

International Crimes Tribunal-1 (ICT-1)
Old High Court Building, Dhaka, Bangladesh.

ICT-BD Case No.01 OF 2013

[Charges:- Crimes against Humanity, abetment and complicity in committing such crimes as specified in section 3(2)(a)(g) read with section 4(1) of the Act No. XIX of 1973]

The Chief Prosecutor
Versus
Md. Mobarak Hossain alias Mobarak Ali

Present:
Mr. Justice M. Enayetur Rahim, Chairman
Mr. Justice Jahangir Hossain, Member
Mr. Justice Anwarul Haque, Member

Date of delivery of Judgment on 24th November, 2014.

Prosecutors:

Mr. Golam Arif Tipu, Chief Prosecutor with
Mr. Syed Haider Ali
Mr. Shahidur Rahman
Mr. Moklesur Rahman
Mr. Abdur Rahman Howladar
Mr. Md. Altab Uddin
Mr. Abul Kalam
Mr. Sheikh Mosfeq Kabir
Mr. Hrishikesh Saha
Mr. Md. Zahid Imam
Mr. Syed Sayedul Haque (Suman)
Ms. Sabina Yesmin Khan

Defence Counsels:

1. Mr. Ahsanul Haque
2. Mr. Mizanul Islam
3. Mr. Muhammad Tajul Islam
4. Mr. Muhammad Tarikul Islam

Judgment

[Under section 20(1) of the Act No.XIX of 1973]

I. Introduction

1. This International Crimes Tribunal-1 [hereinafter referred to as the "Tribunal"] was established under the International Crimes (Tribunals) Act enacted in 1973 [hereinafter referred to as the Act of

1973] by Bangladesh Parliament to provide for the detention, prosecution and punishment of persons responsible for genocide, crimes against Humanity, war crimes, and crimes committed in the territory of Bangladesh, in violation of customary international law, particularly between the period of 25th March and 16th December, 1971. However, no Tribunal was set up and as such no one could be brought to justice under the Act until the government established the Tribunal on 25th of March 2010.

II. Historical Context

2. In August, 1947 the partition of British India based on two-nation theory, gave birth to two new states, one a secular state named India and the other the Islamic Republic of Pakistan of which the western zone was eventually named as West Pakistan and the eastern zone as East Pakistan, which is now Bangladesh.

3. In 1952 the Pakistan authorities attempted to impose Urdu as the only State language of Pakistan ignoring Bangla, the language of the majority population of Pakistan. The people of the then East Pakistan started movement to get Bangla recognized as a State language, eventually turned to the movement for greater autonomy and self-determination and ultimately independence.

4. In the general election of 1970, the Awami League under the leadership of Bangabandhu Sheikh Mujibur Rahman became the majority party of Pakistan. Despite this overwhelming majority, Pakistan government did not hand over power to the leader of the majority party as democratic norms required. As a result, movement started in this part of Pakistan and Bangabandhu Sheikh Mujibur

Rahman in his historic speech of 7th March, 1971, called on the Bangalee people of the eastern zone to strive for independence if people's verdict would not be respected and power was not handed over to the leader of the majority party. On 26th March, 1971 following the onslaught of "**Operation Search Light**" by the Pakistani Military on 25th March, Bangabandhu Sheikh Mujibur Rahman declared Bangladesh independent immediately before he was arrested by the Pakistani army.

5. In the War of Liberation that ensued, all people of East Pakistan whole heartedly supported and participated in the call to free Bangladesh but a small number of Bangalees, Biharis, other pro-Pakistanis, as well as members of a number of different religion-based political parties joined and/ or collaborated with the Pakistan military to actively oppose the creation of independent Bangladesh and most of them committed and facilitated the commission of atrocities in the territory of Bangladesh. As a result, 3 million [thirty lakh] people were killed, more than [two lakh] women raped, about 10 million [one crore] people deported to India as refugees and million others were internally displaced. It also experienced unprecedented destruction of properties all over Bangladesh.

6. The Pakistan government and the military with the help of some pro-Pakistani leaders set up a number of auxiliary forces such as the Razakars, the Al-Badr, the Al-Shams, the Peace Committee etc, essentially to collaborate with the military in identifying and eliminating all those who were perceived to be sympathized with the liberation of Bangladesh, individuals belonging to minority religious groups

especially the Hindus, political groups belonging to Awami League and other pro-Independence political parties, Bangalee intellectuals and civilian population of Bangladesh. Undeniably the road to freedom for the people of Bangladesh was arduous and torturous, smeared with blood, toil and sacrifices. In the contemporary world history, perhaps no nation paid as dearly as the Bangalees did for their emancipation.

III. Brief account of the Accused Md. Mobarak Hossain alias Mobarak Ali.

7. Accused Md. Mobarak Hossain alias Mobarak Ali son of late Shahadat Ali alias Sadat Ali and late Nozibur Nesa was born on 10 January, 1950 at village- Nayadil, Police Station-Akhaura, District-Brahmanbaria. He studied upto class- VIII. His profession is business but he is known as a collaborator in his locality. During the War of Liberation he was a member of Razakar Bahini and associated with the politics of Jamaat-e-Islami and after Liberation he became a Rokon of Jamaat-e-Islami at union parishad level and eventually he has joined the politics of Bangladesh Awami League.

IV. Procedural History

8. At pre-trial stage, one Khodeza Begum filed a case on 03.05.2009 with Brahmanbaria police station. Then the accused surrendered before the High Court Division and obtained ad-interim anticipatory bail for a period of six months. During investigation of this case, the Tribunal was pleased to grant him ad-interim bail with a condition that at any time his bail may be cancelled by the Tribunal.

9. Finally, the chief prosecutor submitted the Formal Charge under section 9(1) of the Act on 25.02.2013 alleging that the accused was a

Razakar in 1971 and he actively participated in the commission of crimes against Humanity such as murder, abduction, conspiracy, deportation, torture, looting, confinement etc. He was also associated with the politics of Jamaat-e-Islami and he aided Pakistani Army in committing crimes in different places of the then Brahmanbaria Sub-Division and thereby he committed such crimes as specified in section 3(2) of the Act during the period of the Liberation War in 1971.

10. The Tribunal, on perusal of Formal Charge and the documents submitted therewith, found prima-facie case, took cognizance of offences as specified under section 3(2) (a), 3(2)(c)(i)(g) and 4(1) of the Act against accused Md. Mobarak Hossain on 12.03.2013. Considering nature of the case, on the same date the accused was taken into custody refusing his prayer for bail, fixing a date of hearing on charge matter.

V. Consistency of the Act of 1973 with other Statutes on international crimes

11. Section 3(2)(a) of International Crimes (Tribunals) Act, 1973 defines the crimes against Humanity in the following manner:

“Crimes against Humanity: namely, murder, extermination, enslavement, deportation, imprisonment, abduction, confinement, torture, rape or other inhumane acts committed against any civilian population or persecutions on political, racial, ethnic or religious grounds, whether or not in violation of the domestic law of the country where perpetrated;”

12. Many have expressed their concern by the degree to which the above definition of 'Crimes against Humanity' under the Act differs from international standards. It may be stated that 'international standard' itself is a fluid concept, it changes with time and requirement through a mechanism of progressive development of law. Therefore, one can look at the concept of 'standard' from entirely a technical perspective; whereas, others can see it as a matter of inherent spirit.

13. Looking at the contemporary standards of definition of 'Crimes against Humanity' in various Statutes on international crimes, the first observation can be made is that there is no consistency among definitions. The Statute of the International Criminal Tribunal for the former Yugoslavia, 1993 [ICTY Statute], the Statute of the International Criminal Tribunal for Rwanda, 1994 [ICTR Statute], the Rome Statute of the International Criminal Court, 1998 [Rome Statute] or the Statute of the Special Court for Sierra Leone, 2002 [Sierra Leone Statute] although share common spirit, do differ in legal technical nitty-gritty.

VI. The Rome Statute: Article-7

Crimes against humanity

14. For the purpose of this Statute, "crime against humanity" means any of the following acts when committed as part of a widespread or systematic attack directed against any civilian population, with knowledge of the attack:

(a) Murder; (b) Extermination; (c) Enslavement; (d) Deportation or forcible transfer of population; (e) Imprisonment or other severe deprivation of physical liberty in violation of fundamental rules of international law; (f) Torture; (g) Rape, sexual slavery, enforced prostitution, forced pregnancy,

enforced sterilization, or any other form of sexual violence of comparable gravity; (h) Persecution against any identifiable group or collectivity on political, racial, national, ethnic, cultural, religious, gender as defined in paragraph 3, or other grounds that are universally recognized as impermissible under international law, in connection with any act referred to in this paragraph or any crime within the jurisdiction of the Court; (i) Enforced disappearance of persons; (j) The crime of apartheid; (k) Other inhumane acts of a similar character intentionally causing great suffering, or serious injury to body or to mental or physical health.

VII. The ICTR Article 3: Crimes against Humanity

15. The International Criminal Tribunal for Rwanda shall have the power to prosecute persons responsible for the following crimes when committed as part of a widespread or systematic attack against any civilian population on national, political, ethnic, racial or religious grounds of (a) murder, (b) extermination, (c) enslavement, (d) deportation, (e) imprisonment, (f) torture, (g) rape, (h) persecutions on political, racial and religious grounds and (i) other inhumane acts.

VIII. THE ICTY Article 5

16. The International Criminal Tribunal shall have the power to prosecute persons responsible for the (a) murder, (b) extermination, (c) enslavement, (d) deportation, (e) imprisonment, (f) torture, (g) rape, (h) persecutions on political, racial and religious grounds and (i) other inhumane acts when committed in armed conflict, whether international or internal in character, and directed against any civilian population.

IX. ICT, 1973 [BD] Section 3

17. Section 3(1) confers the power upon the Tribunals to try and punish any individual or organisation, or group of individuals, or any member of any armed, defence or auxiliary forces, irrespective of his nationality, who commits or has committed, in the territory of Bangladesh, whether before or after the commencement of this Act, any of the crimes mentioned in sub-section (2) of section 3.

18. Section 3(2) (a) enumerates crimes against Humanity as namely, murder, extermination, enslavement, deportation, imprisonment, abduction, confinement, torture, rape or other inhumane acts committed against any civilian population or persecutions on political, racial, ethnic or religious grounds, whether or not in violation of the domestic law of the country where perpetrated.

X. Elements differ in the different Statutes

19. The ICTY requires the crime to be taken place in an armed conflict, be it international or national. The Statute does not require the crime to be committed as a part of widespread or systematic attack on the civilian population, nor it requires that the crime to be perpetrated on discriminatory grounds.

XI. Case laws

20. In February 1995, the Prosecutor of the ICTY indicted Dusko Tadic for war crimes and crimes against Humanity. Tadic challenged the ICTY's jurisdiction over crimes against Humanity. Tadic argued that the definition of crimes against Humanity did not conform to contemporary International law, which required such crimes to be committed in an international armed conflict. In its decision on the

Defense Motion for Interlocutory Appeal on Jurisdiction [“Tadic Decision on Jurisdiction”], the Appeals Chamber of the ICTY rejected this argument by affirming that crimes against Humanity can even be committed in peacetime; the Trial Chamber of the ICTY [“ICTY Trial Chamber”] reaffirmed that although Article 5 of the ICTY Statute required a nexus with armed conflict, such a requirement is unnecessary under international law. The ICTY Trial Chamber also noted that Article 5 required crimes against Humanity to be committed under a second set of circumstances, that is, the acts must be “directed against any civilian population.” The ICTY Trial Chamber interpreted the term “ANY CIVILIAN POPULATION” as having three elements. First, the civilian population must be “specifically identified as a group by the perpetrators of these acts.” Although the ICTY Trial Chamber does not articulate the bases for such as identification, this interpretation suggests that the ICTY Trial Chamber accepted the need for a discriminatory motive. The other two components raised by the ICTY Trial Chamber are that the crimes must be “organized and systematic” and “of a certain scale and gravity”. The ICTY Trial Chamber’s approach in reading these elements into the meaning of “any civilian population” is a novel one. The ICTY Trial Chamber also appeared to require both elements to be present, rather than accepting them as alternative conditions.

21. However, customary international humanitarian law requires that the attack to be either systematic or widespread. Rome Statute and the ICTR also require these two elements to be alternatively present.

22. The ICTY trial Chamber also noted that a crime against Humanity must be widespread or demonstrate a systematic character. However, as long as there is a link with the widespread or systematic attack against a civilian population, a single act could qualify as a crime against Humanity. As such, an individual committing a crime against a single victim or a limited number of victims might be recognized as guilty of a crime against Humanity if his acts were part of the specified context identified above.

23. So it appears that though the ICTY Statute requires the crime to be taken place in an armed conflict, the tribunal holds that armed conflict is not necessary. And though the Statute did not require the crime to be taken place as a part of widespread or systematic attack, the tribunal holds that the term 'any civilian population' instead of any civilian people indicates that the crime to be taken place as a part of widespread or systematic attack on civilian population. Court's language the "population" element is intended to imply crimes of a collective nature and thus exclude single or isolated acts. Thus the emphasis is not on the individual victim but rather on the collective, the individual being victimized not because of his individual attributes but rather because of his membership of a targeted civilian population. This has been interpreted to mean that the acts must occur on a widespread or systematic basis that there must be some form of a governmental, organizational or group policy to commit these acts and that the perpetrator must know of the context within which his actions are taken, as well as the requirement that the actions be taken on discriminatory grounds.

24. The above paragraph and the structure of the opinion made it clear that the ICTY Trial Chamber viewed the term “population” as having three essential components: “widespread or systematic” commission of the acts that constitute crimes against Humanity; a discriminatory motive for those acts; and a governmental, organizational, or group policy to commit those acts. Furthermore, the ICTY Trial Chamber held that if a population was “predominantly” civilian, then the presence of a few non-civilians would not defeat this characterization. The Tadic Judgment did not elaborate on how to construe “Widespread” or “Systematic.” But customary IHL mandates that either systematic or widespread is enough to qualify a crime to be a crime against Humanity.

XII. Law in the International Crimes Tribunal Bangladesh

25. Existence of armed conflict is not necessary though it is admitted that there was an armed conflict in 1971.

26. There is no requirement of discriminatory element except in the case of persecution. The plethora of international case law suggests that “law in this area is mixed”. But as our Statute clearly mentioned the discriminatory element for the act of persecution, the proper law should be to impose the existence of discriminatory elements only for persecution and not for the other acts mentioned in section 3(2)(a).

27. Widespread or systematic: Our law does not require the attack to be part of a widespread or systematic attack. But as discussed in Tadic case by ICTY the word 'civilian population' indicates that the attack to be a part of widespread or systematic attack. It is now well-settled that the attack in Bangladesh in 1971 was widespread and systematic in

nature. Tadic case elaborately discussed what constitutes an attack widespread and systematic.

28. The criterion of "*widespread*" describes a quantitative element. The widespread nature of the attack can arise from the number of victims or its extension over a broad geographic area. The criterion of a "*Systematic*" attack is qualitative in nature. It refers to the organized nature of the committed acts of violence and thus serves to exclude isolated acts from the notion of crimes against Humanity. Earlier case law of the ad hoc tribunals required that the individual act follow a predetermined plan or policy. The Appeals Chamber of the Yugoslavia Tribunal has now distanced itself from such a requirement. Although attacks on a civilian population will typically follow some form of predetermined plan, this does not make the existence of a plan or policy an element of the crime. Under customary international law, crimes against Humanity do not call for a "*policy element*". However, Article 7(2) (a) of the ICC Statute requires that the attack on a civilian population be carried out "*pursuant to or in furtherance of State or organizational policy to commit such attack.*"

29. The International Crimes (Tribunals), Act, 1973, Bangladesh states about the jurisdiction of the Tribunal and defines crimes against Humanity in section 3 as following manner:

"(1) A Tribunal shall have the power to try and punish any individual or group of individuals, or organisation or any member of any armed, defence or auxiliary forces, irrespective of his nationality, who commits or has committed, in the territory of Bangladesh , whether before

or after the commencement of this Act, any of the crimes mentioned in sub-section(2).

(2) -----.

(a) Crimes against Humanity: namely, murder, extermination, enslavement, deportation, imprisonment, abduction, confinement , torture, rape or other inhumane acts committed against any civilian population or persecutions on political, racial, ethnic or religious grounds, whether or not in violation of the domestic law of the country where perpetrated."

To our understanding the proper construction of this section should be

30. Crimes against Humanity can be committed even in peace time; existence of armed conflict is, by definition, not mandatory. Neither in the preamble nor in the jurisdiction sections of the Act was it mentioned that crime against Humanity requires the existence of an armed conflict. Indiscriminate attack on civilian population based on their political, racial, ethnic or religious identity can be termed as crimes against Humanity even if it takes place after 1971. However, no one denies the fact that there was an armed conflict in 1971.

