproduced in accompanying notebook at Tab 25].

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during the abduction and no word passed along, the crime would not cease until the recovery of the body.³⁴ The Inter-American Court of Human Rights stated in *Moiwana v. Suriname*, that the forced displacement of residents from their ancestral lands could be considered even though the displacement of the victims occurred prior to the Court's temporal jurisdiction because the inability of the residents to return to these territories caused the crime to continue into the purview of the Court.³⁵

The ICTR has considered the impact of continuing crimes on its own temporal jurisdiction. In Rwanda, the Court's establishing statute restricts the limit of its jurisdiction to only crimes which occurred in 1994.³⁶ The Court has stated that it could in fact consider facts which would have originated prior to the Court's existence so long as the facts related to conduct which fell within the Court's established jurisdiction.³⁷ Considering conspiracy, the ICTR found that it does indeed constitute a continuing crime, and stated on its admissibility into evidence that

The Trial Chamber accepts the Prosecutor's submission that allegations dating before 1994 do not constitute independent crimes. These allegations merely represent what the

³⁴ *Id.* at pg. 662.

³⁵ *Moiwana Village v. Suriname*, 2005 Inter-Am. Ct. H.R. (ser C) No 124, ¶43, 15 June 2005 [reproduced in accompanying notebook at Tab 16].

³⁶ *ICTR Statute*, Article 1, U.N. Resolution 955, 8 November 1994 [reproduced in accompanying notebook at Tab 18].

³⁷ Stahn, El Zeidy and Olasolo, *Developments at the International Criminal Court: The International Criminal Court's Ad Hoc Jurisdiction Revisited*, 99 A.J.I.L. 421, pg. 430, April 2005 (quoting *Prosecutor v. Nsengiumva*, Decision on the Defence Motions Objecting to a Lack of Jurisdiction and Seeking to Declare the Indictment Void *ab initio*, ¶ 33-39, ICTR- 9634-I, 13 April 2000 [reproduced in accompanying notebook at Tab 26].

Prosecutor intends to offer as relevant and admissible evidence of crimes occurring in 1994, or relate to the continuation of events, clarify, and are supplementary to the substantive charges. . . . Conspiracy is a "continuing crime." Because [it] is a continuing crime, then events that took place outside the period of the Statute can be taken into account if it can be shown that the conspiracy continued into the relevant period of the Statute. Evidence before 1994 may show when the conspiracy actually commenced. All activities prior to 1 January 1994, so far as they are related to the conspiracy, may be relevant...³⁸

The SCSL will need to determine that a crime can be classified as a continuing crime for the possibility of a conviction to result from pre-1996 conduct. Several of the charges which have been made against Charles Taylor hint at the possibility of proving elements which would occur outside of the temporal jurisdiction of the Court, yet still constitute part of a continuing crime.³⁹ One of the charges he has been charged with is the sexual enslavement of women for the use of soldiers.⁴⁰ The beginning element of a crime such as this could be argued to occur upon the kidnapping of the woman and continue throughout her forced servitude as a sex slave. Every forced encounter the woman had with a soldier as a result of her enslavement would be directly related back to her original abduction; if the only evidence which exists demonstrates these occurrences prior to the critical date, then the Court can still consider and

³⁸ Stahn, El Zeidy and Olasolo, *Developments at the International Criminal Court: The International Criminal Court's Ad Hoc Jurisdiction Revisited*, 99 A.J.I.L. 421, April 2005 (quoting *Prosecutor v. Nsenyirumva*, Decision on The Defense Motions Objecting to the Jurisdiction of the Trial Chamber on the Amended Indictment, ¶ 27-28, ICTR- 96-12-I, 13 April 2000) [reproduced in accompanying notebook at Tab 26].

³⁹ *Prosecutor v. Charles Taylor*, Prosecution's Second Amended Indictment, SCSL-03-01-PT, 29 May 2007. [reproduced in accompanying notebook at Tab 1].

⁴⁰ *Id.*, Count 5.

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convict for these offenses, as the crime continues into the jurisdiction of the Court as defined in its establishing statute.⁴¹ Other examples of crimes which may constitute continuing crimes that Charles Taylor has been indicted for include enslavement⁴² and the recruitment of children to serve as soldiers.⁴³ The key to determining the conduct that predates the temporal jurisdiction of the Court which may be admitted and convicted upon will be the classification of the crimes as either continuing or non-continuing. If the crime is a non-continuing crime, and its commission falls outside of the temporal jurisdiction of the Court, then the conduct cannot be punished by the Court. A non-continuing crime however, is not precluded for admission to the Court as evidence. The existence of such evidence may be deemed relevant by the Court and admitted as discussed below.

