

## **International Crimes Tribunal-1 [ICT-1]**

[Tribunal constituted under section 6 (1) of the Act No. XIX of 1973]

**Old High Court Building, Dhaka, Bangladesh**

### **ICT-BD [ICT-1] Case No. 10 of 2016**

[Charges: Participating, committing, aiding and contributing the commission of offences constituting crimes against humanity as specified in section 3(2)(a)(g)(h) of the Act No. XIX of 1973]

#### **Present:**

**Justice Md. Shahinur Islam, Chairman**

**Justice Amir Hossain, Member**

**Justice Md. Abu Ahmed Jamadar, Member**

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The Chief Prosecutor

Vs

(1) Md. Esahaque Shikder,(2) A. Gani alias A. Gani Howlader,(3) Md. Awal alias Awal Moulavi,(4) Md. A. Sattar Pada and (5) Solaiman Mridha alias Soleman Mridha

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#### **For the Prosecution:**

Mr. Golam Arief Tipoo, Chief Prosecutor

Mr. Zead Al Malum, Prosecutor

Mr. Abul Kalam, Prosecutor

Ms. Rezia Sultana Begum, Prosecutor

Ms. Sabina Yesmin Khan, Prosecutor

Mr. Tapas Kanti Baul, Prosecutor

#### **For the Defence:**

**Md. Abdus Salam Khan, Advocate, Bangladesh Supreme Court**

**For two Accused** (1) Md. Esahaque Shikder and (2) Md. A. Sattar Pada.

**Md. Abdus Sattar Palwan, Advocate, Bangladesh Supreme Court**

**For three Accused** (3) A. Gani alias A. Gani Howlader (4) Md. Awal alias Awal Moulavi and (5) Solaiman Mridha alias Soleman Mridha.

**Date of delivery of Judgment: 13 August, 2018**  
**JUDGMENT**  
**[Under section 20(1) of the Act XIX of 1973]**

## **I. Introductory Words**

1. In the case in hand, five accused persons - (1) Md. Esahaque Shikder (2) A. Gani alias A. Gani Howlader (3) Md. Awal alias Awal Moulavi (4) Md. A. Sattar Pada, and (5) Solaiman Mridha alias Soleman Mridha have been prosecuted and tried jointly for the offences enumerated in section 3(2) of the International Crimes (Tribunals) Act, 1973[hereinafter referred as the Act of 1973].

2. The case involves the offences of crimes against humanity allegedly committed around the locality of village-Itbaria under police station – Patuakhali Sadar of Distract [now]-Patuakhali. All the five accused persons have been in prison and today they have been produced before this Tribunal [ICT-1] on call.

3. Five accused (1) Md. Esahaque Shikder (2) A. Gani alias A. Gani Howlader (3) Md. Awal alias Awal Moulavi (4) Md. A. Sattar Pada, and (5) Solaiman Mridha alias Soleman Mridha have been indicted on two counts for the atrocious criminal activities constituting the offences of **‘abduction’**, **‘confinement’**, **‘torture’** **‘murder’**, **‘rape’**, as crimes against

humanity allegedly committed in the locality of village-Itbaria under Police Station-Patuakhali Sadar of District[now]-Patuakhali, in 1971, during the war of liberation of Bangladesh, as arraigned in charge nos. 01 and 02. Trial took place in presence of all the five accused persons.

4. Prosecution alleges that in 1971 the accused persons got themselves enrolled in locally formed Razakar Bahini, an 'auxiliary force', as its members, intending to collaborate with the Pakistani occupation armed force in carrying out its criminal activities aiming to annihilate the pro-liberation Bengali civilians which were calculated to further policy and plan of resisting the Bengali nation in achieving its self-determination and independence.

5. Pursuant to issuance of production warrant the prison authority has produced all the five accused -- (1) Md. Esahaque Shikder (2) A. Gani alias A. Gani Howlader (3) Md. Awal alias Awal Moulavi (4) Md. A. Sattar Pada, and (5) Solaiman Mridha alias Soleman Mridha today before this Tribunal [ICT-1].

6. Now, this **UNANIMOUS** Judgment is being rendered by this Tribunal [ICT-1] for the prosecution of persons belonging to an auxiliary force who have been found responsible for the serious

offences as enumerated in the International Crimes (Tribunals) Act, 1973 committed in violation of international humanitarian law in the territory of Bangladesh in 1971, during the war of liberation.

7. Having jurisdiction under section 10(1) (j), section 20(1) and section 20(2) of the International Crimes (Tribunals) Act, 1973[Act No. XIX of 1973] this ‘Tribunal’ known as International Crimes Tribunal-1 [ICT-1] hereby renders and pronounces the following unanimous judgment.

## **II. Formation and Jurisdiction of the Tribunal**

8. The Act No. XIX enacted in 1973 is destined to prosecute crimes against humanity, genocide and system crimes as enumerated in the Act committed in violation of customary international law is ex-post facto legislation. It is fairly permitted. The 1973 Act of Bangladesh has the merit and means of ensuring the standard of safeguards recognized universally to be provided to the person accused of offences punishable under the Act of 1973. And it is being maintained duly.

9. We reiterate that the Act of 1973 has been enacted to prosecute, try and punish not only the 'armed forces' but also the perpetrators who belonged to ‘auxiliary forces’, or who

committed the offence in the capacity of an ‘individual’ or a ‘group of individuals’ or ‘organisation’. It is manifested from section 3(1) of the Act of 1973 that even any person (individual), if he is *prima facie* found accountable either under section 4(1) or 4(2) of the Act of 1973 for the perpetration of offence(s), can be prosecuted and tried under the Act.

10. This Tribunal set up under the Act of 1973 is absolutely a domestic Tribunal but meant to try ‘internationally recognized crimes’ or ‘system crimes’ committed in violation of customary international law during the war of liberation in 1971 in the territory of Bangladesh. Merely for the reason that the Tribunal is preceded by the word “international” and possessed jurisdiction over crimes such as Crimes against Humanity, Crimes against Peace, Genocide, and War Crimes, it will be mistaken to assume that the Tribunal must be treated as an “International Tribunal”.

### **III. Historical backdrop and Context**

11. A case under the Act of 1973 does not involve any ‘isolated offence’. The person accused of offence enumerated in the Act of 1973. In all the cases already disposed of by rendering judgment considered it relevant and necessary to portray the historical backdrop and context which were inevitably chained to

the commission of mass atrocities directing Bengali civilian population in 1971, during the war of liberation.

12. In the case in hand, the offences for which the accused persons have been indicted were not isolated crimes. Those are recognized as international crimes as happened in war time situation. The events narrated in the charges framed just form part of appalling mass atrocities committed directing pro-liberation civilians constituted the offences of crimes against humanity in 1971 in the territory of Bangladesh during the nine-month bloody war of liberation.

13. We consider it expedient to note emphatically that the verdict of the Tribunal, a court of law in a case under the Act of 1973 is not only meant to render its decision on the arraignment brought. It also reflects the truth and the context behind the commission of horrendous atrocities carried out in 1971 directing the Bengali civilian population. The truth unveiled in each verdict of the Tribunal shall create youth quake to go forward with the spirit of the war of liberation and also makes space to them and the global community as well of knowing what extent of diabolical mass atrocities were conducted against the Bengali civilians in 1971, we believe firmly.

14. In Bangladesh, the efforts initiated under a legislation enacted by our sovereign parliament to prosecute, try and punish the perpetrators of crimes committed in violation of customary international law is an indicia of valid and courageous endeavor to come out from the culture of impunity.

15. Now, in portraying the historical background, in succinct, that ensued the war of liberation of the Bengali nation in 1971 we reiterate that 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. The western zone was named West Pakistan and the eastern zone was named East Pakistan, which is now Bangladesh.

16. In 1952 the Pakistani 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 and eventually turned to the movement for greater autonomy and self-determination and finally independence.

17. The history goes on to portray that in the general election of 1970, the Awami League under the leadership of Bangabandhu Sheikh Mujibur Rahman, the father of the nation became the majority party of Pakistan. But deliberately defying the democratic norms Pakistan Government did not care to respect this overwhelming majority. As a result, movement started in the territory of this part of Pakistan and Bangabandhu Sheikh Mujibur Rahman, the Father of the Nation in his historic speech of 7th March, 1971, called on the Bangalee nation to struggle for independence.

18. It is to be noted with immense pride that the historic March 7 speech of Bangabandhu Sheikh Mujibur Rahman, the father of the nation has been recently recognized by the UNESCO as a ‘world documentary heritage’. The 07 March glowing speech of Bangabandhu calling on the freedom-loving Bangalees crucially activated and inspired the whole nation, excepting a few pro-Pakistan people to get prepared for the war of liberation.

19. In the early hour of 26th March, 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 authorities.

20. In the War of Liberation that ensued in 1971, all people of the then East Pakistan unreservedly supported and participated in the call to make their motherland Bangladesh free but a small number of Bangalees, Biharis, other pro-Pakistanis, as well as members of a number of different religion-based political parties, particularly Jamaat E Islami (JEI) and its student wing Islami Chatra Sangha (ICS), Muslim League, Convention Muslim League joined and/or culpably collaborated with the Pakistani occupation army to aggressively resist the conception of independent Bangladesh and most of them committed and facilitated as well the commission of atrocious activities directing the pro-liberation civilian population.

21. Commission of systematic and widespread appalling atrocities directing civilian population in the territory of Bangladesh, in 1971 was intended to further the policy and plan of annihilating the dream of self determination of Bengali nation. This is now a settled history of which this Tribunal takes judicial notice as permitted by the Act of 1973 and the ROP.

22. The Pakistani occupation army's widespread appalling brutality directing civilian population of Bangladesh was to execute the deliberate plan calculated to wipe out the pro-

liberation Bengali civilians. The Appellate Division, in the case of **Abdul Quader Molla** has observed that –

“The way the Pakistani Army had acted, surpasses anything that could pass for legitimate use of force. It had resorted to wanton murder of civilians, including women and children in a deliberate plan to achieve submission by stark terror. [**Appellate Division, Abdul Quader Molla Judgment, 17 September 2013 page 39**]

23. The above observation of our Apex Court is found mirrored in the events of systematic attack as narrated in the two charges framed, in the case in hand. The history testifies that Pakistani army started its monstrous ‘mayhem’ since 25 March 1971 intending to liquidate the pro-liberation Bengali civilians, to resist their aspiration of self determination.

24. But eventually, grave and recurrent horrific atrocities committed directing the Bengali civilians in the territory of Bangladesh starting since 25 March 1971 did not thrive to foil the highest sacrifice to which the nation always pays tribute and homage to the blood of millions of patriotic martyrs and innocent defenceless people.

25. It is now an undeniable history that the local collaborators belonging to para militia forces actively and consciously assisted the Pakistani occupation army in accomplishing their policy and plan of annihilating the pro-liberation Bangalee civilians. The local collaborators truly had acted as traitors. It is now a settled history which needs no further document to prove.

26. In 1971, the Pakistani occupation army had no companion in Bangladesh—except a few traitors who took stance against the war of liberation and they belonged to the ideology of pro-Pakistan political parties, e.g Muslim League, the Convention Muslim League, the Jamaat-E-Islami [JEI] and the Nizam-i-Islami. It has already been observed in the case of Muhammad Kamaruzzaman, Ali Ahsan Muhammad Mujahid that JEI culpably and actively assisted and facilitated the Pakistani occupation army by forming Razakar, Al-Badar-- Para militia forces, intending to collaborate with them.

27. Prosecution avers that the accused persons being the active members of Razakar Bahini, a para militia force did not keep them distanced from the strategy of JEI to further the policy and plan of the Pakistani occupation army by carrying out barbaric atrocities against the non combatant pro-liberation civilians that resulted in commission of offences enumerated in the Act of

1973, in grave breach of Geneva Convention. It is an indisputable reflection of the settled history.

28. The dreadful ‘aggression’ that resulted in untold violation of civilians’ rights and their indiscriminate killings in the territory of Bangladesh started with launching the ‘operation searchlight’ was in grave breaches of Geneva Convention 1949. After the ‘operation search light’ on the night of 26<sup>th</sup> March 1971 ten millions of Bengali civilians were forced to deport under the horrors of dreadful violence and brutality spread over the territory of Bangladesh.

29. The untold atrocious resistance on part of thousands of local collaborators belonging to Razakar Bahini, Al-Badar Bahini could not impede the nation’s valiant journey to freedom. Undeniably, the ways to self-determination for the Bangalee nation was strenuous, swabbed with enormous blood, struggle and immense sacrifices.

30. Undeniably, the ways to self-determination for the Bangalee nation was swabbed with enormous blood, struggle and immense sacrifices. In the present-day world history, conceivably no nation paid as extremely as the Bangalee nation did for its self-determination and for achieving independent motherland.

31. The nation shall remain ever indebted to those best sons and daughters of the soil who paid supreme sacrifices for an independent motherland – **Bangladesh**. The nation always pays tribute and homage to the blood of millions of patriotic martyrs and innocent defenceless people.

#### **IV. Brief Account of the Accused Persons**

32. Before we move to adjudicate the alleged arraignments brought and accountability of the accused persons therewith we consider it necessary to have a glance on the brief account of the accused persons which is as below:

*(i) Md. Esahaque Shikder*

Accused Md. Esahaque Shikder [83], son of late Osman Shikder alias Afsher Shikder and late Abetun Nesa of Village Gilabonia, Police Station Patuakhali Sadar, District Patuakhali, at present near western Zia Road, Police Station Patuakhali Sadar, District-Patuakhali was born on 10.05.1932 [according to his NID]. He was a supporter of Convention Muslim League since prior to 1971. During the war of liberation in 1971 he committed atrocious activities constituting the offences as crimes against humanity at village-Itbaria under Patuakhali Sadar Police Station, in exercise of his membership in Razakar Bahini, prosecution alleges.

***(ii) A. Gani alias A. Gani Howlader***

Accused A. Gani alias A. Gani Howlader [72], son of late Kasem Howlader and late Syatun Nesa of Village Galachipa, Police Station-Patuakhali Sadar, District-Patuakhali was born on 26.02.1943 [according to his NID]. Since prior to 1971 he was a supporter of Convention Muslim League. In 1971, during the war of liberation he joined the locally formed Razakar Bahini and got engaged in committing criminal activities constituting the offences as crimes against humanity at village-Itbaria under Patuakhali Sadar Police Station, prosecution alleges.

***(iii) Md. Awal alias Awal Moulavi***

Accused Md. Awal alias Awal Moulavi [69], son of late Nur Ahmmad and late Azimon Nesa Begum of Village Galachipa, Police Station-Patuakhali Sadar, District-Patuakhali was born on 03.04.1947 [as per his NID]. Since prior to 1971 he was a follower of Convention Muslim League. During the war of liberation in 1971, he joined the locally formed Razakar Bahini and got engaged in accomplishing criminal activities constituting the offences as crimes against humanity at village-Itbaria under Patuakhali Sadar Police Station, prosecution alleges.

***(iv) Accused Md. A Sattar Pada***

Accused Md. A Sattar Pada [65], son of late Fazle Karim Pada alias Fazlu Pada and late Jamina Khatun alias Ful Bhanu Khatun of Village Sharikkhali, Police Station-Patuakhali Sadar, District

Patuakhali, at present near western side of Shishu Park, Police Station Patuakhali Sadar, District Patuakhali was born on 03.05.1951 [according to his NID]. Since prior to 1971 he was affiliated with the politics of Convention Muslim League. In 1971, during the war of liberation he joined the locally formed Razakar Bahini and got involved in committing criminal activities constituting the offences as crimes against humanity at village- Itbaria under Patuakhali Sadar Police Station, prosecution alleges.

*(v) Solaiman Mridha alias Soleman Mridha*

Accused Solaiman Mridha alias Soleman Mridha [86], son of late Hachon Ali Mridha and late Hakim Janbibi of Village Ballav, Police Station-Patuakhali Sadar, District Patuakhali was born on 08.07.1929 [as per his NID]. He was a follower of Convention Muslim League. During the war of liberation in 1971, he joined the locally formed Razakar Bahini and committed criminal, activities constituting the offences as crimes against humanity at village-Itbaria under Patuakhali Sadar Police Station, prosecution alleges.

## **V. Brief Procedural History**

33. The record goes to depict that on holding investigation in relation to compliant register serial no.46 dated 24.11.2014 involving some atrocious events allegedly committed in 1971

during the war of liberation in systematic manner directing unarmed civilians in different localities of Patuakhali Sadar Police Station by the local Razakars accompanied by the Pakistani occupation army, the Investigating Agency submitted its 'report' finding all the accused persons prima facie accountable for the prohibited criminal activities constituting the offences as crimes against humanity as enumerated in the Act of 1973 before the Chief Prosecutor.

34. Considering the investigation report and materials and documents submitted therewith recommending prosecution the Chief Prosecutor submitted 'formal charge' against 05 [five] accused persons.

35. The Chief Prosecutor considering the nature, pattern and extent of the alleged atrocious events and culpable participation and complicity of all the five accused persons opted to submit a single 'formal charge' recommending their joint prosecution.

36. It appears that the 'formal charge' submitted discloses that the accused persons allegedly participated or facilitated or abetted or aided or had complicity in the commission of the alleged offences and they appear to have allegedly acted in furtherance of common plan and design, sharing common intent in

accomplishing such offences, and therefore, all the 05[five] accused persons have been proposed to be prosecuted jointly which is permissible under Rule 36 of the Rules of Procedure, 2010 of this Tribunal-1

37. On 17.11.2016 this Tribunal[ICT-1] on initial examination of the formal charge and other documents submitted took cognizance of offences as enumerated in the Act of 1973 and then fixed a date for hearing charge framing matter with direction to provide copy of the formal charge and other documents to the defence as required by law and the ROP.

38. On 09.01.2017 this Tribunal -1 heard both sides on charge framing matter and fixed 08.03.2017 for rendering its decision.

39. The Tribunal by its order no. 04 dated 08.03.2017 framed charges on two [02] counts against all the five accused persons. The charges so framed was read over and explained to the accused persons present on dock when they pleaded not guilty and claimed to be tried according to law. With this trial was commenced.

40. In course of trial, prosecution in order to prove the accusation brought adduced and examined in all 11 witnesses including the Investigation officer [IO]. Defence duly cross examined the prosecution witnesses.

41. On closure of prosecution witnesses defence declined to adduce and examine any witness and thus date was fixed for summing up of the case to be placed by both sides.

42. Accordingly, the Tribunal heard the summing up placed by both sides which ended on 30.05.2018 and then case was kept in CAV i.e for delivery and pronouncement of judgment and directed the prison authority to produce the accused persons on call.

## **VI. Summing up**

### **Summing up by the prosecution**

43. Mr. Zead Al Malum the learned prosecutor in placing summing up submitted that all the accused persons in exercise of their membership in locally formed Razakar Bahini consciously engaged in collaborating with the Pakistani occupation army in carrying out atrocious activities around the locality under police station Patuakhali. The atrocities were committed in context of the war of liberation and were systematic in nature. The offences of which the accused persons have been tried were ‘system crimes’ or ‘group crimes’.

44. The learned prosecutor continued placing submission that the documents exhibited proved their membership in Razakar Bahini. Besides, the witnesses examined also consistently

testified it. It was quite practicable for the witnesses of knowing the identity of the accused persons for the reason of their notoriety which became anecdote, in exercise of their affiliation with the auxiliary force, the learned prosecutor added.

45. Ms. Rezia Sultana Begum, the learned prosecutor then placed argument in relation to charges and factual aspects, drawing attention to the sworn testimony of witnesses examined and other materials submitted. She submits that prosecution has been able to prove beyond reasonable doubt participation and complicity of all the five accused with the commission of the offences for which they have been indicted. It appears that prosecution relied upon 11 witnesses examined to substantiate the two charges framed. It would be expedient to address her submission relating to arraignment brought at the time of adjudicating the charges.