31. Though the Statute of the Tribunal does not explicitly requires the attack to be a part of systematic or widespread attack against the civilians, the very term "*any civilian population*" instead of civilian people indicates the plurality of the attack and thus implies that the attack to be part of a systematic or widespread attack against civilian [Tadic case for references]. However, the term '*systematic and*

widespread is a disjunctive, rather than cumulative requirement. The Rome Statute and the ICTR Statute provide that the attack must be part of a systematic or widespread attack against civilians. That means the existence of either systematic or widespread attack is enough to qualify crime against Humanity.

32. *“Widespread”* refers to the large-scale nature of the attack which is primarily reflected in the number of victims. *“Systematic”* refers to the organized nature of the acts of violence and the *“non-accidental repetition of similar criminal conduct on a regular basis.”* Widespread is quantitative while systematic is qualitative.

33. The *“population”* element is intended to imply crimes of a collective nature and thus exclude single or isolated acts. Thus, the emphasis is not on the individual victim but rather on the collective, the individual being victimized not because of his individual attributes but rather because of his membership of a targeted civilian population. This has been interpreted to mean that the acts must occur on a large scale basis [widespread] or, that there must be some form of a governmental, organizational or group policy to commit these acts [systematic, targeted] and that the perpetrator must know of the context within which his actions are taken [knowledge and intent], and finally that attack must be committed on discriminatory grounds in case of persecution.

34. The attack must be directed against any civilian population. The term *“civilian population”* must be interpreted broadly and refers to a population that is predominantly civilian in nature. A population may qualify as *“civilian”* even if non-civilians are among it, as long as it is

predominantly civilian. The presence within a population of members of armed resistance groups, or former combatants, who have laid down their arms, does not as such alter its civilian nature.

35. After making comparative analysis of the definitions provided for crimes against Humanity, crimes against peace, genocide and war crimes under section 3(2)(a), (b), (c) and (d) of the Act of 1973 those are found to be fairly consistent with the manner in which these terms are defined under recent Statutes for the International Criminal Tribunal for the former Yugoslavia [ICTY], the International Criminal Tribunal for Rwanda [ICTR], the International Criminal Court (ICC) Rome Statute, and the Statute of the Special Court for Sierra Leone [SCSL], it can be safely said that the Act of 1973, legislation with its amendments upto 2013 provides a system which broadly and fairly compatible with the current international standards.

36. In the Abdul Quader Molla's case Appellate Division of our Supreme Court have also observed [majority view]:

"For commission of the said offence [crimes against Humanity], the prosecution need not require to prove that while committing any of offences there must be 'widespread and systematic' civilian population'. It is sufficient if it is proved that any person/ persons attack against 'civilian population'. It is sufficient if it is proved that any person/ persons committed such offence during the said period or participated or attempted or conspired to commit any such crime during operation search light in collaboration with

the Pakistani Regime upon unarmed civilian with the aim of frustrating the result of 1970 National Assembly election and to deprive the fruits of the election result" [Page,241-242].

XIII. Special feature of laws and rules applicable to trial procedure

37. The proceedings before the Tribunal shall be guided by the Act of 1973 and International Crimes (Tribunal-1) Rules of procedura, 2010 [herein after referred as ROP of 2010]. Section 23 of the Act prohibits the applicability of the Code of Criminal Procedure, 1898 and the Evidence Act, 1872. The Tribunal is authorized to take into its judicial notice of facts of common knowledge and some official documents which are not needed to be proved by adducing evidence [section 19(3) and (4) of the Act]. The Tribunal may admit any evidence without observing formality, such as reports, photographs, newspapers, books, films, tape recordings and other materials which appear to have probative value [section-19(1) of the Act]. The Tribunal shall have discretion to consider hearsay evidence too by weighing its probative value as per rule-56(2) of the ROP of 2010. The defence shall have right to cross-examine prosecution witnesses on their credibility and to take contradiction of the evidence given by them before the Tribunal as per rule-53(ii) of the ROP of 2010. The accused deserves right to conduct his own case or to have assistance of his counsel [section-17 of the Act]. The Tribunal may release an accused on bail subject to conditions as imposed by it as per rule-34(3) of the ROP of 2010. The Tribunal may, as and when necessary, direct the concerned authorities of the

Government to ensure protection, privacy, and well-being of the witnesses and victims as per rule 58 A of the ROP of 2010.

38. The Act of 1973 is meant to prosecute and try the persons responsible for the offences of crimes against Humanity, genocide and other class crimes committed in violation of customary international law in accordance with the provisions of the Act. However, the Tribunal is not precluded from borrowing international references of those are not found inconsistent to the provisions of our Act of 1973 in the interest of fair justice.

39. The Act of 1973 has ensured all the universally recognised rights to the accused in order to make fair trial. The fundamental and key elements of fair trial are (i) right to disclosure, (ii) holding trial in public, (iii) presumption of innocence of the accused, (iv) adequate time for preparation of defence case, (v) expeditious trial, (vi) right to examine defence witness and (vii) right to defend by engaging counsel.

40. All the aforesaid rights have been provided to the accused to ensure fair justice. In addition to observation of those elements of fair justice, the Tribunal has adopted a practice by passing an order that while an accused in custody is interrogated by the investigation officer, at that time, the defence counsel and a doctor shall be present in the adjacent room of the interrogation room, and the defence counsel is permitted to meet the accused during break time and at the end of such interrogation. The doctor is also allowed to check-up the physical condition of the accused, if necessary. All these measures are being taken by the Tribunal to ensure fair investigation as well as trial.

41. Before going into discussion and evaluation of the evidence on record, it is needed to be mentioned here that the Tribunal has already resolved some common legal issues agitated by the defence in the following cases of the Chief Prosecutor vs. Delwar Hossain Sayeedi [ICT-BD Case No. 01/2011], The Chief Prosecutor Vs. Professor Ghulam Azam [ICT-BD case No. 06/2011], the Chief Prosecutor Vs. Salauddin Quader Chowdhury [ICT-BD Case No. 02/2011] and the Chief Prosecutor Vs. Matiur Rahman Nizami [ICT-BD Case No.03 of 2011] and the Chief Prosecutor Vs. Motiur Rahman Nizami [ICT-BD Case No.03 of 2011]. Apart from this, the Appellate Division of our Supreme Court in the cases of Abdul Quader Mollah Vs Government of Bangladesh and Bangladesh Vs Abdul Quader Mollah has also decided the legal issues involved in the cases under the Act of 1973.

The settled laws/ issues by the Appellate Division and the Tribunal are as follows:

- i. Customary International Law [CIL] shall not be applied if it is contrary to the Act of 1973;
- ii. there is no rule of CIL that prohibits our domestic Tribunal to proceed with the trial as per our domestic legislation;
- iii. our domestic Tribunal has the jurisdiction to continue with the trial in any manner acting in derogation of rules of public international law;
- iv. there is nothing repugnant to CIL in the Act of 1973, rather it is consonant with the provisions of CIL;
- v. the inordinate delay in commencing any proceedings under the Act of 1973 *ipso facto* can not be a ground to doubt the truth or veracity of the prosecution case;

- vi. by the amendment of section 3(1) of the Act of 1973 through Act No.LV of 2009 the jurisdiction of the Tribunal has been extended to try and punish 'any individual,' 'organization' or 'group of individuals' besides any member of any armed, defence or auxiliary forces, irrespective of his nationality who have committed crimes against Humanity mentioned in the Act of 1973;
- vii. the Act of 1973 is a protected law and the moment, subsection 3(1) was amended by way of substitution, it became part of the Statute and it got the protection of any legal challenge to be void or unlawful or even to have become void or unlawful in view of the provisions of Article 47(3) of our Constitution;
- viii. the clemency given to the admitted prisoners of War, pursuant to the tripartite agreement of 1974, in no way, either match the Act of 1973 or any of its provisions ineffective, invalid or void;
- ix. mere failure of the successive governments to act in accordance with the Act of 1973 for last more than forty years, in no way, gave any right to the accused to be exonerated from being tried for the commission of crimes against Humanity as mentioned in section 3(2) of the Act;
- x. in the Act of 1973, no limitation has been prescribed for initiating proceedings against any individual or group of individual or organization or any member of any armed, defence or auxiliary forces irrespective of his nationality for the commission of crimes mentioned in section 3(2) of the Act of 1973;
- xi. the Collaborators Order 1972 was a different legislation aiming to prosecute the persons for the offences punishable under the Penal Code, were scheduled in the Collaborators Order 1972, while the Act of 1973 has been enacted to prosecute and try the persons for crimes against Humanity, genocide and other crimes committed in

violation of customary international law [CIL] and as such there is no scope to characterize the offences indulging in the Collaborators Order 1972 to be the same offences as specified in the Act of 1973;

- xii. the Act of 1973 is a codified law, thus, it is not needed to travel to seek assistance from other trials held or being held by the tribunals/ courts either under the charter of agreements of the nations or under other arrangements under the mandate of United Nations or other International body, such as Nuremburg trial and the Balkan trials.

XIV. Burden of the Prosecution

42. The prosecution, in the light of the charges framed, is burdened to prove (a) the commission of crimes narrated in charges, (b) mode of participation of the accused in committing the crimes for which he has been charged, (c) what was the status and role of the accused at the relevant time and how he had maintained association with the Pakistani occupation army and (d) the context of carrying out of alleged atrocious crimes directed against civilian population and a particular group of population. In determining culpability of the accused prosecution is to establish too that (1) the perpetrator must know of the broader context in which the act committed and (2) the act must not have been carried out for purely personal motives of the perpetrator.

XV. Backdrop and Context

43. The backdrop and context of commission of untold barbaric atrocities in 1971, the War of Liberation, is the conflict between the Bangalee nation and the Pakistani government that pushed the Bangalee nation for self determination and eventually for freedom and

emancipation. The War of Liberation was started following the '**operation search light**' in the night of 25 March 1971 and ended on 16 December 1971 when the Pakistani occupation force surrendered.

44. Having regard to the fact that during the period of War of Liberation in 1971 parallel forces i.e Razakar Bahini, Al-Shams, Al-Badr Peace Committee were formed as auxiliary forces of the Pakistani armed forces that provided moral support, assistance and substantially contributed and also physically participated in the commission of horrendous atrocities in the territory of Bangladesh. It is the fact of common knowledge that thousands of incidents happened through out the country as part of organized and planned attacks against the pro-liberation Bangalee civilian population, Hindu community, pro-liberation political group, freedom fighters and finally the 'intellectuals'. We are to search for answers of all these crucial questions which will be of assistance in determining the culpability of the accused for the offences for which he has been charged.

XVI. Points to be determined

45. In determining culpability of the accused for the perpetration of offences with which he has been charged we are to adjudicate the fundamental issues such as:

- (i) whether the accused was a potential member of Razakar Bahini at the relevant time;
- (ii) whether the accused was substantially associated with Pakistani army and his activities for facilitating the commission of offences.
- (iii) whether the accused physically participated in the commission of crimes as alleged, and

(iv) whether the allegations against the accused constitute a serious case of 'crimes against Humanity'.

XVII. Whether the accused can be prosecuted without prosecuting his accomplices

46. According to the charges it is revealed that apart from the accused, some other armed Razakars and co-perpetrators accompanied the accused at the crime scene in committing the crimes. Excepting the accused, none of his accomplices has been brought to justice, it is true, but that by itself does not make the horrendous episode of atrocities directing attack on the civilian population constituting crimes against Humanity and genocide untrue or give any immunity to accused Mobarak Hossain. If the accused is found guilty and criminally liable beyond reasonable doubt for his culpable acts, inaction in prosecuting his accomplices cannot be the reason for holding the former innocent or relieved from liability. In this regard we may recall the provision as contained in section 4(1) of the Act of 1973 which states that any crime as specified in section 3 is committed by several persons, each of such persons is liable for that crime in the same manner as if it were done by him alone.

XVIII. Witnesses adduced by the parties

47. The prosecution submitted a list of 22(twenty two) witnesses along with Formal Charge and documents. But at the time of the trial, the prosecution has examined in all 12 witnesses including the investigation officer. The prosecution has also adduced some documentary evidence which were duly marked as exhibits 1-10.

48. However, the defence has examined two witnesses out of whom D.W.1 is the accused himself and D.W.2, Asadullah, the son of the accused. Defence has also exhibited some documents, which were duly marked as exhibits A-M.

XIX. Defence Case

49. It is the defence case that the accused Mobarak Hossain was not a Rajakar as such question of Rajakar commander does not arise at all. In 1971 during the Liberation War the accused was a boy of only 14/15 years and was a student of class-VIII and his date of birth is 01.07.1956. The accused in 1971 during the Liberation War never went to the alleged crime sites and also never participated, abetted or facilitated the atrocities as alleged by the prosecution, rather the Pakistani army had committed those atrocities, which would be evident from exhibit-M. As such, all the charges brought against the accused involving with crimes against Humanity and genocide during the War of Liberation are false, fabricated and motivated. The accused is a social worker and a local leader of Bangladesh Awami League, the present ruling party and due to local political enmity he has been falsely implicated in the case.

XX. Summing up the prosecution Case

50. Mr. Syed Haider Ali and Mr. Shahidur Rahman, the learned prosecutors referring to the evidence on record have submitted that the prosecution has proved all the charges beyond reasonable doubt brought against the accused by adducing and examining 12 live witnesses including the investigation officer [P.W-12]. The live witnesses are not only the eye witnesses of various atrocious acts of the accused

but some of them are the members of the victim families and some of them are victims also. As such their credible, corroborative and unimpeachable evidence has sufficiently proved that accused Mobarak Hossain physically participated in abduction, confinement, torture and killing unarmed civilian people, accompanied by his accomplice Rajakars and Pakistani occupation army in 1971 during the Liberation War of Bangladesh and the atrocious acts of the accused and his accomplices were part of systematic attack directed against civilian population, which qualify the offences of murder, abduction, confinement and torture as crimes against Humanity as specified in section 3(2) (a) (g) and (h) read with section 4(1) of the Act of 1973.

51. Mr. Shahidur Rahman, the learned prosecutor has also argued that it has been well proved from the testimonies of the witnesses that the accused had directly participated, abetted and conspired to the commission of crimes as a member of Rajakars along with other Rajakars and he also led the Rajakar forces at different parts of the then Brahmanbaria Sub-Division and Pakistani occupation forces in committing various atrocious acts as listed in the charge nos.1-5 and thus the accused is liable for those crimes in the same manner as if those were done by him alone in view of the provision of section 4(1) of the Act of 1973. Thus, the accused Md. Mobarak Hossain deserves highest punishment under section 20(2) of the Act of 1973.

XXI. Summing up the defence Case

52. Mr. Mizanul Islam and Mr. Tajul Islam, the learned defence counsels reiterating the defence case have submitted that the prosecution has failed to prove that accused was not a minor in 1971

during the Liberation War and he was a member of Razakar Bahini and also a commander thereof. The prosecution witnesses are not at all credible and reliable, who have embellished the prosecution case at the instance of P.Ws 1 and 10. They have further submitted that the instant case has been initiated out of previous enmity and the prosecution has failed to prove any of the charges beyond reasonable doubt and as such the accused Md. Mobarak Hossain is liable to be acquitted from the charges brought against him.

XXII. Whether accused Md. Mobarak Hossain @ Mobarak Ali was a commander or a member of Razakar Bahini/Peace Committee at his locality during the War of Liberation in 1971.

53. It is a fact of common knowledge that during the Liberation War in 1971 Pakistani invading forces with the help of anti-liberation people organized auxiliary forces namely Razakar, Al-Badr, Al-Shams and Peace Committee for the purpose of their operational support in implementing its atrocious activities in furtherance of common plan and design to execute their missions.

54. In the present case defence has claimed rendering evidence through defence witnesses that the accused was not a commander or a member of Razakar Bahini as alleged by the prosecution. During the Liberation War in 1971 he was a boy of only 14/15 years old and was a student of Class- VIII and his date of birth is 01.07.1956. Defence has also claimed that the accused was not in the areas in which the occurrences took place as alleged by the prosecution.