⁴¹ Nissel, Alan, *Continuing Crimes in the Rome Statute*, 664, 25 Mich. J. Int'l L. 653 Spring 2004 [reproduced in accompanying notebook at Tab 25].

⁴² *Prosecutor v. Charles Taylor*, Prosecution's Second Amended Indictment, Count 10, SCSL-03-01-PT, 29 May 2007 [reproduced in accompanying notebook at Tab 1].

⁴³ *Id.*, Count 9.

C. If the crime is not considered a continuing crime that falls within the temporal jurisdiction of the Court, the conduct may still be admitted to provide a historical or contextual background.

Several Courts have held that while crimes that were not considered continuing crimes could not be charged, the conduct could be admitted to provide a context. At Nuremberg, the Court allowed in evidence which demonstrated the “degradation of the German Judicial System under Hitler.”⁴⁴ The evidence, an Article of the “Law to Change the Penal Code,”⁴⁵ and a decree “promulgated against undermining German defensive strength,”⁴⁶ was created prior to the war, and provided a historical backdrop for the policies which were later to be enforced under Hitler during the Second World War. Similarly, the ICTR stated that “pre-1994 evidence may be admissible to prove a pattern, design or systematic course of conduct by the accused, or to provide background evidence.”⁴⁷

⁴⁴ *Josef Altstotter and Others*, Liability for War Crimes, Crimes against Humanity and Membership of Criminal Organisations of German Judges, Prosecutors and Officials of the Reich Ministry of Justice, ¶4, United States Military Tribunal, Nuremberg, Case No. 35, 17 February- 4 December 1947 [reproduced in accompanying notebook at Tab 15].

⁴⁵ *ID.* at ¶ 4.

⁴⁶ *ID.* at ¶ 4.

⁴⁷ Siu, Kam F., *Is Indictment to Commit Genocide a Continuing Crime Such that Acts Committed Outside the Temporal Jurisdiction of the ICTR can be Considered in Prosecuting the Accused?*, Student Memorandum for the Office of the Prosecutor of the International Criminal Tribunal for Rwanda, Case Western Reserve University School of Law, Fall 2004 (quoting *Prosecutor v.*

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The ICTR also identified several considerations that it would examine when determining whether evidence that predates the temporal jurisdiction of the Court could be admitted. The first element, which has been discussed, is the existence of a continuing crime. Specifically, the Court states that the evidence must be relevant to an act which continued into 1994, the restrictions imposed by statute.⁴⁸ Secondly, the court acknowledged that if the evidence were to provide a background to the crimes committed, or to put the acts within a context which would allow for the appropriate analysis of the conduct during the relevant time period, then the evidence would be allowed.⁴⁹ The last element in the consideration was identified as evidence in which there is a similar pattern, or where the evidence presents similar facts to the conduct and facts which are currently in front of the Court.⁵⁰

The ICTR also took the viewpoint in *Nahimana v. Prosecutor*⁵¹, that when deciding whether to consider facts related to the Accused's conduct prior to 1994, while the allegations might not fall within the jurisdictional timeframe, the reliance on them by the Prosecution could be allowable. The Court stated in this instance that while indeed the allegations themselves fell

Aloys Simba, Motion Decision, ICTR-01-76-I, 2004). [reproduced in accompanying notebook at Tab 29].

⁴⁸ *Id.* ¶ 6.

⁴⁹ *Id.* ¶ 6.

⁵⁰ *Id.* ¶ 7.

⁵¹ *Aloys Simba v. Prosecutor*, Decision on Interlocutory Appeal Regarding Temporal Jurisdiction, ICTR-01-76-AR72.2, 29 July 2004 (quoting *Ngeze and Nahimana v. Prosecutor*, Decision on the Interlocutory Appeals, pp.4-5, ICTR 96-11- AR72, 5 September 2000) [reproduced in accompanying notebook at Tab 13].

