

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

ICT-BD Case No.04 OF 2014

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

The Chief Prosecutor

Versus

- 1. Md. Obaidul Haque alias Taher, and**
- 2. Aaur Rahman alias Noni**

Present:

**Mr. Justice Anwarul Haque, Chairman
Mr. Justice Md. Shahinur Islam, Member
Mr. Justice Md. Shohrwardi, Member**

Prosecutors:

Mr. Golam Arif Tipu, Chief Prosecutor with
Mr. Syed Haider Ali
Mr. Rana Das Gupta
Mr. Zead-Al-Malum
Mr. Hrishikesh Saha
Mr. Moklesur Rahman
Mr. Md. Altab Uddin
Ms. Turin Afroz
Mr. Abul Kalam
Ms. Sabina Yesmin Khan

Defence Counsels:

Mr. Abdus Sobhan Tarafdar
Mr. Syed Mizanur Rahman
Mr. Gazi M.H. Tamim
Mr. Md. Mahfuzul Haque

Date of delivery of Judgment: 2nd February, 2016.

JUDGMENT

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

I. Introductory Words

01. Accused Md. Obaidul Haque alias Taher, son of late Monjurul Haque and late Jahura Khanam of village Shunoi

Bhogpara, Police Station Atpara, District Netrokona, presently Mokterpara [Masjid Quarter], Police Station and District Netrokona, and accused Aatur Rahman alias Noni, son of late Ahsan Ali alias Achhan Ali alias Hachhen Ali and late Khatemunnesa of village Kochander, Police Station Kendua, District Netrokona, presently 655, Mokterpara [Masjid Quarter], Police Station and District Netrokona have been put on trial before this Tribunal-1 at the instance of the Chief Prosecutor to answer charges under section 3(2)(a)(c)(g)(h) read with section 4(1) of the International Crimes (Tribunals) Act, 1973.

02. This International Crimes Tribunal-1 [hereinafter referred to as the "**Tribunal**"] was established under the International Crimes (Tribunals) Act enacted in 1973 [hereinafter referred to as the '**Act of 1973**'] by Bangladesh Parliament to provide for the detention, prosecution and punishment of persons responsible for genocide, crimes against humanity, war crimes and other class crimes committed in the territory of Bangladesh, in violation of customary international law, particularly in between the period of 25 March and 16 December, 1971. However, no Tribunal was set up, and as such, no one could be brought to justice under the Act of 1973 until the government established the Tribunal on 25 March, 2010.

II. Jurisdiction of the Tribunal under ICT Act of 1973.

03. The International Crimes (Tribunals) Act, 1973 states about the jurisdiction of the Tribunal and crimes in section 3 as follows:

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

(2) The following acts or any of them are crimes within the jurisdiction of a Tribunal for which there shall be individual responsibility, namely:-

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

(b) Crimes against Peace: namely, planning, preparation, initiation or waging of a war of

aggression or a war in violation of international treaties, agreements or assurances;

(c) Genocide: meaning and including any of the following acts committed with intent to destroy, in whole or in part, a national, ethnic, racial, religious or political group, such as:

(i) killing members of the group;

(ii) causing serious bodily or mental harm to members of the group;

(iii) deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part;

(iv) imposing measures intended to prevent births within the group;

(v) forcibly transferring children of the group to another group;

(d) War Crimes: namely, violation of laws or customs of war which include but are not limited to murder, ill-treatment or deportation to slave labour or for any other purpose of civilian population in the territory of Bangladesh; murder or ill-treatment of

prisoners of war or persons on the seas, killing of hostages and detainees, plunder of public or private property, wanton destruction of cities, towns or villages, or devastation not justified by military necessity;

(e) violation of any humanitarian rules applicable in armed conflicts laid down in the Geneva Conventions of 1949;

(f) any other crimes under international law;

(g) attempt, abetment or conspiracy to commit any such crimes;

(h) complicity in or failure to prevent commission of any such crimes."

To our understanding the proper construction of this section should be-

04. Crimes against humanity can be committed even in peace time; existence of armed conflict is, by definition, not mandatory. Neither in the preamble nor in the jurisdiction sections of the Act of 1973 was it mentioned that crime against humanity requires the existence of an armed conflict. Indiscriminate attack on civilian population based on their political, racial, ethnic or religious identity can be termed as crimes against humanity even if it takes

place after 1971. However, no one denies the fact that there was an armed conflict in 1971.

III. Consistency of the Act of 1973 with other Statutes on International Crimes

05. We have already quoted section 3 of the International Crimes (Tribunals) Act, 1973 where jurisdictions of the Tribunal and crimes have been stated. Now let us see the jurisdiction of other International Tribunals and definition of crimes against humanity provided in their Statutes on international crimes.

Article-7 of the Rome Statute

06. According to Article 7 of the Rome Statute, “crime against humanity” means any of the following acts when committed as part of a widespread or systematic attack directed against any civilian population, with knowledge of the attack:

- (a) Murder; (b) Extermination; (c) Enslavement; (d) Deportation or forcible transfer of population; (e) Imprisonment or other severe deprivation of physical liberty in violation of fundamental rules of international law; (f) Torture; (g) Rape, sexual slavery, enforced prostitution, forced pregnancy, enforced sterilization, or any other form of sexual violence of comparable gravity; (h) Persecution against any identifiable group or collectivity on political, racial, national, ethnic, cultural,

religious, gender as defined in paragraph 3, or other grounds that are universally recognized as impermissible under international law, in connection with any act referred to in this paragraph or any crime within the jurisdiction of the Court; (i) Enforced disappearance of persons; (j) The crime of apartheid; (k) Other inhumane acts of a similar character intentionally causing great suffering, or serious injury to body or to mental or physical health.

Article 3 of the ICTR

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

Article 5 of the ICTY

08. The International Criminal Tribunal for former Yugoslavia [ICTY] shall have the power to prosecute persons responsible for the (a) murder, (b) extermination, (c) enslavement, (d) deportation, (e) imprisonment, (f) torture, (g) rape, (h) persecutions on political,

racial and religious grounds and (i) other inhumane acts when committed in armed conflict, whether international or internal in character, and directed against any civilian population.

09. Under the Rome Statute [Article 7] and Statute of the International Criminal Tribunal for Rwanda [Article 3] the jurisdiction of the Tribunals were given to try offences of 'crimes against humanity' such as murder, extermination, deportation, torture, rape etc. of the person/ persons when the offences committed as a **widespread or systematic attack directed against any civilian population on national, ethnic, racial or religious grounds**. According to ICTY [Article 5] existence of armed conflict is the key element to try offences of crimes against humanity, directed against the civilian population.

10. But the Appellate Division of our Supreme Court in the case of **Abdul Quader Molla Vs. Government of Bangladesh**, vis-a-vis has observed to the effect [majority view]:

"Whereas, under our Act, 1973 the tribunal has jurisdiction to prosecute and punish any person irrespective of his nationality who being a member of any armed, defence or auxiliary forces commits, whether before or after the commencement of the Act, Crimes against Humanity, Crimes against Peace, Genocide and

other crimes connected therewith during the period of war of liberation. The offences of murder, extermination, rape or other inhumane acts committed against civilian population or persecutions on political, racial, ethnic or religious grounds are included in the offence of crimes against Humanity. "

"For commission of the said offence [crimes against Humanity], the prosecution need not require to prove that while committing any of offences there must be 'widespread and systematic' attack against 'civilian population'. It is sufficient if it is proved that any person/ persons attack against 'civilian population'. It is sufficient if it is proved that any person/ persons committed such offence during the said period or participated or attempted or conspired to commit any such crime during operation search light in collaboration with the Pakistani Regime upon unarmed civilian with the aim of frustrating the result of 1970 National Assembly election and to deprive the fruits of the election result." [Page,241-242].

11. In view of the above observation of the Appellate Division it is now well settled that in our jurisdiction for constituting the offence of crimes against humanity the element 'the attack must be widespread and systematic against civilian population' is not at all necessary or mandatory.

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

13. As per section 3(2) of the Act of 1973 to constitute an offence of crime against humanity, the element of attack directed against any civilian population is required. The "*population*" element is intended to imply crimes of a collective nature and thus exclude single or isolated acts. Thus, the emphasis is not on the individual victim but rather on the collective, the individual being

victimized not because of his individual attributes but rather because of his membership of a targeted civilian population. This has been interpreted to mean that the acts must occur on a large scale basis [widespread] or, that there must be some form of a governmental, organizational or group policy to commit these acts [systematic, targeted] and that the perpetrator must know the context within which his actions are taken [knowledge and intent], and finally that attack must be committed on discriminatory grounds in case of persecution.

14. The attack must be directed against any civilian population. The term “*civilian population*” must be interpreted broadly and refers to a population that is predominantly civilian in nature. A population may qualify as “*civilian*” even if non-civilians are among it, as long as it is predominantly civilian. The presence within a population of members of armed resistance groups, or former combatants, who have laid down their arms, does not as such alter its civilian nature.

15. However, for our better understanding it is needed to know the meaning and scope of 'widespread' and 'systematic' attack. '*Widespread*' refers to the large-scale nature of the attack which is primarily reflected in the number of victims. '*Systematic*' refers to the organized nature of the acts of violence and the '*non-accidental*

repetition of similar criminal conduct on a regular basis.'

Widespread is quantitative while systematic is qualitative.

IV. Salient features of ICT Act of 1973 and International Crimes (Tribunal-1) Rules of Procedure, 2010 [ROP, 2010] applicable to trial procedure.

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

to conditions as imposed by it as per rule 34(3) of the ROP, 2010. The Tribunal may, as and when necessary, direct the concerned authorities of the government to ensure protection, privacy, and well-being of the witnesses and victims as per rule 58 A of the ROP, 2010.

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

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

19. All the aforesaid rights have been provided to the accused to ensure fair justice. In addition to observation of those elements of fair justice, the Tribunal has adopted a practice by passing an order that while an accused in custody is interrogated by the investigation

officer, at that time, the defence counsel and a doctor shall be present in the adjacent room of the interrogation room, and the defence counsel is permitted to meet the accused during break time and at the end of such interrogation. The doctor is also allowed to check-up the physical condition of the accused, if necessary. All these measures are being taken by the Tribunal to ensure fair investigation as well as trial.

20. Before going into discussion and evaluation of the evidence on record, it is needed to be mentioned here that this Tribunal has already resolved some common legal issues agitated by the defence in the following cases of the Chief Prosecutor vs. Delwar Hossain Sayeedi [ICT-BD Case No. 01/2011], The Chief Prosecutor Vs. Professor Ghulam Azam [ICT-BD Case No. 06/2011], the Chief Prosecutor Vs. Salauddin Qader Chowdhury [ICT-BD Case No. 02/2011] and the Chief Prosecutor Vs. Motiur Rahman Nizami [ICT-BD Case No.03 of 2011]. Apart from this, the Appellate Division of our Supreme Court in the cases of Abdul Quader Molla Vs Government of the People's Republic of Bangladesh and vis-a-vis [Criminal Appeal Nos. 24-25 of 2013], Muhammad Kamaruzzaman vs. The Chief Prosecutor [Criminal Appeal No. 62 of 2013], Ali Ahsan Muhammad Mujahid vs. The Chief Prosecutor [Criminal Appeal No. 103 of 2013], Salauddin Qader Chowdhury vs. The Chief Prosecutor [Criminal Appeal No. 122 of 2013] and

Allama Delwar Hossain Sayedee vs. The Government of the People's Republic of Bangladesh and vis-a-vis [Criminal Appeal Nos. 39-40 of 2013] has also decided the legal issues involved in the cases under the Act of 1973.

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

- i. Customary International Law [CIL] shall not be applied if it is contrary to the Act of 1973;
- ii. There is no rule of CIL that prohibits our domestic Tribunal to proceed with the trial as per our domestic legislation;
- iii. Our domestic Tribunal has the jurisdiction to continue with the trial in any manner acting in derogation of rules of public international law;
- iv. There is nothing repugnant to CIL in the Act of 1973, rather it is consonant with the provisions of CIL;
- v. the inordinate delay in commencing any proceedings under the Act of 1973 *ipso facto* can not be a ground to doubt the truth or veracity of the prosecution case;
- vi. by the amendment of section 3(1) of the Act of 1973 through Act No.LV of 2009 the jurisdiction of the Tribunal has been extended to try and punish 'any individual,' 'organization' or 'group of individuals' besides any member of any armed, defence or auxiliary forces,

irrespective of his nationality who has committed crimes against Humanity mentioned in section 3(2) of the Act of 1973;

vii. the Act of 1973 is a protected law and the moment, sub-section (1) of section 3 was amended by way of substitution, it became part of the Statute and it got the protection of any legal challenge to be void or unlawful or even to have become void or unlawful in view of the provisions of Article 47(3) of our Constitution;

viii. the clemency given to the admitted prisoners of War, pursuant to the tripartite agreement of 1974, in no way, either match the Act of 1973 or any of its provisions ineffective, invalid or void;

ix. mere failure of the successive governments to act in accordance with the Act of 1973 for last more than forty years, in no way, gave any right to the accused to be exonerated from being tried for the commission of crimes against Humanity as mentioned in section 3(2) of the Act of 1973;

x. in the Act of 1973, no limitation has been prescribed for initiating proceedings against any individual or group of individuals or organization or any member of any armed, defence or auxiliary forces irrespective of his

nationality for the commission of crimes mentioned in section 3(2) of the Act of 1973;

xi. the Collaborators Order, 1972, a different legislation aiming to prosecute the persons for the offences punishable under the Penal Code, were scheduled in the Collaborators Order, 1972, while the Act of 1973 has been enacted to prosecute and try the persons for crimes against Humanity, genocide and other crimes committed in violation of customary international law [CIL], and as such, there is no scope to characterize the offences indulging in the Collaborators Order, 1972 to be the same offences as specified in the Act of 1973;

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

VI. Historical Backdrop and Context

21. In August, 1947 the partition of British India based on two-nation theory, gave birth to two new States, one a secular State named India and the other the Islamic Republic of Pakistan of

which the western zone was eventually named as West Pakistan and the eastern zone as East Pakistan, which is now Bangladesh.

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

23. In the general election of 1970, the Awami League under the leadership of Bangabandhu Sheikh Mujibur Rahman became the majority party of Pakistan. Despite this overwhelming majority, Pakistan government did not hand over power to the leader of the majority party as democratic norms required. As a result, movement started in this part of Pakistan and Bangabandhu Sheikh Mujibur Rahman in his historic speech of 7 March, 1971, called on the Bangalee people of the eastern zone to strive for independence if people's verdict would not be respected and power was not handed over to the leader of the majority party. On 26 March, 1971 following the onslaught of "**Operation Search Light**" by the Pakistani Military on 25 March, Bangabandhu Sheikh Mujibur Rahman declared Bangladesh independent immediately before he was arrested by the Pakistani army.

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

25. The Pakistan government and the military with the help of some pro-Pakistani leaders set up a number of auxiliary forces, such as, the Razakar Bahini, the Al-Badr Bahini, the Al-Shams, the Peace Committee etc, essentially to collaborate with the Pakistani army in identifying and eliminating all those who were perceived to be sympathized with the liberation of Bangladesh, individuals belonging to minority religious groups especially the Hindus, political groups belonging to Awami League and other pro-independence political parties, Bangalee intellectuals and civilian population of Bangladesh. Undeniably the road to freedom for the

people of Bangladesh was arduous and torturous, smeared with blood, toil and sacrifices. In the contemporary world history, perhaps no nation paid as dearly as the Bangalees did for their emancipation.

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

VII. Brief Account of the Accused Persons:

27. (i) Accused Md. Obaidul Haque alias Taher [65], son of late Monjurul Haque and late Jahura Khanam of village Shunoi Bhogapara, Police Station- Atpara, District- Netrokona, presently Mokterpara [Masjid Quarter], Police Station and District Netrokona

was born on 01.01.1950. He obtained B.Com degree. In 1971, he was an active leader of Nezam-e-Islami. During the Liberation War in 1971, he joined the Razakar Bahini, an auxiliary force of Pakistani occupation army and became the commander of Razakar Bahini of Netrokona Sadar and being a potential member of Razakar Bahini committed various crimes against humanity and genocide in 1971 in different areas of the then Netrokona Sub-Division as prosecution alleges. Presently, he is involved with the politics of Bangladesh Nationalist Party [BNP] and doing business at Netrokona town.

28. (ii) Accused Aatur Rahman alias Noni [62] is the son of late Ahsan Ali alias Achhan Ali alias Hachhen Ali and late Khatemunnesa of village-Kochandera, Police Station-Kendua, District-Netrokona, and at present 655, Mokterpara [Masjid Quarter], Police Station and District Netrokona. He passed the SSC examination. In the SSC certificate his date of birth has been mentioned as 07.07.1956, but in the National Identify Card it has been mentioned as 08.08.1958. However, the prosecution has claimed that the accused was 19 years old in 1971 and at present he is 62 years old. In 1971, during the War of Liberation, he joined the Razakar Bahini and committed various crimes against Humanity and genocide in different areas of the then Netrokona Sub-Division

as prosecution alleges. At present he has been doing business at Netrokona town.

VIII. Procedural History

29. Pursuant to the warrant of arrest dated 12.08.2014 issued by this Tribunal in ICT-BD Misc. Case No.04 of 2014, the members of law enforcing agencies having arrested accused Md. Obaidul Haque alias Taher and Aatur Rahman alias Noni produced them before this Tribunal on 13.08.2014.

30. The Chief Prosecutor submitted formal charge under section 9(1) of the Act of 1973 in the Tribunal on 03.12.2014 on the basis of Investigation Report of the Investigation Agency. It has been alleged in the formal charge that during the War of Liberation in 1971, the accused persons as the potential members of Razakar Bahini, an auxiliary force of Pakistani occupation army had committed crimes against humanity and genocide by way of abetting, aiding, participating and providing moral support to commit such crimes in different places of the then Netrokona Sub-Division. On perusal of the formal charge, statement of witnesses and the documents submitted by the prosecution, the Tribunal on 11.12.2014 took cognizance of offences as specified in section 3(2) read with section 4(1) and 4(2) of the Act of 1973 against the accused persons.

31. The prosecution was then directed to furnish copies of formal charge and documents submitted therewith which it intends to rely upon, for supplying the same to the learned defence counsels for preparation of the defence.

32. Before this Tribunal, in course of hearing the charge framing matter, the learned prosecutor Md. Moklesur Rahman made submissions in support of framing charge against the accused persons in the light of the formal charge together with statements of witnesses and documents submitted therewith. While Mr. Shah Mohd. Shahabuddin and Mr. Mizanul Islam, the learned defence counsels for accused Md. Obaidul Haque alias Taher and Aatur Rahman alias Noni by submitting two separate applications for discharge of the accused persons made elaborate submissions for discharging the respective accused from the charges brought against them.

IX. Witnesses adduced by the parties

33. The prosecution submitted a list of 32[thirty two] witnesses along with formal charges and documents. But at the time of the trial, the prosecution has examined in all 23[twenty three] witnesses including the investigation officer. The prosecution has also adduced some documentary evidence which were duly marked as exhibits 1-10.

34. On behalf of accused Aatur Rahman alias Noni a list of 06[six] witnesses was submitted under section 9(5) of the Act of

1973, but eventually no witness was examined on behalf of that accused. On the other hand no list of witnesses was submitted on behalf of accused Md. Obaidul Haque alias Taher. But the learned defence counsel for both the accused persons has cross-examined all the prosecution witnesses.

X. Defence case of the accused persons

35. It is the defence case that accused Md. Obaidul Haque alias Taher and Aatur Rahman alias Noni were never Razakar Commander or Razakar. Exhibit-1, a list prepared by local Muktijodhdha Command Unit showing the names of accused persons as Razakars is an unauthenticated document, and as such, it does not prove the accused persons' membership in local Razakar Bahini in 1971. Prosecution has failed to substantiate this fact by any reliable documentary evidence. Mere oral testimony is not enough to arrive at a conclusion in this regard. Further, according to the S.S.C certificate of accused Aatur Rahman alias Noni, as collected by the I.O. [P.W. 23], his date of birth is 07.07.1956 which shows that he was a boy of 15 years old in 1971, and as such, it was impracticable to claim that he belonged to Razakar Bahini. The further defence case is that during the liberation war in 1971, the accused persons never went to the alleged crime sites and also never participated, abetted or facilitated the atrocities as alleged by the prosecution, and as such, all the charges brought against the

accused persons involving with the offences of genocide and crimes against humanity are false, fabricated and motivated.

XI. Burden of the prosecution

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

XII. Summing up of the prosecution case

37. Mr. Mokhlesur Rahman, the learned prosecutor advancing argument by drawing attention to the oral evidence of many of witnesses together with Exhibit-1, the list of Razakars has contended that the accused persons were members of local Razakar Bahini in 1971. The learned prosecutor has also summed up the context and brief history and the atrocious activities carried out across the territory of Bangladesh in 1971, committed by the

Pakistani occupation army and the Razakar force, armed organ acting under it.

38. Next, Ms. Sabina Yesmin Khan, the learned prosecutor started arguing on each charges and accordingly she has argued on charge nos. 1,2,3,4and 5. In this way prosecution concluded its argument contending that it has been able to prove the charges and complicity of the accused persons therewith. At a stage, Mr. Mokhlesur Rahman, the learned prosecutor has placed argument on charge no.06 that relates to the alleged event of genocide or murder as crimes against humanity. Argument advanced on each charge may conveniently be addressed independently while discussing and evaluating evidence adduced in support of charges.

XIII. Suming up of the defence case

39. Mr. Abdus Sobhan Tarafdar, the learned defence counsel has argued first that the accused persons did not belong to local Razakar Bahini; that they were not involved with any of the offences alleged in any manner; that the Exhibit-1, a list prepared by local Muktijodhdha Command Unit showing the names of accused persons as Razakars is an unauthenticated document which cannot be relied upon and merely on the basis of oral testimony it cannot be concluded that they belonged to Razakar force; that according to the IO [P.W.23] accused Ataur Rahman alias Noni passed SSC examination in 1971 which indicates his minor age at the relevant time, and as such, evidence implicating him with the

alleged offences is incredible. The learned counsel has further submitted that according to the National Identity Card [NID] many of the prosecution witnesses were minor in 1971, and thus, they were not competent to narrate the events they allegedly witnessed or heard, and in this way the defence has questioned reliability of testimony of those witnesses.

40. The learned defence counsel has advanced his argument in respect of charge nos. 01, 02, 03 and 05 drawing attention to inconsistencies between the witnesses and his argument has extended in respect of those charges which may be well addressed while those charges will be adjudicated independently.

41. Mr. Gazi M.H.Tamim, another learned defence counsel has argued on charge nos. 04 and 06 contending that prosecution has failed to prove these two charges and the evidence provided in support of these charges do not offer requisite elements to constitute the offences alleged in these two charges and there has been no evidence whatsoever as to alleged engagement or concern of the accused persons to the commission of offences narrated in these two charges..

XIV. Rebuttal by the prosecution

42. Learned prosecutor Mr. Mokhlesur Rahman during submission on rebuttal has argued that according to the settled jurisprudence, an accused person can be held equally responsible

for the crime for which he is charged with if it is proved that he was part of the plan and design of committing the crime and this jurisprudence corresponds to section 4(1) of the Act of 1973. He has further submitted that the accused persons are thus liable for the atrocious criminal acts constituting the offences of crimes against humanity even if they are not found to have had physical participation to the commission of actual crime.

XV. Whether the accused persons can be prosecuted without prosecuting their accomplices

43. The learned defence counsels referring to the evidence on record and rule 36 of ROP, 2010 have raised a legal question that some Razakars and co-perpetrators, who are still alive, accompanied the accused persons at the crime sites in committing the crimes have not been brought to book by the prosecution as well as the investigation agency, and as such, initiation of the proceeding against the present accused persons on the basis of '**pick and choose**' policy is malafide one and it has vitiated the whole trial.

44. It is true that from the testimonies of some prosecution witnesses it is revealed that some armed Razakars and co-perpetrators accompanied the accused persons at the crime sites in committing the crimes. Excepting the present accused persons, none of their accomplices have been brought to justice, but that by

itself does not make the horrendous episode of atrocities directing attack on the civilian population constituting the offences of crimes against humanity and genocide untrue or give any immunity to the present accused persons. If the accused persons are found guilty and criminally liable beyond reasonable doubt for their culpable acts, inaction in prosecuting their accomplices cannot be the reason for holding the former innocent or relieved from liability. In this regard we may recall the provision as contained in section 4(1) of the Act of 1973 which states that when any crime as specified in section 3 of the said Act is committed by several persons each of such person is liable for that crime in the same manner as if it were done by him alone. Further, we have no hesitation to hold that rule 36 of ROP, 2010 is not mandatory but directory. Non compliance of the said rule *ipso-facto* does not vitiate the trial.

45. It may be mentioned here that we did not find any provision within the four corners of the Act of 1973 that all the perpetrators of an offence must be tried in one trial, failing which one of the perpetrators against whom if any proceeding is brought that would be vitiated. There is a basic principle of criminal jurisprudence that a man cannot be vexed twice for the same cause of action. But one of the perpetrators of an offence cannot be absolved *ipso facto* for non bringing the other perpetrators in the same trial with him. So, the submission made by the learned defence counsels in respect of

this issue has no leg to stand. In this regard we find support from the case of the **Prosecutor vs. Brdjanin [Case No. IT-99-36-T, September 1, 2004, para -728]** where the ICTY Trial Chamber observed –

“An individual can be prosecuted for complicity in genocide even when the perpetrator of genocide has not been tried or even identified.”

46. The ICTY Trial Chamber in the case of Prosecutor vs. Stakic [Case No. IT-97-24-T, July 31, 2003, para 533] also observed that –

“The trial Chamber is aware that an individual can be prosecuted for complicity even where the perpetrator has not been tried or even identified and that the perpetrator and accomplice need not know each other.”

47. However, the failure of the Investigation Agency and the prosecution in not bringing all the co-perpetrators who are still alive in one trial is no doubt frustrating, disappointing and undesirable. We are constrained to express our dissatisfaction on such unmindful investigation of the case. In this connection we would like to mention that as per sections 9 and 10 of the Act of 1973 the Tribunal is not empowered to initiate any proceeding or

frame charge [s] against any person [s], against whom formal charge has not been submitted.

XVI. General Considerations Regarding the Evaluation of Evidence in a case of Crimes against Humanity

48. The accused persons who were allegedly the members of ‘auxiliary forces’ as defined in section 2(a) of the Act of 1973 have been charged for the offences enumerated in section 3(2) of the Act of 1973. The offences for which they have been indicted were ‘system crimes’ committed in violation of international humanitarian law in the territory of Bangladesh in 1971.

49. The accused persons have been brought to justice more than four decades after the barbaric offences occurred. The case so far as it relates to the alleged facts of criminal acts constituting the alleged offences is predominantly founded on oral evidence presented by the prosecution. Together with the circumstances to be divulged it would be expedient to have a look to the facts of common knowledge of which Tribunal has jurisdiction to take into its judicial notice [section 19(3) of the Act of 1973], for the purpose of unearthing the truth. Inevitably, determination of the related legal issues will be of assistance in arriving at decision on facts in issues.

50. Totality of its horrific profile of atrocities committed in 1971 naturally left little room for the people or civilians to witness the entire events of the criminal acts. Some times it also happens that

due to the nature of international crimes, their chaotic circumstances, and post-conflict instability, these crimes usually may not be well-documented by post-conflict authorities.

51. We reiterate that section 23 of the Act of 1973 provides that the 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 this Act. Section 19(1) of the Act provides that the Tribunal shall not be bound by technical rules 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.

52. In adjudicating the atrocious events alleged and complicity of the accused persons therewith we have to keep the ‘context’ in mind in the process of assessment of evidence adduced. The reason is that the term ‘**context**’ refers to the events, organizational structure of the group of perpetrators, *para militia* forces, policies that furthered the alleged crimes perpetrated in 1971 during the war of liberation.

53. It is to be noted too that the testimony even of a single witness on a material fact does not, as a matter of law, require corroboration for a finding to be made. This jurisprudence as propounded by our own jurisdiction shall seem compatible to the

principle enunciated by *ad hoc* tribunal [ICTR] wherein it has been observed as under -

“Corroboration of evidence is not necessarily required and a Chamber may rely on a single witness’ testimony as proof of a material fact. As such, a sole witness’ testimony could suffice to justify a conviction if the Chamber is convinced beyond all reasonable doubt.”
[Nchamihigo, (ICTR Trial Chamber), November 12, 2008, para. 14].

54. In the earlier cases disposed of by this Tribunal in exercise of its jurisdiction it has been settled that hearsay evidence is not readily inadmissible *per se* but it is to be evaluated in light of probability based on corroboration by ‘other evidence’. That is to say, hearsay evidence is admissible and the court can act on it in arriving at decision on fact in issue, provided it carries reasonable probative value [rule 56(2) of the ROP, 2010]. We have already recorded our same view on this issue in different cases. This view finds support too from the principle enunciated in the case of *Muvunyi* which is as below:

“Hearsay evidence is not per se inadmissible before the Trial Chamber. However, in certain circumstances, there may be good reason for the Trial Chamber to consider whether hearsay evidence is supported by other credible and reliable evidence adduced by the Prosecution in order to support a finding of fact beyond reasonable doubt.”
“[Muvunyi, (ICTY Trial Chamber), September 12, 2006, para. 12]

55. Next, it has already been settled by the Tribunal and the Apex Court as well, in earlier cases, that an insignificant discrepancy does not tarnish witness's testimony in its entirety. Any such discrepancy, if found, needs to be contrasted with surrounding circumstances and testimony of other witnesses. In this regard, in the case of **Nchamihigo** it has been observed by **the Trial Chamber of ICTR** that --

"The events about which the witnesses testified occurred more than a decade before the trial. Discrepancies attributable to the lapse of time or the absence of record keeping, or other satisfactory explanation, do not necessarily affect the credibility or reliability of the witnesses.....The Chamber will compare the testimony of each witness with the testimony of other witness and with the surrounding circumstances."

The Prosecutor v. Simeon Nchamihigo, ICTR-01-63-T, Judgment, 12 November 2008, para 15]

56. The alleged events of atrocities were committed not at times of normalcy. The offences for which the accused persons have been charged occurred during the war of liberation of Bangladesh in 1971. Requirement of production of dead body as proof to death does not apply in prosecuting crimes enumerated under the Act of 1973. A victim's death may be established even by circumstantial evidence provided that the *only* reasonable inference is that the

victim is dead as a result of the acts or omissions of the accused constituting the offence.

57. In order to assess the culpability of accused persons, their act and conduct forming part of the attack have to be taken into account to see whether such act or conduct facilitated or substantially contributed to the commission of the crimes alleged. Physical participation to the actual commission of the principal offence is not always indispensable to incur culpable responsibility. The act and conduct of accused are sufficient to form part of the attack if it had a substantial link to the perpetration of the principal crime. It has been observed in the case of *Tadic*, [*Trial Chamber: ICTY, May 7, 1997, para. 691*] that:

"Actual physical presence when the crime is committed is not necessary . . . an accused can be considered to have participated in the commission of a crime . . . if he is found to be 'concerned with the killing.'"

58. However, according to universally recognised jurisprudence and the provisions as contained in the ROP, 2010 onus squarely lies upon the prosecution to establish accused persons' presence, acts or conducts, and omission forming part of attack that resulted in actual commission of the offences of crimes against humanity and genocide as enumerated in section 3(2) of the Act of 1973 for which they have been arraigned. Therefore, until and unless the accused persons are found guilty they shall be presumed innocent.

Keeping this universally recognised principle in mind we shall go ahead with the task of evaluation of evidence provided.

59. The accused persons and the witnesses and victims, as we find in the case in hand, were the residents of the same locality. In absence of anything contrary, it was thus quite natural for the people of being aware as to which persons of their locality were the Razakars.

60. In the case in hand, most of the prosecution witnesses have testified the acts, conducts of the accused persons which allegedly facilitated and substantially contributed to the commission of the principal events. Naturally, considerable lapse of time may affect the ability of witnesses to recall facts they heard and experienced with sufficient and detail precision. Thus, assessment of the evidence is to be made on the basis of the totality of the evidence presented in the case before us and also considering the context prevailing in 1971 in the territory of Bangladesh. Credibility of evidence adduced is to be weighed in the context of its relevance and circumstances.

XVII. Razakar Bahini: It's Objective in 1971

61. We felt it indispensable to focus on this issue as the accused persons allegedly belonged to local Razakar force in 1971. In assessing the charges brought against them and their alleged culpability and also the motivation of their being associated with

the Pakistani army and local Razakars we must have a clear portrayal about the Razakar Bahini and its activities carried out in 1971 in the territory of Bangladesh.

62. Let us examine some citations from nationally and internationally reputed news reportings as well as citations from books written by renowned writers to have a true picture about the role of Jamaat-E-Islami during the War of Liberation. In this regard some citations are quoted below:

“The Jamaat-e-Islami and specially its student wing, Islami Jamaat-e-Talaba (IJT) joined the military’s efforts in May 1971 to launch two para military counter insurgency units. The IJT provided a large number of recruits. The two special brigades of Islamist cadres were named Al-shams (the sun in Arabic) and Al-Badr (the moon). A separate Razakars Directorate was established. Two separate wings called Al-Badr and Al-shams were recognized. Well-educated and properly motivated students from the schools and Madrasas were put in Al-Badr wing, where they were trained to undertake specialized operations, where the remainders were grouped together under Al-shams, which was responsible for the protection of bridges, vital points and other areas. Bangladeshi scholars accused the Al-Badr and Al-shams militias of being fanatical. They allegedly acted as the Pakistan army’s death squads and “exterminated leading left wing professors, journalists, litterateurs and even doctors.”

Source:- *“Pakistan between Mosque And Military” -written by Hossain Haqqani, page 79 published in 2005, Washington D.C. USA.*

63. The Jamaat-e-Islami, a religion based political party and brain child of controversial Islamist thinker Maulana Maududi was significantly pro-active in its mission to destroy the Bangalee

nation in the name of safeguarding Pakistan in collaboration with the Pakistan occupation army. We deem it indispensable to get a scenario on the role and stand of the Jamaat-e-Islami in 1971, particularly when it established various militia Bahinis, namely Peace Committee, Razakar, Al-Badr, Al-shams and Al-Mujaheed, etc. in association with Pakistan Army.

64. The vital role of Jamaat-e-Islami in creating the para-Militia Bahinis is also reflected from the narrative of the book titled “**Sunset at Midday**” which is cited below:

“To face the situation, the Razakar Bahini consisting of pro-Pakistani elements was formed. Al-Badr Bahini was formed mainly with the workers of the student wing of Jamaat-e-Islami, named Islami Chhatra Sangha (I.C.S. now Islami Chhatra Shibir). The general public belonging to Jamaat-e-Islami, Muslim League, Nizam-e-Islami, etc were called Al-shams and the urdu speaking generally known as Biharis were called Al-Mujaheed.”

Source:- ‘Sunset at Midday’,-written by Mohiuddin Chowdhury, a former leader of Peace Committee of Noakhali District, published in 1998, Karachi, Pakistan.

65. It is pertinent to state that it is a fact of common knowledge by the people at large that the Pakistani invading force made attacks on Bangalee people on the very night of 25 March 1971 in the name of so called ‘**operation search light**’ and subsequent their further actions were assisted by anti-liberation people like accused-perpetrators. Anti-liberation forces started their atrocious activities from the very day when Pakistani military ruler secretly decided

not to handover the power to the party which won majority seats in the general election held in 1970. Early atrocious activities of anti-liberation forces can be authenticated by the statements of some people which have been embodied in **Bangladesher Shadhinata Juddya Dalilpatra, Astom Khonda [volume-08] at page nos.301,126 and 90, and Dosom Khonda [volume-10] at page 435** respectively as under :

tgvt সফিকুল হাছ, গ্রাম-কবি'ই নন্দ, -বন-মণ্ডিগ, তরজি-তব্বলুজি x/

০15B গুলু 15 Rb ivRvi Kvi Avgv`i Mõtg Avtm, Avng ZLb
Avgv`i Mõtgi `wY Pivq avb KvuUzZuQ| ivRvKvi Avmqv Avgv`K
etj th, tZv`i Mõg nBtZ Avgv`i PvDj Zuj qv w tZ nBte|
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tgvt tMvj vg tgv`Zdv gUj, Mõg-RqcjnuU, tRj v-e, ov|

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evsvt`tki mxgvbvq titL Avmvi ct_ ivRvKvi iv H pjU¹ 16/17
Rb MvovqubtK tMõZvi Kti RqcjnuU njçç¹KugiuU Awdttm wbtq
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Zv`i Avt`j cy wgvj Uvix K`v`c wbtq hvq| tmLvtb Zv`i fij K`v
evtki tgvUv tMvov w`tq Kuctq Kuctq H mg`Z MvovqubtK nZ`v
Kti| -----|0

Ave`jy gv`tj K, `Mveiy, ivRkvnx|

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wgvj Uvixiv wvfbæ GjvKvq Gtm Acvtikb Kti`Q| Zviv jYcvU
Kti`Q, AvMasthvM Kti`Q, brixal` Kti`Q Ges gvby nZ`v
Kti`Q| Zv`i Acvtikb wj i gta` wbtq³ wj cãvb| Zviv tg
gv`mi gvSvgnS thvMxmb cvj kvq Acvtikb Kti 42 Rb w`tK
nZ`v Kti| tmLvtb tqtq`i Dci AZ`vPvi Kti`Q| Rly gv`tm Zviv
`Mveiy Acvtikb Kti 8/9 RbtK nZ`v Kti| -----|0

mv`lvRvvi t kvgmjy Avj g Avj k`vi

০.....Rly gv`mi cõg mBvtn kiYtLjv v`vbtZ ivRvKvi ewnbx
`Zix nq cvK ivR`^jç»£ gbm`ji tbZtZ;| tg gv`mi gvSvgnS
bvtqK mte`vi gayZvi wR`^j wbtq tgvov MÅ _vbvq hvq| gay
_vbtZ tcvQtj Avng Ges gaythS_fvte KvR`ii` Kwi| 40 Rb

*ivRvKvi BwZgta" tgvovj MÄ _vbtZ Avtm| -----
--/0*

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

" POGROM IN PAKISTAN

**Teachers, Writers, Journalists eliminated
Magistrates shot, Doctors disappear
Gestapo-like raids, rape, extortion."**

In the said report it was narrated to the effect:

*".....A new element in the regime of terror is the Gestapostyle pick-up. Some of those wanted for questioning are arrested openly. Others are called to the army cantonment for interrogation. Most of them do not return. Those who do are often picked up again by secret agent known as RAZAKARS, a term used by the volunteers of the Nizam of Hyderabad who resisted the Indian takeover of the State in 1948
Some University teachers reported for duty on 1st June at the instigation of General Tikka Khan, the Martial Law Administrator, but some of them have since fallen into the hands of the RAZAKARS.
The activities of RAZAKARS are known, if not overtly approved, by the military administration. Occasionally, they are a source of concern. -----.
Organisations caring for the refugees who came into East Pakistan at the time of Partition and the Razakar backed 'Peace Committee' are publishing press notices inviting applications for "allotment" of shops and houses left by Bengalis....."
[Source: *Bangladesher Sawdhinata Juddha*
Dalilpattra: Volume 8, Page 527].*

67. It is found from the book titled '*Muktijuddhe Dhaka 1971*' that in 1971, Jamat-e-Islami with intent to provide support and assistance to the Pakistani occupation army by forming armed Razakar and Al-Badr force obtained government's recognition for those *para militia* forces. The relevant narration is as below:

*"RvgvqvZ Bmjvgx gyw³hyxi üy †K †kl
 chš@ mvgwiK Rvš@vK mg_b K†i/ Zv†i
 mnvqZvi Rb Abvb agvÜ j wb†q cÖ_gZ
 MVb K†i kvš@ KwgwU/ cieZx© mg†q mk̄
 evwnbx ivRvKvi I Avje`i MVb K†i Ges miKvix
 ^xK...Zx Av`vq K†i/ hy×K ag©hy× wn†m†e
 cÖPviYv Pvwj†q DMÖ agx©q Dbÿv`bv m,,wói
 †Pón K†i/ Avi Gi Avov†j mb†i mnvqZvq
 Pvjvq wbwe©Pv†i b,,ksm MYnZ`v, jyU, bvix
 wbhv©Zb, AcniY I Pvu`v Av`vq/ me†©kl
 RvwZi we†eK eyw×Rxex†i nZ`v Kiv nq/''*

[Source: *Muktijudhdhe Dhaka 1971*: edited by Mohit Ul Alam, Abu Md. Delowar Hossain, Bangladesh Asiatic Society , page 289]

68. Thus, the above materials have proved that the members of Razakar Bahini committed and conducted various atrocious acts like genocide, murder, abduction, torture and other inhumane acts as crimes against humanity all over the country to implement the common plan and design of Pakistani occupation army, as its auxiliary force.