#### **Summing up by the Defence**

46. Mr. Abdus Salam Khan the learned counsel defending the accused Esahaque Sikder and Sattar Pada submitted that these accused did not belong to Razakar Bahini; that their name do not find place in the alleged list of Razakars which has been exhibited as Exhibit-3. Questioning credibility of testimony tendered by the prosecution witnesses the learned defence counsel submitted that involvement and complicity of these accused could not be proved. Argument as advanced by him in

relation to charge nos. 01 and 02 may be well focused at the time of adjudicating the charges.

47. Mr. Abdus Sattar Palwan the learned counsel defending the three accused A. Gani alias A. Gani Howlader, Md. Awal alias Awal Moulavi and Solaiman Mridha alias Soleman Mridha submitted that during the visit of the Sectors Commanders Forum in the crime locality seven others and not any of these accused were declared responsible for the crimes committed in 1971. Naturally, it creates doubt as to affiliation of these accused with an auxiliary force and their alleged complicity with the alleged offences as well. Alleged documents relied upon by the prosecution are not credible at all if Sectors Commanders Forum's decision is taken into account, the learned defence counsel added.

48. In placing argument on factual aspects related to the charges the learned defence counsel Mr. Abdus Sattar Palwan chiefly questioning credibility of testimony of witnesses emphatically argued that involvement of any of these accused could not be proved at all. However, the argument placed shall be focused at the time of adjudicating the charges.

**VII. Whether the accused persons belonged to locally formed Razakar Bahini, a para militia force created to collaborate with the Pakistani occupation army in 1971 during the war of liberation**

49. Prosecution avers that the accused persons got engaged in committing the crimes narrated in the charges framed in exercise of their membership in locally formed Razakar Bahini, an auxiliary force as defined in section 2(a) of the Act of 1973.

50. On contrary, defence denied it. However, the burden to prove the alleged affiliation of the accused persons with the locally formed Razakar Bahini lies upon the prosecution.

51. The accused persons have been brought to justice long 46 years after the atrocious events happened in 1971, during the war of liberation. With the lapse of long passage of time it is now challenging indeed to collect evidence, especially documentary in nature to substantiate any crucial fact related to the mass atrocities committed in 1971 in the territory of Bangladesh.

52. Besides, after the brutal assassination of the Father of the Nation Bangabandhu Sheikh Mujibur Rahman on 15 August 1975 the pro-Pakistani quarter who took culpable stance against the war of liberation started destroying evidence of their complicity with the perpetration of mass atrocities.

53. Keeping the above as an inevitable reality in mind now we are to concentrate on weighing the ocular testimony tendered with respect to the fact as to the accused persons' affiliation with an auxiliary force.

54. In the case in hand, most of witnesses testified how they saw the accused persons acting in launching the attack, being part of the criminal enterprise. At this phase of deliberation we are not going to resolve the issue of commission of the crimes alleged and liability of the accused persons therewith. But we may have fair indication, from the evidence of witnesses, as to identity of the accused persons.

55. In 1971, during the war of liberation it was quite practicable indeed of knowing who got enrolled in locally formed Razakar Bahini. This Bahini was an auxiliary force [armed *para militia* force] created to use it for static purpose of the Pakistani occupation army and to have assistance from it in conducting mayhem and mass atrocities directing the unarmed pro-liberation civilians.

56. In 1971, mostly the people belonging to auxiliary force used to opt accompanying the gang formed of Pakistani occupation army in conducting prohibited acts directing non combatant

civilians, history says it. Thus, in absence of anything contrary it may be safely presumed that the local Bengali people who culpably collaborated with the Pakistani occupation army belonged to an auxiliary force.

57. Now, in the case in hand, the question comes forward how the witnesses knew the identity of the accused persons? Who were the local collaborators of the Pakistani occupation army in 1971? Taking active assistance on part of whom the Pakistani occupation army had carried out the attack targeting civilians of village-Itbaria, in 1971?

58. The Tribunal reiterates that in 1971, when a resident of own or neighbouring locality got enrolled in Razakar Bahini, an infamous armed *para militia* force it could not be kept hidden. Notoriety of this *para militia* force made its members commonly known to the residents of the locality. In the case in hand, the witnesses have consistently testified the above pertinent fact. It remained unshaken in their cross-examination.

59. Testimony of most of witnesses impels that they knew the accused persons beforehand and they saw them being armed accompanying the Pakistani occupation army at the crime site.

This matter as has been divulged could not be refuted by the defence in any manner.

60. It transpires from the testimony of P.W.01 Md. Ayub Ali Matbor that on 04 May 1971 at about 10:00 A.M he heard from villagers that Pakistani occupation army arrived at the place near Itbaria Board School by a gunboat being accompanied by the leaders of Patuakhali peace committee and they were received and welcomed by the accused Md. Esahaque Sikder, Abdul Gani Howlader. Md. Awal Moulavi, Md. Abdus Sattar Payda, Solaiman Mridha and 7/8 other Razakars.

61. The uncontroverted fact of coming of Pakistani occupation army, before launching attack at village-Itbaria being accompanied by the leaders of Patuakhali peace committee and welcoming them by the accused persons and their accomplice Razakars proves it patently that the accused persons did it knowing the intent of the troops, in exercise of their membership in locally formed Razakar Bahini.

62. It appears too that one accused was from the village of P.W.01 and the other accused were the residents of his [P.W.01] neighbouring villages-Galachipa, Ballava and Gilabunia. Defence does not appear to have made effort to refute it in cross-

examination. Thus, it is justifiably believed that P.W.01 was familiar with the accused persons and their standing in 1971.

63. P.W.02 Rezia Begum, P.W.04 Fulburu are direct witnesses and victims of the event narrated in both the charges framed. They consistently testified accused persons' presence at the crime site with the gang of attackers. Since the accused persons were from neighbouring locality these witnesses had reason of knowing them beforehand. Their testimony in this regard gets corroboration from P.W.01.

64. It was thus quite practicable of knowing the identity of accused persons and therefore testimony of P.W.02 Rezia Begum, P.W.04 made in this regard inspires credence. Besides, there has been no reason to discard what the witnesses testified in this regard.

65. It has been argued on part of the defenec that P.W.05, P.W.06 and P.W.07 did not testify anything connecting the accused persons with the alleged event of attack. And testimony of P.W.02 and P.W.04 in this regard was inconsistent and as such presence of accused persons with the gang at the crime site in exercise of their membership in Razakar Bahini could not be proved.

66. It is true that testimony of P.W.02 and P.W.04 does not demonstrate accused persons' presence with the group of attackers. But it is to be noted that the victims came on dock to narrate the traumatic experience more than four decades after the event happened. Naturally, all of them are not expected to recount the entire event with detailed precision. Inconsistencies between their testimonies on any particular fact may naturally occur.

67. The mere existence of inconsistencies between the testimonies of direct witnesses does not necessarily undermine and diminish either witness's credibility. Recounting and revisiting traumatic and painful experiences may likely to affect the witness's ability to recount the entire event. In this regard we recall the observation made by the **ICTR Appeal Chamber** that-

“The presence of inconsistencies within or amongst witnesses' testimonies does not per se require a reasonable Trial Chamber to reject the evidence as being unreasonable.”

**[Muhimana, ICTR Appeals Chamber, May 21, 2007, para. 58]**

68. P.W.08 Abdul Ali Fakir, P.W.09 Md. Shahidullah and P.W.10 Shah Alam Kha are the three other direct witnesses to the event of attack conducted at village-Itbaria. Their testimony

also demonstrates that the accused persons were with the gang of attackers and they were armed.

69. At this stage, we are not going to resolve the liability of the accused persons. But evaluation of evidence tendered in respect of presence of accused persons justifiably impels that they had affiliation with the locally formed Razakar Bahini which imbued them to welcome the gang and accompanying them to the crime site.

70. The accused persons have been indicted for the ‘system crimes’ committed in war time situation and those were perpetrated not by an individual but by a group to which the accused persons were part, prosecution alleges.

71. Now, if an individual, being part of a criminal enterprise, is found to remain present at the crime site with the group of Pakistani occupation army, it may be deduced justifiably, in absence of anything contrary, that of course he accompanied the gang, in exercise of his membership or affiliation with any of *para militia* forces. Settled history prompts to deduce it.

72. Defence argued that prosecution failed to prove accused persons’ membership in locally formed Razakar Bahini by

presenting authoritative and sufficient documents. But the Tribunal notes that it is not imperative to prove accused persons' formal membership in Razakar Bahini by providing more and more documents for determining their nexus with the commission of the offences alleged.

73. Besides, in 1971 status and association of an individual became an anecdote around the crime locality for the reason of his culpable engagement in the commission of horrific atrocious activities, we may unerringly deduce it. Therefore, testimony made by the witnesses the victims and residents of the crime localities in respect of accused persons' engagement in locally formed Razakar Bahini inspires credence.

74. It appears that the name of four accused persons excepting accused Esahaque Sikder finds place in the document titled '**১৯৭১ সালের ইতিহাসে কলকাতা-১৯৭১ সালের ডাটাবেস**' [relevant page 16 of prosecution documents volume]. Additionally, the book titled '**১৯৭১ সালের ইতিহাসে কলকাতা-১৯৭১ সালের ডাটাবেস**' [Exhibit-6 : relevant page 54 of prosecution documents volume] also demonstrates that three accused A. Gani alias A. Gani Howlader, Md. Awal alias Awal Moulavi and Md. A. Sattar Pada were Razakars of Itbaria. The name of accused Soleman Mridha however does not find place in the latter document [Exhibit-6].

75. The editor of this book [Exhibit-6] might not have been able to collect inclusive information in this regard. Thus, mere non-mentioning the name of one accused in Exhibit-6 does not exclude the authenticity of information so far as it relates to three accused in respect of affiliation with the Razakar Bahini. The information as has been depicted in those two documents together with the testimony as discussed above amply proves membership of all the five accused in locally formed Razakar Bahini.

76. But prosecution however could not bring forward any document as to accused Esahaque Sikder's membership in Razakar Bahini, true. The Tribunal also finds that the IO [P.W.11] in his cross-examination in reply to question put to him by the defence stated that it was found in investigation that the Razakar Bahini was formed at Itbaria under joint command of all the five accused persons, although no document could be collected showing accused Esahaque Sikder's affiliation with Razakar Bahini. At the same time we are not convinced with the defence submission that non declaration of some of accused persons as members of auxiliary force by the Sectors Commanders Forum negates the affiliation of those accused with the locally formed Razakar Bahini. Might be at the relevant time it did not have any information before it.

77. Mere inadequacy of documentary evidence as averred by the defence by itself does not turn down the fact of accused persons' affiliation with the locally formed Razakar Bahini.

78. In view of above deliberation based on evidence and settled history it stands proved that accused Md. Esahaque Shikder, A. Gani alias A. Gani Howlader, Md. Awal alias Awal Moulavi, Md. A. Sattar Pada and Solaiman Mridha alias Soleman Mridha were with the group of Pakistani occupation army men when the attack was launched at village-Itbaria.

79. The above fact together with the reasoning as stated above impels the unerring conclusion that the accused persons belonged to locally formed Razakar Bahini, a para militia force.

### **VIII. General Considerations Regarding the Evaluation of Evidence in a case involving the offences of Crimes against Humanity, genocide**

80. Before we move to the task of adjudication of charges, we consider it expedient to focus on the settled factors relating to evaluation of evidence as the case involves the offences of 'crimes against humanity' which are known as internationally recognised crimes and not the isolated crimes.

81. In the case in hand, all the five[05] accused persons have been tried for ‘group crimes’ or ‘system crimes’ committed in violation of international humanitarian law, Genocide Convention 1948 and the laws of war, in the territory of Bangladesh in 1971. They were affiliated in locally formed Razakar Bahini, a para militia force created to collaborate with the Pakistani occupation army in carrying out atrocious activities, to further policy and plan, prosecution alleges.

82. The present case chiefly rested upon oral evidence presented by the prosecution. It appears that mostly the victims and direct witnesses came on witness dock to testify what they experienced and observed which are materially related to the commission of principal crimes.

83. The horrific crimes were perpetrated in context of war of liberation in 1971 and those were not isolated crimes. Section 23 of the Act of 1973 expressly provides that provisions of the Criminal Procedure Code, 1898(V of 1898), and the Evidence Act, 1872(I of 1872), shall not apply in any proceedings under the Act of 1973.

84. Further, Section 19(1) of the Act provides that the Tribunal shall not be bound by technical rule of evidence and it shall

adopt and apply to the greatest possible extent non-technical procedure and may admit any evidence which it deems to have probative value.

85. Thus, the task of determination of accountability of an individual accused of offences enumerated in section 3(2) of the Act of 1973 involves a quite different jurisprudence. Proof of all forms of criminal responsibility, through participation in any manner can be given by direct or hearsay or circumstantial evidence. It is now well settled jurisprudence.

86. The Tribunal notes that the context of committing such system crimes and totality of its horrific contour prevailing in war time situation naturally left little room for the people to witness all the criminal acts forming part of attack. Besides, due to lapse of long passage of time it may not always be reasonable to expect the witness to recall and recount every detail with precision. The evolved jurisprudence does not permit to keep this reality aside while adjudicating the arraignments brought under the Act of 1973.

87. It is to be noted that the testimony of even a single witness on a material fact does not, as a matter of law, requires corroboration. The established jurisprudence makes it clear that

corroboration is not a rule of requirement for a finding to be rendered.

88. However, onus squarely lies upon the prosecution to establish the commission of the events of attack and accused persons' presence, acts and conducts forming part of attack resulted in commission of the offences of 'crimes against humanity' as enumerated in section 3(2) of the Act of 1973 for which the accused has been arraigned.

89. The evolved international criminal jurisprudence suggests keeping it in mind too that an insignificant discrepancy or inconsistency which may naturally occur between witnesses' testimony does not diminish either witness's testimony in its entirety. Core of witness's testimony is to be considered and weighed. It is now internationally settled jurisprudence that-- "the presence of inconsistencies within or amongst witnesses' testimonies does not per se require a reasonable Trial Chamber to reject the evidence as being unreasonable" [**Muhimana, ICTR Appeal Chamber, May 21, 2007, para. 58**].

90. Appraisal of the evidence is to be made based on the totality of the evidence presented in the case before us. The Tribunal, however, is not obliged to address all insignificant

inconsistencies, even if occur in witnesses' testimony. We require separating the grains of acceptable truth from the chaff of exaggerations and improbabilities which cannot be safely or prudently accepted and acted upon, in determining accused's accountability.

91. We reiterate that in dealing with the offence of crimes against humanity which is known as 'group crime' it would be significantly immaterial to argue that an accused was not the actual perpetrator or he himself physically participated to the commission of the criminal acts.

92. We are to see how the accused's act or conduct or prohibited act formed part of systematic attack directed against the civilian population and how it resulted in perpetration of crimes as enumerated in section 3(2) of the Act of 1973. Prosecution even is not required to identify the actual perpetrator. This has been now a settled and recognised legal proposition.

93. Finally, it is now well settled too that even hearsay evidence is not inadmissible *per se*. However, mere admission of hearsay evidence does not render it carrying probative value. Such hearsay evidence is to be weighed and assessed in the context of its credibility, relevance, and circumstances and also together with other evidence tendered.

## **IX. Adjudication of Charges**

### **Adjudication of charge no.01**

#### **[Confinement, torture, arson, looting and murder committed at Village-Itbaria under Patuakhali Sadar Police Station]**

94. Charge: That on 04.05.1971 at about 10.00 A.M. accused (1) Md. Esahaque Shikder along with you Razakar accused (2) A. Gani alias A. Gani Howlader (3) Md. Awal alias Awal Moulavi (4) Md. A. Sattar Pada (5) Solaiman Mridha alias Soleman Mridha and your cohort Razakars welcomed the group of Pakistani occupation army and the president and members of Patuakhali Sadar Thana Peace Committee when they arrived at the bank of river adjacent to Itbaria Board School by boat.

Thereafter, the accused persons, Razakars and the Pakistani occupation army by launching attack at village-Itbaria under Patuakhali Sadar Police Station, District Patuakhali started looted about 12/15 houses, tortured about 20/25 persons, bodily injured about 10/15 persons and killed 17 civilians [as named in the formal charge]

Therefore, the accused (1) Md. Esahaque Shikder (2) A. Gani alias A. Gani Howlader (3) Md. Awal alias Awal Moulavi (4) Md. A. Sattar Pada, and (5) Solaiman Mridha alias Soleman Mridha have been charged for participating, abetting, facilitating, contributing and complicity in the commission of offences of

‘confinement’, ‘torture’, ‘murder’ and ‘other inhumane acts’ [looting and arson] as crimes against humanity as part of systematic attack directed against unarmed civilians as enumerated in section 3(2)(a)(g)(h) of the Act of 1973 which are punishable under section 20(2) of the said Act for which the accused persons have incurred liability under section 4(1) of the said Act.

### **Evidence of Witnesses Examined**

95. This charge involves a systematic attack conducted at village-Itbaria that resulted in indiscriminate killing, wanton destruction and forcible capture of numerous women who were taken away after the criminal mission ended.

96. Prosecution relied upon all the witnesses i.e. P.W.01-P.W.10. Of them 06 witnesses [P.W.02, P.W.03, P.W.04, P.W.05, P.W.06 and P.W.07] are the women who were taken away by the gang after it concluded the attack it launched at the crime village.

97. The above 06 witnesses as it appears are the key witnesses to the event that resulted in their confinement and sexual ravishment committed upon them, in captivity [as narrated in charge no.02]. In addition to describing what fate they had to face and experience in captivity they also testified the facts materially related to the killings carried out and how they were

detained unlawfully, in conjunction with the attack launched at village-Itbaria.

98. The other witnesses i.e P.W.01, P.W.08 and P.W.10 are hearsay witnesses in relation to the arraignment narrated in charge no.02. However, they and the above 06 women testified facts materially related to the crimes as narrated in both the charges framed.

99. Thus, it appears that 10 witnesses including the rape victims testified the attack happened at village-Itbaria. And testimony of 09 witnesses [P.W.01-08 and P.W.10] relates to arraignment brought in both the charges framed.

100. In view of above now for the purpose of adjudication of charge no.01 we consider it expedient to focus their testimony so far as it relates to the criminal acts that resulted in indiscriminate killing, conducting wanton destruction and forcible capture of numerous women including the above 06 witnesses [P.W.02, P.W.03, P.W.04, P.E.05, P.W.06 and P.W.07] forming part of systematic and deliberate attack launched at village-Itbaria.

101. Part of their evidence the above witnesses presented relates to the arraignment as narrated in charge no.02 and thus it will be

focused and duly evaluated when the charge no.02 will be attempted for adjudication. Now let us see what the witnesses narrated in relation to the arraignment brought in charge no.01.

102. P.W.0-1 Md. Ayub Ali Matbor [64] is a resident of village Sharikkhali under Police station-Patuakhali of District-Patuakhali is a freedom-fighter. He testified facts related to the event of attack as narrated in charge no.01 and also in respect of arraignment brought in charge no.02 and facts relevant to formation of Razakar Bahini and affiliation of the accused person therewith.

103. P.W.01, in respect of forming peace committee and Razakar Bahini stated that on 27 April 1971 the Pakistani occupation army entered Patuakhali and got stationed in Patuakhali Circuit House and formed local peace committee with the assistance of Muslim League leader Shamsuddin Talukder @ Sanu Mia and Yasin Sikder was made its chairman. P.W.01 next stated that during the first week of May in 1971 Razakar Bahini was formed in Patuakhali and Afaj Uddin [now dead] and Yunus Mia [now dead] were made its commander and a Razakar camp was set up at Patuakhali police line.