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outside of the temporal jurisdiction of the Court, it nevertheless accepted the Prosecution's assertion that the conduct would be used "in proving the ingredients of the offences which were allegedly committed inside the temporal jurisdiction of the Court."⁵² In the context of the SCSL, this viewpoint is essential, as many of the crimes which Charles Taylor has been accused of committing include atrocities which fall outside the Court's purview, yet could still be considered as proving the "ingredients" of the crimes for which commission did indeed occur after the essential 1996 timeframe.⁵³ In *Ngeze and Nahimana v. Prosecutor*, the ICTR stated that:

The prosecution has to prove that all the legal elements of a crime were present at the time of commission of the crime, that is to say, at the time within the mandate year when the crime is alleged to have been committed. However, there is no reason why the evidence of their existence at that point of time cannot (in some cases, at any rate) include evidence deriving from a time prior to the commission of the crimes charged and, in particular, prior to the commencement of the mandate year. Prior matters can ground a finding of the present existence of a fact, in the sense that from one fact a reasonable inference may sometimes be made that another fact also existed.⁵⁴

The ICTR illustrated the point that prior acts and patterns of conduct could be introduced to illustrate the intent necessary to commit crimes which do not fall within the Court's temporal

⁵² Stahn, El Zeidy and Olasolo, *Developments at the International Criminal Court: The International Criminal Court's Ad Hoc Jurisdiction Revisited*, 99 A.J.I.L. 421, pg. 430, April 2005 (quoting *Nahimana v. Prosecutor*, Decision on the Interlocutory Appeals, ¶ 6, ICTR-96-11-AR72, 5 September 2000) [reproduced in accompanying notebook at Tab 26].

⁵³ *Prosecutor v. Charles Taylor*, Prosecution's Second Amended Indictment, SCSL-03-01-PT, 29 May 2007 [reproduced in accompanying notebook at Tab 1].

⁵⁴ *Aloys Simba v. Prosecutor*, Decision on Interlocutory Appeal Regarding Temporal Jurisdiction, ICTR-01-76-AR72.2, 29 July 2004 (quoting *Ngeze and Nahimana v. Prosecutor*, Decision on the Interlocutory Appeals, pp.4-5, ICTR 96-11- AR72, 5 September 2000) [reproduced in accompanying notebook at Tab 13].

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jurisdiction.⁵⁵ While the intent factor may constitute an element of the crimes, the particular acts demonstrating the intent may not qualify the crime itself as a continuing crime. The ICTR considered a case in which prior acts were admitted to demonstrate that the necessary *mens rea* existed for the crime the Accused was indicted. In the *Simba* case, the Accused had met with others for up to a year prior to the commission of the crime to plan it.⁵⁶ The planning included the intended plans for the anticipated genocide. In this case, while the actual genocide occurred in 1994, the planning and intention of the parties was demonstrated in 1993. Since the evidence of prior conduct may indicate the necessary intent that the Accused had for committing the acts he is charged with that the Court does have jurisdiction over, it would stand to reason that the admission of the evidence is both relevant and possess probative value. In the *Nahimana* case, the Court continued its analysis by discussing the impact that prior acts could have when demonstrating intent:

If, for example, a man was charged with a crime committed on a certain date, it would be necessary ... for the prosecution to prove, as an element of the crime, that on that date he had the intent to commit the crime. But the evidence that on that date he had that intent could well derive from an earlier time. It may be that on a previous occasion he did acts or used words showing that he entertained feelings of enmity for the victim or that he even intended to commit the particular crime. A reasonable inference could, in some cases, be drawn that the intent so shown was present at the time of commission of the crime. In the result, the prosecution could prove that, at the actual time of the crime, the accused had the necessary intent, though the proof derived from an earlier time.⁵⁷

⁵⁵ *Id.* pg. 5

⁵⁶ *Prosecutor v. Aloys Simba*, Judgment and Sentence, ICTR-01-76-T, ¶ 259-263, 13 December 2005 [reproduced in accompanying notebook at Tab 14].

⁵⁷ *Aloys Simba v. Prosecutor*, Decision on Interlocutory Appeal Regarding Temporal Jurisdiction, ICTR-01-76-AR72.2, 29 July 2004 (quoting *Ngeze and Nahimana v. Prosecutor*,

While the U.N. Tribunals have ruled that evidence which provides for a context or historical background may be admitted, other international Courts have also ruled on similar matters. In *Moiwana Village v. Suriname*⁵⁸, the Inter-American Court of Human Rights allowed the admission of evidence which demonstrated a pattern of conduct by the Accused.⁵⁹ In this instance, the Village of Moiwana was attacked by members of the Suriname armed forces, where over 40 villagers were massacred and the village was destroyed; those who fled remained in exile and no adequate investigation was made into the incident.⁶⁰ The Court allowed evidence which demonstrated an omission by Suriname to investigate to develop a pattern of a “denial of justice.”⁶¹ In other human rights cases, particularly *Lovelace v. Canada*, where a woman lost her status and legal benefits as an Indian through marriage to a non- Indian, the U.N. Human Rights Committee has stated that it could not rule on acts that occurred prior to the enforcement date of the International Covenant on Civil and Political Rights and its Optional Protocol, unless “the

Decision on the Interlocutory Appeals, pp.4-5, ICTR 96-11- AR72, 5 September 2000)
[reproduced in accompanying notebook at Tab 13].