XVIII. Whether the accused persons belonged to Razakar Bahini

69. Prosecution alleges that the accused persons were the members of local Razakar Bahini and being active associates of local potential Razakar force, an armed organ of the Pakistani occupation army stationed in Netrokona, they had committed, abetted and substantially contributed to the commission of the offences of 'genocide' and 'murder', 'abduction', 'confinement', 'torture' and other inhumane acts as crimes against humanity as narrated in six charges framed against them.

70. Conversely, the defence case as extracted from the trend of cross-examination of prosecution witnesses is that the accused persons namely, Md. Obaidul Haque alias Taher and Ataur Rahman alias Noni were not the members of local Razakar force and they have been falsely implicated with the alleged offences out of local rivalry.

71. In view of above, the prosecution requires to prove that the offences alleged were actually perpetrated and in committing all these offences the accused persons had acted as active accomplices of the group of perpetrators in exercise of their membership in local Razakar Bahini.

72. It is now settled history that the Razakar force was composed of mostly pro-Pakistani Bangalees. Razakars were actively associated with many of the atrocities committed in the territory of Bangladesh by the Pakistan occupation army during the nine - month war of liberation in 1971. On September 7, 1971, Pakistan Defence Ministry through an official order elevated the members of the Razakar Bahini to the status of 'auxiliary force' of the Pakistan Armed Forces. It may be mentioned here that the defence does not dispute it.

73. In the case in hand the crucially material fact that the accused persons were the members of local Razakar Bahini is to be primarily proved by documentary evidence and next oral evidence

provided by the witnesses is to be taken into account and weighed together with the probative value of document relied upon by the prosecution.

74. In view of above, before we enter in adjudicating the charges, we consider it appropriate to resolve the issue 'did the accused persons namely Md. Obaidul Haque alias Taher and Ataur Rahman alias Noni belong to local Razakar Bahini during the war of liberation in 1971?'

75. It appears that intending to substantiate the claim that the accused persons belonged to Razakar Bahini in 1971, prosecution has submitted a list of the members of Razakar, Al-Badr and Al-Shams Bahinis of Netrokona Sadar Upazila which has been marked as Exhibit-1. Additionally, in order to show the potential pro-Pakistan identity of Moulana Monjurul Haque, the father of accused Md. Obaidul Haque alias Taher, the prosecution has also submitted a paper clipping of 'Dainik Sangram' dated 14.09.1971 under the caption " †b†Kvbvq fve-Mæçxi cwi†e†k knx` Avj gv`vbx w`em cvwjZ" which has been marked as Exhibit-5 . It has been stated in the said news report that Moulana Monjurul Haque was the president of Nezam-e-Islami of the then Netrokona Sub-Division. According to the prosecution it got those documents exhibited intending to show that accused Obaidul Haque alias Taher was also consciously with the pro-Pakistan ideology and

culpable activities of his father who contributed substantially in forming local Peace Committee and Razakar Bahini. Due to lapse of long passage of time other relevant documents could not have been procured as the same, by this time, have been destroyed, prosecution has argued. It has been further argued on part of the prosecution that the testimony of prosecution witnesses who are from the crime localities around Netrokona together with Exhibit-1 and Exhibit-5 proves the accused persons' membership in local Razakar Bahini.

76. Mr. Abdus Sobhan Tarafder, the learned defence counsel has argued that Exhibit-1, a list prepared by local Muktijodhdha Command Unit showing the names of accused persons as Razakars is an unauthenticated document, and as such, it does not prove accused persons' membership in local Razakar Bahini in 1971. Prosecution has failed to substantiate this fact by any reliable documentary evidence. Mere oral testimony is not enough to arrive at a conclusion in this regard. Further, according to the SSC certificate of accused Aatur Rahman alias Noni, as collected by the IO [P.W. 23], his date of birth is 07.07.1956 which shows that he was 15 years old in 1971, and as such, it was impracticable to claim that he belonged to Razakar Bahini.

77. We are not convinced with the submission made by the defence. Mere stating by the IO [P.W. 23] that accused Aatur

Rahman alias Noni passed the SSC examination in 1973 and his SSC certificate collected by him [P.W. 23] contains 07.07.1956 as his date of birth alone cannot be conclusive proof of his actual age, particularly when the trend of showing lesser age is often experienced in our society. Besides, defence did not suggest the P.W. 23 that the said date of birth as shown in the SSC certificate was the actual date of birth of the accused Aaur Rahman alias Noni. Defence does not appear to have made any effort by adducing any evidence to substantiate the truthfulness of the date of birth of that accused as shown in the SSC certificate.

78. Next, Exhibit-1 is a list of local Razakars showing names of the accused persons including other Razakars of the locality is a document prepared by the district and local Muktijodhdha Command Unit. It is true that the prosecution could not provide any other documentary evidence in support of the fact of accused persons' membership in local Razakar Bahini. First, we do not find any reason to exclude this document as it appears to have been corroborated by the evidence of witnesses, the locals of the crime sites. Naturally, they had reason of being aware of this fact as an 'anecdote'. Second, due to lapse of long passage of time and some inevitable reasons it may not be possible to collect any other document. In this regard we recall the observation made by the

Appellate Division of our Supreme Court in the case of **Delwar Hossain Sayedee** which is as below:-

" In most cases, the perpetrators destroy and/or disappear the legal evidence of their atrocious acts. Normally the investigation, the prosecution and the adjudication of those crimes often take place years or even decades after their actual commission. In Bangladesh this has caused because of fragile political environment and the apathy of the succeeding government. In case of Bangladesh the process has started after 40 years."

[Appellate Division, Criminal Appeal Nos. 39-40 of 2013, Judgment by His Lordship Mr. Surendra Kumar Sinha, J, page 43]

79. First, it cannot be said that the accused persons cannot be prosecuted and tried if their membership in local Razakar Bahini is believed to be untrue. They can be well prosecuted and tried even as individuals. The Act of 1973 permits it. The core thing is to be seen whether the accused persons collaborated with the local group of Razakars and Pakistani occupation army stationed in Netrokona in carrying out atrocious activities constituting the offences as narrated in the charges framed against them.

80. However, in the case in hand it transpires that the names of the accused persons namely, Md. Obaidul Haque Taher and Aaur Rahman Noni as Razakar Commander and Razakar respectively of Netrokona Sadar Upazila Razakar Bahini find place in the list of Razakars [Exhibit-1], prepared by the Netrokona District Muktijodhdha Unit Command which has been signed by P.W. 01 Nurul Amin, now the Commander of the said District Unit

Command. P.W. 01 is a freedom-fighter. Due to non availability of any other document local Muktijodhdha Unit Command took the responsibility of providing said information as naturally it had authentic acquaintance as to who belonged to local Razakar Bahini in 1971, we lawfully presume. Information provided by the local Muktijodhdha Unit Command thus cannot be readily flouted. Besides, P.W.01 has denied the suggestion put to him by the defence that due to local political rivalry he prepared the said list [Exhibit-1] showing the accused persons as Razakars.

81. P.W.01 Nurul Amin has stated that in the first part of May 1971 under the leadership of Muslim League leader Advocate Fazlul Haque and Nezam-e-Islami leader Moulana Monjurul Haque [father of accused Obaidul Haque alias Taher], Netrokona District Peace Committee was formed, and thereafter, under the supervision of said District Peace Committee Razakar Bahini was formed. He has further stated that accused Md. Obaidul Haque alias Taher became the Commander of Netrokona Razakar Bahini and accused Aatur Rahman alias Noni and many others joined that Razakar Bahini. P.W. 06 Md. Giash Uddin has stated that the president of Nezam-e-Islami Monjurul Haque having formed Peace Committee in Netrokona he became its president, and then having formed Razakar Bahini in Netrokona he made his elder son accused Obaidul Haque the Commander of that Bahini and accused Aatur

Rahman Noni became a member of that Razakar Bahini. Similarly, the locals namely, P.W. 02 Joynuddin, P.W. 03 Md. Motiur Rahman, P.W. 04 Md. Abu Taher, P.W. 05 Md. Siddiqur Rahman, P.W. 07 Md. Nabi Newaz Talukder, P.W. 09 Monju Mia Talukder, P.W. 10 Ayesha Akhter, P.W. 12 Md. Abdul Hannan Chowdhury and many other prosecution witnesses have also stated that accused persons were local Razakars. Of them many prosecution witnesses have specifically testified that accused Obaidul Haque alias Taher and Aatur Rahman alias Noni were the local Razakar Commander and Razakar respectively during the War of Liberation in 1971 and it could not be refuted by the defence in any manner.

82. Admittedly, accused Md. Obaidul Haque alias Taher is the son of Moulana Monjurul Haque, a local prominent leader of pro-Pakistan political party Nezam-e-Islami. It has been found from the unipeachable evidence of prosecution witnesses that Moulana Monjurul Haque, the president of local Nezam-e-Islami substantially contributed in forming Peace Committee in Netrokona and he became its president and the local Razakar Bahini was then formed under his guidance and he made his own son accused Md. Obaidul Haque alias Taher its Commander, and accused Aatur Rahman alias Noni along with others became the members of that Razakar Bahini. It stands proved by the documentary evidence as well.

83. The defence did not provide any evidence, oral or documentary, to substantiate the above mentioned defence case as suggested to P.W. 01 Nurul Amin. In absence of anything contrary, the probative value of Exhibit-1 cannot thus be excluded. Besides, the prosecution witnesses, the locals of the crime sites around Netrokona, unequivocally have testified that the accused persons whom they knew belonged to local Razakar Bahini. The prosecution witnesses have testified consistently the above pertinent fact. The defence could not shake it in their cross-examination in any manner.

84. Naturally, the prosecution witnesses, the locals, were quite capable of being aware of the identity and activities of the accused persons in 1971. Holding membership of local Razakar Bahini by the accused persons thus became an 'anecdote' to them and the locality as well. On this score too their testimony carries value to prove the fact that the accused persons belonged to local Razakar Bahini in 1971. Additionally, failure to impeach this fact on part of the defence thus lawfully prompts to the unerring conclusion that the accused persons were actively associated with the local Razakar Bahini, an 'auxiliary force' under control of Pakistani army for their operational and other purposes during the War of Liberation in 1971.

XIX. Adjudication of charges

Adjudication of charge no. 01

[Murder, confinement, torture, deportation, plundering and arson committed on 17.08.1971 at Bausi bazar under Barhatta Police Station and Trimohoni Bridge under Netrokona]

85. Summary charge: On 17 August 1971 at about 11.00 A.M., Razakar Commander accused Md. Obaidul Haque alias Taher and Razakar accused Aatur Rahman alias Noni along with other Razakars and Pakistani army attacked Bausi bazar of Barhatta Police Station under presently District-Netrokona and having captured unarmed innocent people including Fazlur Rahman, the then president of Bausi Union Awami League and an organizer of the Liberation War, Md. Abdul Hye, Abdul Hannan and 4/5 other persons, tortured them. At the time of capture and torture both the accused persons and their accomplices also having plundered about 400/450 shops of that bazar set them on fire. Thereafter, both the accused and their accomplices having gone to Hindu populated Saha Para, situated beside said Bausi bazar, plundered about 20/25 houses including the houses of Ram Sundar Saha, Krishna Chandra Saha [teacher] and Dharendra Chandra Saha [doctor] set fire to those houses. After the said incidents, the Hindus of those areas being frightened were compelled to be deported to India. Afterwards, both the accused persons and their said accomplices brought said Fazlur Rahman to Netrokona District Council Dakbungalow [rest house], which was used as a 'torture cell', and having confined tortured him there, and at night both the accused

persons and their accomplice Razakars having taken Fazlur Rahnman to Trimohoni bridge shot him to death and threw his dead body in the river.

86. Thus, both the accused persons have been charged for abetting, contributing, facilitating and complicity in the commission of offences of murder, confinement, torture, deportation, and other inhumane acts [plundering and arson] as crimes against humanity as specified in section 3(2)(a)(g) and (h) read with section 4(1) of the Act of 1973 which are punishable under section 20(2) of the said Act.

Evidence of Witnesses Presented

87. To prove charge no. 01, the prosecution has examined as many as 06 [six] live witnesses [P.Ws. 01, 05, 06, 12, 21 and 22]. Before we enter the task of evaluation of evidence adduced, let us first see what the witnesses examined have narrated in Tribunal.

88. P.W. 1 Nurul Amin has deposed that previously he was a trader and at present he is the Commander of Netrokona District Muktijodhdha Unit Command. Awami League candidate Abdul Momen won the general election held in 1970 from the Netrokona-Barhatta-Mohonganj constituency [National Assembly]. Nezam-e-Islami candidate Moulana Monjurul Haque, father of accused Md. Obaidul Haque alias Taher, contested the said election with Abdul Momen. On 26 March 1971 when the Liberation War started they,

the students, youths and general people, who were infavour of liberation, took preparation for that war and many people including himself started to take training in the local Mokterpara field. On 28 April 1971 Pakistan occupation army came to Netrokona town. The leaders and workers of Nezam-e-Islami, PDP, Muslim League, Jamaat-e-Islami and other pro-Pakistani political parties welcomed the Pakistani army men with Pakistani flags. The Pakistani army men set up camps in the District Dakbungalow of Netrokona town and local Vocational Training Institute. He has further deposed that in the first part of May 1971, under the leadership of Muslim League leader Advocate Fazlul Haque and Nezam-e-Islami leader Moulana Monjurul Haque, Netrokona District Peace Committee, consisting of eleven members, was formed. Thereafter, under the supervision of said District Peace Committee other Peace Committees were also formed in Thana and Union level of Netrokona. Under the supervision of the said Peace Committee Razakar Bahini was formed. Accused Md. Obaidul Haque alias Taher, son of above mentioned Moulana Monjurul Haque, became the Netrokona Razakar Commander and accused Ataur Rahman alias Noni, son of Muslim League leader Hasan Ali Mokter, and many others joined that Razakar Bahini. He has also deposed that having received training from Tura Training Centre, Meghalaya, India he came back to Bangladesh and participated in the

Liberation War in different areas. He could know from their source that accused Md. Obaidul Haque and Aatur Rahman Noni along with other Razakars and Pakistani army on 17 August 1971 had attacked Bausi bazar under Barhatta Police Station which was a Hindu populated area. At the time of said occurrence the accused persons and their accomplices had apprehended local Awami League leader Fazlur Rahman from the front side of Ranjan Saha's shop and many others including Hannan from Bausi bazar and its surrounding areas, and they also having plundered that bazar and its adjacent village Saha Para set them on fire. Thereafter, the accused persons and their accomplices having taken away apprehended Fazlur Rahman to the District Dakbungalow camp of Netrokona town by the army jeep tortured him whole day therein and at night they having taken him near the Trimohoni bridge killed him there. During the Liberation War many people were taken there and killed, and at present a monument is there for preserving the memory of those martyrs. He has further deposed that Netrokona District Unit Command of Bangladesh Muktiyodhdha Sangsad prepared a list of the members of Netrokona town and District Razakar, Al-Badr and Al-shams Bahinis [Exhibit-1]. The names of accused Md. Obaidul Haque Taher as Razakar Commander and accused Aatur Rahman Noni as a Razakar have been mentioned in

serial nos. 1 and 2 respectively in the said list [Exhibit-1]. He has identified both the accused persons on the dock.

89. In course of cross-examination he has stated that as per letter of the Deputy Commissioner, the Upazila and District Command prepared the list, Exhibit-1. Being elected he has been discharging his duties as the Commander of Netrokona District Muktijodhdha Sangsad Command since 2010. He participated in the Liberation War in different areas of the then Netrokona Sub-Division under Sector No. 11. He has denied the defence suggestion that due to local political rivalry and conflict he has prepared the said Razakar list including the name of accused Aaur Rahman Noni. He has also denied the defence suggestion that accused Aaur Rahman alias Noni was never a Razakar. There was only one Razakar Commander in Netrokona Sadar. He does not know whether that Razakar Commander was appointed by the government or not, but he was appointed by the Peace Committee. He has denied the defence suggestion that accused Md. Obaidul Haque alias Taher was never a Razakar or Razakar Commander. He has further denied the defence suggestion that accused Md. Obaidul Haque Taher was not involved with those incidents which he has stated in his examination-in-chief. He has also denied the defence suggestion that due to enmity he has deposed falsely against that accused person.

90. Md. Siddiqur Rahman as P.W. 05 has testified that in 1971 he used to live with his elder brother martyr Fazlur Rahman at Malini area of Netrokona town. At that time his said brother was a dealer of M.R, and he having lived with his said brother used to help him in his business. On 17 August 1971 at about 11.00 A.M. Razakar Commander accused Md. Obaidul Haque Taher and Razakar accused Aatur Rahman Noni along with a group of Razakars and Pakistani army men having come to Bausi bazar plundered the shops of that bazar and then set fire to about 400/450 shops. Accused Md. Obaidul Haque Taher and Aatur Rahman Noni apprehended his brother Fazlur Rahman from the front side of Ranjan Saha's shop of the bazar, and he saw that incident from behind that shop. He has further testified that the accused persons and their accomplices also apprehended Hannan Chowdhury, Abdul Hye and other 4/5 people from that bazar. The Razakars knew that the father of said Fazlur Rahman was the president of local Awami League and worked infavour of the Liberation War, and for that reason they having apprehended Fazlur Rahman tortured him severely, and having tortured other apprehended persons including Hannan Chowdhury and Abdul Hye set them free. Thereafter, the Razakars and Pakistani army men having taken his brother Fazlur Rahman in a vehicle to the Dakbungalow of Netrokona town confined him there. He has also testified that his

uncles Bhulu Miah and Saru Miah having gone to Monjurul Haque, father of accused Md. Obaidul Haque Taher, cried and requested him to release his brother, but he having paid no heed to their request got them out, and as such, his uncles came back to their house. On the following day they came to know that accused Md. Obaidul Haque Taher and Ataur Rahman Noni having taken his brother Fazlur Rahman to Netrokona Trimohoni bridge killed him there. His uncles could not find out the dead of his brother after having made search. He has identified both the accused persons on the dock.

91. In cross-examination he has stated that their village home is situated about ten miles away towards east-north from Netrokona town and three miles away towards west from Barhatta thana sadar. At present Ranjan Saha has no shop at Bausi bazar. He has denied the defence suggestion that being tutored he has stated in his examination-in-chief that on 17 August 1971 at about 11.00 A.M. Razakar Commander accused Md. Obaidul Haque and Razakar accused Ataur Rahman Noni along with a group of Razakars and Pakistani army men having arrived to Bausi bazar plundered the shops of that bazar and then set fire to about 400/450 shops, and the accused persons apprehended his brother Fazlur Rahman from the front side of Ranjan Saha's shop of the bazar. He has also denied the defence suggestion that being tutored he has stated in his

deposition that on the following day they came to know that accused persons having taken his said brother near the Netrokona Trimohoni bridge killed him there. He has also denied the defence suggestion that he did not see any occurrence and he has deposed falsely.

92. P.W. 06 Md. Giash Uddin has stated that he is a village-doctor. In 1971, he was a student of class VII of Netrokona Chandranath School, and at that time he used to live in their own house at Satpai area of Netrokona town with his other brothers. At the last part of April 1971, Pakistani army having arrived at Netrokona town set up camps at Vocational Training Institute and District Council Dakbungalow and started creating panic, and as such, they having left Netrokona town went to their village home. Thereafter, he came to know that the president of Nezam-e- Islami Monjurul Haque having formed Peace Committee at Netrokona he became its president and then having formed Razakar Bahini at Netrokona he made his elder son accused Md. Obaidul Haque the commander of that Bahini and accused Aatur Rahman Noni became a member of that Razakar Bahini. He has further stated that on 17 August 1971 at about 11.00 A.M. the members of that Razakar Bahini along with Pakistani army men came to Bausi bazar, a Hindu populated big commercial centre, and there were warehouses of mustard, paddy and jute in that bazar. Razakars and

Pakistani army men having plundered those warehouses set them on fire. They also having plundered the houses of Ram Sundar Saha, Dr. Dharendra Chandra Saha and others of Saha Para, adjacent to that bazar, set them on fire. Thereafter, they apprehended Fazlur Rahman from the front side of Ranjan Saha's shop, and Hannan Chowdhury, Abdul Hye [now dead] from other places of that bazar. Then the Razakars and Pakistani army men having tortured Hannan Chowdhury and Abdul Hye set them free. Since the father of Fazlur Rahman was the president of local Awami League and Fazlur Rahman himself was a worker of Awami League, the Pakistani army men having caught hold of Fazlur Rahman took him away with them. Fazlur Rahman's uncle requested to release him but that was rejected. At night on that day Fazlur Rahman having been taken near the Trimohoni bridge from Netrokona town where he was shot to death. He has identified both the accused persons on the dock.

93. In course of cross-examination he has stated that his grandfather's name is Yeasin who is now dead, and he had three sons and one daughter. In 1971, they were five brothers and one sister, and his father and uncles lived in their paternal house at village Bisara of Baro Kapan Union under Kalmakanda Police Station. He passed the S.S.C. Examination in 1979 from Datta High School at Netrokona. He had no personal acquaintance with accused Aatur

Rahman Noni, but he was a good foot-baller, and as such, he knew him. He has denied the defence suggestions that the statements he made that he came to know that the president of Nezam-e- Islami Monjurul Haque having formed Peace Committee at Netrokona he became its president, and that thereafter having formed Razakar Bahini at Netrokona he made his elder son accused Md. Obaidul Haque Taher the commander of that Bahini, are all false. He has also denied the defence suggestion that the statement he has made that later he heard that accused Aatur Rahman Noni was a Razakar, is also false.

94. P.W. 12 Md. Abdul Hannan Chowdhury as P.W. 12 has deposed that in 1971 he was a student of intermediate class of Netrokona College, and at that time he, his father martyr Shahabuddin Chowdhury and elder brother martyr Abdul Khaleque Chowdhury were living in their own house situated at Mokterpara of Netrokona town. His said elder brother was a student of degree class. In 1971, when the Liberation War started, in the last part of April Pakistani army came to Netrokona town and set up camps at Vocational Training Institute and District Council Dakbungalow. Pakistani army having come to Netrokona firstly formed Peace Committee consisting of Moulana Monjurul Haque and some other persons and thereafter formed Razakar Bahini through the Peace Committee, and accused Obaidul Haque Taher and Aatur Rahman

Noni and many others joined the said Razakar Bahini. Pakistani army and Razakar Bahini started committing torture, genocide, plundering, arson and other atrocities at Netrokona town and its surrounding areas. He [P.W. 12] being afraid went to his own village home at Dattakhil. He has further deposed that perhaps on 17 August 1971 at about 11.00 A.M. Pakistani army men and a group of Razakars attacked Bausi bazar and apprehended Fazlur Rahman from the front side of Ranjan Saha's shop situated towards south, him [P.W.12] from the eastern side and some other people including Abdul Hye from different places of northern side of the bazar. The Razakars and Pakistani army men having apprehended tortured all of them. After having tortured they released him and Abdul Hye, but took Fazlur Rahman with them to Netrokona. Among the said Razakars accused Obaidul Haque Taher and Aatur Rahman Noni were also there. He has also deposed that the father of Fazlur Rahman was the president of local Awami League. Fazlur Rahman having been taken to Netrokona he was tortured all the day and then he was taken near the Trimohoni bridge and killed him there. The Razakars and Pakistani army men also having plundered different shops of Bausi bazar and the houses of adjacent Saha Para set them on fire. He has identified both the accused persons on the dock of the Tribunal.

95. In cross-examination he has stated that at present there are about one thousand shops at Bausi bazar, and of them 50/60 shops belong to Hindu religious people. He himself saw the occurrence of abduction of Fazlur Rahman and taking him to Netrokona town, but he heard that Fazlur Rahman having been taken to Netrokona town he was tortured all the day and then he was taken near the Trimohini bridge and killed him there. He has denied the defence suggestions that Fazlur Rahman was not apprehended from the front side of Ranjan Saha's shop of Bausi bazar, and accused Obaidul Haque Taher and Aatur Rahman Noni were not with the Razakars and being tutored by the prosecution he has stated that the accused persons were with the Razakars.

96. P.W.21 Md. Hossain Ali has stated that his age is about 70 years. In 1971, in the middle of Bangla month Baishakh Pakistani army came to Netrokona, and then A.K Fazlul Haque, Monjurul Haque, Rezek Dakter and Kasumuddin welcomed them in Netrokona town. Thereafter, they formed Peace Committee at Netrokona town and accused Obaidul Haque Taher was made Razakar Commander and accused Aatur Rahman Noni and many others joined that Razakar Bahini. In 1971, at the end of Bangla month Baishakh Razakar Commander accused Obaidul Haque Taher having gone to Fazlur Rahman's shop situated at Malini Road of Netrokona town, demanded 5 seer [Indian weight, which is

about one kilogram] sugar from him, and then Fazlur Rahman told him that there was no sugar in his shop. As such hot words were exchanged between them and then accused Obaidul Haque Taher gave him threat. Later, in 1971, at the end of Bangla month Sraban accused Obaidul Haque Taher and Aatur Rhaman Noni along with some other Razakars and Pakistani army men having attacked Bausi bazar set fire to different shops and assaulted said Fazlur Rahman and some other persons. Thereafter, they having taken Fazlur Rahman with them went to the army camp situated at Netrokona, and tortured him there whole day and at night they having taken Fazlur Rahman to Trimohoni bridge at Netrokona shot him to death there. He has further stated that in 1971 he was an employee of a press situated at Netrokona town and that press was adjacent to the army camp. During the war of liberation when the press was closed he installed a shop of betel-leaves and cigarettes near that press. He has identified both the accused persons on the dock.

97. In cross-examination he has stated that Ali Osman was the owner of the press where he was an employee. In the said press his office hour was from 08.00 A.M. to 08.00 P.M. There were 6/7 employees including him in the said press. He has denied the defence suggestions that he did not see the incident taken place in the shop of Fazlur rahman or that accused Obaidul Haque Taher

was never Razakar Commander nor accused Aatur Rahman Noni was a Razakar or that he has deposed falsely against the accused persons.

98. Santo Miah as P.W.22 has deposed that his age is about 61 years. He has a furniture shop at Bausi bazar. On 17.08.1971 in the morning he was staying at Bausi bazar. On that day at about 11.00 A.M. Razakar Commander accused Obaidul Haque Taher and accused Aatur Rahman Noni along with 20/25 Razakars and Pakistani army came to Bausi bazar and captured 4/5 people therefrom. They tortured Hannan Chowdhury and Abdul Hye among the said captured people. Thereafter, the Razakars and Pakistani army having taken the captured people with them went to Ranjan Saha's shop . At that time Fazlur Rahman came to Ranjan Saha's shop and then the Razakars and Pakistani army also captured him and then accused Obaidul Haque Taher and Aatur Rahman Noni caused him bleeding injury stabbing with bayonet as he was a worker of Awami League. The Razakars and Pakistani army having tortured those 4/5 people who were captured from Bausi bazar, released them, and accused Obaidul Haque Taher and Aatur Rahman Noni handed over Fazlur Rahman to the Pakistani army. Then Razakars and Pakistani army took Fazlur Rahman to Netrokona Dakbungalow. Thereafter, the relatives of Fazlur Rahman having gone to the house of Moulana Monjurul Haque

requested him to release Fazlur Rahman. Then Moulana Monjurul Haque having abused drove them out of his house. Thereafter, accused Obaidul Haque Taher and Aaur Rahman Noni having taken Fazlur Rahman to Trimohoni bridge shot him to death. He has identified both the accused persons on the dock.

99. In course of cross-examination he has stated that his village Mouati is situated one kilometre away towards south from Bausi bazar, and there is no other village in between Bausi bazar and their village. During the war of liberation in 1971 he was a student of class VIII in Bausi School. In 1971, they were two brothers and his another brother was a freedom-fighter. He has further stated that in 1971 he was also a freedom-fighter. In 1971, 90% shops of Bausi bazar belonged to Hindu people. Trimohoni bridge is situated under Netrokona Sadar Police Station. He has denied the defence suggestions that accused Obaidul Haque Taher and Aaur Rahman Noni were not involved with the events which he has stated in his deposition or that he did not see those events. On 17.08.1971 at about 3.00 P.M. he came back to his house from Bausi bazar. He has denied the defence suggestion that he has deposed falsely against accused Obaidul Haque Taher and Aaur Rahman Noni.

Finding with Reasoning on Evaluation of Evidence

100. The charge involves systematic attack by the group of Razakars and Pakistani occupation army accompanied by accused

Md. Obaidul Haque alias Taher and Ataur Rahman alias Noni directing civilian population at Bausi bazaar under Bhatara Police Station on 17 August 1971 at about 11:00 A.M. The attack allegedly resulted in wanton destruction of properties at the bazaar by plundering and arson, torture to civilians and confinement followed by murder. Prosecution in order to prove this charge adduced in all 06 witnesses who have been examined as P.W.01, P.W.05, P.W.06, P.W.12, P.W.21 and P.W. 22. Of these witnesses, P.W.05 Md. Siddiqur Rahman, P.W.12 Md. Abdul Hannan Chowdhury and P.W.22 Santo Miah claim to have witnessed the first phase of the event that took place at Bausi bazaar and P.W.21 Md. Hossain Ali allegedly witnessed a fact relevant to the attack.

101. Prosecution first requires to prove the attack launched at Bausi bazaar that resulted in wanton destruction of civilians' properties, causing torture to civilians and taking away the victim Fazlur Rahman therefrom on forcible capture. Next, complicity and manner of participation of the accused persons with the said attack is to be proved.

102. Ms. Sabina Yesmin Khan, the learned prosecutor has argued that out of 06[six] witnesses examined by the prosecution to substantiate this charge, P.W. 05, P.W. 12 and P.W. 22 are the direct witnesses who have testified the significant phases of the attack that proves the commission of the event of abduction that

resulted in killing of victim Fazlur Rahman. The three other witnesses i.e. P.W. 01, P.W. 06 and P.W. 21 are hearsay witnesses whose testimony shall appear to have corroborated by the said direct witnesses. Even the hearsay testimony of these hearsay witnesses is excluded; evidence provided by the three direct witnesses consistently proves the perpetration of the actual offence and accused persons' participation and complicity therewith.

103. On contrary, Mr. Abdus Sobhan Tarafdar, the learned defence counsel has argued that the accounts made by the said prosecution witnesses in respect of the event of abduction and perpetrators thereof suffer from inconsistencies. The act of killing could not be proved by any direct evidence.

104. P.W.01 Nurul Amin is a freedom fighter. In addition to the alleged event, he has narrated how and when the Pakistani army took Netrokona town under their occupation on 28 April 1971 and how the pro-Pakistani people belonging to Nejam-e-Islami, Muslim League, PDP and Jamaat-e-Islami welcomed the army demonstrating Pakistani flags and the Pakistani army stationed in Netrokona and formed its camp at local Vocational Training Institute and Dakbungalow. P.W.01 has also stated how the local Peace Committee was formed in the month of May 1971 under the leadership of Fazlul Haque Advocate, a local Muslim League leader and Moulana Monjurul Haque, a local Nejam-e-Islami leader

and father of accused Obaidul Haque alias Taher and later this committee had set up its units at Thana and Union level.

105. In respect of the event that took place on 17 August 1971 P.W.01 has stated that accused persons, Razakars and Pakistani army by launching attack at Bausi bazaar, a Hindu populated area apprehended Fazlur Rahman, a local Awami League leader and took him away to Netrokona district Dakbungalow Camp and later on at night he was taken to the place near Trimohoni bridge where he was gunned down to death.

106. The defence does not appear to have been able to refute the above version. It simply suggested P.W. 01 that accused Md. Obaidul Haque alias Taher and Aatur Rahman alias Noni were never Razakars and that due to local political rivalry conflict he has prepared the Razakar list [Exhibit-1] including the name of accused Aatur Rahman Noni and that accused Md. Obaidul Haque Taher was not involved with those incidents which he has stated in his deposition. Of course P.W. 01 has denied it. The defence did not suggest P.W.01 that on 17 August 1971 no murder, confinement, torture, plundering and arson was committed at Bausi bazar and Trimohoni bridge under Netrokona.

107. Now the question comes forward whether the accused persons were with the group of attackers at the crime site. It appears that defence simply denied what has been narrated by P.W.01

implicating the accused persons with the event of attack that resulted in confinement, torture, other inhuman acts and murder of Fazlur Rahman by taking him to the torture cell set up at Netrokona Dakbungalow on forcible capture. Even it could not have been shaken that P.W.01 learnt the event from their sources. Mere denial of what is stated in examination-in-chief by the witness does not render it untrue.

108. The above unimpeached testimony relating to forcible taking away the victim Fazlur Rahman from Bausi bazaar clearly portrays accused persons' presence with the group of Razakars and the Pakistani army. Afterwards, the captured victim was taken away to Netrokona Dakbungalow and during night he was killed by taking near Trimohoni bridge.

109. Although his evidence does not demonstrate that the accused persons too accompanied the group of army in taking the captured victim to the torture cell in Netrokona Dakbungalow and were present or somehow participated physically in accomplishing the killing of victim Fazlur Rahman. But it however is obvious that their act and conduct significantly facilitated the forcible capture of the victim from Bausi bazaar and they collaborated with the group knowing the foreseeable consequence of their act and conduct in accomplishing the act of capture and detention of the victim. Therefore, they cannot evade liability simply for the reason that

they were not present at the torture cell in Netrokona Dakbungalow and at the site near Trimohoni bridge while the act of killing occurred.

110. P.W.05 Md. Siddiqur Rahman is the brother of victim Fazlur Rahman. In 1971 he used to stay with his brother in Netrokona town where his brother had a business to assist him. He is a direct witness in respect of the event of forcible capture of victim Fazlur Rahman and 4/5 other civilians from Bausi bazaar.

111. In narrating the event, P.W.05 has stated that on 17 August 1971 he had been at Bausi bazaar when at about 11:00 A.M. a group of Razakars and Pakistani army accompanied by accused Obaidul Haque Taher and Aatur Rahman Noni by attacking the bazaar started looting the shops there and setting 400/450 shops on fire and then accused persons captured his [P.W.05] brother Fazlur Rahman near one Ranjan Saha's shop. He [P.W.05] saw it remaining in hiding beside Ranjan Saha's shop. They [attackers] also detained 4/5 other persons including Hannan Chowdhury and Abdul Hye.

112. The above version remains unshaken and gets corroboration from the testimony of P.W.01. It thus demonstrates beyond reasonable doubt that in conjunction with the attack the perpetrators accompanied by the accused persons had carried out wanton

destruction of civilians' property by arson and plundering, torture to detained civilians.

113. P.W.05 is a direct witness to the event of attack. His testimony so far as it relates to forcible capture of Fazlur Rahman from Bausi bazaar inspires credence and provides corroboration to what has been stated by the P.W.01 in this regard. It stands proved that the accused persons accompanied the group of Razakars and Pakistani army in launching attack at Bausi bazaar and in conjunction with the attack Fazlur Rahman, the brother of P.W.05 was forcibly captured by active and substantial contribution of the accused persons and then was taken away to Netrokona Dakbungalow by Razakars and Pakistani army. Complicity of accused persons up to this phase of the event that happened prior to killing of Fazlur Rahman stands proved. Defence could not however impeach it in any manner.

114. Causing torture to victim Fazlur Rahman on forcible capture at Bausi bazaar also stands proved from the evidence of P.W.05, a direct witness who has also stated that the other civilians detained were also subjected to torture and eventually were released.

115. The unshaken version of P.W.05 so far as it relates to making approach to Moulana Monjurul Haque, the father of accused Obaidul Haque Taher, to get Fazlur Rahman spared also adds credence in respect of complicity of accused Obaidul Haque alias

Taher and his accomplice accused Ataur Rahman alias Noni with the attack and criminal act of forcible capture of Fazlur Rahman. We have found it too from evidence that Moulana Monjurul Haque did not pay heed to such approach. Later, he [P.W.05] heard that accused Obaidul Haque and Ataur Rahman killed his brother Fazlur Rahman by taking him near Trimohoni bridge.