55. Now let us scrutinise the oral and documentary evidence presented by both parties as to proving or not proving the accused as a member or a commander of Razakar Bahini during the Liberation War. P.W 01 Md. Darul Islam has testified that Mobarak Ali discharged his duty as the commander of Suhilpur Razakar camp. Many atrocious activities including killings were taken place under his leadership during that time. P.W 02 Khodeza Begum has deposed that her mother and grandmother were suggested by Abdur Rouf Razakar that it was possible to release her father if they convinced camp commander Mobarak Hossain of Nayadil village under Akhaura Police Station. P.W 03 Md. Rafiqul Islam has also corroborated the said version in the same voice that A. Rouf Razakar informed that it was possible to release his father if they convinced camp commander Mobarak Hossain of Nayadil village. P.W 04 Md. Khadem Hossain Khan has stated that Mobarak Hossain was the commander of Suhilpur Union Parishad Razakar camp. P.W 05 Md. Ali Akber has deposed that getting directives from Pakistani occupation forces, Razakar Mobarak Ali, Bazu Miah, Mukta Miah, Saheed and others tied them [witness and others] with rope. P.W 06 Md. Abdul Malek has narrated that on 28th or 29th November, 1971 Razakar Mobarak, his accomplice Razakars along with Pakistani invading force came and cordoned their house off. P.W 07 Noni Gopal Mollik has stated that while he was on duty, he came to know that Razakar Mobarak Hossain broke idols habited in the Kalibari Mondir with Ramkrishna Mondir and renamed Annondomoyee Kalimondir as Razakar Manzil after removing signboard of its original name. P.W 08 Md. Abdus Samad has deposed that he came to know later that a man

was abducted from Nayanpur and subsequently was killed while Razakar commander Mobarak Ali was staying in Suhilpur Razakar camp. P.W 09 Vanu Bibi has stated that on 15th Bhadra at about 10:00/11:00 A.M in the year of Liberation War Mobarak Ali rushed to their house to convey a message regarding a peace committee meeting to be held thereof. All were asked to be present at the meeting without fail. In cross-examination this witness has replied that Mobarak Ali went to their house along with Panjabees [Pakistani invading force]. P.W 10 Abdul Hamid has narrated that after coming back home he came to know that his elder brother Abdur Rouf joined Razakar Bahini with Mobarak and P.W 11 Chaman Sikandar Julkernine has also stated that he came to know from the local people present that an injured boy named Asu Ranjan was taken out of the town on Kurlia Bridge where he was killed under the leadership of Razakar commander Mobarak Hossain. All the aforesaid witnesses have identified the accused in the dock at the time of giving their testimonies before the Tribunal. It appears from the said evidence that all the aforesaid P.Ws [01, 02, 03, 04, 05, 06, 07, 08, 09, 10 and 11] by corroborating each other have stated that the accused was a Rajakar camp commander or a member of Razakar Bahini.

56. At the time of argument defence has drawn attention to the Tribunal as to the disclosure of the Investigation Officer [P.W 12] in replying to the questions put to him which read as follows,

“Avgiv mWim Awdm t_tK GB ivRvKvi I gyt “thv×vt`i Zvij Kv mslMh KtiwQ/ DI “ fivj Dtgj 107 cōv t_tK 133 cōv chS- ivRvKvi, Avj e`i, Avj kvgm I kmS-KvgUj Zvij Kv mgr eipYemoqv tRj v ckvmtKi Awdm KZR.c^r-ZKZ/ Dtgj mZ Zvij Kvq tRj v ckvmtKi ` -LZ ev mxj bvB, Zte 106 cōvq tRj v ckvmK Awdmi dtivqmllS† I qv AvtQ/ DI “ dtivqmllS G cōv bvBfi Dtgj L

bvB| Dđj mLZ Fij Dđgi 111 cđvq 93 μıgđK i vRvKvi KgvŪvi tđvevi K tnvđmb, Bmj vgcđđ Dđj L AvđQ Ges ZđZ ıwZvi bıg Dđj L bıB, Zđe 130 cđvi 16 bs μıgđK tđvevi K nvRx, bqıw`j kııđ- Kııđııi m`m` Dđj L AvđQ Ges 117 cđvi 49 bs μıgđK tđvevi K ıgqv, bqıw`j, AvLvDov i vRvKvi ııııđe Dđj L AvđQ KgvŪvi ııııđe bıB| Bmj vgcđđ t`đK bqıw`đi `đZđı AvbgııııK 30/35 ıKđđ ıgŪvi nđZ cvđı | 130 cđvi 16 bs μıgđK tđvevi K nvRx ııı Lv AvđQ, Zđe 1971 mđđđ ıwZııı nvRx ııQđđ b bı| ”

57. From the said version of evidence it appears that though there is no seal and signature of the Deputy Commissioner in the prepared Razakar list but it has included a forwarding letter of the D.C office of Brahamanbaria which indicates that there is an accord in an agreement with the prepared list to be genuine one. However, on query the Tribunal finds initials made by the D.C office on the pages of the said prepared Razakar list. Defence has further argued that at page 130 of the volume of seizure and documentary proof contains in serial no. 16 Mobarak Haji as a member of peace committee while he did not perform hajj at the alleged time of occurrence. With regard to this effect, it is true that there is no evidence that the accused performed hajj before or immediate after the Liberation War. But at the same time it is also evident that the Razakar list was prepared after performance of hajj by the accused so there is no wrong with the prepared Razakar list depicting 'Haji' after his name. Defence has further raised an issue that Mobarak Miah of Nayadil, Akhaura has been mentioned as Razakar, not commander. By the said piece of evidence there has been a positive assertion that accused Mobarak Hossain was no doubt a Razakar. More so, exhibit 03 states that the accused was a member of Razakar Bahini as mentioned at page no. 36 in serial no. 01. It is also disclosed by a news item published in the 'Daily Samakal' dated 29.05.2007 marked

as exhibit 09 where it reports that the accused was a war crime perpetrator during the Liberation War in 1971.

58. Defence has claimed that the accused was born on 01.07.1956 and was a student of class VIII in 1971 which indicates that he was a boy of tender age during the Liberation War. It also contends that at the age of 14/15 years it was impossible on the part of the accused to become a Razakar commander or a member of Razakar Bahini but from the voter list of 2008 marked as exhibit 04 containing his name in serial no. 118 and National I.D Card of the accused marked as exhibit 05 it has revealed that the date of birth of the accused is 10.01.1950. Prior to lodging the instant case there was no barrier on the part of the accused to furnish his actual date of birth to the authorities concerned for having I.D Card and incorporating his name in the voter list. According to the said documentary evidence [exhibits 03 & 04], it makes clear that the accused willingly provided his genuine information to the authorities concerned when there was no criminal case pending against him. Thus the claim of the defence as stated above has no leg to stand.

Upon scrutiny of the oral evidence adduced by said witnesses coupled with documentary evidence, it is well-proved that the accused was a member of Razakar Bahini at his locality during the Liberation War in 1971 and he actively and directly participated in different atrocious activities committed by local Razakar Bahini in association with Pakistani occupation force. Therefore, the above mentioned oral and documentary evidence are sufficient to hold that prosecution has successfully proved the status of the accused as a member of auxiliary force as defined in section 2(a) of the Act at the time of commission of

offences for which the accused has been charged. Nevertheless, even in the capacity of an **'individual'** or a member of **'group of individuals'** the accused is liable to be prosecuted under section 3(1) of the Act if he is found to have committed the offences specified under section 3(2) Act of 1973.

XXIII. Adjudication of charges

Adjudication of charge no.01

[Abduction, torture and killing of 33 unarmed civilians on the bank of Ganga Sagar Dighi of village Tanmandayl under Akhaura Police Station, District- Brahmanbaria]

59. **Summary charge:** During the period of Liberation War, 1971 accused Md. Mobarak Hossain alias Mobarak Ali being a member of Rajakar Bahini as well as a member of group of individuals along with his accomplices namely, Rajakar Bazlur Rahman Boju, Mukta Miah and others called a meeting on 22.08.1971 at the house of Hazi Noor Box of village Tanmandayl and accordingly about 130/132 villagers assembled there at about 2.00/2.30 P.M. Then the accused and his accomplices, as a part of pre-plan, raided the house of Hazi Noor Box and abducted the said villagers and took them to army camp by boats near Ganga Sagar Dighi and detained them there and then the accused and his accomplices interrogated all the detained persons whose relatives had joined Mukti Bahini. The accused selected 26 persons of village Tanmandayl and also selected 7 persons of village Jangail, totalling 33 persons who were confined in Terojhuri hazatkhana and the rest were kept on the bank of said Dighi. On the following day i.e. 23.08.1971, the Pakistani army and Rajakars, with intent to widespread killing, took

those 33 persons to the west bank of Ganga Sagar Dighi and compelled them to dig a waist-deep ditch in which all the 33 civilians were gunned down and buried therein. Thus, the accused has been charged for abetting and facilitating the commission of offences of murder, torture and abduction as crimes against Humanity caused to unarmed civilians and also for conspiracy to commit such crimes as specified in section 3(2)(a)(g) read with section 4(1) of the Act of 1973.

Discussion and evaluation of evidence and findings:

60. The prosecution has examined as many as 4[four] witnesses to prove the offences of abduction, torture and killing of unarmed civilians as mentioned above in charge no. 01.

61. P.W.01 Md. Darul Islam has deposed that he had joined Pakistan Army in 1963 and during Liberation War, 1971 he used to give training to persons in the country as well as in India so that those persons could participate in the Liberation War. There was an army camp at north bank of Ganga Sagar Dighi and Major Sekander was in charge of that camp and Bozu Miah, Abru Miah, Mobarak Ali [accused], Mukta Miah, Jamshed Miah and others of their locality were his associates. He has further deposed that on 22.08.1971 at about 9.00 A.M. said Jamshed, Mukta Miah and Mobarak Ali having gone to the houses of village Tanmandayl informed the villagers that a meeting would be held in the house of Hazi Noor Box and asked them to attend the said meeting. On the same day at about 3.00 P.M. about 130/132 villagers assembled in the house of Hazi Noor Box and at that time Pakistani army having come from the said army camp surrounded the house of Hazi Noor Box and then Pakistani army and Rajakars abducted those villagers

assembled there and took them to the army camp by boats near Ganga Sagar Dighi and thereafter the Pakistani army and Jamshed, Mukta Miah, Mobarak Ali [accused], Bozu Miah selected 26 persons of village Tanmandayl and 7 persons of other villages, totalling 33 persons and took them to west bank of Ganga Sagar Dighi and the rest abductees were confined in the said army camp. Thereafter, the Pakistani army and said Rajakars compelled the selected 33 persons to dig a ditch in which all of them were killed by brush-fires and buried them therein. On the following day i.e. 23.08.1971 the other abductees were released from the said army camp after having been tortured therein of whom one Abul Bashar, who is now an Imam of a mosque, from whom he heard the said incidents and also from his own intelligence source. He has identified the accused in the dock.

62. P.W. 01 has stated in cross-examination that during Liberation War, 1971, accused Mobarak Ali was a Rajakar. He has denied the defence suggestions that the accused was not a Rajakar and he has deposed falsely.

63. P.W. 05 Md. Ali Akbar has testified that he belongs to village Tanmandayl and during the Liberation War, 1971 his age was 22 years. On 22.08.1971 Rajakars Mobarak Ali [accused], Mukta Miah, Bozu Miah and Shahid Miah asked them to assemble in the house of Noor Box where a Panchaet would be formed. Having thought their safety they about 130/132 villagers assembled in the house of Noor Box at about 3.00 P.M. on the same day. Then the said Rajakars asked them whose relatives had joined the Liberation War. In the meantime Pakistani army surrounded that house and then they and the said

Rajakars including the accused having abducted took them to the army camp by boats near Ganga Sagar Dighi and tortured them therein and asked them whose relatives had joined the Liberation War. He has further testified that then the Pakistani army and said Rajakars having selected 33 persons of the abductees confined them in Terojhuri hazatkhana. Thereafter, at about 8.00 P.M. they took said 33 abductees to west bank of Ganga Sagar Dighi and compelled them to dig a ditch in which all of them were killed by brush fires and buried therein. He has also testified that Faiz Miah, Taru Miah, Monnaf Miah, Abul Hashem Molla, Sobhan Miah, Haider Ali, Dr. Taher, Abul Bashar, Raju Miah, Gani Miah and Tota Miah were killed among them. He has identified the accused in the dock.

64. P.W. 05 in cross-examination has stated that on 24th August he received treatment from Dr. Mintu. He does not have any paper to show that accused Mobarak Hossain was a Rajakar, but he himself saw him as a Rajakar. He has further stated that he does not have any document regarding the 10 martyrs whose name he said, but their names have been written in a name plate of the place of execution situated on the bank of Ganga Sagar Dighi. He has denied the defence suggestion that he has deposed falsely.

65. P.W. 09 Vanu Bibi has stated that during Liberation War on 5th Bhadra at about 10.00/11.00 A.M. accused Mobarak Ali came to their house situated at village Tanmandayl and informed her father-in-law Hazi Noor Box, husband Dr. Abu Taher and his elder brother Abul Bashar that a meeting of the Peace Committee would be held in their house and asked them to be present in the said meeting, otherwise they

would face problem. On that day in the afternoon at the time of Asr prayer, 130/135 villagers attended the meeting where Pakistani army, accused Mobarak Ali and his accomplices were present, and at one stage they abducted the villagers attended the meeting including her father-in-law, husband and his elder brother and two maternal fathers-in-law and took them by boats to the army camp situated on the bank of Ganga Sagar Dighi and tortured them therein. Thereafter, she came to know that the Pakistani army and their accomplices took 31 villagers amongst the said abductees including her husband Dr. Abu Taher and his elder brother Abul Bashir and her said two maternal fathers-in-law namely, Golam Moula and Golam Hakkani to the west bank of Ganga Sagar Dighi and compelled them to dig a ditch in which all of them were killed by gun shots. She has further stated that since her father -in-law had gone to Mecca he was released by them and after being released he came back to their house and informed them that due to accused Mobarak Ali those persons were killed. She has also stated that her husband and his elder brother were the workers of Awami League.

66. P.W-09 has stated in her cross-examination that on the date of occurrence about 130/132 Pakistani army men and Bangalees came to their house and they were in their house for about 1/1 ½ hours. She has further stated that accused Mobarak Ali came to their house with the Pakistani army. She has denied the defence suggestions that accused Mobarak Ali never went to their house and she has deposed falsely.

67. P.W-10 Abdul Hamid has deposed that he is a freedom-fighter and he fought against the Pakistani army during the Liberation War,

1971. After independence of Bangladesh he came back to his house at village Nayadil and came to know that his elder brother Abdur Rouf along with accused Mobarak had joined Rajakar Bahini and the accused compelled him to join the said Bahini. He has further deposed that he also came to know from his said elder brother that accused Mobarak Ali, Mukta Miah and Bozu Miah having caught hold of 30/35 persons from village Tanmandayl handed over them to the Pakistani army and thereafter they were all killed on the west bank of Ganga Sagar Dighi where at present there is a mass-graveyard. He has identified the accused in the dock.

68. P.W-10 has stated in cross-examination that accused Mobarak Ali used to live at village Sayadabad under Kashba Police Station and he came to village Nayadil 7/8 years before the Liberation War. He has further stated that he heard the incident from his elder brother which he has narrated in his deposition. He has denied the defence suggestion that he has deposed falsely.

69. Upon scrutiny of the testimonies of said four live witnesses [P.Ws. 01, 05, 09 and 10] as discussed above, we find that the evidence of these witnesses are very much corroborative to each other and out of said four witnesses two witnesses i.e. P.Ws. 05 and 09 are eye-witnesses of part incidents and of them P.W.05 himself is a victim also and P.W. 09 is a member of victims' families. P.W. 05 Md. Ali Akbar having supported the instant charge i.e. charge no. 01, has vividly narrated the alleged incidents that on 22.08.1971 Rajakar Mobarak Ali [accused] along with some other Rajakars asked them to assemble in the house of Noor Box [father-in-law of P.W. 09] where a Panchaet

would be formed and accordingly about 130/132 villagers assembled in the house of Noor Box at about 3.00 P.M. on that day. In the meantime, Pakistani army surrounded that house and then Pakistani army along with some Rajakars including the accused having abducted took them to the army camp near Ganga Sagar Dighi and tortured them therein including him. He has further narrated that thereafter Pakistani army and said Rajakars having selected 33 villagers of the said abductees took them to west bank of Ganga Sagar Dighi and compelled them to dig a ditch in which all of them were killed by brush-fires and buried them therein. P.W. 05 has identified the accused in the dock. P.W. 09 Vanu Bibi having corroborated the evidence of P.W. 05 has also stated that during Liberation War, 1971 on 5th Bhadra at about 10.00/11.00 A.M. accused Mobarak Ali came to their house at village Tanmandayl and informed her father-in-law Noor Box, husband Dr. Abu Taher and his elder brother Abul Bashar that a meeting of the Peace Committee would be held in their house and accordingly in the afternoon 130/135 villagers attended the meeting and at that time Pakistani army, accused Mobarak Ali and his accomplices having abducted the said villagers from the house of said Noor Box took them to the army camp situated on the bank of Ganga Sagar Dighi and tortured them therein. She has further stated that thereafter she came to know that the Pakistani army and their said accomplices took 31 persons of the abductees including her husband and his elder brother and two maternal fathers-in-law namely, Golam Moula and Golam Hakkim to the west bank of Ganga Sagar Dighi and compelled them to dig a ditch in which all of them were killed by gun-shots. The hearsay witnesses namely, P.W. 01 Md. Darul

Islam and P.W. 10 Abdul Hamid, who have also identified the accused in the dock, have also corroborated the evidence of the eye-witness, P.Ws. 05 and 09 as discussed above. All these four witnesses have directly implicated the accused with the offences as narrated in the instant charge. The learned defence counsel has cross-examined these live witnesses thoroughly, but could not shake their evidence, and as such, there is no reason to disbelieve their evidence.