⁵⁸ *Moiwana Village v. Suriname*, 2005 Inter-Am. Ct. H.R. (ser C) No 124, 15 June 2005
[reproduced in accompanying notebook at Tab 16].

⁵⁹ Gibson, T. Russell, *True Fiction: Competing Theories of International Legal Legitimacy and a Court's Battle With Ratione Temporis*, 29 Loy. L.A. Int'l & Comp. L. Rev. 153, 2007. (quoting *Moiwana Village v. Suriname*, 2005 Inter-Am. Ct. H.R. (ser C) No 124, 15 June 2005)
[reproduced in accompanying notebook at Tab 24].

⁶⁰ *Moiwana Village v. Suriname*, 2005 Inter-Am. Ct. H.R. (ser C) No 124, ¶3, 15 June 2005
[reproduced in accompanying notebook at Tab 16].

⁶¹ *ID.* at ¶ 42.

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violations themselves have effects which themselves constitute violations, after that date.”⁶²

Once again, the Courts looked to the probative value of the evidence to be admitted, and made the determination that the weight applied to the evidence would be assessed by the judges at the conclusion of the trial. The appropriate standard in determining the admission of this type of evidence is the probative value, and relevance to the conduct at hand. The Courts have striven for a fair and flexible approach to the admission of evidence, particularly evidence which may hold probative value in the determination of any particular case.⁶³

The SCSL will need to make several evaluations when considering the admissibility of evidence which falls outside of the Court’s temporal jurisdiction, and does not constitute a continuing crime as previously discussed. The Court will rely on the ability to admit any relevant evidence which has probative value for the issue at hand. Relying on this rule will require the analysis of the relevancy, the content of the evidence to be admitted and the circumstances under which it arose,⁶⁴ and the relationship of the probative value to the relevancy.⁶⁵ The SCSL may as

⁶² Stahn, El Zeidy and Olasolo, *Developments at the International Criminal Court: The International Criminal Court’s Ad Hoc Jurisdiction Revisited*, 99 A.J.I.L. 421, April 2005 (quoting *Lovelace v. Canada*, Communication No. 24/1977, para. 10-11, UN Doc. CCPR/C/13/D/24/1977 (1981)) [reproduced in accompanying notebook at Tab 26].

⁶³ *Prosecutor v. Norman, Fofana, Kondewa*, Fofana- Appeal Against Decision Refusing Bail, SCSL-04-14-AR65, 11 March 2005 [reproduced in accompanying notebook at Tab 2].

⁶⁴ *Prosecutor v. Vidoje Blagojević and Dragan Jokić*, Decision on the Admission into Evidence of Intercept-Related Materials ¶ 15, IT-02-60-T, 18 December 2003 [reproduced in accompanying notebook at Tab 4].

⁶⁵ *Prosecutor v. Vidoje Blagojević and Dragan Jokić*, Decision on the Admission into Evidence of Intercept-Related Materials ¶ 19, IT-02-60-T, 18 December 2003 (quoting *Prosecutor v.*

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an alternative however, rely on Rule 93 of the Rules of Procedure and Evidence when admitting evidence which predates the established temporal jurisdictions imposed upon the Court in the establishing statute.

D. Rule 93 specifically allows for the introduction of evidence which illustrates a pattern of prior conduct.

The Rules of Procedure and Evidence, which were adopted from the ICTR,⁶⁶ allow for the introduction of evidence which proves or establishes a historical context for the acts which the Accused is standing trial for. Rule 93(a) states that “evidence of a consistent pattern of conduct relevant to serious violations of international humanitarian law under the statute may be admissible.”⁶⁷ The ICTR has examined the issue of admitting evidence that supports the

Duško Tadić, Decision on Defence Motion on Hearsay, ¶ 8, IT-94-1-T, 5 August 1996) [reproduced in accompanying notebook at Tab 4].