116. Defence did not cross-examine P.W.05 as to from whom he had learnt it. It is to be noted that P.W.05 does not claim that accused persons too accompanied the Razakars and Pakistani army when they took away the captured victim Fazlur Rahman to Netrokona Dakbungalow. But since accused persons' culpable and active complicity to the act of forcible capture of the victim stands proved it may safely be concluded that even their act and conduct prior to the phase of killing made them equally liable for accomplishing the act of killing the victim.

117. On appraisal it reveals that corroborating P.W.01 and P.W.05, in respect of the event of attack, P.W.06 Md Giash Uddin has testified that on 17 August 1971 at about 11.00 A.M. a group of Razakars and Pakistani occupation army by launching attack at Bausi bazaar committed looting and arson of many shops and also destructed the neighbouring houses of Hindu civilians by looting and setting on fire. P.W.06 has also stated that in conjunction with the attack the group forcibly captured Fazlur Rahman and later on

he was gunned down to death near Trimohoni bridge in Netrokona town.

118. It appears that the defence however failed to shake the fact of attack launched by the group of Razakars and Pakistani army. It simply denied it by putting suggestion to P.W.06. It does not transpire from the testimony of P.W.06 that the accused persons also accompanied the group of attackers. But that does not mean that the testimony of P.W.01 and P.W.05 so far as it relates to presence and participation of accused persons at the crime site Bausi bazaar in launching attack shall *ipso facto* stand untrue. Although his unshaken evidence provides corroboration that the accused persons belonged to local Razakar Bahini and victim Fazlur Rahman was gunned down to death on forcible capture from Bausi bazaar on 17 August 1971 by a group of Razakars and Pakistani army men.

119. It is not understandable whether P.W.06 is a direct witness or hearsay witness. Defence remained refrained from cross-examining him on this aspect. However, as a resident of the crime locality P.W.06 might have heard the event, we presume. Defence does not appear to have denied what the P.W.06 has stated in respect of attack at Bausi bazaar, the act of forcible capture of Fazlur Rahman and his killing near Trimohoni bridge in Netrokona.

120. Therefore, we are constrained to conclude that mere non implication of accused persons with the event of attack at Bausi bazaar by P.W.06 does not render the evidence of other PWs depicting complicity of accused persons untrue.

121. Testimony of P.W.12 Md. Abdul Hannan Chowdhury who was also detained and subjected to torture in conjunction with the attack at Bausi bazaar depicts that accused Obaidul Haque alias Taher and Ataur Rahman alias Noni were also with the group of Razakars and Pakistani army and he saw the act of abducting Fazlur Rahman and taking him to Netrokona from Bausi bazaar. The fact of plundering and arson, in conjunction with the attack, has been consistently corroborated by this P.W.12, a direct witness to the first phase of the event.

122. Defence could not refute the above pertinent version relating to the criminal acts and complicity of the accused persons therewith. It simply denied it by putting suggestion to P.W.12. And as such and since his testimony seems to have been consistently corroborated by the P.W.01, P.W.05 and P.W.06 we do not find any reason to exclude the above version that proves the fact of launching systematic attack that resulted in criminal acts constituting the offences of abduction, plundering, arson, torture and confinement.

123. In respect of killing of abducted victim Fazlur Rahman, P.W.12 has stated that he heard that by taking him to Netrokona he was subjected to torture and afterward was killed near Trimohoni bridge. Naturally, war time horrific situation did not allow other civilians to witness the event of detained victim's killing. Defence does not dispute the killing of Fazlur Rahman. Thus, hearsay evidence as to accomplishment of the act of killing, the second phase of the event as made by P.W.12 carries probative value and defence failed to diminish its credence. It may be lawfully inferred that the act of killing of Fazlur Rahman was the outcome of the act of his abduction which has been testified even by direct witnesses P.W.05 and P.W.12.

124. It depicts from the evidence of P.W.21 Md. Hossain Ali that few days prior to the event accused Obaidul Haque alias Taher coming to Fazlur Rahman's shop at Malini Road, Netrokona demanded 5 seer[Indian weight which is about one kilogram] sugar and over this matter there had been exchange of hot words between them. Defence could not refute it by cross-examining the P.W.21. Rather, through denial of the suggestion put to him by the defence that he [P.W.21] did not see the above incident that took place at the shop of Fazlur Rahman it has been affirmed that P.W.21 witnessed this incident. Prosecution, with this, intended to show that hostility developed over the above matter was one of reasons of

targeting Fazlur Rahman, we presume. However, P.W.21 also testified the fact of attack launched at Bausi bazaar which gets corroboration from the evidence of other P.Ws. so far as it relates to the fact of destruction, confinement and torture to civilians and abducting Fazlur Rahman.

125. Evidence of P.W.22 Santo Mia compatibly corroborates P.W.05 and P.W.12, direct witnesses, to the event of attack at Bausi bazaar. Defence failed to impeach what has been narrated by this P.W.22 in respect of the criminal acts resulted from the attack launched by the group of Razakars and Pakistani occupation army. It remained unshaken that on the relevant date and at the relevant time P.W.22 had been at Bausi bazaar when a group of 20/25 Razakars and Pakistani army accompanied by Razakar Commander accused Obaidul Haque Taher and Aatur Rahman Noni by launching attack at Bausi bazaar captured 4/5 civilians including Hannan Chowdhury [P.W.12] and Abdul Hye and tortured them and then brought them to one Ranjan Saha's shop at the bazaar where from they also forcibly captured Fazlur Rahman and accused Obaidul Haque Taher and Aatur Rahman Noni started causing torture by charging bayonet and handed him over to the Pakistani army who took him to Netrokona Dakbungalow[camp].

126. In cross-examination it has been re-affirmed that at the relevant time P.W.22 had been at Bausi bazaar till 03:00 P.M. and

defence did not cross-examine him as to the reason of knowing the accused persons. Additionally, his evidence inspires credence as it gets corroboration from the evidence of P.W.05 and P.W.12, direct witnesses, as well.

127. On integrated evaluation it transpires that P.W.05, P.W.12 and P.W.22, the direct witnesses to the event of attack that eventually resulted in killing of abducted victim Fazlur Rahman, have consistently testified the attack, criminal acts carried out in conjunction with the attack, taking away victim Fazlur Rahman on forcible capture.

128. The offence for which the accused persons have been indicted was 'group crime' and happened in horrific war time situation. Naturally, the perpetrators might not have left space even to anybody to witness their criminal acts. The criminal jurisprudence does not require the prosecution to prove the impracticable. All that it requires is to establishment of such a degree of probability that a man of prudence may, on its basis, believe the existence of a fact in issue. Thus, often legal proof is nothing more than a prudent man's estimation as to the probabilities of the case.

129. Already it has been proved from the evidence of P.W.05, P.W.12 and P.W.22, direct witnesses that the accused persons actively and culpably accompanied the group in launching attack at

Bausi bazaar wherefrom they forcibly apprehended Fazlur Rahman who was taken to Netrokona Dakbungalow and later on was killed. None had occasion to see the act of killing. But act and conduct of accused persons made them active participants in accomplishing the act of forcible capture of the victim Fazlur Rahman. And such acts made them ‘participants’ even to the principal act of ‘killing’.

130. It is to be noted that ‘*participation*’ may occur before, during or after the ‘act’ is committed. Second, the intent requirement may be well deduced from the mode of ‘*participation*’, by act or conduct of the accused forming part of the ‘attack’, and it can consist of providing assistance to commit the crime or certain acts once the crime has been committed.

131. Physical presence or participation to the actual commission of the principal offence is not indispensable to incur culpable responsibility. It has been observed in the case of *Tadic*, that:

“ However, actual physical presence when the crime is committed is not necessary . . . an accused can be considered to have participated in the commission of a crimeif he is found to be ‘concerned with the killing.’ ”
[ICTY Trial Chamber, Tadic Case No. IT-94-1-T, Judgment- May 7, 1997, para. 691]

132. Accused persons’ act and presence with the group of Razakars and Pakistani army at Bausi bazaar formed part of attack directing civilian population that resulted in killing. Even if the accused persons are not found to have had physical presence at the

crime site and direct participation to the killing by gunning down the detained civilian to death they shall be held responsible for their culpable acts and presence with the perpetrators forming part of the attack in accomplishing the act of abduction that eventually resulted in killing of detained Fazlur Rahman. In that case we conclude that their presence with the group of attackers at Bausi bazaar was not at all innocent as they belonged to local Razakar Bahini, the object of forming which was to act under the command of armed force, to further policy and plan of annihilating the pro-liberation Bengali civilians.

133. We have found it proved, on careful appraisal of evidence provided that in conjunction with the attack the group accompanied by accused Obaidul Haque alias Taher and Aatur Rahman alias Noni belonging to local Razakar Bahini had carried out wanton destructive activities directing civilians' property, caused torture on apprehending civilians and took away civilian on forcible capture who was subsequently annihilated.

134. It is to be noted that without being locally collaborated , facilitated and abetted the Pakistani occupation army could not get it identified as to who were the pro-liberation civilians. It may fairly be inferred that during the attack at Bausi bazaar it were the accused persons and their accomplice Razakars who by their culpable act facilitated the forcible capture of Fazlur Rahman, a

pro-liberation civilian who was handed over to the Pakistani army who took him away to Netrokona.

135. The act of carrying out destructive activities and torture to civilians by the group accompanied by the accused persons have been well proved by the corroborative evidence of P.W.05, P.W.12 and P.W.22, the direct witnesses. It is to be noted that destruction of civilians' property by launching attack indubitably had detrimental effect on individuals' fundamental right to maintain normal and smooth livelihood and thus it caused enormous mental harm to the victims. The civilians were non combatants. The object of such destructive activities was to terrorize the innocent civilians, which eventually constituted the offence of 'other inhuman act' as it substantially affected their fundamental right to property and safety.

136. Here, we have found proved that the accused persons culpably accompanied the group of Razakars and Pakistani army and facilitated the act of abduction of Fazlur Rahman from Bausi bazaar where from he was taken away to Netrokona Dakbungalow and afterward he was killed. On integrated evaluation of evidence and circumstances revealed we conclude that since accused persons knowing the consequence of their act and conduct in abducting the victim Fazlur Rahman they cannot absolve of liability even of the killing, the principal offence, although their direct participation to

the act of murder of victim Fazlur Rahman is absent. But the act of abduction is chained to the act of killing.

137. The evidence of the prosecution witnesses does not categorically speak of physical presence of accused persons with the perpetrators at the time of accomplishing the act of killing of captured victim Fazlur Rahman, the principal offence. It transpires that the total event consisted of two phases. And the final phase was the execution phase with which the event ended. Accused persons are found to have had physically present at Bausi bazaar where from victim Fazlur Rahman was picked up forcibly and was handed over to the Pakistani army men. According to settled jurisprudence any act or conduct of an individual amid or prior or after the event of principal offence makes him responsible for the principal act, if such act or conduct had substantially facilitated the commission of the principal offence and thus an individual need not be shown to have participation in all phases of the event.

138. Keeping the above settled proposition in mind it may lawfully be concluded that the act and presence at Bausi bazaar in effecting Fazlur Rahman's forcible capture substantially facilitated and aided the perpetrators who finally accomplished the act of his killing and thus the accused persons are equally responsible for the murder of captured victim Fazlur Rahman and thereby it stands proved beyond reasonable doubt that they were concerned with the

'killing' by culpable act of aiding, facilitating the Pakistani army to whom the victim was handed over knowing the consequence.

139. It would be relevant to note that the Joint Criminal Responsibility or commonly known as, Joint Criminal Enterprise [JCE] is a widely used liability doctrine that has been playing a central role in the allocation of guilt in International Criminal Tribunals. Section 4 of the Act of 1973 incorporates the JCE doctrine into our legislation. Section 4(1) of the Act reads as:

“When any crime as specified in section 3 is committed by several persons, each of such person is liable for that crime in the same manner as if it were done by him alone.”

140. There are three forms of JCE : Basic, Systemic and Extended. The Basic Mode of JCE liability arises when all participants shared the common intent to the concerned crime although only some of them may have *physically perpetrated* the crime. It is a responsibility for acts agreed upon when making the common criminal plan or purpose.

141. In respect of Basic Mode of JCE the **ICTR Appeals Chamber in the case of Gacumbitsi v. Prosecutor [Case No. ICTR-2001-64-A, July 7, 2006, para-158]** observed as under-

“The first (or ‘basic’) category encompasses cases in which ‘all co-perpetrators, acting pursuant to a common purpose, possess the same

criminal intention' to commit the crime that is charged."

142. The Systemic Mode of **JCE** liability is concerned with crimes committed by members of military or administrative units on the basis of common criminal plan or purpose, for instance crimes implemented in *concentration camps* or detention centres. This form of **JCE** does not require proof of a plan or agreement [whether or not extemporaneous].

143. The ICTR Appeals Chamber in the cases of Prosecutor v. Ntakirutimana and Ntakirutimana [Case Nos. ICTR-96-10-A and ICTR-96-17-A, December 13, 2004, para-464] interpreted the Systemic Mode of **JCE** as below-

"The second category is a 'systemic' form of joint criminal enterprise. It is a variant of the basic form, characterised by the existence of an organised system of ill-treatment. An example is extermination or concentration camps, in which the prisoners are killed or mistreated pursuant to the joint criminal enterprise."

144. The Extended Mode of **JCE** liability arises where some extra crimes have been committed beyond the common plan or purpose, but the extra criminal act was nonetheless a *natural and foreseeable consequence* to the perpetrator of the common plan.

145. The ICTR Appeals Chamber in the above mentioned cases of Prosecutor v. Ntakirutimana and Ntakirutimana at para -465 also interpreted the Extended Mode of **JCE** as under-

“ The third category is an ‘extended’ form of joint criminal enterprise . It concerns cases involving a common purpose to commit a crime where one of the perpetrators commits an act which, while outside the common purpose, is nevertheless a natural and foreseeable consequence of executing that common purpose. An example is a common purpose or plan on the part of a group to forcibly remove at gun-point members of one ethnicity from their town, village or region (to effect ‘ ethnic cleansing’) with the consequence that, in the course of doing so, one or more of the victims is shot and killed. While murder may not have been explicitly acknowledged to be part of the common purpose, it was nevertheless foreseeable that the forcible removal of civilians at gunpoint might well result in the deaths of one or more of the civilians.”

146. According to settled jurisprudence, the required *actus reus* for each form of Joint Criminal Enterprise [**JCE**] comprises three elements. First, a plurality of persons is required. They need not be organised in a military, political or administrative structure. Second, the existence of a common purpose which amounts to or involves the commission of a crime provided for in the Statute is required. There is no necessity for this purpose to have been previously arranged or formulated. It may materialise extemporaneously and be inferred from the facts. Third, the participation of the accused in the common purpose is required, which involves the perpetration of one of the crimes provided for in the Statute. This participation need not involve commission of a specific crime under one of the provisions [for example, murder,

extermination, torture or rape], but may take the form of assistance in, or contribution to, the execution of the common purpose.

147. In the case in hand, the acts of the accused persons, as divulged from the evidence of the witnesses, had substantial effects upon the perpetration of the said crimes of murder, abduction, confinement, torture and other inhumane acts [plundering and arson] as crimes against humanity. This is a common knowledge of historical fact that during the Liberation War in 1971, the principal perpetrators i.e. Pakistani occupation army had acted with the criminal intent to destroy the members of Hindu religious group, freedom-fighters, pro-liberation people and the supporters of Awami League who sided with the war of liberation. The accused persons being the members of Razakar force, an armed organ acting under the Pakistani occupation army, were aware of the said criminal intent of the principal perpetrators whom they [accused persons] along with their accomplice Razakars culpably assisted or encouraged in launching the attack at Bausi bazaar that resulted in killing of one detainee i.e. victim Fazlur Rahman. As such, the accused persons who contributed substantially to the commission of the aforesaid offences as listed in the instant charge are criminally responsible both as an aider and abettor and as a co-perpetrator through participating in the Joint Criminal Enterprise [JCE]. So, the argument advanced by the learned defence counsel that the

accounts made by the prosecution witnesses in respect of the event of abduction and perpetrators thereof suffer from inconsistencies and the act of killing of victim Fazlur Rahman could not be proved has no leg to stand.

148. Considering all the facts, circumstances, the evidence on record and the legal aspects as discussed above, we are prompted to arrive at a decision that the prosecution has been able to prove the instant charge [charge no. 01] against the accused persons beyond reasonable doubt. Thus, the accused Md. Obaidul Haque alias Taher and Aatur Rahman alias Noni are criminally liable under section 4(1) of the Act of 1973 as they are found guilty for abetting, contributing, facilitating and complicity in the commission of offences of murder, abduction, confinement, torture, and other inhumane acts [plundering and arson] as crimes against humanity as enumerated in section 3(2)(a)(g) and (h) of the Act of 1973 which are punishable under section 20(2) of the said Act.

Adjudication of charge no. 02

[Murder, abduction, confinement and torture committed on 04.10.1971 at Sree Sree Narosingho Zeur Akhra area of Barhatta road and Mokterpara bridge, presently under District -Netrokona].

149. Summary charge: On 04 October, 1971 at about 12.30 P.M. under the leadership of Razakar Commander accuseed Md. Obaidul Haque alias Taher, Razakar accused Aatur Rahman alias Noni and other Razakars having gone to Sree Sree Narosingho Zeur Akhra area, situated at Barhatta road, presently under District-

Netrokona, abducted Dabir Hossain, a supporter of the Liberation War, and tortured him, and thereafter took him away to Netrokona District council Dakbungalow [rest house], which was used as a 'torture cell', and then having confined there tortured him all the day. On the same day at night both the accused persons and their accomplice Razakars having taken Dabir Hossain away to Mokterpara bridge shot him there to death and threw his dead body in the river.

150. Thus, both the accused persons have been charged for abetting, contributing, facilitating and complicity in the commission of offences of murder, abduction, confinement and torture as crimes against humanity as specified in section 3(2)(a)(g) and (h) read with section 4(1) of the Act of 1973 which are punishable under section 20(2) of the said Act.

Evidence of Witnesses Presented

151. To prove charge no. 02, the prosecution has examined 05[five] live witnesses [P.Ws. 01, 13, 14, 15 and 21]. Now let us see what the witnesses examined have stated.

152. P.W.01 Nurul Amin has stated that previously he was a trader and at present he is the Commander of Netrokona District Muktijodhdha Unit Command. Awami League candidate Abdul Momen won the general election held in 1970 from the Netrokona-Barhatta-Mohonganj constituency [National Assembly]. Nezam-e-

Islami candidate Moulana Monjurul Haque, father of accused Md. Obaidul Haque alias Taher, contested the said election with Abdul Momen. On 26 March, 1971 when the Liberation War started they, the students, youths and general people who were infavour of liberation, took preparation for that war and many people including himself started to take training in the local Mokterpara field. On 28 April, 1971 Pakistani occupation army came to Netrokona town. The leaders and workers of Nezam-e-Islami, PDP, Muslim League, Jamaat-e-Islami and other pro-Pakistani political parties welcomed the Pakistani army with Pakistani flags. The Pakistani army set up camps in the District Dakbungalow of Netrokona town and local Vocational Training Institute. He has further deposed that in the first part of May, 1971 under the leadership of Muslim League leader Advocate Fazlul Haque and Nezam-e-Islami leader Moulana Monjurul Haque, Netrokona District Peace Committee, consisting of eleven members, was formed. Thereafter, under the supervision of the said District Peace Committee other Peace Committees were also formed in Thana and Union level of Netrokona. Under the supervision of the Peace Committee Razakar Bahini was also formed. Accused Md. Obaidul Haque alias Taher, son of above mentioned Moulana Monjurul Haque, became the Netrokona Razakar Commander and accused Ataur Rahman alias Noni, son of Muslim League leader Hasan Ali Mokter, and many others joined

that Razakar Bahini. Having received training from Tura Training Centre, Meghalaya, India he came back to the country and participated in the Liberation War in different areas. He has also stated that on 04 October, 1971 at about 12.00/12.30 P.M. Dabir Hossain, a leader of Chhatra League who was also a footballer, was coming from Mohonganj towards Netrokona. When Dabir Hossain reached Akhra Crossing of Barhatta road, under the leadership of accused Obaidul Haque and Aatur Rahman Noni, a group of Razakars having apprehended took him away to the Mokterpara District Council Dakbungalow Camp and tortured him there, and at night they having taken Dabir Hossain from the said camp near the Mokterpara bridge shot him to death there. He has further stated that Netrokona District Unit Command of Bangladesh Muktijodhdha Sangsad prepared a list of the members of Netrokona town and district Razakar, Al-Badr and Al-Shams Bahinis [Exhibit-1]. The names of accused Md. Obaidul Haque Taher as Razakar Commander and accused Aatur Rahman Noni as Razakar have been mentioned in serial nos. 1 and 2 respectively in the said list [Exhibit-1]. He has identified both the accused persons on the dock.

153. In cross-examination he has stated that as per the letter of the Deputy Commissioner, the Upazila and District Command prepared the list, Exhibit-1. Being elected he has been discharging his duties as the Commander of Netrokona District Muktijodhdha Sangsad

Command since 2010. He has denied the defence suggestions that the statements he made that on 04 October, 1971 when Dabir Hossain was apprehended accused Ataur Rahman Noni was present, and that accused Md. Obaidul Haque Taher was involved with the apprehension of Dabir Hossain, are all incorrect. He has further denied the defence suggestions that accused Md. Obaidul Haque alias Taher and Ataur Rahman alias Noni were never Razakar Commander or Razakar.

154. Md. Abdul Hamid as P.W. 13 has deposed that in 1971 during the Liberation War his age was about 18 years. His village Tenga is situated adjacent to Netrokona town. In 1971, he used to live in his village home. At the last part of April, Pakistani army having arrived to Netrokona town established a camp at District Council Dakbungalow. Thereafter, under the leadership of Moulana Monjurul Haque, Peace Committee was formed, and Razakar Bahini was formed through the Peace Committee, and accused Obaidul Haque Taher, son of Moulana Monjurul Haque, was made commander of that Razakar Bahini, and accused Ataur Rahman Noni and many others joined that Razakar Bahini. He has further deposed that the members of that Razakar Bahini having occupied the house of Maloy Biswas situated at Boro bazar of Netrokona town established a Razakar Camp there which was used as their 'torture cell'. At one stage he [P.W. 13] went to India for

participating in the Liberation War. Thereafter, as a freedom-fighter he came back to Netrokona town to collect informations. He has also deposed that on 04 October , 1971 at about 12.00 P.M. he was sitting in a tea-stall situated at Akhrar More of Netrokona town. After sometime he could see that Razakars including accused Obaidul Haque Taher and Aatur Rahman Noni having tied one Dabir were going towards District Council Dakbungalow. Then he followed them and saw that the said Razakars were torturing Dabir in front of the Dakbungalow. Next day, he heard that accused Obaidul Haque Taher and Aatur Rahman Noni having taken away Dabir near to Mokterpara bridge killed him there. He has identified both the accused persons on the dock of the Tribunal.

155. In course of cross-examination he has denied the defence suggestions that accused Obaidul Haque Taher was not Razakar Commander and accused Aatur Rahman Noni did not join the Razakar Bahini. He has denied the suggestion that it is false and concocted that he heard that accused Obaidul Haque Taher and Aatur Rahman Noni having taken away Dabir near Mokterpara bridge killed him there. He has further denied the suggestions that the accused persons were not involved with the incidents he has stated in his deposition, and the statements he made against the accused persons are tutored, false and motivated.

156. Md. Abu Bakar Siddique as P.W. 14 has stated that his present age is about 63 years. In the last part of April, 1971 Pakistani army came to Netrokona town and then the local leaders of the supporters of Pakistan welcomed them. Pakistani army having come to Netrokona town established camps in the Netrokona Dakbungalow and Vocational Training Institute and thereafter they formed Peace Committee and Razakar Bahini at Netrokona town. The said Razakar Bahini established their camp in the house of a Hindu, who was known as 'Sarbo Banik' , situated at Boro bazar of Netrokona town. They having occupied the house of Shirish Mokter of Masua bazar established an office of Nezam-e-Islami there. The leader of local Nezam-e-Islami Monjurul Haque's son accused Obaidul Haque Taher was made the Razakar Commander, and accused Aatur Rahman Noni and many others joined that Razakar Bahini. He has further stated that when the Razakar Bahini started committing different atrocities in Netrokona town, he being afraid of went to India. Having gone to India he received training for the Liberation War, and after completion of their training their company was sent to Kalmakanda area for participating in the Liberation War. Having come to Kalmakanda area they established a camp at Daiya and thereafter they participated in different operations. Before their operation they used to collect informations in advance through their sources regarding

the activities of Pakistani army and Razakars. He has also stated that they came to know from their one source that the Razakars having apprehended his, accused Ataur Rahman Noni and Obaidul Haque Taher's friend Dabir from Akhrar More of Netrokona town took away him to Dakbungalow and having tortured him whole day there took him near Mokterpara bridge at night and killed him there, and that incident took place on 04 October, 1971. After the liberation of the country when he came back to his house his uncle Badir Uddin, who was a night-guard of Netrokona Girls School, told him that on the day when Razakars having apprehended Dabir took him away to the camp and tortured him, on the same day Razakars also having apprehended kept him [Badir Uddin] detained at that camp. The Head-Mistress Jahanara Begum of that school having gone to the said camp brought his uncle back. His uncle also told him that accused Obaidul Haque Taher and Ataur Rahman Noni had tortured him in the Razakar camp and they having taken Dabir out of the Camp at night shot him to death. He has further stated that both accused Obaidul Haque Taher and Ataur Rahman are his friends and they used to move together since 1963. He has identified both the accused persons on the dock of the Tribunal.

157. In cross-examination he has stated that in 1963 he was a student of class VI of Netrokona Datta High School. Accused Obaidul Haque Taher passed the Degree Examination in 1970. In

1963 accused Ataur Rahman Noni was a student of Anjuman School, but he could not say in which class said accused was reading. His uncle Badir Uddin is now dead. In 1971, Dabir Hossain was a student of Class IX and his elder brother was the D.C. [Deputy Commissioner] of Sylhet. He has denied the defence suggestions that accused Obaidul Haque Taher and Ataur Rahman Noni were not Razakar Commander and Razakar respectively and that the accused persons were not involved with the killing of Dabir Hossain. He has further denied the defence suggestion that he has deposed falsely against the accused persons.

158. P.W. 15 Maksuda Hossain Ava has deposed that during the War of Liberation in 1971, her father Dr. Mosharraf Hossain was posted as Mohonganj Thana Medical Officer of the then Netrokona Sub-Divison and due to that she stayed there with her parents, and at that time she was a student of Class X of Mohonganj Pilot High School. In 1971, they were five brothers and five sisters and of them her elder brother Golam Ahmed as an EPCS officer was posted in Islamabad of the then West Pakistan, second brother Syed Ahmed was a Deputy Commissioner [D.C], third brother Dr. Abu Yusuf was an army officer [Captain] and fourth brother Dabir Hossain was a student of Mohonganj Pilot High School, who was also a renound foot-baller and involved with student politics of Chhatra League. She has further deposed that her brother Dabir

Hossain having been inspired by the 7th March, 1971 Speech of Bangabandhu Sheikh Mujibur Rahman set fire to a Pakistani flag in the Mohonganj Ruhiar [Lohia] field. He took initiative to give rifles' training to the students of Mohonganj for participating in the War of Liberation. Her three sisters including herself and two brothers also took that training. During said training her father having heard about the atrocities committed by the Pakistani occupation army became scared and on 22.04.1971 he along with her[P.W.15] mother, two brothers and five sisters took shelter in Chandrapur village under Barhatta Police Station which was adjacent to Mohonganj. Thereafter, they took shelter in the house of their teacher Mohammad Ali Chowdhury alias Malu Mia situated at village Kamalpur [at present under Dharmapasha Police Station, District Sunamganj]. She has further deposed that while they were staying in Kamalpur village they came to know that on 29.04.1971 Pakistani army having come to Netrokona town established a camp in the Dakbungalow of the town, and thereafter Peace Committee was formed at Netrokona, headed by Advocate Fazlul Haque, and Moulana Manjurul Haque, a leader of political party Nezam-e-Islami, was a leader of that Peace Committee and his son accused Obaidul Haque Taher, whom she knew since 1970, was made commander of that Razakar Bahini. She also knew accused Aatur Rahman Noni who along with many others joined the Razakar

Bahini. They stayed in Kamalpur village for about two months. Sensing that Kamalpur village might be attacked by Pakistani army, her father in the month of July, 1971 keeping her brothers Dabir Hossain and Delwar Hossain in Kamalpur village came to Dhaka along with her mother and sisters including herself. After a few days they came to know that her said two brothers had gone to Meghalaya, India for participating in the War of Liberation. In the month of September, 1971 her mother became very sick. Having heard about the ailment of his mother Dabir Hossain was coming to Dhaka to see his ailing mother and on his way to Dhaka on 04.10.1971 at about 12.00/01.00 P.M. a group of armed Razakars including accused Obaidul Haque Taher and Aatur Rahman Noni captured him from Barhatta road of Netrokona near Sree Sree Zeur Akhra and having tortured took him to the army camp situated at Netrokona Dakbungalow. She has also deposed that then her father requested Moulana Monjurul Haque over telephone to release Dabir Hossain but he did not pay any heed to his request, rather he having blamed him as an agent of India and the father of miscreants told him that the miscreants whom his son and other Razakars had brought after capturing them should not be kept alive. Thereafter, they came to know that accused Obaidul Haque Taher and Aatur Rahman Noni having tortured her brother Dabir Hossain took him away to Mokterpara bridge at night and shot him to death there.

After the liberation of Bangladesh they all came back to Mohonganj and then one Abdul Hamid, who knew Dabir Hossain , told them that at the time of occurrence he had been in a tea-stall situated on the side of Barhatta road near Sree Sree Zeur Akhra and he had seen the occurrence of capture and torture of Dabir Hossain by the accused persons and taking him away to Netrokona Dakbungalow by them. He also told them that the accused persons having tortured Dabir Hossain whole day in the Dakbungalow took him to Mokterpara bridge at night and shot him to death there and threw his dead body in the river. Her father also heard from Badir Uddin, a night -guard of Netrokona Girls High School who was confined in the Netrokona Dakbungalow, that while Dabir Hossain having been taken to that Dakbungalow was confined and tortured there, then he [Badir Uddin] was also confined in that Dakbungalow and saw that occurrence. She has further deposed that they also heard the above mentioned incidents from many others. Ali Akbar [now dead], who was a guard of Mokterpara bridge, having come to their house described the occurrence that he himself had seen the two accused persons to kill Dabir Hossain. She has identified both the accused peresons on the dock.

159. In course of cross-examination she has stated that when her brother Dabir Hossain was a student of Class X then his age was about 20/21 years . Besides accused Ataur Rahman Noni, she knew

other 30/40 persons as players and of them she could remember the names of Jahangir, Shahed Ali, Khaleque Bhai, Abu Bakkar Siddique Bhai and Enayet Bhai. She has denied the defence suggestion that the fact of conversation over telephone between her father and Moulana Monjurul Haque is false. She has also denied the defence suggestions that her brother Dabir Hossain was killed otherwise or that the accused persons were not involved with the events she has stated in her deposition or that she has deposed falsely implicating the accused persons.

160. Md. Hossain Ali as P.W. 21 has testified that his age is about 70 years . In 1971, in the middle of Bangla month Baishakh Pakistani army came to Netrokona , and then A.K Fazlul Haque, Monjurul Haque, Rezek Dakter and Kasumuddin welcomed them at Netrokona town. Thereafter, they formed Peace Committee at Netrokona town and accused Obaidul Haque Taher was made Razakar Commander and accused Ataur Rahman Noni and many others joined that Razakar Bhini. He has further testified that in 1971, in the middle of Bangla month Ashwin accused Obaidul Haque Taher and Ataur Rahman Noni along with some other Razakars having captured Dabir from Akhrar Morh situated at Netrokona town took him away to army camp of Netrokona town and at night they took Dabir to Mokterpara bridge and shot him to death there. He has also testified that in 1971, he was an employee

of a press situated at Netrokona town and that press was adjacent to army camp. During the War of Liberation when the press was closed he installed a shop of betel-leaves and cigarettes near that press. He has identified both the accused persons on the dock.

161. In cross-examination he has stated that the distance between Mokterpara bridge and their press was less than a quarter mile. He has denied the defence suggestion that the statement given by him that in 1971 in the middle of Bangla month Ashwin accused Obaidul Haque Taher and Aatur Rahman Noni along with some other Razakars having captured Dabir from Akhrar Morh situated at Netrokona town took him away to army camp and at night they took Dabir to Mokterpara bridge and shot him to death there, are false, concocted and tutored. He has also denied the defence suggestions that accused Obaidul Haque Taher was never Razakar Commander or that accused Aatur Rahman Noni was never a Razakar or that he has deposed falsely against the accused persons.

Finding with Reasoning on Evaluation of Evidence

162. This charge relates to the event of killing Dabir Hossain, a supporter of the War of Liberation. Accused Obaidul Haque alias Taher and Aatur Rahman alias Noni have been indicted to take away the victim Dabir Hossain on forcible capture on 04 October 1971 at about 12:30 P.M. from the locality of *Sree Sree Narosingho Zeur Akhra* [kô kô biwmsn wRDi A\Loi] at Barahatta road, by

accompanying the group of Razakars, to the 'torture cell', set up at Netrokona district council Dakbungalow where he was subjected to torture in captivity and then on the same date at night the accused persons and their accomplices brought the victim at Mokhtarpara bridge where he was gunned down to death and his body was thrown in the river.

163. The learned prosecutor Ms. Sabina Yesmin Khan has argued that five witnesses [P.W.01, P.W.13, P.W.14, P.W.15 and P.W.21] have been examined to substantiate this charge. Of the five witnesses, P.W.13 is a direct witness to the first phase of the attack and he has testified implicating the accused persons and later on he heard the event of killing. P.W.14, a freedom fighter heard the event from their source and also from his uncle Badir Uddin [now dead] after independence and said Badir Uddin was also kept in captivity at the camp on the day the victim Dabir Hossain was taken there, and as such, hearsay testimony of P.W.14 carries value. P.W.15, a hearsay witness and sister of victim Dabir Hossain, has narrated facts relevant to the event and she heard the act of abduction of victim from P.W.13, a direct witness. P.W.21 is a hearsay witness who corroborates the fact of abducting the victim. In this way, the commission of the crime as described in this charge and complicity of the accused persons have been proved, the learned prosecutor has argued. Defence does not dispute the fact of

killing the victim and it could not impeach the testimony of these witnesses.

164. Mr. Abdus Sobhan Tarafdar, the learned defence counsel questioning the credibility of the testimony of the witnesses examined in support of this charge has argued that inconstant statement of the prosecution witnesses offers reasonable doubt as to involvement of the accused persons with the alleged event of attack that resulted in killing of Dabir Hossain. Statement made by the witnesses before the Tribunal contradicts to their earlier statement.

165. According to the charge framed the 'attack' consisted of three phases. First phase speaks of alleged abduction of the victim Dabir Hossain during day time at a place in Netrokona town. Second, keeping the victim in captivity at the torture cell, set up at Netrokona district council Dakbungalow where he was subjected to torture. Third and final phase of the attack tells about the killing of detained victim Dabir Hossain taking him at a place near Mokhtarpara bridge and it happened in night. The charge framed alleges active participation and contribution of accused persons at all phases of the attack.

166. Naturally, this charge rests on ocular evidence and of five witnesses examined only P.W.13 claims to have witnessed the first phase of the attack i.e the act of abduction of the victim, and the other phases of attack including the act of killing the detained

victim rest on hearsay evidence and facts relevant to the event as testified by the other witnesses. Now, the burden lies upon the prosecution to establish that the act of alleged killing was the upshot of the act of abduction and the accused persons were engaged and concerned to all the phases of the attack to further the common objective of killing the victim.

167. P.W.1 Nurul Amin is a freedom fighter. According to him on 04 October 1971 at about 12:00/12:30 P.M. a group of Razakars led by accused Obaidul Haque Taher and Aaur Rahman Noni detained Dabir Hossain, a leader of Chhatra League [student wing of Awami League] and a football player at a place of '*Akhrar Morh*' at Barahatta road while he was coming towards Netrokona from Mohanganj and they took him away to the camp at district council Dakbungalow and tortured him there, and at night he was gunned down to death at a place near Mokhtarpara bridge.

168. P.W.01 does not state how he became aware of the event he has narrated. He does not claim to have seen the event. However, in absence of any cross-examination on this aspect and since it remained undisputed that P.W.01, a freedom fighter, returned home after receiving training in India and joined the War of Liberation at different places it may be presumed that he came to know the event from their 'sources'. Besides, the act of abducting the victim Dabir Hossain on the date and time and from the place as has been

narrated by him [P.W.01] does not appear to have been disputed or refuted by the defence in any manner. Defence simply suggested that the accused persons were not present with the group at the site where from Dabir Hossain was abducted. Besides, we cannot readily exclude the hearsay testimony of P.W.01 merely terming it 'anonymous'. In accepting or excluding the above hearsay testimony of P.W.01 we are to see whether it gets corroboration from other evidence.

169. P.W.13 Md. Abdul Hamid is a vital witness in respect of this charge as he claims to have seen the accused persons and their accomplices taking away the victim Dabir Hossain on forcible capture, as narrated in the charge framed. Thus, let us weigh the accounts he has made in this regard.

170. According to P.W.13, on 04 October, 1971 at about 12:00 P.M. he had been at a tea stall at a place '*Akhrar Morh*' in Netrokona town when he saw accused Obaidul Haque Taher, Aaur Rahman Noni and other Razakars taking away Dabir Hossain tying him up towards district council Dakbungalow and with this he started following them and saw them [perpetrators] causing torture to Dabir Hossain in front of Dakbungalow.

171. Defence could not impeach the above version and it does not appear to have brought any dispute in respect of the act of abduction of Dabir Hossain from the place and time. Defence

simply denied accused persons' involvement with the event of abduction.

172. It is now settled that cross-examination is the optimal tool in the assessment of credibility of witness and what he narrates in court. Credibility of a witness's account can only be assessed on vigorous cross-examination. But in the case in hand, we see that the defence even did not care to cross-examine the narration made by the P.W.13 on material particular related to the event of forcible capture by the group of Razakars led by the accused persons.

