

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

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

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

### **ICT-BD [ICT-1] Case No. 01 of 2017**

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

#### **Before**

**Justice Md. Shahinur Islam, Chairman**

**Justice Amir Hossain, Member**

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

---

**The Chief Prosecutor**

**Vs**

**(1) Hidaetulla @ Anju @ Md. Hedaetullah @ Anju B.Sc and**

**(2) Sohrab Fakir @ Sohrab Ali @ Sorab Ali**

---

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

Mr. Golam Arief Tipoo, Chief Prosecutor

Mr. Mukhlesur Rahman Badal, Prosecutor

Ms. Sabina Yesmin Khan, Prosecutor

Mr. Tapas Kanti Baul, Prosecutor

Ms. Rezia Sultana Begum, Prosecutor

#### **For the Accused Hedayetullah Anju [absconding] and Sohrab Fakir: State defence Counsel**

Mr. Abdus Shukur Khan, Advocate, Bangladesh Supreme Court

**Date of Delivery of Judgment: 24 April, 2019**

# JUDGMENT

[Under section 20(1) of the Act XIX of 1973]

## I. Introductory Words

1. This case involves arraignments of fraction of barbaric criminal activities conducted deliberately directing the civilian population , pro-liberation civilians out in 1971 in the territory of Bangladesh during the war of liberation constituting the offences of ‘crimes against humanity’ and ‘genocide’ as enumerated in Section 3(2) of the International Crimes (Tribunals) Act, 1973.

2. Two accused (1) Hidaetulla @ Anju @ Md. Hedaetullah @ Anju B.Sc and (2) Sohrab Fakir @ Sohrab Ali @ Sorab Ali have been indicted on six counts for the atrocious criminal activities constituting the offences of ‘abduction’. ‘confinement’ , ‘murder’ and ‘other inhumane acts’ as crimes against humanity and ‘genocide’ committed in the localities under Police Station-Atpara and Modon of the then Netrokona Sub-Division in 1971, during the war of liberation of Bangladesh.

3. Prosecution alleges that the accused persons got themselves affiliated with the locally formed Razakar Bahini, an ‘auxiliary force’ created to collaborate with the Pakistani occupation armed force in carrying out its activities aiming to wipe out the pro-liberation Bengali civilians, in furtherance of policy and plan.

4. Of two accused persons one Hidaetulla @ Anju @ Md. Hedaetullah @ Anju B.Sc has been tried in absentia, in compliance with the provisions contained in the Act of 1973 and the ROP as he could not be arrested in execution of warrant of arrest issued by this Tribunal nor he surrendered to stand trial, in response to the notification published in two daily news papers in compliance with the provisions. Only the accused Sohrab Fakir @ Sohrab Ali @ Sorab Ali has been in detention since pre-trial stage. Pursuant to issuance of production warrant the prison authority has produced this accused person today before this Tribunal [ICT-1].

5. In course of trial, both the prosecution and the defence provided efficient assistance to go with the proceeding in accordance with law by ensuring recognised rights of defence. We appreciate their efforts.

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

6. This Tribunal-1, a special domestic judicial forum constituted under the International Crimes (Tribunals) Act, 1973 has been functioning since 25 March 2010. We reiterate that the Act No. XIX enacted in 1973 in our sovereign parliament is meant to prosecute, try and punish the offenders of the offences of crimes against humanity, genocide and system crimes as enumerated in the

Act, committed in violation of customary international law and the laws of war.

7. It is to be noted that the Act of 1973, an *ex post facto* legislation fairly permits prosecuting, trying and punishing not only the ‘armed forces’ but also the perpetrator[s] who belonged to ‘auxiliary forces’, or who culpably participated in committing the offence enumerated in the Act as an ‘individual’ or a ‘group of individuals’ or ‘organization’ . In the case in hand, the accused persons have been arraigned for committing the alleged offences in exercise of their membership in and potential affiliation with the ‘auxiliary force’-- the locally formed Razakar Bahini.

8. The offences for which the accused persons stood joint trial were ‘system crimes’ and not isolated crimes as those were committed in context of ‘armed conflict’. It is manifested from section 3(1) of the Act of 1973 that even any person (individual), if he is *prima facie* found accountable either under section 4(1) or 4(2) of the Act of 1973 for the perpetration of offence(s), can be brought to justice under the Act.

9. The Tribunal is governed by its guiding legislation ‘The International Crimes (Tribunals) Act of 1973[Act No. XIX of 1973]’ and by the Rules of Procedure [ROP] 2010 formulated by

the Tribunal [ICT-1] under the power conferred in section 22 of the principal Statute. Pursuant to the Act of 1973, the Tribunal [ICT-1] has the authority and jurisdiction to prosecute and try persons responsible for the offences enumerated in section 3(2) of the Act committed in violations of international humanitarian law in the territory of Bangladesh in 1971, during the war of liberation. This Tribunal set up under the Act of 1973 is absolutely a domestic Tribunal but aimed to try ‘internationally recognized crimes’ or ‘system crimes’ committed in 1971 in the territory of Bangladesh.

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

### **III. Brief Historical Background**

11. In portraying the historical backdrop, in brief, that ensued the war of liberation of the Bengali nation in 1971 we restate that in August, 1947, the partition of British India based on two-nation theory, gave birth to two new states, one a secular state named India and the other the Islamic Republic of Pakistan. The western zone was named West Pakistan and the eastern zone was named East Pakistan, which is now Bangladesh.

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

13. The history goes on to portray that in the general election of 1970, the Awami League under the leadership of Bangabandhu Sheikh Mujibur Rahman, the Father of the Nation became the majority party of Pakistan. But deliberately defying the democratic norms Pakistan Government did not care to respect this overwhelming majority. As a result, movement started in the territory of this part of Pakistan and Bangabandhu Sheikh Mujibur Rahman, the Father of the Nation in his historic and farsighted bravely speech of 7th March, 1971, called on the Bangalee nation to struggle for independence. It is to be noted with mammoth pride that the historic March 7 speech of Bangabandhu Sheikh Mujibur Rahman, the Father of the Nation has been recognised by the UNESCO as a world documentary heritage.

14. The 7 March blazing speech of Bangabandhu calling on the freedom-loving Bangalees indispensably mobilized and inspired the whole nation, excepting a few pro-Pakistan people to get prepared

for the war of liberation. In the early hour of 26th March, following the onslaught of “Operation Search Light” by the Pakistani Military on 25th March, Bangabandhu Sheikh Mujibur Rahman declared Bangladesh independent immediately before he was arrested by the Pakistani authorities.

15. In the War of Liberation that ensued in 1971, all people of the then East Pakistan unreservedly supported and participated in the call to make their motherland Bangladesh liberated but a small number of Bangalees, Biharis, other pro-Pakistanis, as well as members of a number of different religion-based political parties, particularly Jamat E Islami (JEI) and its student wing Islami Chatra Sangha (ICS), Muslim League, Convention Muslim League joined and/or significantly collaborated with the Pakistani occupation army to aggressively resist the conception of independent Bangladesh and most of them got actively engaged in committing and facilitating the accomplishment of systematic and widespread appalling atrocities directing civilian population in the territory of Bangladesh, in 1971, to further their policy and plan of demolishing the long cherished dream of self determination and independence of Bengali nation. This is now a settled history of which this Tribunal takes judicial notice as permitted by the Act of 1973 and the ROP.

16. The Pakistani occupation army’s terrible brutality directing civilian population of Bangladesh was planned and in furtherance

of deliberate policy-- the policy to wipe out the pro-liberation Bengali civilians. The Appellate Division, in the case of *Abdul Quader Molla* has observed that –

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

17. The alleged atrocities for which the accused persons stood trial were not isolated from the policy and plan of the occupation Pakistani army who started its ‘mayhem’ since 25 March 1971 intending to wipe out the pro-liberation Bengali civilians, to resist their aspiration of self determination.

18. The nation fought for the cause of independence and self determination and finally achieved independence on 16 December 1971. History testifies that enormously grave and recurrent horrific atrocities directing the Bengali civilians in the territory of Bangladesh starting since 25 March 1971 did not thrive to frustrate the highest sacrifice of the nation as eventually it achieved its independence under the bravely leadership of Bangabandhu Sheikh Mujibur Rahman the valiant architect of independent motherland-- Bangladesh . The nation always pays tribute and homage to him

and also to the blood of millions of patriotic martyrs and innocent defenceless people.

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

20. It is now settled history that Jamat E Islami [JEI] with intent to provide support and assistance to the Pakistani occupation army by forming peace committee, armed Razakar and Al-Badar force obtained government's recognition for those *para militia* forces. JEI started acting antagonistically since the beginning of the war of liberation and it ended in killing of intellectuals.

21. It is found from a report published in **The Daily Sangram 17 April 1971** that a delegation team comprising of members of Central Peace Committee including Professor Ghulam Azam [also the then Amir of Jamat E Islami] in a meeting with the Governor of

East Pakistan Lt. General Tikka Khan expressed solidarity and their adherence to the armed forces.

22. Prosecution avers that accused persons did not keep them distanced from the strategy of JEI to further the policy and plan of the Pakistani occupation army in carrying out barbaric atrocities against the non combatant pro-liberation civilians that resulted in commission of offences enumerated in the Act of 1973. Accused Hedaetullah Anju was a contestant in 1970's election as a candidate of Jamat E Islami [JEI] and he was dominantly affiliated with the locally formed Razakar Bahini. Victims of their target of criminal acts in grave breach of Geneva Convention were the civilians in occupied territory of Bangladesh. It is now a settled history

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

24. It is true that the perpetrators of horrific atrocious activities accomplished in 1971 in the territory of Bangladesh are being prosecuted long more than four decades later. But delay in prosecuting the crimes enumerated in the Act of 1973 cannot be a clog at all.

25. There have been examples of prosecutions of persons allegedly responsible for crimes against humanity even many decades after the acts transpired. In the late 1990s French courts convicted Maurice Papon for atrocities committed in occupied France during World War II. Papon was almost ninety years old at the time, but he was found guilty and sentenced to a term of imprisonment. [<http://www.enotes.com/crimes-against-humanity-reference/crimes-against-humanity>]

26. Finally, the incalculable atrocious resistance on part of thousands of local collaborators could not impede the nation's gallant journey to freedom. Undeniably the ways to self-determination for the Bangalee nation was strenuous, swabbed with huge blood, struggle and mammoth sacrifices. In the present-day world history, conceivably no nation paid as enormously as the Bangalee nation did for its self-determination and cherished independence. The nation shall remain ever indebted to those best

sons and daughters of the soil who paid supreme sacrifices for an independent motherland – **Bangladesh.**

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

27. The following are the brief account of the two accused persons which will essentially portray the ideology, status, mindset and affiliation in auxiliary force they had in 1971 during the war of liberation:

##### **(i) Hidaetulla @ Anju @ Md. Hedaetullah @ Anju B.Sc**

Accused Hidaetulla @ Anju @ Md. Hadaetullah @ Anju B.Sc (absconded) son of late Montaz Uddin Talukder alias Montaz Ali and late Sunneter Nessa @ Akramunnesa of village Kulosree under Police Station Atpara of the then Sub-Division Netrokona[now District]was born on 22.07.1936. He was in teaching profession, after obtaining B.Sc degree first at Chandranath High School, Netrokona and then Jahangirpur Tea Amin High School under Modon Police Station. Accused Hidaetulla @ Anju @ Md. Hedaetullah @ Anju B.Sc was the organizing Secretary of Jamat E Islami[JEI] of the then Netrokona Sub-Division and contested in national assembly election in 1970 as a candidate of JEI. In 1971 he joined the peace committee and Razakar Bahini formed in Netrokona. He was a potential member of the Netrokona Town peace committee. He was prosecuted under the Collaborators

Order, 1972 for the criminal activities carried out around the locality under Atpara Police Station in 1971, in exercise of his membership in Razakar Bahini and peace committee.

**(ii) Sohrab Fakir @ Sohrab Ali @ Sorab Ali**

Accused Sohrab Fakir @ Sohrab Ali @ Sorab Ali son of late Suruj Ali and late Liajer Ma of village Kulosree under Police Station Atpara of the then Netrokona Sub-Division[ now District] joined the Razakar Bahini formed at Atpara, being imbued by the accused Hidaetulla @ Anju @ Md. Hedaetullah @ Anju B.Sc. He was a notorious Razakar and after independence achieved he was prosecuted under the Collaborators Order, 1972 for the criminal activities carried out around the locality under Atpara Police Station in 1971, in exercise of his membership in Razakar Bahini.

## **V. Procedural History**

**28.** The Investigation Agency of the Tribunal constituted under the Act of 1973 started investigation pursuant to complaint register serial no. 52 dated 05.05.2015, in respect of commission of offences enumerated in section 3(2) of the Act of 1973 allegedly perpetrated by (1) Hidaetulla @ Anju @ Md. Hedaetullah @ Anju B.S.C [absconded], (2) Enayet Ullah Monju @ Enaet Ullah @ Monju [died after submission of the formal charge] and (3) Sohrab Fakir @ Sohrab Ali @ Sorab Ali.

29. At pre-trial stage, on prayer of the IO the Tribunal by its order dated 08.02.2016 issued warrant of arrest [WA] against the three suspected accused persons. Of them one suspected accused Sohrab Fakir @ Sohrab Ali @ Sorab Ali was arrested in connection with Gouripur Police Station Case no.06 dated 11.02.2015 and afterwards on his production before this Tribunal he was shown arrested vide Tribunal's order dated 30.3.2016 and was sent to prison. Two other suspected accused could not be arrested at pre-trial stage.

30. Another accused Enayet Ullah Monju @ Enaet Ullah @ Monju [**died after submission of the formal charge**] was produced before the Tribunal on 03.10.2016 by causing his arrest in execution of WA issued. The other accused Hidaetulla @ Anju @ Md. Hedaetullah @ Anju B.S.C could not be arrested.

31. The Investigation Officer [IO] submitted its report together with documents and materials collected and statement of witnesses, on wrapping up of investigation before the Chief Prosecutor on 18.09.2016.

32. After submission of investigation report another accused Enayet Ullah Monju @ Enaet Ullah @ Monju [**died after submission of the formal charge**] was produced before the Tribunal on 03.10.2016

by causing his arrest in execution of WA issued. The other accused Hidaetulla @ Anju @ Md. Hedaetullah @ Anju B.S.C could not be arrested.

33. The Chief Prosecutor, on the basis of the report and documents submitted therewith by the Investigation Agency, after completion of investigation, submitted the 'Formal Charge' on 27.11.2016 under section 9(1) of the Act of 1973 before this Tribunal alleging that the three accused persons had committed the offences of crimes against humanity and genocide, including abetting and also for complicity to commit such crimes narrated in the formal charge during the period of War of Liberation in 1971 around the locality of Atpara and Modon Police Stations of the then Netrokona Sub-Division.

34. The Tribunal, under Rule 29(1) of the Rules of Procedure, took cognizance of offences as mentioned in section 3(2) (a)(c)(g)(h) of the Act of 1973, by application its judicial mind to the Formal Charge and materials and documents submitted therewith.

35. After having the report in execution of warrant of arrest issued against accused Hidaetulla @ Anju @ Md. Hedaetullah @ Anju B.S.C the Tribunal, for the purpose of holding proceeding in absentia against him, ordered publication of notice in two national

daily news papers. But this accused did not turn up and as such treating absconding the Tribunal ordered for hearing the charge framing matter by appointing state defence counsel, at the cost of Government, to defend this absconding accused.

36. It is to be noted too that the accused Anayet Ullah Monju @ Enaet Ullah @ Monju who was detained in prison **died** on 25.1.2017, after submission of 'formal charge'. The learned prosecutor brought this matter to the notice of the Tribunal and the prison authority also communicated the information relating to death of this accused in prison on 26.1.2017 along with related papers. Accordingly, proceedings so far it relates to this accused stood abated vide Tribunal's order dated 27.11.2017.

37. Before commencement of the hearing on charge framing matter the accused Sohrab Fakir @ Sohrab Ali @ Sorab Ali present in court, as brought from prison disclosed that he did not have ability to engage counsel to defend him. With this Tribunal appointed Mr. Abdus Shukur Khan, Advocate, Bangladesh Supreme Court also to defend this accused as state defence counsel, at the cost of government.

38. Then on 27.11.2017 hearing on charge framing matter took place when both sides placed their respective submission. The

learned state defence counsels defending the accused Hidaetulla @ Anju @ Md. Hedaetullah @ Anju B.S.C submitted an application seeking discharge.

39. Tribunal rendered order on charge framing matter on 13.12.2017. The order indicting the accused persons was read over and explained to present accused Sohrab Fakir @ Sohrab Ali @ Sorab Ali to which he pleaded not guilty and claimed to be tried according to law. With this trial commenced.

40. In course of trial, prosecution after placing its opening statement on 08.01.2018 started adducing and examining witnesses in support of arraignments brought. On ending examination of prosecution witnesses both sides placed their respective summing up[argument] which concluded on 07.03.2019. Then the Tribunal kept the case in CAV [for pronouncement of judgment]

## **VI. Summing up [Argument]**

### **Summing up by the Prosecution**

41. **Mr. Mukhlesur Rahman Badal** the learned prosecutor in placing summing up drew attention to the evidence tendered and submitted that the accused Hedayetullah Anju played key role in forming Razakar Bahini at Atpara and Modon Thana and he had significant dominance over it. Accused Sohrab Fakir too was a

notorious member of locally formed Razakar Bahini. Both the accused actively collaborated with the Pakistani occupation army in carrying out criminal activities directing unarmed civilians.

42. It has been further asserted that testimony of witnesses examined are the locals of crime localities and they were familiar with the identity of the accused persons beforehand as notoriety of the accused persons became anecdote around the locality. Thus, the uncontroverted testimony of witnesses in this regard and recognizing them when they accompanied the group of attackers at the crimes sites proves that the accused persons, in exercise of their affiliation with Razakar Bahini knowing participated and contributed to the commission of horrendous crimes , the learned prosecutor added.

43. The learned prosecutor also submitted that the papers forming part of the 'prosecuting documents volume' also lend assurance as to accused persons' affiliation in locally formed peace committee and Razakar Bahini. The accused persons were prosecuted under The Collaborators Order, 1972. Relevant papers have been filed in this regard and the same indicate their association and membership in Razakar Bahini.

44. The learned prosecutor then started arguing on commission of offences alleged and participation and complicity of the accused

persons therewith. On the issue of JCE [basic form] the learned prosecutor drawing attention to observations made in this regard in earlier cases of the Tribunals submitted that both the accused persons incurred equal liability for the offences of which they have been arraigned as they consciously and knowingly acted in joint criminal enterprise intending to execute the common purpose and design. However, argument so placed may be well addressed while each charge will be adjudicated independently.

45. **Mr. Abdus Shukur Khan** the learned state defence counsel defending both accused submitted that these accused were not Razakars and prosecution failed to prove it by adducing any authoritative document whatsoever. The prosecution witnesses had no reason of knowing the accused persons and thus their testimony in respect of seeing the accused persons accompanying the gang of attackers in launching alleged attacks do not carry probative value and credibility.

46. In addition to above submission, the learned state defence counsel also argued to negate complicity and participation of this accused persons with the alleged arraignments brought against them which may be well addressed at the time of adjudicating each charge independently.

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

47. The proceedings before the Tribunal are guided by the International Crimes (Tribunals) Act 1973 and the Rules of Procedure 2010 formulated by the Tribunal under the powers given in section 22 of the Act. Section 23 of the Act of 1973 prohibits the applicability of the Code of Criminal Procedure, 1898 and the Evidence Act 1872. Tribunal is authorized to take judicial notice of fact of common knowledge which is not needed to be proved by adducing evidence [Section 19(4) of the Act].

48. The Tribunal may admit any evidence which it deems to have probative value [Section 19(1) of the Act]. The Tribunal shall have discretion to consider hearsay evidence by weighing its probative value [Rule 56(2)]. Defence shall have right to examine witnesses [Section 10(1) (f) of the Act of 1973].

49. Cross-examination is significant in confronting evidence. The defence shall have liberty to cross-examine prosecution witness on his credibility and to take contradiction of the evidence given by him [Rule 53(ii)].

50. The Tribunal may receive in evidence statement of witness recorded by Magistrate or Investigation Officer, if any only when

the witness subsequently dies or whose attendance cannot be secured without an amount of delay or expense which the Tribunal considers unreasonable [Section 19(2) of the Act]. But in the case in hand, no such statement of witness has been received in evidence.

51. Atrocities as arraigned in the charges framed were committed in wartime situation. Thus, the Tribunal notes that in adjudicating culpability of the person[s] accused of criminal acts, context and situations prevailing at the relevant time i.e during the period of war of liberation in 1971 [ March 25 to December 16 1971] is to be considered.

**VIII. Whether the accused persons belonged to locally formed Razakar Bahini, an auxiliary force created to collaborate with the Pakistani occupation army in 1971 during the war of liberation.**

52. Before we move to adjudicate the arraignments brought in the charges framed we consider it essential and relevant to resolve the fact whether the accused persons allegedly committed the offences, in exercise of their affiliation and membership in locally formed Razakar Bahini, an auxiliary force created in 1971.

**53. Mr. Mukhlesur Rahman Badal**, the learned prosecutor drawing attention to the documents relied upon submitted that both

the accused persons were affiliated in locally formed Razakar Bahini. They were prosecuted even under The Collaborators Order 1972 for criminal acts committed in 1971 around the localities under police stations Modon and Atpara of District [now]-Netrokona which strengthens the fact of their membership in Razakar Bahini.

54. The learned prosecutor also submitted that accused Hedayetullah Anju played key role in forming local Razakar Bahini and he himself too got engaged with it actively, in exercise of his significance dominance over it. The accused persons carried out atrocious activities in collaboration with Pakistani occupaiton army, in exercise of their association and membership in Razakar Bahini, the learned prosecutor added.

55. It has been further asserted by the learned prosecutor that oral testimony of witnesses, the residents and sufferers of the crime localities consistently narrated the identity and affiliation of accused persons in Razakar Bahini while they testified the events of attacks. Defence could not impeach it.

56. Conversely, **Mr. Abdus Shukur Khan** the learned state defence counsel submitted that none of the accused persons belonged to Razakar Bahini. It could not be well proved by relevant

documentary evidence. Oral testimony of prosecution witnesses in this regard cannot be relied upon as the witnesses had no natural reason of knowing the accused persons and their identity. It has been further submitted that the mere fact that the accused persons were prosecuted under The Collaborators Order, 1972 does not prove that they belonged to Razakar Bahini.

57. Tribunal-2[ICT-BD] rendered its observation in the case of *Muhammad Kamaruzzaman* [ICT-BD Case No.03 of 2012, Judgment 09 May 2013, para 89] that--

“in the prosecution of crimes against humanity, principally accused’s status, position, association, authority, conduct, activities, link with the state organization, political party are pertinent issues even prior to the alleged events. In determining alleged culpability of the accused, all these factors have to be addressed and resolved as well.”

58. Thus, before we enter into evaluating evidence presented for adjudication of charges and accused persons’ culpability and liability we consider it appropriate to focus their position, role and identity, by virtue of their political ideology , own might and affiliation in an auxiliary force, around their locality.

59. It remained unimpeached that the Accused Hedayetullah Anju contested National Assembly Election in 1970 as a candidate of JEI with the election symbol scale. Prosecution witnesses testified it consistently. Defence could not refute it. That is to say, he was a potential pro-liberation leader of the localities under Modon Thana and Atpara Thana. A number of authoritative documents demonstrate patently that accused Hedayetullah Anju was a potential member of Netrokona Town Peace Committee. Besides, his pro-significant liberation political profile adds assurance to it.

60. The report titled *Ôkwšł Kugłłi AneqłKi weewł: mk ĩ embxłK mnłh Kivi AnełbÓ* published in **The Daily Dainik Pakistan 23 April 1971** demonstrates the objective of forming peace committee which is as below:[See also M.A Alim Judgment: ICT-2[ICT-BD], 09 October 2013]

*Ômk ĩ embx thLłłB hłte tmLłłB RvZłq  
cZłKv nłłZ łłłq Głłłłq Avmvi Ges ivółvełivax  
ełłł I ĩ ĩłłZKvıł ĩ łłłq Kivi Avfłłłłł  
mg ĩ embxłK mnłh Kłi AcłłłZKi NUbv  
Gvłłłvi Rb ĩ kwšł Kugłłł .....[*

61. Tribunal-2[ICT-BD] in its judgment in the case of MA Alim [judgment paragraph 169] observed the role of peace committee in forming Razakar Bahini by citing narrative made in the book titled *òhıycııva łcłłłZ eısj łł kÓ* which is as below:

ivRvKvi einbx maviYfite kwiš KiguiU  
tbZZyaxb uQj | cōZuU ivRvKvi e'vP ōUūbsō  
Mh̄bi ci kwiš KiguiU vbxq cāv Zv`i  
kc\_ Mh̄b Abōvb cwiPvj bv KiZb| GB  
Abōvb mwiexfite `Uvqvb ivRvKvi`i  
tkivb kixd Oq AvbM̄Z'i kc\_ Mh̄b  
KiZ| Gici ivRvKvi`i ōK̄KvI qvRō  
kwiš KiguiU cāv mivg Mh̄b KiZ|  
.....Zv`i gj- KvR n̄q  
`vavq M̄tg M̄Ā AZ'vPvi , vbhvZb Ges  
mivgwiK einbxi AM̄vZ© c\_  
cōkR|.....tg Rb gv̄m kwiš  
KiguiU D̄`v̄M cōtki meP ivRvKvi  
einbx MV̄bi ci tk̄`iq kwiš KiguiU  
tbZe, GB einbx̄K miKvi x`x̄k̄Z. cōv̄bi  
Rb" mivgwiK miKv̄i i Kv̄Q Av̄te`b  
Riv̄v̄Z\_v̄Kb| ō  
[ m̄ t hyciva t̄c̄yZ eisj v̄`k , Aa'icK  
AveynBiq` , c̄k̄kK mP̄icĪ , c̄k̄kKvj : cōg  
c̄k̄k tdeāvix 2008, cōv, 73-74]

62. It is now a fact of common knowledge that Razakar Bahini, an auxiliary force which was an armed *para militia* force was created for 'operational' and 'static' purpose of the Pakistani occupation army in 1971 during the war of liberation and this *para militia* force acted under the government management.

63. What was the intention of forming such *para militia* force in war time situation? History portrays that intention was not to safeguard lives and properties of Bengali civilian population. Rather, this auxiliary force had consciously acted in furtherance of policy and plan of Pakistani occupation army and in so doing it got knowingly engaged in carrying out recurrent atrocities in a systematic manner directing the unarmed Bengali civilians throughout the territory of Bangladesh in 1971.

64. Pro-Pakistan political parties including Jamat E Islami, Muslim League etc. who had played key role in forming this armed auxiliary force symbolized the pro-liberation Bengali people as their '*enemies*' and '*miscreants*'. It is now settled history.

65. Thus in view of above settled history we arrive at an unerring finding that the accused Hedaetullah Anju as a potential member of peace committee having influential pro-Pakistan political profile even had explicit role in organizing the formation of 'Razakar' Bahini over which he had substantial domination and affiliation. Objective of forming peace committee was to resist the war of liberation by taking stance with the Pakistani occupation army, true. But this organization was not equipped with arms.

66. In the case in hand, it has been found that in recounting horrific events many of prosecution witnesses saw this accused gunning down civilian[s] to death. Accused Hedayetullah Anju for his act and conduct loaded of notoriety forming part of systematic attacks directing civilian population became known as an infamous Razakar of the locality as well. Evidence of prosecution witnesses suggests this conclusion.

