SPECIAL COURT FOR SIERRA LEONE

APPEALS CHAMBER

Before: Hon. Justice George Gelaga King, President
Hon. Justice Emmanuel Ayoola
Hon. Justice A. Raja N. Fernando
Hon. Justice Renate Winter
Hon. Justice Geoffrey Robertson. QC

Registrar: Herman von Hebel, Registrar

Date: 2rd August 2007

The Prosecutor **Against** **Alex Tamba Brima**
Brima Bazzy Kamara
Santigie Borbor Kanu

Case No. SCSL -04-16-A

Public Document

KANU'S NOTICE AND GROUNDS OF APPEAL

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A. INTRODUCTION

Pursuant to Article 20 of the Statute of Special Court ("the Statute") and Rule 108(A) of the Rules of Procedure and Evidence ("the Rules"), the **Kanu Defence** hereby files its Notice and Grounds of Appeal against the Judgment and Sentence of Trial Chamber II, pronounced on 20 June 2007 and rendered on the 19th July 2007 (Registry page Nos. 21465-22096) in the Case of The Prosecutor v.Alex Tamba Brima, Brima Bazzy Kamara and Santigie Borbor Kanu.(Case No. SCSL-04-16-T) as revised pursuant to the corrigendum issued by the Trial Chamber on 19th July 2007 (Registry page Nos. 23025-23678)

The **Kanu Defence** provides Notice of the following Grounds of Appeal:

B. GROUNDS OF APPEAL RELATING TO CONVICTION

GROUND ONE

1. **The 'Greatest Responsibility Requirement' – Chapter IX, paragraph 640 through 659 of the judgment**

1.1 The Trail Chamber erred in law, in its determination of the 'greatest responsibility requirement' under Article 1(1) of the Statute. Its finding that this requirement did not establish a jurisdictional requirement but was merely a guide to prosecutorial discretion does not reflect the intention of the legislators of the Statute manifested in the elaborate discussions preceding the drafting of the Statute.

1.2 The legislators of the Statute deliberately sought to limit the number of suspects before the court and conceived the greatest responsibility test as a jurisdictional requirement, *sine qua non* to any finding of guilt under the Statute. Had the Trial Chamber properly interpreted this provision, it would have 'acquitted' the Appellant for want of jurisdiction.

1.3 Alternatively, if the Trail Chamber would have found that the Appellant meets the jurisdictional threshold, it would not have entered a guilty verdict on any of the crimes charged under Article 6(1) of the Statute to the extent that the Appellant "committed" those crimes in person given that the greatest responsibility requirement instructed the court to look at the overall culpability of the accused person by virtue of his leadership role, within the context of their entire civil war beginning 30 November 1996. Any conviction entered on the basis that the Appellant committed the crimes, *in person*, must therefore be quashed and only be considered as aggravating in relation to sentencing.

GROUND TWO

2. **Pleading Principles When Mode of 'Committing' is Alleged - Paragraph 45 through 95 of the judgment**

2.1 In respect of the allegations relating to criminal liability under Article 6(1), to the extent that the Appellant, *in person*, committed the crimes alleged in the
2.2 Indictment; having found that the Indictment was defective in that it did not sufficiently disclose particulars of the Accused's involvement *in person* (paragraph 53), the Trial Chamber erred in law in finding that such defect was cured by Prosecution's evidence of material facts not pleaded in the Indictment, which the Defence did not object.

2.3 The Trial Chamber erred in concluding that the Defence's failure to object to the 'extraneous' evidence amounted to a waiver, given the complexity of the case and the multiplicity of charges the Appellant was facing. The Trial Chamber failed to appreciate that this evidence would have been relevant to the Prosecution's case in other respects and therefore to that extent admissible.

2.4 Further, in order to avoid an injustice to the Appellant, the Trial Chamber erred in law in drawing such an adverse inference without firstly establishing that the omission was a deliberate defence tactic. On the basis of the foregoing, any conviction against the Appellant under Article 6(1) of the Statute, to the extent that he committed the crimes *in person* must therefore be quashed.

GROUND THREE

3. **Evaluation of Witnesses' Evidence**

The Trial Chamber generally erred in law and fact in its evaluation of the evidence before it. The Trial Chamber generally preferred Prosecution's evidence and only credited the evidence adduced by the Defence where it coincided with that of the Prosecution. The Trial Chamber's entire evaluation of the evidence therefore materially prejudiced the Appellant and must be reviewed.