173. It is to be noted too that failure to cross examine a witness or to cross-examine him on a vital part of his evidence may be treated as acceptance of that part or even the whole of his evidence. If a witness who has given important evidence in the case is not cross examined, it may be assumed that in all probability, his evidence will be accepted. It appears that defence has failed to bring anything by cross-examining P.W.13 that could reasonably prompts us to discredit his testimony so far as it relates to the act of abduction of the victim Dabir Hossain and presence with the group in accomplishing it.

174. In view of above, it stands proved from first hand evidence of P.W.13 that a group of Razakars led by the accused persons took away the victim Dabir Hossain on forcible capture to Netrokona district council Dakbungalow that happened during day time. It

provides corroboration to what has been testified by P.W.01, and as such, the hearsay testimony of P.W.01 in respect of the event of abduction of Dabir Hossain cannot be excluded.

175. In respect of killing, P.W.13 has stated that on the following day he heard that accused Obaidul Haque Taher and Aatur Rahman Noni had killed Dabir Hossain bringing him near Mokhtarpara bridge. Killing of Dabir Hossain is not disputed by the defence. It simply denies accused persons' complicity therewith. However, the act of abduction which stands proved from the evidence of P.W.13, a direct witness, it is indisputably chained to the act of killing the upshot of the first phase of the attack in conjunction with which victim was abducted by the group of Razakars accompanied by the accused persons. Therefore, hearsay testimony of P.W.13 so far as it relates to the act of killing carries probative value.

176. We reiterate that the Tribunal may arrive at decision even on the basis of single testimony and 'corroboration' is simply one of factors to be considered in assessing witness's credibility. It has been held by the **ICTR Trial Chamber that-**

"There is no requirement that convictions be made only on evidence of two or more witnesses.Corroboration is simply one of potential factors in the Chamber's assessment of a witness' credibility. If the Chamber finds a witness credible, that witness' testimony may be accepted even if not corroborated."

[The Chief Prosecutor vs. Pauline Nyiramasuhuko and others, Case No. ICTR-98-42-T, Judgment 24 June 2011, para-174].

177. However, in the instant case, the act of taking the victim Dabir Hossain on abduction to the Netrokona district council Dakbungalow as stated by P.W.13 gets corroboration from the evidence of P.W. 14 Abu Bakar Siddique, a freedom fighter. P.W.14 did not claim to have seen any of phases of the event. It transpires that he [P.W.14] heard the event of keeping Dabir Hossain in captivity at the camp at district council Dakbungalow from his uncle Badir Uddin [now dead] who was also kept in confinement at the same camp when victim Dabir Hossain was brought there and kept detained and later on in night accused Obaidul Haque Taher and Aatur Rahman Noni had killed Dabir Hossain after causing torture to him.

178. There must exist reasonable ground to exclude witness's testimony, direct or hearsay, particularly if the same is provided by one who had natural occasion of knowing the event and facts related to it. The above unshaken evidence demonstrates that Badir Uddin [now dead], the uncle of P.W.14 was also kept in confinement at the same camp when victim Dabir Hossain was brought there and kept detained does not appear to have been denied in cross-examination. Be that as it may, P.W.14's testimony in respect of hearing the account of keeping the victim Dabir Hossain at the camp at district council Dakbungalow from his uncle Badir Uddin cannot be excluded. Rather, it inspires adequate

credence and lends assurance to the act of keeping the victim Dabir Hossain confined at the camp and complicity of the accused persons therewith.

179. P.W.14 has also stated that on returning from India after receiving training they set up a camp at freed area of locality *Daia* and used to get information about the activities of Razakars and Pakistani army from their sources, and accordingly, he knew from one of their sources that accused Obaidul Haque Taher and Aatur Rahman Noni and their accomplices took away Dabir Hossain to Dakbungalow apprehending him from '*akhrar morh*' in Netrokona town and he was subjected to torture and afterward in night he was gunned down to death near Mokhtarpara bridge.

180. It is settled that no tool other than cross-examination exists that will satisfactorily test the credibility of evidence. One of the purposes traditionally attributed to cross-examination is to discredit the witness. Cross-examination is beyond any doubt the greatest engine ever invented for the discovery of truth, in a criminal trial.

181. But the above version which relates to hearing the act of abduction of victim Dabir Hossain from one of sources remained unshaken. Defence merely suggested that the accused persons had no nexus with the alleged criminal acts. But mere denial is not enough to exclude one's testimony, direct or hearsay.

182. In cross-examination, P.W.14 has stated that both the accused persons happen to be friends of his own. P.W.14 has stated in examination-in-chief that he maintained activities together with them [accused persons] since 1963 and it remained undisputed in cross-examination. Both of these two versions collectively reflect that P.W.14 had prior acquaintance about the accused persons. Defence could not bring anything by cross-examining P.W.14 why now he came on dock to depose implicating the accused persons, despite the fact that they happen to be friends of him [P.W.14]. In absence of anything contrary, hearsay version of P.W.14 in respect of abduction of Dabir Hossain carries credibility and lends assurance to what has been stated by the P.W.13, a direct witness to the act of abduction.

183. P.W.15 Maksuda Hossain Ava is the sister of victim Dabir Hossain. She has narrated some facts relevant to the event that resulted in killing of her brother. Defence does not dispute that Dabir Hossain was her [P.W.15] fourth brother who was not attentive to study. Rather, he had keen interest on sports and football playing. Defence could not impeach that the victim Dabir Hossain was involved with the politics of Chhatra League [student wing of Awami League]. Victim's affiliation with the politics of Chhatra League as stated by P.W.15 provides corroboration to what has been stated in this regard by P.W.01. Besides, defence does not

dispute it. Presumably, this was one of reasons of targeting the victim Dabir Hossain who had to lay his life eventually for the cause of independence of the Bengali nation.

184. It also transpires from the testimony of P.W.15 that in the month of July 1971, apprehending the attack by the Pakistani army, her parents along with them excepting her two brothers including victim Dabir Hossain came to Dhaka quitting the village *Kamalpur* where they took shelter and few days later they knew that her two brothers went to Meghalaya, India to join the War of Liberation. This fact remained totally unshaken.

185. It is also found from evidence of P.W.15 that Dabir Hossain on having information about his mother's ailment returned Bangladesh and on his way to Dhaka to meet his mother, taking all risks, on 04 October 1971 at about 12:00/01:00 P.M. near *Sree Sree Zeur Akhra* in Netrokona town at Barahatta road accused Obaidul Haque Taher and Aatur Rahman Noni and a group of armed Razakars apprehended him [Dabir Hossain] and took him away to Netrokona Dakbungalow.

186. How P.W.15 knew the event of abduction? Unimpeached testimony of P.W.15, in this regard, offers rational clarity about the source of knowing the event. It transpires that Md. Abdul Hamid [P.W.13] known to Dabir Hossain saw the act of abducting her

brother and later on he disclosed to them in detail as to how it happened.

187. In respect of knowing the event, P.W.15 has also stated that her father came to know from Badir Uddin, a night guard of Netrokona Girls' High School, that he [Badir Uddin] saw causing torture to Dabir Hossain detained at the camp as he [Badir Uddin] was also in captivity there. Next, P.W.15 has stated that one Ali Akbar [now dead], a guard of Mokhtarpara bridge, saw the accused persons killing Dabir Hossain and he narrated it to them shedding tears.

188. The above versions of P.W.15 as to hearing the event remained unimpeached. Thus, it stands proved even from the hearsay evidence of P.W.15 that the sources of knowing all the three phases of the event including the act of killing at Mokhtarpara bridge are P.W.13 Md. Abdul Hamid, a direct witness to the event of abduction, Badir Uddin [now dead], the uncle of P.W.14 who had occasion to see the victim detained and tortured at the camp where he was also kept detained and one Ali Akbar [now dead], a guard of Mokhtarpara bridge wherein the victim was gunned down to death. Therefore, hearsay evidence of P.W.15 carries much probative value and gets corroboration from the evidence of P.W.13 and P.W.14. Defence even did not care to cross-examine the

narration made by the P.W.15 on this material particular related to the event.

189. Defence, as it appears, suggested P.W.15 that Dabir Hossain would have been the victim of killing in some other manner. But it failed to bring any indication in this regard by cross-examining this P.W.15. Such unfounded defence case in the form of suggestion and mere denial of accused persons' complicity do not render the hearsay testimony of P.W.15 affected adversely on material particulars related to the event of killing Dabir Hossain, the upshot of his unlawful and forcible capture, as has been proved by the direct evidence of P.W.13.

190. Another relevant fact as has been narrated by P.W.15 also provides corroboration to the event of abduction of Dabir Hossain and complicity of the accused persons therewith. P.W.15 has stated that Monjurul Haque, the father of accused Obaidul Haque alias Taher was known to her [P.W.15] father, and thus, her father made a request to him [father of accused Obaidul Haque] over telephone from Dhaka to set Dabir Hossain free in response to which he [Monjurul Haque] reacted by saying that 'miscreants' apprehended by his son [accused Obaidul Haque alias Taher] and other Razakars would not be allowed to survive, terming her [P.W.15] father an 'agent of India' and the father of a 'miscreant'. Defence did not make any effort to refute this version. It simply

denied this pertinent version related to the fact of abduction of Dabir Hossain.

191. The above version depicts that Dabir Hossain was a freedom fighter and it was the key reason of his abduction and killing and at the time of accomplishing the criminal act of abduction Dabir Hossain was a non combatant. This unimpeached fact also provides unerring corroboration to the fact of abducting the victim Dabir Hossain by the accused persons and their accomplices as has been found proved on integrated and rational evaluation of evidence of P.W.13, P.W.14 and P.W.15.

192. P.W.21 Md. Hossen Ali has simply stated that during the Bangla month Aswin accused persons and their accomplices took away Dabir to the army camp from '*akhrar morh*' of Netrokona town on abduction and later on in the night he was killed near Mokhtarpara bridge. On cross-examination P.W.21 has stated that he had a press in Netrokona town which was about quarter mile far from '*akhrar morh*' [the abduction site]. But nothing has been revealed from his evidence that it was practicable to see the event of abduction of Dabir Hossain even staying at his press. Besides, it is not clear at all whether P.W.21 saw or heard the event. He did not state anything about this aspect.

193. The Prosecution's burden in every case under the Act of 1973 includes the need to prove that the offence has been committed and

also that it was committed by the accused, by his act or conduct forming part of attack or physical participation. The defence does not deny the commission of offence proved, but asserts that the prosecution has not been able to prove that the accused persons were with the perpetrators who committed the offence or were involved with its commission in any manner.

194. It appears that defence suggested many of witnesses, in cross-examination, that they narrated particular fact[s] for the first time before the Tribunal. The witnesses denied it. Defence, for the reason of **the Apex Court's decision made in the case of *Abdul Qauder Molla***, could not assert that they [witnesses] did not make it disclosed to IO, by drawing attention to the relevant part of their statement made in court.

195. The Code of Criminal Procedure is not applicable in a case dealt with under the Act of 1973, a special Statute. Therefore, simply putting suggestion that he/she [witness] did not state particular fact[s] or matter[s] any where else, prior to deposing it before the Tribunal does not allow us making comparison between sworn testimony and earlier statement. Besides, in view of decision of the Appellate Division made in the case of *Abdul Qauder Molla* witness's account cannot be contradicted with his or her earlier statement made to IO. As a result, putting a mere suggestion that the witness narrates any particular fact for the first time before the

Tribunal is an impermissible and futile effort to attack credibility of the witness and it deserves exclusion from consideration. In this regard we rely upon the observation made by the Appellate Division of the Supreme Court of Bangladesh in the case of *Abdul Quader Molla* which is as below:

"There is nothing in the Rules that any minor omission of the statement of a witness make his testimony unreliable. The Rules also do not provide for taking any contradiction of the statement of a witness made before the tribunal with any other statement made elsewhere and no adverse presumption could be drawn therefrom."
[Criminal Appeal Nos. 24-25 of 2013 , judgment dated 17.9.2013, His Lordship Mr. Justice Surendra Kumar Sinha, page-199]

196. Additionally, normal discrepancies are those which are due to normal errors of observation, of memory due to lapse of time, due to mental disposition such as shock and horror at the time of the occurrence, which are always there, however honest and truthful a witness may be.

197. It is true that due to lapse of long passage of time an individual may not be able to recall the detail or exact precision of the event or his narration may suffer from exaggeration. It happens due to fallibility of human memory. But it is to be seen whether the essence of his narration relates to the core aspect of the event in describing which he stands on dock. Aspects which were central to the event remains ever encoded in human memory as the same formed part of the context of the event.

198. But however in making account of the 'essence' and 'fundamental elements' of the event by the witness, the trauma he or she sustained may be found to have been sandwiched with the memory that may result incapability in portraying 'detail precision'. But it never affects the 'fundamental feature' of his or her testimony.

199. Episodic memories are inextricably bound up with a specific time, place, and emotional state in the individual's life history. Collectively, the amalgam of this information constitutes a memory episode. Thus, episodic memory provides, in other words, an autobiographical framework that permits recollection of personally-experienced activities and the time and context in which they occurred.

200. Taking the above feature of human memory into account we are thus convinced to consider the evidence provided on the 'core essence' of the event and facts and circumstances providing nexus of the accused persons with that event, ignoring mere inaccuracy or discrepancies. Although we have found that the evidence of P.W.13, P.W.14 and P.W.15, the key witnesses to prove this charge does not suffer from any material discrepancies or infirmity.

201. However, the factual matrix proved by the evidence of P.W.13, P.W.14 and P.W.15 unerringly point towards the accused persons as the active accomplices of the Razakars forming the

group of attackers, i.e. there is no escape from the conclusion that within all human probabilities the crime was committed on substantial contribution and assistance of the accused persons.

202. It is true that none of the prosecution witnesses had opportunity to witness the actual act of killing the detained victim Dabir Hossain, nonetheless direct participation of the accused persons at the phase of abduction and causing torture to him keeping in captivity at the camp at district council Dakbungalow have been proved by credible evidence and by this way criminal responsibility of the accused persons even in respect of causing victim's death by gun shot at Mokhtarpara bridge stands affirmed. For murder as a crime against humanity under section 3(2)(a) of the Act of 1973 does not require the prosecution to establish that the accused personally committed the killing. Personal commission is only one of the modes of responsibility.

203. We cannot agree with the defence argument that in absence of any proof as to physical participation of accused persons with the act of killing they cannot be held responsible. We are to see whether the accused persons had 'concern' with the attack, in any manner. It is to be noted that act of an individual amid or after or prior to the event forms part of attack if it is found to have had substantial effect to the commission of the principal crime, pursuant to the attack. Not necessarily the accused persons are to be shown

to have participated in all aspects or phases of the criminal acts. A single act or conduct may form part of attack facilitating and abetting the actual commission of the principal crime.

204. Liability under the doctrine of **JCE** [basic form] which refers to section 4(1) of the Act of 1973 need not involve the physical commission of a specific crime by all the members of **JCE**, but may take the form of assistance in, or contribution to, the execution of the common purpose. It has been proved beyond reasonable doubt that victim Dabir Hossain was a freedom fighter and the accused persons and their accomplice Razakars knowing it well got him apprehended at the place '*akhrar morh*' in Netrokona town, obviously treating him 'miscreant', and they did such criminal acts to further common purpose i.e causing death of the detained victim.

205. Thus, in view of above deliberation, we are convinced to conclude that accused persons were the participants in a joint criminal enterprise [**JCE**] sharing the intent of that enterprise and their participation to the phase of abduction and causing torture in captivity inescapably assisted and contributed substantially even in accomplishing the act of victim's killing. Consequently, the accused Obaidul Haque alias Taher and Aatur Rahman alias Noni are equally responsible for all that naturally results from the commission of their act and conduct at the phase of abduction and

also at the phase of keeping the detained victim in captivity at the camp, as already proved.

206. Besides, since it has been proved beyond reasonable doubt that the accused persons actively and culpably engaged in abducting the victim Dabir Hossain and also in causing torture keeping him in captivity at the camp, presumably the accused persons did not withdraw them even from the phase of killing the victim, we conclude. Their active and culpable act and conduct, as has been proved, at the phase of abduction and keeping the victim in captivity at the camp indisputably suggest that they wished to assist and facilitate the commission of the act of killing as well. On this score as well, it may safely and justifiably conclude that the accused persons had conscious ‘concern’ and ‘participation’ even to the actual commission of the killing, and thus, they are found responsible for the commission of the murder in question as well. It has been observed by the **ICTY Trial Chamber in the case of Tadic that-**

“In sum, the accused will be found criminally culpable for any conduct where it is determined that he knowingly participated in the commission of an offence that violates international humanitarian law and his participation directly and substantially affected the commission of that offence through supporting the actual commission before, during, or after the incident. He will also be responsible for all that naturally results from the commission of the act in question.”

[Prosecutor v. Tadic, ICTY Trial Chamber, Case No. IT- 94-1-T, Judgment 7 May, 1997, para- 692]

207. The Tribunal further notes that the offence of crimes against humanity is known as ‘system crime’ or ‘group crime’ which is committed not by a single individual. This type of crime is committed by group of individuals and not necessarily all the individuals have to be shown to have physically participated to the actual commission of crime. The accused persons’ ‘subjective intent’ need not be explicitly proved, but can be derived from circumstances. The criminal acts done to the victim Dabir Hossain, a non combatant freedom fighter, forming part of systematic attack, in causing his forcible capture and taking him away to the camp amply shows their subjective intent was to cause the death of the detained victim.

208. In view of deliberation as made herein above we are persuaded to conclude that the prosecution has been able to prove beyond reasonable doubt all the phases of the event that eventually ended in brutal killing of a non combatant freedom fighter Dabir Hossain and the accused Obaidul Haque alias Taher and Aaur Rahman alias Noni by their conscious and culpable act and conduct forming part of attack and being accompanied by their accomplice Razakars had abetted, participated, facilitated and substantially contributed to the commission of abduction, confinement, torture and deliberate killing of victim Dabir Hossain treating him to be a ‘miscreant’. Therefore, the accused Obaidul Haque alias Taher and

Ataur Rahman alias Noni are found criminally liable under section 4(1) of the Act of 1973 for ‘participating’, ‘abetting’ and ‘facilitating’ the commission of offences of **‘abduction’, ‘confinement’, ‘torture’ and ‘murder’** as crimes against humanity as enumerated in section 3(2)(a)(g) and (h) of the Act which are punishable under section 20(2) of the Act.

Adjudication of charge no. 03

[Murder, confinement, abduction, torture and other inhumane acts (plundering and arson) committed in different villages under Barhatta Police Station, District Netrokona].

209. Summary charge: On 19 October, 1971 at about 2.30 P.M. under the leadership of Razakar Commander accused Md. Obaidul Haque alias Taher and Razakar Ataur Rahman alias Noni along with a group of Razakars and Pakistani army having attacked Asma Union abducted Chanfor Ali from Asma village and Rishi Miah from Gumuria village and tortured them. Thereafter, the accused persons and their accomplices having taken away both the abducted people with them went to Laufa village, where unarmed Hindu people had taken shelter in order to go to India, and attacked that village. The accused persons and their accomplice Razakars having attacked Purbopara of Laufa village abducted Ruz Ali Talukder, Moshrab Ali Talukder, Zafar Ali Talukder, Alauddin, Zahed Ali and Abdul Jabbar and having tortured them including some other women of that village plundered their houses. Thereafter, the accused persons and their accomplice Razakars and Pakistani army

having attacked Paschimpara of Laufa village plundered about 50/60 houses and set them on fire. At that time they abducted Sadek Ali and Alam Kha. When the accused persons and their accomplices were going back from Laufa village with the apprehended people the said accused persons on the way killed abducted Ruz Ali Talukder and Zafar Ali Talukder by rifle -shots and then threw their dead bodies in a canal. Thereafter, the accused persons and their accomplice Razakars took away the other abducted people to Thakurakona Razakar Camp. Though subsequently among the abducted people Sadek Ali [now dead] and Alam Kha [now dead] were released from the Thakurakona Razakar Camp, but they having tortured severely whole day other abducted people namely, Moshrab Ali Talukder, Alauddin, Zahed Ali, Abdul Jabbar, Rishi Miah and Chanfor Ali took them away under Thakurkona Railway bridge at night and shot them there in order to kill, and of them Moshrab Ali Talukder, Alauddin, Zahed Ali, Abdul Jabbar and Rishi Miah died on the spot sustaining bullet injuries, and Chanfor Ali sustaining bullet injury luckily survived having jumped into the river.

210. Thus, both the accused persons having been charged for participating, abetting, contributing, facilitating and complicity in the commission of offences of murder, confinement, abduction, torture and other inhumane acts [plundering and arson] as crimes

against humanity as specified in section 3(2)(a)(g) and (h) read with section 4(1) of the Act of 1973 which are punishable under section 20(2) of the said Act.

Evidence of Witnesses Presented

211. To prove the instant charge [charge no. 03], the prosecution has examined 5[five] live witnesses [P.Ws. 02, 03, 04, 07 and 09].

Let us now see what the witnesses examined have stated.

212. P.W. 02 Joynuddin has deposed that his age is about 65 years and he hails from village Gumuria under Barhatta Police Station, District-Netrokona. During the Liberation War, 1971 on 01 Kartik [Bengali month] at about 2.00/2.30 P.M. about 100/150 Razakars and Pakistani army men including Razakar Obaidul Haque Taher and Razakar Aatur Rahman Noni having abducted Chanfor Ali from village Asma came to their village Gumuria and searched for him, his father and uncle and at that time he was also in their house, and having seen the Razakars he went into hiding. They abducted his uncle Rishi Miah and his father went to India along with the refugees. The accused persons and their accomplice Razakars and Pakistani army men having abducted his uncle Rishi Miah started going towards Laufa village which was a station for the freedom-fighters. He has further deposed that he hiding himself in a paddy field followed the accused persons and their accomplices. Having gone to Laufa village the accused persons and

their accomplice Razakars and Pakistani army men divided themselves into two groups and then plundered the houses of that village and set them on fire and also tortured women. Thereafter, they went to Purbopara and having abducted Ruz Ali Talukder, Zafar Ali Talukder, Moshrab Ali Talukder, Alam Kha, Sadek Ali and Alauddin therefrom started going towards Barhatta, and on the way there was a bamboo-culvert wherefrom Ruz Ali Talukder and Zafar Ali Talukder tried to flee away and then accused Obaidul Haque Taher and Ataur Rahman Noni shot them to death with the rifles in their hands. Then the accused persons and their accomplices having taken other abducted people with them went to Thakurakona Camp and tortured them there. Thereafter, abducted Sadek Ali and Alam Kha having been released from that camp came to their house and informed them that they were released on a condition that they would let them know the whereabouts of the freedom-fighters. He has also deposed that after evening the other abducted people having been placed in a queue beside the Thakurakona river they shot them to death except Chanfor Ali who sustaining bullet injury jumped into the river. After two days of the said incident Chanfor Ali having come back to his house told them about the said incident. Chanfor Ali also told them that accused Obaidul Haque Taher and Ataur Rahman Noni committed the said killing. He has further stated that he knew accused Obaidul Haque

Taher since 1970 election, because his father Monjurul Haque came to their locality for seeking votes. He also knew accused Aatur Rahman Noni because he came to their locality to play foot-ball. He has identified both the accused persons on the dock.

213. In cross-examination he has stated that Laufa village is half mile far towards north from their village. At the time of occurrence the number of Razakars and Pakistani army men was about 100/150. He followed Pakistani army men and Razakars for about half mile from about thirty cubits behind them. Besides him, son of Chanfor Ali also followed them. He has denied the defence suggestion that after the incident Chanfor Ali, Sadek Ali and Alam Kha did not tell him about any incident. In 1971, accused Aatur Rahman Noni's age was about 18/19 years. He has denied the suggestions that being tutored he has deposed implicating accused Aatur Rahman Noni, and that before 1974 the said accused did never go to Barhatta to play foot-ball. In 1971, Asma, Gumuria and Laufa villages were under Asma Union. He has denied the defence suggestions that the houses of Sadek Ali and Alam Kha were not situated at Purbopara of Laufa village, and that accused Obaidul Haque Taher was not involved in any way with the incidents as he has stated, and that he did not know that accused since 1970 election. He has also denied the defence suggestion that being

benefited by the State he has deposed falsely against accused Obaidul Haque Taher.

214. Md. Motiur Rahman as P.W.03 has testified that he hails from village Laufa under Barhatta Police Station, District-Netrokona. During the Liberation War, 1971 his age was about 13/14 years. At the time of the 1970 election, his father Moshrab Ali Talukder campaigned for the Awami League candidate and asked the villagers to cast their votes infavour of Awami League candidate. Accused Obaidul Haque Taher also campaigned for his father Monjurul Haque in their locality and since then he knew that accused person. Accused Aatur Rahman Noni was a good footballer and he played foot-ball off and on in their Barhatta playing field. He saw him to play foot-ball. He knew accused Aatur Rahman Noni as a player. He has further testified that in 1971 when the Liberation War started his maternal uncle Ali Ahmed participated in the Liberation War and his said uncle was the Muktijodhdha Commander of Bausi Union. His uncle used to send freedom-fighters to their house and other houses of their village to stay there, and their village was known as a station of freedom-fighters, and that is why Razakars targeted their village. He has also testified that on 19 October, 1971 at about 2.00/2.30 P.M. Razakar Commander accused Obaidul Haque Taher and Razakar accused Aatur Rahman Noni along with about 100/150 Pakistani army men

and Razakars attacked their village Laufa. On the way to their village, they having abducted Chanfor Ali from village Asma and Rishi Miah from village Gumuria brought them. Having entered their village Pakistani army men and Razakars divided themselves into two groups, one group went to Paschimpara and the other group went to Purbopara of their village. Their house was situated at Purbopara. The Razakars and Pakistani army men having entered their house captured his father Moshrab Ali, and accused Aatur Rahman Noni dragged his uncle Ruz Ali out of their room to their courtyard when he was reciting the Holy Quran, and then tortured him inhumanely. They having captured his another uncle Zafar Ali, cousin Alauddin, brother-in-law [fwMœcwZ] Abdul Jabbar alias Montu Miah and another uncle Zahed Ali tortured them inhumanely at their courtyard . When his mother Most. Nurunnahar Begum tried to resist the Pakistani army men and Razakars, they also tortured his mother inhumanely and snatched her necklace and ear-rings away. He and his cousin Alimuddin saw those incidents from inside the bush. He has further testified that thereafter they having plundered their four houses set them on fire. When the Pakistani army men and Razakars were going back from their house with the said apprehended people they also abducted their neighbours Sadek Ali and Alam Kha from their house. They having attacked the house of Nabi Newaz of Paschimpara plundered his

house and then set fire to sixteen rooms. They also having plundered another 50/60 rooms of Paschimpara including the rooms of Hossain Ali, Sonafar Miah and Aslam Ali set them on fire. After having committed those atrocities the Pakistani army men and Razakars were going to Barhatta with the abducted people, and on the way when they were crossing a culvert over a canal his uncles Ruz Ali and Zafar Ali tried to flee away and then accused Obaidul Haque Taher and Ataur Rahman Noni shot both of them to death with their rifles in hands, and thereafter they along with the other abducted people went to Thakurakona Razakar Camp where they also tortured them inhumanely. On that day in the evening they buried the dead bodies of his uncles. Subsequently, among the other abducted people Sadek Ali and Alam Kha were released from the said Razakar Camp on condition that they would give the Pakistani army and Razakars the trace of the freedom-fighters. On that day after evening accused Obaidul Haque Taher and Ataur Rahman Noni along with other Razakars having taken the rest abducted people to under the Thakurakona Railway bridge shot them to death there, but Chanfor Ali of village Asma sustaining bullet injury having jumped into the river saved his life. Sadek Ali and Alam Kha having returned back from the Razakar Camp told them about said torture. His maternal uncle along with other freedom-fighters tried to find out the trace of the abducted people, but failed.

He has also testified that after two days of the occurrence he along with others went to the house of Chanfor Ali to see him, and then Chanfor Ali told them that accused Obaidul Haque Taher and Aatur Rahman Noni having tortured all the abducted people whole day took them to under the Thakurakona Railway bridge in the evening and shot them to death. Having heard the said incidents his mother lost her mental balance and 10/12 years ago she committed suicide having fallen under a train. He has identified both the accused persons on the dock.

215. In cross-examination he has stated that his uncle Zafar Ali had four sons, among them Alauddin was killed at the time of occurrence. Zahed Ali was his uncle as kinsman. Martyr Abdul Jabbar was his sister's husband who lived in their house. The houses of Sadek Ali and Alam Kha were near their house. Gumuria village is situated about one kilometre far towards south from their village. He has denied the defence suggestion that accused Obaidul Haque Taher and Aatur Rahman Noni were not Razakar Commander and Razakar respectively. He has further denied the defence suggestion that being tutored he has stated in his deposition that he saw the occurrence from inside the bush. He has also denied the defence suggestions that he did not see accused Aatur Rahman Noni in the Barhatta football playing field or any other place

before 1974, and he has deposed falsely being benefited or to be benefited financially in future.

216. P.W. 4 Md. Abu Taher has stated that he hails from Asma village under Barhatta Police Station, District-Netrokona. At present he is working as a night -guard in the Barhatta Sub-Registry Office. In 1971 on 01 Kartik [Bengali month] at about 2.00 P.M. he was in their house. At that time about 100/150 Pakistani army men and local Razakars came to their house, and of them accused Razakar Obaidul Haque Taher, Ataur Rahman Noni and Azob Ali having abducted his father Chanfor Ali from the courtyard of their house took him away to Gumuria village as his father gave shelter to the freedom-fighters. Thereafter, they having abducted Rishi Miah from village Gumuria went to Laufa village and after having plundered different houses of that village set them on fire and then went to Purbopara and abducted 8/10 people therefrom. He has further stated that he could see all the said incidents from the paddy-field where he went into hiding. After sometime when the Razakars and Pakistani army men went away, he came out of the paddy field and saw that the dead bodies of Ruz Ali and Zafar Ali were lying near the bamboo-culvert. Alam Kha and Sadek Ali having returned back in the afternoon let them know that other abducted people, who were taken to Thakurakona Camp with them, were being tortured inhumanely. They also let them know that they

were released on a condition that they would give trace of the freedom-fighters to the Pakistani army and Razakars. After two days of the said occurrence, his father Chanor Ali sustaining bullet injury came back to their house and let them know that accused Obaidul Haque Taher and Aatur Rahman Noni along with other Razakars had killed the other abducted people by shots . He has further stated that his father also let them know that he having sustained three bullet injuries jumped into the river and saved his life. He has identified both the accused persons on the dock.

217. In course of cross-examination he has stated that Laufa village is situated towards north from their village. There are cultivating lands and a small beel between their village and Laufa village. He has denied the defence suggestions that accused Obaidul Hague Taher did not abduct his father and Rishi Mia from village Gumuria and that accused Aatur Rahman Noni was not a Razakar and he did not come with the Pakistani army and other Razakars to the place of occurrence on the date and time. He has also denied the defence suggestions that on the date, time and place no occurrence took place as he has stated in his deposition and that he has deposed falsely.

218. P.W.07 Md. Nabi Newaz Talukder has deposed that he is about 70 years old and he hails from village Laufa under Barhatta Police Station, District-Netrokona. At present he has a grocery shop

beside the Barhatta Police Station. In 1971, on 01 Kartik [Bengali month] the local Razakars informed the Razakar Commander Obaidul Haque Taher and Razakar Aatur Rahman Noni that there was a station of the freedom-fighters in their village. On that day at about 2.00/2.30 P.M. accused Obaidul Haque Taher and Aatur Rahman Noni along with about 100/150 Razakars and Pakistani army men came to their village Laufa. On the way to their village they abducted Chanfor Ali from village Asma and Rishi Miah from village Gumuria. Having reached Laufa village they divided themselves into two groups and attacked their village. The Razakars and Pakistani army men abducted Moshrab Ali Talukder, Zahed Ali Talukder, Ruz Ali Talukder, Zafar Ali Talukder, Alauddin Talukder, Jabbar and then accused Obaidul Haque Taher and Aatur Rahman Noni tortured them. At that time Nur Nahar Begum, wife of said Moshrab Ali Talukder, tried to save her husband, and then the Razakars also tortured her and snatched her golden necklace and ear-rings away. He has further deposed that thereafter the Razakars and Pakistani army men having plundered the houses of Purbopara set them on fire and then went to Paschimpara taking the abducted people with them. They having gone to Paschimpara plundered their house and set fire to their sixteen tinshed-rooms. Then they also plundered 50/60 rooms, situated towards west from their house, and set them on fire.

Thereafter, they having taken away the abducted people with them started going towards Barhatta, and on the way when they reached near the bamboo-culvert of a canal, abducted Ruz Ali and Zafar Ali tried to flee away, and then accused Obaidul Haque Taher and Aatur Rahman Noni shot them to death there with their rifles in hands and then went to Thakurakona Camp. They having taken away the abducted people to the said camp also tortured them there, and they released Sadek Ali and Alam Kha on condition that they would give trace of the freedom-fighters to them. At night they having recovered the dead bodies of Ruz Ali and Zafar Ali buried them. He has also deposed that after two days of the said incidents Chanfor Ali came back to village Gumuria who told them that accused Obaidul Haque Taher and Aatur Rahman Noni had tortured them in the camp, and at night after Esha prayer the two accused persons along with 5/6 Razakars took them away to under the Thakurakona bridge and then accused Obaidul Haque Taher and Aatur Rahman Noni shot all the abducted people to death with their rifles in hands, but he [Chanfor Ali] survived sustaining bullet injury. He has further deposed that during the Liberation War he himself and others of his village gave shelter to the freedom-fighters, and that is why the Razakars having got angry attacked their village and committed those atrocities. He knew accused Obaidul Haque Taher since 1970. His father Monjurul Haque

contested the election held in 1970. Accused Obaidul Haque Taher came to Barhatta bazar to campaign for his father. He knew accused Aaur Rahman Noni since 1969 as he was a foot-baller. He has identified both the accused persons on the dock.

219. In course of cross-examination he has stated that his village was known as a station of freedom-fighters. His cousins Osman Gani, Shahjahan, Mobin and many others of their village participated in the Liberation War. He has denied the defence suggestion that he has deposed falsely that he knew accused Aaur Rahman Noni since 1969 as he was a foot-baller. He has also denied the defence suggestions that accused Aaur Rahman Noni did not play football anywhere in 1969, and that he got acquaintance with him since 1974/75, and that accused Obaidul Haque Taher never campaigned for his father Monjurul Haque in the election. He has further denied the defence suggestions that accused Obaidul Haque Taher and Aaur Rahman Noni were not involved in any way with the incidents as he has narrated, and that he has deposed falsely.

220. P.W. 09 Monju Mia Talukder has testified that his present age is about 66 years and he hails from Laufa village. In 1971 on 01 Kartik [Bengali month] at about 2.30 P.M. Razakar Commander accused Obaidul Haque Taher, accused Aaur Rahman Noni, Razakar Azob Ali along with 100/150 Razakars and Pakistani army

men having come to village Asma abducted Chanfor Ali and Rishi Miah therefrom, and then they came to their village. Then they divided themselves into two groups, one group came to their house and at that time his father Ruz Ali was reciting the Holy Quran. Accused Obaidul Haque Taher and Aaur Rahman Noni apprehended his father, and then they also apprehended his three uncles namely, Moshrab Ali, Zafar Ali and Zahed, sister's husband Jabbar Miah, cousin Alauddin, father's cousins Alam Kha and Sadek. The other group of Razakars and Pakistani army men went towards west. He has further testified that at that time he could see that the Razakars and Pakistani army men having taken his father and all other apprehended people with them started going towards Thakurakona, and on the way accused Obaidul Haque Taher and Aaur Rahman Noni shot his father Ruz Ali and uncle Zafar Ali to death near their house. At the time of apprehending his father, his aunt Nurunnahar tried to resist them, and then accused Aaur Rahman Noni and Obaidul Haque Taher snatched her ear-rings away. At night they buried the dead bodies of his father and uncle. His uncles Alam Kha and Sadek Ali having come back let them know that they were released on a condition that they would give the trace of the freedom-fighters. They also let them know that the accused persons had tortured the abducted people. Thereafter, they came to know that Chanfor Ali of village Asma having come back

was staying in Zainuddin's house at Gumuria village. He has also testified that then they went to him who told them that accused Obaidul Haque Taher and Aaur Rahman Noni killed all other abducted people by shots under the Thakurakona bridge. Then they went to the place of occurrence but could not find out the dead bodies. His aunt Nurunnahar having heard of killing of her husband Moshrab Ali became mad. Later Nurunnahar committed suicide under a train near Barhatta Railway Station . Razakars and Pakistani army men having gone to Paschimpara plundered sixteen rooms of Nabi Newaz and the houses of Kala Chand, Akram Ali, Kaz Ali and others and then set them on fire. He has further testified that he knew accused Obaidul Haque Taher since 1970 when he came to their locality to campaign in the election for his father Monjurul Haque. He knew accused Aaur Rahman Noni because he came to play football at Barhatta, Chandrapur Huzrabari and Bausi. He has identified both the accused persons on the dock.

221. In course of cross-examination he has stated that they are three brothers and one sister. Moazzol and Toazzol are his other two brothers. He has national identity card and he is a voter. In his national identity card and voter-list his parents' name, age, profession and date of birth are mentioned. In 1971, Azob Ali was the Razakar Commander and Osman Gani was the Commander of freedom-fighters of his locality. Asma village is within Asma

Union. He has denied the defence suggestions that during the Liberation War his age was not 22/23 years, and that he has stated the month and date of the occurrence as being tutored by the prosecution. He has further denied the defence suggestions that in 1970 or before that he did not know accused Obaidul Haque Taher and that the said accused never went to their locality since before 1971, and that he never saw accused Aatur Rahman Noni and that he did not know him since before 1971, and that he never went to Barhatta, Chandrapur Huzrabari and Bausi to see football game in 1971 or before that, and that he did not see accused Aatur Rahman Noni to play football. He has also denied the defence suggestion that having been financially benefited or to be benefited in future he has deposed falsely.