⁶⁶ *Statute of the Special Court for Sierra Leone*, 16 January 2002 [reproduced in accompanying notebook at Tab 23].

⁶⁷ Rule 93(a), Special Court for Sierra Leone, Rules of Procedure and Evidence, *as amended on*, 27 May 2008 [reproduced in accompanying notebook at Tab 22].

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development of a contextual background and found that so long as the evidence possesses relevant and probative value it should be considered by the Court.⁶⁸

The ICTR amended the original language of Rule 93 as it appeared in the ICTY's Rules of Procedure and Evidence.⁶⁹ Originally, the language of the Rule stated that "evidence of a consistent pattern maybe admissible in the interests of justice,"⁷⁰ however the Court adopted a more narrow definition when adding the language that specifies relevance to "serious violations" rather than just a blanket admissibility.⁷¹ In the instance of Charles Taylor, and the crimes charged within the Indictment, it is arguable that a great majority of the crimes would be included within a narrow reading of the Rule, particularly crimes of murder, sexual violence and enslavement, to name a few.⁷²

⁶⁸ *Aloys Simba v. Prosecutor*, Decision on Interlocutory Appeal Regarding Temporal Jurisdiction, ICTR-01-76-AR72.2, 29 July 2004 (quoting *Ngeze and Nahimana v. Prosecutor*, Decision on the Interlocutory Appeals, pp.4-5, ICTR 96-11- AR72, 5 September 2000) [reproduced in accompanying notebook at Tab 13].

⁶⁹ International Criminal Tribunal for Rwanda, Rules of Procedure and Evidence, *as amended on* 29 June 1995 [reproduced in accompanying notebook at Tab 19].

⁷⁰ International Criminal Tribunal for the Former Yugoslavia, Rules of Procedure and Evidence, *as amended on* 4 October 1994 [reproduced in accompanying notebook at Tab 20].

⁷¹ Kiehl, Christopher, *The Admissibility of Evidence of a Consistent Pattern of Conduct in Criminal Trials*, Student Memorandum for the Office of the Prosecutor of the International Criminal Tribunal for Rwanda, Case Western Reserve University School of Law, Fall 2003 [reproduced in accompanying notebook at Tab 28].

⁷² *Prosecutor v. Charles Taylor*, Prosecution's Second Amended Indictment, SCSL-03-01-PT, Counts 2, 4 & 10, 29 May 2007 [reproduced in accompanying notebook at Tab 1].

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Rule 93(a) appears to have been developed as assurance that evidence relevant to the most serious atrocities may be considered. The reliance on this rule allows for the consideration of the crimes to “prove a pattern, design or systematic course of conduct by the Accused.”⁷³ If the Accused has committed a continuing crime, then the application of this Rule is not necessary. However, if the evidence seeks to prove the elements of a crime, such as in the *Simba*⁷⁴ case, where the necessary intent to commit genocide was demonstrated through meetings up to a year before the commission of the crime, then application of this Rule will ensure the admission of the conduct so long as the crime the Accused has been indicted for qualifies as a “serious violation of international humanitarian law”⁷⁵ as established in the statute.⁷⁶ It is important to note however, that even if the conduct does not qualify as a “serious violation of international humanitarian law”, the evidence still may be admissible so long as the evidence qualifies under Rule 89(c).⁷⁷

⁷³ Kiehl, Christopher, *The Admissibility of Evidence of a Consistent Pattern of Conduct in Criminal Trials*, Student Memorandum for the Office of the Prosecutor of the International Criminal Tribunal for Rwanda, Case Western Reserve University School of Law, Fall 2003 [reproduced in accompanying notebook at Tab 28].

⁷⁴ *Prosecutor v. Aloys Simba*, Judgment and Sentence, ICTR-01-76-T, ¶ 259-263, 13 December 2005 [reproduced in accompanying notebook at Tab 14].

⁷⁵ Rule 93(a), Special Court for Sierra Leone, Rules of Procedure and Evidence, *as amended on*, 27 May 2008 [reproduced in accompanying notebook at Tab 22].

⁷⁶ *Statute of the Special Court for Sierra Leone*, 16 January 2002 [reproduced in accompanying notebook at Tab 23].

⁷⁷ *Compare Prosecutor v. Aloys Simba*, Decision on Prosecutor’s Motion for Admission of Testimony of an Expert Witness, ¶ 5, ICTR-01-76-I, 14 July 2004 *with Prosecutor v. Sesay*,

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IV. Conclusion

A. If the crime is considered to be a non-continuing crime, the Court will be authorized to consider evidence to create a historical context, to prove intent or to demonstrate character however it is unlikely that the Court will be able to convict solely on the basis of such evidence.