70. We also find corroboration of the alleged incidents from Ext. M, a book named '**ਜਾਚੁਕਾ-ਊ ਏਭਯੋਯੋਗੀ**' [Muktijuddhe Bahmanbaria], written by Joydul Hossain, 1st edition, February, 2011, submitted by the defence. At pages 167 and 168 of that book, without mentioning the name of the present accused Mobarak Hossain alias Mobarak Ali and others, the incidents of the instant charge have been narrated therein stating that the Pakistani army along with some local Rajakars committed abduction, torture and killed 33 villagers including four freedom-fighters on the west bank of Ganga Sagar Dighi of village Tanmandayl. The relevant portion of those pages is quoted below:

“22 BNØV ਫਹ-L-m HLcm f_jϕLÙ¹_jϕe ®pej Øqje£u ϕLRª
 cjmjm l_jSjLj-ll pq-k_jϕNaju BM_jEsj bjejl Vjejj¾cjCm Hhw
 S_j%o_jm NË_j-j BH²je Q_jm_ju z
 Øqje£u n_jϕ_ç¹ Lϕ_jϕVI pcpÉ Hhw l_jSjLjllj f_jL h_jϕqe£-L Sjeju
 ®k, HC NË_jj cªϕVI fË_ju fË-aÉL fϕlh_j-IC jªϕJ²h_jϕqe£l ®m_jL
 l-u-R, NË_jjh_jp£-L d-l ϕe-u ®N-mC jªϕJ²h_jϕqe£-L BaË_pjfÑZ
 Ll_j-ej pñhz g-m f_jLh_jϕqe£ l NË_jj cªϕV-a BH²je Q_jϕm-u k_j-L
 pjj-e f_ju a_j-LC BVL L-l -hy-d -g-mz
 Hij-h Q_jlSe jªϕJ²-k_jÜ_jpq 130 Se-L d-l N%o_jp_jNI ϕcϕOI f_js
 f_jLh_jϕqe£l LÉ_j-Çf ϕe-u k_juz ϕcϕOI Ešl f_j-s aqϕpm L_jQ_jϕl-a
 ϕRm f_jLh_jϕqe£l LÉ_jÇfz a_jl f_j-n ®R_jV HLϕV jpϕS-cl ®ial 130

Se-L BVL @l-M fiekÑjae Qimj-ej quz fjlhijqaeL aj-cl Lj-R
 jaçJ²hijqaeL AhØqje Sje-a Qjuz çLç° NEjjhijp£ çLRaC
 Sj-e ej h-m Sjeju z @k jpçS-cl @ial aj-cl BVL ljmj q-uçRm
 @p jpçScçV aMe MxhC @RjV Hhw pwL£eÑ çRm z
 SjuNjçV H-aj -RjV çRm @k Hl @ia-l H-ajN-a-mj jjea-ol nÄjp
 -ehjl j-aj AhØqjJ çR-mjeiz hijhlj cj hå q-u BpçR-mj z
 jjea-ol Ef-l jjeao NjçjNjçc L-l HLçce Hllja Aejqj-l
 LjçV-u-Rz 23 BNØV lja aj-cl-L jpçSc @b-L @hl L-l çe-u
 N%oipjNI çcçOl fçÖQj fj-s pijçhÜ AhØqju çjs Ll-ej quz
 @pMje @b-L NEj-jl çhçnø hÉçJ²hNÑ J jaçJ²-kjÜj-cl @l-M
 hijçL-cl @R-s @cuq quz HmjLjl ljsjLjll jaçJ²ka-Ül pqjuL
çhçnø hÉçJ²hNÑ J jaçJ²-kjÜj-cl çQçe-u @cuq QjSe
 jaçJ²-kjÜjçp 33 Se NEjjhijp£-L @pMj-e ...çm L-l qaÉj Ll
 quz Aåljl ljaz QaççcÑ-L heÉjl fjçez ...çml Bjuj-S pij
 HmjLj fÉLçÇfa quz HmjLjihijp£J i-u çhjSt q-u kijuz çeqa-cl
 @pMj-eC NaÑ L-l Hlpj-b jççV Qjfi @cuq quz
 HMj-e kijl qaÉjl çnLjl q-u-Re aijl q-me VjejçççCm NEj-ll
 jaçJ²-kjÜj ljjSam qL jaçççp, jaçJ²-kjÜj aijlQjççç @jjçj,
 jaçJ²-kjÜj @Mm çjuj, jaçJ²-kjÜj hijh² çjuj, aij² çjuj
 jaçççp, jjm çjuj jaçççp, Bhçm hijhl, Xjx Bhç aj-ql, @ajaj
 çjuj, Bhçm qj-nj @jjçj, @Njmij jççm @jjçj, @Njmij Ljçcl
 @jçj, Bhçm Mj-mL @jjçj, qjucjl Bm£, nijpç plLjl, @jççEm
 qL plLjl, Bhçm jæjç çjuj, @pjhqje çjuj, ljsç çjuj, Bhçm
 gj-uS, çluçS Eçÿe, Bhçm qjæje, Bhçm Nçe, SSç çjuj
 Jl-g epç çjuj, Sjçççm NEj-ll pçde çjuj, Jjl Bm£, @jjççm çjuj,
 jjmç çjuj, @Xw... çjuj, plm çjuj, @qmjm çjuj, Njwiççç
 NEj-ll Bhç çjuj Hhw N%oipjNI çcçOlçj-sl gSmçm qLz
 ”[Underline supplied].

71. During scanning of the evidence, we find some minor inconsistencies and contradictions among the evidence adduced by the witnesses, but an assessment is to be made on the basis of the totality of the evidence presented in the case. The Tribunal, however, is not obliged to address insignificant inconsistencies, if occur in witnesses'

testimonies. In this context, we may refer to the decision of **ICTR Appeals Chamber held in the case of Muhimana as under:**

"The Appeals Chamber reiterates that a trial chamber does not need to individually address alleged inconsistencies and contradictions and does not need to set out in detail why it accepted or rejected a particular testimony."

[ICTR Appeals Chamber, judgment May 21, 2007, para-99]

72. The learned defence counsel argued that as per Ext. M, the book named Muktijuddhe Brahmanbaria, out of 33 killed persons four were freedom-fighters who were not 'civilians' as they were volunteer corps and a party to conflict and hostility and thus the acts resulted in their death cannot be considered as 'directing any civilian population'.

73. We cannot agree with the argument that merely for the reason that four out of numerous civilian victims were freedom-fighters the crimes committed resulting death of numerous civilians cannot be characterized as the offence of crimes against Humanity. The Tribunal notes that specific situation of the victim at the moment of the crimes committed, rather than his status, at the time of event of the attack is to be considered. In the case of **Prosecutor vs. Blaskic, para 214** it has been observed that-

"a civilian is everyone who is no longer an active combatant in the 'specific situation' at the time of the commission of the crime. Besides, broad definition of civilian adopted by the adhoc tribunals implies that the character of a predominantly

civilian population is not altered by the presence of certain non-civilians in their midst."

74. The **ICTY** and **ICTR** Statutes as well as jurisprudence state that the attack must be committed against any civilian population. This qualification has been interpreted to mean that the inclusion of non-civilians [military forces or those who have previously borne arms in a conflict] does not necessarily deprive the population of its civilian character. [**Tadic Trial Judgment, 638; Blaskic Trial Judgment, 2009**].

75. However, the targeted population must remain predominantly civilian in nature. But according to **ICTR** and **ICTY** jurisprudence, it is the situation of the victim at the time of the attack, and not the victim's status, that should be the focus of the inquiry. In the instant charge, at the time of apprehending four freedom fighters they were unarmed civilians and were not in combat. Therefore, we are of the view that the attack as narrated in the instant charge no. 01 was directed against civilian population that resulted in numerous deaths of civilians and thus the offence of such murder is characterized as crimes against Humanity as specified in section 3(2)(a) of the Act of 1973.

76. It is argued by the defence that there is no evidence on record that the accused himself abducted, tortured or killed any person at the time of commission of the alleged offences, and as such, so-called mere presence of the accused at the crime site does not *ipso facto* mean that he abetted or facilitated the commission of the alleged offences. This argument has no leg to stand because it is now well settled that even mere presence at the scene of the crime may, under certain

circumstances, be sufficient to qualify as complicity. From the evidence of the above mentioned four live witnesses, it is found that the accused by his presence in the crime site and by his culpable acts substantially encouraged and facilitated the main perpetrators in committing the crimes and also he shared the intent similar to that of the main perpetrators and thus obviously he knew the consequence of his acts which provided moral support and assistance to the principal perpetrators. Therefore, the accused cannot be relieved from criminal responsibility. In the case of **Prosecutor vs. Charles Ghankay Taylor: Trial Chamber II SCSL: Judgment 26 April 2012, para - 166** , it has been observed that-

"The essential mental element required for aiding and abetting is that the accused knew that his acts would assist the commission of the crime by the perpetrator or that he was aware of the substantial likelihood that his acts would assist the commission of a crime by the perpetrator. In cases of specific intent crimes, such as acts of terrorism, the accused must also be aware of the specific intent of the perpetrator. "

77. In the case in hand, the evidence of eye witnesses [P.Ws. 05 and 09] inescapably shows that the accused actively and knowing the consequence of his acts accompanied the gang of perpetrators i.e. Pakistani Army and Rajakars of the crime site and by his illegal act of abducting the unarmed villagers including the 33 persons killed subsequently from the house of Noor Box he substantially facilitated the commission of crimes of abduction, torture and murder committed by the principal perpetrators. Therefore, it cannot be said at all that the

accused's presence at the crime site and accompanying the principal perpetrators were devoid of guilty intent.

78. It is argued by the defence that admittedly P.Ws. 01 and 10 are hearsay witnesses and as such their evidence is inadmissible and the Tribunal cannot work on it. It is already found that the evidence of these two hearsay witnesses have corroborated the evidence of two eye-witnesses [P.Ws. 05 and 09]. If the evidence of two hearsay witnesses carries probative value, it cannot be brushed away. The hearsay evidence is to be considered together with the circumstances and relevant material facts depicted. Hearsay evidence is admissible and the court can act on it in arriving at a decision on fact in issue, provided it carries reasonable probative value [**Rule 56(2) of the ROP of 2010**]. This view finds support from the principle enunciated in the case of **Muvunyi** which is quoted as below:

"Hearsay evidence is not per se inadmissible before the Trial Chamber. However, in certain circumstances, there may be good reason for the Trial Chamber to consider whether hearsay evidence is supported by other credible and reliable evidence adduced by the Prosecution in order to support a finding of fact beyond reasonable doubt."

[**Muvunyi, ICTY Trial Chamber, September 12, 2006, para- 12**]

79. According to settled jurisprudence of International Law 'hearsay evidence' is not inadmissible per se, even when it is not corroborated by direct evidence. The Tribunal may safely act on 'anonymous hearsay' evidence even without any corroboration. This view finds support from

the case of **Lubanga** [**Lubanga-ICC Pre-Trial Chamber, January 29, 2007, para-106**].

80. In the case in hand, the accused is being tried long four decades after the atrocities were committed. Naturally direct witness may not be available. Thus even anonymous hearsay evidence alone may be relied upon to prove a material fact, considering the reality and context prevailing in 1971. This view finds support from a recent decision given in the case of **Ruto of the ICC** [**Ruto, ICC Pre-Trial Chamber, January 23, 2012, paras 126-130, 148-150, 187-191 and 194-195**].

81. It has been argued that the prosecution has failed to establish that the fact of abducting and taking the villagers to the army camp situated on the bank of Ganga Sagar Dighi itself does explicitly proves the common design of causing death of 33 abductees. But the Tribunal, disagreeing with this proposition, notes that obviously the Pakistani army along with the accused and other Rajakars were aware of predictable consequence of their criminal acts that eventually resulted in killing of numerous unarmed civilians and thus none of them including the accused can evade the responsibility of murder of 33 unarmed civilians. This view finds support from the principle enunciated in the case of **Tadic** [**ICTY Appeals Chamber**] which is as below:

“While murder may not have been explicitly acknowledged to be part of the common design, it was nevertheless foreseeable that the forcible removal of civilians at gunpoint might well result in the deaths of one or more of those civilians. Criminal responsibility may be imputed to all

participants within the common enterprise where the risk of death occurring was both a predictable consequence of the execution of the common design and the accused was either reckless or indifferent to that risk."

**[Prosecutor vs. Du(ko Tadi) ICTY Appeals Chamber
Case No. IT-94-1-A15 July 1999, para-204]**

82. Therefore, there can be no room to deduce that the accused did not have contribution with the commission of crime of murder alleged in any manner and thus he deserves to walk free. It is true that there is no eye witness that the accused Mobarak Hossain alias Mobarak Ali himself physically participated to the actual perpetration of substantial crime of killing 33 unarmed civilians. The Tribunal notes that even a single or limited number of acts on the accused's part would qualify as a crime of murder, unless those acts may be said to be isolated or random. The accused can be held criminally responsible for the crime alleged if he is found that he, by his acts or conducts, was concerned with the killing. Actual physical presence of the accused when the offence of murder was committed was not necessary. It is enough to assume that the accused did not withdraw him from the group or principal perpetrators to facilitate the offence of murder that took place afterwards.

83. Considering all the evidence and the decisions of different International Tribunals as discussed above and the facts, attending circumstances and the context of the Liberation War, 1971, we are inclined to hold that it is proved beyond reasonable doubt that on 22.08.1971 in the afternoon, as a part of pre-plan, Pakistani army and

Rajakar Mobarak Hossain alias Mobarak Ali [accused] and some other Rajakars having abducted many unarmed villagers from the house of Hazi Noor Box of village Tanmandayl took them to the army camp near Ganga Sagar Dighi of village Tanmandayl and tortured them therein and on the following day i.e. 23.08.1971 they with intent to 'widespread killing' selected about 33 persons from the said abductees and took them to the west bank of said Ganga Sagar Dighi and killed them by gun-shots and buried them in a ditch. Thus, the accused is criminally liable under section 4(1) of the Act of 1973 and found him guilty for complicity and substantially contributing and facilitating the actual commission of the offences of murder, torture and abduction as crimes against Humanity caused to unarmed civilians and also for conspiracy to commit such crimes as specified in section 3(2)(a)(g)(h) of the Act of 1973 which are punishable under section 20(2) of the Act.

Adjudication of charge no. 02

[Capture of Hindu Temple 'Annandomoyee Kalibari' which was renamed as 'Razakar Manzil' and abduction of Ashu Ranjan who was tortured to death.]

84. **Summary charge:** During the Liberation War in 1971 accused Md. Mobarak Hossain @ Mobarak Ali being the leader as well as member of a group of individuals formed a Razakar Bahini with anti liberation people and subsequently he along with his cohorts captured a Hindu Temple named Annandomoyee Kalibari which was re-named as Razakar Manzil and looted away goods thereof and also damaged idols habited in the Temple. The accused also abducted a college student named Ashu Ranjan, who hailed from Bhoirab, on 24.10.1971 and caused gun injury on his leg keeping him confined at Razakar Manzil

for four days without treatment. Ashu Ranjan was insisted by accused to chant slogan of 'Pakistan Zindabad' but he gave slogan of 'Joybangla' instead of Pakistan Zindabad. Under such circumstances accused became furious and took him to Kurulia Khal where he [accused] shot him dead on 28.10.1971. Thus the accused has been charged for substantially participating, facilitating and contributing to the commission of offences of murder, abduction, confinement, torture and plundering goods as crimes against Humanity as specified in section 3(2)(a) read with section 4(1) of the Act of 1973.

Discussion and evaluation of evidence and findings:

85. To prove the instant charge the prosecution has examined as many as five live witnesses [P.Ws. 01, 07, 08, 10 and 11].