67. That is to say, in launching attacks, he being 'armed' used to accompany the gang of attackers formed of army men and Razakars. On this score too, accused Hedayetullah Anju is considered to be a person who not only had a position of authority over the locally formed Razakars Bahini but had affiliation in this *para militia* auxiliary force created to collaborate with the Pakistani occupation army, to further its policy and plan. We may safely conclude that atrocious activities of Razakars by assisting the Pakistani occupation army were carried out under guidance and headship of accused Hedayetullah Anju.

68. Tribunal notes that investigation started in respect of three suspected accused one of whom was Enayetullah Monju who happened to sibling of accused Hedayetullah Anju. But before submitting formal charge suspected accused Enayetullah Monju died and as such proceeding so far as it related to him stood abated.

69. It transpires from the prosecution document that Enayetullah Monju was in commanding position in Modon Thana Razakar Bahini. It also transpires that he too was prosecuted under The Collaborators Order, 1972 along with his brother accused Hedayetullah Anju and Sohrab Fakir.

70. Evidence of prosecution witnesses tends to show irresistibly that Enayetullah Monju too accompanied the group of perpetrators in committing crimes arraigned in charges framed.

71. It is evinced from unimpeached testimony of P.W.08 stated that Pakistani occupation army got stationed in Netrokona Sadar at the end of April [1971] and then they formed peace committee and Razakar Bahini in the month of May [in 1971]. Hedayat Ullah Anju was made a Member of the Netrokona and Atpara Thana Peace Committee and he in exercise of his leadership in Jamaat E Islami [JEI] he was entrusted with the task of leading Razakar Bahini at Atpara and Modon Thana Razakar Bahini. Hedaetullah Anju's sibling Enayet Ullah Monju [now dead] was the Commander of Modon Thana Razakar Bahini.

72. Additionally, prosecution witnesses in recounting what they experienced in conjunction with the attacks unequivocally testified

that knew the accused persons as they were affiliated in locally formed Razakar Bahini. It gets corroboration from the facts unveiled and also from the documentary evidence as discussed. Reason of being acquainted with the accused persons and their identity they had in 1971 could not be refuted by the defence.

73. On totality of evidence tendered in respect of affiliation of the accused persons with the locally formed Razakar Bahini it reveals patently that the accused Hedayetullah Anju for his election campaign in National Assembly Election in 1970 used to move around the locality along with his cohort accused Sohrab Fakir. Thus, the witnesses had fair occasion of knowing them beforehand.

74. In 1971 Razakar Bahini, a para militia force, was created to collaborate with the Pakistani occupation army in carrying out brutal atrocious activities directing the civilian population, to further policy and plan. It is now settled. Naturally, a member of such para militia force became well known to the locals for his notorious acts and it may thus be proved even by oral testimony of the witnesses particularly who experienced and observed the acts related to the commission of horrific offences alleged. We consider that there can be no bar to rely solely upon oral testimony in determining a particular fact.

75. Presumably, on explicit endorsement of Hedayetullah Anju an architect of local Razakar Bahini his brother Enayetullah Monju [now dead] too got enrolled in Razakar Bahini of Modon Thana and was placed in its leading position. This fact is other unambiguous indicia of muscular affiliation of accused Hedayetullah Anju in locally formed Razakar Bahini.

76. It transpires for the photocopy of ejahar and charge sheet **[prosecution documents volume page nos. 124-129]** that one Shefali Rani Bhattacharya wife of victim Durgashankar Bhattacharya lodged a case being case no. 06 dated 22.12.1972 with Atpara police station, Netrokona against seven including accused Hedayetullah Anju, his brother Enayetullah Monju [now dead] and accused Sohrab Fakir over the event as arraigned in charge no.04, in the case in hand.

77. That is to say, the accused persons were prosecuted for the ‘criminal acts’, as arraigned in this charge no.04. But there has been no document to show that those persons were convicted or got acquittal after trial in the said case.

78. It also depicts from copy of the letter dated 12.05.2016 communicated by the Sessions Judge, Mymensingh to the Co-ordinator **[prosecution documents volume page no. 122]**,

Investigation Agency that information as to disposal of this particular case could not be traced, on search. However, by communicating the same letter it has been informed that three other cases were lodged with Atpara police station in 1972 under The Collaborators Order, 1972 which were disposed of and in one case present accused Hedayetullah Anju was convicted and sentenced to five[05]years imprisonment.

79. From copy of another document, a letter [**prosecution documents volume page no. 109-110**] also shows it and it appears that Hedayetullah Anju was convicted and sentenced in this case for the offences punishable under sections 147/380 of the Penal Code. But it is not clear whether accused Hedayetullah Anju was so convicted and sentenced for any of criminal acts for which he is being tried now under the International Crimes (Tribunals) Act, 1973.

80. It has not been asserted on part of the defence that the accused Hedayetullah Anju is being tried twice for the same offence or that for the arraignment as brought in charge no.04 he was not only prosecuted earlier under The Collaborators Order, 1972 but was convicted or acquitted after trial. Besides, there has been no relevant paper before us showing the fate of the said case.

81. Thus, the question of double jeopardy does not come forward. Rather, prosecution of the accused persons under The Collaborators Order, 1972 for the criminal acts committed in 1971 during the war of liberation is strong indicia that they were substantially affiliated in locally formed Razakar Bahini and maintaining close nexus with the Pakistani occupation army had carried out atrocious activities.

82. Prosecution document, a list of Razakars of Modon Thana **[prosecution documents volume page no.03]** demonstrates that accused **Sohrab Fakir** was a Razakar. Besides, other documents **[prosecution documents volume page nos.115,124,125 and 128]** go to show that he was prosecuted in 1972 under The Collaborators Order, 1972.

83. Naturally, for the reason of lapse of long passage of time no document could be collected to show whether he was convicted or acquitted in those cases. But it is not relevant in resolving the issue of this accused's affiliation in locally formed Razakar Bahini. Defence does not aver that this accused was so prosecuted under The Collaborators Order 1972 for the 'same offence[s]'. Such prosecution under The Collaborators Order, 1972 itself adds fair assurance to the fact of his membership in Razakar Bahini. It firmly signifies association of accused Sohrab Fakir with the commission

of recurrent criminal activities in 1971 during the war of liberation which points to his membership in locally formed Razakar Bahini.

84. Defence case [of accused Sohrab Fakir] as has been extracted from the trend of cross-examination of P.W.s that one 'Sorab Ali' a resident of village Hatia Tarasbar was a Razakar and not the present accused Sohrab Fakir. By pleading this defence it has been endeavored to show that not the present accused Sohrab Fakir but said 'Sorab Ali' had involvement and complicity with the commission of alleged crimes.

85. Burden to prove it lies upon the defence. But in support of such defence case no evidence has been adduced before the Tribunal. We therefore cannot agree with the defence averment which in no way negates prosecution case.

86. Finally, based on evidence and related facts as discussed above we come to the conclusion that both the accused persons were actively and potentially affiliated in Razakar Bahini formed at Atpara Thana of District[now]- Netrokona. It stands proved too that the accused Hedayetullah Anju had significant dominance over the Razakar Bahini formed in Atpara Thana and Modon Thana of District [now]-Netrokona. Defence could not bring anything, by

cross-examining the prosecution witnesses which may taint this pertinent fact.

## **IX. Way of adjudicating the charges**

87. The accused persons who were allegedly affiliated with the 'auxiliary force' 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.

88. The case in hand rests predominantly on oral testimony of ocular witnesses. Relatives of victims and sufferers of atrocious activities came on dock and recounted what they experienced during the atrocious attack launched in 1971 in and around their localities.

89. In a criminal trial, two things have to be adjudicated. One is commission of the offence and another one is liability of the person accused of such offence. The case in hand deals with the offences of crimes against humanity and genocide. This type of crime is known as 'group crime' or 'system crime' and not an isolated offence punishable under the normal Penal law.

90. The witnesses testified the events they experienced long more than four decades ago. Naturally, due to lapse of long passage of time they may not be able to memorize the exact and detail precision. However, the essence of the traumatic event always remains imprinted in the human memory if a person really had opportunity to see the event of grotesque nature. Thus, it is to be assessed as to how far their testimony on material facts inspires credence. Direct sworn testimony made by witnesses before the Tribunal is subject to the test of cross-examination by the defence.

91. It is now well settled jurisprudence that in committing crimes against humanity the person accused of such crime may not have physical participation. His act or conduct--- amid, prior or subsequent to the event, lawfully makes him responsible for the offence committed by others, if his act or conduct is found to have substantially facilitated and contributed to the commission of such crime.

92. In seeking to establish the truth in its judgment, the Tribunal has relied as well on indisputable facts and on other elements relevant to the case even if these were not specifically tendered in evidence by either party during trial.

93. Hearsay testimony is not inadmissible per se. Its probative value is to be evaluated taking other relevant facts and circumstances into account and the other evidence may lend corroboration to the hearsay evidence. In this regard, the decision in the case of *Limaj* it has been observed that “whether any weight, and if so, what weight will attach to [hearsay opinion] will depend to what extent the question of hearsay is clarified by other evidence and it is shown to be reliable [**Archbold International criminal Courts: page 751: 9-104: HEARSAY**].

94. Thus, hearsay evidence is thus to be weighed in context of its credibility, relevance and circumstances. Keeping this legal position the Tribunal will take advantage to weigh the probative value of hearsay evidence of witnesses made before the Tribunal in relation to charges framed against the accused.

95. In the process of appraisal of evidence tendered it is to be kept in mind that the grains of acceptable truth need to be separated from the chaff of exaggerations and improbabilities. It is appropriate and jurisprudentially logical.

96. In light of settled jurisprudence the prosecution is burdened to prove-(i) commission of the crimes alleged (ii) mode of participation of the accused in committing any of crimes alleged

(iii) how he acted in aiding or providing encouragement or moral support or approval to the commission of any of alleged crimes (iv) what was his complicity to commission of any of crimes alleged (v) context of committing the alleged crimes (vi) the elements necessary to constitute the offence of crimes against humanity (vii) liability of the accused.

97. The offences under adjudication are known as international crimes committed in violation of customary international law and thus this Tribunal shall not be precluded from borrowing guidance from the jurisprudence evolved to characterize the offences alleged as crimes against humanity and genocide.

## **X. Adjudication of Charges**

### **Adjudication of Charge No. 01**

**[Offences of 'plunder', 'arson', 'forcible deportation as crimes against humanity or in the alternative 'genocide' committed at the Hindu populated locality at Shahapara (Hindu Para) of village Modhuakhali under Atpara Police Station of District Netrokona (previously Sub- Division)].**

98. Charge: That on 29 May, 1971, at about 10.00/11.00 A.M. to execute the plan and conspiracy, the accused Hidaetullah @ Anju @ Md. Hedaetullah @ Anju B.Sc [**absconded**], Sohrab Fakir @ Sohrab Ali @ Sorab Ali along with a group formed of Razakars including Anayet Ullah Monju @ Enaet Ullah @ Monju [**died after submission of the formal charge**] and Pakistani Occupation

Army coming from Netrokona by launching attack at Shahapara (Hindu Para) of village Modhuakhali and plundered and torched the house of Dr. Monindra Kumar Roy, Aradhana Roy and carried out destructive activities by looting valuables. In conjunction with the attack, the attackers including the accused persons also plundered and burnt down 20/30 houses including those of Hindu inhabitants as mentioned in the formal charge, resulting in grave destruction of properties of the said Shahapara [Hindu Para]. Afterwards, the attackers left the crime village and the terrorizing situation spread through the attack compelled the members of the victim families as mentioned in the formal charge to deport to India where they took refuge at Balat Camp.

Therefore, the accused (1) Hidaetullah @ Anju @ Md. Hedaetullah @ Anju B.Sc. [absconded] and (2) Sohrab Fakir Sohrab Ali @ Sorab Ali have been charged for actively participating, abetting, facilitating, contributing and also for complicity in the commission of offences of '**plunder**', '**arson**', '**forcible deportation**' as crimes against humanity as specified in section 3(2)(a)(g)(h) or in the alternative offence of '**genocide**' as specified in section 3(2)(c)(g)(h) of the International Crimes (Tribunals) Act, 1973 read with section 4(1) which are punishable under section 20(2) of the Act.

## **Evidence of Witnesses Examined**

99. This charge involves destructive activities carried out the Hindu population of village Shahapara (Hindu Para) of village-Modhuakhali under Police Station Atpara, District [now] Netrokona. Prosecution relied upon testimony of P.W.01, P.W.19, P.W.20, P.W.21 and P.W.22. Of them excepting P.W.01 all are sufferers of the atrocities and had occasion of experiencing the attack alleged. P.W.01 is a hearsay witness.

100. **P.W.19 Kripanando Ray Talukder [66]** is a resident of village –Gopalashram (Modhuakhali) under Police station -Atpara of District [now]-Netrokona. In 1971 he was 19 years old and was an Intermediate student at Teligati Degree College.

101. P.W.19 stated that at the beginning of the war of liberation he had been at his native village –Modhuakhali which was Hindu populated village. He next stated that on 29<sup>th</sup> May 1971 in morning at about 11 A.M on hearing from a local person that Razakars and Pakistani army men were entering at their village, he went into hiding inside a jute field beside the road adjacent to Gopalashram School wherefrom he could see that Razakar Sohrab Fakir, Razakar Hedayetullah Anju and Razakar Enayet Ullah Monju [now dead] being accompanied by 10/12 Pakistani army men and 8/10 Razakars moving towards their house.

102. What happened in conjunction with the attack? P.W.19 stated that the group then first looted valuables and burnt down the houses of Dinesh Talukder and Kali Kumar Talukder. Two hours later Razakars and Pakistani army men moved back quitting the site by crossing the river Mogra. Then he [P.W.19] came out of the hiding place and found that the group of attackers looted all the houses of village and set about 30/40 houses on fire including that of their own. Being scared all the villagers and they then deported to India.

103. P.W.19 further stated that he knew Razakar Sohrab Fakir, Razakar Hedayetullah Anju beforehand as Razakar Hedayetullah Anju contested the national assembly election in 1970 with the symbol of scale and Razakar Sohrab Fakir and Enayet Ullah Monju used to move around the locality for election campaign and that Razakar Sohrab Fakir was a tax collector of Union Board.

104. On his cross-examination P.W.19 stated in reply to defence question that Pakistani occupation army got camped at Atpara Thana after they deported to India on 30<sup>th</sup> may 1971; that they took refuge at Maheshkhola camp of Meghalaya in India.

105. Defence suggested P.W.19 that accused Hedayetullah Anju did not contest in national assembly election in 1970; that accused Sohrab Fakir was not engaged in election campaign for him; that he

did not see the accused persons accompanying the gang in carrying out looting and setting houses on fire and that whatever he testified was untrue and tutored. P.W.19 denied all these defence suggestions.

**106. P.W.20 Md. Motiur Rahman Talukder [65]** is a resident of village –Modon Dokkhinpara under Police station-Modon of District [now]-Netrokona. In 1971 he was 17 years old and was a student of class IX at Gopalashram School and had been staying at Abdul Hamid’s house in Modhuakhali village.

107. P.W.20 , in respect of the event stated that on 14<sup>th</sup> day of Bangla month Jaistha in 1971 in morning at about 10/11 A.M. he along with his 4/5 classmates were playing carom board when he saw the group formed of Razakars and Pakistani occupation army arriving at their village. Seeing it he went into hiding inside a jute field next to the Gopalashram school road wherefrom he could see that Razakar Sohrab Fakir, Razakar Hedayetullah Anju and Razakar Enayet Ullah Monju [now dead] being accompanied by 10/12 Pakistani army men and 8/10 Razakars looting the houses of village including the house of Monindra doctor and burning down 30/40 houses. Afterwards, then Razakars and Pakistani army men had left site by crossing Mogra river.

108. P.W.20 also stated that after that event occurred, all the Hindu residents of Modhuakhali village deported to India. He also took refuge in India and after receiving training at Tura camp in India he joined the war of liberation war.

109. P.W.20 further stated that he knew Razakar Sohrab Fakir, Razakar Hedayetullah Anju and Enayet Ullah Monju beforehand and that Razakar Hedayetullah Anju and Enayet Ullah Monju were their relatives and Razakar Sohrab Fakir was a tax collector of Union Board. P.W.20 identified accused Sohrab Fakir on Dock.

110. On his cross-examination P.W.20 stated in reply to defence question that he fought in the war at Atpara, Modon and Balibari of Kishoreganj under Sector 11. He could not tell who the peace committee members of Atpara and Modon police station.

111. P.W.20 denied defence suggestions that he was not at home at the time of the event happened ; that he did not see the event; that he did not know the accused persons beforehand; that they were not Razakars; that they were not involved in the event narrated by him and that whatever he testified was untrue or tutored.

**112. P.W.21 Aradhan Roy [61]** is a resident of village – Gopalashram (Modhuakhali) under Police station -Atpara of

District-Netrokona. In 1971 he was possibly 13 years old and was a student of class V at Gopalashram School. P.W.21 stated that their village-Modhuakhali was Hindu populated.

113. In narrating the event P.W.21 stated that on the 14<sup>th</sup> day of Bangla month Jaistha in 1971 in morning at about 10/11 A.M. he had been at their house when he heard that Razakars and Pakistani occupation army were coming to their village and then he went into hiding inside their house wherefrom he saw accused Monju, Anju, Sohrab Fakir being accompanied by 10/12 Pakistani army men looting their house and then setting it on fire. Seeing this he fled from there. Two hours later Razakars and Pakistani army men had left site and then he saw that 30/40 houses of their village were burnt down after committing looting. Being scared and panicked they then deported too India.

114. He [P.W.21] knew the accused persons beforehand as they used to come to their village for electoral campaign in 1970' election and that Razakar Sohrab Fakir was a tax collector of Union Board. P.W.21 identified accused Sohrab Fakir on Dock.

115. On cross-examination defence simply suggested to P.W.21 that he did not see the event; that the accused were not involved in the event he narrated; that he did not know the accused persons

beforehand and that he did not see the event or heard about it as he was a minor in 1971. P.W.21 denied all these suggestions put to him by the defence.

**116. P.W. 22 Purnendu Shekhor Acharjo Chowdhury [60]** is a resident of Gopalashram village under Atpara police Station of District [now] Netrokona. Prosecution tendered him and defence declined to cross-examine him.

**117. P.W.01 Md. Khurshed Alam Khan @ Bachchu [65]** is a resident of village-Salpasunoi under police station-Atpara of District [now] Netrokona. He is a freedom-fighter. In 1971 he was 19 years old and a student of BA first year in Mymensingh Gouripur College. He is a hearsay witness.

118. P.W.01 stated that on receiving training at Maheshkhola youth camp, India he returned back to Bangladesh during the third week of May, 1971, having the copies of journal 'Joy Bangla' with him.

119. P.W.01 continued stating that on 29 May, 1971 he was engaged in distributing the journal when he heard from Suruj Ali[now dead] the husband of his sister that accused Hedayetullah Anju , his brother Enayet Ullah Monju [now dead], their 8/10 cohort Razakars and Pakistani occupation army at about 10:00-

11:00 A.M, on that day[29 May] looted and burnt down houses of 20/30 Hindu civilians of Hindu populated village Modhuakhali that resulted in deportation of panicked civilians of Hindu community to India.

120. On cross-examination, in reply to defence question put to him P.W.01 stated that in the fourth week of May, 1971 Razakar Bahini was formed at Atpara Thana; that Enayet Ullah Monju [now dead] was the commander of Modon Razakar Bahini . P.W.01 denied the defence suggestion that he did not hear the event from Suruj Ali and that what he testified was untrue and tutored.

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

### ***Prosecution Argument***

**121. Mr. Mukhlesur Rahman Badal**, the learned prosecutor argued that four direct witnesses namely P.W.19, P.W.20, P.W.21 and P.W.22 had occasion of seeing the initiation of attack and the accused persons accompanying the group of attackers, the Pakistani army, 29 May, 1971, at about 10.00/11.00 A.M at Shahapara [Hindu Para] of village- Modhuakhali under Police Station- Atpara of District [now] Netrokona. P.W.22 has been tendered and thus evidence of witnesses including that of P.W.01, a hearsay witness remained unshaken. Consistently corroborative evidence of these witnesses demonstrates it patently that the horrific attack directing civilians of Hindu populated locality resulted in massive

destruction of civilians' property constituting the offence of 'other inhumane acts' as crimes against humanity.

122. The role of accused persons and the act of consciously accompanying the Pakistani troops in heading towards the crime village lends support of their culpable association with the criminal enterprise, in carrying out indiscriminate devastating activities as arraigned in this charge, the learned Prosecutor added.

123. It has been further submitted by the learned Prosecutor that defence does not dispute the wanton destruction of civilians' property, by looting and burning down houses. It simply denies accused persons presence with the gang at the crime site and their participation with the devastating activities. But mere denial does not negate the arraignment straightway, particularly when their participation stands proved from evidence presented.

### ***Defence Argument***

124. On contrary, **Mr. Abdus Shukur Khan**, the learned State defence counsel submits that the testimony of witnesses suffers from inherent inconsistencies and improbabilities and as such the same cannot be relied upon. The witnesses relied upon by the prosecution to substantiate this charge had no practicable opportunity of seeing the accused persons accompanying the group chiefly formed of Pakistani troops in launching attack that resulted in devastating destruction, by looting and setting the houses on fire.

P.W.21 was a tender aged boy in 1971 and thus recounting the alleged event by him, long four decades after it happened is impracticable. Out of local rivalry the accused persons have been falsely implicated in this case, the learned state defence counsel added.

125. Prosecution requires proving that—

- i. An organised attack was launched at village Modhuakhali directing the Hindu community;
- ii. The gang of attackers was accompanied by the accused and their cohort Razakars;
- iii. The gang by launching attack looted households and burnt down numerous houses of Hindu civilians;
- iv. Instantly after the attack the Hindu civilians being scared deported to India;
- v. Intention of the gang was to cause mental harm and extreme panic and coercion amongst the Hindu community

126. It transpires that P.W.19 Kripanando Ray Talukder, a resident of crime village—Gopalashram (Modhuakhali) under Police station- Atpara of District[now]-Netrokona on 29<sup>th</sup> May 1971 in morning at about 11 A.M saw, remaining in hiding place, the gang formed of army men, Razakars and the accused Sohrab Fakir, Razakar Hedayetullah Anju and Razakar Enayet Ullah Monju [now dead] entering at their village who first started looting valuables and then

burnt down the houses of Dinesh Talukder and Kali Kumar Talukder.

127. The attack continued for two hours, P.W.19 testified. Defence could not refute it. Coming out from the hiding place P.W.19 found that the group of attackers looted all the houses of village and set about 30/40 houses on fire including that of their own. Being scared all the villagers and they then deported to India. We do not find any reason to believe that P.W.19 has made an untrue account.

128. The attack and criminal activities conducted in conjunction with the attack as testified by P.W.19 could not be impeached in any manner. No attempt appears to have been made on part of the defence to refute the facts unveiled in version of P.W.19.

129. The attack that resulted in devastating activities is not disputed. Defence chiefly denied accused persons' involvement and complicity with the commission of crimes. But mere denial does not negate accused persons' participation committing the grave criminal acts, if it is found well proved that they were with the gang at the crime site, sharing common intent.

130. The narrative made by P.W.19 gets corroboration from testimony of P.W.20, P.W.21, direct witnesses. All these witnesses,

the residents of crime locality experienced the attack launched at their village and they consistently made account how the gang being accompanied by the accused persons and their cohort Razakars had carried out devastating activities at village-Modhuakhali which forced them and the Hindu civilians of the locality to deport to India, in fear of life.

131. Defence by putting suggestion to P.W.19, P.W.20 and P.W.21 attempted to assert that they did not know the accused persons. In this regard what we see in testimony of witnesses? All the witnesses relied upon to prove this charge consistently testified that accused Hedayetullah Anju contested the National Assembly Election in 1970 with the symbol of scale [election symbol of JEI] and his brother Enayet Ullah Monju [now dead] and accused Razakar Sohrab Fakir used to move around the locality for election campaign and that Razakar accused Sohrab Fakir was a tax collector of Union Board, before the war of liberation ensued. Defence could not impeach it. Besides, already we have rendered reasoned finding in the preceding segment relating to their affiliation with locally formed Razakar Bahini.

132. Thus, it was quite practicable of knowing the accused persons beforehand. Defence could not negate the reason of knowing them beforehand. Besides, political profile, education and potential

affiliation with the locally formed Razakar Bahini made him widely known to the residents of localities under police station-Atpara of Distract [now] –Netrokona. History says that in 1971, a civilian was not expected to be actively affiliated with the Pakistani occupation army to collaborate and assist them unless he was a part of policy and plan, in furtherance of common purpose.

133. The learned state defence counsel argued that P.W.21 was a tender aged boy in 1971 and thus recounting the alleged event by him, long four decades after it happened is impracticable. We are not in agreement with this submission.

134. On this issue we are of the view that first, the arraignment brought in this charge does not solely rest upon testimony of P.W.21; that two other direct witnesses have made consistent account what they experienced in conjunction with the attack. Second, in this regard we reiterate that ‘mere minor age’ of witness at the time of the commission of the event does not readily diminish the credibility of his or her testimony if it offers the ‘core essence’ of the traumatic event and if the same inspires credence.

135. In the case in hand, we have found that the core essence of testimony of P.W.21 as far as it relates to the event of attack happened gets corroboration from evidence of two other witnesses.

We do not find any reason to keep his testimony aside, terming unreliable. The Appellate Division of Bangladesh Supreme Comport in the **Mujahid Appeal** has observed as below—

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, Appellate Division, Ali Ahsan Muhammad Mujahid Case, Judgment 16.06.2015, page-167]**

136. Accused persons' presence at the crime site with the group at the time of launching attack in question; looting households, setting houses on fire do not seem to have been controverted in any manner. Defence even does not seem to have questioned practicability of seeing the event as testified by the witnesses. The reason of knowing the accused as testified by P.W.s appears to be natural. Defence could not impeach it.

137. On evaluation of evidence of witnesses it has been depicted that defence even does not dispute the attack that resulted in looting, burning down houses and deportation of Hindu civilians. Defence simply denied accused persons' presence at the crime site with the gang formed of army men and Razakars. But in no way it

could be negated that the accused persons were with the gang of attackers at the crime site, by cross-examining the witnesses.

138. In war time situation, wanton destruction or devastation carried out in the localities or villages, not justified by military necessity constitutes a violation of the laws or customs of war. The elements for the crime of wanton destruction not justified by military necessity are-

- (i) The destruction of property occurs on a large scale;
- (ii) The destruction is not justified by military necessity; and
- (iii) The perpetrator acted with the intent to destroy the property in question or in reckless disregard of the likelihood of its destruction.

139. What is 'Military necessity'? The necessity of those measures which are indispensable for securing the ends of the war, and which are lawful according to the modern law and usages of war is considered as 'Military necessity'. But the facts, circumstances unveiled and the pattern of attack do not lead to the conclusion that the devastating activities which were gravely detrimental to normal livelihood of the civilians of the village under attack were lawful and for securing military necessity.

140. Rather, it may be unerringly inferred that intending to generate vicious terror, intimidation and coercion the gang being accompanied by their local collaborators including the accused persons targeted the Hindu populated vicinity. Carrying out such prohibited devastating activities directing Hindu community of particular vicinity only by the members of Pakistani occupation army would not have been possible without the active assistance and contribution of their local collaborators including the accused persons affiliated with the Razakar Bahini.