104. P.W.01 further stated that possibly on 04 May 1971 at about 10:00 A.M he heard from villagers that Pakistani occupation army arrived at the place near Itbaria Board School by a gunboat being accompanied by the leaders of Patuakhali peace committee and they were received and welcomed by the accused Md. Eshaque Sikder, Abdul Gani Howlader. Md. Awal Moulavi, Md. Abdus Sattar Pada, Solaiman Mridha and 7/8 other Razakars. Hearing this he [P.W.01] and freedom-fighter Sanu Mia went to hide inside a jungle taking rifle with them wherefrom they could hear gun firing, scream of people and flames of fire from different places of village Itbaria.

105. P.W.01 stated that at about 05 P.M they could see, remaining in hiding, that Pakistani occupation army and the accused persons he named and Razakars taking away 10/12 women, 4/5 children and a male with them.

106. P.W.01 also stated that after the Pakistani occupation army and Razakars had left the site they came out of the jungle and moved to village Itbaria where they found 14/15 houses ablaze and 13/14 dead bodies including that of Javed Ali Akanda, Belayet Kha, Kadam Ali Sikder, Anis Sikder, Menaj Sikder, Soleman Sikder, Seraj Uddin @ Ledai member, Waj Uddin

Matbor lying scattered at different houses. The bodies were buried and then he returned back his home in early morning.

107. In respect of reason of knowing the accused persons P.W.01 stated that accused Sattar Pada was one of his villagers; the other accused persons were the residents of neighbouring villages Galachipa, Ballava, and Gilabunia and thus he knew them beforehand.

108. In cross-examination by accused Esahaque Sikder P.W.01 stated in reply to defence question that he heard from the people of their locality that the accused persons and their accomplice Razakars received the Pakistani occupation army in front of Itbaria Board School and that the bush where he remained in hiding was about 500 yards far from their house.

109. Defence does not appear to have even denied the narrative made by P.W.01 about the event of attack and facts related to it and that this accused belonged to locally formed Razakar Bahini.

110. In cross-examination, on part of accused Md. Abdul Gani, Md. Awal and Soleman Mirdha it has been suggested to P.W.01 that what he testified implicating these accused was untrue and

that the accused were not involved with the event he narrated. P.W.01 denied it.

111. In cross-examination done on part of accused Md. Abdus Sattar Pada P.W.01 stated that he had been at their house when the Pakistani army and Razakars arrived at the place near Itbaria Board School; that the village Ballava where he remained in hiding inside a bush was about 100 yards far from the road through which the army men and Razakars took away the detained women and children and that at that time the Razakars accompanying the army men were equipped with fire arms.

112. It appears that the event as testified by P.W.01 has not been denied and no effort appears to have been made to refute it in any manner. Even it remained undisputed that this accused was a Razakar in 1971 and actively accompanied the gang formed of Pakistani army men and Razakars, as testified by P.W.01.

113. P.W.02 Rezia Begum [73] is a resident of village Itbaria under police station-Patuakhali Sadar of District-Patuakhali. In 1971 she was 28 years old and had been staying at her conjugal home at village Itbaria. She is a direct witness to the phases of the attack. She is one of victims of sexual ravishment happened

in Patuakhali circuit house keeping her and other women detained there.

114. P.W.02 stated that at the end of Bangla month Baishakh in 1971 at about 10:00 A.M she heard that Pakistani occupation army and Razakars arrived in front of Itbaria Board School by gunboat and the local Razakars received them. Her [P.W.02] conjugal home was adjacent to Board School. The army men and Razakars then started looting Chowkiderbari and it was set on fire.

115. P.W.02 then stated that she and her husband's brothers' wives Hasan Banu and Joyful [both are now dead] went into hiding inside a bush behind their house. Pakistani army and Razakars including accused Awal Moulavi, Soleman Mridha and Abdus Sattar Pada shot Zabed Ali Akanda and Belayet Kha, husbands of her two sisters to death, dragging them out at the courtyard.

116. What happened next? P.W.02 went on to testify that then Pakistani army and Razakars took away her, her husband's brothers' wives Hasan Banu, Joyful and also the kids on their laps, on forcible capture to the house of their neighbour Muslim Sikder where they made stood in a line in the courtyard and then

the army men and Razakars gunned down Soleman Sikder, Kadam Ali Sikder, Anes Sikder and Menaj Sikder to death, bringing them there forcibly. Then the army men and Razakars took them to the house of Ledai Member, adjacent to Sikderbari where they shot Ledai member to death, bringing him at the courtyard.

117. P.W.02 next stated that the perpetrators then took Rushia Begum the wife of Gani Howlader, the son of Ledai member and Monwara, Fulbaru and another one who remain sheltered at that house, along with them to the *morh* of Napitbari where they were made assembled. Therefrom they along with 11 detainees were taken to the house of Abdul Ali Fakir, adjacent to Napitbari where three detainees were shot to death and the three detained women were taken to open space near Fakirbari wherefrom she along with 12/14 detained women were taken to the house of Zamina at their village wherefrom husband of Zamina was also forcibly captured and their house was set on fire.

118. P.W.02 further stated that at the time of Magrib *Ajan* the army men and Razakars then took 15 detained women including her, with their kids on their lap away to Patuakhali circuit house.

119. In respect of reason of knowing the accused persons P.W.02 stated that these accused very often used to come to their village and roam about and thus she knew them beforehand.

120. Accused Md. Esahaque Sikder and Abdul Gani Howlader declined to cross-examine P.W.02.

121. But however, on part of accused Md. Abdul Awal Moulavi and Soleman Mridha P.W.02 has been cross-examined when it has been suggested that she [P.W.02] did not see these accused prior to the event she narrated. P.W.02 denied it. P.W.02 stated in reply to defence question that Chowkiderbari, Napitbari, Sikderbari and the house of Ledai Member were nearer to their house.

122. Defence suggested that what she [P.W.02] testified implicating these accused was untrue and the accused did not belong to Razakar Bahini and that the event did not happen in the manner she testified. P.W.02 denied it blatantly.

123. P.W.03 Hazera Begum [74] is a resident of village-Kalikapur under police station- Patuakhali Sadar of District-Patuakhali. In 1971 at the relevant time she had been at her paternal home at village Itbaria. She experienced facts materially

related to the principal crimes. In conjunction with the attack P.W.03 was forcibly captured and finally taken away to Patuakhali circuit house, after carrying out mass atrocities in different sires at village Itbaria.

124. P.W.03 stated that in the end of Bangla month Baishakh in 1971 at about 10:00 A.M on hearing uproar of people she guessed arrival of Pakistani occupation army and Razakars in the field of Itbaria Board School which was intervened by two houses from her paternal house. The army men and Razakars looted Chowkiderbari and set it on fire. Then they [perpetrators] looted the house of Esahaque Payda, burnt it down and gunned down two to death and they took away Rezia the wife of Esahaque Pada, Hason Banu and Joyful to the house of Muslim Sikder on forcible capture. The people were on run with this.

125. P.W.03 next stated that the army men and Razakars coming to Sikderbari gunned down Soleman Sikder, Goni Sikder, Anes Sikder and Menhaj Sikder to death there. They [P.W.03 and others] went into hiding inside a bush nearer to their house while the army men and Razakars had left the site Sikderbari and at that time she [P.W.03] sustained a bullet hit injury as the army men and Razakars started gun firing by besieging their house. Her [P.W.03] baby daughter Nasima who was on her lap also

received injury on her head. The army men and Razakars then started beating her [P.W.03] husband when he managed to run away. Then the army men and Razakars took her away along with other detained women on forcible capture from the bush and took them to the house of Ledai member when she [P.W.03] could recognize accused Soleman Mridha, Md. Awal Moulavi and Md. Abdus Sattar Pada.

126. What happened at the house of Ledai Member? P.W.03 stated that the army men and Razakars looted and burnt down the house of Ledai Member and shot Ledai Member to death and detained Hason Banu the wife of Ledai Member and Rushia the wife of Goni Howlader and they along with her were taken to the morh of Napitbari.

127. P.W.03 also stated that arriving at Napitbari the army men and Razakars looted and burnt down houses and therefrom they the detainees were taken to the house of Karam Ali where Karam Ali Fakir and Shamsu Fakir were shot to death and then the perpetrators moved to village Durgapur taking them the detainees with them.

128. What happened at village Durgapur? The army men and Razakars looted and burnt down the house of Zamina, shot one

male resident to death and detained Zamina. Therefrom the army men and Razakars taking them the detained 15 women and Adam Biswas to her[P.W.03] husband's house at village Kalikapur where they looted and burnt down the house and then after Asar prayer the army men and Razakars took them to Patuakhali circuit house when it was about 06:00 P.M.

129. Finally, the P.W.03 stated that she knew the accused persons beforehand as they were residents of their locality.

130. In cross-examination by accused Md. Abdul Awal Moulavi and Soleman Mridha P.W.03 stated in reply to defence question that the house of accused Md. Awal Moulavi was nearer to their house opposite to the road at village Sharikhkhali; that accused Soleman Mridha's house was south to their house at village Ballava.

131. Instead of cross-examining intending to impeach what has been testified in examination-in-chief defence simply suggested that what has been testified implicating these accused was untrue and tutored; that these accused were not Razakars and that they were not associated with the commission of alleged event. P.W.03 denied the defence suggestion.

132. P.W.03 denied the suggestion put on part of accused Md. Abdus Sattar Pada that this accused was not a Razakar. P.W.03 however stated that she saw this accused even prior to the event happened. No more cross-examination on part of this accused appears to have been done. Besides, on part of accused Md. Esahaque Sikder cross-examination of P.W.03 has been declined, presumably since P.W.03 does not testify anything implicating this accused.

133. P.W.04 Fulburu [65] is one of direct witnesses to facts materially related to the attack. She is one of victims of sexual ravishment allegedly committing upon her and other women keeping in detention at Patuakhali circuit house, on forcible capture.

134. P.W.04 stated that in 1971 she was 20 years old and had been staying at her conjugal home at village Itbaria. In the end of Bangla month Baishakh at about 12:00 noon Pakistani occupation army and Razakars carried out looting and arson at their neighbouring houses.

135. P.W.04 also stated that on the day before the event happened her younger sister Monwara [P.W.05] came to her conjugal home to see her [P.W.04] ailing husband. She and her

sister Monwara went into hiding inside a bush east to their house and adjacent to Ledai member's house when the army men and Razakars attacked their house. At that time Rushia along with her kid and Hason Banu the wife of Ledai member also got sheltered inside the same bush.

136. P.W.04 next stated that army men and Razakars looted Ledai member's house and burnt down it and shot Ledai members to death – they saw it remaining in hiding inside the bush. Then the army men and Razakars taking her, her sister Monwara, Rushia and Hason Banu with them on capture moved to the morh of Napitbari when Razakar accused Md. Soleman Mridha, Md. Awal Moulavi, Md. Abdul Goni Howlader, Md. Abdus Sattar Pada, Md. Esahaque Sikder and their cohort Razakars were with the gang.

137. In cross-examination on part of accused A. Goni Howlader., Md. Awal Moulavi and Soleman Mridha chiefly it has been suggested that what the P.W.04 testified was untrue ; that she was not sexually violated as testified; that the accused persons were not Razakars. On behalf of accused Md. Abdus Sattar Pada simply it has been suggested that this accused did not belong to Razakar Bahini and what she testified implicating this accused was untrue.

138. The event testified by the P.W.04 has not been denied even by these three accused, in cross-examination. It appears too that no effort appears to have been made on part of defence to impeach the version so far as it relates to the event of attack that resulted in killing civilians, looting and burning down households, abducting numerous women on forcible capture, in conjunction with the attack.

139. P.W.05 Monwara Begum [62] is the younger sister of P.W.04 Fulburu. She [P.W.05] is one of victims of sexual ravishment committed upon her and other women detainees at Patuakhali circuit house. She narrated what she experienced and saw, in conjunction with the attack launched at places of Itbaria village. In 1971 she was married and used to reside at her conjugal home at village- Kalikapur.

140. P.W.05 stated that in the end of Bangla month Baishakh in 1971 she went to conjugal home of her sister Fulburu at village Itbaria to see her sister's ailing husband Ajahar Molla. On the following day at about 12:00 noon being aware of the attack at neighbouring Chowkiderbari by the Pakistani army and Razakars she and her sister Fulburu went into hiding inside a bush nearer to Ledai member's house. Two other women with their kids on lap also remained in hiding inside the same bush wherefrom they

could see the army men and Razakars looting and burning down the house of Ledai member and also shoot Ledai member to death.

141. P.W.05 next stated that then the army men and Razakars forcibly capture them the four women and a kid on lap of one detainee and took them to Napitbari morh where keeping them under guard of army men and Razakars some of perpetrators attacked Fakirbari and gunned down four to death and three women were forcibly captured from that house and brought them in a nearer field wherefrom they along with other women detainees were taken to Zamina's house at village- Durgapur where Zamina's husband was subjected to torture , one civilian was killed and Zamina was detained.

142. In cross-examination on part of accused Md. Esahaque Sikder, Abdul Goni Howlader and Md. Awal Moulavi it has suggested that what the P.W.05 testified implicating these accused was untrue and tutored. P.W.05 denied it. The other accused Soleman Mridha declined to cross-examine P.W.05, presumably since she did not state anything implicating this accused.

143. P.W.06 Soitun Nesa [61] is one of victims who were sexually violated at Patuakhali circuit house taking her along with other women there on forcible capture. In 1971 she had been residing at her parental home at village Itbaria. She is a direct witness to the attack conducted at their village.

144. P.W.06 stated that on 20<sup>th</sup> day of Bangla month Baishakh in 1971 at about 02:30 P.M she , her cousin sister Moirun Nesa[now dead] and her grand-mother[now dead] went into hiding inside a bush adjacent to the house of her maternal uncle Ajahar Sikder, seeing Pakistani army and Razakars coming towards the house of their neighbour Menaj Fakir. They saw, remaining in hiding, army men and Razakars gunning down Menaj Fakir and his brother to death at the courtyard.

145. P.W.06 next stated that thereafter, the army men and Razakars forcibly captured her and Moirun Nesa from the bush where they remained in hiding and took away to the open space at the north of Fakir Bari where she found 14 more detained women. Then she [P.W.06] saw the army men and Razakars killing Shamsul Haque Fakir and Karam Ali Fakir the two brothers of Abdul Ali Fakir by gunshot and they detained Ful Banu the wife of Shamsul Fakir.

146. In cross-examination defence suggested P.W.06 that she did not see the event she testified; that she did not know the accused persons since prior to the alleged event and that the accused persons did not belong to Razakar Bahini. P.W.06 denied the suggestion.

147. P.W.07 Jamina Begum [58] one of victims who were allegedly sexually ravished keeping in protracted captivity at Patuakhali circuit house [as narrated in charge no.02]. She also testified how that attack was launched at their house that resulted in killing of huge number of civilians [as narrated in charge no.01].

148. In respect of the event of attack that resulted in killing and torture as arraigned in charge no.01 P.W.07 stated that on 20 Baishakh at about 05:00 P.M in 1971 a group formed of Pakistani occupation army and Razakars attacked their house and with this she, her husband and neighbour Ismail Gharami went into hiding inside a bush , east to their house wherefrom they were dragged out and Ismail Gharami was shot to death, her husband was subjected to torture and she along with other women detainees was taken to Patuakhali circuit house.

149. Accused Esahaque Sikder and Soleman Mridha declined to cross-examine P.W.07.

150. But however P.W.07 has been cross-examined by the rest accused Abdus Sattar Pada, Abdul Goni Howlader and Awal Moulavi. P.W.07 in reply to question put to her P.W.07 stated that they could see the army men and Razakars when they remained in hiding inside the bush and they too could see them. In cross-examination, P.W.07 expressed ignorance about the location of village-Galachipa and what were the father's name of accused Abdul Goni Howlader and Awal Moulavi.

151. P.W.07 denied the defence suggestion that these accused were not Razakars and were not with the gang as testified and that what she narrated was untrue and tutored.

152. P.W.08 Abdul Ali Fakir [66] is a resident of village-Itbaria, the crime village. He is a direct witness to the attack that resulted in killing and forcible capture of numerous women of their village, in conjunction with the attack. P.W.08 later on heard that the detained women were subjected to sexual abuse at Patuakhali circuit house where they were kept in protracted captivity.

153. P.W.08 testified that on 20 Baishakh [first part of May], 1971 he had been at their house when he saw Pakistani army men and Razakars coming towards their house along with 10/12 women, 2/3 kids and a male and with this he and his cousin brother Rashid Fakir went into hid inside a bush east to their house wherefrom he saw army men and Razakars gunning down Shamsul Fakir, Karam Ali Fakir, Akkel Ali to death taking to the east of their house.

154. P.W.08 next stated that the Pakistani occupation army men and Razakars moving towards north taking his[P.W.08] brother's wife Ful Banu and other women on forcible capture. Then he came out of the bush and arranged burial of bodies of victims with the assistance of other people. P.W.08 also stated that accused Razakar Esahaque Sikder, Sattar Pada, Awal Moulavi, Goni Howlader and Soleman Mridha were with the gang at the time of event he testified.

155. In respect of knowing the accused persons beforehand P.W.08 stated that the accused persons used to move around the haat bazaar and thus he knew them beforehand.

156. In cross-examination, P.W.08 stated that accused Esahaque Sikder's house was at village-Gilabunia, about one kilometer far

from the village-Itbaria [crime village]. P.W.08 denied the defence suggestion that the event he narrated did not happen; that he did not know the accused persons; that what he testified was untrue and tutored. Defence however does not appear to have denied that the accused persons belonged to Razakar Bahini.

157. P.W.09 Md. Shahidullah [65] is a direct witness to the facts materially related to the attack launched at village-Itbaria. In 1971 he used to provide assistance to his father, an organiser of the war of liberation, he stated.

158. P.W.09 stated that on 26 April 1971 the Pakistani occupation army attacked Patuakhali when he and his parents got sheltered at his maternal uncle's house at village Itbaria and during their staying there on 04 May 1971 in the afternoon he heard that the Pakistani army and Razakars attacked the village Itbaria. Afterwards at about 03:00/04:00 P.M the gang entered his maternal uncle AKM Abdul Jalil's house and with this he and his younger brother Ahsanullah went into hiding inside a bush behind the mosque adjacent to the house, his father took shelter inside the mosque and his mother along with his sister Nargis and younger brother Bashir went into hiding inside a bush on the bank of the pond adjacent to their house.

159. What happened next? P.W.09 went on to state that during staying inside the bush he heard gun firing and saw the accused Esahaque Sikder, Abdus Sattar Pada, Soleman Mridha, Goni Howlader and Awal taking his[P.W.09] father to the army men dragging him out from the mosque inflicting torture and then the accused persons told that his [P.W.09] father was affiliated with politics of Awami League and an organiser of the war of liberation and thus he needed to be annihilated and then the accused Abdus Sattar Pada gunned his farther down to death there. The army men and Razakar then had left the site. Later on they saw the dead body of his cousin brother Nuruzzaman floating in the pond. They then arranged burial of the bodies.

160. With regard to reason of knowing the accused persons P.W.09 stated he very often used to visit his maternal uncle's house ; that the accused were the inhabitants of the locality of his maternal uncle and they used to move towards bazaars through the road in front of his maternal uncle's house and thus he knew the accused beforehand.