86. Md. Darul Islam as P.W 01 has testified that he joined Pakistan army in 1963. During the Liberation War in 1971 he was a Habilder in the intelligence branch of the freedom fighters. He came to know through spy that Mobarak Ali on being made commander of Razakar Bahini after its formation was deployed from Gongashagor camp in Annondomoyee Kalimondir where he along with his accomplice Razakars broke idols habited in the Temple and looted goods thereof. They renamed Kalimondir as 'Razakar Manzil' in place of Kalimondir. The accused left 'Razakar Manzil' giving charge to other Razakars after staying few days there and took the charge over as commander of Razakar Bahini of Suhilpur Razakar camp at Brahmanbaria. He has further stated that accused Mobarak Ali was a 'rokan' of union level and was a member of Jamaat-e-Islami before and after the Liberation War. He has identified the accused in the dock.

87. On cross-examination he has replied that he has no document regarding accused Mobarak Ali as to whether he was a volunteer of Pakistan army or member of Razakar Bahini but he was a Razakar. In reply to a question put to him he has said that he cannot recall who the Razakar commander of Brahmanbaria Sub-Division was in 1971 and he does not know who the convener of Brahmanbaria Peace Committee was. He has denied that he has given evidence against the accused falsely.

88. Nani Gopal Mollik as P.W 07 has deposed that he received training from India under the leadership of freedom fighter Abdul Quddus Makhon during the Liberation War. He was in intelligence branch at Akhaura and Brahmanbaria Sadar to extract and report the movement of Pakistani army and Razakars. During his performance he came to know in the month of August that Razakar Mobarak Hossain destroyed idols habited in the Annandomoyee Kalimondir Temple and renamed as 'Razakar Manzil' removing its real name. He has further testified that Razakars plundered surrounding houses of Hindu communities after torturing them. In the month of October they abducted one Ashu Ranjan Dev from Suhilpur area and put him in Annandomoyee Kalibari where he was severely tortured. During torture they [Razakars] gave him urine in spite of water when he requested them for water. Thereafter, they killed him after torture taking him to Kurulia Khal. He has identified the accused in the dock.

89. On cross-examination he has replied that he was not present at the time of destroying the idols habited in the Temple but he saw the broken idols rushing to the spot after occurrence. He has further replied

that the house of Ashu Ranjan Dev was at Bhoirab. He does not know as to whether Ashu Ranjan had any brother or sister. Except army and Razakar, none of the Hindu communities had any scope to enter Annondomoyee Kalibari but the Muslim people were allowed to go there at that time. He has denied the suggestion that he has given false evidence against the accused.

90. Abdus Samad as P.W 08 has testified that in the month of Bhadra, people of peace committee convinced some locals to join Razakar Bahini, among them, they were Kachu Miah, Mobarak Hossain, Nozrul Miah, Mannan, Azad, Alim, Abul, Tazul, Nuru, Khalil Miah and others who joined the Razakar Bahini subsequently. Kachu Miah and Mobarak Hossain asked him to go with them for cook as chef, failing which they [witness and his other relatives] would be in trouble as happened earlier. Under such compelling circumstances he went with them to Brahmanbaria Kalibari by train. People of peace committee opened the lock and key of Kalibari when they reached there. Thereafter, they plunged the broken idols into the pond and they renamed Kalibari Mondir as 'Razakar Manzil'. He worked there as chef. About two months later, Razakars brought a gun injured Hindu boy to Razakar Manzil and bad smell was coming out from his inflicted body as no treatment was given to him. Four or five days later that boy was not seen in Kalibari Manzil. Thereafter, he came to know that Razakar commander Mobarak Hossain, Razakar commander Kachu Miah along with other Razakars took the boy to Kurulia Khal where they killed him. Razakar commander Mobarak Hossain, Kachu Miah and other Razakars left the 'Razakar Manzil' for Suhilpur Razakar camp after the

said occurrence but he [witness] remained there and another group under the leadership of Razakar Nazrul came and stayed in the Razakar Manzil. He has identified the accused in the dock.

91. On cross-examination he has replied that when he went to Kalibari Mondir he could see idols habited in the Temple. He has further said that he had seen an army instructor in Kalimondir [Temple] who was a sepoy. In reply to a question he has told that he never served in any hotel as chef but he worked with a chef of their village. He does not know how to read and write. He also does not know who were priest and a Maiden dedicated to the two Temples. He has denied that he has given false evidence against the accused.

92. Abdul Hamid as P.W 10 has stated in his deposition that in 1970 in the middle of October he joined army. He obtained army training from EBRC at Chittagong. On 09th December, 1971 Chittagong was declared independent. At the time Indian soldiers were deployed in Chittagong cantonment where he participated in training for about one month. Thereafter, he was sent to Comilla cantonment then Syedpur cantonment from where 3/4 months later he came to his village home on leave and to know that his elder brother Abdur Rouf joined Razakar Bahini along with accused Mobarak. Then he asked his elder brother how he had joined the Razakar Bahini since his another brother was detained in Pakistan prison. In reply his elder brother told that accused Mobarak Ali forcefully compelled him to join Razakar Bahini. Then he asked his elder brother to know what he did during stay in Razakar Bahini. In reply he told him that a boy named Ashu Ranjan was brought to Kalimondir which was renamed as Razakar Manzil. His elder

brother further told him that Mobarak Ali and his accomplices took Ashu Ranjan to Kurulia Khal where they shot him dead. His elder brother Abdur Rouf died around 3/3½ years ago. He has identified the accused in the dock.

93. In cross-examination he has replied that he heard the facts narrated in the deposition from his elder brother. He has also denied the suggestions that he did not join army or he has given false evidence at the influence of Khodeza Begum [P.W 02].

94. Chaman Sikandar Julkernine as P.W 11 has testified that in 1971 he was a student of Class V in Annoda Govt. High School at Brahmanbaria. In the 3rd or 4th week of October, 1971 their school bearer Salam brought a notice of the Head Master in the class room which was read out directing them to go to Annondomoyee Kalibari to see a miscreant held and kept him therein. Thereafter, under the leadership of school teacher Abdur Rouf they about twenty three students went to the gate of Kalibari where they could see a signboard in the name of 'Razakar Manzil' written in Urdu. A sentry prevented them from going inside. After taking permission they entered Kalibari where they could see a bullet injured youth around 18/19 years old at the balcony. The youth was screaming to get water. One of the Razakars among 3/4 wearing brown dresses fetched a glass of water to him and took it back and told the youth that if he chanted slogan as 'Pakistan Zindabad' he would be given water but the injured youth declined to do so, then one of the Razakars offered him urine to take in spite of water showing his chain of pant. Having no patience of hearing on such inhumane acts of the Razakars they left the scene and the youth was

not further seen in Kalibari 3/4 days after such heinous acts of the said Razakars. He further came to know from the locals present that Razakars under the leadership of Razaker commander Mobarak Hossain took the injured boy to Kurulia Bridge where they shot him dead and put his dead body on the edge of the canal. He also came to know that Razakars looted the houses of Hindus around Kalibari. He has identified the accused in the dock.

95. In cross-examination he has replied that there were two Temples, one was Annondomoyee Kalimondir and another was Ramkrishna Mondir. He has denied the suggestions that Mobarak belonged to Awami League, a freedom fighter and he was a man of Syedabad village under Kasba police station and was a student of class VIII in 1971.

96. From the evidence of P.W. 01 it has revealed that he was a member of the then Pakistan army. He came back home from West Pakistan on leave in the month of November, 1970. Subsequently, he joined the Liberation War when it began and he worked in the intelligence branch during the Liberation War. It is also found in his examination-in-chief that he did not see the killing of one Ashu Ranjan directly and debris of Idols dismantled by the accused in the Temple but he heard the occurrence through spy of the intelligence branch. This witness has not stated in evidence about the hearing upon the date and time of the occurrence. It appears from the evidence of P.W 07 that he joined the Liberation War after receiving training from India. Subsequently, he was deployed in the intelligence branch at Akhaura and Brahmanbaria Sadar. And his duty was to extract and report of the movement of Pakistani army and Razakars. He heard in the month of

August that Razakar Mobarak Hossain along with his accomplices destroyed idols habited in the Annandomoyee Kalimondir Temple and renamed Kalimondir as 'Razakar Manzil' instead of its original name. He further heard that accused Mobarak and his accomplices abducted one Ashu Ranjan who was subsequently shot dead by them. Though this witness has given a source of information mentioning intelligence branch but when he heard those incidents happened to be taken place by the conduct of the accused and others, has not been found in the evidence.

97. From the evidence of P.W 08 it appears that he came to know about the killing of Ashu Ranjan but from whom he knew it, has not been stated in his deposition. It is also evident that Razakars brought Ashu Ranjan from Sutiara village of Mojlishpur Union under Brahmanbaria Sadar, not by accused Mobarak Hossain directly. Whereas, other hearsay witnesses have stated that Mobarak Hossain brought him [victim] to the Kalibari Mondir. Thereby, it finds much contradictory evidence between P.W 08 and other witnesses about the holding and bringing the victim to the alleged Kalimondir.

98. P.W 10 also heard the occurrence from his elder brother when he asked him [elder brother] what he did during stay in Razakar Bahini. In reply his elder brother Abdur Rouf, a Razakar, told him that a youth named Ashu Ranjan was brought to Kalimondir. Such reply creates ambiguity in the reality as to who actually brought said Ashu Ranjan to Razakar Manzil. With regard to the destruction of idols habited in the Temple, P.W 11 has not narrated that the idols were destroyed inside the Temple. He only could see an injured boy, no role of Mobarak he

observed. Although he heard from locals that Razakar Mobarak picked him [Ashu Ranjan] up to Kurulia Bridge and shot him dead but there is no evidence of any witness from whom he received information about the conduct of the accused in the killing of Ashu Ranjan. This witness has stated in his examination-in-chief that he went to Kali Mondir to see a miscreant named Ashu Ranjan after getting notice from the Head Master of their school. Such evidence does not invite the involvement of the accused in the killing of Ashu Ranjan although he had seen Ashu Ranjan on his own eyes in an injured condition in Kalibari Mondir.

99. Nevertheless, a book named Muktijuddey Brahmanbaria written by Mr. Joydul Hossain, marked as exhibit-'M' by defence, had been published in February, 2011 where it has appeared a fact of killing of one Ashu Ranjan containing at page 158 which is reproduced below:

*ওঁহীে কঁতঁরীে ওঁবীে অবিিঁআব তঁ-মন চিঁপেব গঁতঁ “থিঁব চিঁকেম্বখি নতঁZ এঁx
 নq| অবিিঁআবি চঁতঁq .yj tj tঁMঁQj | ZিB মুঁয় স কিতঁZ চঁতঁিub| Gকঁউ অub tঁLtঁZ
 চঁতঁে মঁতঁqঁQj | তঁmLub তঁ_তঁK ইবঁRুকবি ইবঁZতঁK অঁতঁি িবতঁq হুq| িe Gj Gd Gi m`m`
 অবিিঁআবতঁK চিঁকেম্বx এঁpযেওqৱ অub`gqx কঁয় কেওতঁZ ইবঁRুকবি চঁুইতঁেওZ
 Ae`নq অubকঁতঁq িতঁL| Ab`PবিRবতঁK কঁবিমঁতঁি চঁুলতঁq তঁ`q|
 অনZ অবিিঁআবি Ici অগুবঁয়K িবঁহঁZb Pযঁতঁব নতঁqতঁQ| ইবঁRুকবি I কুঁশ-
 কঁুগুডি m`m`iv চঁZি`b ZতঁK জুলতঁcub কঁতঁiতঁQ| ZতঁK তঁ`Lvi Rb` e`u তঁjক
 কঁয় কেওতঁZ িfo RূগতঁqতঁQ| মাবিব RbMয গঁt b gঁt Zvi চঁZ মনুবঁয়Z I k`v
 RুবতঁqতঁQ| চঁPui`b চঁS-অবিিঁক কঁয় কেওতঁZ অuk ইবঁLনq| ZতঁK তঁKুব Lবি
 তঁ`qv নqub| Zvi চঁতঁqi ৭Z`নub তঁ_তঁK অেিগ িl “চঁতঁQ| িPukrmvi e`e`নv
 কঁিব নqub| অবি চঁub চঁub কিতঁZ Pবঁtঁj GKRb ইবঁRুকবি চঁubi গঁস নতঁZ িবতঁq
 `হঁ ি`ুতঁq তঁ_তঁK িmKZv কঁতঁiতঁQ| ZতঁK চঁub চঁub কিতঁZ তঁ`qub| Ab`GKRb
 ইবঁRুকবি অবিিঁ গঁtঁi ি`তঁK চঁহঁe কঁtঁi চঁub তঁLtঁZ এঁtঁjতঁQ| Gগুবঁfৱে Zvi Ici
 অগুবঁeK িবঁহঁZb Pযঁতঁব নতঁqতঁQ| কুঁশ- কঁুগুডি m`m`iv অবিিঁ কঁu তঁ_তঁK
 গঁতঁ “হঁy`i তঁMcb Z`` RুবতঁZ তঁPতঁqতঁQ| িK` অবি Gকঁউ K_বি I Reve তঁ`qub|
 অবিিঁক চঁuk`ব িR``ev` এঁtঁZ এঁjv নতঁqতঁQ| অবি PঁRকবি কঁtঁi এঁtঁjতঁQ Rqesjv/
 AZ`পি মন` কিতঁZ bv তঁcঁtঁি অবি অবি I এঁtঁjতঁQ, গঁtঁY অগুবি তঁKুবv fq tঁbB,*

**“तबZvi gtŚ;Avgivw १|Z| Avgvi i l “ thLtb cto:Q tm ~nb creT tm ~nb
~nb nteB|Ū**

100. On a plain reading of the said facts it finds as to how Ashu Ranjan was apprehended, tortured, humiliated and subsequently killed by Razakars with the help of Pakistani invading force. Though these containing facts of the book do support the hearsay evidence of the witnesses excluding the name of the accused but from the given evidence of all witnesses it has not revealed that they [witnesses] had seen directly regarding apprehension, torture, humiliation and subsequent killing of Ashu Ranjan by the accused. These containing facts may be treated as like as hearsay evidence.

101. Upon scrutiny of the evidence adduced by the aforesaid 5 (five) live witnesses along with the facts narrated in the said exhibit-‘M’ against the accused it transpires that except P.W 08 remaining witnesses are found to be hearsay witnesses. Though P.W 08 went with Razakars for cook as chef who was supposed to see everything, but many contradictions are found present in his given evidence. His evidence has disclosed that Razakars brought Ashu Ranjan to Kalimondir whereas from other hearsay evidence of witnesses it has emerged that Mobarak along with his accomplices brought Ashu Ranjan to Razakar Manzil. Other hearsay witnesses have also disclosed that the idols habited in the Temple, had been destroyed but he [P.W. 08] stood silent as to the destruction of idols in the Temple. So, it finds many contradictions presented by the prosecution witnesses to each other in proving the instant charge. It is unsafe to find an accused guilty of an offence depending on much contradictory evidence. If any degree of

doubt arises by evaluation of evidence, its benefit goes to the accused. The incidents as indicted in the charge might be true but it has to be proven against the accused beyond all ambiguities by adducing clear evidence so that no one can be deprived of fair justice.

102. With regard to the instant charge we are not convinced and satisfied with the aforesaid given evidence that the prosecution has been able to prove the instant charge beyond reasonable doubt against accused Mobarak Hossain that he by his act or conduct substantially participated and contributed to the commission of the offences of abduction, murder, confinement, torture and other inhumane acts as crimes against Humanity as specified in section 3(2)(a) of the Act of 1973.

Adjudication of charge no. 03

[Abduction and murder of Abdul Khaleque of village Satian under Brahmanbaria police station]

103. **Summary Charge:** During the Liberation War on 11 November, 1971 between around 08.00/ 09.00 A.M accused Md. Mobarak Hossain being the Razakar commander as well as a member of group of individuals along with his armed accomplices abducted Abdul Khaleque of village Satian who was known as help-mate of freedom fighters from the western road of his house. The accused took the victim to the Razakar camp of Suhilpur Union Parishad and physically tortured him which his [victim] daughter, son and others witnessed. It was learnt that in the night Abdul Khaleque was taken to the Bakayl Ghat situated at western bank of Titas River where he was shot dead with a bayonet charge to confirm his death. On the following day, the

relatives of the victim recovered dead body of Abdul Khaleque having marks of violence on his person from Bakayl Ghat and buried his dead body at Kolamuri graveyard. Thus the accused has been charged for substantially participating and contributing to the commission of abduction, murder, confinement, torture and other inhumane acts as crimes against Humanity and therefore, the accused has committed the offences as specified in section 3(2)(a) read with section 4(1) of the Act of 1973.