141. The accused persons have been charged for the offences of 'plunder', 'arson', 'and 'forcible deportation'. The essence of the offence of 'plunder' includes all forms of unlawful appropriation of property of civilians, in violation of laws of war. Act of wanton looting and burning down houses constituted a form of unlawful appropriation of property and civilian object in context of war and is therefore embraced within 'plunder. Act of 'arson' too causes arbitrary damage of civilians' object including their houses. It stands proved, in the case in hand, that the criminal gang burnt down numerous house of the crime village, in conjunction with the attack.

142. The attack was conducted in day time and it continued for couple of hours—it stands proved. Defence does not dispute it. It transpires that defence simply denied accused persons' presence at the crime sites with the gang. But it could not refute the act of participation of accused persons in accomplishing the devastating activities being part of the criminal enterprise.

143. Tribunal notes that other inhumane act reasonably and logically encompasses the '*coercive acts*' which are injurious for one's physical or mental wellbeing and detrimental to their normal livelihood.

144. The perpetrators committed such vicious activities intending also to create a climate of terror, particularly for the people belonging to Hindu community and who took stance in favour of the war of liberation. The accused persons by their substantial facilitation, assistance and contribution participated in committing the crimes.

145. Looting households and setting the houses of civilians of the village on fire, by launching prohibited attacks deliberately against civilians or civilian objects were not justified by military necessity constituted the offence of 'plunder' which was rather the offence of 'other inhumane act' as such prohibited acts caused untold mental

sufferings, trauma impacting gravely on the normal livelihood of the affected civilians.

146. Wanton horrific destructive activities directing the Hindu civilians of village-Modhuakhali indisputably created coercion and extreme terror which eventually and instantly forced the civilians of Hindu community to deport to India quitting the place of their own living, it has been well proved. Their displacement did not relate forcible transfer within the State. Their deportation was beyond State border. Thus, such deportation was involuntary and the upshot of grave coercion spread through deliberate attack directing a particular group.

147. Prohibited criminal acts of indiscriminate looting and setting numerous houses on fire carried out by the gang cumulatively constituted a grave coercive situation intending to cause mental harm of Hindu civilians and intimidation to their normal living. The attack ended in instant deportation of the Hindu civilians to India. In fact, horrific situation created by the attackers forced them to deport. The pattern and intent of attack was a blatant denial, on discriminatory grounds, of a fundamental right of civilians, laid down in international customary or treaty law,

148. The facts unfolded in evidence presented suggest the conclusion that the accused persons being part of the criminal enterprise had the intention to inflict serious mental suffering which was rather a serious attack directing civilians of the Hindu populated crime village and they knew that their act of accompanying the gang at the crime site was likely to cause serious suffering or a serious and reckless attack upon the normal human livelihood. Harm caused by such deliberate criminal acts obviously resulted in a grave and long-term difficulty to civilians' capacity to lead a normal life.

149. From the facts and circumstances we are convinced to conclude that widespread destruction of property not justified by military necessity was carried out unlawfully and wantonly by the criminal enterprise to which the accused persons were active part and the same eventually forced deportation of numerous Hindu civilians. Grave sufferings caused to protected civilians did not conform to the fundamental principle of humanity,

150. On totality of evidence it has been found proved beyond reasonable doubt that the accused Hidaetullah @ Anju @ Md. Hedaetullah @ Anju B.Sc [**absconded**], Sohrab Fakir @ Sohrab Ali @ Sorab Ali not only accompanied the group of army men but also with hateful intention guided, substantially contributed, aided and

abetted them in accomplishing the acts of ‘**wanton destruction**’ of civilians’ property that also resulted in ‘**deportation**’ of civilians to India constituting the offences of ‘other inhumane act’..

151. Therefore, accused Hidaetullah @ Anju @ Md. Hedaetullah @ Anju B.Sc [absconded] and Sohrab Fakir @ Sohrab Ali @ Sorab Ali are found criminally liable under section 4(1) of the Act of 1973 for abetting, facilitating and contributing the actual commission of the offence of ‘**other inhumane acts**’ as ‘**crime against humanity**’ as specified in section 3(2) (a) (g)(h) of the Act which are punishable under section 20(2) of the Act of 1973 .

### **Adjudication of Charge No. 02**

**[Offences of confinement, arson, torture and killing of 02 civilians at village Mobarakpur Purbopara under Atpara Police Station]**

152. That on 23 August, 1971 at about 11:00 A.M a group formed of Pakistani occupation army and Razakars being accompanied by the accused Md. Hedaetullah @ Anju B.Sc [**absconded**] and his brother Anayet Ullah Monju @ Enaet Ullah @ Monju [**died after submission of the formal charge**] by launching attack at village Mobarakpur Purbopara torched the houses of civilians and by indiscriminate gun firing to the bushes wherein the feared residents of the locality went into hiding sensing the presence of the attackers that resulted in bullet hit injury to Md. Abul Kashem [now dead]. In conjunction with the attack the group of attackers forcibly detained

Malek Talukder and Kalachan Munshi , caused torture to them and then bringing those two detainees at the place near the pond of Malek Talukder the accused Hidaetulla @ Anju @ Md. Hedaetullah @ Anju B.S.C[absconded] and his accomplice Anayet Ullah Monju @ Enaet Ullah @ Monju [died after submission of the formal charge] shot them to death and then had carried out destructive activities by looting valuables from Malek Talukder's house and it was set on fire too. Afterwards, the group headed towards the Atpara Police Station army camp, quitting the crime site.

Therefore, the accused Hidaetulla @ Anju @ Md. Hedaetullah @ Anju B.Sc [**absconded**] has been charged for actively participating, facilitating, abetting and substantially contributing to the commission of the offences of '**arson**', '**torture**' and '**murder**' as crimes against humanity as specified in section 3(2)(a)(g)(h) read with section 4(1) of the International Crimes (Tribunals) Act, 1973 which are punishable under Section 20(2) of the Act.

### **Evidence of Witnesses Examined**

153. According to prosecution the arraignment brought in this charge rests upon testimony of six [06] witnesses who have been examined as P.W.01, P.W.06, P.W.07, P.W.08, P.W.09 and P.W.10. Some of them are near relatives of victims and had natural occasion of experiencing the attack that resulted in killing two

civilians and devastating activities by looting and burning down the houses. Now let us see what the witnesses' sworn narratives made in Tribunal.

**154. P.W.06 Md. Abul Kashem (68)** is a resident of village-Mobarakpur under Police Station-Atpara of District [now]-Netrokona. In 1971 he was about 21 years old. He is a near relative of victims. He is a direct witness to the facts materially related to the attack, it transpires.

155. P.W.06 stated that on 6<sup>th</sup> Bhadra (Bengali month), 1971 at around 11 A.M he had been at home when he heard the sound of gun firing and saw the people fleeing from east to west as Pakistani Army were approaching. With this he went into hiding inside a nearer bush and during his staying there he received a bullet hit at his wrist. Then he saw that accused Hedaetullah Anju, his brother Enayet Ullah Monju [now dead], armed Razakars and army men setting their and surrounding houses on fire. He then also saw accused Hedaetullah Anju and his brother Enayet Ullah Monju [now dead] taking away his maternal uncle Kalachan Munshi and uncle Abdul Malek Talukder towards east, on forcible capture from the bank of the pond adjacent to the mosque.

156. P.W.06 next stated that one hour later he came out of the hiding place and found bullet hit dead body of his maternal uncle and uncle lying on the bank of the pond.

157. P.W.06 sensing attack went into hiding and received bullet hit injury, in conjunction with the attack. The attack was carried out in day time by launching attack at village-Mobarakpur. The group formed of army men and Razakars accompanied by the accused Hedaetullah Anju and his brother [now dead].defence could not controvert these crucial facts as experienced by P.W.06.

158. P.W.06 also stated that 4/5 days prior to the event of attack freedom-fighters came to their locality when they used to assist them and arrange serving of food for them and knowing it the Pakistani Army and Razakars had carried out the attack.

159. In respect of reason of knowing the accused persons beforehand P.W.06 stated that accused Hedaetullah Anju competed in National Assembly Election in 1970 with the symbol of scale and that his brother Enayet Ullah Monju[now dead] was engaged in election around their locality that's why he knew them beforehand.

160. In cross-examination done on part of accused Hedaetullah Anju, in reply to defence question put to him P.W.06 stated that Pakistani occupation army got stationed at Atpara Thana at the end of Bangla month Sravan and that village-Kulosree is around 5/6 miles north from their village. P.W.06 denied defence suggestions that he did not see any event he testified; that he did not know the accused Hedaetullah Anju; that the accused was not a Razakar and that what he testified was untrue and tutored.

**161. P.W.07 Md. Abul Hashem (65)** is a resident of village-Mobarakpur Purbopara, under Police Station-Atpara, District [now]- Netrokona. In 1971 he was 18 years old. He had occasion of watching activities carried out in conjunction with the attack launched.

162. P.W.07 stated that on the 6th day of Bangla month Bhadra in 1971 at about 11 A.M he was cutting jute in the jute field with Kalachan Munshi when suddenly he heard the sound of gun firing and with this they coming in front of the mosque found Abdul Malek Talukder there. Then Kalachan Munshi and Abdul Malek Talukder remained stayed there and asked him [P.W.07] to quit. He then went into hiding inside a bush wherefrom he saw accused Hedaetullah Anju, his brother Enayet Ullah Monju [now dead],

10/12 armed Razakars and Pakistani army men approaching towards their village with indiscriminate gun firing.

163. P.W.07 next stated that he [P.W.07] also saw the accused Hedaetullah Anju , his brother Enayet Ullah Monju [now dead] taking away Kalachan Munshi and Abdul Malek Talukder to the bank of the pond of one Chandu Mia, on forcible capture and other Razakars setting the house on fire. He [P.W.07] then secretly move towards Chandu Mia's house when he saw the accused Hedaetullah Anju gunning down Kalachan Munshi and Abdul Malek Talukder to death.

164. P.W.07 also stated that in conjunction with the attack the gang of attackers burnt down 50/60 house of their village. 5/6 days prior to the event of attack freedom fighters came to their village when they provided assistance to them and arranged serving of food for them.

165. Finally, P.W.07 stated that accused Hedaetullah Anju competed in National Assembly Election in 1970 with the symbol of scale and his brother Enayet Ullah Monju [now dead] was engaged in election campaign for his brother and thus he knew him beforehand.

166. In cross-examination done by the state defence counsel defending the absconding accused Hedaetullah Anju P.W.07 stated in reply to defence question that village-Kulosree is 5/6 miles far from their village; that he never visited the village-Kulosree; that Pakistani occupation army got stationed at Atpara Thana, after the event happened at their village.

167. P.W.07 denied the defence suggestions that he did not see the event of killing he testified; that he did not know the accused; that the accused did not belong to Razakar Bahini and that what he testified was untrue and tutored. P.W.07 denied all these suggestions blatantly.

**168. P.W.08 Md. Abdul Halim Khan (70)** is a resident of village-Baniajan under Police Station-Atpara, District- Netrokona. In 1971 he was about 23 years old and was a teacher of Khaguria High School.

169. P.W.08 on the date of event at the relevant time on hearing the sound of gun firing came out of home and saw eastern part of their village and the houses of adjacent village on fire. Then he started moving towards Mobarakpur and after arriving there at 11 A.M he saw the houses ablaze and heard the sound of gun firing. With this he remained stayed in the Haor which was about 300 yards far from

Atpara-Teligati road. One hour later, he [P.W.08] saw the accused Razakar Hedaetullah Anju, his sibling Enayet Ullah Monju [now dead] and 10/12 cohort Razakars and army men moving towards the army camp.

170. In respect of the event P.W.08 stated that on 23<sup>rd</sup> August, 1971 he had been at home when at about 9-10 A.M. hearing the sound of gun firing came out of home and saw eastern part of their village and the houses of adjacent village on fire. Being scared, people were running. He then started moving towards Mobarakpur, passing the Haor [water body] and after arriving there at 11 A.M he saw the houses ablaze and heard the sound of gun firing. With this he remained stayed in the Haor which was about 300 yards far from Atpara-Teligati road. One hour later, he saw the accused Razakar Hedaetullah Anju and his sibling Enayet Ullah Monju [now dead] and 10/12 cohort Razakars and army men moving towards the army camp.

171. What the P.W.08 experienced next? P.W.08 stated that after the Razakars and army men had left the site he moved to the house of Abdul Malek Talukder and found the dead body of Kalachan Munshi and Abdul Malek Talukder lying in front of the house of Sondu Mia.

172. P.W.08 also stated that 5/6 days prior to this event the freedom-fighters attacked Atpara Thana when 7/8 Razakars died. The local people provided assistance and arranged serving of food for them and this was the reason of launching attack at village Mobarakpur.

173. In respect of reason of knowing the accused Hedayat Ullah Anju P.W.08 stated that this accused participated in 1970 National Assembly Election with the symbol of balance [election symbol of Jamaat E Islami] and he [P.W.08] was affiliated with student politics and thus he knew him beforehand. Besides Hedaetullah Anju was a teacher before the election.

174. In cross-examination, in reply to defence question P.W.08 stated that their house was adjacent to Atpara Thana; that on the day the event happened Pakistani occupation army got stationed at Atpara by setting up their camp and their village was about two kilometers far from village-Mobarakpur.

175. P.W.08 denied defence suggestions that he did not know accused Hedaetullah Anju and his brother Enayet Ullah Monju [now deceased]; that the gang formed only of army men had attacked the village Mobarakpur and carried out killing; that the accused was not with the gang; and that what he testified was untrue and tutored.

**176. P.W.09 Md. Gholam Rabbani @ Nantu (65)** is a resident of village- Mobarakpur Purbopara under Police Station- Atpara, District [now]- Netrokona. In 1971 he was about 18 years old. At that time he was a student of HSC in Netrokona College. He is direct witness to the facts materially chained to the event of attack. He is the younger brother of victim Abdul Malek Talukder.

177. P.W.09 stated that on 23<sup>rd</sup> August, 1971 he had been at home when at about 11 A.M he heard the gun firing from eastern end. With this he came out of home and saw Razakar Hedaetullah Anju, his brother Enayet Ullah Monju [now deceased], their 10/12 accomplice Razakars and Pakistani army men were coming towards their village with indiscriminate gun firing. His elder brother Abdul Malek asked him [P.W.09] to flee quickly. Then his mother, two sisters and wife of his elder brother went into hiding inside a jute field behind their house. He [P.W.09] along with his father went into hiding inside a bush beside the bank of a pond nearer to the house of Sondu Mia.

178. P.W.09 next stated that Razakars and army men burnt down their house by throwing white powder. He saw, remaining stayed inside the bush, Hedaetullah Anju, his brother Enayet Ullah Monju [now dead] taking away his [P.W.09] elder brother Abdul Malek

Talukder and Kalachan Munshi to the place nearer to Sondu Mia's house on forcible capture from the place nearer to the mosque. He [P.W.09] also saw Hedaetullah Anju, gunning down them to death there. After the gang had left the site he came out of hiding place and found bullet hit dead body of his elder brother and Kalachan Munshi

179. P.W.09 further stated that 4/5 days prior to the event freedom-fighters came to their village when they provided backing to them in different ways which made the Pakistani occupation army and Razakars aggressive in carrying out devastating activities by burning 50/60 houses and the houses of their neighbouring villages, by launching attack.

180. In respect of reason of knowing the accused Hedaetullah Anju P.W.09 stated that this accused participated in 1970 National Assembly Election with the symbol of balance [election symbol of Jamaat E Islami] and his brother Enayet Ullah Monju [now deceased] was engaged in election campaign in support of him and even used to come to their house in this connection and thus he knew the accused beforehand.

181. In cross-examination done on part of absconding accused Hedaetullah Anju P.W.09 stated in reply to defence question that

Pakistani occupation army got camped in Netrokona on 29th April, 1971 and they got stationed at Atpara Thana on 23rd August, 1971; that only one army camp existed at Atpara Thana; that he joined the Liberation War at the end of Bengali month Bhadra and that there were 15 more freedom-fighters from their village. P.W.09 also stated that their village was quarter mile away from Atpara Thana and that Sondu Miah's house was adjacent to their house.

182. P.W.09 denied defence suggestions that he did not see the accused and his brother shooting his [P.W.09] brother and Kalachan Munshi to death; that he did not know the accused; that the accused did not belong to local peace committee and Razakar Bahini; that the accused did not visit their village for seeking vote and that what he testified was untrue and tutored.

**183. P.W. 10 Md. Sondu Miah (63)** is a resident of village-Mobarakpur under Police Station- Atpara, District[now]-Netrokona. In 1971 he was 16/17 years old. He narrated facts related to the attack launched at village-Mobarakpur.

184. P.W.10 stated that on 6<sup>th</sup> day of Bangla month Bhadra in 1971 at around 11 A.M. he was cutting grass in the field when he heard gun firing and then he started going back home by boat and on the way, he saw Pakistani occupation army , accused Hedaetullah

Anju, his brother Enayet Ullah Monju [now dead] and other Razakars moving towards their home. With this he fled inside a jute field wherefrom he witnessed, Hedaetullah Anju, his brother Enayet Ullah Monju [now dead] bringing his[P.W.10] maternal uncle Abdul Malek Talukder and Kalachan Munshi near the pond of their house where Hedayetullah Anju shot them to death.

185. P.W.10 stated too that the gang of army men and Razakars after carrying out devastating activities at their house and neighbouring house moved back to Atpara. Then he found bullet hit dead body of Abdul Malek Talukder and Kalachan Munshi lying on the bank of pond of their house.

186. P.W.10 next stated that accused Hedaetullah Anju was a B.Sc teacher of school and additionally he competed in 1970 in National Assembly Election with the symbol of scale [election symbol of Jamaat E Islami] and that's why he knew him beforehand.

187. In cross-examination, defence does not seem to have attempted to controvert or challenge what has been testified by P.W.10 on facts materially related to the attack. Defence simply however put suggestions to P.W.10 that he did not know the accused; that the accused was not involved with the event he testified; that the accused was not a Razakar and that what he

testified was untrue and tutored. P.W.10 blatantly denied all these suggestions.

188. P.W.01 Md. Khurshed Alam Khan @ Bachchu [65] is a resident of village- Salpasunoi under police station-Atpara of District [now] Netrokona. He is a freedom-fighter. In 1971 he was 19 years old and a student of BA first year in Mymensingh Gouripur College. He is a hearsay witness.

189. P.W.01 stated that on receiving training at Maheshkhola youth camp, India he returned back to Bangladesh during the third week of May, 1971. On 23 August 1971 he was on the way to his home from his relative's house at village-Koilong when at about 01:00 P.M he found bullet hit dead body of Abdul Malek Talukder of village-Mobarakpur under Atpara police station , lying on the bank of pond and also saw 60/60 houses ablaze.

190. P.W.01 also stated that he heard from Kashem[P.W.06], Hashem[P.W.07] and Nantu of that village that on that day at about 11:00 A.M a group formed of Pakistani occupation army, 10/12Raxakars and accused Hedaetullah Anju and his sibling Enayet Ullah Monju [now dead] by launching attack had killed Abdul Malek Talukder and Kalachan Munshi. Relatives of

Kalachan Munshi took away his dead body, before he [P.W.01] arrived there [the killing site].

191. On cross-examination P.W.01 denied the defence suggestions that he did not hear the event; that what he stated implicating the accused was untrue and tutored.

## **Finding on Evaluation of Evidence**

### ***Prosecution Argument***

192. The learned prosecutor **Mr. Mukhlesur Rahman Badal** drawing attention to the ocular testimony of witnesses relied upon in support of this charge submitted that a group formed of the accused Hedaetullah Anju, his brother Enayetullah Monju [now dead], cohort Razakars had carried out systematic attack that resulted in devastating activities of civilians' property; that the gang detained two unarmed civilians and accused himself physically participated in causing their death by gunning down.

193. The learned prosecutor further submits that the witnesses the residents of the crime site had natural occasion of seeing the activities carried put, remaining in hiding as the event happened in day time; that the witnesses knew the accused beforehand for the reason of his political profile and notoriety as a person having dominance over the locally formed Razakar Bahini.. Defence does

not dispute the attack that resulted in killing civilians. It simply denied complicity of accused persons with the event.

194. The learned prosecutor further submitted that defence could not impeach what the witnesses testified and as such it stood proved by their evidence that the accused Hedayetullah Anju physically and culpably participated in committing the offences, sharing common intent of the criminal enterprise.

### *Defence Argument*

195. On contrary, **Mr. Abdus Shukur Khan** the learned state defence counsel defending both accused submitted that the witnesses examined in support of this charge are not reliable; that they had no rational reason of knowing the accused persons; that it is not practicable to recollect what they allegedly experienced; that the witnesses have testified being tutored and out of political rivalry. Prosecution could not prove the indictment brought against the accused and he was not with the gang formed of Pakistani army men, the learned state defence counsel added.

196. It transpires that only accused Hidaetulla @ Anju @ Md. Hedaetullah @ Anju B.Sc has been indicted in this charge. However, the charge framed narrates participation of his brother Enayetullah Monju as a member of the gang of attackers in carrying

out the attack. But he could not be indicted as he died before hearing charge framing matter, despite the investigation agency recommended his prosecution on conclusion of investigation on the basis of which Chief Prosecutor submitted the formal charge as well.

197. This charge involves commission of looting, burning down houses and killing two unarmed civilians constituting the offences of crimes against humanity. Prosecution relied upon testimony of P.W.01, P.W.06, P.W.07, P.W.08, P.W.09 and P.W.10. Of them P.W.01 is a hearsay witnesses and the rest are direct witnesses to the facts materially linked to the perpetration of crimes alleged, by .launching attack, prosecution alleges.

198. The matters required to be proved by the prosecution are—

- (i) Launching systematic and deliberate attack at village Mobarakpur
- (ii) The gang of attackers formed of Pakistani army men, accused and his accomplice Razakars;
- (iii) Devastating activities by looting and burning down houses was carried out;
- (iv) The accused actively and culpably participated in committing the crimes including the killing two civilians.

199. It has been divulged from the consistently corroborative evidence of evidence of P.W.06, P.W.07, P.W.08, P.W.09 and P.W.10, the residents of crime village- Mobarakpur that the attack was launched with gun firing which naturally made the residents of the locality under attack scared and thus many of residents opted to go into hiding. The witnesses relied upon to substantiate this charge too went into hiding sensing the systematic attack. Defence does not seem to have made any attempt to controvert it.

200. By whom the attack was launched? P.W.06 Md. Abul Kashem is a survived victim who at the stage of initiation of attack received bullet hit injury at his wrist, during his staying inside a nearer bush. He [P.W.06] also witnessed the Pakistani occupation army, accused Hedaetullah Anju , his brother Razakar Enayetullah Monju[now dead] and their cohort Razakars setting their and surrounding houses on fire .

201. Thus, it stands proved that the group of attackers was accompanied by the accused Hedaetullah and his brother Enayetullah Monju [now dead].defence could not controvert this crucial fact as experienced by P.W.06.

202. Gun firing together with the act of blazing the houses, as evinced from testimony of P.W.06 was intended to spread terror and such terrorizing situation did not allow the civilians to come out to resist the perpetrators. Rather, the residents of the vicinity had to remain in hiding.

203. It has been affirmed in cross-examination of P.W.06 that Pakistani occupation army got stationed at Atpara Thana at the end of Bangla month Sravan [first part of August]. And just few days later, the event arraigned in this charge occurred on 23 August 1971. Obviously, it was not at all viable for the Pakistani occupation army in designing and launching attack at particular rural vicinity without active and substantial assistance and participation of accused and their cohorts belonging to Razakar Bahini.

204. What more the P.W.06 had occasion of seeing, being stayed inside the bush? His[P.W.06] unshaken testimony goes to demonstrate that he also saw the accused Hedaetullah Anju and his brother Enayetullah Monju [now dead] taking away his[P.W.06] maternal uncle Kalachan Munshi and uncle Abdul Malek Talukder towards east, on forcible capture from the bank of the pond adjacent to the mosque.

205. P.W.07 remaining in hiding could see the accused Hedaetullah Anju, his brother Enayet Ullah Monju [now dead] taking away Kalachan Munshi and Abdul Malek Talukder to the bank of the pond of one Chandu Mia, on forcible capture and also saw other Razakars setting the house on fire.

206. It is evinced that P.W.07 then secretly moved towards Chandu Mia's house [killing site] when he saw the accused Hedaetullah Anju gunning down Kalachan Munshi and Abdul Malek Talukder to death. Defence could not shatter this crucial piece of evidence. There has been no reason of disbelieving the narrative made by P.W.07.

207. P.W.08 is a direct witness to material facts. It transpires from his testimony that he on the date of event at the relevant time on hearing the sound of gun firing came out of home and saw eastern part of their village and the houses of adjacent village on fire. Then he started moving towards Mobarakpur and after arriving there at 11 A.M he saw the houses ablaze and heard the sound of gun firing.

208. It has been revealed too that being scared P.W.08 remained stayed in the Haor which was about 300 yards far from Atpara-Teligati road. One hour later, he [P.W.08] saw the accused Razakar Hedaetullah Anju, his sibling Enayet Ullah Monju [now dead] and

10/12 cohort Razakars and army men moving back towards the army camp.

209. It has been found proved too from evidence of P.W.06, P.W.07 and P.W.08 that in conjunction with the attack the gang burnt down houses of civilians. Presumably, intending to keep the attack unimpeded the gang had carried out such devastating activities. The key intent of the attack conducted was to wipe out pro-liberation civilians and by accomplishing such brutal act to spread terror and intimidation around the vicinity.

210. It also transpires that after the Razakars and army men had left the site P.W.08 moved to the house of Abdul Malek Talukder and found the dead body of Kalachan Munshi and Abdul Malek Talukder lying in front of the house of Sondu Mia. Defence could not controvert it in any manner that bullet hit dead body of two civilians were found lying in front of the house of Sondu Mia. P.W.09 also found bullet hit dead body of his elder brother Abdul Malek Talukder and Kalachan Munshi, after the gang had left the site.

211. The above piece of crucial fact was linked to the act of killing accomplished at the place in front of the house of Sondu Mia and the gang accompanied by accused Hedaetullah Anju, his sibling

Enayet Ullah Monju [now dead] and 10/12 cohort Razakars were the part of the criminal enterprise, sharing common intent and purpose as they were fond quitting the site with the group, as testified by P.W.08.

212. The killing of two civilians namely Kalachan Munshi and Abdul Malek Talukder was accomplished on the bank of the pond of one Chandu Mia, on forcible capture and accused Hedayetullah Anju was the physical perpetrator of the act of killing. It stands proved from the evidence of P.W.07, a direct witness.

213. The act of killing and accused Hedaetullah Anju's physical participation therewith gets firm corroboration from P.W.06, a direct witness as his unshaken testimony impels that the accused Hedaetullah Anju and his brother Enayetullah Monju [now dead] took away his [P.W.06] maternal uncle Kalachan Munshi and uncle Abdul Malek Talukder towards east, on forcible capture from the bank of the pond adjacent to the mosque.

214. P.W.01, heard from Kashem[P.W.06], Hashem[P.W.07] and Nantu of that village that on that day at about 11:00 A.M a group formed of Pakistani occupation army, 10/12 Razakars and accused Hedaetullah Anju and his sibling Enayet Ullah Monju [now dead]

by launching attack had killed Abdul Malek Talukder and Kalachan Munshi.