161. In cross-examination, in reply to defence question P.W.09 stated that accused Soleman Mridha and Md. Awal Moulavi were the residents of village-Gilabunia and accused Abdul Goni Howlader were from village-Galachipa. P.W.09 denied the

defence suggestion that he did not know the accused; that the accused were not involved with the commission of the offences he testified and that what he testified was untrue and tutored. Defence however even does not appear to have denied that the accused belonged to Razakar Bahini.

162. P.W.10 Shah Alam Kha [60] is the son of one of victims. He witnessed the killing of his father and one other. In 1971 he was 14 years old. He stated that on 20 Baishakh [first part of May] 1971 along with his father, Javed Ali Akanda [mother's sister's husband] came to his maternal uncle's house at village-Itbaria to work favoring the war of liberation. During their staying there at about 10:00/10:30 A.M they heard the people saying with shouting that the Pakistani occupation army and Razakars were on move towards their village. With this they attempted to escape when they had to face the army men and Razakars who then detained his father and Khalu and he managed to go into hiding inside a bush wherefrom he saw the accused Soleman Mirada, Sattar Pada, Awal Moulavi and Goni Howlader gunning his father and Khalu down to death,

163. P.W.10 went on to stated that his aunty and wives of his two maternal uncles too remained in hiding inside the same bush but they were taken out therefrom by Razakars and army men and

took away towards east. Then he coming out of the bush came to the bodies of his father and Khalu and buried their bodies.

164. In respect of knowing the accused persons P.W.10 stated that he used to visit his maternal uncles' house very often and the accused were the residents of the same locality and thus knew them beforehand.

165. In cross-examination, defence does not appear to have made any effort to impeach what has been testified in examination-in-chief. Defence simply put suggestion to P.W.10 that he did not know the accused; that the accused were not Razakars, that they were not involved with the event he narrated and what he testified was untrue and tutored. P.W.10 denied it blatantly.

### **Finding with Reasoning on Evaluation of Evidence Presented**

166. Ms. Rezia Sultana Begum the learned prosecutor submitted that in all 10 witnesses have been examined in support of this charge. The evidence of those direct witnesses including the women captured forcibly from the village-Itbaria during the course of the attack proved it that all the accused persons were with the gang of perpetrators and actively facilitated and substantially contributed to the commission of indiscriminate

killings, wanton destruction and unlawful detention of 15 women under intimidation and horror. It has also been submitted that defence by cross-examining those witnesses simply denied the involvement of the accused persons with the event of attack. But it however could not impeach the facts materially related to the commission of offences as unfolded from the evidence of those direct witnesses and victims, in any manner.

167. The learned prosecutor then submitted that the accused persons incurred liability under the theory of JCE as they, by their act and conduct forming part of the attack, consciously participated to the commission of brutal offences, the learned prosecutor added. The attack happened in rural locality and thus it would not have been possible to accomplish the crimes without culpable and active contribution and assistance of the accused persons who belonged to locally formed Razakar Bahini an auxiliary force of the Pakistani occupation army, the learned prosecutor added.

168. Ms. Rezia Sultana Begum, the learned prosecutor next submitted that consistent testimony of direct witnesses proved it beyond reasonable doubt that the accused persons actively and culpably participated in committing the crimes, knowing

consequence and sharing common intent, the learned prosecutor added.

169. Mr. Abdus Salam Khan the learned counsel defending the accused Esahaque Sikder and Sattar Pada chiefly argued, attacking credibility of the testimony tendered by the prosecution witnesses that involvement and complicity of these accused could not be proved in any manner; that there had been no reason of knowing the accused persons beforehand, as testified by the witnesses; that it was impracticable of allegedly seeing these accused accompanying the gang at the crime site ; that the P.W.10 was a tender aged boy in 1971 and as such had no reasonable opportunity of experiencing the alleged event of attack and other criminal acts.

170. Mr. Abdus Salam Khan, the learned counsel went on to submit that it was not at all possible for the women victims allegedly captured of knowing the identity of these accused. They had no reason of knowing the accused persons beforehand, as testified and it was impracticable of allegedly seeing these accused accompanying the gang at the crime site and that they have been falsely implicated in this case. The learned defence counsel submitted that the defence however did not dispute the event of attack that resulted in killings and other criminal acts.

171. Mr. Abdus Sattar Palwan the learned counsel defending the three accused A. Gani alias A. Gani Howlader, Md. Awal alias Awal Moulavi and Solaiman Mridha alias Soleman Mridha argued that the pattern of alleged attack did not make space of seeing any of local collaborators accompanying the gang, as testified by the prosecution witnesses; that the witnesses had no reason of knowing any of these accused beforehand; that their testimony does not inspire credence in proving alleged participation and complicity of these accused in carrying out the alleged event of attack.

172. The Tribunal notes that all the five accused persons have been indicted for the offences narrated in two charges framed. The charge no.01 relates to the attack that resulted in killing numerous civilians at village-Itbaria, wanton destruction and taking away numerous women, captured forcibly in conjunction with the attack.

173. The event as narrated in charge no.01 happened in day time on 04 May 1971 which ended in taking away a number of women on forcible capture from the crime localities. The attack launched at village-Itbaria continued for hours together and was carried out at the houses of civilians of village-Itbaria, the charge framed arraigns.

174. The charge no.02 relates to arraignment of causing grave sexual ravishment in captivity upon the 15 women unlawfully and forcibly detained, in conjunction with the attack launched on 04 may 1971, as narrated in charge no.01.

175. Prosecution examined in all 11 witnesses including the IO. Of them six [06] are rape victims who have been examined as P.W.02, P.W.03, P.W.04, P.W.05, P.W.06 and P.W.07. They testified also the facts materially related to the act of killings civilians as narrated in charge no.01. These witnesses were forcibly detained in conjunction with the attack, the charge framed arraigns.

176. The arraignment of keeping 15 women detained at Patuakhali circuit house as narrated in charge no.02 was continuance of the event of attack happened on 04 may 1971 as the victims were forcibly captured in conjunction with the attack launched at village- Itbaria on that day.

177. The six rape victims came on witness box and narrated their untold pain and trauma they sustained and what grave attack directing their supreme honour happened in protracted captivity at Patuakhali circuit house. They also testified facts materially

related to the event of attack as narrated in charge no.01 which ended in killing of number of unarmed civilians.

178. The other witnesses i.e. P.W.01, P.W.08, P.W.09 and P.W.10 who have narrated facts relating to the event of launching attack on 04 May, 1971 that resulted in annihilation of pro-libration civilians and they later on heard the act of committing sexual ravishment upon the women, detained in conjunction with the attack at village-Itbaria, in captivity at Patuakhali circuit house. Naturally, they did not have occasion of seeing anything happened at Patuakhali circuit house.

179. That is to say, all the above witnesses testified facts materially related to the arraignments brought in both the charges framed. Now, we consider it expedient to concentrate on the part of their testimony so far as it relates to the event of attack narrated in this charge no.01.

180. It appears that P.W.01 Md. Ayub Ali Matbor is a freedom-fighter. He testified some pertinent facts materially related to the event of attack, as a direct witness. In respect of other phases of attack he is a hearsay witness.

181. His [P.W.01] testimony demonstrates that on 04 May 1971 at about 10:00 A.M just after arrival of Pakistani occupation army at the place near Itbaria Board School by a gunboat who were being welcomed by the accused Md. Esahaque Sikder, Abdul Gani Howlader, Md. Awal Moulavi, Md. Abdus Sattar Pada, Soleman Mridha and 7/8 other Razakars, the gang started its collective criminal mission to which the accused persons were active part.

182. It is evinced too from the above unimpeached version of P.W.01 that on arriving at village-Itbaria the Pakistani occupation army and the accused persons and their accomplice Razakars started attacking the village-Itbaria and carried out wanton devastating activities. P.W.01 and his companion Sanu Mia, remaining in hiding, could hear gun firing, and scream of people and flames of fire from different places of village-Itbaria. Defence could not refute this piece of crucial fact. The attack launched was thus systematic and deliberate.

183. Uncontroverted fact of welcoming the Pakistani occupation army by the accused persons as testified by the P.W.01 suggests the unmistakable inference that the accused persons were quite aware about their arrival and intent and purpose of the criminal mission. Conducting criminal activities targeting pro-liberation

civilians of rural vicinity would not have been possible without the substantial contribution and facilitation of the accused persons who in exercise of their membership in a para militia force, Razakar Bahini enthusiastically welcomed the Pakistani occupation army.

184. It stands affirmed also in cross-examination of P.W.01 that the accused persons and their accomplice Razakars received and welcomed the Pakistani occupation army in front of Itbaria Board School and he[P.W.01] went into hiding inside a bush , about 500 yards far from their house. It was practicable of seeing the gang moving towards the crime village.

185. It appears from unshaken testimony of P.W.01, that he at the ending phase of the attack saw the accused persons and army men and their cohorts taking away the 10/12 women, 4/5 children and a male with them and later on he [P.W.01], after the gang had left the site, saw the houses ablaze and 13/14 dead bodies of villagers lying scattered.

186. Defence could not controvert the above version which is crucially related to the indiscriminate killing conducted at village-Itbaria. P.W.01 did not see committing the killings. But seeing numerous dead bodies lying scattered just immediate after

the attack ended is indisputable substantiation of conducting the massacre.

187. P.W.02 Rezia Begum, one of rape victims had been at her conjugal home, adjacent to Itbaria Board School in 1971. She corroborating the P.W.01 stated that she heard the coming of the group of army men in front of Itbaria Board School by gunboat and the local Razakars received them. It transpires from her description too that just after arrival the army men and Razakars forming the gang started looting Chowkiderbari and it was set on fire.

188. Defence could not bring anything by cross-examining this P.W.02 which may reasonably prompt us to keep the above version aside. The version of P.W.01 and P.W.02 cumulatively impels that the gang came to the crime village with intent to carry out prohibited criminal activities, with the culpable and active assistance and collaboration of local Razakars, the accused persons.

189. Carrying looting of the households and setting the houses of civilians at Chowkiderbari on fire as found proved from corroborative evidence of P.W.01 and P.W.02 was indicia of

spreading horror and coercion at the initial phase of the attack launched.

190. P.W.01 does not claim to have witnessed any of killings happened in conjunction with the attack. He [P.W01] remained in hiding inside a bush till the criminal mission ended with taking away a number of women away on forcible capture from the crime village.

191. But P.W.02 is a direct witness of the facts including the killings carried out in conjunction with the attack. It has been divulged from testimony of P.W.02 that the Pakistani army and Razakars including accused Awal Moulavi, Soleman Mridha and Abdus Sattar Pada shot Zabed Ali Akanda and Belayet Kha, husbands of her two sisters to death, dragging them out at the courtyard. At this stage, P.W.02 remained in hiding inside a nearer bush behind their house. Thus, naturally it was practicable of seeing the activities carried out by the perpetrators. This uncontroverted version made by P.W.02 a direct witness demonstrates patently that the accused persons did not merely accompany the gang but they physically participated in committing the killing. And they carried out such horrific criminal act within the sight of victims' relatives. Obviously it caused immense mental harm and trauma to the survivors.

192. Taking away a number of unlawfully detained women of the crime village as testified above by the P.W.01 relates to the arraignment as narrated in charge no.02. Seeing numerous bodies lying scattered proves that the gang conducted the act of indiscriminate killing in conjunction with the attack when the accused persons were with the criminal enterprise, being conscious part of it. However, we consider it appropriate to weigh this version of P.W.01 together with the testimony of direct witnesses to the phases of the attack.

193. What happened next to killing Zabed Ali Akanda and Belayet Kha, her [P.W.02] two sisters' husbands? The gang then took her and Hasan Banu, Joyful, the wives of her husband's brothers, with their kids on their laps, away to the courtyard of the house of their neighbour Muslim Sikder where the army men and Razakars gunned down Soleman Sikder, Kadam Ali Sikder, Anes Sikder and Menaj Sikder to death, bringing them there forcibly.

194. The above version remained uncontroverted. It thus transpires that killing two relatives and then gunning down four neighbours Soleman Sikder, Kadam Ali Sikder, Anes Sikder and Menaj Sikder were accomplished in her and other women detainees by the army men and the accused persons. It also

stands proved that at the relevant time the accused persons were equipped with fire arms.

195. It is very hard to imagine what extent of torment the P.W.02 and other women detainees had to experience and see when killing of near ones happened in their presence. The gang eventually taken away 15 women with them, after the criminal mission at village Itbaria ended with killing of numerous civilians and wanton destruction. And all the killings were carried out in presence of the detainee women. It has been found from the evidence presented by some of captured women that the killings happened at selected and different houses of village Itbaria.

196. It transpires from evidence of P.W.02 that after conducting killing at the house of her neighbour Muslim Sikder the gang taking her and other women detainees with them moved to the house of Ledai Member, adjacent to Sikderbari

197. P.W.03 Hazera Begum is one of detainees who were forcibly captured in conjunction with the attack and she had occasion of seeing the facts materially related to killings and carrying destructive activities'. It is found from her testimony that the army men and Razakars looted Chowkiderbari and set it

on fire. Then they [perpetrators] looted the house of Esahaque Pada, burnt it down and gunned down two to death and they took away Rezia the wife of Esahaque Pada, Hason Banu and Joyful to the house of Muslim Sikder on forcible capture.

198. The fact unveiled from above version in relation to killing happened at Chowkiderbari provides corroboration to what has been testified in this regard by P.W.02, one of the captured victims.

199. The gang keeping the women detainees including P.W.03 with them then moved to the house of Ledai member where Ledai member was shot to death and his wife Hason Banu and Rushia the wife of Goni Howlader were made captured. All these criminal acts happened in front of the women detainees including the P.W.03. It is patently found from evidence of P.W.03 which remained unshaken.

200. Then the gang moved towards Napitbari, taking the women already detained with them and thus the women detainees naturally had fair occasion of seeing and experiencing what happened there, evidence of P.W.03 demonstrates it.

201. It has been divulged too from evidence of P.W.03 that arriving at Napitbari the army men and Razakars looted and burnt down houses and Karam Ali Fakir and Shamsu Fakir were shot to death at the house of Karam Ali and then the gang of perpetrators moved to village-Durgapur, taking them the women detainees with them.

202. Unimpeached version of P.W.03 one of direct witnesses who was kept detained with the gang till it completed its horrific criminal mission at village Itbaria goes to demonstrate that at village-Durgapur the gang looted and burnt down the house of Zamina, shot one male resident to death and detained Zamina and there from the army men and Razakars forming the gang had left the site taking them the detained 15 women and Adam Biswas with them to Patuakhali circuit house when it was about 06:00 P.M. The gang also carried out looting and burning down house of her husband at village Kalikapur.

203. P.W.05 a victim is the younger sister of P.W.04. Both of them are victims as they were forcibly captured from the crime village and taken away by the gang towards Patuakhali. On the day before the event happened P.W.05 came to her sister's [P.W.04] conjugal home.

204. The conjugal home of P.W.04 Fulburu was adjacent to Ledai Member's house-- it has been found from evidence of P.W.04. With the launching of the attack P.W.04, her younger sister P.W.05, Rushia along with her kid and Hason Banu the wife of Ledai Member went into hiding inside a nearer bush wherefrom they saw the army men and Razakars looting and burning down the house of Ledai member and gunning down Ledai member to death. This devastating activities and the act of killing are found corroborated from the uncontroverted evidence of P.W.02 and P.W.03, the two other women who too were got forcibly captured in conjunction with the attack.

205. P.W.04 and P.W.05 were kept detained with the squad even when it moved to another place Napitbari where the husband of Zamina was subjected to torture, one was shot to death and Zamina was forcibly captured.

206. The event testified by the P.W.04 has not been denied even by the defence, in cross-examination. It appears too that no effort appears to have been made on part of the defence to impeach the version so far as it relates to the event of attack that resulted in killing civilians, looting and burning down households, abducting numerous women on forcible capture.

207. The gang to further its criminal intent and purpose carried out attack first at Chowkiderbari and kept it continued at Sikderbari, Ledai Member's house, Napitbari and at the house of one Zamina of Durgapur. And from all these sites the gang forcibly captured in all 15 women and 4/5 kids of those detainees. Killings thus happened within the sight of these women detainees. In other words they were forced and brutally coerced to see killing of their near ones. It was more than beastly deed which caused immense mental harm to them.

208. It is evinced that sensing the attack at their house, nearer to the house of Ledai Member P.W.05, her elder sister P.W.04 and other women remained in hiding inside a bush wherefrom the army men and Razakars took them the four women and a kid on lap of one detainee away to Napitbari morh – a place of village Itbaria, on forcible capture. This piece of version could not be refuted in any manner. Presumably, such extremely prohibited acts of the attackers being actively assisted by the accused persons were intended to spread horror and in accomplishing it the defenceless women and their kids were not spared.

209. It also transpires that taking the women detainees at place of Napitbari morh they were kept under guard of army men and

Razakars and some of perpetrators gunned down four to death, by launching attack at Fakirbari.

210. P.W.05 a victim is the younger sister of P.W.04 who was a victim too. On the day before the event happened P.W.05 came to her sister's [P.W.04] conjugal home which was adjacent to the house of Ledai member at village Itbaria.

211. P.W.05 consistently corroborated what happened in conjunction with the attack and after she, her elder sister P.W.04 and others got coercively detained. P.W.05 also witnessed the gang causing torture to Zamina's husband, detaining Zamina and killing one civilian at Durgapur when the gang moved there taking them the women detainees with them.

212. P.W.06 Soitun Nesa is one of victims who along with her cousin sister Moirun Nesa [now dead] and her grand-mother [now dead] remained in hiding inside a bush adjacent to the house of her maternal uncle Ajahar Sikder, sensing the attack launched. P.W.06 and her cousin sister Moirun Nesa [now dead] got captured by the gang after accomplishing the act of killing Menaj Fakir and his brother -- uncontroverted testimony of P.W.06 demonstrates it.

213. It has been transpired too that after taking the P.W.06 and her cousin sister Moirun Nesa at an open space at the north of Fakirbari she found there 14 more detained women. Presumably, the members of the criminal enterprise being divided into groups had carried out attacks at places Chowkiderbari, Sikderbari, Ledai Member's house, Napitbari, Fakirbari and Durgapur and detaining a number of women including P.W.06 from those places finally made them assembled at Fakirbari.

214. What the P.W.06 experienced at Fakirbari when she was taken there on unlawful capture? P.W.06 saw the army men and Razakars killing two unarmed civilians --Shamsul Haque Fakir and Karam Ali Fakir the two brothers of Abdul Ali Fakir by gunshot and they detained Ful Banu the wife of Shamsul Fakir. All these brutal criminal acts occurred within the sight of P.W.06 and other women detainees.

215. The above account made by the P.W.06 makes an exposure of severe brutality indeed. The perpetrators did not bring their mission to an end with the killing of civilians but they unlawfully detained Ful Banu the wife of one of victims simultaneously. The trauma Ful Banu the wife of one victim of killing sustained cannot be précised in any way.

216. P.W.06 stated too that the accused Md. Esahaque Sikder, Sattar Pada, Awal Moulavi, Goni Howlader, Soleman Mridha, Ainal Mridha [now dead], Karim Kha [now dead] and others were with the army men and Razakars when they were taking away towards Patuakhali circuit house.

217. The above piece of evidence indisputably impels the irresistible conclusion that all the five accused persons consciously and culpably participated in accomplishing the selective killing of civilians of village-Itbaria, wanton destruction and forcible capture of a number of women some of whom were near ones of civilians killed, by being culpably present with the criminal enterprise till it concluded its culpable mission.

218. Defence however does not appear to have made effort to refute the testimony in relation to the commission of crimes and participation and complicity of the accused persons therewith by cross-examining the P.W.06.