The Court is restricted in the crimes in can hear. As such, if the conduct of the crime does not fall within the temporal limitations, the Court does not have the ability to convict for those actions. An analysis of the available case law, particularly from the ICTR⁷⁸, demonstrates that the conduct may be admitted onto the record for purposes which include the demonstration of character, the proof of intent⁷⁹, or just to provide a historical context for the crimes which the Court does have jurisdiction over. The inclusion of Rule 93(a) bolsters the Court's authority to admit such evidence⁸⁰, but the Court is not limited to the admission of prior conduct evidence in

Kallon, Gbao, Ruling on Gbao Application to Exclude Evidence of Prosecution Witness Mr. Koker, SCSL-04-15391, 23 May 2005 [reproduced in accompanying notebook at Tab 12].

⁷⁸ See e.g., *Simba v. Prosecutor*, Decision on Interlocutory Appeal Regarding Temporal Jurisdiction, ICTR-01-76-AR72.2, 29 July 2004 [reproduced in accompanying notebook at Tab 13].

⁷⁹ *Aloys Simba v. Prosecutor*, Decision on Interlocutory Appeal Regarding Temporal Jurisdiction, ICTR-01-76-AR72.2, 29 July 2004 (quoting *Ngeze and Nahimana v. Prosecutor*, Decision on the Interlocutory Appeals, pp.4-5, ICTR 96-11- AR72, 5 September 2000) [reproduced in accompanying notebook at Tab 13].

⁸⁰ Rule 93(a), Special Court for Sierra Leone, Rules of Procedure and Evidence, *as amended on*, 27 May 2008 [reproduced in accompanying notebook at Tab 22].

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the use of this rule. Rule 89(c) allows the Court to consider any evidence which is relevant and provides probative value.⁸¹ Considering this, prior acts and a prior pattern of conduct will be admitted to the record so long as the Prosecution can demonstrate the relevancy, or show that the crime for which the Accused has been indicted is a “serious violation of international humanitarian law,”⁸² in which case the evidence would be admissible under Rule 93(a).

B. If the crime is considered a continuing crime, the Court will be authorized to use the evidence in a manner to convict, as the evidence may prove actual elements of the crime and therefore the conduct will fall within the Court’s temporal jurisdiction and be eligible for punishment by the Court.

If the Prosecution can demonstrate that the prior acts and conduct of the Accused constitute a continuing crime⁸³, then the Court will not only be able to consider the conduct as relevant evidence, but will also be able to convict the Accused for the offense.⁸⁴ Since a

⁸¹ Rule 89(c), Special Court for Sierra Leone, Rules of Procedure and Evidence, *as amended on*, 27 May 2008 [reproduced in accompanying notebook at Tab 22].

⁸² Rule 93(a), Special Court for Sierra Leone, Rules of Procedure and Evidence, *as amended on*, 27 May 2008 [reproduced in accompanying notebook at Tab 22].

⁸³ Nissel, Alan, *Continuing Crimes In The Rome Statute*, pg. 664, 25 Mich. J. Int’l L. 653, Spring 2004 [reproduced in accompanying notebook at Tab 25].

⁸⁴ *Id.*, pg. 664.

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continuing crime is comprised of elements that occur at various points in time, it is only necessary to show that some of the elements fell within the temporal jurisdiction in order to give the Court proper jurisdiction, as all elements put together create the overall crime for which the Accused will be tried. In the context of the SCSL, the Court will need to examine whether the events that occurred at the beginning of the civil war could be construed as a larger continuing crime that lasted into the Court's temporal jurisdiction. For instance, Charles Taylor has been indicted for sexual slavery,⁸⁵ recruitment of children soldiers⁸⁶ and enslavement⁸⁷ amongst others. Each one of these crimes has elements which extend over a period of time, and therefore, if the Prosecution can show that some elements were fulfilled prior to the granted temporal jurisdiction while other elements were satisfied after the critical date, then the Court may both consider and convict on the basis of evidence which proves the completion of the crimes.

⁸⁵ *Prosecutor v. Charles Taylor*, Prosecution's Second Amended Indictment, Count 5, SCSL-03-01-PT, 29 May 2007 [reproduced in accompanying notebook at Tab 1].

⁸⁶ *Id.*, Count 9.

⁸⁷ *Id.*, Count 10.