GROUND FOUR

4. **Evidence of Accomplice Witnesses**

4.1 The Trial Chamber generally erred in law and fact in overly relying on the inconsistent and sometimes uncorroborated evidence of witnesses implicated in the commission of the crimes alleged in the Indictment, in particular George Johnson, TF1-334 and Gibril Massaquoia.

4.2 The Trial Chamber failed to properly evaluate the inconsistencies in the evidence of these witnesses given its prominence in the Prosecution's case. Where the evidence of either of these witnesses was uncorroborated, the Trial Chamber failed to caution itself appropriately as required by law.

4.3 More particularly, the Trial Chamber erred in law, in paragraph 125, in holding that the mere fact that "none of these Prosecution witnesses ha[d] been charged with any crimes..." did not qualify their evidence as "accomplice evidence". These errors therefore invalidate the judgment to the extent of the Trial Chamber's reliance on the evidence of the named witnesses.

GROUND FIVE

5. **Liability under Article 6(3) – Bombali District – paragraph 2034 through 2044 of the judgment**

The Trial Chamber erred in law in finding in paragraph 2044 that the Prosecution had established beyond a reasonable doubt that Appellant was liable as a superior under Article 6(3) for the crimes committed in Bombali District. In arriving at this decision the Trail Chamber erred in finding that the Appellant had effective control over the AFRC subordinates in the *entire* Bombali District (Paragraph 2040). (Emphasis added). The evidence on record, at best, merely showed that the Appellant shared concurrent responsibility with other superiors. All convictions under Article 6(3) of the Statute entered against the Appellant in the Bombali District must therefore be quashed.

GROUND SIX

6. **Liability under Article 6(3) – Freetown and the Western Area – paragraph 2065 through 2080 of the judgment**

The Trial Chamber erred in law and fact in finding in paragraph 2080 that Accused Kanu was liable under Article 6(3) for crimes committed in the Western Area in that the evidence adduced does not lead to a reasonable conclusion that he had effective control over his subordinates in the *entire* Western Area. His position, *de jure* or *de facto*, does not support this finding. The evidence on record, at best, merely showed that the Appellant shared concurrent responsibility with other superiors and only participated in the commission of *some* of the crimes in the Western Area. (Emphasis added). All convictions against the Appellant in the Western Area under Article 6(3) of the Statute must therefore be quashed.

GROUND SEVEN

7. **Mistake of Law: Crimes Relating to Child Soldiers (Article 4(c) of the Statute – paragraph 727 through 738 of the judgment**

Trial Chamber erred in law in dismissing the argument that the absence of criminal knowledge on the Appellant's part vitiated the requisite *mens rea* for the crimes relating to child soldiers. (Para 732; also see paragraph 1251). The

conviction for conscripting children under the age of 15 years must therefore be quashed.

GROUND EIGHT

8. **Cumulative Conviction – Chapter XII, paragraph 2099 – through 2111 of the judgment**

The Trial Chamber erred in law in paragraph 2108 in finding that it was permissible to convict an accused under Article 3(b) or 3(d), as well as the underlying crimes charged in Articles 3(a) (murder and mutilation) and Articles 3(e) (outrages upon personal dignity). This finding was premised on a yet another error of law that,"each of the acts under Count 1 and 2 have a materially distinct element, i.e. *the intention* terrorise or to collectively punish". (Emphasis added) All convictions against the Appellant under Article 3(a) and 3(d) must therefore be struck off and only those which contain an additional materially distinct element (Crimes under Article 3(b) and 3(d) be allowed to stand.

GROUND NINE

9. **Responsibility for Crimes of Enslavement under Article 6(1) – paragraph 2089 through 2098 of the judgment**

The Trial Chamber erred in law and fact in paragraphs 2096 and 2097 in finding that the Appellant was responsible under Article 6(1) for planning the commission of the crime of sexual slavery and for planning the commission of conscription of children under the age of 15 into the armed group or using them to participate actively in hostilities in the Bombali and the Western Area when there was no sufficient evidence on record to reasonable come to that conclusion. On that basis, the convictions against the Appellant on those charges must fall.

GROUND TEN

10. **Joint Criminal Enterprise – Paragraph 56 through 85 of the judgment**

Having found in paragraph 85 that Joint Criminal Enterprise as a mode of criminal liability, the Indictment had been defectively pleaded, the Trial Chamber erred in law in not quashing the entire Indictment. The entire Indictment should have been quashed once joint criminal enterprise was discarded.