215. It has already been settled that in a case under the Act of 1973 'hearsay evidence' is admissible and it may be taken into consideration if supported by 'other evidence'. The phrase 'other evidence' includes relevant facts, circumstances and testimony of ocular witnesses. We see that source of hearsay testimony of P.W.01 are P.W.06 and P.W.07, two direct witnesses and the residents of the crime locality and thus what the P.W.01 narrated carries probative value and inspires credence too.

216. It could not be controverted by the defence that P.W.09 saw Razakar Hedayetullah Anju, his brother Enayet Ullah Monju [now deceased], their 10/12 accomplice Razakars and Pakistani army men heading towards their village with indiscriminate gun firing.

217. P.W.09 the brother of victim Abdul Malek Talukder saw Razakars and army men burning down their house by throwing white powder. He also saw, remaining stayed inside the bush, accused Hedaetullah Anju, his brother Enayet Ullah Monju [now dead] taking away his [P.W.09] elder brother Abdul Malek Talukder and Kalachan Munshi to the place nearer to Sondu Mia's

house on forcible capture from the place nearer to the mosque where accused Hedayetullah Anju, gunned down them to death.

218. The above proves that the detainees were shot to death taking them on forcible capture at the place nearer to Sondu Mia's house on forcible capture from the place nearer to the mosque.

219. The act of killing two unarmed civilians gets corroboration from other direct witness P.W.10 who remaining in hiding inside a jute field could see accused Hedaetullah Anju, his brother Enayet Ullah Monju [now dead] bringing his [P.W.10] maternal uncle Abdul Malek Talukder and Kalachan Munshi near the pond of their house where Hedayetullah Anju shot them to death.

220. P.W.09 too testified in categorized manner that 4/5 days prior to the event happened freedom-fighters came to their village when they provided backing to them in different ways which made the Pakistani occupation army and Razakars aggressive in carrying out attack. We are convinced to conclude that such act of taking explicit stance in support of freedom-fighters made leaked to the army men obviously by their local collaborators belonging to Razakar Bahini. Presence of accused and his accomplice Razakars at the crime site strengthens this inference.

221. It has been found proved too from evidence of P.W.06, P.W.07 and P.W.08 that in conjunction with the attack the gang burnt down houses of civilians. The gang of army men and Razakars after carrying out devastating activities at their house and neighbouring house moved back to Atpara, testimony of P.W.10 demonstrates ancillary criminal acts, committed in conjunction with the attack. It remained unimpeached.

222. Presumably, intending to keep the attack unimpeded the gang had deliberately carried out such devastating activities. The key intent of the attack conducted was to wipe out pro-liberation civilians and by accomplishing such brutal act to spread terror and intimidation around the vicinity.

223. It stands proved from testimony of P.W.08 that accused Hedaetullah Anju was made a Member of the Netrokona and Atpara Thana Peace Committee and he by virtue of his leadership in Jamaat E Islami [JEI] was entrusted with the task of forming and leading Razakar Bahini at Atpara and Modon Thana. Accused Hedaetullah Anju's sibling Enayet Ullah Monju [now dead] was the Commander of Modon Thana Razakar Bahini. Defence could not controvert it in any manner. Thus, it is not at all believable that without knowledge and participation of accused Hedayetullah Anju, a person having significant dominance over the Razakar

Bahini at Atpara Than and Modon Thana such dreadful atrocious activities was carried out.

224. The above proves that the detainees were shot to death taking them on forcible capture at the place nearer to Sondu Mia's house on forcible capture from the place nearer to the mosque.

225. The act of killing two unarmed civilians gets corroboration also from another direct witness P.W.10 who remaining in hiding inside a jute field could see accused Hedaetullah Anju, his brother Enayet Ullah Monju [now dead] bringing his [P.W.10] maternal uncle Abdul Malek Talukder and Kalachan Munshi near the pond of their house where Hedaetullah Anju shot them to death.

226. The killing the upshot of a methodical and deliberate attack directing civilian population thus constituted the offence of 'crimes against humanity'. Not only the act of accomplishing the killings but the criminal gang had carried out destructive activities which caused harm and grave sufferings to the relatives of victims and the residents of the locality. Such devastating acts increased magnitude of the attack.

227. What is 'crime against humanity'? How it impacts on humanity and detriments civilization? First, the phrase 'crimes

against humanity’ suggests offences that aggrieve not only the victims and their own communities, but all human beings, regardless of their community. Second, the phrase suggests that these offences cut deep, violating the core humanity that we all share and that distinguishes us from other natural beings. [**David Luban**, ‘*A Theory of Crimes against Humanity*’, Yale Journal of International Law 29. no.1 (2004): 86]

228. What was the reason and intent of carrying out such systematic and horrific attack at the crime village? We have got it from testimony of. It transpires from testimony of P.W06, P.W.07, P.W.08 and P.W.09 the relatives of victims and the residents of the crime village as well consistently testified that further stated that 4/5 days prior to the event freedom-fighters came to their village when they provided backing to them in different ways. Defence could not controvert it. Even this piece of crucial fact remained unimpeached as well. Presumably, this was the reason which made the Pakistani occupation army and Razakars aggressive in carrying out designed and deliberate attack.

229. It has been unambiguously unveiled from evidence of P.W.06 and P.W.07 that freedom-fighters used to come to their locality when they provided assistance to them and arrange serving of food for them. It transpires from testimony of P.W06, P.W.07, P.W.08

and P.W.09 the relatives of victims and the residents of the crime village as well consistently testified that 4/5 days prior to the event freedom-fighters came to their village when they provided backing to them in different ways. This piece of crucial fact remained unimpeached.

230. In view of above pertinent fact we may justifiably infer that this information was made leaked to the Pakistani army stationed at Atpara by none but by the accused and his cohort Razakars and then they orchestrated a collective criminal design of launching attack at village Mobarakpur. This was the reason why the army men in collaboration with the local Razakars opted to carry out a designed attack directing civilians of village- Mobarakpur.

231. The attack conducted at village Mobarakpur ended in killing two civilians. But mere lesser number of victims did not diminish the magnitude and gravity of the atrocious offences committed. The pattern of the attack itself was intended to extend a message of keep the civilians of the locality under grave intimidation and panic which indisputably caused mental harm to the population of the locality attacked which was utterly detrimental to their normal livelihood.

232. The above finding suggests an irresistible the conclusion that the accused Hedayetullah Anju and his cohort Razakars had actively collaborated with the army men in designing the deliberate attack directing civilian population of the locality of Mobarakpur. But in the name of taking revenge or resisting the opponent the gang had carried out prohibited activities that resulted in forcible capture, mental harm and murder of non-combatant protected civilians, in violation of laws of war and international humanitarian law.

233. It is now well settled legal proposition that ‘mental harm’ may include, but is not necessarily restricted to, acts of ‘torture’ or ‘inhuman’ or ‘degrading treatment’. In the case in hand, the harm caused was beyond temporary despondency and it obviously resulted in a grave and long-term disadvantage to the relatives of victims and residents of the crime locality. Thus, causing harm by plundering and burning down properties of civilians indeed involved serious despondency and disadvantage to the victims of the attack.

234. Devastating activities and killing accomplished deliberately by launching systematic attack also caused untold mental harm to relatives and the locals of the crime locality. The total attack causing mental harm and damaging normal livelihood of the

population of village-Mobarakpur thus constituted the offence of ‘other inhumane act’ as crimes against humanity.

235. The attack as arraigned in this charge was systematic indeed. The offences were committed in the context of the war of liberation. In this regard, Tribunal-2[ICT-BD] observed in the case of **Mir Quasem Ali that—**

‘The Tribunal notes that if the specific offences of ‘Crimes against Humanity’ which were committed during 1971 are tried under 1973 Act, it is obvious that they were committed in the ‘**context**’ of the 1971 war of liberation. This ‘context’ itself is sufficient to prove the existence of a ‘*systematic attack*’ on Bangladeshi self-determined population in 1971. It is the ‘*context*’ that transforms an individual’s act or conduct into a crime against humanity and it may be validly presumed that the accused being aware of this context, participated the commission of crimes by his culpable act or conduct.’

**[ICT-BD Case No. 03 of 2013; Judgment: 02 November 2014. para 109]**

236. Therefore, we are convinced to assume that objective of targeting the pro-liberation Bengali civilians of village-Mobarakpur

was to wipe out civilians indenting to resist and defy the war of liberation which was the core policy of the Pakistani occupation armed forces. Tribunal takes judicial notice.

237. The pattern of attack, number of members forming the gang and criminal acts carried out collectively also lead to assume that the attack was ‘systematic’ and directing the ‘civilian population’. It is not necessary of causing death of huge number of civilians to constitute the offence of crime against humanity. Even killing of a limited number of civilians constitute the offence of crime against humanity, if the necessary factors are found proved. In this regard we recall the jurisprudence evolved in the case of **Nahimana, Barayagwiza and Ngeze [ICTR Appeal Chamber]** that –

“The Appeals Chamber considers that, except for extermination, a crime need not be carried out against a multiplicity of victims in order to constitute a crime against humanity. Thus an act directed against a limited number of victims, or even against a single victim, can constitute a crime against humanity, provided it forms part of a widespread or systematic attack against a civilian population.”

**[Nahimana, Barayagwiza and Ngeze, ICTR Appeals Chamber, November 28, 2007, para. 924]**

238. On due appreciation of the intrinsic value of evidence presented before us, in respect of facts materially related to the principal crime, the killing we arrive at unanimous finding that the prosecution has been able to prove beyond reasonable doubt that the accused **Hidaetulla @ Anju @ Md. Hedaetullah @ Anju B.Sc**, being part of the criminal enterprise participated, substantially contributed and facilitated by his act and conduct forming part of attack directing non combatant civilians , in committing the offences of **‘murder’** and **‘other inhumane act’** as specified in section 3(2) (a) (g)(h) of the Act which are punishable under section 20(2) read with section 4(1) of the Act.

**Adjudication of Charge No. 03**

**[Offences of confinement, arson, torture and killing Helim Talukder at village Modon Dakkhin Para under Modon Police Station]**

239. That on 30 August, 1971 at about 12 P.M a group formed of 10/12Pakistani occupation army and armed Razakars being accompanied by the accused (1) Hidaetulla @ Anju @ Md. Hedaetullah @ Anju B.Sc [**absconded**], (2) Sohrab Fakir @ Sohrab Ali @ Sorab and their accomplice Anayet Ullah Monju @ Enaet Ullah @ Monju [**died after submission of the formal charge**] attacked the village Modon Dakkhin Para when the residents thereof went into hiding inside the bushes around their houses, being panicked. The group then started searching the houses to

have trace of freedom-fighters. With this Helim Talukder, the brother of freedom- fighters Md. Hamidur Rahman and Md. Abu Taher attempted to escape by going into hiding but the accused persons forcibly captured him, looted households of the detainee's house, set the cow-shed on fire and then the group accompanied by the accused persons took away the detained Helim Talukder with them tying his hands up to the Pakistani Army Camp at Modon Police Station where he was subjected to torture.

On the same day, in the evening the accused persons and their accomplices brought the detained Helim Talukder on the bank of the river Mogra where he was shot to death and his body was thrown to the river. The dead body of the victim could not be traced.

Therefore, the accused (1) Hidaetulla @ Anju @ Md. Hedaetullah @ Anju B.Sc [**absconded**] and (2) Sohrab Fakir @ Sohrab Ali @ Sorab Ali have been charged for actively participating, facilitating, abetting and substantially contributing to the commission of the offences of '**arson**', '**torture**' and '**murder**' as crimes against humanity as specified in section 3(2)(a)(g)(h) read with section 4(1) of the International Crimes (Tribunals) Act, 1973 which are punishable under Section 20(2) of the Act.

## **Evidence of Witnesses Examined**

240. The arraignment brought in this charge rests upon the sworn account made by P.W.01, P.W.02, P.W.03, P.W.04 and P.W.05. Of them P.W.01 is a hearsay witness. The other four witnesses, prosecution claims, traumatized sufferers who had natural opportunity of seeing prohibited acts chained to the commission of crimes. Let us eye on what has been narrated by these witnesses.

241. **P.W.02 Md. Bazlur Rahman [59]** is a resident of village-Modon Dokkhinpara under police station-Modon of District [now]-Netrokona. In 1971 he was about 13 years old and was a student of class VII, Jahangirpur T. Amin School. He is the brother of victim and had experienced facts materially chained to the attack alleged.

242. In narrating the facts materially related to the attack launched leading to commission of the principal crime P.W.02 testified that on 30<sup>th</sup> August, 1971 at around 12 A.M. he had been at his home with his parents and siblings when the people of their village started running to and from by screaming that the Pakistani army and Razakars were coming. With this, he took hide under the water hyacinth fled beside their home wherefrom he saw Pakistani Army men, accused Hedaetullah Anju, his brother Enayet Ullah Monju [now dead] and accused Sohrab Fakir and their accomplice Razakars forcibly capturing his brother Helim Talukder, looting

and setting their house on fire. The gang took away his detained brother to Modon Thana Pakistani army and Razakar camp where he was subjected to torture.

243. P.W.02 next stated that once Razakar Gopal and Razakar Anwar of their village used to work at their house who on the following day coming to their house informed his father that those accused persons tortured his [P.W.02] brother charging bayonet in captivity and the accused persons shot his [P.W.02] detained brother to death taking him on the bank of the river Mogra and threw the dead body into the river. However, they did not find the dead body even after searching a lot.

244. P.W.02 also stated that his two other siblings Hamidur Rahman and Abu Taher [now dead] joined the war of Liberation war. This was the reason why the accused persons and Pakistani Army attacked their house and murdered his brother, by taking him away on forcible capture.

245. Why the P.W.02 knew the accused persons? In this regard P.W.02 stated that accused Hedaetullah Anju was a teacher of nearby Jahangirpur T Amin School and he competed in National Assembly Election in 1970 with the symbol of scale. His brother Enayet Ullah Monju [now dead], and accused Sohrab Fakir were engaged in the election campaign in favour of Hedaetullah B.Sc

[Anju] and thus he knew them beforehand. Finally, P.W.02 stated that the name of the road beside their house has been named in the name of his martyr brother. P.W.02 identified the accused Sohrab Fakir on dock.

246. Cross examination, in reply to defence question out to him P.W.02 stated that accused Sohrab Fakir's home was at village-Kulosree under Atpara Thana which was about 4/5 kilometers away from their house; that on 27<sup>th</sup> August, 1971 Pakistani Army camp was set up in Modon Thana and that in every Thana of Netrokona Pakistani Army got stationed by setting camps. P.W.02 also stated that there had been no other Razakars at their village excepting Gopal and Anwar.

247. P.W.02 denied defence suggestions that accused Sohrab Fakir was not a Razakar; that he used to sing songs at different shrines before the Liberation War; that accused Hedaetullah Anju did not compete in 1970's National Assembly Election with the symbol of scale; that accused Sohrab Fakir did not take part in his election campaign; that the accused persons were not with the Pakistani occupation army when they launched attack at their house and that what he testified was untrue and tutored.

248. P.W.03 Md. Motiur Rahman [65] is a resident of village- Modon Majhpara under police station- Modon, District [now]- Netrokona. In 1971 he was about 18 years old. He in addition to two other events testified the event of attack as alleged in this charge no.03.

249. Before narrating what he experienced in conjunction with the attack P.W.03 stated that in 1971 during the war of liberation he used to provide information to the freedom-fighters secretly about the activities of Razakars.

250. P.W.03, in respect of the event as arraigned in charge no.03 stated that on 30th August, 1971 around 01:00 P.M. he was in the field when he saw the Pakistani Army and Razakars approaching from eastern side and on seeing it he went into hiding inside the jute field. After 20/30 minutes he saw Pakistani Army men, accused Hedaetullah Anju, his brother Enayet Ullah Monju[now dead) and accused Sohrab Fakir and their cohort Razakars taking away Helim Talukder tying up his hands towards Modon Thana. Half an hour later when he came out of the hiding place, he saw their house was set ablaze and things were broken.

251. P.W.03 next stated that at that night, on the same day local Razakar Gopal informed him that after causing torture the accused

persons had killed Helim Talukder, taking him near Mogra River, and dumped the dead body into river.

252. In respect of reason of knowing the accused persons P.W.03 stated that accused Hedaetullah Anju contested election in 1970 with the symbol 'scale'[ election symbol of JEI] and his brother Enayet Ullah Monju[now dead) and accused Sohrab Fakir were engaged in election campaign in his favour and thus he knew them beforehand.

253. In cross examination it has been affirmed that P.W.03 used to secretly provide information to the freedom-fighters stationed around the localities about the activities of Razakars. In reply to defence question P.W.03 stated that accused Sohrab Fakir was a resident of village Kulosree, about three-three and half kilometers far from their village.

254. Defence simply denied accused persons' presence with the gang of attackers at the crime site. P.W.03 denied the defence suggestions that he did not know the accused persons and that what he testified implicating accused persons was untrue and tutored. It however does not appear to have taken attempt to controvert the crucial facts related to the event that resulted in killing a civilian as testified by P.W.03

255. P.W.04 Md. Abdul Khaleqe (66) is a resident of village-Kuliati under police station- Modon, District- Netrokona. In 1971 he was about 20 years old and an examinee of SSC from Jahangirpur T. Amin High School. He is a freedom-fighter. On receiving two months and fifteen days' training from Tura training center in India he came back along with 25 freedom fighters and got stayed around the locality under police station-Modon. But their staying there was made leaked to the Pakistani occupation army by accused Hedayetullah Anju, his brother Enayet Ullah Monju [now dead] and accused Sohrab Fakir.

256. P.W.04 in narrating the backdrop of the event of attack stated that on 28<sup>th</sup> August, 1971 while the Pakistani occupation army men being accompanied by the accused persons were coming towards Modon crossing the river Mogra, they the freedom-fighters made an ambush and they brush fired their boat in the mid of the river, the boat got leaked and thus few Pakistani army men and Razakars died. In this situation there had been a battle with them for one night by exchanging gun firing.

257. P.W.04 continued narrating that on the following day i.e. on 29<sup>th</sup> August, 1971 Pakistani army from a helicopter started gun firing to them that resulted bullet hit injury on his leg and also

resulted in death of his co-freedom-fighter Abdul Quddus. Then they moved back to secure place taking his dead body with them. They also attempted to know, by sending source what the Pakistani Army and Razakars were going to do.

258. In respect of the event of attack arraigned P.W.04 is a hearsay witness. P.W.04 stated that on 30<sup>th</sup> August, 1971 at around 08:00 P.M. he came to know from the source that accused Hedaetullah Anju, his brother Enayet Ullah Monju[now dead], accused Sohrab Fakir and their cohort Razakars forcibly captured Helim Talukder by launching attack at his house as they did not find his two brothers who were freedom-fighters.

259. In recounting the act of taking away the victim P.W.04 stated that the gang took away detained Helim Talukder to the army camp and on their way back they set numerous houses on fire. P.W.04 also knew that detainee Helim Talukder was shot to death taking him on the bank of the river Mogra and his body was dumped into the river. However, the dead body could not be traced even. In remembrance of him [Helim Talukder], a road of the locality has been named upon his name in 1974.

260. P.W.04 finally stated that accused Hedaetullah Anju was a school teacher and accused Sohrab Fakir was engaged in election campaign in his favour and thus he knew them beforehand.

261. In cross-examination, in reply to defence question put to him P.W.04 stated that he was a freedom fighter under sector 11; that Pakistani occupation army arrived at Modon Thana on 28<sup>th</sup> August[1971]; that accused Sohrab Fakir was a resident of village Kulosree.

262. P.W.04 denied defence suggestions that he did not know the accused persons; that accused Hedaetullah Anju did not contest election in 1970; that accused were not Razakars and that what he testified was untrue and tutored.

263. Defence does not appear to have made effort to impeach the facts related to the event of attack. It simply denied what has been testified by the P.W.04

264. **P.W.05 Khudiram Chandra Das (82)** is a resident of village- Modon Das Para, P.S. Modon, District- Netrokona. In 197 he was about 34 years old. He is a direct witness to the initiation of the attack launched.

265. P.W.05 stated that on 30<sup>th</sup> August, 1971 at around 12 P.M. he was on the way through the road beside police station of Modon when he saw some Razakars and Pakistani occupation army men approaching towards the house of Helim Talukder. Seeing it he went into hiding inside the jute field, north to Modon Thana. One and half hour later, he saw accused Hedaetullah Anju, his brother Enayet Ullah Monju [now dead], accused Sohrab Fakir, their 8/10 cohort armed Razakars and Pakistani army men taking away Helim Talukder towards police station tying him up.

266. P.W.05 also stated that afterwards he came to know from Razakar Gopal and Nitu that in that very evening accused Hedaetullah Anju, his brother Enayet Ullah Monju [now deceased] and accused Sohrab Fakir shot Helim Talukder to death taking him on the bank of the river and threw his dead body into the river. In respect of reason of killing Helim Talukder P.W.05 stated that his two other brothers were freedom fighters.

267. P.W.05 finally stated that accused Hedaetullah Anju was a teacher of Jahangirpur T. Amin Pilot High School and he contested in National Assembly Election in 1970 with the symbol of scale/balance and thus he knew him. His brother Enayet Ullah Monju [now dead] and accused Sohrab Fakir took part in the election

campaign in favour of Hedaetullah Anju and that's why he also knew them.

268. On cross examination, P.W.05 in reply to defence question stated that Modon Thana was about 100/150 yards away from their house. P.W.05 denied the defence suggestions that he did not know the accused persons; that he did not witness and hear the event he testified and that what he testified implicating the accused persons was untrue and tutored.

269. In cross-examination of P.W.05 it has been affirmed that Modon Thana was about 100/150 yards away from the house of P.W.05 and as such it was practicable to see the gang taking away the victim Helim Talukder towards Modon Thana by the gang formed of army men, accused persons and their cohort Razakars. Testimony of P.W.05 made in this regard inspires credence. This proved criminal act was chained to the act of wiping out the detained victim.

270. P.W.01 Md. Khurshed Alam Khan [65] is a freedom-fighter. He is a hearsay witness. He testified that on 31 August 1971 after dusk he had been at Teligati bazaar when he heard from Hafizur Rahman that on the preceding day i.e. 30 August 1971 at about 12:00 noon a group formed of Pakistani occupation army, 10/12

armed Razakars accompanied by accused Hedaetullah Anju, his brother Enayet Ullah Monju, accused Sohrab Fakir by launching attack at the house of two freedom-fighters Hamidur Rahman[now dead] and Abu Taher [now dead] forcibly captured their younger brother Helim Talukder, looted households, burnt down houses and took him away to Modon Thana army camp and on the same day in evening gunned him down to death taking on the bank of the river Mogra and dumped his body into the river. In cross-examination, defence simply denied what the P.W.01 stated.

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

### ***Prosecution Argument***

**271. Mr. Mukhlesur Rahman Badal**, the learned prosecutor argued that it has been proved beyond reasonable doubt that the Pakistani troop accompanied by both the accused and their accomplice Razakars by launching attack at the house of Helim Talukder forcibly captured him, carried out looting, burnt down houses and took away the unlawfully detained victim to Modon Thana army and Razakar camp. P.W.02, P.W.03 and P.W.05 are direct witnesses to the facts related to the first phase of attack and they saw the accused persons with the gang in carrying out criminal acts.

272. The learned prosecutor next submits that cumulative evaluation of evidence provided by the P.W.02, P.W.03 and P.W.05 impels the conclusion that the accused persons having significant affiliation in locally formed Razakar Bahini were with the group of army and they actively participated at all phases of attack and thereby contributed to the commission of the principal crime, the killing.

273. The learned prosecutor further submits that ‘presence’ of the accused persons with the attackers at the crime site together with their affiliation in Razakar Bahini his role and position by itself speaks a lot. Why had the accused persons and their accomplices accompanied the gang of army at the crime site in causing forcible capture of a civilian , two brothers of whom were freedom-fighters? The accused persons knowingly and sharing common intent got engaged in accomplishing such atrocious activities, by providing active and culpable assistance to the Pakistani occupation army.

274. The evidence presented proves it beyond reasonable doubt that the accused persons culpably and actively accompanied the Pakistani occupation army in committing the murder of Helim Talukder after subjecting him to torture in captivity. Devastating destruction of property of civilians as found proved was detriment to fundamental rights of non combatant civilians. The accused

persons incurred liability of committing the killing, the principal crime as it was chained to the first phase of the attack, the learned prosecutor added.

### ***Defence Argument***

275. Conversely, **Mr. Abdus Shukur Khan** the learned state defence counsel defending both the accused argued that the prosecution failed to prove the arraignment brought in this charge; that the witnesses the prosecution relies upon made inconsistent version on material particular; that it was not practicable of seeing the group of attackers launching attack as testified and that there has been no evidence to show that the accused persons participated or contributed in accomplishing the killing of victim Helim Talukder. Testimony of witnesses relied upon suffers from improbability.

276. Tribunal notes that the first phase of attack resulted in looting, burning down houses and taking away victim Helim Talukder, on forcible capture. The act of killing, the ending phase of the attack was chained to the criminal activities carried out in conjunction with the first phase of attack.

277. It appears that defence suggested P.W.02 that the accused persons were not with the Pakistani occupation army when they launched attack at their house. It rather affirms that attack was launched at the house of victim Helim Talukder.

278. Killing the victim Helim Talukder after taking him away to the army and Razakar camp was the upshot of the attack. Witnesses had no opportunity of seeing this phase of criminal mission. Later on, they heard it from Gopal and Anwar, two Razakars of their village. The witnesses, the relatives and residents of the crime village recounted what they experienced during the first phase of attack.

279. P.W.02 Md. Bazlur Rahman is the brother of victim Helim Talukder and had experienced facts materially chained to the attack alleged. At 12 A.M. on the date of event P.W.02 on sensing coming of Pakistani occupation army and Razakars at their village he took hide under the water hyacinth fled beside their home. In context of war of liberation naturally the non-combatant civilians being scared had to opt to go into hiding wherever they could to save own-self. It is basic human instinct.

280. The above piece of version leads to the conclusion that the criminal gang arrived at the village-Modon Dakkhin Para. Besides,

presumably, it was well understood to the residents of the village under attack that the group formed of Pakistani army men and Razakars came to their village not to secure safeguard of residents and thus the residents including the P.W.02 went into hiding. What happened next?

281. It is evinced from uncontroverted testimony of P.W.02 that Pakistani army men, accused Hedaetullah Anju, his brother Enayet Ullah Monju [now dead], accused Sohrab Fakir and their accomplice Razakars taking away his[P.W.02] brother Helim Talukder towards Modon Thana Pakistani army and Razakar camp, on forcible capture. P.W.02 saw all these criminal acts remaining in hiding place.

282. Defence could not bring anything by cross-examining P.W.02 that it was not practicable of seeing those acts forming part of attack remaining in hiding and that P.W.02 had no reason of recognizing the accused persons.

283. The first phase of attack and participation and role of accused persons as recounted by P.W.02 gets corroboration from testimony of P.W.03 Md. Motiur Rahman, a resident of the crime village.

284. At the relevant time, seeing the Pakistani army and Razakars approaching he [P.W.03] went into hiding inside the jute field and

20/30 minutes later he saw Pakistani army men accompanied by accused Hedaetullah Anju, his brother Enayet Ullah Monju [now dead), accused Sohrab Fakir and their cohort Razakars taking away Helim Talukder tying up his hands towards Modon Thana. Coming out of the hiding place, he saw their house was set ablaze.

285. The above proves it unerringly too that the accused persons were with the gang of attackers when by launching attack victim Helim Talukder was taking away to Modon army and Razakar camp, on forcible capture. Defence simply denied accused persons' presence with the gang of attackers at the crime site. But it could not impeach, in any manner, what has been testified by P.W.03 in respect of the first phase of attack.