Finding with Reasoning on Evaluation of Evidence

222. This charge involves attack directing different villages namely, Asma, Gumuria, Laufa [both Purbopara and Paschimpara] by the group of Razakars and Pakistani army accompanied by accused Obaidul Haque alias Taher and Aatur Rahman alias Noni. The attack allegedly was launched on 19 October 1971 at about 02:30 P.M. In conjunction with the attack the perpetrators allegedly took away many civilians on capture and on the way back from village Laufa, two of the detainees Ruz Ali Talukder and Zafar Ali Talukder were shot to death. Thereafter, the perpetrators took other

abductees to Thakurakona Razakar Camp and tortured all of them there. Subsequently, two abductees namely, Sadek Ali and Alam Kha were released after causing torture to them, and the other detainees namely, Moshrab Ali Talukder, Alauddin, Zahed Ali, Abdul Jabbar, Rishi Miah and Chanfor Ali were taken to Thakurakona railway bridge at night intending to wipe them out, and thus, they were shot to death excepting Chanfor Ali who managed to survive by jumping into the river though he sustained bullet injury. In conjunction with the attack the group of perpetrators plundered the houses of abductees of Purbopara of Laufa village and also plundered about 50/60 houses of Paschimpara of Laufa village and set those on fire.

Thus the entire attack consisted of phases as below:

- (a) Forcible capture of Chanfor Ali from village Asma.
- (b) Abduction of Rishi Miah from village Gumuria.
- (c) Abduction of Ruz Ali Talukder, Moshrab Ali Talukder, Zafar Ali Talukder, Alauddin, Zahed Ali and Abdul Jabbar from Purbopara of Laufa village.
- (d) Plundering of 50/60 houses and setting those on fire at Paschimpara of village Laufa when Sadek Ali and Alam Kha were also forcibly captured.
- (e) On the way back from village Laufa apprehended Ruz Ali Talukder and Zafar Ali Talukder were gunned down to death.
- (f) The rest of detainees were taken to Thakurakona Razakar Camp where they were subjected to torture and two detainees Sadek Ali and Alam Kha were released therefrom.

(g) The rest of the detainees namely, Moshrab Ali Talukder, Alauddin, Zahed Ali, Abdul Jabbar, Rishi Miah and Chanfor Ali were taken to Thakurakona railway bridge where they were shot to death except Chanfor Ali who luckily survived as he jumped into the river though he sustained bullet injury.

223. The accused persons have been indicted for participation, abetting, contributing and facilitating to the commission of the above criminal acts constituting the offences of abduction, confinement, torture, other inhuman act and murder of unarmed civilians on forcible capture, by their act, conduct and culpable presence with the group of attackers at crime sites, the charge framed alleges.

224. Ms. Sabina Yesmin Khan, the learned prosecutor, drawing attention to the evidence of P.W.02, P.W.03, P.W.04, P.W.07 and P.W.09 has argued that of those witnesses, P.W.09 Monju Mia Talukder is the son of victim Ruz Ali Talukder and relatives of other victims and he saw the act of killing two detained persons. Defence could not refute his testimony. P.W. 04 Md. Abu Taher is the son of survived victim Chanfor Ali. P.W.03 Md. Motiur Rahman is the son of victim Moshrab Ali and nephew of victim Ruz Ali Talukder and Zahed Ali. P.W. 02 Joynuddin is the relative of victim Rishi Miah and P.W. 07 Md. Nabi Newaz Talukder is also a member of victim family. All of them are direct witnesses and they have consistently testified the event of attack, killing of two detained victims on the way back from village Laufa. Their

corroborative and unshaken evidence proves accused persons' presence and culpable act at the crime site with the group of attackers formed of Razakars and Pakistani occupation army. Defence could not refute the testimony of these witnesses. P.W.04 heard the event from his father victim Chanfor Ali who luckily survived when he and other detainees were taken to the killing site.

225. Prosecution has further argued that the unimpeached testimony of these witnesses, on material particulars, proves it beyond reasonable doubt that the accused persons were with the gang of attackers and consciously abetted and substantially contributed and facilitated the principals in perpetrating the actual crimes. Defence could not bring anything in their cross-examination that may lead to disbelieve what they have testified on oath.

226. Conversely, the learned defence counsel Mr. Abdus Sobhan Tarafdar has argued that P.W.02 who claims to be an eye witness to the event of attack that resulted in abduction of victims is impracticable. The prosecution witnesses have made contradictory statement as to the attack allegedly launched at two *paras* of village Laufa. Prosecution has failed to provide evidence to prove who killed which victim. Evidence in respect of killing Ruz Ali Talukder and Zafar Ali Talukder, two detainees also suffers from gross inconsistencies. Evidence provided in respect of the second

phase of the attack is hearsay and it does not inspire credence. Therefore, it could not be proved that the accused persons were involved with any of phases of the event alleged in this charge.

227. Defence, as it can be extracted from the trend of cross-examination, simply denies that the accused persons were not with the group of attackers and the prosecution witnesses had no reason of recognizing the accused persons. Defence could not bring any inconsistency in this regard, by cross-examining the P.Ws. Thus, in absence of anything contrary, it stands proved that an 'attack' was launched directing civilians of villages on the date and time as testified by the attackers and in conjunction with the attack seven civilians were killed.

228. Before we evaluate the evidence provided by the witnesses, in respect of this charge, the Tribunal considers it indispensable to note that even due to lapse of long passage of time a witness may be capable in narrating the 'core essence' of the event he witnessed and it happens because of the nature of the events. But however in making account of the 'essence' and 'fundamental elements' of the event by the witness, the trauma he or she sustained may be found to have been sandwiched with the memory that may result incapability in portraying 'detail precision'. But it never affects the 'fundamental feature' of his or her testimony.

229. It is to be borne in mind too in evaluating evidence provided that failure to make detail precision with absolute consistency, as a result of lapse of long passage of time, does not necessarily impugn one's evidence given in relation to the 'central facts' involving the principal crime. Long more than four decades after the crimes committed a witness may not always be reasonably expected to memorize detail and accurate precision. Therefore, argument advanced by the learned defence counsel on inconsistencies between witnesses does not stand on legs. **The ICTR in the case of Nyiramasuhuko** has considered this issue by observing that –

“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 et al., ICTR-98-42-T, Judgement, 24 June 2011, para. 179]

230. In adjudicating the instant charge involving murder of a number of villagers who were 'protected persons' on forcible capture from their houses, we are to determine that --

- (a) The attack was systematic and the commission of murder of abductees happened as the upshot of the act of their forcible abduction.
- (b) That in conjunction with the attack two of detainees were killed.

(c) That the accused persons participated, facilitated and contributed to the commission of the principal crime as co-perpetrators agreeing the purpose and plan of the group of attackers i.e the enterprise.

231. P.W.02 Joynuddin, a resident of village Gumuria , as found from his evidence, on 01 Kartik[Bengali month] in 1971 at about 2:00/2:30 P.M. he saw the group of Razakars and Pakistani occupation army accompanied by accused Obaidul Haque Taher and Aaur Rahman Noni coming to their house with a detained civilian named Chanfor Ali, apprehended from village Asma and with this he went into hid wherefrom he could see them abducting his uncle Rishi Miah and then the gang started moving towards village Laufa which was known as 'station for freedom fighters'.

232. It is also evinced from the testimony of P.W.02 that the group of attackers came to their house with Chanfar Ali, a civilian detained from village Asma, looking for him [P.W.2 Joynuddin], his father and uncle. On seeing it he went into hiding and his father was not at home at that time.

233. Why the perpetrators attacked their house in search of him, his father and uncle? Testimony of P.W.02 unveils that he and his father Komir Uddin and Uncle Rishi Miah [victim] used to transport people by boats from Bangladesh to India for refuge. That is to say they including the P.W.02 sided with the War of Liberation. Indisputably this was the reason of launching attack at their house.

234. It is evinced too from the testimony of P.W.02 that accused Obaidul Haque alias Taher and Aatur Rahman alias Noni and their accomplices detaining his uncle Rishi Miah started moving towards Laufa village, adding that with this he started following them and at a stage he[P.W.02] saw the group started looting the village and torturing its women, being divided into two groups.

235. The above version remained unshaken. Defence simply denied that the accused persons were not with the group of attackers. But there has been no reason to disbelieve the P.W.02 as he had opportunity to see the attackers to come their home with a civilian apprehended from village Asma, taking away his uncle Rishi Mia on forcible capture, looting the village Laufa and causing torture to its women. Quite naturally P.W.02 had opted to follow the group of perpetrators when it was moving towards village Laufa to know the fate of his uncle Rishi Miah who was being taken away on forcible capture.

236. He added that they detained Ruz Ali Talukder, Zafar Ali Talukder, Moshrab Ali Talukder, Alam Kha, Sadek Ali and Alauddin. When the detainees were being taken to Barahatta, Ruz Ali Talukder and Zafar Ali Talukder tried to flee away, but accused Obaidul Haque Taher and Aatur Rahman Noni shot them to death and took the other detainees to Thakurakona Camp, said Joynuddin [P.W. 02]. This version gets consistent corroboration from the

evidence of P.W.04 Abu Taher, the son of Chanfor Ali who was also picked up by the attackers accompanied by the accused persons, in conjunction with the attack. This pertinent version could not be shaken in any manner in cross-examination.

237. It also depicts from his evidence that he [P.W.02] and the son of victim Chanfor Ali started following the gang when it was on move towards village Laufa through a paddy field. And thus, P.W.02 had opportunity to see facts relevant to what happened there.

238. It has been re-affirmed in cross-examination of P.W.02 Joynuddin, nephew of victim Rishi Miah as he has stated in reply to question put to him by the defence that he and the son [P.W.04 Md. Abu Taher] of victim Chanfor Ali started following the group of Razakars and the army by moving through the paddy field. It adds assurance too to the fact of seeing the detained villagers taking away on capture.

239. On cross-examination, P.W.02 also has stated in reply to question put to him by the defence that in 1971 accused Ataur Rahman Noni was 18/19 years old and he [P.W.02] used to see him [accused Ataur Rahman Noni] playing football at the Barahatta play ground. It again affirms that P.W.02 knew the accused Ataur Rahman Noni even since prior to the event, and thus, naturally he could recognise him while he accompanied the group in launching

attack that resulted in criminal activities including abduction and destructive activities followed by killing of captured victims. It also affirms that accused Aatur Rahman Noni was quite adult at the relevant time which excludes his non affiliation with local Razakar force and the group of attackers as claimed by the defence.

240. We have found that the gang arriving at village Laufa got divided into two groups and started plundering the houses and setting those on fire and also caused torture to women. This phase of attack consisted of wanton destruction of civilians' property and causing inhumane acts to civilians causing the offence of 'other inhumane act'.

241. In respect of the next phase of the attack P.W.02 is a hearsay witness. According to him, he heard from Sadek Ali and Alam Kha, two of civilians detained in conjunction with the attack village Laufa who were eventually released.

242. His [P.W.02] hearsay testimony in respect of abduction of other civilians from Purbopara of village Laufa, abducting civilians therefrom, gunning down two detainees named Ruz Ali Talukder and Zafar Ali Talukder to death by accused persons when they attempted to flee and taking all the civilians captured forcibly from the crime villages to Thakurakona Razakar Camp inspires credence as he heard those phases of the event from the persons who were also apprehended , in conjunction with the attack, by the gang

formed of Razakars including the accused persons and Pakistani army .

243. The evidence regarding Sadek Ali and Alam Kha were abducted and taken to Razakar Camp remained unimpeached. Defence does not dispute it and release of these two abductees from the camp. Thus, hearing the event subsequent to the attack at villages Asama and Gumuria is quite natural and his [P.W.02] above hearsay evidence carries probative value particularly it appears to have corroborated by other evidence.

244. Thus, testimony of P.W.02 so far as it relates to seeing the accused persons accompanying the gang in launching attack and the act of abducting civilians from their village is considered direct evidence in respect of one of the phases of the attack which inspires credence. We do not find any reason of disbelieving it.

245. Why the village Laufa was opted as a target of attack? It is divulged from the evidence of P.W.03 Md. Motiur Rahman, a resident of village Laufa and the son of victim Moshrab Ali Talukder that in 1971 his father was a supporter of Awami League and his uncle Ali Ahmed was a freedom fighter who used to send freedom fighters to their house and other houses of their village [Laufa] to stay, and thus, their village was known as a 'station of freedom-fighters'. P.W.03 has stated that this was the reason why the Razakars targeted their village. Defence could not bring

anything to diminish credibility of this version by cross-examination. This version is the indisputable reflection of the mindset of Pakistani occupation army and their auxiliary force i.e. Razakar Bahini towards the pro-liberation Bengali population.

246. The Tribunal notes that the Pakistani occupation army, for obvious reason, was not at all acquainted and familiar with geographical location of certain places, language and people belonging to pro-liberation ideology. The history says that the local collaborators actively aided the Pakistani army of being acquainted with these which were essentially required for carrying out atrocious attack directing the civilians. It happened too in launching attack directing the pro-liberation civilians of villages.

247. According to P.W.03 the group of attackers accompanied by accused Obaidul Haque Taher and Aaur Rahman Noni along with about 100/150 Pakistani army men on 19 October 1971 at about 02:00/02:30 P.M. came to their village having abducted Chanfor Ali of village Asma and Rishi Mia of village Gumuria with them. It gets corroboration from the evidence of P.W.02 who saw the gang taking away those two civilians on forcible capture towards village Laufa.

248. How the P.W.03, a direct witness to the attack, could recognise the accused persons? Had he any reason of knowing the accused persons even since prior to the event? In this regard,

P.W.03 has stated that in 1970 election, accused Obaidul Haque Taher used to campaign for his father Monjurul Haque [admittedly a local leader of Nezam-e-Islami, a pro-Pakistan political party] around the locality and since then he [P.W.03] knew accused Obaidul Haque Taher. P.W.03 has also stated that accused Aatur Rahman Noni was a good foot-ball player and very often he saw him playing football in their Barahatta playing field.

249. The above version offering reason of knowing the accused persons since prior to the event seems to be natural and it could not be shaken in any manner. P.W.03 Md. Motiur Rahman, as depicts from his unshaken testimony, saw , remaining in hiding inside a bush, the accused persons and their accomplices causing inhumane torture to his relatives and his mother as well when she attempted to resist the Pakistani army and Razakars who took away his family inmates on forcible capture. This version remained unimpeached. Defence could not bring anything, in his cross-examination, to discredit it.

250. Testimony of P.W.03 Md. Motiur Rahman, a direct witness to the event of attack at their house, demonstrates that in conjunction with the attack accused Aatur Rahman Noni dragged his uncle Ruz Ali Talukder out while he was reciting the Holy Qur'an and started causing inhumane torture to him. Defence could not shake this version. Rather it gets corroboration from the

evidence of P.W.09 Monju Mia Talukder, the son of victim Ruz Ali who had occasion to see this extremely barbaric criminal act.

251. The accused persons and their accomplices by attacking the house of P.W.03 committed looting of their houses and that of their neighbours and destructed the same by setting fire on them. Such destructive activities as testified by P.W.03 seems to have been corroborated by P.W.04 Md. Abu Taher, the son of victim Chanfor Ali and P.W.07 Md. Nabi Newaj Talukder, a victim of such destructive activities. Such acts detrimental to the fundamental rights and normal livelihood of 'protected persons' constituted the offence of 'other inhumane act'.

252. P.W.03 Md. Motiur Rahman has also heard the next phase of the event from survived victim Chanfor Ali [father of P.W.04] and detainees Sadek Ali and Alam Kha who were released from the Razakar Camp. His evidence cannot be excluded as it gets corroboration from the evidence of direct witnesses.

253. P.W.04 Md. Abu Taher [son of victim Chanfor Ali], another direct witness, has testified corroborating P.W.02 Joynuddin how his father Chnafor Ali was picked up from his house accusing him of sheltering freedom fighters, by the group of local Razakars and Pakistani army accompanied by accused Obaidul Haque Taher and Ataur Rahman Noni. P.W.04 has also consistently stated that the group of attackers also abducted other civilians from Gumuria and

Laufa villages including Rishi Miah which he could witness from a paddy field. He heard gun shots and after the group left the site, he came out and found dead bodies of Ruz Ali and Zafar Ali near a bamboo bridge. It proves that those two victims were gunned down to death when they were taking away along with other detainees.

254. The above version of P.W.04 remained unrefuted. He is a direct witness to the event of attack and the act of abducting his father Chanfor Ali. His evidence demonstrates too that the accused persons were also with the group of attackers formed of Razakars and Pakistani occupation army. We find no reason to exclude his evidence.

255. It thus stands well proved that accused Obaidul Haque alias Taher and Ataur Rahman alias Noni were with the attackers at the crime sites, the villages Asma, Gumuria and Laufa and facilitated the act of abducting Chanfor Ali [the father of P.W.04] and taking away some other villagers on forcible picking up. It is also evinced from the unshaken evidence of P.W.04 that two detained victims namely, Ruz Ali Talukder and Zafar Ali Talukder were gunned down to death at a place near a bamboo bridge, as he [P.W.04] found their dead bodies there, after coming out of the hiding place.

256. Two days later, victim Chanfor Ali returned home as he managed to dive into river despite receiving bullet hit and Chanfor Ali died 10/12 years ago who had been suffering from disabilities.

It is quite believable that after returning home, P.W.04 heard from his father Chanfor Ali as to what happened to other detained villagers after they were taken to the camp.

257. Evidence of P.W.04 also demonstrates that two of the detainees, Alam Kha and Sadek Ali were set free on condition of bringing information about freedom fighters. It remained unimpeached as well. Survived victim Chnafor Ali disclosed to his son P.W.04 that accused Obaidul Haque alias Taher and Aaur Rahman alias Noni were with other Razakars when the other detainees were shot to death. It thus demonstrates that the accused persons continued to accompany the group till the act of killing the detained persons, the tragic dying phase of the event.

258. Totality of evidence provided by P.W.04 offers unerring conclusion that the detainees were captured forcibly with intent to annihilate them as they actively sided with the war of liberation and the freedom fighters. And it is evinced too that the attack was planned and designed mission directing the civilian population to which the accused persons were 'part' and they actively facilitated the group in perpetrating the act of abduction of villagers knowing the upshot of their act and conduct, and thus, they are equally liable even for the act of actual killing of detained victims. The doctrine of **JCE**, basic form, permits for holding them responsible as above.

259. In respect of the act of killing Ruz Ali Talukder and Zafar Ali Talukder when they were being taken away along with other detained villagers, P.W.09 Monju Mia Talukder, the son of victim Ruz Ali Talukder, saw the accused Obaidul Haque Taher and Aatur Rahman Noni accompanying the group, killing his father Ruz Ali Talukder and uncle Zafar Ali Talukder at a place near their house, on their way to Thakurakona. Evidence of P.W.09 also demonstrates that his father Ruz Ali Talukder was apprehended and tied up when his father was reciting the Holy Qur'an at his house. His [P.W.09] other relatives were also apprehended and tied up, P.W.09 has stated. Defence could not bring anything by cross-examining this witness that can reasonably create doubt as to the truthfulness of his testimony. Additionally, it finds corroboration from the testimony of P.W.03 Md. Motiur Rahman, a direct witness to the initial phase of the event of attack causing abduction, torture and destructive activities.

260. In cross-examination it has been affirmed that at the relevant time victim Ruz Ali Talukder had been at his home as P.W.09 in reply to question put to him by the defence that on the day of the event of attack her mother gave birth of a daughter baby and that is why his father [Ruz Ali Talukder] was reciting the Holy Qur'an. It has also been re-affirmed that accused persons were with the group of attackers as P.W.09 replied to question put to him, in cross-

examination, that he could recognise accused Obaidul Haque Taher and Aatur Rahman Noni accompanying the group of 100/150 Razakars and Pakistani army men.

261. Causing torture on forcible capture by dragging Ruz Ali Talukder out when he was reciting the Holy Qur'an was indeed a deliberate attack against the religion Islam as well and the accused persons by accomplishing such inhumane act had gravely demeaned the Holy Qur'an, the complete code of life, we conclude. Such beastly act of the accused persons and their accomplices aggravates the level of their culpability.

262. Defence suggested that the event of abduction and killing did not happen in the manner he has described. P.W.09 has denied it. But no specific defence case could have been extracted as to how and in which manner it happened. However, the defence does not appear to have disputed the event of abduction followed by brutal killing of detained villagers.

263. P.W.07 Nabi Newaj Talukder has narrated the event of attack that resulted in abduction of villagers, plundering houses of their village and also implicated the accused persons with the group of attackers in carrying out all those criminal activities. He [P.W.07] is a resident of crime village Laufa and according to him at night they brought the dead bodies of Ruz Ali Talukder and Zafar Ali Talukder to their house. Thus, presumably being a villager he had

reason of being aware of the attack. Besides, his evidence as to the first phase of the attack gets corroboration from the evidence of P.W.02 and P.W.04, the direct witnesses.

264. According to him [P.W.07], he later on heard from two released detainees Sadek Ali and Alam Kha that accused Obaidul Haque Taher and Ataur Rahman Noni tortured them in captivity at Thakurakona Razakar Camp for extracting information about freedom fighters and two detainees [Sadek Ali and Alam Kha] were set free on condition of providing information about the freedom fighters. It patently indicates that the objective of the 'criminal mission' was to get information about the freedom fighters and to annihilate them and pro-liberation Bengali civilians.

265. P.W.07, two days later, also heard from survived victim Chanfor Ali that they [detained persons] were subjected to torture at Thakurakona Razakar Camp by the accused persons and their accomplices and then they took all the detainees, in tied up condition, at the bank of river under the Thakurakona bridge where the accused Obaidul Haque Taher and Ataur Rahman Noni gunned them down to death, but he however luckily survived despite receiving bullet hit.

266. The above hearsay evidence of P.W.07 in respect of the criminal acts caused to the detainees after taking them away to the Thakurakona Razakar Camp, causing torture to them in captivity,

taking them under the Thakurakona bridge, accomplishing the act of killing and accused persons' complicity and participation therewith seems to have been consistently corroborated by the evidence of P.W.02 and P.W.04 who also heard this phase of event from survived victim Chanfor Ali and released detainees Sadek Ali and Alam Kha.

267. System crime or group crime committed in war time situation in fact is the upshot of series of acts and activities and an individual may not have participation to all phases of the event. It was not practicable, due to horrific situation prevailing in 1971, to witness or experience all the phases of a particular event. One might have had opportunity to see or know or experience a particular phase or act or conduct of the accused forming part of systematic attack that eventually resulted in the event which was significantly related to the commission of principal crime.

268. In the case in hand, we are to evaluate whether the hearsay testimony of the prosecution witnesses so far as it relates to the next phase of the event involving causing torture to the detained persons in captivity at Razakar Camp ,their killing and complicity and participation of the accused persons therewith carries value and credence.

269. Naturally, none had opportunity to witness how the detainees were subjected to torture at the Razakar Camp and how afterwards

they were taken under Thakurakona bridge and who participated in accomplishing the act of killing the victims. We have already got it proved that two of detainees Sadek Ali and Alam Kha were set free from the Razakar Camp on condition of providing information to the Razakars about the freedom fighters and their location. Chanfor Ali [father of P.W.04], one of the victims who miraculously survived despite receiving bullet hit as he was also taken together with other detainees under the Thakurakona bridge by the accused persons and their accomplices.

270. All the five witnesses examined, in support of this charge, including the direct witnesses who are near relatives of victim Chanfor Ali , Ruz Ali Talukder, Zafar Ali Talukder, Rishi Miah, Moshrab Ali Talukder and other victims have testified the dying phase of the event as learnt from survived victim Chanfor Ali[**now dead**] and two released detainees Sadek Ali and Alam Kha[**both are now dead**]. Their hearsay evidence about this phase of event carries due probative value and indisputably it had nexus to the phase of the event of attack that resulted in abducting the villagers, causing torture to detainees and destructive activities detrimental to the normal livelihood of protected civilian persons to which P.W.02, P.W.04 and P.W.09 are direct witnesses. And accordingly, totality of their evidence proves it beyond reasonable doubt that the accused Obaidul Haque alias Taher and Aatur Rahman alias Noni

were with the group of attackers formed of Razakars and the Pakistani occupation army till accomplishing the act of killing the detained villagers under the Thakurakona bridge.

271. It is now settled that in committing an internationally recognized crime, there can be several perpetrators where the conduct of each one of them fulfils the requisite elements of the definition of the substantive offence. The offence of murder of numerous civilians on forcible capture from the crime villages as already proved was a 'system crime', not an isolated one and there had been a 'context' in committing such crime directing the civilian population.

272. Integrated evaluation of evidence of five witnesses examined by the prosecution impels to the conclusion that the accused persons not only actively guided and assisted the criminal gang in carrying out the systematic and horrific attack directing civilians of three villages that eventually resulted in killing of many of persons detained in conjunction with the attack but they were part of the common plan and design----evidence and circumstances unveiled before us unequivocally proves it.

273. Evidence and material facts unveiled unambiguously depicts that the significance of the accused persons' contribution in happening the act of abduction of the victim villagers are relevant to demonstrate that the accused persons, by their act and conduct,

shared the intent to pursue the common purpose of the group of attackers which was rather a 'criminal enterprise'. This is sufficient for holding the accused persons responsible even for the act of killing the abducted villagers as it was the upshot of the prior act of abduction.

274. The pattern and extent of attack directing the villages, the way the villagers were forcibly captured from their houses and killing two of detained villagers while taking them towards the Thakurakona Razakar Camp and role and conduct of the accused persons accompanying the group in causing abduction, torture and wanton destructive activities, as found proved, leads us to conclude that all the participants including the accused persons were in 'agreement' to further the purpose and plan of the enterprise. And therefore, the accused persons' 'concern' and 'complicity' cannot be kept excluded even in perpetrating the principal crime, the murder of detained villagers that occurred during the night on the bank of river under the Thakurakona bridge. It is immaterial to show accused persons' role and conduct also at the phase of killing the abducted villagers. In this regard the proposition evolved in the **ICTY** may be cited as relevant and it is as below:

" If the agreed crime is committed by one or other of the participants in a joint criminal enterprise such as has already been discussed, all of the participants in that enterprise are equally guilty of the crime regardless of the part played by each in its commission."

*[Prosecutor vs. Vasiljevic, Case No. IT-98-32-T
(Trial Chamber), November 29, 2002, para. 67]*

275. Thus, if we exclude the hearsay testimony of the prosecution witnesses made in respect of accused persons' presence and culpable role at the Razakar Camp and killing site, even then the accused persons incurred equal liability as 'co-perpetrators' in committing the offence of murder of unarmed civilians, under the doctrine of **Joint Criminal Enterprise [JCE]** which corresponds to section 4(1) of the Act of 1973 which reads as below:

"When any crime as specified in section 3 is committed by several persons, each of such person is liable for that crime in the same manner as if it were done by him alone".

276. Section 4(1) of the Act of 1973 refers to the concept of **JCE**. Fundamentally the **JCE** requires that a group of individuals had a common plan, design, or purpose to commit a crime, that the accused participated in some way in the plan and that the accused intended the accomplishment of common plan or purpose.

277. The expression '*committed*' occurred in section 4(1) of the Act of 1973 includes 'participation' in **JCE**. Section 4(1) tends to cover the necessary elements of **JCE**. In line with the recognized principles almost common to all legal systems, a person who takes 'consenting part' in the commission of the crime or who is found to be 'connected with plans or enterprise' involved in the commission of crime [as enumerated in section 3(2) of the Act] or who is found

to 'belong an organisation or group' engaged in the activities of committing crime, is guilty together with the 'principals'. Thus, murder as a crime against humanity under the Act of 1973 does not require the prosecution to establish that the accused persons personally committed the killing of detained villagers. Personal commission is one of the modes of responsibility.

278. It is to be noted further that a co-perpetrator in a joint criminal enterprise need not physically commit all the parts of the *actus reus* of the crime committed. Nor an accused, a participant in a joint criminal enterprise is required to be shown physically present when and where the principal crime was committed. Additionally, this view finds support from the principle enunciated by the **ICTY Appeal Chamber in the case of *Krnjelac*** which is as below:

"The Appeals Chamber notes that, in accordance with its decision in the Tadic Appeals Judgement, once a participant in a joint criminal enterprise shares the intent of that enterprise, his participation may take the form of assistance or contribution with a view to carrying out the common plan or purpose. The party concerned need not physically and personally commit the crime or crimes set out in the joint criminal enterprise."

[Krnjelac, (Appeals Chamber), September 17, 2003, para. 81].

279. Active and culpable participation of accused Obaidul Haque alias Taher and Aaur Rahman alias Noni at the phase of the event involving forcible capture of villagers by itself offers unmistakable conclusion that they shared the intent of the group of perpetrators

belonging to Razakar Bahini and Pakistani army to further common purpose and plan of killing the abductees. The substantial contribution and facilitation in effecting the act of abduction of villagers, by launching systematic attack, eventually caused the barbaric death of the victims who were 'protected persons' under the Laws of War and Geneva Convention of 1949.

280. In all 07 of the detained villagers were killed of whom two namely, Ruz Ali Talukder and Zafar Ali Talukder were shot to death when they attempted to escape on the way of taking them away along with other detainees at a place near a bamboo-bridge. Five of detained persons were afterwards killed at the crime site. Two of detained persons were set free on condition and one detainee Chanfor Ali[father of P.W.04] managed to survive despite receiving bullet hit -- all these have been proved beyond reasonable doubt.

281. The fact of death of victims resulting from the attack launched in their villages is not disputed. It has been proved that accused Obaidul Haque alias Taher and Aaur Rahman alias Noni accompanied the group of attackers in perpetrating the act of abduction of the victim villagers by launching attack. Of course, such conduct and relevant facts unveiled together prove their conscious 'concern' and 'complicity' even to the commission of the act of killing the abductees that happened afterwards on the bank of

river under the Thakurakona bridge. Their dead bodies could not have been traced.

282. But it is now settled that to prove the offence of murder as crime against humanity it is not necessary to establish that the body of the deceased person has been recovered. It is sufficient to prove that the death was the result of an act or an omission of the group of perpetrators. This view finds support from the decision of the **ICTY Trial Chamber in the case of *Krnojelac*** which reads as below:

"Proof beyond reasonable doubt that a person was murdered does not necessarily require proof that the dead body of that person has been recovered. [T]he fact of a victim's death can be inferred circumstantially from all of the evidence presented to the Trial Chamber."
[Krnojelac, (Trial Chamber), March 15, 2002, para. 326]

283. It has been argued by the defence that the prosecution witnesses examined in support of this charge have made contradictory statement as to the attack allegedly launched at two *paras* of village Laufa and the evidence in respect of killing Ruz Ali Talukder and Zafar Ali Talukder, alleged two detainees, also suffers from gross inconsistencies.

284. We reiterate that the witnesses, the near relatives of victims, came on dock to narrate the trauma they sustained long more than four decades after the event occurred. Naturally, due to laps of long passage of time their memory may not respond to narrate the event with exactitude. But we are to see what they have stated on the core

essence of the event. It is to be noted that the core essence of the event retains in human memory for long time if it involves horrific traumatic event. Observation of one witness may not always go with absolute consistency with that of other. 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. In this connection we may refer to the observation made by the **ICTR Trial Chamber in the case of Jean-Paul Akayess's case** which is quoted as under:

"Many of the eye-witnesses who testified before the Chamber in this case have seen atrocities committed against their family members or close friends, and/ or have themselves been the victims of such atrocities. The possible traumatism of these witnesses caused by their painful experience of violence during the conflict in Rwanda is a matter of particular concern to the Chamber. The recounting of this traumatic experience is likely to evoke memories of the fear and the pain once inflicted on the witness and thereby affect his or her ability fully or adequately to recount the sequence of events in a judicial context. The Chamber has considered the testimony of those witnesses in this light."

[The prosecutor vs. Jean-Paul Akayesu, Case No. ICTR-96-4-T, Trial Chamber, Judgment on 2 September 1998, Para 142]

285. Thus, it would be unjust and wrong to treat any inaccuracy or inconsistency as being synonymous with giving false testimony. Moreover, false testimony requires the necessary *mens rea* and not a mere wrongful statement. In the case in hand, defence has failed to bring any *mens rea* that could have prompted the witnesses to make wrong statement. Therefore, mere inconsistencies in narrating the event with detail precision does not in any way question the truthfulness of their testimony, particularly when the same remained unimpeached and inspires credence.

286. It appears that the defence, with intent to shake reliability, suggested the prosecution witnesses that they did not state earlier on which material particular they have stated before the Tribunal. In this regard we reiterate that the Act of 1973 does not provide provision of contradicting one's testimony made on oath with his or her earlier statement made to the Investigating Officer [IO]. Besides, there is no obligatory provision of reducing witnesses' statement in writing, during investigation. Absence of any such provision does not permit to make compare between the testimony of a witness made on oath and his or her earlier statement. Additionally, inconsistencies may naturally occur between testimony proved in court and statement made earlier to the IO. In this regard, we recall the observation of the **Appellate Division of**

Bangladesh Supreme Court made in the case of Allama *Delwar*

Hossain Sayedee which reads as below:

*" witness may not say a fact to the investigation officer as he has not been asked by him and if the witness discloses that fact in Tribunal at the trial on the query of the prosecutor, it cannot be said that this statement contradicts earlier statement.....
In the absence of any Rules guiding the procedure for recording statement of a witness, normally the investigating officers examine the witnesses sometimes in a slip shod manner and sometimes at his whims. Therefore, the defence is not legally entitled to take contradiction of the statement of a witness with his earlier statement made to the investigation officer in accordance with section 145 of the Evidence Act."
[Criminal Appeal No. 39-40 of 2013, Judgment 17 September 2014, His Lordship Mr. Justice Surendra Kumar Sinha, Pages-136-137]*

287. On integrated evaluation of evidence provided by the prosecution, we therefore, come to the conclusion that the prosecution has been able to prove beyond reasonable doubt that to further common plan and purpose a group formed of Razakars and Pakistani army accompanied by accused Obaidul Haque alias Taher and Ataur Rahman alias Noni by launching systematic attack at three villages forcibly captured villagers, caused inhumane torture to them, had carried out wanton destruction by looting and setting civilians property on fire and on the way of taking away the captured villagers victims namely, Ruz Ali Talukder and Zafar Ali Talukder were killed when they attempted to escape . It also stands proved that accused Obaidul Haque alias Taher and Ataur Rahman alias Noni actively and culpably participated, assisted and

facilitated the commission of those criminal acts, at the first phase of the attack. It also stands well proved that five of the detained villagers were also killed on the bank of river under Thakurakona bridge and in accomplishing the act of killing the accused persons had concern to the commission of the principal offences and their act and conduct encompass 'abetment' and 'facilitation' indisputably which had substantial effect on commission of the principal offences of 'torture', 'confinement', 'abduction', 'murder' and 'other inhumane act' [plundering and arson] which were chained together and were perpetrated to further same purpose.

288. In view of above, accused Obaidul Haque alias Taher and Aatur Rahman alias Noni are, therefore, found criminally liable under section 4(1) of the Act of 1973 for 'participating', 'abetting', 'facilitating' and substantially 'contributing', by their act, conduct and culpable 'concern' forming part of attack, to the actual commission of killing of unarmed civilians constituting the offence of 'murder' as crime against humanity' and also to the commission of 'abduction, 'confinement', 'torture' and 'other inhuman act' 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 Act.

Adjudication of charge no. 04

[Maloy Biswas of Mokterpara and Advocate Sreesh Chandra Sarkar of Mesoa bazar, both under Netrokona Sadar Police

Station were forcefully dispossessed on any day in May, 1971 and then they were deported to India]

289. Summary charge: On any day in May, 1971 during the Liberation War, under the leadership of Razakar Commander accused Md. Obaidul Haque alias Taher, another Razakar accused Aatur Rahman alias Noni along with other Razakars having forcefully dispossessed Maloy Biswas from his house, situated at Mokterpara under Netrokona Sadar Police Station, established a Razakar Camp there which was used as a 'torture cell' by the Razakars and Pakistani army. They also having dispossessed forcefully Advocate Sreesh Chandra Sarkar from his house, situated at Mesoa bazar under Netrokona Sadar Police Station, established the office of Nezam-e- Islami there. Subsequently, both of them with their family members were compelled to be deported to India.

290. Thus, both the accused persons have been charged for abetting, facilitating and complicity in the commission of offences of deportation and other inhumane act [forceful dispossession] as crimes against humanity as specified in section 3(2) (a) (g) and (h) read with section 4(1) of the Act of 1973 which are punishable under section 20(2) of the said Act.

Evidence of Witnesses Presented

291. To prove charge no. 04, the prosecution has examined 05(five) witnesses [P.Ws. 12, 13, 14, 17 and 21]. Before we enter

the task of evaluation of evidence adduced, let us first see what the witnesses examined have narrated in the Tribunal.

292. P.W. 12 Md. Abdul Hannan Chowdhury has deposed that perhaps on 04 November, 1971 Razakars having apprehended took away his elder brother Abdul Khaleque Chowdhury to the Razakar Camp established in the house of Maloy Biswas. Thereafter, his father Shahabuddin Chowdhury went to the said Razakar Camp to free Abdul Khaleque Chowdhury, but he was also apprehended and tortured by the Razakars, and at night the Razakars having taken his father and said elder brother away near Trimohoni bridge shot them to death.

293. Md. Abdul Hamid as P.W. 13 has testified that in 1971 during the Liberation War his age was about 18 years. His village Tenga is situated adjacent to Netrokona town. In 1971, he used to live in his village home. At the last part of April Pakistani army having come to Netrokona town established a camp at the District Council Dakbungalow. Thereafter, under the leadership of Moulana Monjurul Haque Peace Committee was formed, and Razakar Bahini was formed through the Peace Committee, and accused Obaidul Haque Taher, son of Moulana Monjurul Haque, was made Commander of that Razakar Bahini, and accused Aatur Rahman Noni and many others joined the Razakar Bahini. He has further deposed that the members of the Razakar Bahini having occupied

the house of Maloy Biswas situated at Boro bazar of Netrokona town established a Razakar Camp there which was used as their 'torture cell' . At one stage he [P.W. 13] went to India for participating in the Liberation War. Thereafter, as a freedom-fighter he came back to Netrokona town to collect informations. He has identified both the accused persons on the dock of the Tribunal.

294. In cross -examination he has denied the defence suggestion that accused Obaidul Haque Taher, son of Monjurul Haque, was not Razakar Commander and accused Aaur Rahman Noni did not join the Razakar Bahini. He has also denied the defence suggestions that the house of Maloy Biswas situated at Netrokona town was not occupied and no Razakar Camp was established there. He has also denied the defence suggestion that being tutored he has deposed falsely against accused Obaidul Haque Taher and Aaur Rahman Noni.