219. The accused persons were the residents of their [P.W.06] locality and thus she [P.W.06] knew them beforehand. Defence could not controvert it. Thus, it inspires credence that Razakar accused Md. Soleman Mridha, Md. Awal Moulavi, Md. Abdul Goni Howlader, Md. Abdus Sattar Pada, Md. Esahaque Sikder

were with the gang when she[P.W.06] was taken to Napitbari morh on detaining them unlawfully, as testified by the P.W.06. Facts unveiled suggest inferring that without the active assistance of the accused persons a number of women could not be detained.

220. In view of above, active presence of the accused persons with the criminal gang and their participation in accomplishing the entire attack stands proved and it gets consistent corroboration also from the account made by P.W.06 one of women detainees. We do not find any reason of keeping her account aside terming untruthful. She and other women detainees coming on witness box recounted the horrific episode which naturally retains alive for ever in her memory.

221. P.W.07 Zamina Begum is one of women who were taken away on forcible capture from the crime site by the gang, after the squad accomplished its mission at village-Itbaria. She [P.W.07] saw the gang of army men and Razakars gunning down her neighbour Ismail Gharami to death. It is also found that her husband was subjected to torture by dragging him out from the hiding place.

222. The above piece of version of P.W.07 which relates to part of killing mission appears to have been consistently corroborated by P.W.05 who also witnessed the gang causing torture to Zamina's husband, detaining Zamina and killing one civilian.

223. The above thus proves killing of another civilian and taking away another woman [P.W.07] under intimidation, along with other women detainees. This killing and unlawfully detaining the P.W.07 formed part of the criminal mission.

224. It transpires that killing happened in places of village-Itbaria. Defence could not refute it in any manner. Women relatives of victims killed got captured from each of those places, in conjunction with the attack. The gang had carried out killing, looting and burning down houses keeping the women detainees with them till it had left the site after its criminal mission at village-Itbaria ended. Not only that the gang took away the women detainees with them when it had left the site. Some of women detainees were so taken away together with their kids.

225. It is also found from evidence of P.W.01 that at about 05 P.M on the day of the event he saw , remaining in hiding, that Pakistani occupation army and the accused persons and their

accomplice Razakars taking away 10/12 women, 4/5 children and a male with them.

226. P.W.08 also saw the Pakistani army men and Razakars being accompanied by accused persons coming towards their house along with 10/12 women, 2/3 kids and a male and then taking away his [P.W.08] brother's wife Ful Banu.

227. The kids even were not spared. Some of women were unlawfully captured with their kids. What a blatant violation of fundamental rights. Indisputably, the women detainees including P.W.02, P.W.03, P.W.04, P.W.05, P.W.06 and P.W.07 in other words were inhumanly forced to experience the act of annihilation of their near and dear ones which caused untold and immense serious mental harm to them, we conclude.

228. P.W.08, P.W.09 and P.W.10 are the direct witnesses to some acts of killings and facts related to the atrocities carried out. Of them P.W.09 and P.W.10 are the sons of victims. Their evidence needs to be weighed together with that of the women detainees who were eventually taken away by the gang with them, after the event of attack ended at village-Itbaria.

229. P.W.08 Abdul Ali Fakir a resident of village-Itbaria who witnessed the attack launched at their village. His testimony corroborates the fact of gunning down three civilians Shamsul Fakir, Karam Ali Fakir, Akkel Ali to death taking them to the east of their [P.W.08] house. He saw it remaining in hiding inside a nearer bush.

230. He[P.W.08] also saw the Pakistani army men and Razakars being accompanied by accused persons coming towards their house along with 10/12 women, 2/3 kids and a male and the gang then took away his[P.W.08] brother's wife Ful Banu and other women with them on forcible capture.

231. Defence could not impeach the credibility of this account which crucially relates to the attack that resulted in indiscriminate killing and unlawfully detaining a number of women.

232. The above piece of pertinent version which is materially related to the commission of crimes demonstrates that at one phase of attack three civilians Shamsul Fakir, Karam Ali Fakir, Akkel Ali were shot to death and from the site where it happened women including Ful Banu the wife of the brother of P.W.08

was also taken away on intimidation along with other women detainees.

233. P.W.09 Md. Shahidullah had been at the crime village at his maternal uncle AKM Abdul Jalil's house and sensing the attack he , his brothers, sisters and parents went into hiding wherefrom he[P.W.09] saw the accused Esahaque Sikder, Abdus Sattar Pada, Soleman Mridha, Goni Howlader and Awal taking his[P.W.09] father to the army men dragging him out from the mosque inflicting torture and then the accused persons told that his [P.W.09] father was affiliated with politics of Awami League and an organiser of the war of liberation and thus he needed to be annihilated and then the accused Abdus Sattar Pada gunned his farther to death there.

234. The above uncontroverted account of the facts made by P.W.09 goes on mentioning indisputably the participation of all the five accused in accomplishing this phase of killing.

235. The above unshaken narrative made by a direct witness P.W.09 proves active and physical participation of all the five accused persons in accomplishing killing of pro-liberation civilians. Additionally, it may be presumed reasonably that the accused persons had played antagonistic and culpable role

consciously in getting the victims identified as pro-liberation civilians for the purpose of their annihilation.

236. In war time situation, on the face of such systematic attack naturally a civilian, instead of being a bystander did not have any option excepting to go into hiding wherever he could, to save own life. Thus, what the P.W.08 and P.W.09 saw remaining in hiding inside a bush as testified by them carries value and credence. Besides, there has been nothing before us to deduce that it was not practicable of seeing the criminal activities remaining in hiding inside bush.

237. Defence questioned the matter of recognizing the accused persons by the P.W.08 and P.W.09. It appears that P.W.08 stated that the accused persons used to move around the haat bazaar and thus he knew them beforehand. In cross-examination of P.W.08 it has been found that accused Esahaque Sikder's house was at village-Gilabunia, about one kilometer far from the village-Itbaria [crime village].

238. P.W.09 very often used to visit his maternal uncle's house when he had occasion of seeing the accused persons the inhabitants of the locality moving towards bazaars through the road in front of his maternal uncle's house. In absence of

anything contrary we may safely act upon the reason these two witnesses testified in respect of knowing the accused persons beforehand.

239. It is to be noted that defence even does not appear to have denied in cross-examination of P.W.09 that the accused belonged to Razakar Bahini. In context of the war of liberation in 1971 fame or infamy made an individual commonly known to the locals particularly of rural vicinity. The accused persons for their notoriety, in exercise of their membership in locally formed Razakar Bahini an auxiliary force naturally became well-known around their locality, we may safely and justifiably infer.

240. Thus, testimony of P.W.08 and P.W.09, two potential direct witnesses demonstrating killing, forcible capture of women and participation of the accused persons therewith inspires credence.

241. P.W.10 Shah Alam Kha the son of one of victims. He witnessed the killing of his father and one other. He too remaining in hiding inside a bush saw the accused Soleman Mirada, Sattar Pada, Awal Moulavi and Goni Howlader gunning his father and Khalu down to death.

242. P.W.10 also saw Razakars and army men taking away his [P.W.10] aunty and wives of his [P.W.10] two maternal uncles who too remained in hiding inside the same bush, towards east. This version remained uncontroverted in cross-examination. Defence does not dispute the killing and other criminal acts carried out in conjunction with the attack.

243. Testimony of P.W.10 thus adds to the conclusion that the criminal gang accompanied by the accused persons caused death of a large number of civilians and forcible capture of numerous women at places of the crime village-Itbaria which naturally was witnessed by the relatives of victims.

244. Testimony of P.W.10 as to identification of accused persons at the crime site accompanying the gang is not credible as at the relevant time he was only 14 years old, the learned defence counsel argued. But we are not convinced with this submission.

245. Merely for the reason of tender age of a witness at the time of the event happened his sworn testimony cannot be readily kept aside from consideration. We are to assess credibility of his testimony and to see whether it is possible to recount what he experienced during the event of attack. In this regard we may put reliance upon the observation of the ICTR that--

“The Appeals Chamber finds that it was reasonable for the Trial Chamber to accept Witness TAX’s testimony despite her young age at the time of the events [11 years old]. There is no rule requiring a Trial Chamber to reject per se the testimony of a witness who was a child at the time of the events in question, and the Appellant did not demonstrate that Witness TAX was not reliable or credible.” **[Gacumbitsi, (Appeals Chamber), July 7, 2006, para. 94]**

246. We further recall the observation made on this issue by the ICTR Trial Chamber that---

“The young age of the witness at the time of the events is not in itself a sufficient reason to discount his testimony, but implies that it should be evaluated with some caution.”  
**[Simba, (Trial Chamber), December 13, 2005, para. 78:]**

247. What we see in the case in hand? In 1971 at the relevant time P.W.10 was 14 years old, true. But the narrative he made together with testimony of other direct witnesses demonstrates that it was quite practicable for him of seeing the criminal acts forming part of the horrific attack.

248. On cumulative evaluation of testimony of P.W.08 and P.W.10 we may arrive at reasonable conclusion that killing was not the lone intent of the gang, it also opted to take away women with them on forcible capture and it happened at the places of village-Itbaria the gang had launched the attack.

249. Prosecution witnesses testified the organized massacres of civilians of village-Itbaria, presumably based on their pro-liberation identity and the perpetrators accompanied by the accused persons targeted the victims, to further policy and plan.

250. The facts unveiled suggest the reasonable inference that the accused persons knew that their act and conduct would lead to killings and massacre. The evidence presented in this case amply supports the conclusion that the attack against the civilians of village-Itbaria was organized and systematic.

251. All the accused belonged to locally formed Razakar Bahini, a para militia force created to act to further policy and plan of the Pakistani occupation army. Already we have rendered our reasoned finding in this regard. Thus, it cannot be said that the accused persons remained with the gang as mere spectators. Obviously they, sharing common intent consciously accompanied the squad chiefly formed of Pakistani occupation

army who were welcomed by the accused persons when it arrived at Itbaria by gunboat.

252. Tribunal notes that ‘committing’ is not limited to direct and physical perpetration and that even other acts can constitute direct participation in the *actus reus* of the crime. The question of whether an accused acts with his own hands, e.g. when killing people, is not the only relevant criterion. We should keep this evolved jurisprudence in mind.

253. According to settled jurisprudence the notion of ‘commission’ covers “participation in a joint criminal enterprise’. Considering the context of carrying out crimes “direct and physical perpetration” need not mean physical killing -- other acts of other member or members too can constitute ‘direct participation’ in the *actus reus* of the crime.

254. The settled proposition is that if the presence can be shown or inferred, by circumstantial or other evidence, to know and to have a direct and substantial effect on the commission of the illegal act, then it is sufficient on which to base a finding of participation and assign the criminal culpability.

255. The accused persons were members of Razakar Bahini, an auxiliary force which had to act to collaborate with the Pakistani occupation army in accomplishing criminal mission. The attack conducted in rural vicinity. The army men were not familiar with the locality and the civilians to be attacked. Presumably, being part of the plan, the accused persons accompanied the gang to provide culpable assistance and substantially contribute to the commission of killings and detention of women. Due to horrendous nature and pattern of the attack the witnesses might not have opportunity to see the act of actual participation of any of members of the gang.

256. In the case in hand, the accused persons are found to have acted culpably being part of the criminal enterprise, sharing common intent. Thus they were accountable under the doctrine of JCE [Basic Form].

257. The jurisprudence makes clear that ‘committing’ is not limited to direct and physical perpetration and that other acts can constitute direct participation in the *actus reus* of the crime. The question of whether an accused acts with his own hands, e.g. when killing people, is not the only relevant criterion. Acts can constitute direct participation in the *actus*

*reus* of the crime. The accused persons participated in the enterprise in the realization of its common design or purpose.

258. In the case in hand, the accused persons were physically present at the crime site and played a significantly culpable role in conducting the criminal mission directing villagers of Itbaria. Apart from this it is evinced too that by being present during the attack the accused persons actively participated through gunning down some of villagers to death and thus they are found to have committed the brutal killings.

259. The accused persons did not keep them abstained from effecting unlawful capture of women from the crime site. Omission to expressing disagreement on part of accused persons in effecting capture of number of women, the relatives of villagers killed provided 'significant contribution' to the act of taking away those captured women towards Patuakhali, after the mission ended. Presumably the accused persons consciously endorsed such criminal acts.

260. In the case in hand, initial intent of criminal acts was to create intimidation and grave coercion around the locality and the population thereof and also increases gravity of the massacre. In addition to causing death of civilians by gunning them

down, wanton destruction and capture of a number of women under coercion was to create terror. Exposure to terror is a denial of the fundamental right to security of civilians which is internationally recognized.

261. It transpires that the event of killing of civilians of village-Itbaria remained undisputed. All the witnesses testified it consistently. Most of witnesses saw who accompanied the gang and who participated in killing of villagers. Let us have a glance on testimony tendered in this regard.

262. P.W.02, one of women detainees saw 03 accused Awal Moulavi, Soleman Mridha and Abdus Sattar Pada killing Zabed Ali Akanda and Belayet Kha.

263. P.W.09 saw 05 accused with the gang at the time of event he testified. Father of P.W.09 was taken out dragging from the mosque and their inciting utterance was that his [P.W.09] father was an organizer of the war of liberation and thus would not be allowed to survive. P.W.09 then saw 01 accused Abdus Sattar Pada gunning his father down to death.

264. The act of killing the father of P.W.09 was a segment of atrocities carried out by launching attack which continued for

hours together. The above uncontroverted version indisputably proves active and culpable participation of all the five accused not only to the commission of killing the father of P.W.09 but that of all the criminal acts that resulted in killing a number of villagers, wanton destruction, confinement of women at village Itbaria.

265. P.W.10 saw the 04 accused Soleman Mirada, Sattar Pada, Awal Moulavi and Goni Howlader gunning his father and Khalu down to death.

266. Thus, evidence of P.W.02, P.W.09 and P.W.10 collectively demonstrates that 04 accused actually had participated in causing death of a number of civilians at multiple places at village-Itbaria. And accused Esahaque Sikder was with the group.

267. Now let us have a look to what has been testified by other witnesses in respect of presence and role of the accused persons.

268. It appears that P.W.03, one of women detainees at a stage of the attack could recognize 03 accused Soleman Mridha, Md. Awal Moulavi and Md. Abdus Sattar Pada accompanying the gang.

269. While P.W.04 another woman detainee too saw that 05 accused at the morh of Napitbari when Razakar accused Md. Soleman Mridha, Md. Awal Moulavi, Md. Abdul Goni Howlader, Md. Abdus Sattar Pada, Md. Esahaque Sikder and their cohort Razakars were with the gang.

270. It is found too from evidence of P.W.08 that 05 accused Razakar Esahaque Sikder, Sattar Pada, Awal Moulavi, Goni Howlader and Soleman Mridha were with the gang at the time of event he testified.

271. What the rest three witnesses testified in respect of the role of the accused persons? The rest three witnesses P.W.05, P.W.06 and P.W.07 testified some of killings. But they did not name any of accused persons. But it does not mean that the accused were not with the group.

272. It is evinced too from evidence of P.W.03, P.W.04 and P.W.08 that all the 05 accused were with the group at the crime site. Besides, evidence of P.W.02, P.W.09 and P.W.10 impels conclusively that all the accused were with the gang during conducting the attack that happened for hours together.

273. In horrific situation arising out of systematic and sudden attack all the individuals who had occasion of experiencing the event might not have equal opportunity of seeing all the phases or all the acts carried out by all the accused persons or perpetrators. And all the accused might not be known to all the witnesses who saw the happening of criminal acts, since prior to the event.

274. Additionally, we reiterate that due to lapse of long passage of time and also for the nature of trauma incurred by witnesses does have an intense impact on witnesses when they testify in court. The witness may not be able to recall every detail with precision. The ICTR in the case of *Nyiramasuhuko* has considered this issue by making observation as below:

“Many witnesses lived through particularly traumatic events and the Chamber recognises that the emotional and psychological reactions that may be provoked by reliving those events may have impaired the ability of some witnesses to clearly and coherently articulate their stories. Moreover, where a significant period of time has elapsed between the acts charged in the indictments and the trial, it is not always reasonable to expect the witness to recall every detail with precision. [ICTR, *The Prosecutor v. Pauline*

*Nyiramasuhuko*, ICTR-98-42-T, Judgement,  
24 June 2011, para. 179]”

275. Thus, mere omission on part of three direct witnesses P.W.05, P.W.06 and P.W.07 in stating name of accused persons does not diminish it that they were not with the group.

276. Next, merely not attributing specific overt act to an accused would not be fatal to the case of the prosecution. It is now well settled that in every criminal trial, discrepancies and omission are bound to occur due to lapse of long passage of time between the dates of the event happened and deposition of witnesses made before the Court. In the case in hand, such omission which is trivial in nature does not create doubt in the mind of the Tribunal about the truthfulness of the statement of other witnesses who have consistently testified accused persons’ presence and participation to the commission of the crimes.

277. Already it stands proved that the accused belonged to Razakar Bahini. Apart from this, now based on evidence of P.W.02-04 and P.W.08-P.W.10, the six witnesses it is proved that 05 accused were with the squad at the crime site and of them 04 Awal Moulavi, Soleman Mridha, Abdus Sattar Pada and Goni Howlader physically participated in gunning down a number of civilians.

278. Accused Esahaque Sikder was with the group till the mission ended. It is found proved. The facts and circumstances lead us to conclude that accused Esahaque Sikder was with the squad not as a mere spectator. Rather, he aggressively participated in accomplishing capture of the father of P.W.09 and also substantially contributed the commission of his annihilation. Presumably, he along with other accused substantially contributed to the commission of the criminal acts, in exercise of his membership in auxiliary force, Razakar Bahini and thus he too incurred equal liability under the doctrine of JCE [Basic Form]. All the five accused participated in accomplishing the criminal mission being part of the criminal enterprise, we conclude.

279. Tribunal notes that both positive acts and omissions may constitute instigation, but it must be proved that the accused directly intended to provoke the commission of the crime. In the case in hand, we find from evidence of P.W.09 the son of a victim that the inciting utterance of the accused persons substantially and directly prompted to commit the killing of the father of P.W.09. Acts and conducts of the accused persons forming grave provocation in accomplishing the killing of the father of P.W.09 collectively made all the five accused physical

participants to this crime, a part of the entire attack happened at village-Itbaria.

280. Intention of acts and conducts of the accused persons forming part of a vast group was extremely notorious. It is rationally deduced from the devastating contour of the crimes perpetrated, in conjunction with the attack.

281. Facts and circumstances divulged from totality of evidence of witnesses tell it unerringly that the disparaging criminal acts committed directing civilians of the crime village were not for an occasional motive. Intention was to wipe out the pro-liberation civilians and to spread terror amongst the civilians.

282. Act of all the five accused including the accused Esahaque Sikder as has been testified by P.W.09 not only formed part of attack but it also proves active participation of accused Esahaque Sikder to the killing of the father of P.W.09 and the commission of crimes carried out in conjunction with the attack as well.

283. That is to say, not only the 04 accused but all the five accused had played the active role as perpetrators in relation to killing of numerous villagers, being part of the murderous enterprise.

284. Indiscriminate annihilation of numerous villagers [of village-Itbaria] was discriminatory in nature. The victims did not form the entire population of village-Itbaria. Killing a number of villagers suggests the conclusion that they were so wiped out on selective basis.

285. It stands proved that the accused persons the local Razakars welcomed the Pakistani occupation army arrived at Itbaria Board School and accompanied them in moving to the crime site. Why they accompanied them? Presumably, they being imbued by the policy and plan culpably and actively assisted the army men in locating the targeted villagers to wipe them out. And they did it consciously and knowing the consequence of their act and conduct, sharing common intent.