286. P.W.05 Khudiram Chandra Das is a resident of crime village. He too is a direct witness to the facts related to the first phase of attack. He, remaining in hiding inside the jute field saw the gang approaching towards the house of Helim Talukder, the victim.

287. It stands proved from unimpeached evidence of P.W.05 that one and half hour later he saw accused Hedaetullah Anju, his brother Enayet Ullah Monju [now dead], accused Sohrab Fakir, their 8/10 cohort armed Razakars and Pakistani army men taking away Helim Talukder towards Modon police station tying him up.

288. The above version of P.W.05 adds further assurance as to the act of launching attack, taking away the victim Helim Talukder away on forcible capture by a group formed of Pakistani army men accompanied by accused persons.

289. In cross-examination of P.W.05 it has been affirmed that Modon Thana was about 100/150 yards away from the house of P.W.05 and as such it was practicable of seeing the gang formed of army men, accused persons and their cohort Razakars taking away the victim Helim Talukder towards Modon Thana. Testimony of P.W.05 made in this regard inspires credence. This proved criminal act was chained to the act of wiping out the detained victim.

290. P.W.04 Md. Abdul Khaleqe, a resident of village- Kuliati under police station- Modon, District- Netrokona is a freedom-fighter. He is a hearsay witness. After the event happened he heard from source that accused Hedaetullah Anju, his brother Enayet Ullah Monju[now dead], accused Sohrab Fakir and their cohort Razakars forcibly captured Helim Talukder by launching attack at his house as they did not find his two brothers who were freedom-fighters.

291. It transpires that at the relevant time P.W.04 along with his co-freedom-fighters had been around the localities and prior to the

attack they had battle with army men and Razakars. It was quite practicable for him and his co-freedom-fighters of being aware of activities of Razakars and army men, through their source.

292. Arraignment brought in this charge chiefly rests upon ocular testimony of three direct witnesses. In addition to their evidence we may take the hearsay testimony of P.W.04 into account in resolving the indictment. Hearsay evidence is not *inadmissible per se* if it gets corroboration from ‘other evidence’.

293. It is now well settled that the phrase ‘other evidence’ also refers to ocular evidence tendered. In the case in hand, it transpires that testimony of P.W.04 so far as it relates to the attack seems to have been corroborated by evidence of P.W.02, P.W.03 and P.W.05, direct witnesses to facts materially linked to the attack and accused persons’ participation therewith.

294. It stands proved that accused Hedaetullah Anju , his brother Enayet Ullah Monju [now dead] and Sohrab Fakir accompanied the criminal enterprise in launching systematic and deliberate attack that resulted in devastating activities and unlawful capture of victim Helim Talukder.

295. The attack was conducted in day time. Thus, the witnesses even remaining in hiding had fair opportunity of seeing the criminal activities carried out by the gang of attackers, by launching attack. Defence questions the fact of recognizing the accused persons at the crime site with the group. Had really the witnesses any rational reason of knowing the accused persons beforehand? If the answer is affirmative, testimony tendered in this regard by the witnesses inspires credence and the same cannot be kept aside from consideration, as argued by the defence.

296. It has been found well proved from evidence of three direct witnesses i.e.P.W.02, P.W.03 and P.W.05 that accused Hedaetullah Anju contested in National Assembly Election in 1970 with the symbol of scale [election symbol of JEI], his brother Enayet Ullah Monju [now dead], and accused Sohrab Fakir were engaged in the election campaign in favour of Hedaetullah B,Sc [Anju]. Defence does not seem to have been able to controvert it.

297. Taking the above unimpeached facts unveiled into account a reasonable Trier of facts must arrive at finding that the witnesses had rational and fair reason of knowing the accused persons beforehand. Besides, the political profile of accused Hedayetullah Anju and his nexus in locally formed Razakar Bahini made him well known to the residents of localities under Modon Thana and

Atpara Thana. Accused Sohrab Fakir was a close associate of accused Hedayetullah Anju since prior to the war of liberation ensued, it stands proved too. All these cumulatively lead to the conclusion that the witnesses could recognize the accused persons in accompanying the gang of attackers, in launching attack.

298. What happened next to taking away the victim to Modon army and Razakar camp? The charge framed arraigns that on the same day, in the evening the accused persons and their accomplices shot the detainee to death taking him on the bank of the river Mogra and the body was dumped into the river. Victim's dead body could not be traced. It was the ending phase of the attack.

299. P.W.02, P.W.03 and P.W.05 the direct witnesses to the facts materially related to the first phase of attack had no occasion of seeing the ending phase. They are hearsay witnesses to this part of attack that resulted in killing the detained victim. First, the act of taking away the victim on forcible capture by launching systematic attack was indisputably chained to the act of killing the victim, the ending phase of the attack. Second, hearsay evidence is admissible if it gets corroboration from 'other evidence' which refers to proved circumstances or facts related to the principal offence committed.

300. It transpires that the victim was wiped out in evening on the same day and not instantly after taking him at army and Razakar

camp at Modon Thana. That is to say, victim was kept in captivity for hours together. This fact itself is fair indicia that in captivity he was subjected to torture, before he was annihilated. True, there is no evidence in this regard. But the entirety of facts forces to conclude that of course the victim was not well treated in captivity. Rather, it may be safely inferred that the victim was subjected to arbitrary **'torture'** in captivity before he was shot to death.

301. It is also found from uncontroverted testimony of P.W.02 and P.W.03 that in conjunction with the attack at the house of victim Helim Talukder the perpetrators looted the house and set it on fire. That is to say, in addition to forcible capture of a civilian the gang carried out arbitrary destructive activities directing civilian's property. Such prohibited act caused mental harm to the sufferers and other civilians as the same were gravely detrimental to fundamental rights of civilian population. Ancillary act of looting and setting house on fire, conducted in conjunction with the attack, thus constituted the offence of **'other inhumane act'** as crime against humanity.

302. Who was Helim Talukder? Why he was so taken away on forcible capture? It is not required to show the motive of attack launched. But however, from evidence presented we find some

facts which lead to the inference as to reason of launching such systematic and deliberate attack.

303. It is evinced that victim Helim Talukder was the younger brother of two freedom-fighters Hamidur Rahman and Abu Taher [now they are dead]. It transpires from evidence of P.W.04, a freedom-fighter that the attack was chiefly intended to apprehend those two freedom-fighters but the group of attackers did not find them and then took away their younger brother Helim Talukder on forcible capture. It gets corroboration from evidence of P.W.05. Pursuant to designed attack leading to killing detained victim Helim Talukder was thus a patent reflection of antagonistic and aggressive attitude of the perpetrators to the pro-liberation civilians.

304. Accused persons were with the gang at the crime site not as mere spectators. Proved affiliation of accused persons in locally formed Razakar Bahini suggests to conclude that they consciously and knowing the forceable consequence actively and substantially contributed in carrying out such criminal activities directing civilians, being part of the criminal enterprise and sharing common intent and purpose.

305. Victim Helim Talukder was a civilian of rural vicinity. Pakistani occupation army, for obvious reason, was not at all

acquainted and familiar with particular geographical location of certain places and pro-liberation civilians. The history says that the local collaborators actively and knowingly aided the army men of being acquainted with these which were essentially required for carrying out atrocious attack directing the civilians.

306. The group of army obviously had to borrow idea and assistance from their local collaborators in locating the site to be attacked. The accused persons and their accomplice Razakars accompanying the group thus knowingly provided aid and substantial contribution in causing forcible capture of the victim.

307. Defence could not dislodge this proved crucial act forming part of first phase of attack. We do not find any reason to ditch the consistent testimony tendered in this regard merely on argument of a fishy character, advanced by the learned state defence counsel. Participation of accused persons in first phase of attack thus unerringly provides indication of accused persons' 'concern' and 'participation' even to the criminal acts leading to the event of killing.

308. In the case in hand, conscious and culpable act of the accused persons, as has been found proved substantially affected the actual commission of murdering the detained victim. Tribunal notes too

that ‘concerned in the killing’ does not mean that a member of the group actually and physically acted in effecting the act of killing in question.

309. It is now well settled that membership in ‘collective criminality’ by itself makes all the members of the group equally responsible, for the crimes committed. Direct participation of accused persons in causing unlawful detention of victim substantially affected the act of accomplishment of killing and thus they are liable for the principal crime. In this regard, we may recall the observation of 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, paragraph 692]

310. It stands proved that the accused persons being part of the criminal enterprise participated in carrying out criminal activities proved. Facts and pattern of the attack which eventually ended in killing one unlawfully detained civilian tends to the conclusion that the accused Hedaetullah Anju and Sohrab Fakir voluntarily participated in the joint criminal enterprise [JCE] sharing the same criminal intent in all the aspects of the common criminal design.

311. The above suggests that the accused persons were equally liable for the crimes perpetrated under the doctrine of JCE [Basic Form] which refers to section 4(1) of the Act of 1973. The theory of ‘joint criminal enterprise’ [JCE] is simply a means of committing a crime, in violation of international humanitarian law and it by itself is not a crime. Settled legal proposition in respect of JCE [Basic Form] is ---“In the first form of joint criminal enterprise, all of the co-perpetrators possess the same intent to effect the common purpose.” [*Kvočka et al.*, ICTY Appeal Chamber, February 28, 2005, para. 82:]

312. On rational appraisal of evidence presented on part of prosecution we arrive at decision that it has been found proved beyond reasonable doubt that the accused (1) Hidaetulla @ Anju @ Md. Hedaetullah @ Anju B.Sc and (2) Sohrab Fakir @ Sohrab Ali @ Sorab Ali, by their act and conduct forming part of systematic

attack participated, aided and substantially facilitated and contributed to the commission of offences of **‘other inhumane act’, ‘torture’ and ‘murder’ as crimes against humanity**, specified in section 3(2) (a) (g)(h) of the International crimes (Tribunals) Act, 1973 which are punishable under section 20(2) read with section 4(1) of the Act.

#### **Adjudication of Charge No.04**

**[Offences of arson, abduction, confinement, torture, forcible deportation, murder of 07 Hindu Civilians as crimes against humanity and/or genocide at the Hindu populated village Sukhari under Police Station Atpara]**

313. That on 03 September, 1971 at about 01:00 P.M a group formed of 20/30 Pakistani occupation army, Razakars and the accused (1) Hidaetulla @ Anju @ Md. Hedaetullah @ Anju B.Sc **[absconded]**, **his brother** Anayet Ullah Monju @ Enaet Ullah @ Monju **[died after submission of the formal charge]** and the accused (2) Sohrab Fakir @ Sohrab Ali @ Sorab Ali by launching attack at the house of Hashem of village-Sukhari started indiscriminate gun firing intending to terrorize the civilians. With this the villagers being scared went into hiding inside the bushes. The group of attackers then plundered the house of Bidhan Kumar Sarker, vandalized it and then set it on fire. In conjunction with the attack the group of attackers carried out looting and set the houses of other civilians on fire.

On the same day, in the evening the group of attackers being accompanied by the accused persons, in conjunction with the attack forcibly captured nine [09] Hindu civilians [as named in the formal charge] of whom 02 are now dead and took them all away to the army camp at Modon Police Station where they were subjected to ruthless torture in captivity and later on, at about 08:00 P.M the detainees were taken on the bank of the river Mogra adjacent to the Police Station where they were made stood in a line when the accused persons and their accomplice Razakars gunned them down to death and threw their bodies to the river, Two detainees[as named in the formal charge] however got release from captivity in exchange of money and bundle of tins.

The family members of the victims being terrified by such atrocious activities were forced to deport to India where they took refuge and returned back after the independence achieved when they found their houses burnt down.

Therefore, the accused (1) Hidaetulla @ Anju @ Md. Hedaetullah @ Anju B.Sc [**absconded**] and (2) Sohrab Fakir @ Sohrab Ali @ Sorab Ali have been charged for actively participating, facilitating, abetting and substantially contributing to the commission of the offences of '**arson, 'abduction, 'confinement, 'torture, forcible deportation, murder as crimes against humanity** as specified in

section 3(2)(a)(g)(h) read with section 4(1) of the International Crimes (Tribunals) Act, 1973 **and/or 'genocide'** as the attack was directed against the Hindu religious group with intent to destroy it, either whole or in part, as enumerated in section 3(2)(c)(g)(h) read with section 4(1) of the International Crimes (Tribunals) Act, 1973 which are punishable under Section 20(2) of the Act.

### **Evidence of Witnesses Examined**

314. Prosecution relied upon five witnesses i.e. P.W.01, P.W.11, P.W.12, P.W.13, P.W.14 and P.W.15. Of them excepting P.W.01 the rest five are from crime village and they claim to have seen fact related to the attack at their village which continued till dusk. Before we arrive at finding on arraignment and accused persons' participation therewith let us first eye on what has been testified by those witnesses.

**315. P.W. 11 Mrs. Ajita Biswas (70/71).** She is a resident of village- Sukhari under police station-Atpara, District [now]- Netrokona. She is a direct witness to the devastating activities carried out in conjunction with the attack. In 1971 he was about 22 years old and she was the mother of two kids-- one was 3 years old and another was 07 days old. She is wife of victim Monoronjon Biswas.

316. P.W.11 stated that on 17<sup>th</sup> day of Bangla month Bhadra in 1971 at around 01:00 P.M. she had been at home with her kids and husband. Suddenly on hearing gun firing, everybody attempted to flee on their own. She too went into hiding inside a jungle, about 100 yards away taking her 07 days old son with her. At that time one *Brahmin* (higher caste in Hindu religion) lady also hid with her. Their village was mostly Hindu populated. Then accused Hedaetullah Anju, his brother Enayet Ullah Monju [now dead] and Sohrab Fakir coming to jungle snatched away their gold ornaments, at gunpoint. When the Razakars went away, they got hidden inside the deep of jungle. Just before dusk when the sound of gun firings stopped, they came back home and found the house of their own and of neighbours on ablaze.

317. P.W.11 next stated that afterwards she took refuge at the house of Nobi Hossain with her one week old kid. Her other child was taken by her mother-in-law and aunt-in-law while they were fleeing. She came to know that accused Hedaetullah Anju, his brother Enayet Ullah Monju [now dead] and Sohrab Fakir, their cohort Razakars and Pakistani army men took away her husband Monoronjon Biswas along with Durga Shankar Bhattacharyya, Polu Dey, Taresh Sarkar, Dinesh Sarkar and his son Shailesh Sarkar, wife Prafulla Bala, two more Muslims Abdul Hamid and Chan Khan to Modon army camp.

318. What happened next? What fate the detainees had to face, after they were taken away forcibly? P.W.11 stated that afterward, at about 10:00 P.M. two detainees Abdul Hamid and Chan Khan returned back and from them she knew that accused Razakar Hedaetullah Anju, his brother Enayet Ullah Monju [now deceased] and Sohrab Fakir along with Pakistani army men and their accomplice Razakars gunned down her husband and other six detainees to death on the bank of the river Mogra . Abdul Hamid Khan and Chan Khan also disclosed that they were spared considering the fact that they were Muslims and on condition that they would send the looted products to Razakar camp and keep them informed about whereabouts of the freedom fighters.

319. P.W.11 also stated that subsequent to that event happened, all of her family members and neighboring Hindu families deported to Maheshkhola, India, being scared. After independence they came back and found their houses burnt to ashes.

320. Finally, P.W.11 stated that accused Hedayetullah Anju was a teacher. Her husband got private lesson from him. He , as a candidate with the symbol of balance contested in National Assembly Election in 1970 and used to visit the localities in relation to election campaign and seeking vote. Another accused

Sohrab Fakir was a tax collector of union board and he used to visit their house and other residents' houses. Both the accused persons were residents of the locality about half mile away from their house. Thus she knew the accused persons beforehand. P.W.11 identified accused Sohrab Hossain on dock.

321. On cross examination, in reply to defence question put to her P.W.11 stated that Modon police station was about three miles far from their house. P.W.11 expressed ignorance as to whether there was a man named Sohrab at village Trasabor.

322. P.W.11 denied defence suggestions that the accused persons were not Razakars; that she did not know them; that accused Hedayetullah Anju did not contest national Assembly Election in 1970; that she did not see the accused persons with the gang at the crime site and that what she testified implicating the accused persons was untrue and tutored. Defence simply denied the event as testified by the P.W.11 terming it untrue.

**323. P.W. 12 Jibon Chandra Sarkar (80)** is a resident of mostly Hindu populated village- Sukhari under police station- Atpara, District- Netrokona. In 1971 he was about 33 years old. He studied up to class VII. He is a direct witness to the act of initiation of attack alleged.

324. P.W.12 stated that on 17<sup>th</sup> Bhadra (Bengali Month), 1971 at around 01:00 P.M he had been at home when he heard gun firing and with this he came out to the brink of pond and found accused Hedaetullah Anju, his brother Enayet Ullah Monju [now dead] and Sohrab Fakir standing at the front part of a boat and more Razakars were inside the boat. Then he [P.W.12] got back to home and untying his cows he, being scared immersed himself in the nearby water body of a ditch at Muslim Para.

325. P.W.12 next stated that during dusk he came out from the water body, went to the house of Muslim when he came to know that Razakars took away two Muslims Abdul Hamid and Chan Kha and seven Hindu civilians Dinesh Sarker, Shailesh Sarker, mother of Shailesh Sarker, Monoronjon @ Nripendra, Durga Shankar, Taresh and Palu Dey .

326. What happened next? P.W.12 also stated that two Muslim detainees Abdul Hamid and Chan Khan returned back home at about 10:00 P.M and he knew from them that accused Hedaetullah Anju, his brother Enayet Ullah Monju [now dead] and Sohrab Fakir gunned down seven Hindu detainees to death taking them on the brink of the river Mogra and threw their dead bodies into the river. Detainees Abdul Hamid and Chan Khan were set at liberty on

condition that they would send the looted households to Razakar Camp and would keep them informed about the whereabouts of freedom-fighters. Abdul Hamid and Chan Khan are now dead. On the following day he [P.W.12] deported to Maheshkhola, India and the Hindu residents of their village too deported to India. Their village was mostly Hindu populated.

327. P.W.12 finally stated that accused Hedaetullah Anju was a teacher. He contested in National Assembly Election in 1970 with the symbol of balance [election symbol of JEI] and used to visit the locality for election campaign. Accused Sohrab Fakir was Union tax collector before the war of liberation. Thus he knew them beforehand. P.W.12 identified accused Sohrab Fakir on dock.

328. Cross examination in reply to defence question put to him P.W.12 stated that at the time of the event happened he alone had been at home and the other inmates already had gone to India; that the Pakistani occupation army got stationed at Modon Thana; that Modon Thana was about one and half miles far from their home and that he could not recall whether Pakistani Army got camped at Atpara Thana.

329. P.W.12 denied defence suggestions that he did not know the accused persons; that the accused did not belong to Razakar Bahini

and that he did not see and hear what he testified; that accused persons were not involved in committing crimes alleged and that he being influenced by the rival of accused testified falsely.

**330. P.W. 13 Md. Badsha Mia [75]** is a resident of crime village-Sukhari under police station-Atpara, District [now]- Netrokona. In 1971 he was about 28 years old. He had opportunity of watching the initiation of the attack alleged.

331. P.W.13 stated that on 17<sup>th</sup> day of Bangla month Bhadra, 1971 at around 12:00-01:00 P.M he was engaged in working in the land beside the home of Upendra Sarkar when he heard gun firing and then saw the Razakars approaching by boat and among them, he found accused Hedaetullah Anju, his brother Enayet Ullah Monju [now dead] and Sohrab Fakir standing at the front bit of the boat. Then he went into hiding inside a nearby bush.

332. P.W.13 next stated that after some time he moved to the boat when he came to know that Razakars brought forcibly captured Upendra Sarkar and at that time Upendra wanted some money from him. Then accused Hedaetullah Anju taking money from him [P.W.12] set Upendra free. Then he came back home and went into hiding along with family inmates.

333. P.W.13 continued stating that later on he heard that the Razakars he named and their accomplice Razakars took away Dinesh Sarker, wife of Dinesh Sarker, Shailesh, Durga Shankar, Taresh Chandra, Palu Dey, Monoronjon @ Nripendra, Abdul Hamid and Chan Kha to Modon camp. On the same day at 10:00/11:00 P.M detainees Abdul Hamid and Chan Kha returned back home on conditional release and he[P.W.13] knew from them that they were set at liberty on condition of shifting the looted household to camp and to provide information about the freedom-fighters. They [released detainees] also disclosed that the Razakars he named shot the seven Hindu detainees to death taking them on the bank of the river Mogra and dumped their bodies into the river. Abdul Hamid and Chan Kha are not alive now.

334. P.W.13 stated that accused Hedaetullah Anju was a teacher and he contested National Assembly Election in 1970 with the election symbol balance and used to visit their locality in connection with election campaign. Accused Sohrab Fakir was Union Board tax collector prior to the war of liberation ensued. Thus he knew them beforehand. P.W.13 identified the accused Sohrab Fakir on dock.

335. On cross examination P.W.13 stated in reply to defence question put to him that on hearing sound of gun firing he went into

hiding and then few minutes later coming out therefrom he moved to the boat of Razakars. P.W.13 also stated that at the time of the event of attack his wife, daughters and son also went into hiding and that Modon Thana was about two miles far from their house. P.W.13 denied defence suggestions that he did not know the accused persons; that he did not see the accused persons on Razakars boat; that they were not involved in the event he testified and that what he testified was untrue and tutored.

**336. P.W. 14 Mrs. Pronoti Rani Sarkar [58]** is a resident of crime village- Sukhari under police station- Atpara, District [now]- Netrokona. In 1971 she was about 12 years old and was a student of class V of Dhormora Ramdhon High School. She is a direct witness to the facts related to the event of attack.

337. P.W.14 stated that on the 17<sup>th</sup> day of Bangla month Bhadra in 1971 at around 01:00 P.M she had been at home when she heard sound of gun firing and with this she came out and saw a group of Razakars approaching towards the *ghat* in front of their house by a boat. She also saw accused Hedaetullah Anju, his brother Enayet Ullah Monju [now dead] and Sohrab Fakir standing on the boat. What happened next to seeing the Razakars arriving by boat? P.W.14 stated that then she went into hiding inside a bush adjacent to Durgashankar's house and her father Jogobondhu Biswas and her

brother Monoronjon Biswas ran away inside a bush nearer the pond.

338. P.W.14 next stated that their village was mostly Hindu populated. Razakars and Pakistani army men looted and set their and neighbouring houses on fire. Where she fled, just beside that place there was a footpath. After some time remaining stayed in hiding place she saw Hedaetullah Anju, his brother Enayet Ullah Monju [now dead] and Sohrab Fakir and their accomplice Razakars taking away Dinesh Chandra Sarkar, his wife Prafulla Rani Bala, his son Shailesh Chandra Sarker, detaining them unlawfully. She [P.W.14] also saw the Razakars beating them when Prafulla Bala requested them to release her husband and son and eventually took them away.

339. P.W.14 also stated that later on in the evening she saw those Razakars taking away Monoronjon Biswas, Durga Shankar Bhattacharya, Taresh Sarkar, Polu Dey , Chan Kha and Abdul Hamid towards Modon army camp by boat, on forcible capture. Then at the time of dusk she came out of hiding place and found the houses burnt down. Then all of their family inmates and numerous Hindu families of their village took refuge at the house of a neighbor Nobi Hossain.

340. How the P.W.14 knew the fate of the detained civilians? P.W.14 stated that on the same day in the night at about 10:00 P.M detainees Abdul Hamid and Chan Khan returned back home who disclosed that accused Razakar Hedaetullah Anju, his brother Enayet Ullah Monju [now dead], Sohrab Fakir along with Pakistani army men and cohort Razakars shot the seven detainees to death taking them on the bank of the river Mogra and threw their dead bodies into the river. They also disclosed that they got released on condition that they would send the looted households to Razakar Camp and would keep them[Razakars] informed about the whereabouts of freedom-fighters. Abdul Hamid Khan and Chan Khan are not alive now.

341. P.W.14 then stated that just after one day after the event of attack happened they along with family inmates and Hindu civilians of the locality deported to India and took refuge at Bagmara Refugee Camp. After independence they returned back but found nothing in their house.

342. Finally, P.W.14 stated that accused Sohrab Fakir was Union Board tax collector, prior to the war of liberation accused Hedaetullah Anju was a teacher and he contested National Assembly Election in 1970 with the symbol of balance [election symbol of JEI] and used to visit their locality in connection with his

election campaign. Thus she knew them beforehand. P.W.14 identified accused Sohrab Fakir on dock.

343. On cross examination P.W.14 stated in reply to defence question that Modon Thana was about one and half-two miles away from their house; the residents of the houses west, north and south to their house were Hindu civilians.

344. Instead of making effort to refute what the P.W.14 testified in examination-in-chief defence simply suggested that P.W.14 did not know the accused persons; that they were not Razakars; that she did not see or hear the events she testified and that what she testified was untrue and tutored .

345. P.W. 15 Badal Chandra Ghosh [67] is a resident of crime village- Sukhari under police station-Atpara, District [now]-Netrokona. In 1971 he was about 20/21 years old. He is a direct witnesses to the facts related to the first phase of the attack.

346. P.W.15 stated that their village was mostly Hindu populated. On 17<sup>th</sup> day of Bangla month Bhadra in 1971 at about 01:00 P.M he had been at home when he heard sound of gun firing and then he came out and saw Razakars arriving in front of *ghat* of Hashem by boat. He also saw accused Hedaetullah Anju, his brother Enayet

Ullah Monju [now dead] and Sohrab Fakir, other Razakars and Pakistani army men standing in front of the boat. With this all members of his family went into hid wherever they could. He got hidden inside a nearby bush wherefrom he saw the Razakars carrying out looting households and setting the houses on fire.

347. P.W.15 next stated that at a stage, remaining in hiding inside the bush he saw the Razakars he named and their accomplice Razakars taking away Dinesh Sarker, his wife, his son Shailesh Sarker, Durgashankar, Taresh Sarker, Monoronjon Biswas, Palu Dey, Abdul Hamid and Chan Kha towards Modon army camp by boat, on forcible capture.

348. P.W.15 stated too that at the time of dusk he came out of the hiding place and their family inmates and other Hindu families took refuge at their neighbouring Mia Bari.

349. P.W.15 also stated what he heard about the destiny of the detained victim; that on the same day at about 10:00 P.M two detained Muslims came back and from them he came to know that accused Hedaetullah Anju, his brother Enayet Ullah Monju [now dead] , Sohrab Fakir and their accomplice Razakars gunned down seven detained Hindu civilians to death taking them on the bank of the river Mogra and dumped their bodies into the river.

350. P.W. 15 also stated that on the following day their family and the other Hindu families of the village deported to India and took refuge at Maheshkhola refugee camp. After the independence achieved they returned back.

351. In respect of reason of knowing the accused persons P.W.15 stated that accused Hedaetullah Anju was a teacher and he contested in National Assembly Election in 1970 with the symbol of scale and used to visit their village seeking vote and accused Sohrab Fakir was tax collector of union board and used to visit their village. Thus he knew them beforehand. He identified the accused Sohrab Fakir on dock.

352. On cross examination P.W.15 stated that in 1971 Pakistani occupation army got stationed in Modon Thana by setting camp; that Modon Thana was about two miles far from their house. P.W.15 also stated that he is not acquainted with Sorab Ali, Torab Ali and Abdur Rahman of village- Hatia Tarasbar. P.W.15 denied the defence suggestions that the accused were not Razakars; that he did not witness the event of attack or hear the vent he testified and that what he testified was untrue and tutored.