295. P.W. 14 Md. Abu Bakar Siddique has stated that his present age is about 63 years. At the last part of April, 1971 Pakistani army came to Netrokona town and then the local leaders of the supporters of Pakistan welcomed them. Pakistani army having come to Netrokona town established camps in the Netrokona Dakbungalow and Vocational Training Institute and thereafter they formed Peace Committee and Razakar Bahini at Netrokona town. The said Razakar Bahini established their camp in

the house of a Hindu, who was known as ' Sarbo Banik', situated at Boro bazar of Netrokona town. They having occupied the house of Shirish Mokter of Masua bazar established an office of Nezam-e-Islami. The leader of local Nezem-e-Islami Monjurul Haque's son accused Obaidul Haque Taher was made the Razakar Commander, and accused Ataur Rahman Noni and many others joined that Razakar Bahini. He has further stated that when the Razakar Bahini started committing different atrocities at Netrokona town, he being afraid of went to India. Having gone to India he received training for the Liberation War, and then he came back to Kalmakanda area for participating in the Liberation War. He has also stated that having freed Netrokona town from Pakistani army and Razakars they [freedom-fighters] entered into Netrokona town on 9 December, 1971 coming from different directions. Having gone to Boro bazar Razakar Camp they found some tortured women in naked condition there and then having rescued they gave them clothes collecting from nearby shops. Besides, they came to know that after the departure of the Razakars from the camp, some other tortured women went away from that camp. He has further stated that both accused Obaidul Haque Taher and Ataur Rahman Noni are his friends and they used to move together since 1963.

296. In cross-examination he has stated that in 1963 he was a student of class VI of Netrokona Datta High School. Accused

Obaidul Haque Taher passed the Degree Examination in 1970 . In 1963, accused Aatur Rahman Noni was a student of Anjuman School. He has denied the defence suggestions that the testimony given by him are untrue, tutored , concocted and motivated that Razakar Bahini established their camp in the house of a Hindu, who was known as 'Sarbo Banik', situated at Boro bazar of Netrokona town and that they having occupied the house of Shirish Mokter of Masua bazar established an office of Nezam-e-Islami there and that the leader of local Nezami-e-Islami Monjurul Haque's son accused Obaidul Haque Taher was made the Razakar Commander, and accused Aatur Rahman Noni and many others joined that Razakar Bahini. He has further denied the defence suggestion that he has deposed falsely against the accused persons.

297. P.W. 17 Md. Abul Kashem has deposed that in 1971, he was a student of Class VI in Anjuman High School situated at Netrokona . Now he is running a business in Netrokona town. In the month of April, 1971 Pakistani army having come to Netrokona town formed Peace Committee and Razakar Bahini there. Under the leadership of the then Muslim League leaders Fazlul Haque and Moulana Monjurul Haque Peace Committee was formed in Netrokona town. Accused Aatur Rahman Noni and many others joined the Razakar Bahini. The Razakars having occupied the houses of Maloy Biswas, Sarbo Banik and Shirish Chandra situated

at Netrokona town established Razakar camps there which were used as torture cells. He has further deposed that after the liberation, he along with many others having gone to those houses saw different alamats of torture. The Razakars having attacked different houses of Hindu people of Netrokona town plundered the same. He identified accused Aatur Rahman Noni on the dock.

298. In course of cross-examination he has stated that their Joynagar village was adjacent to the town. Accused Aatur Rahman Noni was a student of higher class of the same school where he [P.W.17] studied. He has denied the defence suggestions that accused Aatur Rahman Noni did not join Razakar Bahini or that he did not know him. He has also denied the defence suggestions that in 1971 accused Aatur Rahman Noni was a student of Class VIII or that he has deposed falsely.

299. Md. Hossain Ali as P.W. 21 has testified that his age is aboput 70 years. In 1971 in the middle of Bangla month Baishakh, Pakistani army came to Netrokona , and then A.K Fazlul Haque, Monjurul Haque, Rezek Dakter and Kasumuddin welcomed them at Netrokona town. Thereafter, they formed Peace Committee at Netrokona town and accused Obaidul Haque Taher was made Razakar Commander and accused Aatur Rahman Noni and many others joined that Razakar Bahini. He has further testified that thereafter Razakars having occupied the house of Maloy Biswas

of Netrokona town established a Razakar Camp there. They also having occupied the house of Shirish Mokter of Mesua bazar and the house of Sarbo Banik of Boro bazar, both within Netrokona town established Razakar Camps there. The Razakars having established those Razakar Camps committed various atrocities including torture upon women. He has also testified that after the liberation of Bangladesh he visited those houses where Razakar Camps had been established and he found those houses seriously damaged. He found many clothes of women and blood stains on the wall and floor of the house of Maloy Biswas. He has identified both the accused persons on the dock.

300. In cross-examination he has denied the defence suggestion that accused Obaidul Haque Taher was never Razakar Commander or accused Aaur Rahman Noni was never a Razakar or that he has deposed falsely against the accused persons.

Finding with Reasoning on Evaluation of Evidence

301. The instant charge [charge no. 04] framed alleges that on any day in May 1971, accused Md. Obaidul Haque alias Taher and Aaur Rahman alias Noni along with other Razakars having forcefully dispossessed Moloy Biswas and Advocate Sreesh Chandra Sarkar from their houses established Razakar Camp and office of Nezam-e-Islami there respectively. It is also alleged that subsequently, both Maloy Biswas and Advocate Sreesh Chandra

with their families were forced to deport to India. For such criminal acts the accused persons have been indicted for abetting, facilitating and complicity in the commission of offences of 'deportation' and 'other inhumane act' [forceful dispossession] as crimes against humanity. Prosecution has examined 05[five] witnesses mentioned above in support of this charge.

302. Mr. Mokhlesur Rahman, the learned prosecutor has argued that 05[five] witnesses [P.W. 12, P.W. 13, P.W. 14, P.W. 17 and P.W. 21] have been examined by the prosecution and from their evidence it will reveal that Razakar Camp and Nezam-e-Islami's office were set up at the houses of Maloy Biswas and Advocate Sreesh Chandra Sarkar respectively which were used as 'torture cells' and thus it proves that the real owners of those houses were forcefully dispossessed constituting the offences of 'deportation' and 'other inhumane act'.

303. Per contra, Mr. Gazi M.H. Tamim, one of the learned defence counsels in placing argument has submitted that the prosecution has failed to prove this charge by adducing any lawful evidence and the testimony of witnesses examined in support of this charge does not provide legal requirements to constitute the offences of deportation and other inhumane act. Besides, none of the witnesses has implicated the accused persons with the alleged acts.

304. On a careful scrutiny of the testimonies of the aforesaid five witnesses it appears that testimony of P.W. 12 Md. Abdul Hannan Chowdhury does not speak anything about the fact of dispossessing Maloy Biswas and Advocate Sreesh Chandra Sarkar with their families from their houses, and their forcible deportation to India in consequence of such 'forceful dispossession'. He [P.W. 12] has stated that Razakars, on 04 November, 1971 forcibly took away his brother Abdul Khaleque Chowdhury at the Razakar Camp set up at the house of Maloy Biswas. Presumably, with this P.W. 12 intended to establish that Razakar Camp was set up at the house of Maloy Biswas. But mere existence of Razakar Camp at the house of Maloy Biswas does not prove that he [Maloy Biswas] was forcibly dispossessed from his house by the accused persons, and he and his family were forced to deport to India by them [accused].

305. P.W. 13 Md. Abdul Hamid has stated that Razakar Bahini having occupied the house of Maloy Biswas set up a camp there which was used as their 'torture cell'. P.W. 14 Md. Abu Bakar Siddique has testified that Razakar Bahini set up their camp in the house of 'Sarbo Banik' and established an office of Nezam-e-Islami in the house of Sreesh Mokter. But P.W. 17 Md. Abul Kashem and P.W. 21 Md. Hossain Ali have stated that Razakars occupying the houses of Maloy Biswas and Sreesh Mokter set up their camps which were used as torture cells. The fact stated by these

prosecution witnesses does not prove the fact of 'forceful dispossession' and 'deportation' of Maloy Biswas and Advocate Sreesh Chandra Sarkar and their families as described in the instant charge framed. Causing torture to civilians keeping in captivity at the said Razakar Camp does not relate to this charge.

306. The offence 'deportation' is not defined in the Act of 1973. In respect of definition of deportation the **ICTY Trial Chamber** observed as under -

" Trial Chambers of the Tribunal have held in several judgments that deportation is defined as the forced displacement of persons by expulsion or other coercive acts from the area in which they are lawfully present, across a national border, without lawful grounds The Trial Chamber agrees with there findings."

[Prosecutor vs. Blagoje Simic, Tadic and Zaric, Case No. It-95-9, Judgment -17 October, 2003, para -122]

307. The **ICTY Trial Chamber** also observed same view in a subsequent case as follows:

"The Trial Chamber by a majority vote is satisfied that the actus reus of ' deportation' under Article 5(d) of the Statute consists of the forcible displacement of individuals across a State border from the area in which they are lawfully present without grounds permitted under international law..... "

[Prosecutor vs. Brdjanin, Case No. IT-99-36-T, Judgment -1 September, 2004, para-544]

308. According to the above view made by the **ICTY Trial Chamber**, 'deportation' means forcible displacement of individuals across a State border from the area in which they are lawfully present, without lawful grounds. But in the instant charge, the evaluation of evidence of the witnesses examined does not provide

any indication that Maloy Biswas and Advocate Sreesh Chandra Sarkar and their families were 'forced' or 'compelled' to deport to India in consequence of their alleged dispossession. At the same time, voluntarily, without force or coercion, going to India with family abandoning own property does not constitute the elements of the act of 'deportation'.

309. It is true that dispossessing one illegally from his own house obviously a grossest infringement of one's fundamental right to property and such act causes harm to him that reasonably qualifies as an act of 'inhumane act'. The defence does not dispute the fact of setting up Razakar Camp at the house of Maloy Biswas and office of Nezam-e-Islami at the house of Advocate Sreesh Chandra Sarkar. But there has been no evidence that Maloy Biswas and Advocate Sreesh Chandra Sarkar and their families had been at their respective houses till setting up Razakar Camp and Nezam-e-Islami's office there, by dispossessing them.

310. Be that as it may, how can it be deduced that they and their families were 'dispossessed' from their houses? Maloy Biswas and Advocate Sreesh Chandra Sarkar and their families might have left the locality abandoning their houses, for the reason of war time situation, and such case there can be no room to say that they were allegedly 'dispossessed' therefrom and thus causing mental harm by depriving the real owner of normal enjoyment of his property does

not arise. And as such and in absence of any specificity about act and conduct of perpetrators mere fact of setting up Razakar Camp at the house of Maloy Biswas and Nezam-e-Islami's office at the house of Advocate Sreesh Chandra Sarkar and carrying out criminal activities there as stated by the witnesses does not constitute the offence of 'other inhumane act'.

311. Next, none of the witnesses examined has testified that the accused persons were with the Razakars in accomplishing the act of 'forceful dispossession' of Maloy Biswas and Advocate Sreesh Chandra Sarkar and their families from their houses in any manner.

312. The fundamental principle of Criminal Jurisprudence is that onus of proving everything essential to establishment of charge against accused lies upon the prosecution which must prove charge substantially as laid down i.e. to prove to the hilt beyond all reasonable doubt on strength of clear, cogent, credible and unimpeachable evidence. Proof of charge must depend upon judicial evaluation of totality of evidence, oral and circumstantial, and not by an isolated scrutiny. Prosecution version is, also, required to be judged taking into account overall circumstances of case with a practical, pragmatic and reasonable approach in appreciation of evidence. It is always to be remembered that the graver the charge the greater is the standard of proof required.

313. On totality of evidence and the legal aspects as discussed above it appears that the prosecution has not been able to prove the necessary legal requirements to prove the commission of the offences of 'deportation' and 'other inhumane act' [forceful dispossession] as narrated in the charge framed. At the same time there has been no evidence as to specificity of any act or conduct on part of the accused persons in abetting, facilitating and contributing to the commission of the offences alleged. So, we find substance in the argument advanced by the defence that there is no element of 'deportation' and 'forceful dispossession' [other inhumane act] in the instant charge and none of the witnesses has implicated the accused persons with the alleged acts. Therefore, we are constrained to conclude that prosecution has been failed to establish charge no. 04 beyond reasonable doubt that accused Md. Obaidul Haque alias Taher and Aatur Rahman alias Noni by their act or conduct abetted, facilitated or contributed to the commission of the offences of 'deportation' and 'other inhumane act' [forceful dispossession] as crimes against humanity as enumerated in section 3(2)(a)(g) and (h) read with section 4(1) of the Act of 1973.

Adjudication of charge no. 05

[Murder, abduction and torture committed on 15.11.1971 at different places under Netrokona Sadar Police Station]

314. Summary charge: On 15 November, 1971 at about 11.00 A.M Razakar Commander accused Md. Obaidul Haque alias Taher

and Razakar accused Aatur Rahman alias Noni along with other Razakars having attacked Birampur bazar under Netrokona Sadar Police Station abducted Badiuzzaman Mukta, a freedom-fighter and organizer of the Liberation War, from the cloth-store of Siddiqur Rahman, where he had hidden himself, and also said Siddiqur Rahman. They also abducted Abdul Malek alias Shanto, Sree Ramchandra Talukder alias Lebu, Islam Uddin, Mizanur Rahman, a bank employee and an adolescent boy Ismail Hossain from that bazar and its adjacent area, and then all of them were taken to Lakhmiganj Kheyaghat and accused Md. Obaidul Haque alias Taher shot said Sree Ramchandra Talukder alias Lebu to death and threw his dead body in the river. Thereafter, the other abducted persons having been taken to the 'torture cell', situated at Netrokona District Council Dakbungalaw [rest house] were tortured by them there. At noon the accused persons and their accomplice Razakars having taken the abducted persons on an open jeep moved all over Netrokona town and tortured them, and in the evening they were all taken to the army camp, situated at the Vocational Training Institute, and tortured them there again. At night the abducted persons having been taken to the Mokterpara bridge all of them, except the bank employee Mizanur Rahman, were killed by rifle shots by accused Md. Obaidul Haque alias Taher and Aatur Rahman alias Noni and their accomplice Razakars. Though the

dead bodies of Badiuzzaman Mukta and Siddiqur Rahman were recovered but the other dead bodies were not found.

315. Thus, both the accused persons have been charged for complicity in, abetting, aiding and facilitating the commission of offences of murder, abduction and torture as crimes against humanity as specified in section 3(2)(a)(g) and (h) read with section 4(1) of the Act of 1973 which are punishable under section 20(2) of the said Act.

Evidence of Witnesses Presented

316. To prove the instant charge [charge no. 05], the prosecution has examined as many as 09[nine] live witnesses [P.Ws. 01, 08, 10, 11, 16, 17, 18, 19 and 20]. Now let us have a look to what has been deposed by these witnesses.

317. P.W. 01 Nurul Amin has deposed that previously he was a trader and at present he is the Commander of Netrokona District Muktijodhdha Unit Command. Awami League candidate Abdul Momen won the general election held in 1970 from the Netrokona-Barhatta-Mohonganj constituency [National Assembly]. Nezam-e-Islami candidate Moulana Monjurul Haque, father of accused Md. Obaidul Haque alias Taher, contested the said election with Abdul Momen. On 26 March, 1971 when the Liberation War started they, the students, youths and general people who were infavour of liberation, took preparation for that war and many people including

himself started to take training in the local Mokterpara field. On 28 April, 1971 Pakistan occupation army came to Netrokona town. The leaders and workers of Nezam-e-Islami, PDP, Muslim League, Jamaat-e-Islami and other pro-Pakistani political parties welcomed the Pakistani army with Pakistani flags. The Pakistani army set up camps in the District Dakbungalow of Netrokona town and local Vocational Training Institute. He has further deposed that in the first part of May, 1971 under the leadership of Muslim League leader Advocate Fazlul Haque and Nezam-e-Islami leader Moulana Monjurul Haque, Netrokona District Peace Committee, consisting of eleven members, was formed. Thereafter, under the supervision of the said District Peace Committee other Peace Committees were also formed in Thana and Union level of Netrokona. Under the supervision of the said Peace Committee, Razakar Bahini was formed. Accused Md. Obaidul Haque alias Taher, son of above mentioned Moulana Monjurul Haque, became the Netrokona Razakar Commander and accused Aatur Rahman alias Noni, son of Muslim League leader Hasan Ali Mokter, and many others joined that Razakar Bahini. Having received training from Tura Training Centre, Meghalaya, India he [P.W. 01] came back to the country and participated in the Liberation War in different areas. He has also deposed that on 15 November, 1971 at about 10.00 /10.30 A.M a group of Razakars and Pakistani army including Razakar

Commander accused Obaidul Haque Taher and Aatur Rahman Noni went to Lakhmiganj Kheyaghat from the District Council Dakbungalow Camp, and from there the two accused persons and their accomplice Razakars having crossed the river by boat went to Birampur bazar and the Pakistani army remained at the Lakhmiganj Kheyaghat. Having gone to Birampur bazar the accused persons and their accomplice Razakars abducted Badiuzzaman Mukta, Abdul Malek Shanto, Lebu, Siddiqur Rahman, Ismail, Ismail Hossain and a bank employee Mizanur Rahman took away them to Lakhmiganj Kheyaghat. When they knew that Lebu was a Hindu, then he was shot to death at Lakhmiganj Kheyaghat, and the other abducted people were taken to Netrokona District Council Dakbungalow Camp and thereafter they having been taken on a jeep were moved around Netrokona town and tortured them inhumanely. He has further deposed that at night the abducted people including Badiuzzaman Mukta having been taken to Mokterpara bridge all of them, except the bank employee Mizanur Rahman, were shot to death. He has further deposed that Netrokona District Unit Command of Bangladesh Muktijodhdha Sangsad prepared a list of the members of Netrokona town and district Razakar, Al-Badr and Al-Shams Bahinis [Exhibit-1]. The names of accused Md. Obaidul Haque Taher as Razakar Commander and accused Aatur Rahman Noni as a Razakar have been mentioned in

serial nos. 1 and 2 respectively in the said list [Exhibit -1]. He has identified both the accused persons on the dock.

318. In course of cross-examination he has stated that as per the letter of the Deputy Commissioner, the Upazila and District Command prepared the list, Exhibit-1. Being elected he has been discharging his duties as the Commander of Netrokona District Muktijodhdha Sangsad Command since 2010. He participated in the Liberation War at different areas of the then Netrokona Sub-Division under Sector No. 11. He has denied the defence suggestions that accused Aatur Rahman alias Noni was never a Razakar, and it is untrue that said accused person was involved with the incident of 15 November. He has further denied the defence suggestions that accused Md. Obaidul Haque alias Taher was never a Razakar or Razakar Commander and that the said accused was not involved with those incidents which he has stated in his examination-in-chief, and it is untrue, concocted and tutored that on 15 November, 1971 at about 10.00/10.30 A.M. a group of Razakars and Pakistani army men including Razakar Commander accused Obaidul Haque Taher went to Lakhmiganj Kheyaghat from the District Council Dakbungalow Camp. He has also denied the defence suggestion that due to enmity he has deposed falsely against the accused persons.

319. Md. Abdul Mannan Sobuj as P.W. 08 has testified that he is a teacher of a primary school and in 1971 he was a student of class VIII of Bekhaihati High School. On 15 November , 1971 at about 11.00 A.M. he went to Birampur bazar and saw there that under the leadership of Razakar accused Obaidul Haque Taher a group of Razakars having arrived at that bazar started firing shots. Having seen that situation he along with his cousin [gvgvZ fvB] Faruque took shelter in a bush near the bazar from where he could see that the Razakars apprehended his maternal uncles Mukta and Siddiqur Rahman, and then apprehended Abdul Malek Shanto and Lebu from a shop of the bazar. The Razakars also apprehended Islam Uddin. They apprehended Mizanur Rahman from his house situated beside the bazar, and on their way back they apprehended one adolescent boy named Ismail. Thereafter, having taken those abducted people with them the Razakars started going towards Lakhmiganj Kheyaghat. Then he and his cousin Faruque came back to their house and informed the inmates of their house about the said incident, and thereafter, he, his cousin Faruque, grand-mother [bvbx] Moktabennessa, mother Aeysha Akter and aunt [Lvjv] Zhinu went to Monjurul Haque's house situated at Mokterpara of Netrokona town. Having not seen Monjurul Haque in his house he and his cousin Faruque came out to the street and his mother, aunt and grand-mother were waiting in that house. After having come to

the street they came to know that the said abducted people were being tortured. Then they proceeded a little bit ahead and found that under the leadership of accused Obaidul Haque Taher the Razakars were torturing the said abducted people including his maternal uncle Badiuzzaman Mukta. Thereafter, all the abducted people except Lebu having been got up on an open jeep of Pakistani army were moved around Netrokona town and tortured. Before that when the Razakars knew that Lebu was a Hindu, then they killed him by firing shot at Lakhmiganj Kheyaghat. Though his maternal uncle Badiuzzaman Mukta was being tortured, he was chanting slogan 'Joy Bangla'. He has further testified that sometime before evening he and his cousin Faruque went to the house of Moulana Monjurul Haque and found that his [P.W. 08] mother, grand-mother and aunt were begging the life of Badiuzzaman Mukta catching hold the legs of said Moulana Monjurul Haque, who is the father of Razakar Commander accused Obaidul Haque Taher. Then Moulana Monjurul Haque directed his son accused Obaidul Haque Taher to get all of them out of their house, and accordingly, the said accused got them out of the house. Then they took shelter in a nearby village. On the following morning he and his cousin Faruque having gone near to Mokterpara bridge of Netrokona town found that the Razakars including accused Obaidul Haque Taher and Ataur Rahaman Noni were expressing joy on the said bridge by

firing blank shots . They heard that those Razakars had killed five persons by firing shots among the abducted people and released another abducted man knowing that he was a bank employee. Having heard the said incidents he along with his cousin Faruque, mother, grand-mother and aunt came back to their house. His maternal uncle Badiuzzaman Mukta was an organizer of the Liberation War. He has also testified that after three days of the said incidents they came to know that the dead body of his maternal uncle Badiuzzaman Mukta was floating on the river beside the village Dewpur. Then he, his cousin Faruque and maternal uncle Kachu Miah having gone to that river found the dead bodies of his maternal uncle Badiuzzaman Mukta and Siddiqur Rahman together there, and then they having brought the dead of Badiuzzaman Mukta to their house buried the same. He knew accused Aatur Rahman Noni since before the occurrence as he was a good footballer. He also knew accused Obaidul Haque Taher because his father Moulana Monjurul Haque used to go to different religious gatherings to deliver speech and the said accused accompanied him. He has identified both the accused persons on the dock.

320. In cross-examination he has stated that in 1971 their house was at village Norendra Nagar. Since his father married his cousin [PvPvZ †evb], his [P.W. 08] maternal grand-father's house and their own house was the same house. In 1971, the number of family

members of their house was about 25/30. Birampur bazar is situated about $2 \frac{1}{2}$ kilometres away towards east-north from their village. Lakhmiganj Kheyaghat is situated towards south from Netrokona Sadar, but he could not say the distance between them. Lakhmiganj Kheyaghat is situated about $3 \frac{1}{2}$ kilometres far towards north from their village. Having taken food for his maternal uncle Badiuzzaman Mukta he used to go to Birampur bazar every day. His said uncle having stayed at Birampur bazar used to gather freedom-fighters and worked for the organization of the Liberation War, and he stayed at different places at night, but he did not stay at his own house at night . He has denied the defence suggestion that it is not true that he and his cousin Faruque saw the incidents from inside the bush. The house of Monjurul Haque situated at Netrokona town is about eight kilometres far towards north from their village home. He has denied the defence suggestion that accused Obaidul Haque Taher did not go to religious gatherings with his father Monjurul Haque. He has further stated that having come out of the house of Monjurul Haque they stayed at night in the house of Santhu Miah at Banuapara village. He has denied the defence suggestion that accused Obaidul Haque Taher was not involved with the incidents as he has stated. He has also denied the defence suggestion that he has deposed falsely.

321. P.W. 10 Ayesha Akhter has stated that her age is about 80 years. They were five brothers and sisters and Badiuzzaman Mukta was the youngest among them, and he was an organizer of the freedom-fighters. On 28 Kartik [Bengali month], 1971 she sent her son Sobuj and his brother's son Faruque to Birampur bazar to collect information about her brother Badiuzzaman Mukta. Accordingly Sobuj and Faruque having gone to Birampur bazar saw that Razakar Commander accused Obaidul Haque Taher and Razakar accused Aatur Rahman Noni along with some other Razakars abducted her brother Badiuzzaman Mukta from the shop of Siddiqur Rahman and other seven persons from different places of the bazar and then having tortured took them away to Netrokona town. Thereafter, Sobuj and Faruque having come back to the house told her and her mother and others about the said incident. Having heard about the said incident she and her mother Muktabennessa, sister Johura Akhter, Sobuj and Faruque went to the house of a big leader of Netrokona town Monjurul Haque where Razakars always used to go. She has further stated that they reached the house of Monjurul Haque at about 4.00 P.M. , at that time he was not in his house. After about half an hour Monjurul Haque came back to his house and having seen them in his house asked who were they. Then her mother told him that she was the mother of Badiuzzaman Mukta who was brought there after having

been abducted. At that time his associates having shown them told that they were the mother and sister of freedom-fighters, and then Monjurul Haque asked them why did they come to his house? Then her mother disclosed her identity and having begged the life of her [P.W.10] brother Badiuzzaman Mukta requested him to release her said brother. Then Monjurul Haque told them that Badiuzzaman Mukta was chanting slogan ' Joy Bangla', he was rebellious and he could not be released. At that time they caught hold the legs of Monjurul Haque, and then he directed accused Obaidul Haque Taher and Aatur Rahman Noni to get them out of his house, and accordingly, the accused persons got them out of the house. It was about evening when they came out of the house of Monjurul Haque and then they met Sobuj and Faruque who told them that the Razakars had tortured her brother Badiuzzaman Mukta even then he had been chanting slogan ' Joy Bangla'. Thereafter, at night they took shelter in the house of Motuza Ali at Bainnapara near Netrokona town. She has also stated that on the following morning they sent Faruque and Sobuj to Netrokona town to collect information about her brother Badiuzzaman Mukta. Faruque and Sobuj having gone near the Netrokona bridge came to know that Razakars including accused Obaidul Haque Taher and Aatur Rahman Noni having killed six people including her brother Badiuzzaman Mukta by firing shots under the bridge threw their

dead bodies in the river, and released one man who was a bank employee. After 2/3 days they came to know that the dead body of her said brother was floating at Katlighthat which was a bit far from the said bridge. She has further stated that having heard that her son Sobuj, nephew Faruque and cousin Kachu went to Katlighthat and having recovered the dead body of her brother Badiuzzaman Mukta therefrom brought it to their house and buried the same. She has identified both the accused persons on the dock.

322. In course of cross-examination she has stated that she herself did not see the incident of abduction of her brother Badiuzzaman Mukta from Birampur bazar and killing him under the Netrokona bridge, but she heard about the said incident. She has denied the defence suggestion that having been tutored she has stated that Badiuzzaman Mukta was abducted and killed. She has further denied the defence suggestion that she did not see accused Obaidul Haque Taher and Ataur Rahman Noni since before. She has also denied the defence suggestions that accused Obaidul Haque Taher and Ataur Rahman Noni were not involved with the incident relating to Badiuzzaman Mukta which she has narrated in her statement, and she has deposed falsely.

323. Md. Amir Uddin as P.W. 11 has deposed that his age is about 80/82 years. In 1971, his younger brother Siddiqur Rahman had cloth business and a tailoring shop at Birampur bazar. On 15

November, 1971 at about 11.00 A.M having heard gun-shots coming from Birampur bazar, he went to the said bazar from his house and found there that accused Obaidul Haque Taher and Aatur Rahman Noni apprehended six people including his brother Siddiqur Rahman, Badiuzzaman Mukta, Abdul Malek Shanto, Islam Uddin and Ismail. They also apprehended another person from his house beside the bazar. The accused persons having taken away the above mentioned apprehended people with them started going towards Lakhmiganj Kheyaghat, and on the way they apprehended a boy named Ismail whose age was about 10/11 years. He has further deposed that at that time he, Islam Uddin's father Hafiz Uddin and Abdul Malek Shanto's father Faez Uddin Akond saw from inside a bush near Lakhmiganj Kheyaghat that accused Obaidul Haque Taher having killed Lebu Talukder by gun shot threw his dead body in the river guessing that he was a Hindu, and having taken away other apprehended people with them crossed the river and went away by an army vehicle. Thereafter, 4/5 people including himself having gone to the house of Monjurul Haque at Netrokona town begged the lives of the apprehended people from him. Then Monjurul Haque abused him saying that he [P.W.11] was an agent of freedom-fighters , and asked him to get out of his house. Then having come out of the house of Monjurul Haque he saw before the old criminal court that the apprehended people were

got up on an open jeep and tortured , and at that time Badiuzzaman Mukta was shouting by chanting slogan ' Joy Bangla'. When the apprehended people were shouting saying 'water', 'water', then accused Obaidul Haque Taher and Ataur Rahman Noni were torturing them instead of giving them water. He has further deposed that at night they stayed in the house of Kurpa Meer situated beside Netrokona town. At about 12.00/1.00 A.M. they heard gun-shots coming from Mokhterpara bridge. In the morning they went near the bridge and heard from the people present there that the freedom-fighters who had been brought there yesterday after having abducted, they were all killed by gun-shots. They also saw that accused Obaidul Haque Taher and Ataur Rahman Noni and other Razakars were expressing joy by firing blank shots. After two days of the said incidents they came to know that two dead bodies were floating on Saiduli river. Then they having recovered the dead bodies, one of Badiuzzaman Mukta and the other one of his brother Siddiqur Rahman, brought to their house and buried them. He has identified both the accused persons on the dock.

324. In cross-examination he has stated that in 1971, there were 15/20 shops at Birampur bazar. Lakhmiganj Kheyaghat is situated about two miles far towards north -west from Birampur bazar, and Netrokona town is situated about three miles far from Lakhmiganj Kheyaghat . The distance of the house of Badiuzzaman Mukta from

his house is about one kilometre towards west, and Abdul Malek Shanto's house is 100/150 cubits far from Birampur bazar. He has also stated that there are about 20/50 houses between their house and Birampur bazar, and there was no house from the houses of Abdul Malek Shanto and Ismail to Birampur bazar, but there are 10/20 houses between the house of Lebu and Birampur bazar. He has denied the defence suggestions that accused Obaidul Haque Taher and Aatur Rahman Noni were not involved with the incidents as he has narrated, and that he did not see the accused persons since before. He has also denied the defence suggestion that being tutored he has deposed falsely.

325. Md. Belal Miah as P.W. 16 has testified that he is a village-doctor and in 1971 he was a student of Class X and then his age was about 22/23 years. He is also a freedom-fighter and he having received training from India participated in the War of Liberation under Sector No. 11. During the War of Liberation they came to know through their sources that on 15.11.1971 Pakistani army and Razakars having attacked Birampur bazar captured Badiuzzaman Mukta, Abdul Malek Shanto, Siddiqur Rahman, Islamuddin, Lebu and Mizanur Rahman and took them away to the camp situated at the Dakbungalow of Netrokona town. Accused Obaidul Haque Taher and Aatur Rahman Noni were among those Razakars. After having taken away the captured people to the camp they were

tortured inhumanely there. He has further testified that later on Amiruddin, Haji Faezuddin Akond and Hafizuddin having gone to the house of Moulana Monjurul Haque requested him to release the captured people, but he drove them out of the house blaming them as Indian agents. Then they coming out of the house to the road found that Badiuzzaman Mukta, Islamuddin, Shanto Miah, Siddiquir Rahman, Mizanur Rahman and Ismail having been tied with a open jeep were being tortured by some Razakars. Despite the torture, Badiuzzaman Mukta was chanting the slogan ' Joy Bangla'. The Razakars having boarded the said victims on the jeep tortured and projected them all over Netrokona town and in the evening the victims were taken to Pakistani army camp situated at Vocational Training Institute and tortured them there and eventually at the end of night they were taken near Netrokona Mokterpara bridge and all of them were killed by gun shots and their dead bodies were thrown in the river except Mizanur Rahman, a bank employee who was ultimately released. He has also testified that he heard about the said incidents in details from said Mizanur Rahman. Badiuzzaman Mukta, Abdul Malek Shanto, Siddiquir Rahman and Islamuddin were his relatives. He heard from one Faruque that accused Obaidul Haque Taher and Aaur Rahman Noni had exulted on the road by firing blank shots . He has identified both the accused persons on the dock.

326. In cross-examination he has stated that he heard the names of both the accused persons from Mizanur Rahman. He has denied the defence suggestion of the fact that accused Obaidul Haque Taher and Ataur Rahman Noni were among the Razakars is false and tutored. He has also denied the defence suggestion that he did not hear from Faruque that accused persons had exulted on the road by firing blank shots or that he has deposed falsely.

327. P.W. 17 Md. Abul Kashem has stated that in 1971, he was a student of Class VI in Anjuman High School situated at Netrokona. Now he is running a business in the Netrokona town. In the month of April, 1971 Pakistani army having come to Netrokona town formed Peace Committee and Razakar Bahini there. Under the leadership of the then Muslim League leaders Fazlul Haque and Maulana Monjurul Haque Peace Committee was formed in Netrokona town. Accused Ataur Rahman Noni and many others joined the Razakar Bahini. He has further stated that on 15.11.1971 at about 01.00 P.M he came to Netrokona town and having gone to Dakbungalow he saw that Razakars were torturing some people after capturing and bringing them there. Among the 4/5 detained and tortured people one was Badiuzzaman Mukta from whose body blood was falling down and he was chanting slogan ' Joy Bangla'. He could identify accused Ataur Rahman Noni among the said Razakars. Then he came back to his house. He has also stated that

in the afternoon having come near the field of Mokterpara he saw that the Razakars were torturing those captured people on an open jeep and then he again came back to his house. At night he heard gun-shots, and on the next day he came to know that those captured people were shot to death. He has identified accused Aatur Rahman Noni on the dock.

328. In course of cross-examination he has stated that their Joynagar village was adjacent to the town. Accused Aatur Rahman Noni was a student of higher class of the same school where he studied. He has denied the defence suggestions that accused Aatur Rahman Noni did not join Razakar Bahini or that he did not know him. He has also denied the defence suggestions that in 1971 accused Aatur Rahman Noni was a student of class VIII or that he has deposed falsely.

329. Sree Subod Chandra Dev Roy as P.W. 18 has deposed that in 1971 he was a student of Class II of Birampur Primary School. He was born in 1957, but wrongly his year of birth as 1965 has been stated in the National I.D Card, and for this wrong entry he has taken steps. On 15.11.1971 at about 11.00 A.M. he was in his house, and at that time he heard gun-shots coming from Birampur bazar. After sometime, having gone to Birampur bazar he came to know that under the leadership of accused Obaidul Haque Taher and Aatur Rahman Noni a group of Razakars coming from

Netrokona town to Birampur bazar attacked that bazar and captured Shanto Bhai, his [P.W. 18] own uncle [mother's sister's husband]] Ramchandra Talukder Lebu, Islamuddin, Siddiqur Rahman and Mukta Bhai [Badiuzzaman Mukta], and they also captured Mizanur Rahman from his house situated beside the Birampur bazar. The Razakars having taken away those captured people with them were going away and on their way they captured one cow-boy named Ismail and also took him away with them. The Razakars took away all the captured people to Pakistani army men who had been staying at the Lakhmiganj Kheyaghat. Accused Ataur Rahman Noni killed his said uncle Ramchandra Talukder Lebu by gun-shot knowing him as a Hindu and threw his dead body in the water. Haji Faezuddin Akond, Lal Miah alias Hafizuddin and Amiruddin saw the said incident from inside a bush. The other captured people were taken away to Netrokona town in a vehicle belonging to Pakistani army. Haji Faezuddin Akond, Hafizuddin and Amiruddin went to Moulana Monjurul Haque's house situated at Netrokona town immediately after the captured people were taken away to Netrokona town, and informed him [Moulana Monjurul Haque] about the said incident and then he drove them out of the house abusing them. They coming out of the house of Moulana Monjurul Haque went near the Netrokona Dakbungalow and saw there that the said captured people were being tortured under the leadership of

accused Taher and Noni, and thereafter the captured people having been lifted on an open jeep they were again tortured. At that time victim Mukta was chanting slogan ' Joy Bangla' and then he was again tortured. He has further deposed that Faezuddin, Hafizuddin and Amiruddin having seen that incident, in the evening took shelter in a house of their relative situated at village Kurpa adjacent to Netrokona town wherefrom they heard gun-shots in the early morning. In the morning they having gone near Mokterpara bridge came to know that accused Obaidul Haque Taher and Aatur Rahman Noni along with other Razakars had killed all the said captured people, except Mizanur Rahman, and threw their dead bodies in the water. Since it was disclosed that Mizanur Rahman was a bank employee he was released. Faezuddin, Hafizuddin and Amiruddin also saw accused Obaidul Haque Taher and Aatur Rahman Noni and other Razakars to exult there. Thereafter, Faezuddin and his said two companions came back to Birampur bazar and narrated the said incidents to the people present there. He [P.W. 18] being present there also heard about the incident. After three days of the said incidents, the dead bodies of Siddiqur Rahman, Mukta and his uncle Ramchandra Talukder Lebu were found floating on the Siaduli river wherefrom the dead bodies were recovered and then fire was applied to the mouth of the dead body of Ramchandra Talukder Lebu and floated the dead body again on

the river and two other dead bodies were buried by their relatives. He has identified both accused persons on the dock.

330. In cross-examination he has stated that in 1971 many Hindu people of their locality went to India and elsewhere, but they did not go. At the time of occurrence his elder brother Provat Chandra was staying in another house of their village. He has denied the defence suggestion that Haji Faezuddin Akond, Hafizuddin and Amiruddin did not tell them about the occurrence of the Birampur bazar. He has stated that on the next day of the occurrence, Haji Faezuddin Akond and his two other said companions told them about the incident of Birampur bazar. He has denied the defence suggestions that the accused persons were not involved with the incidents or that at the time of the incidents they were not present in their locality or that he has deposed falsely.