286. The accused persons have been arraigned for the offence of torture as crime against humanity as well. How the accused persons inflicted torture and upon whom? It is to be noted that causing torture is not confined in inflicting bodily injury only. It may be caused even by inflicting severe mental harm. In this regard the **ICTY Trial Chamber** observed that --

.....The mental suffering caused to an individual who is forced

to watch severe mistreatment inflicted on a relative would rise to the level of gravity required under the crime of torture. ....[Kvočka et al.,(Trial Chamber), November 2, 2001, para. 149]

287. In the case in hand, the six women detainees the relatives of victims were forced not only to watch severe mistreatment but the acts of killings also were carried out within their sight which inevitably caused grave mental harm to them. It constituted the offence of 'torture'. It is hard to deduce the level of mental harm the relatives of victims were forced to sustain under intimidation. In this way the six women detainees and other witnesses the relatives of victims were intentionally subjected to torture.

288. Detaining 15 women unlawfully along with kids of some of detainees, in conjunction with the attack stands proved. The six victims consistently testified it. The gang being accompanied by the accused persons had left the sites taking the detained women and kids of some of them away with them. It stands affirmed too in cross-examination of P.W.6, one of victims.

289. It remained uncontroverted that P.W.01 in the evening, on the day of attack launched, saw the gang and accused persons moving towards Patuakhali taking women detainees, kids of some of detained women and one male away with them. Evidence of P.W.01 lends strength to the testimony of six women victims in respect of taking them away on forcible capture. Defenec could not impeach it in any manner.

290. Additionally, we have found it proved that wanton destruction by looting households and burning down houses also occurred within the sight of the survived relatives of victims. Such disparaging activities were intended to terrorize the villagers. It naturally caused grave mental harm to them which was the constituent of the offence of torture.

291. The murderous enterprise to which all the five accused persons were active part conducted its criminal mission in day time. One by one, the gang on locating the victims with the active aid and assistance of the accused persons gunned them down to death even in presence of their dear ones and detained the females in conjunction with the attack. Such horrific criminal acts were carried out violating all norms of humanity and prohibition. The trauma sustained by the witnesses the detained

women who witnessed committing the killing their dear and near ones was beyond measure indeed.

292. The attack was carried out by moving places at village-Itbaria and it continued for hours together. Extreme antagonistic attitude of the accused persons substantially facilitated the brutal acts of killings. Their brutality exceeded all limits. Not only that, they actively participated in accomplishing killing of some of defenceless villagers, as found proved from evidence of some of direct witnesses and near ones of victims.

293. It is evinced beyond reasonable doubt that the murder, the cruel and inhumane treatment by causing destructive acts and detaining a number of women as unveiled were intended to intimidate the civilian population of a particular rural vicinity which constituted blatant denials of fundamental rights that indisputably had a severe impact not only on the victims but also the survived segment of the population of the crime village as well which amount to the offences of crimes against humanity, we conclude.

294. The role and conduct the accused persons had played during the course of the attack suggests the conclusion that their deliberate common intent was to accomplish killing of civilians

and detaining a number of women, by spreading horror. This view gets strength from the observation made by the **ICTR Appeal Chamber** in the case of **Ntakirutimana and Ntakirutimana** which is as below:

“An example [of the first category of JCE] is a plan formulated by the participants in the joint criminal enterprise to kill where, although each of the participants may carry out a different role, each of them has the intent to kill.

**[Ntakirutimana and Ntakirutimana, ICTR Appeal Chamber, December 13, 2004, para. 463]**

295. Additionally, acts and conduct of accused persons substantially lent assistance, encouragement and moral support to the perpetration of crimes. And thus they acted pursuant to a common purpose which made them responsible under the doctrine of first category of JCE [Basic Form].

296. The accused persons welcomed the group formed of Pakistani occupation army and peace committee chairman and members when they arrived at Itbaria Board School by gunboat. Tribunal finds it proved from the evidence of P.W.01. Defence could not negate it by cross-examining the P.W.01. This fact impels irresistible conclusion that all the accused were well aware about the coming of the gang at Itbaria and its intention

and plan. It is hard to believe that presence of the accused persons with the troops at the crime sites was forced one. They got engaged with the troops pursuant to orchestrated plan.

297. The act of welcoming the troops is also fair indicia that the accused persons being aware of the plan and purpose joined them in conducting attack and remaining with them at the crime site consciously participated in committing the crimes, sharing common intent.

298. The above also suggests to reasonably inferring that the accused persons used to maintain close affiliation with the Pakistani occupation army stationed in Patuakhali. Tribunal also finds that the IO [P.W.11] in his cross-examination in reply to question put to him by the defenec stated that it was found in investigation that the Razakar Bahini was formed at Itbaria under joint command of the accused persons who used to stay in Patuakhali and occasionally used to come at Itbaria.

299. The kind of attack launched at village-Itbaria wouldn't be conceivable without designing a wide organizational effort and plan. The existence of a plan may be proved through circumstances and facts unveiled. The above version together with the evidence presented forces to reasonably infer that the

accused persons were potential Razakars and had constant nexus with the Pakistani occupation army stationed at Patuakhali circuit house and pursuant to the plan of launching attack they remained present at Itbaria Board School not only to receive the troops but aiming to locate and identify the sites and civilians to be targeted, by joining the criminal enterprise. The accused persons were thus engaged at both the preparatory and execution phases, we conclude.

300. In the context of horrific crimes, 'direct and physical perpetration' need not mean physical killing -- other acts of the member or members of the group can constitute direct participation in the *actus reus* of the crime.

301. It transpires from the extreme antagonistic attitude of accused persons reflected in their inciting utterance as unveiled from evidence of P.W.09 the son of one victim that the gang in planned way had launched the attack intending to wipe out the civilians whom they perceived to be potential pro-liberation civilians. The task of targeting pro-liberation civilians of village-Itbaria would not have been possible without the substantial contribution and assistance on part of the accused persons. The pattern, nature and extent of the systematic attack conducted reasonably impel this conclusion.

302. The Tribunal is convinced to record its finding that all the five accused physically participated to the commission of killing some of villagers and provided substantial contribution and facilitation by remaining stayed with the squad when it accomplished criminal activities including killing numerous civilians, by launching systematic attack.

303. The Accused persons are thus held criminally responsible under the mode of liability of JCE [Basic Form,] as it has been established beyond reasonable doubt that they had an understanding or entered into an agreement with the gang of Pakistani occupation army when they welcomed them at Itbaria Board School and accompanied them to the crime site to commit the crimes, agreeing upon with the Pakistani occupation army and in doing so they provided substantial contribution and aid. This view is in conformity to the provisions in respect of ‘liability’ contained in section 4(1) of the Act of 1973.

304. On cautious appraisal of evidence presented as made above we eventually arrive at decision that the prosecution has been able to prove that the accused (1) Md. Esahaque Shikder,(2) A. Gani alias A. Gani Howlader,(3) Md. Awal alias Awal Moulavi,(4) Md. A. Sattar Pada, and (5) Solaiman Mridha alias Soleman Mridha are found criminally liable under section 4(1) of

the Act of 1973 for participating, abetting, assisting, substantially contributing and also for complicity, by their act and conduct forming part of systematic attack, to the accomplishment of devastating criminal activities and mass killing constituting the offences of 'torture', 'abduction and murder' as crimes against humanity as enumerated in section 3(2)(a)(g)(h) of the Act of 1973 which are punishable under section 20(2) of the said Act.

## **Adjudication of Charge no.02**

### **[Abduction, confinement, torture and rape committed in the Patuakhali Circuit House]**

305. Charge: That after the commission of offences as crimes against humanity at village-Itbaria on 04.05.1971 as narrated in charge no. 01, on the same day [04.05.1971] at about 05.30 P.M. the group formed of Pakistani occupation army , accused (1) Md. Esahaque Shikder (2) A. Gani alias A. Gani Howlader (3) Md. Awal alias Awal Moulavi (4) Md. A. Sattar Pada, and (5) Solaiman Mridha alias Soleman Mridha and their accomplice Razakars having abducted already detained about 15 women [names of the victims are narrated in the formal charge] from the village Itbaria forcibly took them away to the Joint Camp of Razakars and Pakistani army set up at the Patuakhali Circuit House, and keeping them in captivity there the accused persons,

their accomplice Razakars and Pakistani occupation army men tortured and raped them in turn, and as such, all the victim women became sick. Thereafter, the detained victim women were set free on different dates, lastly on 14.05.1971.

Therefore, the accused (1) Md. Esahaque Shikder (2) A. Gani alias A. Gani Howlader (3) Md. Awal alias Awal Moulavi (4) Md. A. Sattar Pada, and (5) Solaiman Mridha alias Soleman Mridha have been charged for participating, abetting, facilitating, contributing and complicity in the commission of offences of abduction, confinement, torture and rape as crimes against humanity as part of systematic attack directed against unarmed civilians as enumerated in section 3(2)(a)(g)(h) of the Act of 1973 which are punishable under section 20(2) of the said Act for which the accused persons have incurred liability under section 4(1) of the said Act.

## **Evidence of Witnesses presented**

306. It transpires that the event narrated in this charge is chained to the event occurred at village-Itbaria [as narrated in charge no.01]. The victims of crimes alleged in this charge were forcibly captured, in conjunction with the attack narrated in charge no.01.

307. Prosecution relied upon six victims, the key witnesses who have been examined as P.W.02, P.W.03, P.W.04, P.W.05, P.W.06 and P.W.07 and also upon three other hearsay witnesses who have been examined as P.W.01, P.W.08 and P.W.10. All these witnesses have testified the event of attack at village – Itbaria that resulted in indiscriminate killing of numerous civilians and forcible capture of 15 women who are the victims of the criminal acts for which the accused persons have been indicted in charge no.02.

308. We have already rendered reasoned finding as to the crimes carried out at village-Itbaria as narrated in charge no.01 based on testimony of all these witnesses. It already stands proved that 15 women were taken away, under intimidation from village-Itbaria on forcible capture in conjunction with the attack as narrated in charge no.01.

309. Now, we consider it appropriate to concentrate on the testimony presented just in respect of the arraignment narrated in charge no.02 which relates to keeping the 15 women detained in captivity at Patuakhali circuit house and committing rape upon them and participation of the accused persons therewith. Accordingly, first let us see what the victims testified in exposing their immense pains and trauma they sustained.

310. P.W.02 Rezia Begum, one of victims stated that at the time of Magrib *Ajan* the army men and Razakars took 15 detained women including her, with their kids on their lap away to Patuakhali circuit house. Detained Kadam Ali also was taken to circuit house where they were kept in captivity. In night they the detainees were kept in small rooms. Pakistani occupation army and Razakar sexually violated her keeping in captivity for two days and as a result she became sick. Then she and the wives of her husband's brothers were set at liberty and thus returned back home. The wives of her husband's brothers were sexually ravished in captivity, they told it. Accused Soleman Mridha, Md. Abdus Sattar Pada, Md. Awal Moulavi and their cohort Razakars and army men sexually ravished them in captivity at circuit house.

311. In respect of reason of knowing the accused persons P.W.02 stated that these accused very often used to come to their village and roam about and thus she knew them beforehand. Defence does not appear to have been able to controvert what the P.W.02 stated in examination-in-chief in relation to core offence committed upon her and other women detainees keeping them in confinement at circuit house.

312. P.W.03 Hazera Begum stated that after Asar prayer [on the day of the event of attack as narrated in charge no.01] the army men and Razakars took them away to Patuakhali circuit house when it was about 06:00 P.M. P.W.03 next stated that she was kept confined in a big room of Patuakhali circuit house and then in small rooms where they were subjected to rape by the Razakars and army men for four days. As a result she, Sakhina [now dead], Ful Banu [now dead] became sick. She could not recognize anybody as she lost conscience. For the reason of their sickness she along with Sakhina and Ful Banu were left abandoned in front of their respective house. After getting treatment they disclosed the event they experienced. Bullet hit injured Nasima, her baby daughter died three days after she returned home.

313. P.W.03 stated that she knew the accused persons beforehand as they were residents of their locality.

314. In cross-examination by accused Md. Abdul Awal Moulavi and Soleman Mridha P.W.03 stated in reply to defence question that the house of accused Md. Awal Moulavi was nearer to their house opposite to the road at village Sharikhkhali; that accused Soleman Mridha's house was south to their house at village Ballava.

315. P.W.04 Fulburu, one of victims stated that they along with all the detainees were taken to Zamina's house at village Durgapur, from Napitbari where the husband of Zamina was subjected to torture and one was shot to death[in conjunction with the attack narrated in charge no.01]. There from they along with Zamina were taken away to Patuakhali circuit house.

316. P.W.04 next stated that they were kept detained in a big room in Patuakhali circuit house and then in small rooms. The army men and Razakars keeping them in captivity at circuit house for ten days committed rape upon them. As a result she and her sister Monwara became ailing and thus she, Monwara and detainee Soitun Nesa were left abandoned in front of their respective house. Then they received treatment by village doctor and after recovery they disclosed the event to inmates. P.W.04 finally stated that the accused persons were the residents of their locality and thus she knew them beforehand.

317. In cross-examination by accused Esahaque Sikder P.W.04 stated in reply to defence question that those who committed sexual violation upon her were Pakistani army men and Razakars. P.W.04 denied the defence suggestion that this accused was not involved with the event she narrated; that at the relevant time she was not at village Itbaria.

318. P.W.05 Monwara Begum, one of victims stated that she along with 15 women detainees with two kids and a male detainee were taken away to Patuakhali circuit house. Her husband Aziz's house was near the circuit house and thus she could understand that she and other detainees were kept confined at circuit house. She [P.W.05] was kept in captivity in a small room for ten days when she was subjected to sexual violation.

319. P.W.05 further stated that she did not know the accused persons by face but she heard the name of accused Sattar Pada, Awal Munshi, Esahaque Sikder, Goni Howlader and Yasin Sikder when the Razakars violated her sexually at circuit house taking her there forcibly from her sister's house.

320. Finally, P.W.05 stated that ten days later she became sick in captivity and then she, her elder sister Fulburu [P.W.04], Soitun Nesa [P.W.06] were left abandoned in front of their house. The women detained at circuit house were subjected to sexual violation by army men and Razakars. On returning home they received treatment from Moti doctor of their village.

321. In cross-examination on part of accused Md. Esahaque Sikder, Abdul Goni Howlader and Md. Awal Moulavi it has been suggested that what the P.W.05 testified implicating these

accused was untrue and tutored. But the defence could not bring anything by cross-examining this P.W.05 which may reasonably diminish truthfulness of her testimony.

322. In respect of the event narrated in charge no.02 P.W.06 one of victims stated that the gang of army and Razakars taking them the 15 women detainees and kids of some of them and a male moved to Patuakhali circuit house. It was about 06:00 P.M. Accused Md. Esahaque Sikder, Sattar Pada, Awal Moulavi, Goni Howlader, Soleman Mridha, Ainal Mridha [now dead], Karim Kha [now dead] and others were with the army men and Razakars who took them away to Patuakhali circuit house.

323. P.W.06 Soitun Nesa, one of victims testified further that they were kept confined in a big room and taking her to another room the army men and Razakars committed sexual ravishment upon her, keeping in captivity for ten days which resulted in ailment and thus she along with Moirun Nesa were left abandoned in front of their house. They received treatment but one month later her cousin sister Moirun Nesa died.

324. With regard to reason of knowing the accused persons P.W.06 stated that they used to move through roads, and she could also know their name when they made conversation with

each other at Patuakhali circuit house. Defence could not impeach the fact of detaining the women at Patuakhali circuit house and committing rape upon them in captivity.

325. P.W.07 Jamina Begum , one of rape victims, in respect of the arraignment in relation to commission of rape in captivity as narrated in charge no.02 stated that Razakar accused Awal Moulavi, Sattar Pada, Goni Howlader, Ainal Mridha[now dead] and Karim Kha[now dead] were with the gang when they were taken to Patuakhali circuit house on forcible capture.

326. P.W.07 went on to state that army men and the accused Razakars committed rape upon her keeping in captivity for five days in a small room. At that time she was seven-months pregnant and thus became ailing and thus she was set at liberty and came back to her conjugal home.

327. Finally, P.W.07 stated that she knew the accused persons beforehand as they used to move around the locality and through the road adjacent to their house.

328. Now let us see what the three other witnesses P.W.01, P.W.08 and P.W.10 stated in respect of the arraignment brought in charge no.02. Naturally, they are hearsay witnesses as to the

act of committing rape. But they have testified facts materially related to the act of taking away the victims on forcible capture, as direct witnesses.

329. P.W.0-1 Md. Ayub Ali Matbor [64] is a resident of village Sharikkhali under Police station-Patuakhali of District-Patuakhali is a freedom-fighter. He stated that on the following day[of the event of attack conducted at village-Itbaria] he went to sector no.09 to join the battle and during his staying in sector no.09 he heard that the detained women were subjected to torture and sexual violence by the Pakistani army men in captivity at Patuakhali circuit house.

330. P.W.01 also stated that after independence he heard from Rezia Begum [P.W.02], Monwara Begum [P.W.05], Hazera [P.W.03], Soitun Nesa [P.W.06], Ful Banu, Monwara the victims who were subjected to sexual violence in captivity at Patuakhali circuit house that the army men, Razakars and the accused persons committed sexual violence upon them keeping in captivity in circuit house for 8/10 days.

331. In respect of reason of knowing the accused persons P.W.01 stated that accused Sattar Pada was one of his villagers; the other accused persons were the residents of neighbouring villages

Galachipa, Ballava, and Gilabunia and thus he knew them beforehand.

332. In cross-examination by accused Esahaque Sikder P.W.01 stated in reply to defence question that he heard from the people of their locality that the accused persons and their accomplice Razakars received the Pakistani occupation army in front of Itbaria Board School.

333. In respect of the fate of the detained women[ as narrated in charge no.02] P.W.08 Abdul Ali Fakir stated that later on he heard that the women taken away to Patuakhali circuit house were subjected to rape committed by army men and Razakars in protracted captivity.

334. P.W.08 also stated that four days later his brother's wife Ful Banu was left abandoned in front of their house as she became seriously ailing. She was medically treated and then heard from her [victim] that the accused Razakars, their accomplices and the army men committed rape upon her keeping in captivity at Patuakhali circuit house.

335. Defence could not bring anything in cross-examination which may reasonably force the Trier of fact that the P.W.08 did

not hear the event or he had no occasion of such hearing as to the crimes done to the victims at Patuakhali circuit house.

336. P.W.10 Shah Alam Kha stated too that later on he heard that the wives of his two maternal uncles and aunty were taken away to Patuakhali circuit house along with other detained women and they were kept in captivity for two days when they were subjected to 'torture' and two days later they were left abandoned near their house.

337. Defence does not seem to have made any effort to refute that P.W.10 did not hear anything from the victims

### **Finding with Reasoning on Evaluation of Evidence**

338. Ms. Rezia Sultana the learned prosecutor submitted that 06 victims coming to witness box testified the fact of detaining 15 women including them at Patuakhali circuit house, taking them there on forcible capture from village-Itbaria, in conjunction with the attack [as narrated in charge no.01]. Those victims also testified about the grave sexual ravishment committed upon them in captivity and the involvement and complicity of the accused persons therewith.

339. It has been submitted too by the learned prosecutor that the defence could not controvert it in any manner by cross-examining those key witnesses, the rape victims. The other witnesses who witnessed taking the victims away by the gang with them and few days later they heard from the victims what trauma they sustained in captivity at Patuakhali circuit house. Their hearsay evidence gets corroboration from the victims, the learned prosecutor submits.

340. Mr. Abdus Salam Khan the learned counsel defending the accused Esahaque Sikder and Sattar Pada submitted that it was not possible of keeping 15 women detained at Patuakhali circuit house as it was in fact an army camp and at that time the circuit house consisted of four rooms only. Prosecution could not prove that the detained women were taken to Patuakhali circuit house and that these accused were engaged in accomplishing the offences alleged in this charge. The offence of rape as arraigned in charge no.02 did not happen as testified by the alleged six victims, the learned counsel added.