353. P.W.01 Md. Khurshed Alam Khan [65] is a freedom-fighter. He is a resident of village-Salpasunoi under police station-Atpara of

District [now]- Netrokona. He is a hearsay witness. He stated that on 04 September 1971 i.e. one day later he came to Najirganj bazaar where he heard from Fazlur Rahman[ now dead] of village-Sonajur and Arzu Mia of village Sukhari[crime village] that on the preceding day at about 01:00 P.M. a group formed of Pakistani occupation army, Razakars and accused Hedaetullah Anju, his brother Enayet Ullah Monju[ now dead] and accused Sohrab Fakir arriving at village-Sukhari by boat had carried out looting, arson and at the time of dusk they moved back to Modon army camp taking detained seven Hindu civilians and Chan Kha and Abdul Hamid ; that in the night the Hindu detainees were shot to death taking them on the bank of the river Mogra and two Muslim detainees got release, in exchange of money. After the event the Hindu residents of the locality being scared deported to Maheshkhola refugee camp in India.

354. In cross-examination, defence simply denied what the P.W.01 testified. It does not seem to have made effort to refute the fact of hearing the event, on the following day from two villagers.

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

### ***Prosecution Argument***

355. The learned prosecutor **Mr. Mukhlesur Rahman Badal** argued that the prosecution chiefly depends upon testimony of

direct witnesses some of whom are relatives of victims to prove this charge involving the event of calculated killing of numerous Hindu civilians; that specific intent of such attack was to destroy the Hindu religious group of the crime locality.

356. The learned prosecutor further argued that five witnesses – P.W.11, P.W.12, P.W.13, P.W.14 and P.W.15 have testified the attack that resulted in death of numerous civilians belonging to Hindu religion; that the accused persons knowingly and sharing common intent . Defence could not controvert this pertinent piece fact materially linked to the attack. Launching a systematic and planned attack mainly aiming the Hindu population that resulted in death of numerous Hindu civilians and it constituted the offence of ‘genocide’.

357. The learned prosecutor also asserted that for obvious reason none had opportunity of seeing what happened next to forcibly taking away the Hindu civilians and two Muslim civilians, by launching attack. The witnesses later on heard the fate of detained Hindu civilians from two released detainees. Hearsay evidence on this aspect is linked to the first phase of attack and thus accused persons are equally liable for the annihilation of detained Hindu civilians, the learned prosecutor added.

### ***Defence Argument***

358. Conversely, **Mr. Abdus Shukur Khan** the learned state defence counsel defending both accused submits that it was not practicable of seeing the act of moving the gang, in conjunction with the attack and testimony of witnesses in this regard is not credible; that it could not be proved that accused persons were with the gang of perpetrators and that there has been no evidence to connect the accused persons with the act of killings alleged.

359. The charge framed arraigns that the accused persons, being party of the criminal mission participated and committed and aided in launching systematic attack that resulted in killing of numerous Hindu civilians and destructive activities constituting the offences of crimes against humanity or in alternative the offence of 'genocide' as the same was intended to destroy the Hindu religious community of the crime village-Sukhari, either whole or in part.

360. The arraignment brought in this charge no.04 rests upon testimony of six witnesses. Of them five are the residents of the crime village and relatives of victims who claim to have watched facts crucially chained to the attack that resulted in deliberate killing of numerous Hindu civilians. The act of killing happened

later on, after taking away the victims on forcible capture and thus, naturally none had occasion of witnessing this phase of attack.

361. Tribunal notes that extremely frightened situation and horror created in course of the attack the people including the witnesses might not have fair space of seeing all activities carried out by the perpetrators. Presumably, extreme fear and horror made them compelled to go into hiding wherever they like. However, the witnesses, the residents of the crime village carrying immense trauma came on dock to recount what they experienced, in course of the attack launched at their village.

362. P.W. 11 Ajita Biswas is the wife of one victim Monoronjon Biswas. She is a direct witness to some crucial facts. At the relevant time she had been at home. Suddenly on hearing gun firing she taking her 07 days old kid with her and others went into hiding inside a jungle, about 100 yards away. Then accused Hedaetullah Anju, his brother Enayet Ullah Monju [now dead] and Sohrab Fakir coming to jungle snatched away their gold ornaments, at gunpoint. This piece of version of P.W.11 recounting the traumatic experience remained uncontroverted.

363. Naturally, being gravely scared P.W.11 did not come out of the jungle. She remained in hiding till the gang had left the site, just before dusk. Defence could not impeach this pertinent fact relating

to accused persons' culpable presence at the crime site and participation in advancing the attack.

364. P.W.11 does not claim to have seen any other activities carried out in conjunction with the attack at their village. That is to say, P.W.11 does not seem to have made any count of exaggeration in narrating what she watched, in course of the attack conducted. Thus, what she recounted tends to prove that on the day and time a gang of attackers accompanied by the accused persons had launched attack at Hindu dominated village- Sukhari ; and that the accused persons were equipped with fire arms which patently proves *mens rea* and *actus reus* of the accused persons.

365. It transpires that coming out of the hiding place P.W.11 took instant refuge at the house of Nobi Hossain with her one week old kid and came to know that accused persons, their cohorts and Pakistani occupation army took away her [P.W.11] husband Monoronjon Biswas along with Durga Shankar Bhattacharyya, Polu Dey, Taresh Sarkar, Dinesh Sarkar and his son Shailesh Sarkar, wife Prafulla Bala, Abdul Hamid and Chan Khan to Modon army camp.

366. The killing of Hindu detainees is not disputed. Hindu detainees were wiped out after taking them away on unlawful

capture. Thus, causing forcible capture of those Hindu civilians, as learnt by P.W.11 later on cannot be disbelieved at all.

367. It is evinced too from testimony of P.W.11 that afterward, two detainees Abdul Hamid and Chan Khan returned back on conditional release and from them they knew that accused Razakar Hedaetullah Anju, his brother Enayet Ullah Monju [now deceased] and Sohrab Fakir along with Pakistani army men and their accomplice Razakars gunned down her [P.W.11] husband and six other detainees to death on the bank of the river Mogra.

368. Defence could not controvert that Abdul Hamid and Chan Khan were also unlawfully detained and were taken away along with seven detained Hindu civilians and later on they got conditional release. Obviously those two released detainees had occasion of the observing the fate of seven detained Hindu civilians. Thus, what the P.W.11 and others heard from them [survived victims] in respect of killing seven Hindu detainees carries probative value. Besides, hearsay evidence on this aspect gets corroboration from other related proved facts as well. This piece of evidence tends to prove that the accused persons physically participated in annihilating the Hindu detainees, in execution of the designed criminal mission.

369. The crucial fact as testified by P.W.12, a direct witness to related aspects of the attack also proves it amply that accused persons were with the criminal gang. It reveals that seeing it P.W.12 became gravely scared and thus went into hiding. It was natural. Thus, and horrific context did not allow space to the P.W.12 of seeing the entire activities carried out by the group. But it may be lawfully inferred that the accused persons were with the gang, sharing common intent and being part of the criminal enterprise in accomplishing the act of forcible capture of Hindu civilians and two Muslim civilians.

370. P.W.12 remained in hiding in the nearby water body of a ditch for couple of hours. Coming out of the hiding place he knew that Razakars took away two Muslims Abdul Hamid and Chan Kha and seven Hindu civilians Dinesh Sarker, Shailesh Sarker, mother of Shailesh Sarker, Monoronjon @ Nripendra, Durga Shankar, Taresh and Palu Dey.

371. P.W.12 is a hearsay witness in respect of the ending phase of the attack. He heard from two survived Muslim detainees after they returned back home on conditional release what destiny the Hindu detainees had to embrace.

372. Corroborative evidence of P.W.11 and P.W.12 proves indisputably that the horrific and coercive situation spread by carrying out grave atrocious activities chiefly directing Hindu population compelled the survived Hindu civilians to deport to India.

373. P.W.13 as well saw the accused persons with the gang of attackers who arrived at the crime village by boat, unlawfully detaining one civilian Upendra and releasing him in exchange of money. At this phase of the event P.W.13 came back home and went into hiding along with family inmates. Thus, naturally P.W.13 did not have any practicable occasion of seeing the criminal acts carried out in conjunction with the attack. But he later on, heard what happened to the detained civilians who were taken away, by launching attack. It has been affirmed in cross-examination of P.W.13 that the Razakars arrived by boat with gun firing.

374. It also transpires from testimony of P.W.14 that she and others remained stayed in hiding inside bush till the gang of attackers had left the site at the time of dusk. That is to say, the gang of attackers had carried out criminal activities, by launching systematic attack which continued for couple of hours. Defence could not refute it in any manner.

375. It stands proved from the corroborative evidence of P.W.11, P.W.12, P.W.13 and P.W.14 that the gang took away seven Hindu civilians and two Muslim civilians of the crime village, on forcible capture and the accused persons being part of the criminal enterprise actively participated in accomplishing criminal activities, sharing common intent.

376. It was not at all possible for any civilian of seeing the upshot of the attack, the killing after taking away the detained victims on forcible capture to army camp at Modon Thana. But P.W.14 heard the ending phase of the attack that resulted in brutal killing of seven Hindu civilians from two survived detainees who were Muslim civilians of the crime village. Defence could not impeach it.

377. The distance between the crime village and Modon Thana was about one and half-two miles, as testified by P.W.14. It could not be refuted. It stands proved that the gang had left the site just before the dusk taking the detained civilians towards Modon Thana army camp by boat. Thus, the fact of returning back of two survived Muslim detainees at 10:00 P.M, on the same day as consistently testified by the witnesses inspires credence.

378. The attack launched and participation of accused persons therewith gets corroboration also from testimony of P.W.15.

Testimony of P.W. 15 Badal Chandra Ghosh a resident of crime village- Sukhari also depicts that at the time of initiation of attack he saw the accused persons arriving at the village by boat, accompanying the gang. P.W.15 remained in hiding till dusk and he saw the accused persons, their cohorts and army men taking away the seven Hindu civilians and two Muslims.

379. Hearsay testimony of P.W.15 in respect of material facts including the accused persons accompanying the gang, causing looting, arson, taking away the detainees gets consistent corroboration from evidence of other witnesses. Defence could not impeach the aspects related to the attack as testified by P.W.15. It simply denied accused persons' presence at crime site and participation in advancing the attack.

380. P.W.01 is a freedom-fighter and he is from a village under Atpara police station. The event of attack happened on 02 September 1971 and just on the following day he heard the event from two people one of whom was from crime village. Defence does not question the staying of the P.W.01 around the localities, after coming back from India after receiving training. His hearsay testimony is not anonymous. It gets corroboration from other evidence. Besides, this charge does not solely rests upon testimony of P.W.01.

381. An attempt has been made by the defence by putting suggestion to some witnesses that one 'Sorab Ali' was a resident of village Hatia Tarasbar who was a Razakar. Presumably, by pleading this defence it has been endeavored to show that not the present accused Sohrab Fakir but said 'Sorab Ali' was a Razakar and he had involvement and complicity with the commission of alleged crimes. But the attempt was a futile effort. Defence could not show by adducing evidence of any kind such 'defence case' credible and acceptable. Additionally, mere putting such unfounded defence case does not negate the credibility of prosecution case in any way.

382. On totality of evidence tendered it stands proved that the crime village was mostly Hindu populated. It remained undisputed. The attackers had carried out looting households and burning down numerous houses of civilians. Out of nine detainees seven belonged to Hindu community. Two detainees were Muslims and later on they got conditional release. It also depicts that the coercion and panic created by launching horrific attack eventually forced the relatives of victims and civilians of Hindu community of the locality to deport to India. All these cumulatively suggest that 'specific intent' of the perpetrators was to destroy the Hindu

community of crime village-Sukhari, either whole or in part. Such intent is a key element to constitute the offence of genocide.

383. The act of accompanying the principals, the army men at the crime site and taking away the victims on capture by itself indicates accused persons' conscious decision to participate by aiding and abetting in committing the principal crime. The accused persons did it with knowledge of the intent of the criminal mission.

384. The crime site was remote vicinity. It was not possible for the Pakistani occupation army men to locate the Hindu dominated site and identify civilians of Hindu community to be targeted. Accused persons, in exercise of their culpable nexus with the locally formed Razakar Bahini substantially contributed and aided in advancing the criminal mission, we conclude it unerringly.

385. The attack happened in day time and it continued for couple of hours. Naturally, the relatives and some of civilians of the village under attack had opportunity of seeing the criminal acts including the act of unlawfully taking away nine detainees away to the army camp.

386. Ocular testimony of witnesses in this regard together with what the two survived detainees disclosed to the witnesses, on

coming back home on getting conditional release proves unerringly that the accused Hidaetulla @ Anju @ Md. Hedaetullah @ Anju B.Sc and Sohrab Fakir @ Sohrab Ali @ Sorab Ali actively participated even in accomplishing the ending phase of the attack, the killing of numerous Hindu civilians. That is to say, the accused persons were actively concerned in all phases of the attack, knowing consequence of their act and conduct and thus they incurred equal liability.

387. It stands proved that two survived Muslim detainees returned back on conditional release at 10:00 P.M, on the same day and disclosed what happened to Hindu detainees. Hearsay testimony in this regard thus carries probative value. It is undisputed that the dead bodies of detainees could not be traced even. Thus, and the act of forcibly taking away the victims together proves the act of wiping out the detainees. Therefore, hearsay evidence in this regard inspires credibility.

388. According to settled jurisprudence of International Law ‘hearsay evidence’ is not inadmissible *per se*, even when it is not corroborated by direct evidence. Even the Tribunal can safely act even on anonymous hearsay evidence without any corroboration. It gets support from the case of *Lubanga* [*Lubanga* (ICC Pre-Trial Chamber) January 29, 2007, para 106].

389. But in the case in hand, hearsay evidence in respect of the act of killing as testified by the witnesses carries value and credence. They heard this phase of attack from two survived detainees. Their hearsay evidence is thus not anonymous and the same gets corroboration from ‘other evidence’. The phrase ‘other evidence’ refers also to facts and circumstances materially chained to the upshot of the attack, the barbaric and deliberate killing.

390. 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. This view finds support 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]

391. Corroborative evidence of witnesses also proves that the gang had carried out looting and burning down houses of civilians, in conjunction with the attack. Such destructive activities were quite detrimental to fundamental rights of civilians and the same not only caused the normal livelihood of civilians but caused intimidation, coercion, threat and panic that resulted in untold mental harm constituting the offence of **‘other inhumane act’**.

392. Tribunal notes that comprehensive devastation of homes and property of civilians indeed constituted destruction of the livelihood of the population of the crime village which is sufficient to constitute the offence of crime against humanity. Those were persecutory acts which caused severe deprivation of fundamental rights of civilian population, with intent to destroy the Hindu community, either whole or in part, we conclude.

393. It stands proved from consistent testimony of witnesses that deportation of Hindu civilians of the crime village just one day after the event occurred suggests concluding that the intimidating and coercive situation resulted from the attack carried out indisputably caused grave mental harm to the survivors and relatives of victims. Such serious mental harm was sternly detrimental to fundamental rights of protected civilians.

394. Deportation of Hindu civilians of the crime village just one day after the event occurred suggests concluding that the intimidating and coercive situation resulted from the attack carried out indisputably caused grave mental harm to the survivors and relatives of victims. Such serious mental harm was sternly detrimental to fundamental rights of protected civilians which was chained to the ‘specific intent’ element.

395. As regards the elements to constitute the offence of ‘deportation’ as crime against humanity no physical force is needed to cause one’s deportation. Creating a coercive climate by destructive criminal activities is sufficient to force or compel an individual to deport. It is now settled jurisprudence.

396. In reality, panic, coercion, grave mental harm forced the population of the crime locality to deport. Such displacement was against the choice and will of the civilians. This view finds support from the observation of **ICTY Trial Chamber** made in the case of **Jovica Stanišić and Franko Simatović** which is as below:

“Forcible displacement means that people are moved against their will or without a genuine choice. Fear of violence, duress, detention, psychological oppression, and other such circumstances may create an environment where there is no choice but

to leave, thus amounting to the forcible displacement of people”.

**[ Prosecutor v. Jovica Stanišić and Franko Simatović, Case No. IT 03-69-T, Judgment, ICTY Trial Chamber, 30 May 2013, para. 993]**

397. In the case in hand, horrific situation created through criminal and devastating activities forced them to get displaced beyond the national border. The accused persons who participated in creating such terrified situation cannot evade responsibility of this prohibited act.

398. According to Section 3(2)(c)(ii)(iii) of the Act of 1973 ‘genocide’ means and includes ‘causing serious bodily or mental harm to members of the group and deliberately inflicted on the group condition of life calculated to bring about its physical destruction in whole or in part.

399. In the case in hand, deliberate and arbitrary destructive activities carried out and compelling the Hindu civilians to deport inevitably caused ‘serious mental harm’ and detrimental effect on the group condition. Such prohibited acts were indeed calculated to bring about destruction of the Hindu religious group. Such prohibited destructive activities and deportation under compulsion together with the killing seven Hindu civilians lead to the

conclusion that ‘specific intent’ of the perpetrators was to ‘destroy’ the Hindu community, either whole or in part, we conclude.

400. Why the accused persons accompanied the gang in heading towards the crime village, a Hindu dominated vicinity and remained stayed with it till taking away the nine civilians of whom seven belonged to Hindu community to Modon army camp? From the facts unveiled it may safely be inferred that they too were cognizant part of the enterprise, in exercise of their affiliation in auxiliary force and being aware of the consequence provided culpable assistance and aid to the gang in carrying out looting, burning down houses and taking away the victim on forcible capture that ended in killing seven Hindu detainees.

401. It is now settled that in certain circumstances, aiding and abetting need not be tangible, but may consist of moral support or encouragement in committing the crimes. In the case in hand, accused persons’ presence with the group at the site wherefrom victims were captured unlawfully and taken away is sufficient to constitute the *actus reus* of aiding and abetting, and also the relevant *mens rea* required to commit the principal crime, brutal killing of seven Hindu civilians.

402. ‘Specific intent’ is one of constituent elements of genocide. Intent is not tangible and it may be well inferred from facts and circumstances unveiled. The pattern and magnitude of attack which continued for hours together demonstrate that intent of the gang to which the accused persons were active part was to destroy local Hindu community, either whole or in part.

403. The criminal gang eventually gunned down the seven Hindu civilians to death to which the accused persons were also ‘concerned’ as accomplices and aiders. Accused persons’ culpable presence at the crime site and active participation at the first phase of the attack had indisputable nexus with the ending phase of the attack that resulted in annihilation of seven Hindu civilians. It is not required to show as to which accused gunned down which victim to death. In respect of act and contribution of an accused to a mass killing the **ICTR** observed in the case of **Mpambara** that--

“The [perpetrator’s] act need not directly cause any single victim’s death, but must contribute to a mass killing event. As to the nature of the contribution required, a standard of ‘sufficient contribution’ has been adopted in some cases, assessed according to ‘the actions of the perpetrator, their impact on a defined [victim] group, and awareness [by the accused] of the impact on the defined group.’

**[ICTR Trial Chamber, Mpambara,  
Judgment, September 11, 2006, para. 9]**

404. Keeping the settled jurisprudence in mind we are convinced to utter the view that direct and physical perpetration need not mean physical killing; other acts too can constitute direct participation.

405. In the case in hand, act or conduct of accused persons in carrying out looting, burning down numerous houses of Hindu dominated locality and taking away numerous Hindu civilians detaining unlawfully indisputably substantially aided, assisted, contributed, facilitated and impacted to the perpetration of the collective killing as well. The accused persons and their accomplice Razakars were affiliated in the locally formed Razakar Bahini. The army men thus obviously had to execute its 'criminal mission' with the assistance, aid and contribution of the accused persons.

406. Accomplishing killing of numerous Hindu civilians and damaging the normal livelihood of population of particular Hindu dominated vicinity by causing indiscriminate looting and burning down houses would not have been possible without the collaboration, active assistance and contribution of the accused persons belonging to locally formed auxiliary force. Their presence at the crime site with the criminal gang chiefly formed of army men indubitably had impact and causal link in targeting the Hindu

civilians and the accused persons knowingly aided and assisted to execute the murderous enterprise, with intent to destroy the Hindu religious group of particular geographical vicinity.

407. Thus, the accused persons had acted in such detrimental way knowing the forceable consequence and the intent of the enterprise, we conclude. In this regard we recall the observation of **ICT-BD-1** made in the case of **Shamsuddin Ahmed and 04 others** which are as below:

“Presence of the accused persons in the crime-site, combined with their membership in local Razakar Bahini and their knowledge of the criminal enterprise are considered sufficient to find them guilty for the crimes committed by the enterprise. Accused may be said to have aided and abetted in accomplishing the principal offence if it is found that he accompanied the group at the crime site ‘knowing the intent’ of the perpetrators belonging to the group. ....Act of accompanying the group ‘sharing intent’ in perpetrating the principal offence makes an accused part of the criminal enterprise.”

**[ICT-1, ICT-BD Case No.01 of 2015, the Chief Prosecutor vs. Shamsuddin Ahmed and 04 others, Judgment: 3 May, 2016]**

408. In view of deliberation made above on evaluation of evidence presented and settled related legal proposition we are convinced to conclude unanimously that the prosecution has been able to prove beyond reasonable doubt the event of horrific attack directing population of Hindu dominated village-Sukhari that resulted in killing of seven [07] defenceless Hindu civilians, destructive activities and persecutory acts with specific intent to destroy the Hindu community, either whole or in part constituting the offence of 'genocide'.

409. What is the offence of 'genocide'? Is it required to show killing of a large or countless number of individuals belonging to a particular protected group or population to constitute the offence of 'genocide'? Section 3(2)(c) of the Act of 1973 states the acts necessary to constitute the offence of 'genocide' if the same is found to have been conducted or carried with 'specific intent' to destroy the group or population targeted. It is compatible with the Convention on the Prevention of Genocide, 1948.

410. The definition of 'genocide' is thus rooted in 'specific intention' and not on number of individuals killed. The pertinent thing is that the perpetrators, by carrying attack, intended to destroy the group of individuals, in whole or in part. And such intended

destruction of a group, in whole or in part, could be accomplished through methods even other than causing deaths.

411. Thus, the offence of ‘genocide’ could be perpetrated even without a single individual’s direct death, as we find from the Section 3(2) of the Act and the Convention on the Prevention of Genocide, 1948. Tribunal notes that viciousness of genocide is based on the thought that a group of people does not deserve to live or subsist, that they must be dehumanized, and finally removed.

412. Already, in adjudicating this count of charge [charge no.04] we got it proved that the perpetrators accompanied by the accused persons by deliberate criminal acts had killed seven Hindu civilians, looted households and burnt down houses of the civilians of the Hindu community of the village-Sukhari. And all these cumulatively created untold horror and coercion which forced the survived Hindu civilians to deport to India, quitting their own homes.

413. All the above acts are found to be ‘genocidal acts’ which caused ‘indirect death’ against the survived Hindu civilians. Destruction of a group does not mean its total physical destruction or genocidal killing does not include annihilation of total members of the group under attack. In this count of charge, it stands proved

that seven Hindu civilians were wiped out because of their membership in Hindu religious group. It together with other proved atrocious dehumanizing activities proves visibly the ‘specific intent’ of the gang of perpetrators.

414. The phrase ‘in whole or in part’ means that there is no lower limit to the number of individuals against whom the criminal acts are committed. The offence of ‘genocide’ is committed even when any of acts enumerated in section 3(2)(c) of the Act of 1973 are committed against even a single individual of a protected group with ‘specific intent’, a constituent element of ‘genocide’. Pattern and extent of destruction carried out in conjunction with the attack, as found proved was not the unintended upshot to achieve some other goal. Rather, the goal of the gang of perpetrators was to destroy the Hindu community to which the victims and the sufferers belonged.

415. In portraying the ferocity of atrocious acts committed during the nine months period of the war of liberation in 1971 the **Appellate Division**, in the case of *Abdul Quader Molla* observed that--

“What has happened in Bangladesh is nothing short of genocide. If what Hitler did in Germany and Poland was an example of racial genocide, if the tragedy of Jallianwala Bagh was an

example of colonial genocide by the use of armed might, what happened in Bangladesh was no less a case of cultural and political genocide on a scale unknown to history. The whole of Bangladesh became truly a Jallianwala Bagh, hallowed and sanctified by the blood of patriotic martyrs and innocent defenceless people; whose only fault was that they were somewhat different than those who came to rule them from Pakistan.”

**[Appellate Division, Abdul Quader Molla Judgment, 17 September 2013 page 42]**

416. The event of horrendous racial genocide as found proved, in the case in hand, is thus a fragmented portrayal of genocide committed in 1971 during the war of liberation. Pattern, magnitude of the attack compels us to conclude it. The attack was calculated to cripple the defenceless Hindu community of the village-Sukhari which was Hindu dominated.

417. On rational and total evaluation of evidence presented the matters which are found to have been proved beyond reasonable doubt are that –

- (i) A systematic attack was launched by the group formed of Pakistani occupation army, Razakars and the accused persons;

- (ii) The vicinity under attack was Hindu dominated locality;
- (iii) The accused (1) Hidaetulla @ Anju @ Md. Hedaetullah @ Anju B.Sc and (2) Sohrab Fakir @ Sohrab Ali @ Sorab Ali remained stayed with the gang till it ended its criminal mission at the crime village;
- (iv) Devastating activities too were carried out in conjunction with the attack;
- (v) Seven Hindu civilians and two Muslim civilians were taken away to Modon army camp, on forcible capture;
- (vi) Detained seven Hindu civilians were gunned down to death ;
- (vii) The residents of the crime village being scared, coerced and panicked were compelled to deport to India; and
- (viii) Intent of the criminal mission of which the accused persons were active part was to destroy the Hindu community of the village-Sukhari, either whole or in part;

418. It thus stands proved beyond reasonable doubt that the accused persons consciously and being part of the criminal enterprise by their act, conduct, forming part of systematic attack and pursuant to common 'understanding' participated, facilitated,

aided, abetted, contributed to the commission of the offence of 'genocide'.

419. In light of above evaluation we are persuaded to conclude that it has been proved unequivocally that the accused (1) Hidaetulla @ Anju @ Md. Hedaetullah @ Anju B.Sc and (2) Sohrab Fakir @ Sohrab Ali @ Sorab Ali, in exercise of affiliation in locally formed Razakar Bahini, by their act and conduct forming part of systematic attack consciously participated, aided, abetted, substantially contributed to the commission of the offence of 'genocide' as enumerated in section 3(2)(c)(i)(ii)(iii)(g)(h) of the Act of 1973 and thus the accused persons are found criminally liable under section 4(1) of the Act.

#### **Adjudication of Charge No.05**

**[Offences of abduction, confinement of Hamid Hossain of village Modon Majhpara and torture as crimes against humanity]**

420. That on 02 September, 1971 in between 01:00 P.M to 02:00 P.M a group formed of accomplice Razakars and 03 Pakistani army men accompanied by the accused Sohrab Fakir @ Sohrab Ali @ Sorab Ali by launching attack at village Modon Majhpara apprehended Hamid Hossain, the brother of freedom-fighter Ali Hossain and then forcibly took him away to Modon Majhpara Liton House where he was subjected to brutal torture. However, the

detainee was set at liberty on the same day in exchange of financial gain.