C GROUNDS OF APPEAL RELATING TO SETENCE

In sentencing the Appellant to single term of imprisonment of fifty years for all the Counts on which he was found guilty, credit being given to him for the period during

which he was detained in custody pending trial,[1] the Trial Chamber erred in law and/or fact in one or more of the following ways:

GROUND ELEVEN

11. The Trial Chamber generally failed to give adequate weight to the Appellant Kanu's mitigating circumstances. The sentence imposed is inordinately high and excessive it induces a sense of shock. The sentence effectively approximates a life term, which the legislators of the Statute deliberately excluded.

GROUND TWELVE

12. The sentence unduly emphasizes the retributive and deterrent aspects of punishment and pays no regard whatsoever to the rehabilitative element, which should have instructed the court especially in the context of Sierra Leone. The sentence manifestly negates the spirit of reconciliation and reconstruction espoused in the Amnesty Agreement and evinced through the Truth and Reconciliation process.

GROUND THERTEEN

13. More particularly, the Trial Chamber erred in paragraphs 137 and 138 in dismissing the argument that the Amnesty Agreement constituted a mitigating factor. The agreement should have been an indication to the court that the people of Sierra Leone, and the international community at large, were no longer bent on retribution but peace and reconciliation. While not a bar to Prosecution, the agreement should at least have been mitigatory.

GROUND FOURTEEN

14. The Trail Chamber erred in paragraphs 115 and 116 in dismissing the argument that the fact that the Appellant did not bear the "greatest responsibility" under Article 1(1) of the Statute constituted a mitigating factor. It is clear from the Statute and the preparatory documents that the intention of the legislators was to try those who bear the greatest responsibility, by virtue of their leadership position. Even if that not be jurisdictional requirement (which is respectfully contested), the fact that the Appellant did not fall into that category, should at least have been considered mitigatory.

GROUND FIFTEEN

[1] Sentencing Judgment (Disposition), p. 36

15. The Trial Chamber erred in paragraphs 123 and 124 in disregarding the fact that there was general chaos in Freetown during the time that most the crimes were committed as a mitigating factor when there are established authorities that such factor generally constitutes mitigating circumstances. The Trial Chamber failed to establish why it had distinguished the present case.

GROUND SIXTEEN

16. Having conceded in paragraph 25 that such factors as "the behavior or conduct of the accused subsequent to the conflict" or his "assistance to the detainees or victims" would constitute mitigating circumstances, the Trial Chamber erred in not recognizing the Appellant's positive contribution to the peace process after the war as a mitigating factor.

GROUND SEVENTEEN

17. The Trial Chamber erred in paragraphs 125 and 126 in not finding the Appellant's lack of proper military training as a mitigating factor. The court, with all due respect, failed to appreciate that the point raised did not relate to the Appellant's (then Accused) culpability but that it was only raised in mitigation.

GROUND EIGHTEEN

18. Similarly, with respect to Count 12 relating to the recruitment and training of child soldiers, the Trial Chamber erred in paragraph 127 and 128 in not finding the absence of criminal knowledge on the Appellant's part as a mitigating factor. Again the court, misconstrued the argument to be one relating to culpability when it was only raised in mitigation.

GROUND NINETEEN

19. The Trial Chamber erred in not applying the principle of 'hierarchy of relative criminality' in sentencing the Appellant. The Appellant notes that as a general sentencing principle, heavier penalties should be imposed on those who have committed the gravest crimes and whose responsibility for those crimes is highest and submits that it was therefore incumbent upon the court in sentencing, the then 3 Accused, to develop an appropriate tariff reflecting their varying culpability given their relative roles and their respective positions of authority.

GROUND TWENTY

20. Had the Trial Chamber not erred in any one or more of the above grounds, it would not have passed so harsh a sentence against the Appellant Kanu. It would have passed a lesser penalty commensurate with the Appellant's degree of blameworthiness.

D RELIEF SOUGHT

18. In appealing against the Judgment and Sentence, the Appellant seeks the following relief:

18.1 With respect to the convictions entered against him, that such convictions be set aside on the basis of any one or more of grounds 1 through 20, above.

18.1.1 With respect to the sentence, depending on the honourable court's determination of the Appellant's case on the merits, that the learned Appeals Chamber substitutes the sentence with a lesser custodial term as it might deem appropriate regard being had to the mitigating factors in the case. In any event, that the Appeals Chamber substitutes the sentence passed with a lesser penalty cognizant of all the mitigating factors in the case.

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