Discussion and evaluation of evidence and findings:

104. In respect of proving the instant charge the prosecution has examined as many as four live witnesses [P.Ws. 01, 02, 03 and 10].

105. Md. Darul Islam as P.W. 01 has testified that he joined Pakistan army in 1963. During the Liberation War in 1971 he was a Habilder in the intelligence branch of freedom fighters. He came to know from one Abul Bashar, Pesh Imam of a Mosque and through spy that Mobarak Ali having rendered the charge to other Razakars took over the charge of Suhilpur Razakar camp as Razakar commander under whom many killings and torture took place. When a freedom fighter named Abdul Khaleque of Satian village came to his house to see his ailing mother, Mobarak Ali along with his accomplices captured him and subsequently killed him by gun shots. Accused Mobarak Ali was a 'rokan' of Jamaat-e-Islami of Union Level and he was a member of Jamaat-e-Islami before and after the Liberation War. He has identified the accused in the dock.

106. On cross-examination he has replied that he was in West Pakistan at the artillery centre in army before coming back home on leave in 1970. During the Liberation War he was given task of

intelligence by Subeder Abdus Sattar who is not now alive. He has further replied that he has no written proof or document as to whether Mobarak Ali was a volunteer of Pakistan army but Mobarak Ali was a Razakar. He has denied the suggestions that he was in Pakistan during the Liberation War and he came back home in the way of escaping after independence.

107. Khodeza Begum as P.W 02 has deposed that she was about 14/15 years old during the War of Liberation. Her father was serving in the Ansar Department since before starting Liberation War and participated in the freedom fight in 1971. On 9th November, 1971 her father came home upon hearing ailment of his [father of the witness] wife as well as his parents. On 11th November, 1971 Pakistan army along with Razakars held her father while he was attempting to flee home away sensing their presence in the village and they started beating her father after apprehension. Thereafter, they [witness and others] went on towards them in a weeping tune. Razakars took her father to Suhilpur Union Parishad office that was established as Razakar camp. On that day after 'Asr' prayer her mother and grand-mother went to the camp with food for her father. At the camp one Razakar named Abdur Rouf told her mother and grand-mother to give the meal to him which he would feed her father. Razakar Abdur Rouf told them further that it was possible to release her father through camp commander Mobarak Hossain of Nayadil village. Then her mother and grand-mother came back home and explained the same to them [witness and others]. Thereafter, her mother went to the house of Khaleque moulana beside their house and requested him to bring her

father on release. In reply Khaleque moulana told her mother to go to the camp for releasing her father on the following morning as the day was fallen in night. Next morning before going to Khaleque moulana, locals started telling each other that her father was shot dead lying on the western bank of Titas River. Thereafter, they having cried went to the Bakayl Ghat and could see her father's hands and legs tied along with a numerous bullet injuries on the right forehead, separated skull of head, marks of bullet injuries on the right chest and signs of slit under belly button lying on the ground. Thereafter, her mother went to Khaleque Moulana who handed over a slip to them from the camp by which they brought the dead body and buried the same at the family graveyard. She has further stated that she heard about Razakar commander Mobarak Hossain and his accomplice Razakar Jomshed who were present at the time of holding and taking her father and at that time she could see them. She has identified the accused in the dock against whom she has deposed.

108. On cross-examination she has replied that her father participated in the Liberation War in 1971, before that he was in Ansar Department. She has no knowledge at which places her father participated in the freedom fight during the Liberation War because she did not go with her father for participation in the Liberation War but she heard that her father fought in many places including Akhaura, Ranidia and Sarail. She has written proof that her father was a freedom fighter. She did not produce such documents to the investigation officer but she gave gazette number of her father as freedom fighter to him [investigation officer]. Bakayl Ghat is about two kilometres from the place from where

her father was held and taken away. When the occurrence took place there were crops in the paddy field beside both of the road. There was none in the paddy field working beside both of the road when the occurrence took place because all locals fled away in fear of them [Razakars and Pakistan army]. She had shown the place of occurrence to the investigation officer, from where her father was caught hold. In reply to a question she has told that on the day of occurrence she had seen 15/20 Razakars at Suhilpur Union Parishad. She had also seen Pakistani army at that camp. She has denied that she has given false evidence against the accused.

109. Rafiqul Islam as P.W 03 has testified that he was a boy of 10/11 years old during the Liberation War, in 1971. His father was Ansar commander before 25th March, 1971. After 26th March his father joined the Liberation War. On 9th November, 1971 his father came home secretly to see his [P.W 03] ailing mother and grand-parents. On 11th November at about 8.00/9.00 A.M they got message that Pakistan occupation force along with Razakars were coming towards their house. In a hurry his father got out of the house and made an attempt to flee away by the western side of their house. But Pakistani army along with Razakars captured his father and took him [victim] to Suhilpur Razakar camp on hands being tied. Thereafter, in a loud voice they started weeping and shouting and used to go behind back of the Razakars to the camp. They left the Razakar camp when Razakars chased them to leave. On that very day after 'Asr' prayer his mother and grand-mother went to that camp with food for his father. There was a Razakar named A. Rouf of Nayadil village who kept the food after taking it from his

mother and grand-mother in order to feed his [P.W 03] father. His mother and grand-mother asked A. Rouf Razakar how to release his father. In reply A. Rouf Razakar told them that it was possible to release his father if they meet camp commander Mobarak Hossain of Nayadil village, which he came to know from his mother and grand-mother. His grand-mother died long years ago and his mother had been fallen sick by stroke since 3/4 years back. Now her [mother of the witness] conversations are illegible. Thereafter, his mother and grand-mother went to Khaleque Moulana of their village, a Muslim league Leader, and requested him to release his father but Khaleque Moulana declined to go in the night and assured them to go the following day of apprehension to release his father. Next morning around 8.30/9.00 A.M locals used to speak with each other that his father was shot dead lying on the bank of Titas River at Bakayl Ghat. Then they went to the scene and could see his father's dead body having numerous bullet injuries with right skull, right chest and signs of slit under belly button. Later, he heard from locals that injuries of stomach were charged with bayonet. They could recognise Razakar commander Mobarak Hossain when Razakars were taking his father to the camp. The accused was then youth and slim who did not have beared at that time. To bring the dead body of his father after killing, his mother and grand-mother went to Muslim League leader Khaleque Moulana who gave a slip from Razaker camp along with dead body and then they buried the same at Kalamuri graveyard. He has identified the accused in the dock.

110. On cross-examination he has told that A. Rouf narrated the killing story of his father when they met him four years before and A.

Rouf also introduced his brother Abdul Hamid as freedom fighter with them from whom they came to know that his father and Abdul Hamid both fought together during the for some days War of Liberation. For this reason, they have given name of Abdul Hamid as witness in the case filed by his sister [P.W 02]. In presence of his sister Khodeza Begum he had talks with Abdur Rouf. He has denied the suggestions that Abdur Rouf son of Abdul Kahar Bhuiyan was not a Razakar in 1971 nor his brother Abdul Hamid was a freedom fighter. Zillur Rahman was the Chairman of Suhilpur Union Parishad in 1971. On the day of occurrence he did not see Zillur Rahman at Suhilpur Union Parishad Razakar camp because he did not enter the camp. Distance between Bakayl Ghat and their house were two kilometres. There were paddy fields beside the place from where his father was held and taken to the camp but none was present. At the time of occurrence locals were not assembled upon hearing hue and cry of them. All fled away in fear of Pakistan army and Razakars. He has denied that he has given false evidence by taking money from Abdul Hamid [P.W 10].

111. Abdul Hamid as P.W 10 has deposed that he joined the Pakistani army in the middle of 1970. He participated in the Liberation War in 1971. After independence he again joined Bangladesh army and after 3/4 months he having come to his village home on leave came to know that his own elder brother Abdur Rouf joined Razakar Bahini along with accused Mobarak. Then he asked his elder brother how he joined Razakar Bahini since his another brother was detained in Pakistan prison. In reply his elder brother told him that accused Mobarak Ali forcibly compelled him to join Razakar Bahini. Apart from other

incidents his elder brother told him further that Mobarak Ali along with his accomplices abducted a freedom fighter named Abdul Khaleque from Satian Village and tortured him at the Suhilpur Razakar camp. Subsequently, they [Mobarak and his cohorts] killed him by gun shots at Bakayl Ghat. His elder brother Abdur Rouf died around 3/3½ years ago. He has identified the accused in the dock.

112. In cross-examination he has replied that he had seen P.W 02 Khodeza Begum once in their house about 4/4½ years back. It is not a fact that Chittagong was freed on 16th December, 1971. Chittagong was declared independent on 9th December, 1971. He has denied the suggestions that his father was a member of peace committee, he was not in army and he has given false evidence at the influence of Khodeza Begum [P.W 02].

113. In the assessment of evidence adduced by the aforesaid four live witnesses it has emerged that there is a specific charge of abduction, confinement, torture and murder of Abdul Khaleque against the accused. From the evidence of P.W 01 it has revealed that he was a member of Pakistani army and he joined the intelligence branch during the War of Liberation as freedom fighter. Although he could not see the killing of Abdul Khaleque directly by the accused but he heard the incident through one Abul Bashir, a Pesh Imam of a mosque, and spy of intelligence branch. Here it finds a definite source of hearing on the killing of freedom fighter Abdul Khaleque by accused Mobarak Hossain.

114. In cross-examination it has been reaffirmed by his reply that Mobarak Hossain was a Razakar. The evidence of this witness is no doubt hearsay evidence as he heard the incident from his sources and

thereby it does not have probative value alone as it was settled earlier in other cases but it can enforce to have its credibility if it corroborates other non hearsay evidence as per Rule 56(2) of ROP, 2010 which states as under,

“The Tribunal shall also accord in its discretion due to consideration to both hearsay and non-hearsay evidence, and the reliability and probative value in respect of hearsay evidence shall be assessed and weighed separately at the end of the trial.”

115. There is no doubt that the International Crimes (Tribunals) Act of 1973 is a special legislation enacted by the legislators in parliament in 1973 with a view to try and punish the perpetrators who committed atrocious acts, in the territory of Bangladesh, whether before or after the commencement of this Act. By dint of section 22 of the said Act Rules of Procedure, 2010 has been framed, so that proper and fair adjudication can be made by the Tribunal. Rule 56(2) of the ROP, 2010 defines distinction between the hearsay evidence and non hearsay evidence as to how it will be assessed and weighed for its reliability and probative value in the final adjudication. Since there is much hearsay evidence appeared in support of proving the instant charge it may be envisaged later on.

116. Having gone through the evidence of P.W 02 it finds that she is a member of victim family. Her father Abdul Khaleque was killed as he joined the Liberation War in 1971 as freedom fighter. It appears from her deposition that at the time of occurrence she was around 14/15 years old which qualified her to be able to understand everything properly. Her evidence discloses that she could see the presence of

Razakar commander Mobarak Hossain along with his accomplice Razakar Jomshed at the time of holding and taking her father to Suhilpur Razakar camp but she could not recognise them by names. Subsequently, she heard their names [accused and others] from her mother and grand-mother who were suggested at the camp by one Razakar named Abdur Rouf, brother of P.W10, that only Razakar commander Mobarak Hossain of Nayadil village was able to release abducted Abdul Khaleque from there. Accordingly, her mother went to the house of Khaleque moulana beside their house, a Muslim League leader, to get help from him for releasing her father. Getting request from her mother, Khaleque moulana refused to go to the camp in that night but gave assurance to take steps for releasing her father next morning. Nothing had have in their hands next morning when they got message from the local people's conversation that freedom fighter Abdul Khaleque was killed by gun shots at Bakayl Ghat and his dead body was lying on the western bank of Titas River.

117. It is also found from the evidence that P.W 10 has also disclosed in his deposition that his elder brother joined Razakar Bahini and told him that Mobarak of Nayadil village was the commander of Razakar Bahini of Suhilpur camp and was able to release the abducted Abdul Khaleque from Suhilpur Razakar camp. Such evidence has supported and corroborated the evidence of P.W 02 who had directly seen the apprehension of her father by accused along with his accomplices. It is also evident that after Asr prayer the mother and grand-mother of P.W 02 went to Razakar camp with food for her father which was kept by Razakar Abdur Rouf, brother of P.W 10. The evidence such as taking

food by her mother and grand-mother for her father to the Suhilpur Razakar camp after 'Asr' prayer is a quite natural version of evidence because the victim family might have thought that he [victim] was detained without having food for long hours.

118. It is pertinent to mention here upon scrutiny of the evidence of P.W 02 that her [P.W 02] grandmother died long years back and her mother's talks [conversations] are not presently illegible due to her serious ailment like stroke she suffered a few years ago. Therefore, the prosecution has been reasonably unable to adduce the evidence by both of them in proving the instant allegation brought against the accused.

119. It has also revealed from cross-examination by her reply reaffirming that her father was a freedom fighter. Defence does not raise voice on it seriously and it was not objected that her father was not killed at the alleged date and time of the occurrence. She had shown the place of occurrence to the investigating officer from where her father was caught hold by the accused along with his cohorts. Defence has not tried to carry out any query about the truthfulness of the place of occurrence by putting question to the investigating officer while examining him before the Tribunal.

120. It is found from the evidence of P.W 03 that he was a boy of 10 to 11 years old at the time of occurrence and he is a member of victim family. In his examination-in-chief he has narrated that his father was Ansar Commander before 25th March, 1971. Subsequently, his father took participation in the War of Liberation.

121. Upon hearing the ailment of his mother and grand-parents, his father came home to see them on 9th November, 1971. His father's

presence was intimated somehow to the members of Razakar Bahini as well as Pakistani army who started coming towards their house to apprehend his father on 11th November 1971 at about 8.00 to 9.00 A.M. Sensing their [perpetrators] presence in the village, his father made an attempt to flee home but in vain.

122. Ultimately his father was captured and taken by the accused along with his accomplices to Suhilpur Razakar camp where they tortured him inhumanely. Members of victim's family tried to release him but no chance they got to reach Razakar commander Mobarak. Finally, the next morning they obtained information from the present locals in conversation to each other that freedom fighter Abdul Khaleque was killed by gun shots at Bakayl ghat. Exactly similar evidence has been given by P.W 02 as to the abduction and killing of victim Abdul Khaleque and it is very hard to disbelieve the evidence of P.Ws 02 and 03 accordingly.

123. More so, on cross-examination this witness [P.W 03] has replied that 4(four) years back he along with his sister Khodeza Begum [P.W 02] went to meet Abdur Rouf, a member of Razakar Bahini, to know the accurate scenario about their father's killing. Verifying this version of evidence, the defence put question to P.W 10, brother of Abdur Rouf, who has told in reply that he saw Khodeza Begum once in their house around 4/4½ years back. So, the aforesaid piece of evidence of P.W 03 has been corroborated by such reply in a same voice as to the veracity of both the witnesses.

124. Accused himself as D.W 01 has stated in his deposition that P.W-10 Abdul Hamid and P.W 01 Darul Islam both in collusion with each

other instigated P.W-02 Khodeza Begum to lodge the present case against him [accused] along with one Jomshed Miah who was born in 1972 due to previous enmity. D.W 01 has also claimed that the said witnesses have given false evidence against him.

125. From the said evidence of D.W 01 it does not find any clue of why there was enmity between P.W 02 and the accused and what kind of connection they [P.W 02 and accused] have had long before filing the instant case for which she could bring fabricated allegation against the accused. The accused has further claimed that he was born on 01.07.1956 and was a student of class VIII in 1971 which indicates that he was a boy of tender age during the Liberation War. It also contends that at the age of 14/15 years there was no scope to become a Razakar commander or a member of Razakar Bahini but from the voter list of 2008 [Exhibit-04 SL. No. 118] and National I.D Card of the accused [Exhibit-05] it has revealed that the date of birth of the accused is 10.01.1950. So, prior to lodging the instant case he exposed his actual age and date of birth to the legal authorities for having I.D Card and to include his name in the voter list.