Therefore, the accused Sohrab Fakir @ Sohrab Ali @ Sorab Ali has been charged for actively participating, facilitating, abetting and substantially contributing to the commission of the offences of **'abduction', 'confinement', 'torture', as crimes against humanity** as specified in section 3(2)(a)(g)(h) read with section 4(1) of the International Crimes (Tribunals) Act, 1973 which are punishable under Section 20(2) of the Act.

## **Evidence of Witnesses Examined**

421. Prosecution relies upon testimony of two witnesses namely P.W.03 and P.W.18. Of them P.W.03 victim's brother's son and he allegedly watched the criminal acts conducted in taking away his uncle on forcible capture. P.W.18 is a hearsay witness who happens to be the elder brother of victim. He heard the event from victim. Now let us see what these two witnesses narrated in their sworn testimony.

**422. P.W.03 Md. Motiur Rahman [65]** is a resident of village-Modon Majhpara under police station-Modon of District [now] Netrokona. He is a direct witness to the facts related to the attack

alleged in charge no.05. In 1971 he was 18 years old. Victim Hamid Hossain was his uncle.

423. P.W.03 stated that on 02 September 1971 at about 01:00 P.M he had been nearer to their house when he saw accused Sohrab Fakir, two Razakars and three Pakistani army men coming to their house forcibly apprehended his uncle Hamid Hossain, the brother of Ali Osman who was a freedom-fighter and took him away to the house of Malek of Majhpara peace committee where he was subjected to brutal torture in the name of extracting information about the freedom-fighters. In evening the detainee was set at liberty in exchange of money.

424. P.W.03 also stated that he knew the accused Sohrab as he was engaged in election campaign for accused Hedaetullah Anju who contested 1970's National Assembly Election.

425. On cross-examination, P.W.03 denied the defence suggestions that he did not know the accused; that the accused were not associated with the alleged event; that they did not belong to Razakar Bahini and that what he testified was untrue and tutored.

**426. P.W. 18 Md. Ali Osman Mia** is a resident of village –Modon Majhpara under Police station- Modon of District-Netrokona. In

1971 he was 20 years old and a student of class X at Jahangirpur T Amin High School. He is a freedom-fighter and elder brother of victim Abdul Hamid.

427. P.W.18 stated that on receiving training at Tura training camp in India he, his co-freedom-fighters came back to Bangladesh at the end of July, 1971 and joined the liberation war around the localities of Dharmapasha, Uliarchar, Kishoreganj, Tarail, Modon, Atpara, Mohonganj.

428. P.W.18 is a hearsay witness in respect of the event .P.W.18 after independence he returned back home and knew from his brother Abdul Hamid[ victim] that on 16 day of Bangla month Bhadra, 1971 at about 12:00/1:00 PM Razakar Sohrab Fakir, being accompanied by 3 Pakistani army men and 8/10 cohort Razakars came to their house and detained his[P.W.18] brother Abdul Hamid and took him away at the house of local peace committee chairman Abdul Malek where he was subjected to brutal torture .

429. P.W.18 also stated that he heard too that in evening on the same day his brother [victim] got release in exchange of money. It was because he [P.W.18] joined the liberation war as freedom-fighter and also to extract information about freedom fighters.

Torture caused to his [P.W.18] brother resulted in his physical impairment.

430. P.W.18 further stated that he knew Razakar Sohrab Fakir beforehand as he and Enayet Ullah Monju used to come in their locality for election campaign in favour of Hedaetullah Anju, a candidate in 1970's election.

431. On cross-examination P.W.18 stated in reply to defence question that Pakistani occupation army got camped at Atpara Thana and Modon Thana; that Malek was the chairman of Modon Than peace committee. P.W.18 denied defence suggestions that he did not take notice of the event from his brother Abdul Hamid as he testified; that the accused was not involved with the alleged event and that what he testified was untrue.

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

### ***Prosecution Argument***

**432. Mr. Mukhlesur Rahman Badal**, the learned prosecutor in advancing argument on this charge no.05 drew attention to testimony of P.W.03 and P.W.18. It has been asserted that P.W.03 is a direct witness to the first phase of attack that resulted in forcible capture of the victim; that the offences were not isolated ones and the same were carried out systematically intention of

which was arbitrary and unlawful and causing torture to extract information about freedom-fighters and such act was carried out to further policy and plan of the Pakistani occupation army.

### ***Defence Argument***

433. On contrary, **Mr. Abdus Shukur Khan** the learned state defence counsel defending both the accused submits that participation of accused in launching attack could not be proved by corroborative evidence; that the P.W.03 had no reason of recognizing the accused Sohrab Fakir; evidence of P.W.03 remained uncorroborated and that there has been no evidence to prove the act of causing alleged torture to victim and accused had no nexus with it.

434. This charge involves the offences of abduction, confinement and torture. Victim of the offences eventually got release, in exchange of money, the charge framed alleges. The event happened in day time, according to arraignment brought. Only accused Sohrab Fakir @ Sohrab Ali @ Sorab Ali has been arraigned in this count of charge.

435. It is evinced from testimony of P.W.03, direct witness to facts materially allied to the attack that prohibited acts carried out by launching attack were first aimed to effect victim Hamid Hossain's

forcible capture by launching first phase of attack at his house on 02 September 1971 at about 01:00 P.M. Victim was the uncle of P.W.03.

436. Since the attack happened in day time it was practicable for P.W.03 of seeing the activities conducted in conjunction with the attack. Defence simply denied that P.W.03 did not see the initiation of attack at the house of victim. But it does not seem to have made effort to controvert it. Mere denial does not negate credibility of what is stated in examination-in-chief.

437. The gang of attackers formed of accused Sohrab Fakir, two Razakars and three Pakistani army men, the charge framed arraigns. Character of the group of perpetrators itself proves that the attack launched by it was in context of the war of liberation, not to satisfy anybody's personal aggression. Razakars along with the accused Sohrab Fakir who was also a member of locally formed Razakar Bahini in collaboration with the Pakistani occupation army designed the attack directing unarmed civilian, sharing common purpose and intent, we safely infer it.

438. We have got it from unimpeached version of P.W.03 that victim Hamid Hossain was the brother of Ali Osman , a freedom-fighter. It stands proved too from unshaken ocular testimony of

P.W.03 that he saw the accused Sohrab Fakir, two Razakars and three Pakistani army men coming to their house who forcibly apprehended his[P.W.03] uncle Hamid Hossain and took him away.

439. Where the detained victim was taken away and what happened next? It transpires patently from evidence of P.W.03, direct witness that victim was taken to the house of Malek of Majhpara peace committee where he was subjected to brutal torture in the name of extracting information about the freedom-fighters. It has also been revealed too that on the same day in evening the detainee was set at liberty in exchange of money. Defence could not controvert it in any manner by cross-examining the P.W.03.

440. P.W.03 does not claim that he himself witnessed the gang causing brutal torture at the house of Malek of Majhpara peace committee where he was taken and kept in captivity for hours together. But since the victim eventually returned back on release, in exchange of money it was quite natural for P.W.03 and relatives of victim of being aware as to why and what extent mistreatment was inflicted to him in captivity. Thus, testimony of P.W.03 in this regards inspires credence.

441. Questioning the reason of recognizing the accused Sohrab Fakir accompanying the group in launching the first phase of attack the learned defence counsel submitted that P.W.03 had no reason of knowing this accused beforehand and thus his evidence implicating this accused cannot be taken into account to connect him with the alleged attack.

442. We are not agreed with the above contention. It appears not only from evidence of P.W.03 but also from evidence of other prosecution witnesses it already stands proved that accused Sohrab Fakir was actively engaged in election campaign around the localities for accused Hedaetullah Anju when he contested National Assembly Election in 1970. Additionally, notoriety carried out, in exercise of membership in Razakar Bahini made him known to the people of the localities.

443. Thus, seeing the accused Sohrab Fakir accompanying the group in taking away victim on forcible capture as testified by the P.W.03, a direct witness proves this accused's active and culpable participation in accomplishing the act of forcible capture of victim, in conjunction with the first phase of attack.

444. P.W.18 is the elder brother of victim Abdul Hamid. He is a freedom-fighter. He heard the event from victim, after

independence. It was quite natural. Facts materially related to the attack as testified by the P.W.18 gets corroboration from P.W.03, a direct witness.

445. The learned state defence counsel submits that only the P.W.03 allegedly witnessed the act of launching attack by the group being accompanied by accused Sohrab Fakir and his evidence does not seem to have been corroborated by any other witness. The other witness is a hearsay witness. Thus, uncorroborated testimony of P.W.03 cannot form the sole basis of proving the arraignment.

446. We are not agreed with this argument. It is now settled that Tribunal may arrive at decision even on the basis of testimony of a single witness and ‘corroboration’ is simply one of factors to be considered in assessing witness’ credibility. This view finds support from the observation made by the ICTR Trial Chamber in the case of Pauline *Nyiramasuhuko which is as below:*

“There is no requirement that convictions be made only on evidence of two or more witnesses. The Chamber may rule on the basis of a single testimony if, in its opinion, that testimony is relevant and credible. 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.

**[Nyiramasuhuko, ICTR Trial Chamber, 24 June 2011 Paragraph 174]**

447. Evidence of P.W.03 and P.W.18 collectively and consistently proves that the victim was kept confined at the house of local peace committee chairman Abdul Malek, for couple of hours when intending to extract information about freedom-fighters he was subjected to vicious torture that resulted in his physical impairment.

448. Viewed as a whole, the evidence presented shows that the attack was carried out collectively and in systematic manner with seriousness and directed against a non-combatant civilian. Purpose was to obtain information about freedom-fighters under intimidation, coercion and by inflicting torture in captivity. Criminal acts carried out were not for any justified reason. Rather, the method and pattern of the attack reflects antagonistic attitude of accused and his cohort Razakars to the pro-liberation civilian population.

449. Act of 'unlawful confinement' of civilians is a grave breach of the Geneva Conventions of 1949. In the case in hand, keeping the victim in unlawful confinement and cussing torture to him in captivity constituted the next phase of the attack. The first phase of

attack resulted in forcible capture of the victim by launching a systematic attack at his house.

450. Testimony of P.W.03 , a direct witness to the facts linked to the first phase of attack proves it unambiguously that accused Sohrab Fakir, his cohort Razakars and army men were engaged in conducting this phase of attack, it stands proved. Defence does not seem to have been able in any manner to impeach the act of detaining the victim forcibly and then taking him away to the house of the local peace committee chairman. Presumably, the group of perpetrators carried out such attack, being imbued by the policy and plan of Pakistani occupation army.

451. Hearsay evidence of P.W.18 in respect of first phase of attack gets corroboration from P.W.03. Source of such hearsay evidence was the victim, the younger brother of P.W.18. We do not find that hearsay evidence of P.W.18 suffers from exaggeration of any degree and as such the same carries probative value and inspires credibility.

452. Elements to constitute the offence of ‘unlawful confinement’ are: (I) causing deprivation to one’s liberty; (II) Deprivation of liberty caused was unjustified and (III) Accused being part of the group had reasonable knowledge that his act or omission was likely

to cause arbitrary deprivation of physical liberty of the person detained.

453. There has been nothing to show that deprivation of victim's liberty was for any justified caused. The group being accompanied by accused Sohrab Fakir intending to accomplish unlawful objective caused explicit deprivation of victim's recognized liberty by keeping him confined, on forcible capture. Accused being part of the JCE was aware that his act forming part of attack was aimed to cause unlawful confinement that ended in inflicting arbitrary torture to victim.

454. Act of forcible capture of victim and taking him away were chained to the act of confining him. It stands proved that accused Sohrab Fakir by his act, in exercise of his membership in locally formed Razakar Bahini, aided and substantially contributed to the commission of abduction of victim on forcible capture that resulted in torture caused in confinement.

455. We have found it proved that on abduction the victim was kept in captivity at the house of the chairman of the local peace committee, an organization formed to collaborate with the Pakistani occupation army. Accused Sohrab Fakir being a member of the criminal enterprise thus cannot evade responsibility of inflicting

mistreatment to the victim keeping him in unlawful confinement. In this regard **ICTY Trial Chamber** observed in the case of **Tadic** that—“The aider and abettor “will . . . be responsible for all that naturally results from the commission of the act in question.” [ **Tadic, ICTY Trial Chamber, Judgment , May 7, 1997, para. 692**]

456. Committing a crime, in violation of international humanitarian law may be done or accomplished individually or jointly with others. Act of accused Sohrab Fakir that he carried out by accompanying the gang in launching attack at the house of the victim had a substantial effect even to the act of confining the victim and causing brutal torture to him, in the name of extracting information.

457. Act and conduct of accused forming part of the attack in effecting unlawful capture of victim was chained to the next phase of the event i.e. inflicting inhumane torture to victim keeping him in unlawful confinement at the house of local peace committee chairman. And thus all the members of the group including the accused Sohrab Fakir were equally liable under the doctrine of JCE [Basic Form] even for the prohibited and criminal acts conducted directing the victim keeping him in captivity.

458. Evidence adduced tends to the conclusion that the total event was advanced to materialize common criminal design and goal and thus it is not required to show which member of the group inflicted torture to victim. Active participation in first phase of attack unerringly links him also with the next phase of the event. In this regard we recall the observation made by the **ICTY Trial Chamber** in the case of **Simic, Tadic, and Zaric** that--

“The first category is where all the participants in the joint criminal enterprise share the same criminal intent. To be established, it must be shown that the accused must have (i) voluntarily participated in one of the aspects of the common criminal design; and (ii) intended the criminal result, even if not personally effecting it.”

**[Simic, Tadic, and Zaric, ICTY Trial Chamber, October 17, 2003, para. 157]**

459. It is now settled jurisprudence that when a number of persons are involved in a common plan aimed at the commission of a crime, they can be convicted of participation in a joint criminal enterprise [JCE-Basic Form, the first category] in relation to that crime. It transpires from the evidence presented that all the members of the group acted pursuant to a common purpose, possessing the same criminal intention.

460. It transpires that few hours after unlawful confinement the detained victim got release, in exchange of money. But in view of above we conclude that mental harm and physical harm inflicted to the detained victim keeping in unlawful confinement cumulatively constituted the offence of ‘torture’ which was intentionally inflicted against an unlawfully confined individual aiming to obtain information.

461. The offence of ‘**torture**’ consists of the infliction, by act or omission, of severe pain or suffering, whether physical or mental. Such act or omission must be intentional and aimed at obtaining information under intimidation and coercion and those prohibited acts must be linked to context of armed conflict. It stands proved that torture caused to the victim in confinement was to extract information about his freedom-fighter brother who was engaged in the war of liberation.

462. In respect of constitutive elements of the offence of ‘torture’ it is found well resolved by the **ICTY Appeal Chamber** in the case of **Kunarac, Kovac, and Vokovic** that--

“The definition [of torture] is based on the following constitutive elements: “(i) The infliction, by act or omission, of severe pain or suffering, whether physical or mental. (ii) The act or omission

must be intentional. (iii) The act or omission must aim at obtaining information or a confession, or at punishing, intimidating or coercing the victim or a third person, or at discriminating, on any ground, against the victim or a third person.”

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

463. True that permanent injury is not a requirement for torture; evidence of the suffering need not even be visible after the commission of the crime.” But what we see in the case in hand? It stands proved from evidence of P.W.18, the elder brother of victim that the victim was subjected to arbitrary and brutal torture in captivity which was conducted and substantially facilitated by the accused Sohrab Fakir and such inhumane torture eventually resulted in victim’s physical impairment. Defence could not refute it. Besides, we do not find any reason of reciting an untrue narrative as to reason of physical impairment of own younger brother.

464. In the case in hand, it has been found proved that confining the victim in captivity at the house of chairman of local peace committee was to extract information about freedom fighters. Victim was the younger brother of freedom fighter [P.W.18]. It may be inferred justifiably that such confinement was unlawful as

the victim was subjected to ‘inhumane torture’ in captivity, in the name of interrogation, for extracting information.

465. Besides, act of coercing the victim by inflicting deliberate persecuting act to pour out information about freedom-fighters was indisputably arbitrary and detrimental to his fundamental right which caused serious mental harm, in addition to physical harm.

466. In view of reasoned discussion as made above on rational appraisal of evidence presented we deduce that the accused Sohrab Fakir @ Sohrab Ali @ Sorab Ali knowingly and consciously participated, aided and substantially contributed, by his act and conduct forming part of systematic attack to the commission of offences of ‘**abduction**’, ‘**confinement**’ and ‘**torture**’ as ‘crimes against humanity’ as enumerated in section 3(2)(a)(g)(h) of the Act of 1973 and thus he is criminally liable under section 4(1) of the Act of 1973.

### **Adjudication of Charge No.06**

**[Offences of 'arson', and 'deportation' as crimes against humanity committed at village Modon Dakkhin Para]**

467. Charge: That on 06 September, 1971 at about 10:00/11:00 A.M a group of 20/30 Razakars and 10/20 Pakistani occupation army accompanied by the accused (1) Hidaetulla @ Anju @ Md. Hedaetullah @ Anju B.Sc [**absconded**], **his** accomplice (2) Anayet

Ullah Monju @ Enaet Ullah @ Monju [**died after submission of the formal charge**] and the accused (3) Sohrab Fakir @ Sohrab Ali @ Sorab Ali by launching attack at Mir Bari of Modon Dakkhin Para looted valuables from the houses of late Khorshed Alam Koraishi, Md. Abul Hashem's father, Motiur Rahman, freedom fighter Ali Osman, Suruzzaman and Kazi Miah, vandalized and torched their houses. In this way, by carrying out devastating activities continued its attack at village-Modon Dakkhin para directing civilians throughout the day when they burnt down at least 150-200 houses. The attack thus forced the residents of the village- Modon Dakkhin Para to get internally displaced, in fear of life.

Therefore, the accused (1) Hidaetulla @ Anju @ Md. Hedaetullah @ Anju B.Sc [**absconded**] and (2) Sohrab Fakir @ Sohrab Ali @ Sorab Ali have been charged for actively participating, facilitating, abetting and substantially contributing to the commission of the offences of '**arson**', and '**deportation**' as crimes against humanity as specified in section 3(2)(a)(g)(h) read with section 4(1) of the International Crimes (Tribunals) Act, 1973 which are punishable under Section 20(2) of the Act.

## **Evidence of Witnesses Examined**

468. Prosecution relies upon testimony of five witnesses namely P.W.01, P.W.03, P.W.16, P.W.17, and P.W.18. Of them three are direct witnesses to the devastating activities carried out by launching attack, as arraigned in this charge no. 06. Group of perpetrators formed of Pakistani occupation army men, Razakars including the accused persons by launching attack carried out destructive activities in day time, charge framed alleges. Now, let us see what the witnesses have narrated in Tribunal.

**469. P.W.03 Md. Motiur Rahman [65]** is a resident of village- Modon Majhpara under police station-Modon of District [now] Netrokona. He is a direct witness to the act of initiation phase of the attack alleged in charge no.06.

470. P.W.03 stated that on 06 September 1971 at about 12:00 noon he had been at their house when he saw the people running here and there and then he saw accused Hedayetullah Anju, his brother Enayet Ullah Monju [now dead], Sohrab Fakir, their accomplice Razakars and Pakistani army men approaching towards their house and with this he went into hiding in the haor, in front of their house. The accused persons burnt down their house after carrying out looting. Then the accused persons and Pakistani army men carried out looting at village- Kandapara and burnt down houses. In this way the gang looted households and burnt down about 175 houses.

After the event happened the Hindu residents of the village deported to India and Muslim residents got sheltered to their relatives homes, being scared.

471. On cross-examination, defence simply denied that P.W.03 knew the accused; that the accused were associated with the alleged event; that they belonged to Razakar Bahini. P.W.03 also denied the suggestion put to him that the narrative he made was untrue and tutored.

**472. P.W.16 Momtaj Begum [63]** is a resident of village–Modon Kandapara under Police station - Modon of District-Netrokona. In 1971 she was 16 years old. She got married three years before liberation war ensued. In 1971 she and her husband had been at her paternal house.

473. P.W.16 stated that on the 20th day of Bangla month Bhadra in 1971 at about 11:00 A.M. accused Razakar Sohrab Fakir, Razakar Hedaetullah Anju and Razakar Enayet Ullah Monju [now dead] being accompanied by 5/6 Pakistani army men and 15/20 cohort Razakars by launching attack at the house of freedom fighter Ekhlas Koraishi looted households and burnt down it. In conjunction with the attack the gang also set many houses along

with freedom fighter Ali Osman's house on fire after carrying out looting.

474. P.W.16 next stated that the very same group came to their house at about 2:00/3:00 P.M when she along with her family inmates went into hiding inside a jungle nearby their house wherefrom she saw **the Razakars she named** and Pakistani army men looting their households and setting the house on fire. Then the group of perpetrators moved back to the camp. On that day they the gang looted and set about 150/200 houses on fire as the residents of those localities used to assist the freedom fighters.

475. In respect of reason of knowing the accused persons P.W.16 stated that she knew accused Razakar Sohrab Fakir, Razakar Hedaetullah Anju and Razakar Enayet Ullah Monju beforehand as they were from her native village-Kulosree. P.W.16 also identified the accused Sohrab Fakir Present on dock.

476. On her cross-examination in reply to defence question P.W.16 stated that village-Kulosree was about 2 miles away from their home and that this village was under Atpara police station; that there were 10/12 localities under the village-Modon; and that there were possibly 20/25 freedom fighters including Ekhlas Koraishi, Osman Ali, Monjur Ali, Abdul Khaleque and Roton. P.W.16 also

stated in reply to defence question that Pakistani army got camped at Modon police station but she couldn't say on which date Pakistani army men arrived at Modon Police Station. P.W.16 also stated on cross-examination that she saw, remaining stayed at her house, the perpetrators setting Ekhlash Koraishi and Osman Ali's house on fire.

477. P.W.16 denied defence suggestions that she did not know accused persons; that she did not see them at the time of event; that the accused persons were not involved in the event she narrated and that what she testified was untrue and tutored.

**478. P.W.17 Md. Mukhlesur Rahman [60]** is a resident of village –Modon Dakkhin para under Police station-Modon of District [now]-Netrokona. In 1971 he was 14 years old and a student of class-V.

479. P.W.17 stated that there were 20/25 freedom fighters in their village including Ekhlashuddin Koraishi [his brother], Md. Shahjahan, Chan Miah, Ali Osman, Abdul Hamid Master and Abu Taher.

480. In respect of the event P.W.17 stated that on 20<sup>th</sup> day of Bangla month Bhadra in 1971, in morning at about 11:00 A.M.

accused Razakar Sohrab Fakir, Razakar Hedaetullah Anju and Razakar Enayet Ullah Monju [now dead] being accompanied by 5/6 Pakistani army men and 15/16 Razakars came to their house. With this he along with his father and brother went into hiding inside a jungle wherefrom he saw them looting their house and setting it on fire.

481. P.W.17 also stated that later on, the same gang carried out looting and burnt down houses of freedom fighter Ali Osman [P.W.18] and other residents of Majhpara. On their way back to camp the gang looted Kaji Miah's house and set it on fire. In conjunction with the attack the gang also carried out looting and set about 150/200 houses on fire. After that event happened, the residents of their village including his family inmates deported to India.

482. Finally, P.W.17 stated that he knew accused Sohrab Fakir, Hedaetullah Anju beforehand as Hedaetullah Anju contested in 1970's election with the symbol of balance and accused Razakar Sohrab Fakir used to accompany him in conducting his election campaign. P.W.17 identified accused Sohrab Fakir on Dock.

483. On cross-examination, in reply to defence question put to him P.W.17 stated that Pakistani occupation army got stationed at

Modon police station on 13<sup>th</sup> Bhadra[1971]; that Abdul Malek was the Chairman of peace committee; Kaji Alam was the commander of freedom fighters of Modon; that Kaji Miah's house was at Kandapara and it is next to 10/15 houses west to his[P.W.17] house and that remaining in hiding he witnessed the act of looting and arson directing the houses of freedom-fighters Osman Ali[P.W.18] and Kaji Miah.

484. P.W.17 denied the defence suggestions that he did not see accused Sohrab Fakir and Hedaetullah Anju with the gang at the time of the event; that they were not involved in committing the offences he testified and that what he testified was untrue.

**485. P.W.18 Md. Ali Osman Miah [68] is** a resident of the village-Modon Majhpara under police station-Modon of District [now] Netrokona. He is a freedom-fighter. The charge framed arraigns devastating activities conducted at his house as well. He heard the event of attack from his brother Abdul Hamid.

486. P.W.18 stated that after independence he returned back home and heard from his brother Abdul Hamid that on 20<sup>th</sup> day of Bangla month Bhadra in 1971 a gang formed of Razakars Sohrab Fakir, Hedaetullah Anju, Enaet Ullah Monju [now dead] , 10/12 Razakars and Pakistani occupation army by launching attack at their village and carried out looting at 150/200 houses including their houses

and the house of freedom fighter Ekhlas Koraishi and burnt down those houses.

487. In cross-examination, defence simply denied what the P.W.18 testified. P.W.18 denied the defence suggestions put to him that what he testified was untrue and tutored.

488. P.W.01 Md. Khurshed Alam Khan [65], a freedom-fighter is a resident of village-Solpogunoi under police station Atpara of District [now]- Netrokona. He is a hearsay witness in respect of the event arraigned in this charge no.06.

489. P.W.01 stated that on 06 September 1971, in the night, he came to Teligati bazaar when he heard from Raisuddin[now dead] of village-Kuliati of Modon police station that on that day at about 10:00-11:00 A.M a group formed of 10/20 Pakistani occupation army, 20/30 Razakars being accompanied by accused Hedaetullah Anju, his brother Enaet Ullah Monju[now dead] and accused Sohrab Fakir by launching attack carried out indiscriminate looting and burnt down 150/200 houses including the houses of Khorshed Alam Koraishi, freedom-fighter Osman Ali[P.W.18], Suruj Chan, Kaji Mia. After the event, the civilians of the locality took refuge at their relatives' home, being scared.

490. In cross-examination defence simply denied what the P.W.01 testified narrating what he heard, immediate after the event happened. In reply to defence question put to him P.W.01 stated that the Pakistani occupation army arrived in Netrokona on 29 April, 1971; that Razakar Bahini was formed at Atpara Thana during the fourth week of May, 1971 and that he could not recollect in which month Razakar Bahini at Modon Thana was formed.

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

#### ***Prosecution Argument***

491. **Mr. Mukhlesur Rahman Badal** the learned prosecutor submitted that in all 05 witnesses [P.W.01, P.W.03, P.W.16, P.W.17 and P.W.18] have been examined to substantiate the arraignment brought in this charge. Of them P.W.03, P.W.16, P.W.17 are direct witnesses to the criminal activities carried out by launching systematic attack by the group formed of Pakistani army men, Razakars and the accused persons. Their unimpeached testimony proves that the accused Hidaetulla @ Anju @ Md. Hedaetullah @ Anju B.Sc [**absconded**] and (2) Sohrab Fakir @ Sohrab Ali @ Sorab Ali being active part of the joint criminal enterprise [JCE] were knowingly engaged in perpetrating grave destructive activities directing civilians' property that eventually resulted in causing mental harm and serious detriment to civilians' normal livelihood and deportation of the residents of the locality. Defence could not shatter the core of testimony related to accused

persons' participation to the commission of crimes, arraigned in this charge no.06, the learned prosecutor added.

### ***Defence Argument***

**492. Mr. Abdus Shukur Khan** the learned state defence counsel for both accused submitted that the witnesses relied upon by the prosecution to substantiate the alleged arraignments brought in this charge had no reason of knowing these accused beforehand; that long more than four decades after the alleged event happened it is not possible to recall the event they allegedly experienced; that it could not be proved that the accused persons were with the group of attackers ; and what the witnesses testified implicating them with the offences alleged is untrue and tutored.