341. This charge involves the act of unlawfully detaining 15 women of village-Itbaria in conjunction with the attack as narrated in charge no.01 and keeping them in protracted captivity at Patuakhali circuit house where they were subjected to rape.

342. In adjudicating the charge no.02 prosecution chiefly relied upon testimony of six of victims. The key matters to be proved are that the victims were taken away to Patuakhali circuit house; that they were subjected to rape or sexual ravishment in protracted captivity and that the accused persons participated in accomplishing such barbaric crimes by their act of substantial contribution and facilitation.

343. Six rape victims came on witness box and have been examined as P.W.02, P.W.03, P.W.04 P.W.05, P.W.06 and P.W.07. In addition to them P.W.01, P.W.08, P.W.09 and P.W.10 are the witnesses to the event of attack and they too testified how the 15 women were forcibly captured during the course of launching attack at village-Itbaria.

344. In adjudicating the charge no.01 on evaluation of testimony of all the above witnesses including the rape victims we have found it proved that the gang during the course of carrying out the attack unlawfully detained numerous women including P.W.02, P.W.03, P.W.04 P.W.05, P.W.06 and P.W.07 and took them away with them, after accomplishment of mass killing of numerous pro-liberation civilians of village-Itbaria.

345. It is to be noted too that the arrangement brought in charge no.02 significantly depends upon the success of the prosecution in proving the accusation brought in charge no.01. For the taking away 15 women to Patuakhali circuit house on capture from village-Itbaria was inevitably chained to the attack as narrated in charge no.01. Already all the five accused have been found criminally liable for the arraignment brought in charge no.01.

346. We have already rendered our reasoned finding, in adjudicating charge no.01 based on evidence of victims and other direct witnesses that the gang formed of Pakistani occupation army, accused persons and their accomplice Razakars took away 15 women with them on intimidation after it concluded its criminal mission at village-Itbaria.

347. That is to say, the offence of 'abduction' of 15 women from village-Itbaria and accused persons' liability therewith have been already found proved. Therefore, we do not consider it to reiterate how, when, wherefrom and by whom the 15 women were forcibly captured and taken away.

348. Now, the arraignment brought in this charge no.02 needs to be resolved through adjudication of the fate the victims had to face and where they were taken and kept confined and

participation of accused persons therewith. The charge no.02 alleges that the victims were taken at Patuakhali circuit house where they were kept in unlawful confinement and during captivity they were subjected to rape. Few days later, they got released as they became ailing due to barbaric wrong done to them.

349. Only the victims detained at circuit house had occasion to experience the criminal acts and wrongs done to them. Naturally, none other had opportunity of seeing the wrongs caused to the victims detained at the circuit house.

350. The core of the arraignment brought in this charge thus can be well proved chiefly by the victims. However, it appears that in addition to the testimony of victims prosecution relied also upon other witnesses who later on heard from the victims as to what grave wrong was caused to them.

351. In view of above now the prosecution requires to prove that—

- (i) The 15 women unlawfully detained from village Itbaria were taken to Patuakhali circuit house;
- (ii) Why the victims were taken and detained at Patuakhali circuit house;

(ii) The women were kept confined at circuit house for couple of days;

(iii) During captivity the detained women were subjected to rape;

(iv) The accused persons participated, aided, abetted and substantially contributed to the commission of grave criminal act of rape upon the detained victims;

(iv) Due to recurrent sexual ravishment the victims became ailing and thus some of them were left abandoned at their locality.

352. Intending to resolve the above crucial aspects first let us evaluate the testimony of the rape victims who are the key witnesses as to what happened to them in captivity.

353. The event testified by the P.W.04, one of victims has not been denied even by accused A. Goni Howlader, Md. Awal Moulavi and Soleman Mridha, in cross-examination. It appears too that no effort has been made on part of defence to impeach the version so far as it relates to the event of attack that resulted in killing civilians, looting and burning down households, abducting numerous women on forcible capture, detaining the women in captivity at Patuakhali circuit house and committing

sexual ravishment upon them including P.W.04 in protracted captivity. Rather, in cross-examination by accused Esahaque Sikder the fact of committing sexual violation by the army men and Razakars upon P.W.04 and other detainees in captivity at Patuakhali circuit house has been affirmed. It may be lawfully inferred too that the accused persons who were with the gang in taking away the detained women at Patuakhali circuit house also took part in committing such barbaric wrong upon them in captivity.

354. Facts unveiled in the case in hand tend to impel it patently that the accused persons were quite aware of the plan of the criminal enterprise and they consciously aided, abetted and facilitated to the commission of the horrific atrocities, remaining stayed at the crimes sites of village-Itbaria with the gang.

355. It already stands proved that the number of women were unlawfully detained, in conjunction with the attack as narrated in charge no.01. In adjudicating the charge no.01 it has been found proved too that the accused persons being part of the enterprise actively participated and facilitated in effecting capture of the women under intimidation and coercion. The accused persons even did not keep them distanced from the gang when it took the

unlawfully detained women away to Patuakhali circuit house, presumably the army camp. It also stands proved.

356. What fate the detained women had to face? They were kept in protracted captivity there. It could not be controverted. Defence does not dispute it. Some of victims came to witness box of the Tribunal and narrated the untold trauma they sustained which demonstrates that they were sexually ravished in captivity.

357. In adjudicating charge no.01 we have got it proved that all the five accused persons formed part of the group and substantially contributed in effective unlawful detention of 15 women, in conjunction with the attack at village-Itbaria. In the late evening the gang had left the site taking the women detainees with them. It also stands proved.

358. All the five accused Razakars were with the group when it launched attack at village-Itbaria and detained her and other women who were taken away after the mission ended, as found proved in adjudicating charge no.01.

359. P.W.02 Rezia Begum, one of victims could recognize the accused persons accompanying the gang when she was taken to

the house of Ledai members, on forcible capture [during conducting attack at village Itbaria as narrated in charge no.01].

360. The above gets corroboration from another victim P.W.04 Fulburu. P.W.06 Soitun Nesa another victim too categorically stated that accused Md. Esahaque Sikder, Sattar Pada, Awal Moulavi, Goni Howlader, Soleman Mridha, Ainal Mridha [now dead], Karim Kha [now dead] and others were with the army men and Razakars who took them away to Patuakhali circuit house.

361. The act of taking away the detained women towards Patuakhali from village-Itbaria happened in day time. P.W.02, P.W.04 and P.W.06 had natural reason of knowing the accused persons beforehand. They stated it in their sworn testimony. Defence could not impeach it. Thus, there has been no reason of disbelieving their testimony so far as it relates to recognizing the accused persons accompanying the gang.

362. Besides, in adjudicating the arraignment brought in charge no.01 it has been found proved beyond reasonable doubt that all the five accused persons actively and culpably participated in carrying out killing of villagers, looting household and burning down houses. The women victims were captured from village

Itbaria, in course of the attack carried out. Thus, it adds assurance to what has been testified by the P.W.02, P.W.04 and P.W.06 in respect of physical participation of all the five accused also in taking away 15 women detainees including them to Patuakhali circuit house.

363. It is evinced too from testimony of P.W.02 Rezia Begum, one of victims that the army men and Razakars took 15 detained women including her, with their kids on their lap and one Kadam Ali away to circuit house.

364. It transpires patently from testimony of P.W.02, P.W.03, P.W.04 and P.W.07 that the accused persons too were physically participated in perpetrating the act of rape and sexual invasion upon the detained women. It has already been proved that the accused persons were culpably with the squad in taking away the women detainees at Patuakhali circuit house and they being the members of auxiliary force had close nexus with the army camp set up there. Therefore, Tribunal finds no earthly reason to disbelieve accused persons' participation to the commission of brutal and beastly act directing the women detainees.

365. All the detained women including the six victims who came on witness box were subjected to rape and sexual violence in

protracted captivity at Patuakhali circuit house. Tribunal got it proved from the unimpeached evidence of six of victims. The six brave victims recounted the extreme harm caused to their supreme worth, with immense trauma.

366. The act of disparaging attack on their supreme honour need not be proved with detailed precision. Keeping 15 women detained in protracted captivity at the army camp at Patuakhali circuit house obviously was not for any pious purpose. Besides, a woman is not believed to portray a fabricated story of demolishing self worth. She will never invite social stigma by telling untrue account of ravishing self worth.

367. It has also been proved that the serious attack on their supreme worth resulted in their ailment and thus eventually they were set at liberty. All the six victims consistently stated it. Besides, the evidence of P.W.01, P.W.08 and P.W.10 proves that the victims had to receive medical treatment as they became sick for the grave recurrent violence committed upon them in captivity.

368. P.W.01 Md. Ayub Ali Matbor, a freedom-fighter after independence he heard from Rezia Begum [P.W.02], Monwara Begum [P.W.05], Hazera [P.W.03], Soitun Nesa [P.W.06], Ful

Banu, Monwara the victims that they were subjected to sexual violence in captivity at Patuakhali circuit house by the army men, Razakars and the accused persons keeping them in captivity in circuit house for 8/10 days.

369. It transpires that one victim Ful Banu was the wife of brother of P.W.08 Abdul Ali Fakir. P.W.08 too thus naturally had reason of knowing the event of gravest wrong done to the women detainees from Ful Banu.

370. It is found from evidence of P.W.08 that four days later Ful Banu was left abandoned in front of their house as she became seriously ailing. She was medically treated and then heard from her [victim] that the accused Razakars, their accomplices and the army men committed rape upon her keeping in captivity at Patuakhali circuit house.

371. It transpires patently from evidence of P.W.10 Shah Alam Kha, another hearsay witness that two victims were the wives of his two maternal uncles and one victim was his aunty who were subjected to 'torture' in captivity. And two days later they were left abandoned near their house.

372. Setting the victims released after keeping them in captivity for days together naturally made their relatives worried of knowing the fate the victims had to face in captivity. Thus, hearing the grave sexual ravishment committed upon them as testified by these hearsay witnesses inspires credence.

373. Few days later the victims returned home as they became sick as testified by the victims remained unshaken. Defence does not appear to have made effort to refute it by cross-examining them. The hearsay testimony of P.W.01, P.W.08 and P.W.10 depicts too that the victims so released became sick and had to undergo treatment. Receiving medical treatment by the victims also lends assurance as to beastly brutality caused upon the victims. All these cumulatively suggest that the victims were subjected to recurrent grave sexual violence in captivity. Defence could not refute this material fact in any manner.

374. It is found from evidence of victim P.W.03 Hazera Begum that another detainee bullet hit injured Nasima, her baby daughter died three days after she was set at liberty from captivity. Testimony of P.W.07 Jamina Begum, one of victims demonstrates that the accused Razakars committed rape upon her keeping in captivity for five days in a small room and at that time

she was seven-months pregnant and thus became ailing. Thus, she was set at liberty and came back to her conjugal home.

375. The above uncontroverted narration made by P.W.03 and P.W.07 demonstrates that even bullet hit injured detained woman Nasima and seven-month pregnant P.W.07 Jamina Begum were not kept apart from the beastly lust of the perpetrators including the accused persons. What a brutality! It was worse than death.

376. It has been settled jurisprudentially that those who make their contribution with the shared intent to commit the offence can be held equally liable, regardless of the level of their contribution to its commission. It is found that the accused persons not only substantially contributed to the commission of offences of confinement, torture and rape upon the victims but they physically participated too in committing extreme sexual ravishment upon the victims.

377. In view of above all the five accused persons can be lawfully held liable for the grave wrongs done to the women detainees. They were indisputably concerned with the criminal act of sexual ravishment upon the detained women under the doctrine of JCE. What reasons are found as the backup of this finding?

378. First, the accused persons belonged to Razakar Bahini an auxiliary force and thus obviously they had nexus to the activities carried out at the circuit house where the army men got stationed.

379. Second, the accused persons remained with the gang till it arrived at the circuit house taking the women with them on forcible capture from the village-Itbaria, in conjunction with the attack as narrated in charge no.01.

380. Third, since the accused persons had conscious and culpable role in effecting detention of those women they cannot evade responsibility of causing grave wrong done upon the victims in captivity at the circuit house.

381. Finally, from the evidence of some of victims it stands proved that the accused persons too physically committed the wrong upon them, in addition to the Pakistani occupation army. That is to say, the detainees were subjected to recurrent mass sexual violation. Horrific misdeed was caused to the defenceless women in captivity. We fail to measure the extent of trauma they sustained.

382. Thus, there can be no room to deduce that the accused did not incur liability for the crimes as there has been no direct evidence showing their physical participation. Act and conduct of the accused persons which provided substantial support and facilitation in keeping the women detained at the circuit house formed part of attack and it is sufficient to infer the liability of the accused persons even for the sexual violence committed upon the detainees. Obviously the accused persons should have known the consequence of taking the victims there and keeping them in captivity and in this way they knowingly contributed and substantially facilitated the commission of barbaric sexual abuse.

383. It is to be noted that system crime or group crime is accomplished not by a particular individual. It is carried out by a group of perpetrators and thus all the members forming the gang are equally liable for the criminal acts. In this regard we may recall the observation of **ICTR** made in the case of **Rutaganda** that—

“[T]he Accused may . . . be held criminally [responsible] for criminal acts committed by others if, for example, he planned such acts, instigated another to commit them, ordered that they be committed or

aided and abetted another in the commission of such acts.”

**[Rutaganda, ICTR Trial Chamber, December 6, 1999, para. 35]**

384. Committing grave sexual violation upon the women in protracted captivity rather caused the living death of victims. War time rape or mass rape is not a mere offshoot of war but a deliberate weapon used as a strategy of war.

385. **Gabriela Mischkowski** rightly pointed that—

“in practice, rape survivors are more or less routinely accepted as “vulnerable” rather than “threatened” for mainly two reasons: they are either perceived as too shameful to talk about “such things” in front of a public audience, or-based on a less prejudiced and more enlightened understanding of rape and its social implications—they are to be protected from public stigmatising.”

**[Gabriela Mischkowski, Medica Mondiale, Cologne, Germany: The trouble with rape Trials: Bangladesh Genocide and the Issue of Justice, a paper presented in the International conference held at Heidelberg University, Germany 4-5 July, 2013, publication of Liberation War Museum, Bangladesh, page 98]**

386. But we see in the case in hand that the six rape victims, as brave women, came on dock to speak the trauma they sustained.

The grave misdeed directing their supreme honour was worse than death, overcoming all vulnerabilities. They were kept confined for days together at the army camp at Patuakhali circuit house. The perpetrators had carried out the act of sexual violence as an instrument of threat to the civilians who took stance in favour of war of liberation.

387. The effects of rape as a weapon of war do not cease, once the rape is over, or once the physical wounds are healed. The wounds of rape never heal, and they leave permanent scar on victims, their families, communities, nations and even the humanity too.

388. Our social pattern does not allow a woman to prefer bringing a false accusation of yellowing her supreme honour as it stamps stigma on her life, and makes her social and family life devastated. Thus, we find no rationale to doubt the testimony of victims.

389. Defence could not dislodge the testimony of victims. Their testimony demonstrates that at the said army camp 15 women taken there on forcible capture along with them were subjected to rape in protracted captivity. Thus, we may safely infer that the

camp was used as a ‘rape camp’ with which the accused persons had conscious and active affiliation and nexus.

390. The above leads to conclude that defying the Article 27 of fourth Geneva Convention providing war time protection to women, the Pakistani occupation army and their local collaborators, the accused persons had committed indiscriminate sexual violence upon the numerous helpless women keeping them in unlawful and protracted captivity.

391. It has been divulged that the accused persons did not get distanced from the gang after concluding its criminal mission at village-Itbaria. But they continued providing active facilitation even in taking away the victims captured forcibly, in conjunction with the attack as listed in charge no.01

392. In war time, rape is used as a weapon instead of a bullet and this weapon continues to exert its effect beyond the primary victim and it eventually outrages the civility. The research on war time rape shows that in war time, the soldiers assume the use of rape as an effective weapon of launching attack not simply against an individual, but against social and gender stigmas aiming for the advancement of societal break-down.

393. In the case in hand, six [06] rape crimes survivors came on dock. The intention of inflicting grave sexual violence upon them was in fact to destroy their lives [as narrated in charge no.02]. Nothing can heal their myriad trauma. At the same time the perpetrators by such invasion incurably harmed their families and the society as well. The blatant shock caused to the humanity by such beastly crimes is never erased. **Kellt D. Askin** in his article on wartime rape published in 2003 in an international journal that --

“Rape is a potent weapon for a number of reasons. The destructive stereo-types and harmful culture and religious attitudes associated with female chastity or notions of so-called “purity” make sex crimes useful tools for destroying lives. .... Rape crimes survivors (and who do not survive) are not the only victims of sexual violence. The impact and the harm often extend to families, local communities, and society at large.”

**[Kellt D. Askin: ‘Prosecuting Wartime Rape and Other Fender-Related Crimes under International Law: Extraordinary Advances, Enduring Obstacles’: Berkeley Journal of International Law, Vol. 21:288]**

394. It has been found proved that the accused persons knowingly and consciously facilitated and substantially contributed to the act of taking away the victims to Patuakhali

circuit house on capture in conjunction with the attack as narrated in charge no.01. Such act endorsed and assisted to keep the 15 detained females in unlawful protracted captivity when they were subjected to sexual violence [as narrated in charge no.02]. And also it stands proved from evidence of some of victims that the accused persons too participated in committing the grave sexual violence upon the victims. Obviously it together with the nature of crimes deserves to be considered as an aggravating factor.

395. The act of rape abusing recognized human rights of victims, in war time, was extremely grave and understandably proscribed. The criminal act of rape upon numerous detained women was an attack against women indeed which intended to send a message of intimidation to the pro-liberation Bengali civilians, we conclude.

396. The accused persons being close associates of the Pakistani occupation army stationed at Patuakhali circuit house substantially facilitated and contributed in ensuring victims' detention that eventually resulted in their grave sexual ravishment and they did it as an instrument of threat to the civilians who took stance in favour of war of liberation.

397. The act of sexual invasion and rape upon numerous women in protracted captivity at Patuakhali circuit house is a mere part of horrific scenario of physical invasion committed upon the countless women in the territory of Bangladesh in 1971, during the war of liberation by the Pakistani occupation army and their local collaborators.

398. A crime against humanity involves the commission of certain prohibited acts committed as part of attack directed against a civilian population. The act of abetment as appears in the Act of 1973 is punishable. And the act of abetment encompasses ‘approval’, ‘encouragement’, ‘assistance’ or support’ that contributes substantially to the accomplishment of the actual crime.

399. The acts of the accused persons formed “part of”—and not simply coincide with—the attack [systematic] resulted in sexual invasion upon the detained 15 women taking them to Patuakhali circuit house on capture under grave intimidation, from the village-Itbaria.

400. It already stands proved [in adjudicating charge no.01] that the accused persons were with the gang when it moved towards Patuakhali taking the detained women with them. It also proves

accused persons' visible nexus with the army stationed at Patuakhali circuit house. Obviously the accused persons knew or should have known the forceable consequence of taking the detained women there. Thus, it may irresistibly be inferred that the accused persons knowingly facilitated and contributed to secure confinement of the victims at Patuakhali circuit house.

401. The accused persons' act was thus significantly chained to the act of victims' confinement which eventually facilitated inflicting recurrent sexual invasion upon them. Intention of causing such grave attack upon the supreme honour of the victims was to dehumanize and defeat the morals of pro-liberation Bengali population and to leave the society with long-term suffering as well.