126. Besides, a book named Muktijuddey Brahmanbaria written by Mr. Joydul Hossain, marked as exhibit-M by defence, had been published in February, 2011 where it has noted a fact of killing of Abdul Khaleque containing at page 149 which is as follows:

“*mynj cÿ DËi BDubqtb QwZqub Mtgi Avbmi KgvÛvi Lvj K ivRvKvi
ewnbxZ t_K gÿ “ thvv`i mnhMZv KiQb | gÿ “ thvv`i mv_ Zvi
Mvcb thvhM Qj | Zvi i KvQ Zvb ivBdtj i ,ij mieivn KiZb | AbK
mgq gÿ “ thvv`i mv_ ivZ KwqQb | mynj cÿ, `ËLvj v I gRj kcÿ t_K
AviMÄ tgNbvNvU ch\$- gÿ “ thvv`i hvZvqZ Zvb mnhMZv KiZb |*

ৱে।ক।উ। ৱ।ব।ৱ।ব। নতq হ।ব। c।, G।v।K।v। Ab"। i।v।ৱ।K।v।i।v। Z।t।K। e।m।o। t।_।t।K। a।t।i।
 ৱ।b।t।q। n।Z।'।v। K।t।i। | G। n।Z।'।v।K।t।Ū।i। m।t।_। m।y।j।c।y।i। i।v।ৱ।K।v।i। K।g।Ū।v।i। A।v।e।j। K।v।j।g।
 t।P।s।a।j।x। ৱ।ৱ।o।Z। ৱ।Q।j। |”

127. In the given facts it is stated that Ansar Commander Khaleque of Satian village under Suhilpur Uttar Union, staying in Razakar Bahini, helped the freedom fighters. He had secret communications with freedom fighters and used to supply ammunitions of rifle to them. He also spent night with freedom fighters many times. This fact discloses that he was in fact a freedom fighter acting as an agent of the freedom fighters staying in Rajakar Bahini. Razakars captured him from his house and subsequently killed him after his conduct was disclosed to them. Razakar Commander Abul Kalam Chowdhury of Suhilpur was involved with this killing.

128. Relying upon the facts as stated above, defence has contended that the name of the accused has not been mentioned in the given facts and Razakar commander of Suhilpur was Abul Kalam Chowdhury, not Mobarak Hossain. But from the very facts it has disclosed that Khaleque was apprehended by Razakars who killed him subsequently. So, it finds the facts true as stated by the witnesses in their respective evidence. It has also established by evidence of witnesses that the accused was a Razakar during the Liberation War. Therefore, it does not require proving by the prosecution that Mobarak Hossain was to be a Razakar commander. In this respect P.W-04 has narrated in his deposition that Mobarak Hossain was the commander of Razakar camp of Suhilpur Union Parishad which meant he was camp commander [commander-in-charge of the camp], not the commander of entire

Suhilpur Union Parishad. In the given facts it also indicates that Abul Kalam Chowdhury was the commander of Suhilpur, not the camp commander. It is a fact that the writer of the book has not mentioned the name of any Razakar in his book except the name of one Abul Kalam Chowdhury as Razakar commander of Suhilpur. In support of this fact no oral evidence has been given by any of the witnesses on oath. Even then both the D.Ws have stood silent in this regard. Although D.W-02 has stated in his deposition that:

‘D³ eBtqi 149-150 cōvq tj Lv AvtQ th D³ Avāy Lv tj KtK nZ^v Kti tQ Avej Kvj vg tPšajx bitg R%bK e^{il} “ hvi evox m^{ij} tgšj ex ciov Mtg Aew⁻Z|ō

129. But the book contains like as

‘Gj vKvi Ab^o i vRvKvi i v ZvtK emio t⁻tK aⁱ vbtq nZ^v Kti | G nZ^v Kv tŪi mvt⁻ m^{ij} c^{ij} i i vRvKvi KgvŪvi Avej Kvj vg %v^{ij} R^{io}Z vQj’ |

130. From which it does not mean that only Abul Kalam Chowdhury killed Abdul Khaleque rather other Razakars were also involved with alleged abduction and killing of Abdul Khaleque. It has simply been stated that Razakar commander Abul Kalam Chowdhury of Suhilpur was involved with this killing. In the given facts it also indicates that Abul Kalam Chowdhury was the commander of Suhilpur, not the camp commander. In light of discussion of the said facts it is opined that reliance of the defence upon exhibit-M has supported the evidence of prosecution witnesses in addition to prove the instant charge.

131. D.W 02 is the eldest son of the accused, who has given evidence claiming that his father was innocent and has been implicated in a

fabricated case. It appears from his statements made before the Tribunal that he is a man of 37 years old. According to him, at the time of occurrence he was not born whereas he has given a lengthy statement narrating many things including his father's movement and position where and how he had resided during the Liberation War in 1971 but it is surprising to know that in reply to a question by the prosecution he has told that he does not know about his father's National I.D Card number which contains date of birth of his father as 10.01.1950. In the assessment of evidence of D.W-02 it appears that upon hearing the facts from others he has deposed in his father's favour but he has failed to state the actual date of birth of his father which was mentioned in the National I.D Card [Exhibit-05] as 10.01.1950. In view of the discussions as stated above, it is very hard to consider his all evidence to be genuine one.

132. On scrutiny of the evidence of both D.Ws it reveals that the accused has taken a plea that he lived with his younger uncle at Nayadil village while he was a student of Class VIII and in the month of Baishak, 1971 Pakistani occupation force ignited around 50/60 houses of Nayadil village under attack including his uncle's house and his books were also set on fire thereof. Thereafter, he left Nayadil village for his own village at Syedabad while his uncle for Borishal village. It is now settled jurisprudence that when an accused raises the plea of alibi he is merely denying that he was in a position to commit the crime with which he has been indicted, more particularly that he was elsewhere than at the time of commission of offence at the scene. The burden of proof lies on prosecution which does not lessen for reason of success or

failure to prove the plea of alibi. It was opined by ICTR Appeal Chamber that:

“The only purpose of an alibi is to cast reasonable doubt on the Prosecutor’s allegations, which must be proven beyond reasonable doubt. In alleging an alibi, the accused merely obliges to Prosecution to demonstrate that there is no reasonable likelihood that the alibi is true.”

[Nahimana, Barayagwiza and Ngeze, (Appeals Chamber), November 28, 2007, Para. 417]

133. The statement made by D.W-01 does not offer any reasonable indication that at the time of occurrence he was not able to commit any atrocious act as alleged by the prosecution. If he was a minor boy of 14 to 15 years old at the alleged time how could he along with his two brothers purchased a land measuring 4½ decimals and made structures thereon in 1973 as disclosed by his evidence. However, defence failure does not invite any formation to make the accused guilty of the offence and no requirement in criminal jurisprudence is necessary by the defence in proving or not proving any allegation brought by the prosecution. In the case of **Jorgic V. Germany**, it was observed by ECHR [European Court of Human Rights] that,

“It does not require the attendance and examination of witness on behalf of the accused. It is the task of the Tribunal to ascertain whether the taking and assessment of evidence violated the principle of a full ‘equality of arms’ rendering the proceedings as a whole unfair.”

[Inter alia Vidal V. Bedgiuna, Judgement of 22 April 1992, Series A no. 235, PP 32-33, & 33 and Heidegger V. Austria (dec.) no. 27077/95, 5 October 1999].

134. The spirit of criminal jurisprudence is that once the responsibility is given to the prosecution to prove the charge, framed on the basis of allegation brought by them it should not turn down in the name of any plea of alibi by the defence. Very recently our Appellate Division has also observed in the case of Abdul Quader Molla, reported in 22 BLT (AD) 2014, page 08 which is quoted below:

“Under our criminal jurisprudence the accused is presumed to be innocent until his guilt is proved. He is not required to prove anything. The burden is always upon the prosecution. But if the accused raises a plea amounting to a confession of guilt, the tribunal can convict him relying upon the plea. Our Penal Code provides for certain exceptions and in the case of an exception, the burden of proving the existence of circumstances bringing the case within any of the exceptions lies on the accused and the Tribunal must presume the absence of such circumstances. Adding to it, the burden of proving the special defence of alibi is on the accused setting it up. The appellant, in this case, failed to create reasonable doubt to the possibility of his being absent at the scene of occurrence; rather it has been established that he was very much present in Mirpur and masterminded all the killing and other heinous crimes against Humanity.”[Italic supplied]

135. It is true that the testimonies of P.Ws 01 and 10 are being found to be hearsay evidence but their evidence have supported and corroborated the non-hearsay evidence of P.Ws 02 and 03. It is also

evident that P.W.10 knew about the killing of Abdur Khaleque from his brother Abdur Rouf who died around 3/3½ years ago. The reliability and probative value in respect of such hearsay evidence shall have to be assessed and weighed at the end of the trial as per Rule 56(2) of the ROP, 2010. In the present charge the concluding scenario is that non hearsay evidence of P.Ws 02 and 03 have been supported and corroborated by hearsay evidence of P.Ws 01 and 10 without having significant discrepancies, therefore, it gets reliability and probative value in the assessment of evidence for its finality.

136. Nevertheless, it is evident that P.W 12 Shamol Chowdhury has been assigned Investigation Officer to investigate the case. After conclusion of investigation he has submitted report along with relevant dossier to the learned Chief Prosecutor. In his examination-in-chief he has stated that on 27.07.2012 he visited the places of Satian village, Suhilpur Union Parishad Razakar Camp, bank of Titas River and Bakayl Ghat to ascertain the abduction, confinement, torture and killing of martyr Abdul Khaleque and his further evidence is that during investigation he recorded statements of four witnesses including Khodeza Begum.

137. In cross-examination this witness has replied that during investigation he found existence of four Razakar camps including Suhilpur Union Parishad.

138. By the said evidence it has established that there was a Razakar camp at Suhilpur Union Parishad during the Liberation War where martyr Abdul Khaleque was kept confined after apprehension and subsequently he was killed by gun shots at Bakayl Ghat and his dead

body was lying on the bank of Titas River and on those places the Investigating Officer had paid visits during investigation. This piece of evidence has also linked to the subsequent evidence of aforesaid four other witnesses. So no question of doubt has been found in respect of proving the instant charge.

139. On a careful scrutiny of the evidence it appears that the participation of the accused in the abduction as well as killing of victim Abdul Khaleque is found available in the testimonies of all four witnesses. No significant inconsistencies are found in the scanning of their evidence adduced on oath before the Tribunal.

140. As the accused along with his cohorts deliberately apprehended the victim and soon after apprehension he [victim] was kept confined at Suhilpur Razakar camp and finally was taken in night to Bakayl Ghat, the killing site. No chance was given to the relatives of the victim to meet him at the Suhilpur Razakar camp as evident by the witnesses; therefore, prosecution is not required to prove that the accused was involved with all stages of the event, either physically or by his act or conduct or omission. Even then, prosecution has become stronger in proving the charge in the proper manner as well. But a single act or conduct of accused, before, during or after the event, is sufficient to infer his [accused] culpability. In this context the ICTY Appeal chamber opined as under,

"All other conditions being met, a single or limited number of acts on [the accused's] part would qualify as a crime against humanity, unless those acts may be said to be isolated or random."

[Deronjic, (Appeals chamber), July 20, 2005,

Para. 109]

141. In the light of discussion and evaluation of evidence as narrated above it is crystal clear that the offences of abduction, confinement and murder committed by the accused during the War of Liberation in 1971 as a Razakar as well as Razakar commander or a member of group of individuals. Therefore, we are led to hold that the prosecution has been able to prove the instant charge beyond reasonable doubt against the accused that had direct participation and complicity in the commission of those atrocious acts and as such accused Md. Mobarak Hossain alias Mobarak Ali is criminally liable under section 4(1) of the Act and held him guilty of his substantial contribution to the actual commission of offences as crimes against Humanity as specified in section 3(2)(a)(g)(h) of the Act of 1973 which are punishable under section 20(2) of the Act.

Adjudication of Charge nos.04 and 05

Since both the charge nos.4 and 5 are identical, those are being adjudicated together for proper and effective adjudication.

(a)[Abduction of Khadem Hossain Khan and tortured upon him keeping in confinement].

142. **Summary charge no.04:** During the War of Liberation on 24/25 November, 1971 at about 2.00/2.30 P.M the accused Md. Mobarak Hossain alias Mobarak Ali being Razakar commander as well as a member of group of individuals led a team of Razakars in apprehending and abducting Khadem Hossain Khan who was kept confined at Army camp stationed at Brahmanbaria college and in the said camp Pak-army and Razakars inhumanely tortured him and eventually he was

sent to the jail of Brahmanbaria. Thus accused Md. Mobarak Hossain is charged for substantially contributing to the commission of offences of abduction, confinement and torture as crimes against Humanity caused to unarmed civilians as specified in section 3(2)(a) of the Act of 1973.

(b)[Abduction and torture of Abdul Malek and killing of Md. Siraj].

143. **Summary charge no.05:** During the period of the War of Liberation on 28/29 November, 1971, at about 11.00 P.M the accused Mobarak Hossain being the Razakar commander as well as a member of group of individuals along with Pakistani Army Abducted Abdul Malek of village Kharompur and Md. Siraj of village Amirpara from their respective houses and took them to Army camp stationed at Brahmanbaria college and after torturing them inhumanly, sent them to local jail. Eventually the accused along with his accomplice Razakars in a planned way took away Md. Siraj and a few others from jail to Kurulia Khal and killed those civilians by gun-shots on 6 December, 1971. Therefore, the accused Md. Mobarak Hossain is charged for substantially contributing to the commission of offences of murder, abduction, confinement, torture and other inhumane acts as crimes against Humanity caused to unarmed civilians as specified in section 3(2)(a) of the Act.

Discussion and evaluation of evidence and findings:

144. The prosecution in order to prove charge no.04 has examined solitary witness P.W-04 Md. Khadem Hossain Khan, who has claimed to be the victim of the occurrence.

145. P.W-04 Md. Khadem Hossain Khan has deposed that during the Liberation War, 1971 he had a shop under the name any style 'Radio

House' at Kumar Shil intersection at Brahmanbaria town and the supporters of independence used his said shop as their office; when the straggle for liberation was started after 26 March,1971 his said shop was looted by the Pakistani army and he went to India in the month of May, 1971 and after having taken training he returned to Mazlishpur area under Brahmanbaria District; he was assigned to collect information regarding the movement of Pakistani army and Rajakars in order to inform the same to the freedom fighters and to guide the freedom fighters for their safe movement. One day he came to know that his teacher principal Ismail Hossain was seriously ill and having learnt such information he on 24/25 November,1971 went to the house of his said principal situated at Station Road Brahmanbaria and after meeting him when he came out from the house of his teacher on road, at that time under the leadership of the accused Mobarak Hossain 5/6 Rajakars apprehended him and took him at army camp stationed at Brahmanbaria college and handed over him to the Pakistani army. At that time accused Mobarak Hossain in Urdu language told the Pakistani army "Ea Khatanak admiha, o Mukhtiha, o technician admiha, o mine fitting kia, o bohu pul tuta ha" that means accused Mobarak Hossain told the Pakistani army that he was a bad man, freedom fighter, a technician who had installed mines and destroyed various bridges. This witness has further stated that accused Mobarak Hossain was the commander of the Rajakar camp situated at Suhilpur Union Parishad. The Pakistani army hung up him keeping his legs upwards and in humanely assaulted by electric wire as a result of such torture he received severe injuries and ultimately lost his sense. The

Rajakars who apprehended him were present at the camp. When he regained his sense he found him inside the Brahmanbaria old jail and found many freedom loving people there who were tortured; after 4/5 days Siraj Miah and Malek Miah of his locality were brought to the said jail after having tortured on them and he came to know from them that under the leadership of accused Mobarak Hossain they were apprehended from their respective houses and having been tortured they were sent to the jail. Two days before the liberation of the country the army men took Siraj from the jail and killed him at Kurualia Khal. After 16 December, 1971 when the country was liberated the freedom fighters and local Awami League leaders came to the jail and rescued them after breaking the lock. This witness has identified the accused present in the dock.

146. On cross-examination P.W-04 has stated that he was released from the jail on 7/8 December, 1971 and the Brahmanbaria was liberated on 6 December. He has further stated that he has no knowledge whether one can be sent to the jail without any custody warrant. He has further stated that no witness is alive who saw the occurrence of his abduction and he did not file any case against the accused after the liberation of Bangladesh. He knows Abul Kalam Chowdhury, the Rajakar commander of Brahmanbaria District, and he did not have any documents as to the commandership of accused Mobarak Hossain, and no body was present when he met Ismail Hossain. He has also stated that he narrated about the incident to Joydul Haque and he did not read the book 'Muktijuddhe Brahmanbari'

written by Joydul Haque. He has denied the defence suggestion that he has embellished the prosecution case.