331. P.W. 19 Md. Mizanur Rahman has testified that he is about 74 years old. He passed the Metriculation Examination in 1962 from Baniajan City High School under Atpara Police Station and in 1964 he joined the Dhobaura Primary School as a teacher, and in 1966 he joined the National Bank as an employee. In 1971, he was posted at Gaeshpur Branch of National Bank under Gaforgaon Police Station. In the month of April, 1971 he along with his family went to his village home at Birampur. On 15.11.1971 he was in his house at Birampur village. On that day at

about 11.00 A.M. 15/20 Razakars having come to Birampur bazar from Netrokona started firing shots. His house was situated adjacent to said Birampur bazar. Two Razakars having apprehended him took him away to Birampur bazar and one of them hit his right eye with a bayonet . At that time he could see that the Razakars having captured Badiuzzaman Mukta, Abdul Malek Shanto, Siddiqur Rahman, Islamuddin and Lebu Sarkar tied them up all. Thereafter, the Razakars having taken away the six captured people including him with them started going towards Netrokona and on their way they also apprehended one boy named Ismail. Thereafter, the Razakars came to know that captured Lebu Sarkar was a Hindu, and as such, they shot him to death at the bank of the river and threw his dead body in the river. He has further testified that then the Razakars took away them to Netrokona Dakbungalow with a bus. Then he told the Razakars that he was a bank employee, he would give them money and requested them to release him. Then the Razakars having kept him outside took all other captured people inside the Dakbungalow and tortured them there. Thereafter, the Razakars having lifted them on an open army jeep projected them all over Netrokona town and then they were taken to Pakistani army camp situated at Vocational Institute. In the evening the Razakars took them all including him inside a room. At about 11.00 P.M. the Razakars took them to Mokterpara bridge and killed all of

them by gun shots except him. Thereafter, he was released as he was a bank employee. His elder brother came to know that when they were captured from Birampur bazar by the Razakars, accused Ataur Rahman Noni and Obaidul Haque Taher were with them. He has identified both the accused persons on the dock.

332. In course of cross-examination he has stated that Badiuzzaman Mukta's house was situated at village Narendranagar. He has denied the defence suggestion that he has deposed falsely.

333. Abdul Khaleque Akond as P.W. 20 has deposed that in 1971 his age was about 10/11 years and then he was a student of Class III in Birampur Government Primary School. On 15.11.1971 at 11.00 A.M. he was staying at Birampur bazar and then 10/15 armed Razakars attacked Birampur bazar. His brother Abdul Malek Shanto had a dispensary at that bazar and one Ramchandra Lebu was an employee of that dispensary. At that time the Razakars attacked their said dispensary and apprehended his brother Abdul Malek Shanto and the employee Ramchandra Lebu. Beside their dispensary, Siddique had a tailoring shop where one Islamuddin was an employee and at that time Badiuzzaman Mukta was in that shop. The Razakars apprehended said Siddique, Islamuddin and Badiuzzaman Mukta. Beside the Birampur bazar the Razakars attacked the house of Mizanur Rahman and apprehended him. Then the Razakars with all the said apprehended people started going

towards Lakhmiganj, and on their way they apprehended one boy aged about 13/14 years. Then he came back to his house and informed all about the said occurrence. He has further deposed that the Razakars having taken away all the apprehended people with them went to Lakhmiganj Ferryghat where Pakistani army were staying. Knowing Ramchandra Lebu as a man of Hindu community , accused Aatur Rahman Noni and Obaidul Haque Taher shot him to death at the Lakhmiganj Ferryghat and threw his dead body in the river. His father Haji Faezuddin Akond and Amiruddin saw that incident from inside a bush and having come back to their house informed them about the occurrence. Razakars and Pakistani army men having lifted the apprehended people on an army jeep went to Netrokona town. Then his father, Amiruddin and Hafizuddin went to the house of Moulana Monjurul Haque and requested him to release the apprehended people and in reply to Moulana Monjurul Haque told them that they were the fathers of freedom-fighters, if they did not go away, they would face the same consequence as of the apprehended people . Then his father and his other companions came out of that house and went to old Dakbungalow and saw there that the apprehended people were being tortured and Badiuzzaman Mukta was chanting slogan' Joy Bangla'. Having seen that incident his father and his companions came out of the Dakbungalow and stayed at night in the Meerbari

situated at village Kurpa of Netrokona town . In the morning all of them went to Mokterpara bridge and heard from the people present there that the people who were apprehended from Birampur yesterday, all of them were killed there. He has also deposed that after two days his father was informed that two dead bodies were found floating on the river. Then his father along with others went to the river and identified the two dead bodies as one of Siddiqur Rahman and the other one of Badiuzzaman Mukta. Then both the dead bodies were brought to their houses and buried. They also saw the dead body of Ramchandra Lebu floating on the river, but the dead bodies of his brother and others were not found. He has identified both the accused persons on the dock.

334. In cross-examination he has denied the defence suggestions that his father did not tell him about the occurrence or that accused Taher and Noni were not involved in any way with the killing of Ramchandra Lebu or that accused Taher and Noni were not involved with the incidents which he has narrated in his testimony. He has also denied the defence suggestion that he has deposed falsely.

Finding with Reasoning on Evaluation of Evidence

335. This charge involves the criminal acts of abduction and torture of unarmed seven civilians and murder of six persons of them on forcible capture from Birampur bazaar under Netrokona

Police Station on 15 November 1971, launching an attack by the group of Razakars accompanied by accused Obaidul Haque alias Taher and Aatur Rahman alias Noni. The event consisted of various phases and finally resulted in brutal killing. Prosecution adduced and examined as many as nine [09] witnesses to prove this charge. Some of the witnesses are relatives of victims who had occasion to see the fact relevant to the phase or phases of the event that resulted in killing the civilians, the principal offence.

336. Mr. Mokhlesur Rahman, the learned prosecutor in advancing his argument has submitted that this charge [charge no. 05] relates to brutal killing of 06 [six] civilians on forcible capture. In all 09[nine] witnesses have been examined and of them P.W. 08, P.W.11, P.W. 17, P.W. 19 and P.W. 20 are direct witnesses of the attack that resulted in abduction of civilians. P.W. 19 is one of the detainees who was eventually released is a vital witness and he has narrated how he and other victims were taken to the camp on forcible capture by launching attack at Birampur bazar. Hearsay evidence of other witnesses gets corroboration from the testimony of direct witnesses to the different phases of the event. The defence has utterly failed to shake credibility of their evidence by cross-examining them.

337. Per contra, Mr. Abdus Sobhan Tarafdar, the learned counsel defending the accused persons has argued that P.W. 19 is allegedly

one of the victims. But he has not stated that the accused persons were with the group of attackers formed of Razakars and Pakistani occupation army although he has stated later on he heard from his brother that accused Obaidul Haque alias Taher and Ataur Rahman alias Noni were also with the group in launching the attack. But he [P.W. 19] could have recognized the accused persons if really they had accompanied the group to the crime site. Thus, if he [P.W. 19] is believed, the evidence of other witnesses so far as it relates to accused persons' presence with the group of perpetrators at the crime sites deserve to be excluded.

338. The event as it appears from the charge framed consisted of the following phases:

(a) First on 15.11.1971 at about 11:00 A.M. by launching attack, the group of perpetrators belonging to Razakar Bahini apprehended some civilians namely (1) Badiuzzaman Mukta, (2) Siddiqur Rahman, (3) Abdul Malek alias Shanto, (4) Sree Ram Chandra Talukder alias Lebu, (5) Islam Uddin, (6) Mizanur Rahman[a bank employee] and an adolescent boy (7) Ismail Hossain from Birampur bazaar. On the way of taking away the detainees captured Sree Ram Chandra Talukder alias Lebu was shot to death at Kheyaghat.

(b) On forcible capture the other 06 detainees were taken away to Netrokona district Dakbunglow where they were subjected to torture and then the Razakars picking the detainees on an open jeep started moving around Netrokona town with the act of causing torture to them.

(c) On the same day, in the evening the detainees were taken back to the army camp stationed at the Vocational Training Institute, Netrokona where they were again subjected to torture.

(d) Afterward, at night the detainees excepting Mizanur Rahman [bank employee] were taken to Mokhtarpara bridge

where accused Obaidul Haque Taher and his accomplices gunned them down to death.

339. Of nine witnesses examined in support of this charge, P.W.08 Md. Abdul Mannan Sobuj and P.W.11 Md. Amir Uddin are near relatives of victims Badiuzzaman Mukta and Siddiqur Rahman respectively. They had been at Birampur bazaar at the relevant time, and as such, had an opportunity of seeing the event of abduction remaining in hiding inside a bush, prosecution claims. P.W.19 Md. Mizanur Rahman is one of detainees who was finally released from captivity has described the event of their abduction from Birampur bazaar and torture caused to them in Netrokona town. P.W.20 Abdul Khalek Akond is the brother of victim Abdul Malek Shanto. He allegedly saw the act of abduction of his brother and others from Birampur bazaar. He also allegedly heard what happened in Netrokona town after the detainees were taken therefrom his father who allegedly accompanied P.W.11 in making an appeal to Moulana Monjurul Haque, the father of accused Obaidul Haque to get the detainees released.

340. P.W.01 Nurul Amin and P.W.16 Md. Belal Miah are the freedom fighters and residents of the crime locality. They allegedly heard the event from locals and their sources. P.W. 10 Ayesha Akhter is the elder sister of victim Badiuzzaman Mukta and she allegedly heard the event from P.W.08, a direct witness to the act of abduction.

341. P.W.18 Sree Subod Chandra Dev Roy is the son of victim Lebu's brother. He allegedly heard the event from P.W.11, a direct witness. P.W.17 Md. Abul Kashem allegedly saw the accused persons and their accomplices torturing the detainees in Netrokona town while they were taken on a move by a jeep around the town.

342. Thus, four witnesses namely, P.W.08 Md. Abdul Mannan Sobuj, P.W.11 Md. Amir Uddin, P.W.19 Md. Mizanur Rahman and P.W.20 Abdul Khalek Akond are the vital witnesses to this charge as they claim to have witnessed the act of abduction and some relevant facts. The other witnesses have narrated what they heard in respect of the event of attack and facts relevant to it.

343. The charge framed narrates that later on, dead bodies of Badiuzzaman Mukta and Siddiqur Rahman could be recovered and other dead bodies could not have been traced. Thus, according to the charge framed the entire event was thus a criminal mission of an 'enterprise' to which the accused persons had active part.

344. In adjudicating this charge, we are to see whether (i) the accused persons took '*consenting part*' in the commission of the crime(ii) the accused persons were '*concerned*' with plans or enterprise (iii) the accused 'belonged to' the perpetrator organisation or group. The first two can be well inferred from the act and conduct of the accused persons-- prior, amidst or

subsequent to the commission of the principal offence of murder which are relevant to it.

345. We reiterate that the crimes for which the accused persons have been indicted occurred in war time situation and naturally the existing horrific situation did not allow all the act of killing the final phase of the event to take place in public. It is to be noted that defence does not dispute the fact of abduction of seven civilians and killing six of them later on. It simply denies accused persons' complicity with the commission of the criminal acts constituting the offences of abduction, torture and murder as crimes against humanity, as understood from the trend of cross-examination of prosecution witnesses.

346. On careful appraisal, it transpires that in cross-examination it remains undenied and unimpeached that P.W.01 was a freedom fighter and he came back home after receiving training in India and started fighting around the areas. It stands re-affirmed too as P.W.01 in reply to question put to him replied that he participated in the War of Liberation at different areas of Netrokona sub-division under Sector No. 11. Thus, presumably P.W.01 had opportunity of being aware of the event of the attack he has narrated on dock that resulted in killing of civilians by the group of attackers formed of Razakars including accused Obaidul Haque alias Taher and Aatur Rahman alias Noni and the Pakistani army.

347. Defence, as it appears, could not dislodge what has been testified by P.W.01 about the act of abduction of seven civilians followed by killing of six detainees. It has simply suggested to P.W.01 in cross-examination that the accused persons were not Razakars and they were not involved with the event as narrated in examination-in-chief. But such mere denial is not sufficient to allow the testimony of P.W.01 to go on air unless its value is shaken. Besides, already we have recorded reasoned finding, in preceding deliberation, that the accused persons belonged to local Razakar force.

348. P.W.8 Md. Abdul Mannan Sobuj, a direct witness has narrated how his maternal uncles Badiuzzaman Mukta and Siddiqur Rahman and others were forcibly abducted from Birampur bazaar by a group of Razakars under the leadership of accused Obaidul Haque Taher and how he could see the event of this phase of attack. The narration which relates to the event of abduction of seven civilians from Birampur bazaar remains unshaken in cross-examination of P.W.08. Defence simply suggested that the accused persons were not involved with the event he has narrated in examination-in-chief.

349. P.W.08 is a relative of two abductees [Badiuzzaman Mukta and Siddiqur Rahman] and he had fair occasion to see the act of forcible capture. Had Badiuzzaman Mukta been at Birampur bazaar

at the relevant time? The answer is 'yes'. Because in reply to question put to P.W.08 in cross-examination he has stated that his[P.W.08] maternal uncle Badiuzzaman Mukta used to go to Birampur bazaar everyday intending to get gathered with freedom fighters to work organizing the War of Liberation and he used to stay at different places at night and not at his own home. It thus affirms that on the day of attack and at the relevant time Badiuzzaman Mukta, a freedom fighter, had been staying at Birampur bazaar and it provides assurance as to causing attack on him by the group of Razakars.

350. Besides, testimony of P.W.20 Abdul Khaleque Akond, a direct witness to the event of attack at Birampur bazaar demonstrates that victim Abdul Malek Shanto, his brother, had a dispensary at the bazaar and victim Lebu was an employee there and victim Siddiqur Rahman had a tailoring shop adjacent to said dispensary where the victim Islamuddin was an employee.

351. How the P.W.08 could recognise the accused Obaidul Haque alias Taher when the event of forcible capture took place? We have got from his unshaken evidence that P.W.08 had been at the bazaar at the relevant time and on the face of the attack launched, he and his cousin Faruque went into hid inside a bush near the bazaar. In cross-examination , P.W.08 has stated in reply to question put to him that he knew accused Obaidul Haque Taher as he[accused]

used to accompany his father Moulana Monjurul Haque in attending different religious gatherings in the locality and he knew accused Aatur Rahman Noni since prior to the event as he was a good foot-ball player of the locality. Therefore, P.W.08 had fair reason of recognizing the accused persons even remaining in hiding place and his direct testimony as to seeing the accused persons with the group of attackers in accomplishing the act of abduction of unarmed civilians gets credence and also corroborates what has been testified by P.W.01 in this regard.

352. It stands corroborated by the evidence of P.W.10 Ayesha Akhter, the elder sister of victim Badiuzzaman Mukta that on the day he was forcibly captured, her [P.W.10] son Sobuj [P.W.08] and Faruque had been at Birampur bazaar as she sent them there for collecting information about Badiuzzaman Mukta. On coming back from bazaar Sobuj [P.W.08] and Faruque disclosed to her the event of abduction of Badiuzzaman Mukta and others by the group of Razakars accompanied by accused Obaidul Haque alias Taher and Aatur Rahman alias Noni. P.W.10 is a hearsay witness and she heard the event of abduction from Sobuj [P.W.08] and Faruque which was natural.

353. Source of hearsay testimony of P.W.10 was the direct witness who has testified as P.W.08. There has been no reason to disbelieve the hearsay testimony on the event of attack that resulted

in killing of numerous civilians including Badiuzzaman Mukta and complicity of accused persons therewith. Besides, her [P.W.10] hearsay version gets corroboration from the evidence of other witness [P.W.08] who saw the accused persons and their accomplices in materializing the act of forcible capture of the victims from Birampur bazaar.

354. It is argued by the defence that P.W. 10 Ayesha Akhter is a hearsay witness, and as such, her evidence is inadmissible and the Tribunal cannot rely wholly on it to convict the accused. It is already found that the evidence of this hearsay witness has been corroborated by the evidence of some other direct witnesses. If the evidence of P.W. 10 carries probative value, it cannot be brushed away. The hearsay evidence is to be considered together with the circumstances and relevant material facts depicted. Hearsay evidence is admissible and the court can rely on it in arriving at a decision on fact of issue, provided it carries reasonable probative value [**Rule 56(2) of the ROP, 2010**]. This view finds support from the principle enunciated in the case of **Muvunyi** which is quoted as below:

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

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

355. According to settled jurisprudence of International Law ‘hearsay evidence is not inadmissible per se, even when it is not corroborated by direct evidence. The Tribunal may safely rely on ‘anonymous hearsay’ evidence even without any corroboration. This view finds support from the case of **Lubanga [Lubanga-ICC Pre-Trial Chamber, January 29, 2007, para-106].**

356. In the case in hand, the accused persons are being tried long after four decades after the atrocities were committed. Naturally direct witness may not be available. Thus, even anonymous hearsay evidence alone may be relied upon to prove a material fact, considering the reality and the context prevailing in the country in 1971. This view finds support from a recent decision given in the case of **Ruto of the ICC [Ruto, ICC Pre-Trial Chamber, January 23, 2013, paras –126-130, 148-150, 187-191 and 194-195].**

357. P.W.10 has testified how the event of abduction happened and complicity of the accused persons with the commission of said criminal act as she learnt it from a direct witness, one of her relatives, and as such, hearsay testimony so far as it relates to abduction of Badiuzzaman Mukta and others and accused persons’ role and participation therewith obviously carries probative value.

358. From the narration made by P.W.08 in respect of next phase of the event, after forcible capture of civilians from Birampur bazaar, it has been found proved that P.W.08 and his mother and inmates coming to Netrokona town saw accused Obaidul Haque alias Taher and other Razakars causing torture to the detainees except Lebu and the detainees were then taken on a move around town by a jeep of Pakistani army when they were subjected to torture.

359. Defence could not dislodge the criminal acts of causing torture as narrated above by P.W.08 in any manner by cross-examining him. Thus, it stands proved that the accused persons did not keep them distanced even from the next phase of the event involving causing torture and inhumane act to the detainees in Netrokona town.

360. What happened to captured Sree Ramchandra Talukder alias Lebu? We have found from evidence of P.W.08 that Lebu was gunned down to death at Kheyaghat when the Razakars came to know that he was a Hindu. Gunning down Lebu, a detainee, at Kheyaghat after his forcible capture from Birampur bazaar seems to have been corroborated by the P.W.11 Md. Amir Uddin, a direct witness. It transpires that at the relevant time P.W.11 Md. Amir Uddin, the brother of victim Siddiqur Rahman, had been at Birampur bazaar and saw the event of attack remaining in hid

inside a bush. P.W.11 consistently corroborated P.W.08, another direct witness, and both of them have testified how the group of Razakars accompanied by accused Obaidul Haque alias Taher and Ataur Rahman alias Noni forcibly captured seven civilians including a boy of 10/11 years old and had gunned down Lebu to death almost instantly after his capture.

361. We have found it from evidence of P.W.11 that Hafizuddin, the father of Islam Uddin [victim], and Fayeze Uddin, the father of Shanto [victim] were also with him [P.W.11] when they could see the event of attack and the act of forcible capture remaining inside the bush. It remains unimpeached in cross-examination. What a tragedy! Dear sons were being taken away on forcible capture but they being the fathers could not resist it. Indisputably such barbaric criminal act was grossest breach of human rights.

362. Accused persons' active complicity even with the act of killing the detainees gets assurance from the relevant fact testified by the P.W.08 that he and his cousin Faruque saw his mother and others begging life of his maternal uncle Badiuzzaman Mukta from Moulana Monjurul Haque, the father of accused Obaidul Haque alias Taher when instead of paying heed to their appeal he asked his son accused Obaidul Haque alias Taher to get them out of their house. This fact together with unshaken fact of seeing the accused persons on the following morning by expressing joy as stated by

P.W.08 leads to the conclusion that the accused persons actively contributed and were 'concerned' to the act of killing the detainees.

363. It is evident also from the evidence of P.W.11 Md. Amir Uddin that when they begged life of the detainees to Moulana Monjurul Haque, the father of accused Obaidul Haque alias Taher without paying heed to it he asked them to get out. P.W.18 Sree Subod Chandra Dev Roy, relative of victim Lebu corroborates it.

364. Testimony of P.W.20 Abdul Khaleque Akond, the brother of victim Abdul Malek Shanto, also lends corroboration to the crucial relevant fact of making approach to Moulana Monjurul Haque to spare the lives of the detainees as he has deposed that his[P.W.20] father, Md. Amir Uddin [P.W.11] and Hafizuddin went to Moulana Monjurul Haque's house in Netrokona town and appealed to release the detained persons when Moulana Monjurul Haque reacted by saying that they were the fathers of freedom fighters and would face the same consequence if they did not go away.

365. The above relevant fact could not be shaken by the defence in any manner. It indicates how mighty person, the father of accused Obaidul Haque alias Taher, was in 1971 in Netrokona. Why the relatives of the detainees moved to Moulana Monjurul Haque for release of their dear ones? He was a local pro-Pakistan political person of prominence who significantly acted in founding local Peace Committee and Razakar force to which his own son

accused Obaidul Haque alias Taher was a potential member. This was the reason why the relatives of the detained victims, finding no other way, moved to Moulana Monjurul Haque, the father of the accused Obaidul Haque alias Taher. Thus, this fact offers inevitable conclusion that accused Obaidul Haque alias Taher actively participated in committing the forcible capture of victims from Birampur bazaar.

366. The detained persons were gunned down to death at Mokhtarpara bridge at night. In the following morning relatives of victims came to know it and two days after the event of killing dead bodies of Badiuzzaman Mukta and Siddiqur Rahman were found floating on the river. All the P.W.16, P.W.17 and P.W.18 examined in support of this charge have consistently testified it.

367. Victim Sree Ramchandra alias Lebu is the uncle of P.W.18 Sree Subod Chandra Dev Roy. P.W.18 heard the event from P.W.11 Amir Uddin, an eye witness to the event of abduction occurred at Birampur bazaar. Besides, it remained unshaken and defence does not dispute the event of killing the detainees. It simply denied accused persons' concern and complicity to the event of killing.

368. According to P.W.18 Sree Subod Chandra Dev Roy, his uncle Lebu was shot to death by accused Ataur Rahman alias Noni. As regards killing of Lebu, P.W.11 Md. Amir Uddin, a direct

witness has stated that accused Obaidul Haque Taher gunned down Lebu to death at Kheyaghat on knowing that he was a Hindu civilian. Such discrepancy as to who killed the captured victim Lebu does not impact on the truthfulness about the core fact of killing Lebu in any manner. It remains undisputed that victim Lebu was shot to death in conjunction with the attack launched at Birampur bazaar by the group of Razakars led and accompanied by accused Obaidul Haque alias Taher rather and his accomplice accused Aatur Rahman alias Noni. We have found it proved that both the accused persons accompanied the group of Razakars and were present at the crime site. And as such, both the accused persons incurred liability for the killing of captured Hindu civilian Lebu.

369. It is true that none had opportunity to see the actual act of killing that happened during mid-night at Mokterpara bridge, and thus, naturally it could not be practicable to provide direct evidence in respect of such untold frightening act of mass killing. But the evidence provided in relation to the act of forcible capture of victims, causing torture to them by bringing in Netrokona town and accused persons' presence with the group of perpetrators at those phases of attack and their act and conduct as have been proved unerringly make them 'participants' and 'concerned' with the total event that ended in barbaric killing of detainees.

370. P.W.19 Md. Mizanur Rahman, a bank employee is a vital witness in proving the instant charge as he was one of the persons detained forcibly from Birampur bazaar and finally he was spared by the perpetrators. He has narrated how he and other victims were apprehended from Birampur bazaar, how and why captured Lebu was shot to death at the bank of river. According to him after taking those to Netrokona town they were subjected to torture when they were forced to move by a jeep around Netrokona town and finally they were taken to army camp set up at Vocational Training Institute wherefrom at about 11:00 A.M. Razakars took the detainees excepting him to Mukterpara bridge where they were shot to death.

371. The above version could not be shaken in any manner by the defence. Besides, there has been no reason to exclude his testimony. According to him, later on he heard from his brother that the accused persons also were with the group of perpetrators. It gets assurance from the testimony of P.W.11, a direct witness, to the act of abduction and causing torture to detainees in Netrokona town. So, the submission made by the learned defence counsel has no substance that if P.W. 19 was one of the victims he could recognise the accused persons at the time of alleged event , but he has not stated that the accused persons were with the group of attackers,

and as such, the accused persons were not with the alleged group of attackers.

372. Involvement of the accused persons with the act of causing torture by forcing the detainees to move around Netrokona town by a jeep gets corroboration from the testimony of P.W.11 Md. Amir Uddin who saw it after coming out of the house of Moulana Monjurul Haque, being failed to get response to approach of releasing the detainees. P.W.11 has stated that he saw at a place before the old criminal court that apprehended persons were taken up on an open jeep and tortured when Badiuzzaman Mukta was chanting slogan 'Joy Bangla' and other detainees were asking for water but accused Obaidul Haque alias Taher and Ataur Rahman alias Noni started causing torture to them instead of giving water. What a brutality!

373. P.W.17 Md. Abul Kashem also saw this phase of event involving causing torture to detainees when they were forced to move around town by an open jeep as he [P.W.17] came to Netrokona town on 15.11.1971 at about 01:00 P.M. and he could recognise accused Ataur Rahman Noni with the group of Razakars.

374. The above pertinent relevant fact remained unimpeached and it indisputably proves the accused persons' active and culpable participation in causing torture to detainees even in Netrokona town, after they were brought from Birampur bazaar on forcible

capture. That is to say, the accused persons did not keep them distanced from the perpetrators even in carrying out criminal acts in Netrokona town, after taking the detainees there on forcible capture. This fact further indicates that the accused persons also were with the group of Razakars who finally brought the detainees at the army camp set up at Vocational Training Institute.

375. The above proved pertinent fact leads to conclude that the accused persons consciously, culpably and knowingly participated all the phases of the event and their guilty conduct as depicted above and their culpable presence and complicity in accomplishing the act of abduction of civilians substantially contributed and facilitated to the commission of the act of killing, the principal crime.

376. P.W.16 Md. Belal Miah is a freedom fighter and he joined the War of Liberation under Sector No. 11. He heard the event from their sources and Faruque who was with P.W.08 at the bazaar at the relevant time, as found from evidence of P.W.08

377. The Tribunal notes that ‘concerned in the commission’ refers to an indirect degree of ‘participation’ and a person can be held concerned in the commission of an act of criminal offence by an organisation or group of individuals even he is not found to be present at the crime site but took such a part at any phase of the event in the perpetration of such crime by his act or conduct

providing abetment with intent to further its [plan of attack] object. Obviously intention of forcible capture of victims was to annihilate them and the accused persons knowing it consciously participated at this phase of the attack, and therefore, we may safely conclude that the accused persons were consciously 'concerned' with the entire event that finally resulted in brutal killing of the victims forcibly captured from Birampur bazaar.

378. There can be no room to deduce that none saw the accused persons participating physically in committing the killing the detainees, and thus, they deserve to walk free. It is now settled that even a single or limited number of acts on the accused's part would qualify as a crime against humanity, unless those acts may be said to be isolated or random. An accused person can be held criminally responsible for the crime alleged if he is found that he , by his acts or conducts, was 'concerned with the killing'.

379. It is to be noted that 'system crime' or 'group crime' committed in war time situation in fact is the upshot of series of acts and activities and an individual may not have participation to all phases of the event. Besides, it was not practicable, due to horrific situation prevailing in 1971, to witness or experience all the phases of a particular event. He might have had opportunity to see or know or experience a particular phase or act or conduct of the accused forming part of systematic attack that eventually resulted in

the event which was significantly related to the commission of principal crime.

380. Therefore, it is not necessary to prove by direct evidence that the accused persons were seen gunning down the detainees to death. Accused's act and conduct are sufficient to conclude their participation in accomplishing the principal offence. Their conduct and act starting from the act of abduction and prior to finding dead body of Badiuzzaman Mukta floating on the river indisputably proves their 'participation', 'contribution' and 'complicity' to the act of 'abduction', 'torture' and 'murder' as crimes against humanity.

381. On rational evaluation of evidence provided by the prosecution it transpires patently that the act and conduct of the accused persons and culpable presence with the group of Razakars and Pakistani army first at Birampur bazaar in accomplishing the act of forcible capture of seven unarmed civilians and gunning down one of the detainees namely, Sree Ramchandra Talukder alias Lebu to death there, presence with the perpetrators while causing torture to detainees after taking away them in Netrokona town and active participation therewith and finally taking the detainees to the army camp if chained together it impels to the unerring conclusion that the accused persons actively participated and contributed to the commission of the event of killing as well.

382. Defence failed to shake the above in any manner by cross-examining the witnesses. It simply denied that the accused persons were not with the group of perpetrators, at any phase of the event. But it in no way cast any doubt on the fact of accused persons' complicity and concern and participation in carrying out all those criminal activities that resulted in brutal killing of six detainees. It has been observed **by the Appellate Division of our Supreme Court in the case of Allama Delwar Hossain Sayedee** that-

"It is to be remembered that the object of cross examination is to bring out desirable facts of the case modifying the examination-in-chief and to impeach the credit of the witness. The other object of cross examination is to bring out facts which go to diminish or impeach the trustworthiness of the witness."

[Criminal Appeal Nos.39-40 of 2013, Judgment 13 September, 2014, His Lordship Mr. Justice Surendra Kumar Sinha, Pages 138-139]

383. But in the case in hand, defence, as it appears, has failed to impeach what has been narrated by the witnesses in relation to the event, facts relevant to it and accused persons' complicity therewith and it could not diminish the trustworthiness of the witnesses even.

384. The accused persons belonging to local Razakar Bahini being the members of the 'group' of attackers substantially abetted and facilitated the principals in committing the principal crime of murder, it may lawfully be concluded from the evidence adduced .

385. Thus, not only are principals guilty but also the accused persons, who took a consenting part in the commission of crime, were connected with the enterprises involved in actual commission of the murder, as they by their act abetted to the principals and their accomplices forming the group. Now, all legal authorities agree that where a common design of a group of attackers exists and the group has carried out its purpose, then no distinction can be drawn between the ‘finger man’ and the ‘trigger man’. This view finds support from the observation made by the **ICTY Appeal Chamber, in the case of *Tadic***, that –

“Although only some members of the group may physically perpetrate the criminal act (murder, extermination, wanton destruction of cities, towns or villages, etc.), the participation and contribution of the other members of the group is often vital in facilitating the commission of the offence in question. It follows that the moral gravity of such participation is often no less – or indeed no different – from that of those actually carrying out the acts in question.”

[ICTY Appeal Chamber, *Tadic* Case No.: IT-94-1-A, Judgment 15.7.1999, para 191]

386. Therefore, each one of the accused persons actually participated in the crime, facts and evidence presented lead to conclude it. The facts of the present case examined in light of the above principles do not leave any doubt that all the members of the

group of perpetrators had a common intention in committing this brutal crime.

387. It is to be noted that the doctrine of **JCE** [basic form] allows an acceptance of the same level of responsibility for every member of the group of attackers who was part of common design and objectives of the attack, if not physically involved in the actual commission of the crime . The basic characteristic of the crime of barbaric killing of numerous civilians as unveiled was that behind its commission there had been a collective and designed criminal plan with intent to implement which all the members of the group of attackers including the accused persons had acted at different levels of the attack and presumably each of them provided different contributions to the achievement of the final goal, the killing of detained civilians who were protected persons. Since the act of killing the detained persons was the outcome of collective criminality the accused persons being the members of the joint endeavor are held equally responsible as co-perpetrators even they are found materially remote from the actual commission of the crime.

388. On cumulative and rational evaluation of evidence and circumstances revealed we safely conclude that it has been proved beyond reasonable doubt that the group comprising of accused Obaidul Haque alias Taher , accused Aatur Rahman alias Noni,

their accomplice Razakars and Pakistani occupation army had launched a frightening attack at Birampur bazaar on the day and time as described in the charge framed when they forcibly captured 07 unarmed civilians who belonged to pro-liberation ideology, killed one detainee Sree Ramchandra Talukder alias Lebu knowing him to be a Hindu civilian and then the other six detainees were taken to Netrokona town where they were subjected to inhumane torture by the accused persons and their accomplices and finally taken to local army camp wherefrom they excepting one detainee were taken to Mukterpara bridge during mid-night where they were gunned down to death. In this way, the accused persons being part of the enterprise and by their act and conduct forming part of systematic attack in materializing the culpable mission were 'concerned', took 'participation' and 'aided' and substantially 'contributed' to the actual commission of the killing and thereby they are found **guilty** for the offences of '**abduction**', '**torture**' and '**murder**' as crimes against humanity enumerated in section 3(2)(a)(g) and (h) of the Act of 1973, and thus, the accused Obaidul Haque alias Taher and accused Ataur Rahman alias Noni incurred criminal liability under section 4(1) of the Act of 1973.

Adjudication of charge no. 06

[Genocide, murder and abduction committed on any day of first part of October, 1971 at Jail Gate and Trimohoni bridge of Netrokona town]

389. Summary charge: On any day of first part of October, 1971 between 10.00 A.M. and 2.00 P.M. accused Md. Obaidul Haque alias Taher and Aaur Rahman alias Noni along with some Pakistani army men and Razakars having abducted 15 [fifteen] people of Hindu religious community of Netrokona town including Kamini Chakraborty [a teacher of Netrokona Chandranath High School], Durgacharan Chakraborty, Binanda Das, Satish Sarker, Brojendra Sarker, Nitish Sarker, Motilal Saha, Komal Saha, Sunil Saha, Surendra Saha, Dinesh Sarker and Pijush Sarker from the Jail Gate of Netrokona took all of them to Trimohoni bridge of Netrokona town and then killed all of them there by firing shots with intent to destroy, in whole or in part, the Hindu religious group.

390. Thus, both the accused persons have been charged for complicity, abetting, aiding and facilitating the offences of genocide, and murder and abduction as crimes against humanity as specified in section 3(2)(a)(c)(g) and (h) read with section 4(1) of the Act of 1973 which are punishable under section 20(2) of the Act.

Evidence of Witnesses Presented

391. To prove charge no. 06 the prosecution has examined 03[three] witnesses [P.Ws. 01, 13 and 14]. Now let us see what the witnesses examined have stated.

392. P.W 01 Nurul Amin has deposed that previously he was a trader and at present he is the Commander of Netrokona District Muktijodhdha Unit Command. Awami League candidate Abdul Momen won the general election held in 1970 from the Netrokona-Barhatta-Mohonjanj constituency [National Assembly]. Nezam-e-Islami candidate Moulana Monjurul Haque, father of accused Md. Obaidul Haque alias Taher, contested the said election with Abdul Momen. On 26 March, 1971 when the Liberation War started they, the students, youths and general people who were infavour of liberation, took preparation for that war and many people including himself started to take training in the local Mokterpara field. On 28 April, 1971, Pakistani occupation army came to Netrokona town. The leaders and workers of Nezam-e-Islami, PDP, Muslim League, Jamaat-e-Islami and other pro-Pakistani political parties welcomed the Pakistani army with Pakistani flags. The Pakistani army set up camps in the Dakbungalow of Netrokona town and local Vocational Training Institute. He has further deposed that in the first part of May, 1971 under the leadership of Muslim League leader Advocate Fazlul Haque and Nezam-e-Islami leader Moulana Monjurul Haque, Netrokona District Peace Committee, consisting of eleven members, was formed. Thereafter, under the supervision of the said District Peace Committee other Peace Committees were also formed in Thana and Union level of Netrokona. Under the

supervision of the said Peace Committee Razakar Bahini was formed. Accused Md. Obaidul Haque alias Taher, son of above mentioned Moulana Monjurul Haque, became the Netrokona Razakar Commander and accused Ataur Rahman alias Noni, son of Muslim League leader Hasan Ali Mokter, and many others joined that Razakar Bahini. Having received training from Tura Training Centre, Meghalaya, India he came back to the country and participated in the Liberation War in different areas. He has further deposed that in the first week of October, 1971, 27 [twenty seven] Hindu people were abducted from Netrokona Jail Gate and at night they were taken away to Trimohoni bridge and 26[twenty six] people of them were killed by firing shots there and the rest one survived. He has also deposed that Netrokona District Unit Command of Bangladesh Muktiyodhdha Sangsad prepared a list of the members of Netrokona town and district Razakar, Al-Badr and Al-Shams Bahinis [Exhibit-1]. The names of accused Md. Obaidul Haque Taher as Razakar Commander and accused Ataur Rahman Noni as a Razakar have been mentioned in serial nos. 1 and 2 respectively in the said list [Exhibit-1] . He has identified both the accused persons on the dock.

393. In course of cross-examination he has stated that as per the letter of the Deputy Commissioner, the Upazila and District Command prepared the list, Exhibit-1. Being elected he has been

discharging his duties as the Commander of Netrokona District Muktijodhdha Sangsad Command since 2010. He participated in the Liberation War at different localities of the then Netrokona Sub-Division under Sector No. 11. He has denied the defence suggestion that he has deposed falsely.

394. Md. Abdul Hamid as P.W. 13 has testified that in 1971, during the Liberation War his age was about 18 years. His village Tenga is situated adjacent to Netrokona town. In 1971, he used to live in his village home. At the last part of April Pakistani army having come to Netrokona town established a camp at the District Council Dakbunglow. Thereafter, under the leadership of Moulana Monjurul Haque Peace Committee was formed, and Razakar Bahini was formed through the Peace Committee, and accused Obaidul Haque Taher, son of Moulana Monjurul Haque, was made Commander of that Razakar Bahini, and accused Aaur Rahman Noni and many others joined that Razakar Bahini. He has further testified that the members of that Razakar Bahini having occupied the house of Maloy Biswas situated at Boro bazar of Netrokona town established a Razakar Camp there which was used as their 'torture cell'. At one stage he [P.W.13] went to India for participating in the Liberation War. Thereafter, as a freedom fighter he came back to Netrokona town to collect informations. He has also testified that at the first part of October he heard that Razakars

having apprehended 27 [twenty seven] people from the front side of Jail Gate took them away near Trimohoni bridge and killed them there. He has identified both the accused persons on the dock.