402. The 15 women unlawfully captured from their village-Itbaria were forced and intimidated to go with the gang to Patuakhali. That is to say, they were abducted violating the norms of customary international law. But they were not either party to any conflict. Keeping the 15 defenceless women in captivity by itself caused immense and severe mental harm to them which was the constituent of the offence of 'torture'.

403. In the case in hand, severe mental pain and harm were inflicted the constitutive elements are found. Infliction of such harm was intentional and it was intended to intimidate and coerce the women detained and the relatives of civilians killed. All these go with the observation made by the **ICTY Appeal Chamber** in respect of constitutive elements of the offence of ‘torture’, in the case of **Kunarac, Kovac, and Vokovic** which is as below:

“The definition [of torture] is based on the following constitutive elements: “(i) The infliction, by act or omission, of severe pain or suffering, whether physical or mental. (ii) The act or omission must be intentional. (iii) The act or omission must aim at obtaining information or a confession, or at punishing, intimidating or coercing the victim or a third person, or at discriminating, on any ground, against the victim or a third person.”

**[Kunarac, Kovac, and Vokovic : ICTY Appeals Chamber, June 12, 2002, para. 142]**

404. In order to prove an arraignment for an offence enumerated in the Act of 1973 testimony of a single witness is sufficient if it is found to be credible and trustworthy. Corroboration is not needed to substantiate the accusation brought. But in the case in

hand, the arraignments brought in charge no.02 involving the offences of confinement, rape and torture are found to have been well proved chiefly by the six rape victims. Additionally, their testimony provides corroboration to hearsay evidence.

405. Facts and criminal acts unveiled lead us to infer indisputably that the accused persons knew it well that their assistance and contribution impacted substantially to the act of keeping the women captured from village-Itbaria. And it irresistibly prompts to the reasonable conclusion that they got engaged also in accomplishing criminal acts including sexual ravishment upon the detained women at Patuakhali circuit house.

406. The accused persons thus acted pursuant to ‘common plan of collective criminality’ and thus incurred liability under the doctrine of JCE [form I] which refers to the liability mode contained in section 4(1) of the Act of 1973.

407. On totality of evidence we have found it proved beyond reasonable doubt that –

- (i) all the five accused persons actively and physically participated in accomplishing the act of taking away the 15 women along with some of their kids on capture from village-Itbaria;

(ii) 15 women including six victims who came on witness box were kept detained at the army camp for couple of days;

(iii) grave sexual violation was committed upon them that resulted in their serious ailment;

(iv) eventually the victims were left abandoned in front of their house;

(v) Nasima one of victims who received bullet hit injury before she was captured forcibly during the attack carried out at village-Itbaria was kept detained at Patuakhali circuit house along with her baby daughter who died three days after she was set at liberty from captivity;

(vi) one victim P.W.07 Jamina Begum was seven-month pregnant when she was subjected to rape in captivity;

(vii) all the five accused persons had close nexus with the army camp at Patuakhali circuit house which was rather a 'rape camp'; and

(viii) all the five accused participated, substantially contributed and facilitated, being part of the criminal enterprise in committing grave recurrent sexual violation directing the 15 detained victims.

408. It has been thus unequivocally proved that as a part of ‘systematic attack’ the accused (1) Md. Esahaque Shikder,(2) A. Gani alias A. Gani Howlader,(3) Md. Awal alias Awal Moulavi,(4) Md. A. Sattar Pada, and (5) Solaiman Mridha alias Soleman Mridha are found criminally liable under section 4(1) of the Act of 1973 for participating, abetting, facilitating, contributing and complicity in the commission of offences of ‘**confinement**’, ‘**torture**’ and ‘**rape**’ as offences of crimes against humanity as enumerated in section 3(2)(a)((g)(h) of the Act of 1973 which are punishable under section 20(2) of the said Act.

## **X. Conclusion**

409. The horrific events of attacks directing noncombatant civilians as found proved in the case depict split portrayal of the blood-bathed history of the birth of our dear motherland—**Bangladesh** Monstrous mass atrocities in Bangladesh began on the mid-night of 25 March, 1971 with the launch of ‘Operation Searchlight’ and it continued till the nation achieved its independence on 16 December 1971.

410. It is now settled fact of history that the local collaborators belonging to armed para militia forces – Razakar Bahini, Al-Badar, Al-Shams actively and culpably assisted and facilitated the Pakistani occupation army in conducting horrific mass atrocities and genocide in the territory of Bangladesh in 1971 during the war of liberation.

411. Defence does not dispute that infamous Razakar Bahini was created as an ‘auxiliary force’ as defined in section 2 of the Act of 1973. It is found proved that Razakar Bahini was formed at Itbaria under police station-Patuakhali Sadar of District[now]-Patuakhali with which all the five accused persons used to keep close affiliation, being its members intending to collaborate with the Pakistani occupation armed force, by maintaining ‘static relation’ for ‘operational’ purpose.

412. The protected non combatant Bengali civilians staying in the territory of Bangladesh in 1971 had to experience dreadful and countless experience of criminal acts done with the substantial contribution of the Razakar Bahini and its loyalty to Pakistani occupation army together with extreme antagonistic approach to the war of liberation made the members of such para militia force culpably imbued even to participate physically in committing the prohibited criminal acts directing civilian

population. In the case in hand, we have found it to happen at village-Itbaria.

413. In the case in hand, the victims of two events of attacks were the defenceless pro-liberation civilians and a number of defenceless women of village-Itbaria under police station Patuakhali Sadar of District [now] -Patuakhali. The accused persons in exercise of their affiliation with the locally formed Razakar Bahini deliberately collaborated with the Pakistani occupation army, in accomplishing the monstrous crimes as arraigned in both the charges framed.

414. The victims were not directly related to conflict and they the defenceless civilians were made deliberately selected as targets on account of their stance in favour of the war of liberation. A number of women were captured, taken away and kept detained at the army camp set up at Patuakhali circuit house where they were subjected to recurrent rape. Presumably, intending to terrorize the civilians those women were gravely assaulted in such a beastly way.

415. The charges involve the diabolical offences '**confinement,** **torture,** **abduction,** **rape** and **murder**' as crimes against humanity. The accused persons have been indicted for these

‘group crimes’ which are found to have been committed in ‘systematic’ manner and in context of war of liberation.

416. In the case in hand, the accused (1) Md. Esahaque Shikder (2) A. Gani alias A. Gani Howlader (3) Md. Awal alias Awal Moulavi (4) Md. A. Sattar Pada, and (5) Solaiman Mridha alias Soleman Mridha have been indicted in two charges which have been found proved beyond reasonable doubt.

417. Criminal acts the accused persons are found to have had committed were to further policy and plan of the Pakistani occupation army in the locality of village-Itbaria under Patuakhali Sadar police station of District-[now] Patuakhali] in 1971 were grave violation of internationally recognized human rights. It reminds once again how horrendous mass atrocities were committed directing non combatant civilians, on discriminatory grounds by the Pakistani occupation army and their local collaborators belonging to Razakar Bahini during the nine-month war of liberation in 1971 in the territory of Bangladesh. In the case in hand, the accused persons are found proved to have had active and substantial role in accomplishing the crimes as narrated in both the charges.

418. The evidence presented by the prosecution depicts patently that in conducting attacks at village-Itbaria all the five accused persons consciously and knowingly accompanied the group of perpetrators formed of Pakistani occupation army and Razakars and they did it intending to substantially assist the army men in getting the targets located and identified.

419. The accused persons not only simply accompanied the gang but they actively participated, by act of assistance, substantial contribution and facilitation forming part of systematic attack to the commission of devastating activities, abducting numerous women and killing a large number of civilians.

420. The accused persons are also found to have had physical participation in causing deliberate killing of civilians, during the attack and they are also found to have had substantial contribution and participation in effecting confinement of 15 women and causing grave sexual abuse upon them. All these criminal acts were carried out to further policy and plan of resisting the war of liberation and crippling the pro-liberation Bengali civilians.

421. The truth unveiled through trial before this tribunal obviously shall make the nation and especially the new generation enthused to go with the spirit of the war of liberation and it shall make space to the global community of knowing in exchange of what extent of sacrifice the Bengali nation achieved its long cherished independence and independent motherland—**Bangladesh.**

## **XI. VERDICT ON CONVICTION**

422. Burden of establishing the guilt of the accused persons squarely lies upon the prosecution. In the case in hand, in proving each count of charges brought against the accused persons, the standard has been found to be reasonably met as all the accused (1) Md. Esahaque Shikder (2) A. Gani alias A. Gani Howlader (3) Md. Awal alias Awal Moulavi (4) Md. A. Sattar Pada, and (5) Solaiman Mridha alias Soleman Mridha are found to have incurred liability for the crimes which have been proved beyond reasonable doubt.

423. Having cautious appraisal of all the evidences presented before us and arguments advanced by both parties and based upon the factual and legal findings set out in passing on judicially all the charges, the Tribunal [ICT-1] **UNANIMOUSLY** finds the accused-

- (1) Md. Esahaque Shikder (2) A. Gani alias A. Gani Howlader
- (3) Md. Awal alias Awal Moulavi (4) Md. A. Sattar Pada, and
- (5) Solaiman Mridha alias Soleman Mridha-

**Charge No.01: GUILTY** of participating, abetting, assisting, substantially contributing and also for complicity to the accomplishment criminal activities directing civilian population constituting the offence of ‘torture’, ‘abduction’ and murder’ as crimes against humanity as enumerated in section 3(2) (a)(g)(h) of the Act of 1973 and thus the accused persons incurred criminal liability under section 4(1) of the Act of 1973 and they be convicted and sentenced under section 20(2) of the said Act.

**Charge No.02: GUILTY** of participating, abetting, facilitating, contributing and also for complicity in the commission of offences of ‘**confinement**’, ‘**torture**’, and ‘**rape**’ constituting the offences of **crimes against humanity** as enumerated in section 3(2)(a)((g)(h) of the Act of 1973 and thus the accused persons incurred criminal liability under section 4(1) of the Act of 1973 and

they be convicted and sentenced under section 20(2) of the said Act.

## **XII. Verdict on Sentencing**

424. Mr. Zead Al Malum the learned prosecutor in advancing validation of awarding just sentence submitted that the crimes proved for which the accused persons incurred liability were extremely grave in nature. The arraignment brought in charge no.01 was horrific indeed and it involved the offence of indiscriminate killing happened in day time directing defenceless pro-liberation civilians and in conducting the attack the accused persons and their accomplices and army men opted to carry out wanton devastating activities and forcible capture of 15 women who were taken away under intimidation towards Patuakhali.

425. Some of victims who were kept in confinement at Patuakhali circuit house witnessed and experienced how their dear ones were killed and how culpably the accused persons participated to the commission of such horrific killings. The attack was deliberate and grave in nature and it continued for hours together. All these factors deserve to be taken into account in awarding highest punishment, the learned prosecutor added.

426. The learned prosecutor next submitted for awarding highest punishment also in respect of the offence of rape upon 15 women as it happened at Patuakhali circuit house keeping the victims in protracted captivity [as listed in charge no.02] on substantial contribution of all the accused persons.

427. Conversely, the learned defence counsels Md. Abdus Salam Khan and Md. Abdus Sattar Palwan without placing any submission on this aspect simply reiterated that prosecution failed to prove the accusation brought against the accused persons by adducing credible evidence and thus they deserve acquittal.

428. It is now settled that gravity entails the particular circumstances of the case, the form and degree of the participation of the accused in the crimes, the number of victims and length of time of continuing the attack. According to settled jurisprudence all these factors including the gravity of the offences committed is the deciding factor in the determination of the sentence to be awarded.

429. The settled legal proposition explicitly suggests taking the gravity of the crime into account as one of the key sentencing factors. The gravity of the offence is to be considered as the

starting point for consideration of an appropriate sentence. At the same time the sentence to be awarded should reflect the totality of criminal conduct the accused persons are convicted of.

430. In awarding sentence we must also eye on the untold trauma and harm sustained by the victims and their families. It also significantly deserves to be considered in weighing the gravity of offences.

431. **Charge no.01** involves the offence of ‘torture’, ‘abduction’ and ‘murder’ as crimes against humanity. Casualty occurred was extremely grave in nature. It has been found proved that the gang formed of Pakistani occupation army and Razakars including the accused persons deliberately and in planned way conducted the killing of numerous civilians of village Itbaria on discriminatory ground [as narrated in charge no.01]. The attack continued for hours together and in presence of relatives of victims.

432. Wanton destruction was carried out too intending to terrorize the villagers. The gang moving one place to another of the village wiped out pro-liberation civilians. The accused persons even physically participated in committing killings. It aggravates their liability.

433. In adjudicating this charge we have found it proved that the group of perpetrators formed of Pakistani occupation army, the accused persons, the members of Razakar Bahini and their accomplices deliberately carried out the massacre at village-Itbaria directing pro-liberation civilians.

434. Eye witnesses including the female relatives of victims recounted having watched their loved ones killed in a heinous manner, in conjunction with the attack. Not only that, 15 women including the 06 victims who came on witness box to narrate their trauma were forced to experience the killing of their dear ones and finally they were taken away.

435. Horrific terror spread throughout the crime village naturally did not allow the survived male inmates to resist the perpetrators although it was felt that their abduction was not for any pious purpose. What a brutality! It has been found proved too that inciting act on part of the accused persons secured killing of numerous civilians and abduction of 15 women.

436. All the criminal acts constituting those offences as narrated in charge no.01 could not be perpetrated without the active and culpable assistance and participation of all the accused persons who were the part of the criminal enterprise. Tribunal rendered

this finding based on facts unveiled. Mode of their participation as found proved from evidence of direct witnesses aggravates their liability.

437. Committing recurrent rape upon 15 women keeping them in captivity at the army camp set up at Patuakhali circuit house [as listed in **charge no.02**] has been proved. It happened pursuant to deliberate and systematic attack to which the accused persons were conscious part. The accused persons despite being Bengali consciously opted to facilitate victims' confinement. They by their act consciously participated in perpetrating the gravely shocking crimes upon the defenceless women at the army camp which was in fact a 'rape camp'.

438. The victims of recurrent rape in captivity have been carrying the trauma they sustained like a bullet for the rest of their lives. Stigma of such grave sexual invasion not only destroyed the victims' families but dehumanized the society. The perpetrators used the act of rape as a weapon which was more powerful than a bullet. Rape is thus a living death.

439. The women including the six victims who came on witness box are few number of hundreds of thousands women who sacrificed their supreme honour for the cause of our

independence. The rest of their life must be allowed to go on with utmost honour. In fact they fought by laying their highest self-worth, for the cause of our independence. It is the time to unlock the collective voice to recognise and honour our great mothers and sisters, the war heroines.

440. The Tribunal clearly affirms that crimes against humanity committed directing a number of women as narrated in charge no.02 are more serious even than the offence of mass killing. Crime of sexual invasion perpetrated by keeping 15 women in protracted captivity is particularly exceptionally shocking to the human conscience. Thus, precisely on account of their extreme gravity, offences of ‘confinement’ and ‘rape’ as crimes against humanity [as narrated in charge no.02] must be punished appropriately.

441. Thus, the sentence to be awarded must be appropriate and just considering the relative seriousness of the offences so that it can convey the degree of wrongdoing and not simply the commission of wrongdoings. The inherent nature of the violence and aggression conducted at village-Itbaria [as narrated in charge no.01] indisputably makes the issue of awarding just punishment extremely imperative.

442. The event of massacre constituting the offence of crimes against humanity [as listed in charge no.01] for which all the five accused persons have been found guilty is a small portrayal of the horrific discriminatory killing of pro-liberation civilians in the territory of Bangladesh in 1971. Crimes committed upon unlawfully detained 15 women in captivity [as listed in charge no.02] were the upshot of attack as narrated in charge no.01. Thus, the proved arraignments brought in both the charges collectively increase the magnitude of the crimes which deserves to be considered as an aggravating factor.

443. Inappropriate lesser sentence causes injustice not only to the victims of crimes but sometimes to the whole society. Thus, Letters of law cannot remain non responsive to the victims and relatives of martyrs and the nation too who have been still carrying colossal and unspeakable trauma.

444. In view of deliberation as made above and considering the nature and proportion to the gravity of the offences and also keeping the factors as focused above into account we are of the UNANIMOUS view that justice would be met if the convicted accused persons who have been found guilty beyond reasonable doubt for the crimes proved are condemned and sentenced as below, under the provision of section 20(2) of the Act of 1973:

Hence it is

## **ORDERED**

**That all the five the accused—**

**(1) Md. Esahaque Shikder** , son of late Osman Shikder alias Afsher Shikder and late Abetun Nesa of Village-Gilabonia, Police Station Patuakhali Sadar, District Patuakhali, at present near western Zia Road, Police Station Patuakhali Sadar, District- Patuakhali,

**(2) A. Gani alias A. Gani Howlader** , son of late Kasem Howlader and late Syatun Nesa of Village Galachipa, Police Station Patuakhali Sadar, District-Patuakhali,

**(3) Md. Awal alias Awal Moulavi** , son of late Nur Ahmmad and late Azimon Nesa Begum of Village Galachipa, Police Station Patuakhali Sadar, District-Patuakhali

**(4) Md. A Sattar Pada** , son of late Fazle Karim Pada alias Fazlu Pada and late Jamina Khatun alias Ful Bhanu Khatun of Village-Sharikkhali, Police Station Patuakhali Sadar, District Patuakhali, at present near western side of Shishu Park, Police Station Patuakhali Sadar, District Patuakhali, AND

**(5) Solaiman Mridha alias Soleman Mridha** , son of late Hachon Ali Mridha and late Hakim Janbibi of Village Ballav, Police Station Patuakhali Sadar, District Patuakhali--

Are found UNANIMOUSLY guilty of the offences of **‘torture’**, **‘abduction’** and **‘murder’** as crimes against humanity enumerated in section 3(2)(a)(g)(h) of the International Crimes(Tribunals) Act of 1973 as listed in **charge no.01** and also of the offences of **‘confinement’**, **‘torture’** and **‘rape’** as **crimes against humanity** enumerated in section 3(2)(a)(g)(h) of the International Crimes(Tribunals) Act of 1973 as listed in **charge no.02**. Accordingly, they be convicted and condemned UNANIMOUSLY to the sentence as below:

**‘Sentence of death’** for the crimes as listed in charge **no.01** and they be hanged by the neck till they are dead, under section 20(2) of the International Crimes (Tribunals) Act, 1973; **AND**

**‘Sentence of death’** for the crimes as listed in charge **no.02** and they be hanged by the neck till they are dead, under section 20(2) of the International Crimes (Tribunals) Act, 1973;

The **‘sentences of death’** as awarded above, in respect of charge nos. 01 and 02 will get merged.

The **‘sentence of death’** awarded as above under section 20(2) of the International Crimes (Tribunals) Act , 1973 [The Act No.XIX of 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.

The convicts are at liberty to prefer appeal before the Appellate Division of the Supreme Court of Bangladesh against their conviction and sentence within 30 [thirty] days of the date of order of conviction and sentence as per provisions of section 21 of the International Crimes (Tribunals) Act, 1973.

Let certified copy of the judgment also be furnished to the prosecution and the accused, free of cost, at once.

Issue conviction warrant against the convicted accused (1) Md. Esahaque Shikder,(2) A. Gani alias A. Gani Howlader,(3) Md. Awal alias Awal Moulavi,(4) Md. A. Sattar Pada, and (5) Solaiman Mridha alias Soleman Mridha.

Let copy of the judgment together with the conviction warrant be sent also to the District Magistrate, Dhaka for information and causing necessary action.

**Justice Md. Shahinur Islam, Chairman**

**Justice Amir Hossain, Member**

**Justice Md. Abu Ahmed Jamadar, Member**