147. To prove charge no.5 P.W-6 Abdul Malek in his examination-in-Chief has stated that in 1971 when the Liberation War was started he was 25/26 years old and he went to Agartola, India and after taking training he returned to Bangladesh under the instruction of their regional commander Abul Bashar and he helped the freedom fighters to their movement and gave assistance to the refugees so that they could safely reach India. In this way as per the direction of the local freedom fighters commander he along with Siraj Miah, Khadem Hossain and Noor Miah had performed their duties. On 28/29 November, 1971 accused Rajakar Mobarak Hossain, his accomplice Rajakars and Pakistani army captured him from his house and they also apprehended Siraj Miah. Thereafter, they were boarded in a Launch and taken to Brahmanbaria Sadar police station on the following morning and thereafter the Pakistani army and the accused and other Rajakars took him in a room of Brahmanbaria Government collage which was being used as 'torture room' and started assaulting on him with electric wire and at one stage he lost his sense and after regaining sense he found himself along with Siraj Miah in Brahmanbaria jail; after 3/ 4 days when he was recovered from his sickness he along with about 30 persons were taken to Medda T.B Hospital by a vehicle and their blood were tested and eventually blood of 8[eight] persons including him were squeezed from their respective bodies. Thereafter, when he was being taken again to the jail on the way he found his elder brother Abdur Rahman; accused Mobarak Hossain and the Pakistani army men gave

him an opportunity to talk with his brother and his brother supplied him a 'lungi' and then he was taken to Brahmanbaria jail. After 2/3 days Siraj Miah along with 20/25 persons were boarded in a vehicle but he could not be boarded in the vehicle as there was no place in the said vehicle. Thereafter he came to know that Siraj Miah including the other persons were killed at Kurulia khal [canel]. After 3/ 4 days of the said incident he could understand that the country was liberated and the local leaders and the freedom fighters released them from the said jail.

148. In cross-examination he has stated that the Pakistani army along with 4/5 Rajakars surrounded his house and Rajakars Mobarak, Musa Miah, Noor Miah and Lal Miah were with them, and except Mobarak no other is present in the dock. He could not remember the name of the persons who were taken to the T.B Hospital and blood were taken from their bodies. He has further stated that Abul Kalam Chowdhury was the Razakar commander of Brahmanbaria; after liberation of the country he did not file any case against accused Mobarak as he was sick for long time; Jharu son of Siraj Miah is alive and he has been cited as a witness. He has denied the defence suggestions that at the instance of witnesses Khadiza Begum and Abdul Hamid he has deposed falsely against the accused.

149. On careful examination of the above evidence it is evident to us that P.W-04 Md. Khadem Hossain Khan is the only witness adduced by the prosecution to prove charge no.04. It is by now settled proposition of law that conviction can be awarded relying up on a solitary witness if his evidence is found credible and reliable. On perusal of the evidence of P.W-04 we find some material discrepancies and contradictions between

the examination in chief and cross-examination of P.W-04. In chief P.W-04 has stated that he along with other prisoners were rescued from the jail after 16 December, 1971. But in his cross-examination he has stated that he was released from the jail on 7/8 December, 1971. In his cross-examination he has also failed to mention the name of jailor, jail Supper or Sub-Divisional officer of Brahmanbaria during the Liberation War. Further P.W.04 in his deposition did not mention that Md. Abdul Malek [P.W-06] was a freedom fighter and they worked together as per the instructions of local commander of freedom fighters; but P.W-06 Abdul Malek deposed to that effect. However, P.W-06 did not say that he found P.W-04 at jail and he [P.W-04] was apprehended by the accused and other Rajakars and tortured at army camp.

150. In view of the above material contradictions and omission in the evidence of P.W-04 and P.W-06, we are not inspired and confident to convict the accused relying on the evidence of solitary witness in absence of other corroborative evidence and as such for want of evidence we are of the view that the prosecution has failed to adduce sufficient evidence to prove charge no.04.

151. For proving charge no.05 P.W-04 in his examination in chief stated that while he was in Brahmanbaria jail Siraj Miah and Malek Miah were also taken to the said jail and from them he came to know that under the leadership of accused Mobarak they were apprehended and 2[two] weeks before the liberation of the country the army men took Siraj from jail and killed him at Kurulia Khal. But on scrutiny of the evidence of P.W-06 Abdul Malek it appears that he did not say anything that he had informed P.W-04 that under the leadership of accused

Mobarak Hossain he and Siraj were apprehended and tortured at army camp or even he saw P.W-04 in the Brahmanbaria jail at the relevant time. Further from the evidence of P.W-06 it is also evident that he did not specifically mention who took Siraj and others from the jail in order to kill them.

152. For lack of evidence it is very difficult to hold that accused Mobarak Hossain took Siraj and 20/25 other persons from the jail and thereafter killed them at Kurulia Khal.

153. Having discussed and considered as above we are of the view that the prosecution has failed to prove charge nos.04 and 05 beyond reasonable doubt against the accused Mobarak Hossain that he by his act or conduct abetted or facilitated to the commission of the offence of abduction, confinement, torture and killing as crimes against Humanity as specified in section 3(2)(a) of Act of 1973 and as such he be acquitted from the said charges.

XXIV. Conclusion

154. It is a fact of common knowledge as well that the Pakistani occupation army organized Razakar, Al-Badr for the purpose of their support in implementing its atrocious activities in furtherance of organized plan and policies.

155. Together with the Al-Badr and Al-Shams paramilitary forces, the Razakar were under Pakistani Army command. The Razakar force was composed of mostly pro-Pakistani Bengalees. Razakars were actively associated with many of the atrocities committed by the Pakistan Army during the 9 month War of Liberation in 1971. On September 7, 1971, Pakistan Defence Ministry through an official order [No.4/8/52/543

P.S=1/Ko/3659 D-2Ka] elevated the Razakar Bahini to the status of auxiliary force of the Pakistan Armed Force, it is true, but even before such elevation, the alleged East Pakistan Razakars Ordinance, 1971 was promulgated by the Government of East Pakistan on 2 August 1971 and prior promulgation of the said Ordinance the accused as a member of volunteer Razakar force acted and conducted actively along with and in association with the Pakistani army in committing atrocities. This is enough for an unerring inference that the accused had acted as a member of a militia force under control of Pakistani army for their operational and other purposes and therefore, we are of view that at the time of committing crimes for which he has been charged with, the accused was a member of 'auxiliary force' as defined in section 2(a) of the Act of 1973.

156. Regarding numerous atrocious acts occurred by Razakars in the territory of Bangladesh after 26 March, 1971 a news report was published on 20th June, 1971 in the world famous news paper "**The Sunday Times**" under the caption-

POGROM IN PAKISTAN

Teachers, Writers, Journalists eliminated

Magistrates shot, Doctors disappear

Gestapo-like raids, rape, extortion.

In the said report it was narrated to the effect:

"A new element in the regime of terror is the Gestapostyle pick-up. Some of those wanted for questioning are arrested openly. Others are called to the army cantonment for interrogation. Most of them do

not return. Those who do are often picked up again by secret agent known as RAZAKARS, a term used by the volunteers of the Nizam of Hyderabad who resisted the Indian takeover of the State in 1948.....

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Some University teachers reported for duty on 1st June at the instigation of General Tikka Khan, the Martial Law Administrator, but some of them have since fallen into the hands of the RAZAKARS.

The activities of RAZAKARS are known, if not overtly approved, by the military administration. Occasionally, they are a source of concern.

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Organisations caring for the refugees who came into East Pakistan at the time of Partition and the Razakar backed 'Peace Committee' are publishing press notices inviting applications for "allotment" of shops and houses left by Bengalis."

157. Thus, the above report proves that before formal promulgation of Razakar Ordinance in August, 1971 the Razakar bahini was formed and the members of said bahini conducted atrocious acts all over the country to implement the common plan and policies of Pakistani occupation army, as its auxiliary force.

[Source: Bangladesh Sawdhinata Juddha Dalilpattra: Volume 8, Page 527].

158. Now it is indeed a history that the Pakistani army with the aid of its auxiliary forces, pro-Pakistan political organizations implemented the commission of atrocities in 1971 in the territory of Bangladesh in furtherance of following policies:

- i.** policy was to target the self-determined Bangalee civilian population;
- ii.** high level political or military authorities, resources military or other were involved to implement the policy;
- iii.** auxiliary forces were established in aiding the implementation of the policy; and
- iv.** the regular and continuous horrific pattern of atrocities perpetrated against the targeted non combatant civilian population.

159. The above facts in relation to policies are not only widely known but also beyond reasonable dispute. The context itself reflected from above policies is sufficient to prove that the offences of crimes against Humanity as specified in section 3(2)(a) of the Act of 1973 were the inevitable effect of part of systematic attack directed against civilian population.

160. It is quite coherent from the facts of common knowledge involving the backdrop of our War of Liberation for the cause of self determination that the Pakistani armed force, in execution of its plan and policy in collaboration with the local anti liberation section belonging to Jamaat-e-Islami[JEI] and its student wing Islami Chhatra Sangha [ICS] and auxiliary forces, had to deploy public and private resources and target of such policy and plan was the unarmed civilian

Bangalee population, pro-liberation people, Hindu community and pursuant to such plan and policy atrocities were committed to them as a 'part of a regular pattern basis' through out the long nine months of War of Liberation. It may be legitimately inferred from the phrase "directed against any civilian population" as contained in the Act of 1973 that the acts of the accused comprise part of a pattern of 'systematic' crimes directed against civilian population.

161. Therefore, the crimes for which the accused has been charged and found guilty were not isolated crimes, rather these were part of organized and planned attack intended to commit the offence of crimes against Humanity as enumerated in section 3(2)(a) of the Act of 1973 in furtherance of policy and plan with the aim of frustrating the result of general election of 1970 and to deprive the fruits of election result.

162. From the backdrop and context it is thus quite evident that the existence of factors, as discussed above, lends assurance that the atrocious criminal acts 'directed against civilian population' formed part of 'systematic attack'. Section 3(2) (a) of the Act of 1973 enumerates the offences of crimes against Humanity. If any of such offences is committed 'against any civilian population' shall fall within purview of crimes against Humanity.

163. Despite lapse of long 40 years time the testimonies of PWs most of whom are live witnesses to the incidents of atrocities narrated in the charges do not appear to have been suffered from any material infirmity. Besides, no significant inconsistencies appear between their examination in chief made before the Tribunal and cross-examination.

164. It has been proved from the testimonies of witnesses that the accused had directly participated and facilitated in the commission of crimes as listed in charge nos.1 and 3 as a member of Razakar Bahini [force]. Moreover, we have found that for the reason of his atrocious acts in the locality the accused was widely known as a 'Razakar'. According to section 3(1) of the Act of 1973 it is manifested that even any person **(individual or a member of group of individuals)** is liable to be prosecuted if he is found to have committed any of the offences specified in section 3(2) of the Act of 1973. Thus, accused Mobarak Hossain even in the capacity of an 'individual' or a member of 'group of individuals' comes within the jurisdiction of the Tribunal as per provision of section 3(1) of the Act of 1973.

165. We are convinced from the evidence both oral and documentary led by the prosecution that accused Mobarak Hossain was a potential member of Razakar Bahini [force] of the then Brahmanbari Sub-Division. He, at that time, was widely and generally known as 'Razakar'. The purpose of Razakar Bahini was to assist the Pakistani occupation army to implement their design and plan in the commission of their atrocious acts against the Bengalee civilian population including the Hindu, religious group, intellectuals and pro-liberation civilians. As such we may legitimately infer that the accused Mobarak Hossain as a Razakar committed the said offences as listed in charge nos.1 and 3.

166. Section 4(1) of the Act of 1973 refers to Joint Criminal Enterprise [JCE] that when any crime as specified in section 3(2) is committed by several persons, each of such person is liable for that crime in the same manner as if it were done by him alone. In the case in hand, in dealing

with the charges we have found that the accused Mobarak Hossain himself participated and contributed along with his accomplice Rajakars and Pakistani army, in the commission of crimes against Humanity and as such he is held criminally liable under section 4(1) of the Act of 1973.

XXV. Verdict on conviction

167. For the reasons set out in the judgment and having considered all evidence and arguments advanced by both the parties, this Tribunal unanimously finds accused Md. Mobarak Hossain alias Mobarak Ali guilty and not guilty in the following charges framed against him.

Charge No.01:

168. The accused is found **GUILTY** of the offences of murder, torture and abduction as crimes against Humanity and also for conspiracy to commit such offences as specified in section 3(2)(a)(g)(h) read with section 4(1) of the Act of 1973 and he be convicted and sentenced under section 20(2) of the said Act.

Charge No.02:

169. The accused is found **NOT GUILTY** of the offences of murder, abduction, confinement, torture and other inhumane acts as crimes against Humanity as specified in section 3(2)(a) of the Act of 1973 and thus he be acquitted of the said charge.

Charge No.03:

170. The accused is found **GUILTY** of the offences of murder, abduction, confinement, torture and other inhumane acts as crimes against Humanity as specified in section 3(2)(a)(g)(h) read with section

4(1) of the Act of 1973 and he be convicted and sentenced under section 20(2) of the said Act.

Charge No.04:

171. The accused is found **NOT GUILTY** of the offences of abduction, confinement and torture as crimes against Humanity as specified in section 3(2)(a) of the Act of 1973 and thus he be acquitted of the said charge.

Charge No.05:

172. The accused is found **NOT GUILTY** of the offences of murder, abduction, confinement, torture and other inhumane acts as crimes against Humanity as specified in section 3(2)(a) of the Act of 1973 and thus, he be acquitted of the said charge.

XXVI. Verdict on sentence

173. From the foregoing discussions we have found accused guilty of the offences of murder, abduction, confinement, torture, conspiracy and other inhumane acts as mentioned in charge nos.01 and 03 which fall within the purview of crimes against Humanity as specified in section 3(2)(a)(g)(h) of the International Crimes (Tribunals) Act, 1973. Now a pertinent question is before us as to decide what punishment can be awarded to the accused which shall squarely meet the ends of justice.

174. We have weighed up the gravity of offences proportionately which had been committed by the accused during the War of Liberation of Bangladesh in 1971. We are of agreed view that the above mentioned two charges [charge nos.01 and 03] brought against the accused have been proved beyond reasonable doubt. It is well proved that accused

Md. Mobarak Hossain alias Mobarak Ali had complicity and substantially contributed and facilitated in mass killing as listed in charge no.01. It is also proved that the mass killing was followed by abduction, torture and conspiracy. We have taken due notice of the intrinsic gravity of the said offences of crimes against Humanity which are particularly shocking to the conscience of mankind.

175. In consideration of the gravity and magnitude of the offences particularly in charge no.01, we unanimously hold that the accused deserves the highest punishment as provided under section 20(2) of the International Crimes (Tribunals) Act, 1973.

176. However, we are of the further view that considering the proportionate to the gravity of the offences, the accused Md. Mobarak Hossain alias Mobarak Ali deserves imprisonment for life for committing the offences as listed in charge no.03. Accordingly, we do hereby render the following **ORDER** on **SENTENCE**.

Hence, it is

ORDERED

That accused Md. Mobarak Hossain alias Mobarak Ali son of late Shahadat Ali alias Sadat Ali and late Nojibunesa of village-Nayadil, Police Station-Akhaura, District-Brahmanbaria is held guilty of the offences of 'crimes against Humanity', 'conspiracy' and 'complicity' enumerated in section 3(2)(a)(g)(h) of the International Crimes (Tribunals) Act, 1973 as listed in charge no.01 and he be convicted accordingly and 'sentenced to death' thereunder for the said charge

[charge no.01] and be hanged by the neck till he is dead under section 20(2) of the said Act, 1973.

The accused Md. Mobarak Hossain alias Mobarak Ali is also held guilty of the offences of 'crimes against Humanity', 'conspiracy' and 'complicity' enumerated in section 3(2)(a)(g)(h) of the International Crimes (Tribunals) Act, 1973 as listed in charge no.03 and be convicted accordingly and sentenced to 'imprisonment for life' thereunder for the said charge [charge no.03] under section 20(2) of the said Act of 1973.

The accused Md. Mobarak Hossain alias Mobarak Ali is held not guilty of the offences of 'crimes against Humanity' enumerated in section 3(2)(a) of the International Crimes (Tribunals) Act, 1973 as listed in charge nos.02, 04 and 05 and he be acquitted of the said three charges.

However, as and when the 'sentence of death' will be executed the other sentence of 'imprisonment for life' would naturally get merged into the sentence of death executed.

The sentences of death and imprisonment for life awarded as mentioned above under section 20(2) of the International Crimes (Tribunals) Act, 1973 shall be carried out and executed in accordance with the order of the Government as required under section 20(3) of the said Act of 1973.

The convict is at liberty to prefer appeal to the Appellate Division of the Supreme Court of Bangladesh against the conviction and sentence within 30(thirty) days of the date of order of conviction and sentence as per provisions of section 21 of the said Act of 1973.

The convict be sent to the prison with a conviction warrant accordingly.

Let a certified copy of the judgment be provided to the prosecution and the convict free of cost, at once.

Let a copy of the judgment be also sent to the District Magistrate, Dhaka for information and necessary action.

(M. Enayetur Rahim, Chairman)

(Jahangir Hossain, Member)

(Anwarul Haque, Member)