395. In cross-examination he has denied the defence suggestion that accused Obaidul Haque Taher, son of Moulana Monjurul Haque was not Razakar Commander and accused Aatur Rahman Noni did not join the Razakar Bahini. He has further denied the defence suggestion that it is not true that at the first part of October he heard that the Razakars having apprehended 27[twenty seven] people from the front side of Jail Gate took away them near Trimohoni bridge and killed them there. He has also denied the defence suggestion that being tutored he has deposed falsely against accused Obaidul Haque Taher and Aatur Rahman Noni.

396. P.W. 14 Md. Abu Bakar Siddique has stated that his present age is about 63 years. At the last part of April, 1971 Pakistani army came to Netrokona town and then the local leaders of the supporters of Pakistan welcomed them. Pakistani army having come to Netrokona town established camps in the Netrokona Dakbungalow and Vocational Training Institute and thereafter they formed Peace Committee and Razakar Bahini at Netrokona town. The leader of local Nezam-e-Islami Monjurul Haque's son accused Obaidul Haque Taher was made the Razakar Commander, and accused Aatur Rahman Noni and many others

joined that Razakar Bahini. He has further stated that when the Razakar Bahini started committing different atrocities at Netrokona town, he being afraid of went to India. Having gone to India he received training for the Liberation War, and then he came back to the localities of Kalmakanda for participating in the Liberation War. He has further stated that at the last part of November, 1971 they came to know that Razakars having abducted 27 [twenty seven] people from Netrokona jail, including a teacher Kamini Babu, took away them near the Trimohoni bridge and killed them there by gun-shots.

397. In cross-examination he has stated that in 1963 he was a student of class VI of Netrokona Datta High School. Accused Obaidul Haque Taher passed the Degree Examination in 1970. In 1963 accused Aaur Rahman Noni was a student of Anjuman School. He has denied the defence suggestion that the statement made by him is untrue, tutored, concocted and motivated that at the last part of November, 1971 they came to know that Razakars having abducted 27 [twenty seven] people from Netrokona jail, including a teacher Kamini Babu, took away them near the Trimohoni bridge and killed them there by gun-shots. He has further denied the suggestion that he has deposed falsely against the accused persons.

Finding with Reasoning on Evaluation of Evidence

398. This charge involves killing of 15 civilians belonging to Hindu community on abduction from the jail gate, Netrokona. The victims were allegedly gunned down to death on forcibly taking to Trimohini bridge of Netrokona with intent to destroy Hindu religious group, in whole or in part. A group of Razakars and Pakistani occupation army stationed in Netrokona accompanied by accused Obaidul Haque alias Taher and Aatur Rahman alias Noni allegedly committed the criminal acts constituting the offences of genocide, and murder and abduction as crimes against humanity.

399. Mr. Mokhlesur Rahman, the learned prosecutor at the time of summing up the prosecution case in respect of charge no. 06 involving the offence of 'genocide' and / or 'murder' as crimes against humanity frankly submitted that 03[three] witnesses have been examined by the prosecution in support this charge, but their hearsay evidence does not prove the event of abduction followed by killing of 15[fifteen] Hindu civilians and complicity of the accused persons therewith.

400. Mr. Abdus Sobhan Tarafdar, the learned defence counsel has argued that none of the three witnesses examined in support of this charge could prove the alleged event and complicity of the accused persons therewith. The learned counsel eventually has opted to endorse the submission made by the prosecution when it has been

frankly admitted that this charge could not be proved by any lawful evidence.

401. In order to substantiate the indictment, prosecution adduced in all three witnesses who have been examined as P.W.01, P.W.13 and P.W.14. All of them are freedom fighters and they have narrated the alleged event as hearsay witnesses. Prosecution argued that at the relevant time these witnesses had been around the locality of Netrokona on coming back from India after receiving training and naturally they knew the event either from their sources or the locals.

402. On the other hand, defence avers that the alleged event of large scale killing of 15 Hindu civilians could not be proved by any credible evidence. The prosecution witnesses examined in support of this charge are all hearsay witnesses and their version in respect of number of civilians captured and killed shall seem to be contradictory and none of these witnesses has testified that the civilians allegedly captured from jail gate belonged to Hindu community. Besides, none of these three witnesses has testified regarding accused persons' implication or their complicity, in any manner, with the alleged event that resulted in killing of numerous Hindu civilians, and thus, they cannot be held responsible for the alleged event of killing even if it is found to have been proved.

403. It appears that the charge framed categorically discloses the act of abduction of 15 civilians as named therein belonging to Hindu religious group who were allegedly forcibly taken away from the place in front of jail gate, Netrokona. And afterwards the detainees were killed by gun shots at Trimohini bridge.

404. Accused persons have been indicted for abetting, aiding and facilitating the commission of the offences of 'genocide', 'murder' and 'abduction' as crimes against humanity as they allegedly accompanied the group of Razakars and Pakistani occupation army in accomplishing the principal offence of large scale killing with intent to destroy a religious group, in whole or in part.

405. First, we are to see whether the pattern of the event qualifies to be the offences of 'genocide', and 'murder' and 'abduction' as crimes against humanity and then prosecution requires proving accused persons' complicity and role in accomplishing the alleged criminal acts.

406. The basic principle of the concept of 'genocide' is indiscriminate and systematic destruction of members of a group because they belong to that group. In the case in hand, it transpires from the charge framed that barbarity of combined acts aiming to cause organized annihilation was against the members of collectivity i.e 'Hindu religious group'. Thus, the intent of the author of the crime alleged was not only to harm an individual, but

also to cause massive damage to the collectivity to which the later belongs, as narrated in the charge.

407. To constitute the offence of 'genocide' any of acts specified in section 3(2)(c) of the Act of 1973 is to be committed with intent to destroy, a religious group, either whole or in part. Intent is a mental factor which is hard, even impracticable, to determine, and as such, it can only be inferred from a certain number of presumptions of fact. However, 'intent' may be fairly inferred from (a) the scale and pattern of atrocities, (b) the fact of systematically targeting the individuals belonging to a particular religious group, (c) political dogma of the perpetrators of the crime, and (d) extent and repetition of the destructive and discriminatory acts.

408. However, first let us see how far the prosecution has been able to prove the commission of the offence. It transpires that all the three witnesses namely, P.W.01 Nurul Amin, P.W.13 Md. Abdul Hamid and P.W. 14 Md. Abu Bakar Siddique are hearsay witnesses.

409. According to P.W.01, during the first week of October 1971, 27 Hindu people were abducted from Netrokona jail gate and at night they were then taken to Trimohini bridge where 26 people were shot to death and one survived. But the number of civilians abducted as stated by P.W.01 contradicts with what has been described specifically in the charge framed. Besides, which of 27

detainees as stated by P.W.01 survived? Is he or any of his relatives still alive? If the answer is in affirmative, why he or any of his relatives has not been made witness to this charge? These entire crucial and materially relevant aspects remained unexplained by the prosecution.

410. Surprisingly, according to P.W.13 all the 27 detainees were killed and he does not state anything as to survival of one detainee. Additionally, his testimony seems to be significantly incompatible with that of P.W.01 as he [P.W.13] does not state that the detained persons belonged to Hindu community. Be that as it may, his testimony does not portray the act of abducting 'Hindu civilians', and thus, the narration as made by P.W.13 does not provide element to constitute the offence of 'genocide'.

411. More so, none of these two witnesses has stated the name of any of victims as described specifically in the charge framed. Such failure on part of the prosecution does not impel to put reliance upon their hearsay testimony.

412. Next, P.W.01 and P.W.13 have testified that the alleged event of abduction followed by the alleged killing happened during the first part of October, 1971. But P.W.14 Md. Abu Bakar Siddique has stated that the event occurred during the last part of November, 1971 which is significantly contradictory to the

description made in the charge framed and also to what has been stated by P.W.01 and P.W.13.

413. Prosecution, as it appears, has failed to show even as to what happened to the dead bodies of the victims. Naturally, the relatives would have made effort in getting dead bodies of victims, after the alleged event of killing happened. But no evidence in this regard has yet been provided. Even it remains undisclosed as to availability of relatives of alleged victims. For the relatives of alleged victims could have been cited as best, competent and material witnesses to prove the event. We are constrained to observe that the investigation agency too did not show due diligence to unveil all these material facts relevant to the principal event, by holding effective investigation.

414. Next, according to P.W.13 and P.W.14 Razakars were the perpetrators of the act of abducting 27 civilians. But they do not state anything implicating any of accused persons. P.W.01 remained silent as to who perpetrated the act of abduction of civilians. All these three prosecution witnesses do not state from whom or how they knew the event of alleged abduction. Their anonymous hearsay testimony, even on collective evaluation, does not provide any indication even that the accused Md. Obaidul Haque alias Taher and Ataur Rahman alias Noni were with the group of perpetrators belonging to Razakar Bahini at any phase of

the event as narrated in this charge[charge no.06]. Therefore, we find substance in the argument advanced on part of the defence in this regard.

415. The accused persons have been indicted for abetting and aiding to the commission of the offences of genocide and crimes against humanity. The act of abetment is to be directed to assist, encourage or lend moral support which had substantial effect to perpetration of crimes by the principals .It is now well settled jurisprudence. But the evidence led does not show even an indication that the accused persons were present with the gang at any of alleged crime sites or prosecution could not bring anything to link them with the event narrated in the charge framed.

416. Mere membership in local Razakar Bahini does not connote an act of providing assistance and encouragement as there has been no indication that the accused persons by their specific act or conduct forming part of attack 'assisted' and 'encouraged' the principals in accomplishing the core offence as listed in charge no.06. Besides, the event of alleged abduction of 15 Hindu civilians followed by their killing as described in the charge framed itself remains not proved.

417. On cumulative evaluation of anonymous evidence of P.W.01, P.W.13 and P.W.14 who are freedom fighters we come to conclude that prosecution has failed, by adducing credible evidence, to

prove that 15 civilians as specifically named in the charge framed were abducted and were then killed and all of the abductees belonged to Hindu community. The charge of committing the offence of 'genocide' or 'murder' as crimes against humanity as narrated in this charge thus stands not proved as it lacks necessary requirements.

418. Finally, an integrated evaluation of evidence of the above three anonymous hearsay witnesses impels to the conclusion that prosecution could neither prove the commission of the event of killing 15 civilians on abduction as they belonged to Hindu community nor it could prove complicity of any of accused persons with the perpetration of alleged event. It is not understood on the basis of what evidence prosecution brought the allegation of killing 15 civilians belonging to Hindu religious group. As a result, utter failure on the part of the prosecution to bring any credible evidence, oral or documentary, prompts us to deduce it could not prove the alleged event of abduction of 15 Hindu civilians followed by their killing and also accused persons' alleged complicity therewith and it has been admitted by the prosecution as well. Accordingly, the accused persons cannot be found guilty of the offence of 'genocide', 'murder' or 'abduction' as crimes against humanity as enumerated in section 3(2)(a)(c)(g) and (h) of the Act of 1973 for which they have been charged with.

XX. Finding with Reasoning on the Defence case and assertions raised by the defence

419. Defence chiefly asserts, as has been extracted from the trend of cross-examination, that the accused persons have been falsely implicated in this case out of rivalry, that the accused persons did not belong to local Razakar Bahini and accused Aatur Rahman alias Noni was tender aged at the relevant time as he passed SSC examination in 1971.

420. It is to be reiterated that success of prosecution does not rest upon failure of the defence in proving its own defence. Similarly, success in proving defence case does not *ipso facto* render the prosecution case untrue. However, specific defence case, if proved, may reasonably cast doubt on prosecution case. Keeping this settled principle in mind let us render our resolution on what have been asserted by the defence.

421. The first one is an affirmative assertion which needs to be proved by evidence by the defence. Mere suggesting it to the prosecution witnesses does not offer even an indication as to truthfulness of this positive assertion. Burden was upon the defence to prove it. But the defence despite having due opportunity afforded to it remained abstained in adducing evidence and examining any witness to substantiate it. Besides, no circumstance could have been unveiled by cross-examining the prosecution witnesses to make this assertion believable.

422. Next, denying the fact of accused persons' membership of local Razakar Bahini is a negative assertion which is not required to prove by adducing evidence. However, defence could have brought reasonable indication to negate the membership of accused persons in Razakar Bahini by cross-examining the prosecution witnesses. But the defence, as it is found, has failed to negate this fact relating to status of the accused persons in 1971.

423. Lastly, as regards the age of accused Aaur Rahman alias Noni we have already rendered our reasoned finding in the preceding segment of the judgment that mere passing SSC examination in 1971 and since the SSC certificate collected by the IO [P.W.23] does not conclusively prove the actual age of accused Aaur Rahman alias Noni. And therefore, it by itself does not negate the version of the locals who have deposed on dock on oath in respect of culpable affiliation of accused Aaur Rahman alias Noni, in exercise of his membership of local Razakar Bahini, in carrying out atrocious activities around the locality of Netrokona.

424. Besides, we have already found that defence has failed to show that the testimony of the prosecution witnesses in respect of affiliation of accused Aaur Rahman alias Noni with the group of perpetrators, in the capacity of Razakar, in accompanying the group of perpetrators to further the objectives of the criminal mission of

the group directing civilian population suffers from intense fragility and lack of credence.

425. As a result, we are forced to pen our view that the defence has been unsuccessful in dispelling the fact that accused Aatur Rahman alias Noni belonged to local Razakar Bahini in 1971. Defence, without placing any proof converse to the fact unveiled in prosecution evidence, has made a futile argument in respect of accused Aatur Rahman's age in 1971 merely with intent to put aside him by hiding truth, we conclude.

426. Defence drawing attention to the statement of the IO [P.W.23], questioned the age of some of prosecution witnesses namely P.W.03, P.W.06, P.W.09, P.W.18 and P.W.19 in 1971. The learned defence counsel Mr. Abdus Sobhan Tarafdar has submitted that the National Identity Card of those witnesses as collected by the IO during investigation go to show that those witnesses were minor in 1971, and as such, it was impracticable for them to witness the event and memorize it in Tribunal.

427. It appears that the National Identity Card of P.W.03 contains his date of birth as 13.03.1968 and that of rest of above prosecution witnesses go to show that they were above 10 years of age in 1971.

428. First, the National Identity Card cannot be considered as conclusive proof of one's age. Since near recent, citizens are getting their National Identity Card. It cannot be said that in all cases it

corresponds to any other authenticated documents e.g. school registration, birth registration. For in our society, it has become a trend of showing lesser age in National Identity Card and showing such lesser age even for the purpose of educational registration was not unlikely. Additionally, defence did not put suggestion to the IO [P.W.23] that the date of birth as shown in the National Identity Card of those witnesses is correct.

429. It appears that P.W.03 Md. Motiur Rahman while deposing before the Tribunal on 23. 4.2015 has stated that now he is 57 years old. Be that as it may, in 1971 he was a boy of 13 years. It could not be refuted in his cross-examination in any manner. It is to be noted that the core essence of an extremely traumatized event retains in human memory even after lapse of long passage of time. Mere minor age at the time of commission of the event does not readily diminish credibility of his or her testimony if it offers the 'core essence' of the traumatic event. Therefore, we are not convinced to go with the submission advanced by the learned defence counsel.

430. In view of above, merely for the reason of minor age testimony of the above prosecution witnesses cannot be discarded, if the same inspires credence. This view finds support from the observation propounded by The Appellate Division of Bangladesh

Supreme Court **in the case of Ali Ahsan Muhammad Mujahid**

observed that -

" There is no rule requiring the Court to reject per se the testimony of a witness who was child at the events in question. The probative value to be attached to testimony is determined to its credibility and reliability".

[Criminal Appeal No. 103 of 2013, Judgment on: 16-06-2015, His Lordship Mr. Justice Hasan Foez Siddique, Page-167]

431. In rendering above observation the Appellate Division relied upon the decision made in the case of ***Gacumbitsi v. Prosecutor*** which runs as below:

"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). The young age of the witness at the time of the events is not itself a sufficient reason to discount his testimony."

[Gacumbitsi v. Prosecutor, Case No. ICTR-2001-64-A Appeal Chamber]

432. In adjudicating charges, we have already rendered our reasoned decision as to credibility of testimony of those witnesses, and thus, the contention as has been agitated by the defence question the age of some of prosecution witnesses in 1971 is of no substance. Besides, defence did not endeavor of showing this contention acceptable by adducing any other reasonably reliable proof.

XXI. Conclusion:

433. Preamble of our Constitution speaks it unambiguously that the people of Bangladesh, having proclaimed their independence on the 26th March , 1971 and, through a historic struggle for national liberation, established the independent, sovereign People's Republic of Bangladesh.

434. The atrocities committed in 1971 in the territory of Bangladesh can not be termed as mere 'force used to prevent Awami League in the then East Pakistan from coming to power'. The Appellate Division of the Supreme Court of Bangladesh in disposing of the criminal review petitions [**Abdul Quader Mollah vs. The Chief Prosecutor, Criminal Review Petitions Nos. 17-18 of 2013 , Page -2**] acknowledged the settled history as below:

"All the above incidents took place when the people of the country were fighting against the occupation army of Pakistan for liberation of the country."

435. In disposing of the above review petitions, the Appellate Division further observed[Page-3]:

"These offences were perpetrated in Bangladesh following the onslaught of 'Operation Search Light' from the night following 25th March, 1971 to 16th December, 1971, by the Pakistani occupation army and their collaborators after the declaration of independence of the country by late Sheikh Mujibur Rahman. There were wide spread atrocities like killing of three million people, rape, arson and looting of unarmed civilians, forcing 10

million people to take shelter in the neighbouring country, India."

436. The above depicts the core of the history of the birth of independent homeland of the Bengali nation. After the declaration of independence and birth of a separate homeland Bangladesh, the Pakistani occupation armed forces and the armed *militia* forces formed to collaborate with them started committing barbaric atrocious activities directing civilians in the name of fighting the freedom fighters within the territory of Bangladesh and in this way they made them engaged with an **‘intra-state war or armed conflict’**.

437. History says that the Pakistani occupation army and their local collaborators had carried out their brutal criminal activities directing the Bengali civilian population in the territory of Bangladesh. Were those acts compatible with the notion of ‘protection of civilians’ in own territory during armed conflict or intra-state war or conflict as contained in the Geneva Convention or international humanitarian law or Laws of War? The answer is absolutely ‘NO’. The Pakistani occupation armed forces and their armed organs including the auxiliary forces indisputably had committed forbidden act of aggression against Bangladesh in 1971.

438. In the instant case, the evidence presented by the prosecution demonstrates that the group of perpetrators engaged in committing the offences proved formed of Pakistani army and members of local

Razakar Bahini, an auxiliary force. Accused Md. Obaidul Haque alias Taher and Aatur Rahman alias Noni had accompanied the group in launching the attacks that resulted in killing of civilians, massive destruction of civilians' property, abduction, confinement and torture. In relation to the charges proved, the accused persons are found to have had participated, abetted and substantially contributed, by their act or conduct, to the commission of the crimes. **[as listed in charge nos. 1,2,3 and 5]**. All these were done in systematic manner to further policy and plan.

439. Testimony of most of the prosecution witnesses, direct witnesses and relatives of victims, naturally had fair occasion to see and experience actual commission of criminal event including the acts and conducts of the accused persons forming part of the attacks, and the activities carried out by the group of perpetrators accompanied by the accused persons. Some of the prosecution witnesses have also testified on substantial facts crucially relevant and material to the commission of the principal crime of killing. Their testimony does not appear to have been suffered from any material infirmity that may smash their credibility.

440. Presumably, accused Md. Obaidul Haque alias Taher and Aatur Rahman alias Noni belonging to local Razakar Bahini achieved significant trust of the Pakistani occupation army stationed in Netrokona and around it and their active and visible

association with the locally headquartered Pakistani army was the fair indicative of their high level of culpability. Accused persons' conscious and culpable conduct---antecedent, contemporaneous and subsequent, as have been found---all point to their unerring guilt which is well consistent with their 'concern' and 'participation' in the commission of the crimes proved [**as listed in charge nos. 1, 2, 3 and 5**].

441. The offences for which accused Md. Obaidul Haque alias Taher and Aatur Rahman alias Noni have been found criminally responsible were the part of horrendous atrocities against the civilian population committed in context of the War of Liberation in 1971 across the territory of Bangladesh, with objective to annihilate the Bengali nation by resisting in achieving its independence. The offences proved in the instant case reflect a fragmented portrayal of tragic scale and dreadful nature of atrocities committed in context of the War of Liberation in 1971 in the territory of Bangladesh.

442. Accused Md. Obaidul Haque alias Taher and Aatur Rahman alias Noni are also found to have had participation to phase or phases of the event constituting the principal crimes already proved. Accused persons were actively concerned and engaged in launching attack that resulted in killing of civilians of three villages, in execution of plan [**as listed in charge no.03**] already

has been proved. They physically participated in abducting civilians and kept them confined and caused torture for the purpose of extracting whereabouts of freedom fighters. On their culpable assistance and participation, the group formed of Pakistani army and Razakars had carried out massive and wanton destruction of civilians' property, in conjunction with the attack, causing grave detriment to the protected civilians' fundamental right and mental harm to them as well [**as listed in charge no. 03**].

443. The accused persons are also found to have had 'consenting part' that made them equally liable for the actual commission of killing pro-liberation civilians including non combatant freedom-fighter detained from Birampur bazaar [**charge nos. 5**].

444. Accordingly, accused Md. Obaidul Haque alias Taher and Aaur Rahman alias Noni have been held criminally responsible under section 4(1) of the Act of 1973 and also under the doctrine of **JCE** [Basic Form] for the commission of crimes proved [**as listed in charge nos. 1, 2, 3 and 5**].

445. The atrocious and horrific events and conscious and active engagement of accused Md. Obaidul Haque alias Taher and Aaur Rahman alias Noni therewith as have been found proved [**as listed in charge nos. 1,2,3 and 5**] demonstrate that the same were accomplished deliberately in furtherance of common plan of

annihilation of Bengali nation and pro-liberation civilians and freedom fighters.

446. The undisputed history says that the Bengali nation and the freedom fighters fought for nine months to get their homeland Bangladesh free from the capture of Pakistani armed forces. Three million people laid their lives, hundreds of thousands women sacrificed their supreme honour for the cause of freeing their dear motherland Bangladesh. Besides, about ten million people were deported to India as refugees and million others were internally displaced. This settled history is now indisputably mingled with the nation's holy emotion and the glory of the war of the liberation through which the nation achieved its motherland 'Bangladesh'.

447. Therefore, bearing the above in mind the Tribunal notes that no guilty man should be allowed to go unpunished, merely for any faint doubt, particularly in a case involving prosecution of crimes against humanity committed in 1971 in violation of customary international law during the War of Liberation of Bangladesh. The wheels of justice must move to halt the culture of impunity.

XXII. Verdict on conviction

448. For the reasons set out in the judgment and having considered all evidence, both oral and documentary, and arguments advanced by both the parties, this Tribunal unanimously finds the

accused **Md. Obaidul Haque alias Taher and Ataur Rahman alias Noni** in,

Charge No.01: GUILTY of the offences of abetting, contributing, facilitating and complicity in the commission of offences of murder, abduction, confinement, torture, and other inhumane acts [plundering and arson] as crimes against humanity as enumerated in section 3(2)(a)(g) and (h) read with 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 the offences of participating, abetting and facilitating the commission of offences of murder, abduction, confinement and torture as crimes against humanity as enumerated in section 3(2)(a)(g) and (h) read with section 4(1) of the Act of 1973 and they be convicted and sentenced under section 20(2) of the said Act.

Charge no.03: GUILTY of the offences of participating, abetting, facilitating and contributing to the commission of offences of murder, abduction, confinement, torture and other inhumane act as crimes against humanity as enumerated in section 3(2)(a)(g) and (h) read with section 4(1) of the Act of 1973 and they be convicted and sentenced under section 20(2) of the said Act.

Charge no.04: NOT GUILTY of the offences of deportation and other inhumane act [forceful dispossession] as

crimes against humanity as enumerated in section 3(2)(a) of the Act of 1973 and they be acquitted thereof accordingly.

Charge no.05: GUILTY of the offences of participating , aiding and contributing to the commission of offences of murder, abduction and torture as crimes against humanity as enumerated in section 3(2)(a)(g) and (h) read with section 4(1) of the Act of 1973 and they be convicted and sentenced under section 20(2) of the said Act.

Charge no.06: NOT GUILTY of the offences of genocide, and murder and abduction as crimes against humanity as enumerated in section 3(2)(a)(c) of the Act of 1973 and they be acquitted thereof accordingly.

XXIII. Verdict on sentence

449. Mr. Mokhlesur Rahman and Ms. Sabina Yesmin Khan, the learned prosecutors have submitted that accused Md. Obaidul Haque alias Taher and Ataur Rahman alias Noni should face the highest sentence, being a sentence of death, as they are proved to have participated in the commission of barbaric criminal acts constituting the offences of crimes against humanity. The accused persons were part of system barbaric cruelties that resulted in killing of numerous unarmed civilians with intent to annihilate the pro-liberation Bengali civilians. The intrinsic gravity and extent and pattern of criminal acts constituting the offences of crimes against

humanity deserve to be considered as an 'aggravating factor' in awarding the highest sentence. They have also submitted that only such sentence would be just and appropriate to punish, deter those crimes at a level that corresponds to their overall magnitude and reflect the extent of the suffering inflicted upon the million of victims.

450. Per contra, Mr. Abdus Sobhan Tarafdar has simply submitted that the accused Md. Obaidul Haque alias Taher and Aaur Rahman alias Noni were not with any such criminal activities for which they have been indicted and they had no nexus with the local Razakar Bahini. Prosecution has failed to prove the accusation brought against them and thus they deserve acquittal.

451. As a cursory review of the history of punishment reveals that the forms of punishment reflect norms and values and aspiration of a particular society at a given time. Distressed victims may legitimately insist appropriate and highest sentence while the defence may demand acquittal, in a criminal trial. But either of such demands is never considered as a catalyst in deciding the sentence to be inflicted upon the person found guilty of a criminal charge, in a court of law. Undeniably, the punishment must reflect both the calls for justice from the persons who have directly or indirectly been victims and sufferers of the crimes, as well as respond to the call from the nation as a whole to end impunity for massive human

rights violations and crimes committed during the War of Liberation in 1971.

452. In the case in hand, the Tribunal, in assessing the aggravating factors, must eye on the nature and extent of the offences committed, their scale, the role and position of the convicted accused persons they played in providing contribution to the accomplishment of crimes, and the trauma and harm sustained by the victims and their families. In assessing it, eyes should also be kept concentrated to the preamble of the Act of 1973. It is to be noted that commission of offences as specified in the Act of 1973 itself portrays enormity, gravity and diabolical nature of the crimes.

453. At the same time, we consider it appropriate to rely upon the observation made by the Appellate Division of Bangladesh Supreme Court as to the factors to be considered in inflicting punishment. In the **Criminal Review Petition Nos. 17-18 of 2013 [Abdul Quader Mollah Vs. The Chief Prosecutor, International Crimes Tribunal, Dhaka]**, the Appellate Division has observed as under:

"The language is so clear that in convicting the accused person death sentence is the proper one, and if the Tribunal feels that a lesser sentence is to be awarded, it shall assign reasons therefor and in such case, it shall consider the gravity of the crime and the culpability of such accused person."

454. In the said **Criminal Review Petitions the Appellate Division** has also observed as follows:

".....while deciding just and appropriate sentence to be awarded for any of the offences to any accused person, the aggravating and mitigating factors and circumstances in which the crimes have been committed are to be balanced in a proportionate manner. The petitioner, it was observed, has committed worst and barbarous types of crimes against Humanity. He took active role in the killing of almost the entire family except one, and participated in the incident of rape of innocent victims. His acts are comparable to none. Entire world raised voice against the barbaric Crimes against Humanity perpetrated in Bangladesh. Justice demands that it should impose a sentence befitting to the perpetration of the crime so that it reflects public abhorrence of crime. Cases of murders in a cold and calculated manner without provocation cannot but shock the conscience of the society which must abhor such heinous crime committed on helpless innocent persons. More so, the accused expressed no repentance for his conduct at any stage. His direct participation in the incident was cruel and brutal. Considering the nature of the offence, this Division by majority was of the view that the sentence of death was just and proper proportionate to the gravity of the crime.

It was further observed that while considering the punishment to be given to an accused person, the court should be alive not only to the right of the perpetrator, but also rights of the victims of the crimes and the society's reasonable expectation from the court for the proportionate deterrent punishment conforming to the gravity of the offence and consistent with the public abhorrence for the heinous crime committed by the accused persons."

455. Recently, in the **Criminal Review Petition No. 62 of 2015** [*Ali Ahsan Muhammad Mujahid case*] the Appellate Division has observed that Lord Justice Denning, Master of the Rolls of the Court of Appeal in England, appearing before the British Royal Commission on Capital Punishment, stated his views on this point as under:

"Punishment is the way in which society expresses its denunciation of wrongdoing; and in order to maintain respect for law; it is essential that the punishment inflicted for grave crimes should adequately reflect the revulsion felt by the great majority of citizens for them. It is a mistake to consider the objects of punishment as being deterrent or reformatory or preventive and nothing else------. The truth is that some crimes are so outrageous that society insists on adequate punishment, because the wrong doer deserves it, irrespective of whether it is a deterrent or not."

456. The Appellate Division has also observed in the said **Criminal Review Petition No. 62 of 2015** that-

" While awarding the sentence, the Court must take into consideration the unbearable pains, tears rolling down the cheeks and sufferings of the widows and children of the victims who cried for getting justice for about 43 years."

457. We have taken due notice of the intrinsic magnitude of the offences of crimes against humanity which are predominantly shocking to the conscience of mankind. We have also carefully considered the mode of participation of the accused persons to the commission of crimes proved beyond reasonable doubt and the proportionate to the gravity of offences.

458. We have already found in our foregoing discussions that the accused persons are guilty of the offences mentioned in 04 [four] charges being charge nos. 01, 02, 03, and 05 in the commission of those offences as specified in section 3(2) of the Act of 1973.

459. Charge no. 01 relates to murder of one civilian picked up forcibly from Bausi bazaar. It is now settled jurisprudence that culpability for crimes against humanity requires that the accused had the relevant knowledge of the underlying attack. That is, the accused must be aware that his actions formed part of the systematic attack against the civilian population. It has already been proved that the accused persons knowing the consequence of their

act and conduct were with the group of attackers. It also stands proved that on abduction the victim was handed over to the Pakistani occupation army.

460. Similarly, the accused persons are found to have had participation and presence at the site where from the group of Razakars forcibly captured the victim Dabir Hossain [**as listed in charge no. 02**] who was later on shot to death although actual or physical participation of the accused persons to the commission of the principal offence of murder could not have been proved by any direct evidence. Culpable act and presence of convicted accused persons with the group of attackers in forcibly capturing the victim Dabir Hossain made them 'concerned' and 'engaged' even with the act of killing the victim, under the doctrine of Joint Criminal Enterprise [**JCE**] as their act and conduct in abducting the victim indisputably facilitated and substantially contributed to the commission of the principal crime i.e. murder.

461. It is true that such culpable conduct of accused persons even made them equally responsible for the actual commission of the act of killing as well. Settled jurisprudence permits it and accordingly they have been found guilty of the offences of murder as listed in charge nos. 01 and 02. For it was rather impracticable due to war time situation existing in 1971 to experience or see the actual act of killing. However, considering the extent of role and participation,

the accused persons have already been held guilty for abetting, aiding, and substantially contributing to the commission of murder of those two civilians as listed in charge nos. 01 and 02.

462. Since the events proved in charge nos. 01 and 02, we deem it appropriate to award sentence to the accused persons to suffer imprisonment for life till their natural death, considering the extent of role and participation of the accused persons and the gravity and magnitude of each of the offences narrated in these two charges under section 20(2) of the Act of 1973.

463. In adjudicating charge nos. 03 and 05, we have found it proved that the convicted accused persons, as it transpires, did not keep them distanced from the group of perpetrators even after accomplishing the act of abduction of the victims. But they continued to remain with the group in accomplishing the other phases of the event that resulted in barbaric killing of the victims.

464. Aggravating factor includes recidivism, amount and pattern of harm caused to victims. Decision in awarding sentence is the task of weighing up of aggravating factors which include the degree to which the convicted accused persons were the part of an outrageous criminal activity. Aggravating circumstances grow out of the way a crime was committed, as when the offender is cruel to a victim. We have found it proved that the convicted accused persons were engaged in committing the act of abduction, torture

and killing of victims in so cruel manner [as listed in charge nos. 03 and 05].

465. It is now settled that the gravity of the crimes committed by the convicted person stems from the degree of his participation in the crimes. The offences as listed in charge nos. 03 and 05 relate to the commission of large scale killing of unarmed civilians with extreme barbaric pattern and the accused persons, as found proved, were engaged and concerned even in all the phases of the attack including the phase of killing the abductees captured forcibly in broad day light from a bazaar and villages.

466. The attack was so outrageous and organised that had kept the near relatives including the fathers of some of victims captured from their houses [as listed in charge no.3] in such a vulnerable condition that despite witnessing the perpetrators accompanied by the accused persons taking away their near and dear ones forcibly they could not resist it. Even one of the civilians was forcibly dragged out when he was reciting the holy Qur'an. It is hard to believe that the accused persons and their accomplices were really human beings. Their barbaric wrong doing had rather painted the notion of humanity with untold shame and shock. Similarly, the relatives of the victims captured forcibly from Birampur bazaar remained mere spectators even on seeing the attack directed upon

their relatives who were eventually killed [as listed in charge no. 05].

467. 'Penal value' of the offences proved is considered as a factor in awarding sentence. We have found it proved that the convicted accused persons were part of the 'enterprise' and substantially contributed to the commission of offences of barbaric killing of pro-liberation civilians with intent to further and culpably assist the objectives of the 'criminal syndicate' formed of Razakars and Pakistani occupation army. The convicted accused persons were knowingly engaged in committing the offences as listed in charge nos. 03 and 05 in depraved manner. It has also been proved that the captured victims were subjected to deliberate and systematic infliction of severe pain, before they were gunned down to death [as listed in charge no. 05].

468. The mode and degree of the participation of the accused persons, as already found proved, aggravate their culpability in accomplishing the crimes [as listed in charge nos. 03 and 05]. Convicted accused persons were active and willing participants in the massive criminal operation carried out in several neighbouring villages, in conjunction with the same attack, already found proved [as listed in charge no. 03]. We consider it just to take all these factors into account too for weighing the aggravating circumstances.

469. The extremely tragic experience of the relatives of the victims increases the gravity of the barbaric offences committed. Severe brutality of these crimes as unveiled resulted in horrendous killing of large number of unarmed civilians which shocks or pricks not only the judicial conscience but even the conscience of the humanity. The nature of the crimes as listed in charge nos. 03 and 05, the manner in which the same were perpetrated and the conduct of the accused persons deserve to be taken into consideration in awarding sentence.

470. The Tribunal constituted under the Act of 1973 does have an obligation to award appropriate punishment so as to respond the victims' cry for justice and the untold trauma they have sustained. We must keep in mind too, in awarding sentence, public abhorrence of the crimes proved needs a reflection the court's verdict in the measure of punishment.

471. In view of above discussion and considering the nature and proportion to the gravity of offences and also keeping the factors as discussed above into account, we are of the view that no punishment other than death will be equal to the said horrendous and barbaric crimes for which the accused persons have already found guilty beyond reasonable doubt in the charge nos. 03 and 05. It may be mentioned here that the accused persons expressed no repentance for their such conduct at any stage, and we do not find

any mitigating factors to award lesser sentence to the accused persons other than death.

472. Considering all the factors, circumstances and the observations made by our Apex Court as mentioned above, we are of agreed view that justice would be met if for the crimes as listed in charge nos. 03 and 05, accused Md. Obaidul Haque alias Taher and Aatur Rahman alias Noni who have been found guilty beyond reasonable doubt are sentenced to death for each of the said two charges under section 20(2) of the Act of 1973. Accordingly, we do hereby render the following **ORDER ON SENTENCE**.

Hence it is

ORDERED

That accused (1) Md. Obaidul Haque alias Taher, son of late Monjurul Haque and late Jahura Khanam of village Shunoi Bhogpara, Police Station Atpara, District Netrokona, at present Mokterpara [Masjid Quarter], Police Station and District Netrokona, and accused (2) Aatur Rahman alias Noni, son of late Ahsan Ali alias Achhan Ali alias Hachhen Ali and late Khatemunnesa of village Kochander, Police Station Kendua, District Netrokona, at present 655, Mokterpara [Masjid Quarter], Police Station and District Netrokona are held guilty of the offences of ' crimes against humanity ' as enumerated in section 3(2)(a)(g) and (h) of the International Crimes (Tribunals) Act, 1973 as listed

in charge nos. 03 and 05 and they be convicted accordingly and sentenced thereunder to death for each of the said two charges and the said sentences of death be executed by hanging the accused persons by the neck or by shooting them till they are dead, as decided by the government, under section 20(2) of the said Act.

The accused Md. Obaidul Haque alias Taher and Ataur Rahman alias Noni are found guilty of the offences of 'crimes against humanity' as enumerated in section 3(2)(a)(g) and (h) of the International Crimes (Tribunals) Act, 1973 as listed in charge nos. 01 and 02, and they be convicted accordingly and sentenced thereunder to suffer imprisonment for life till their natural death, for each of the said two charges under section 20(2) of the said Act.

However, the above two sentences of imprisonment for life till natural death shall run concurrently.

The accused Md. Obaidul Haque alias Taher and Ataur Rahman alias Noni are found not guilty of the offences of 'crimes against humanity' as enumerated in section 3(2)(a)(g) and (h) of the International Crimes (Tribunals) Act, 1973 as listed in charge no. 04 and they be acquitted of the said charge.

The accused Md. Obaidul Haque alias Taher and Ataur Rahman alias Noni are also found not guilty of the offences of 'genocide' and 'crimes against humanity' as enumerated in section 3(2)(a)(c)(g) and (h) of the International Crimes (Tribunals) Act,

1973 as listed in charge no. 06 and they be acquitted of the said charge.

However, as and when any one of the two 'sentences to death' will be executed, the other 'sentence to death' and the sentences to suffer imprisonment for life till natural death would naturally get merged into the sentence to death first executed.

The sentences of death and imprisonment for life till natural death awarded as above under section 20(2) of the International Crimes (Tribunals) Act, 1973 [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.

The convicts be sent to the prison with conviction warrants accordingly.

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

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

(Justice Anwarul Haque, Chairman)

(Justice Md. Shahinur Islam, Member)

(Justice Md. Shohrowardi, Member)