493. Tribunal notes that 'system crimes' or 'group crimes' committed in war time situation in fact is the upshot of series of prohibited acts and activities and an accused , a member of the group may not have participation at all aspects of the event of attack. The charge framed arraigns that gravely devastating and destructive activities were conducted, by launching systematic attack at the village targeted.

494. Thus, pattern of attack suggests the rational inference that an individual might have had opportunity of seeing or knowing or

experiencing a particular phase or act or conduct of the accused persons forming part of systematic attack which were significantly linked to the commission of crimes, and not the entire attack.

495. However, we have to arrive at decision on integrated evaluation of evidence tendered by the 05 witnesses. In going on with this task we are to keep it in mind that—**‘proof does not mean rigid mathematical formulae since that is impossible’**. However, ‘proof’ must mean such evidence as would induce a man of reasonable prudence to come to a definite conclusion

496. Prosecution, for holding the accused persons liable for the offences of which they have been indicted requires proving that—

- (i) Destructive activities of indiscriminate looting and burning down hundreds of houses were conducted at the crime village , by launching systematic attack;
- (ii) Residents of the crime village were eventually forced under coercion and horror to deport ;
- (iii) the accused persons took ‘consenting part’ in the commission of the offences;
- (iv) the accused persons were knowingly ‘connected’ with plan and criminal mission of the enterprise, being part thereof;

497. The sworn testimony of P.W.03 Md. Motiur Rahman, a resident of village-Modon Majhpara depicts that he saw the group accompanied by accused Hedaetullah Anju, Sohrab Fakir and their accomplice Razakars coming towards their house when he being scared went into hiding wherefrom he further saw the accused persons setting their house on fire after carrying out looting.

498. It is also evinced from uncontroverted testimony of P.W.03 that the criminal gang also carried out looting and arson that resulted in destruction of about 175 houses including the house of freedom-fighter Ekhlash, Rahim and Hashem.

499. Defence, it appears, simply denied accused persons' participation in conducting the criminal acts. But carrying out the arbitrary devastating activities directing civilians' property remained unimpeached. Mere denial does not negate accused persons' participation, being part of the criminal gang, particularly when it stands proved that they were actively with the gang at the crime sites till the criminal mission ended.

500. Act of random looting and arson by launching attack at the house of freedom-fighters Osman [P.W.18], Ekhlash Koraishi gets corroboration from the evidence of P.W.16 Momtaj Begum, a resident of the crime village. Her testimony depicts that on the 20<sup>th</sup>

day of Bangla month Bhadra in 1971 at about 11:00 A.M she saw the group formed of army men, accused persons and their cohort Razakars moving first towards the house of Ekhlash Koraishi and Osman [P.W.18] where they carried out destructive activities--looting and arson.

501. It is found proved too from evidence of P.W.16 that the destructive activities of group of perpetrators did not get halted after attacking the house of Ekhlash Koraishi and Osman [P.W.18] and next, at about 02:00/03:00 P.M P.W.16 saw the gang coming towards their house and with this she went into hiding inside a bush wherefrom she saw the gang looting their house and setting it on fire.

502. The reason of knowing and recognizing the accused persons present at the crime site accompanying the gang seems to be natural. It is found from testimony of P.W.16 that she and the accused persons were from the village-Kulosree and thus she knew them beforehand. Besides, defence could not refute this piece of fact. Additionally, already it has been found well proved that accused Hedaetullah Anju was a local potential leader of Jamaat E Islami [JEI], pro-Pakistani political party and he contested in National Assembly Election in 1970 when accused Sohrab Fakir

was engaged in election campaign in his favour, around the localities.

503. This above uncontroverted fact together with the culpable nexus and association of accused persons with the Pakistani occupation army stationed at Atpara and infamy they achieved by virtue of affiliation in locally formed Razakar Bahini obviously made them notoriously known to the people of the localities under Atpara and Modon Thana.

504. Was it practicable of seeing the act of indiscriminate looting and arson conducted at the house of Ekhlash Koraishi and Osman Ali, as testified by P.W.16? Yes, it was possible. Defence could not impeach it. Rather, in cross-examination it has been affirmed as P.W.16 in reply to defence question stated that she saw the act of looting and arson at the house of Osman [P.W.18] and Ekhlash remaining stayed at their [P.W.16] house.

505. It is found proved as well that in addition to looting and burning down the houses of Osman[P.W.18] , Ekhlash Koraishi and P.W.16 the gang in conjunction with the attack had carried out destructive activities by conducting looting and arson of 150/200 houses in their surrounding localities too.

506. It has been found affirmed in cross-examination of P.W.16 as she stated in reply to defence question that there were 20/25 freedom-fighters including Ekhlash Koraishi, Osman Ali[P.W.18], Monjur Ali, Abdul Khalek, Ratan of their village-Modon Majhpara.

507. Testimony of P.W.17 Md. Mukhlesur Rahman depicts that he also sensing the attack went into hiding wherefrom he saw the group accompanied by the accused persons looting their house and setting it on fire. In conjunction with the attack, the gang had carried out looting and setting about 150/200 houses including the houses of freedom fighter Ali Osman [P.W.18] and Kaji Miah on fire.

508. It has been affirmed in cross-examination of P.W.17 that remaining in hiding it was practicable of seeing the act of looting and arson directing the houses of freedom-fighters Osman Ali and Kaji Miah as the house of Kaji Miah's was at Kandapara which was next to 10/15 houses, west to his[P.W.17] house.

509. It was not practicable indeed that the witnesses or residents of the crime village had opportunity of seeing which member or members of the gang set those numerous houses on fire. But based on consistently corroborative evidence of P.W.03, P.W.16 and P.W.17 it stands proved that the accused persons were with the

gang at the crime site. Obviously they did not remain present with the group of attackers as mere spectators. In execution of common purpose and design they accompanied the gang, knowing the consequence and sharing intent, in exercise of their affiliation in Razakar Bahini, we conclude it unerringly.

510. P.W.18 Md. Ali Osman Miah and P.W.01 Md. Khurshed Alam Khan are hearsay witnesses. They are freedom-fighters and were engaged in the war of liberation in 1971. It has already been proved that the house of P.W.18 was also looted and destructed by setting fire. P.W.18 heard the event from his brother, after independence. It was quite natural. P.W.01 heard the event from a resident of village-Kuliati of Modon police station, when he came to Teligati bazaar after the event occurred.

511. Hearsay evidence of P.W.01 and P.W.18 is not only admissible but the same carries probative value as it gets consistent corroboration from evidence of three direct witnesses—P.W.03, P.W.16 and P.W.17.

512. Why the group of perpetrators opted to conduct devastating activities at the crime village and its surrounding localities, on the same day? It is found from testimony of P.W.16 that many residents of their village joined the war of liberation as freedom-

fighters. It remained undisputed that there were 20/25 freedom fighters in their [P.W.17] village including his brother Ekhlisuddin Koraishi, Osman [P.W.18], as testified by P.W.17.

513. Thus, it may be justifiably inferred that purpose and intention of the criminal mission was to resist the war of liberation showing extreme aggression by reigning havoc and extreme terror throughout the locality by carrying out methodical and arbitrary attack directing civilians' properties and their normal livelihood. It has been found proved too that the residents of the crime village being gravely scared eventually opted to deport to India.

514. Deportation occurs when a person is moved across a national border separating two States. Deportation and forcible transfer both entail the 'forcible displacement' of persons from the area in which they are lawfully present. In the case in hand, fear of violence, psychological oppression, and other such coercive circumstances created an environment where there was no option for the residents of the crime village but to leave, thus amounting to the 'forcible displacement'.

515. That is to say, intimidation, coercion, horror, and panic created through devastating activities eventually forced the civilians of the crime village to get displaced beyond the national border. It was

indeed intense detriment to fundamental rights of civilians and such gross prohibited acts, in this way, dumped them in an ocean of countless mental harm and uncertain livelihood.

516. The activities carried out by the criminal enterprise were persecutory acts leading to ‘deportation’ which caused severe deprivation of fundamental rights of civilians of the crime village. The accused persons being members of the group understood that their acts formed part of the collective criminal activity which rendered the victims, the residents of the crime village significantly scared and vulnerable.

517. It is settled that the term ‘forcibly’ is not restricted to physical force, but may include threat of force or coercion that causes fear of violence, by taking advantage of a coercive environment. Comprehensive devastation of homes and property of civilians indeed constituted destruction of the livelihood of the population of the crime village which was a constitutive element to constitute the offence of ‘deportation’ as crimes against humanity.

518. Pattern of attack and the facts unveiled lead us to infer it irresistibly that the ultimate aim of attack was the ‘removal’ or displacement of residents from the locality in which they used to live, or eventually even from humanity itself. The systematic and

deliberate destruction of individuals' homes and means of their livelihood indisputably resulted in such a forced displacement from own locality.

519. Tribunal notes that wanton destructive devastation of a localities or villages not justified by military necessity constitutes a patent violation of the laws or customs of war. It has been proved that destruction of civilians' property occurred on a large scale. The perpetrators acted with the intent to destroy the civilians' property intending to cripple their normal livelihood and also to create horror which caused mental harm and sufferings too. All those prohibited acts cumulatively constituted the offence of '**other inhumane act**'.

520. Act of accompanying the criminal gang to the crime site itself was an act of aiding and abetting amounting to 'assistance' to the perpetrators. This view finds support from the observation made by ICTR Trial Chamber in the case of *Akayesu* which is as below:

According to the Rwanda Tribunal, aiding means giving assistance to someone, while abetting involves facilitating the commission of an act by being sympathetic thereto.

**[ Prosecutor v. Akayesu ; Case No. ICTR- 96-4-T, Judgment, 2 September 1998, para. 423]**

521. Indisputably, the accused Hidaetulla @ Anju @ Md. Hadaetullah @ Anju B.Sc and Sohrab Fakir @ Sohrab Ali @ Sorab Ali accompanied the troops in exercise of their notorious affiliation in Razakar Bahini a militia force, knowing foreseeable consequence which by itself indicates that the accused persons, being part of JCE intentionally participated in execution of the plan of causing grave harm and detriment to civilians and their normal livelihood, by providing assistance, approval and encouragement to the enterprise.

522. Facts unveiled suggest the conclusion that the accused Hidaetulla @ Anju @ Md. Hadaetullah @ Anju B.Sc and Sohrab Fakir @ Sohrab Ali @ Sorab Ali by their act and conduct provided conscious and intentional assistance to the troops, sharing intent of conducting unlawful and prohibited acts directing civilian population. The accused persons too were thus ‘participants’ which is sufficient to trigger their individual criminal responsibility as ‘participants’ under the doctrine of JCE-I [Basic Form]. In this regard it has been observed by the ICTY that—

“Mere presence constitutes sufficient participation under some circumstances so long

as it was proved that the presence had a significant effect on the commission of the crime by promoting it and that the person present had the required mens rea.”

**[ICTY: Aleksovski, (Trial Chamber), June 25, 1999, para. 64]**

523. Having considered the totality of the evidence, it stands proved that the attack was carried out in structured manner, in context of war of liberation. Victims were purely non-combatant civilians who did not take part in active hostility. Near ones of many of them were freedom-fighters, as found proved.

524. Razakar Bahini was formed in 1971 on explicit endorsement of Jamaat-E-Islami [JEI] to collaborate with the Pakistani occupation army in resisting and annihilating the Bengali nation. It is now settled history that this auxiliary force symbolized the pro-liberation Bengali people and freedom-fighters as their ‘enemies’ and ‘miscreants’, to further policy and plan of Pakistani occupation army.

525. The attack, which was carried out by the group of attackers, was directed against numerous victims and their properties, on the ground that they were perceived to be pro-liberation civilians. Narrative made by direct witnesses [P.W.03, P.W.16 and P.W.17] is chiefly based on episodic memory. Their recounting stored in

their episodic memory which has reliably portrayed the event of methodical and destructive attack filled with extreme horror and accused persons' culpable participation therewith.

**526.** It is now settled that '**Participation**' includes both direct participation and indirect participation. Thus, it is not required to show that the accused persons directly accomplished the act of arson and looting. The factual matrix proved by the prosecution unerringly indicates that the accused Hidaetulla @ Anju @ Md. Hadaetullah @ Anju B.Sc and Sohrab Fakir @ Sohrab Ali @ Sorab Ali had consciously acted as the active 'participants' of the criminal enterprise and as such they cannot evade liability of committing the offences proved.

527. On totality of evidence adduced we are of the view that the prosecution has been able to prove beyond reasonable doubt that accused Hidaetulla @ Anju @ Md. Hadaetullah @ Anju B.Sc and Sohrab Fakir @ Sohrab Ali @ Sorab Ali by their act and conduct forming part of systematic attack participated, abetted and substantially contributed to the accomplishment prohibited and arbitrary acts constituting the offences of '**deportation**' and '**other inhumane act**' as crimes against humanity as enumerated in section 3(2)(a)(g)(h) of the International Crime (Tribunals) Act ,

1973 and thus they are criminally liable under section 4(1) of the Act of 1973.

## **XI. Conclusion**

528. In the case in hand, arraignments brought in six charges involve some frightening events of systematic attack occurred deliberately and methodically directing pro-liberation civilians and civilians belonging to Hindu religious group of rural vicinities under Police Station-Atpara and Modon of the then Netrokona Sub-Division, in context of the War of Liberation in 1971.

529. Tribunal notes that accused Hidaetulla @ Anju @ Md. Hadaetullah @ Anju B.Sc has been indicted in five charges excepting charge no.05. While another accused Sohrab Fakir @ Sohrab Ali @ Sorab Ali has been indicted in five charges excepting charge no.02.

530. Accused Hidaetulla @ Anju @ Md. Hadaetullah @ Anju B.Sc indicted in five charges i.e. charge nos. 01,02,03,04, and 06 has been found guilty of offences arraigned. This accused has been absconding as he could not be arrested. Another accused Sohrab Fakir @ Sohrab Ali @ Sorab Ali detained in prison has been found guilty in relation to arraignments brought in charge nos. 01,03,04,05 and 06.

531. Both the accused persons arraigned of the charges have been found to have had cognizant and culpable participation, by aiding and substantially contributing to the perpetration of horrendous crimes. Their act and conduct, in exercise of their potential membership in and affiliation with the locally formed Razakar Bahini formed part of systematic attack.

532. Of the two accused persons, accused Hidaetulla @ Anju @ Md. Hadaetullah @ Anju B.Sc was a mighty associate of the locally stationed Pakistani occupation army, in addition to his dominance and affiliation in locally formed Razakar Bahini. It is found proved that he carried out atrocities taking his close fellow, another accused Sohrab Fakir @ Sohrab Ali @ Sorab Ali with him. Both the accused are found to have collaborated with the Pakistani occupation army in conducting attacks with extreme aggression and antagonism that resulted in barbaric crimes like ‘crimes against humanity’ and ‘genocide’.

533. It has been found proved that the accused persons knowingly participated and aided the criminal mission with intent to intimidate, arbitrary harm and to wipe out the pro-liberation civilians and Hindu civilians. Diabolical acts carried out by the accused persons in collaboration with the Pakistani occupation

army formed part of the horrific mayhem conducted throughout the territory of Bangladesh in 1971.

534. Accused persons being members of auxiliary force remained engaged in providing culpable support and assistance to the Pakistani occupation army in carrying out its atrocious activities with intent to liquidate the pro-liberation civilians perceiving them 'anti-state elements', 'miscreants', to further the key purpose and policy of forming such auxiliary squad..

535. In the case in hand , presumably, in the name of encountering the 'freedom-fighters' and their activities the accused persons deliberately designed plan to attack the unarmed pro-liberation civilians of the locality which eventually ended in killing numerous unarmed civilians, as arraigned in **charge nos. 02 and 03**.

**536. Charge no.04** relates to racial genocide. By launching attack in day time at village-Sukhari under Atpara police station a number of Hindu civilians were taken away and later on annihilated. Accused persons are found to have had explicit participation and substantial contribution in committing the criminal acts at all aspects of the attack with specific intent of which they were quite aware.

537. Conducting such designed and planned and systematic attack launched at a particular Hindu dominated locality directing Hindu community would not have been possible without active, culpable and enthusiastic engagement of the accused persons, we have found it proved.

538. The accused persons are found to have had active and culpable participation in accomplishing devastating activities, unlawful confinement, torture in captivity, forced displacement of scared civilians, as arraigned **in charge nos. 01, 05 and 06**. Offences arraigned in those three charges are also found to be gravely detrimental to fundamental rights of civilians which were committed in violation of laws of war and international humanitarian law.

539. The prohibited acts constituting the offences are known as 'system crimes' or 'group crimes'. Those crimes were not divisible from the horrendous atrocities committed in the territory of Bangladesh in 1971 during the war of liberation. It has now become an undeniable history.

540. The Tribunal, in adjudicating all the charges, already rendered its reasoned decision holding the accused persons criminally liable under the doctrine of JCE [Basic Form] which corresponds to

section 4(1) of the Act of 1973 for the commission of crimes proved [offences of ‘abduction’, ‘confinement’, ‘torture’, ‘other inhumane act’, ‘deportation’, ‘murder’ as crimes against humanity and ‘genocide’].

## **XII. VERDICT ON CONVICTION**

541. For the reasoned findings based on rational appraisal of evidence rendered in our Judgment and having considered argument advanced, we **UNANIMOUSLY** find—

**Two accused (1) Hidaetullah @ Anju @ Md. Hedaetullah @ Anju B.Sc [absconded], (2) Sohrab Fakir @ Sohrab Ali @ Sorab Ali -**

**Charge No.01: GUILTY** of abetting, facilitating and contributing to the commission of the offence of ‘**other inhumane acts**’ as ‘**crime against humanity**’ as specified in section 3(2) (a) (g)(h) of the Act which are punishable under section 20(2) read with section 4(1) of the Act of 1973 and they be convicted and sentenced under section 20(2) of the said Act.

**Accused Hidaetulla @ Anju @ Md. Hedaetullah @ Anju B.Sc-**

**Charge No.02:GUILTY** of participating, substantially contributing and facilitating to the commission of the offences of ‘**murder**’ and ‘**other inhumane act**’ as specified in section

3(2) (a) (g)(h) of the Act which are punishable under section 20(2) read with section 4(1) of the Act of 1973 and he be convicted and sentenced under section 20(2) of the said Act.

**Two accused (1) Hidaetulla @ Anju @ Md. Hedaetullah @ Anju B.Sc and (2) Sohrab Fakir @ Sohrab Ali @ Sorab Ali-**

**Charge No.03:GUILTY** of participating, aiding and substantially facilitating and contributing to the commission of offences of **‘other inhumane act’, ‘torture’ and ‘murder’ as crimes against humanity**, specified in section 3(2) (a) (g)(h) of the International crimes (Tribunals) Act,1973 which are punishable under section 20(2) read with section 4(1) of the Act of 1973 and they be convicted and sentenced under section 20(2) of the said Act.

**Two accused (1) Hidaetulla @ Anju @ Md. Hedaetullah @ Anju B.Sc and (2) Sohrab Fakir @ Sohrab Ali @ Sorab Ali-**

**Charge No.04: GUILTY** of participating, aiding, abetting, substantially contributing to the commission of the offence of **‘genocide’** as enumerated in section 3(2)(c)(i)(ii)(iii)(g)(h) of the Act of 1973 which are punishable under section 20(2) read with section 4(1) of the Act of 1973 and they be convicted and sentenced under section 20(2) of the said Act.

**Accused Sohrab Fakir @ Sohrab Ali @ Sorab Ali-**

**Charge No.05: GUILTY** of participating, aiding and substantially contributing to the commission of offences of ‘**abduction**’, ‘**confinement**’ and ‘**torture**’ as ‘crimes against humanity’ as enumerated in section 3(2)(a)(g) (h) of the Act of 1973 and he be convicted and sentenced under section 20(2) of the said Act.

**Two accused (1) Hidaetulla @ Anju @ Md. Hedaetullah @ Anju B.Sc and (2) Sohrab Fakir @ Sohrab Ali @ Sorab Ali-**

**Charge No.06: GUILTY** of participating, aiding and substantially contributing to the commission of offences of ‘deportation’ and ‘**other inhumane act**’ as crimes against humanity as enumerated in section 3(2)(a)(g)(h) of the International Crime (Tribunals) Act , 1973 and they be convicted and sentenced under section 20(2) of the said Act.

### **XIII. VERDICT ON SENTENCE**

**542. Mr. Mukhlesur Rahman Badal**, the learned Prosecutor concluded summing up by urging that the accused persons should face the highest sentence, , as they are proved to have had consciously participated in committing horrendous crimes proved, by aiding, abetting, contributing and substantially facilitating the gang of perpetrators to which they were active part. The offences arraigned in all the six counts of charges were the outcome of deliberate and systematic attack.

543. The prosecutor further submits that the accused persons with extreme aggression got knowingly engaged in causing brutal torture, grave devastating activities, killing pro-liberation civilians and indiscriminate killing of individuals because of their membership in Hindu religious group.

544. The victims and sufferers of the offences proved loaded with untold magnitude and pattern have been carrying immense trauma which may be taken into account as an aggravating factor; that the role of the accused persons in accomplishing the crimes proved was extremely barbaric and arbitrary and culpable which aggravates their liability, the learned prosecutor added.

545. On contrary, **Mr. Abdus Shukur Khan** submits that prosecution could not prove participation of accused persons or their involvement in the alleged offences for which they have been indicted; that they had no nexus with the army and did not have concern with any of crimes in question in any manner. Thus the accused persons deserve acquittal.

546. We reiterate that in awarding sentence in a case involving offences enumerated in Section 3(2) of the Act of 1973, the Tribunal at all times eyes on the magnitude and extent of the

offences committed together with the role the convicted accused had played and mode of his participation to the perpetration of the crimes proved. At the same time the trauma and harm inflicted to victims and their relatives also considerably act in assessing the gravity of offences.

547. It is to be noted that commission of offences as specified in the Act of 1973 itself portrays enormity, magnitude and diabolical nature of the criminal acts constituting those offences. In the case in hand, it stands proved that accused Hidaetulla @ Anju @ Md. Hedaetullah @ Anju B.Sc was a mighty associate of Pakistani occupation army stationed at Atpara Thana and Modon Thana and he had significant dominance over the locally formed Razakar Bahini in 1971 and that another accused Sohrab Fakir @ Sohrab Ali @ Sorab Ali was a notorious member of locally formed Razakar Bahini and a notorious and close associate of accused Hedaetullah Anju.

548. Victims and relatives of victims may legitimately insist appropriate and just 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 awarded to the accused found guilty of a criminal charge, in a court of law.

549. Undeniably, we are of view that the punishment to be awarded 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 diabolical crimes committed during the war of liberation 1971.

550. We must keep it in mind that sentence must always reflect the inherent level of gravity of a crime which requires consideration of the particular circumstances of the cases, as well as the form and degree of the participation of the convicted accused in the crime.

551. It is now jurisprudentially settled that gravity of offence is the 'litmus test' for the purpose of arriving at decision in respect of the issue of appropriate and just sentence to be awarded. We are to determine the aggravating factors, by weighing the intrinsic gravity of the crimes proved and the form and level of contribution of the convicted accused in accomplishing the crimes

552. In determining the gravity of the crimes, the Tribunal chiefly respects to the legal nature of the offences committed, their scale, the role of the accused played in their commission, and the shock sustained by the victims and their families together with the preamble of the Act of 1973.

553. Accused persons have already been found guilty for the diabolical offences of which they have been indicted. In the case in hand, the convicted accused Hidaetulla @ Anju @ Md. Hedaetullah @ Anju B.Sc and Sohrab Fakir @ Sohrab Ali @ Sorab Ali were not low-level offenders. They, with extreme antagonism consciously participated, aided, abetted and substantially contributed in committing the atrocious criminal activities in collaboration with the Pakistani occupation army directing civilian population of the localities under Atpara and Modon police stations that resulted in murder of numerous pro-liberation non combatant civilians, mass killing, causing inhumane torture and serious mental harm to civilians detaining them unlawfully; creating dehumanizing and coercive conditions, detrimental to fundamental rights of civilians , in furtherance of common purpose and criminal design.

554. Any form of punishment does not make what the victims and sufferers have lost returned. Nevertheless, the grave and barbaric wrongs committed by the convicted accused persons of course need to be righted so that we can uphold the letters of law.

555. A sentence to be awarded must always reflect the inherent level of gravity of a crimes and degree of the participation of the

accused therewith. We should keep in mind too that the letters of law cannot remain non responsive to the relatives of martyr victims and the nation who have been still carrying colossal and appalling trauma for the horrendous atrocious acts experienced in 1971, during the war of liberation.

556. In the case in hand, it is found proved that the accused Hidaetulla @ Anju @ Md. Hedaetullah @ Anju B.Sc and Sohrab Fakir @ Sohrab Ali @ Sorab Ali by their arbitrary and culpable act and conduct participated in committing the offences of devastating activities constituting the offences of ‘other inhumane act’ and ‘deportation’ [**as listed in charge no.01 and 06**]. For no valid necessity they being part of the criminal enterprise actively participated in committing such crimes causing immense mental harm to civilian population and their normal livelihood.

557. Convicted accused Sohrab Fakir is found to have had active and physical participation in committing ‘**abduction**’, ‘**confinement**’ and ‘**torture**’ of a non-combatant civilian constituting the offence as ‘crimes against humanity’ [**as listed in charge no.05**]

558. Criminal acts carried out in course of the event of attacks [**as listed in charge nos. 01, 05 and 06**] did not cause annihilation of

any civilian, true. But the prohibited and arbitrary acts carried out indisputably were grossly detrimental to normal livelihood of unarmed pro-liberation civilian population, causing immense harm and trauma-- already we have rendered reasoned finding in this regard. Participation of convicted accused persons in accomplishing such deliberate prohibited acts makes their antagonistic and aggressive attitude visible.

559. The events involving killing of civilians, [**as listed in charge nos.02 and 03**] were enormously appalling indeed. Victims of the offences arraigned **in charge nos.02 and 03** were near relatives of freedom-fighters. Victims were killed in most dreadful manner, taking them away on forcible capture. Instead of shielding the civilian population the convicted accused persons rather consciously took part in accomplishing the purpose of the criminal mission, in exercise of their potent affiliation in locally formed Razakar Bahini.

560. It is now well settled that a crime is aggravated if it was committed with premeditation. In the case in hand, premeditated and enthusiastic participation of convicted accused persons in the criminal missions in accomplishing killings [**as listed in charge nos.02 and 03**] unambiguously reveals their higher level of criminality.

561. It has been well proved that the accused persons knowingly and sharing specific intent of the gang of perpetrators actively participated in effecting forcible capture of seven Hindu civilians who were gunned down to death [**as listed in charge no.04**], in violation of customary international law and the laws of war. Grave devastating activities and extremely coercive and horrific situation created in conjunction with the attack forced the survived residents of the locality to deport beyond the border of Bangladesh, quitting their homes.

562. All the above aspects of the attack, as found proved cumulatively lead to the conclusion that an offence of ‘**genocide**’[**as listed in charge no.04**] was committed as the attack was ‘specifically intended’ to cripple the civilian population of a particular vicinity, either whole or in part, because it belonged to Hindu religious group.

563. If the acts forming systematic attack directed against Hindu civilian population causing mass killings and creating reign of untold terror[**as listed in charge nos.4**] is not hideous or dastardly, it is beyond understanding as to what other act can be so. The survived Hindu residents of the crime village were the immediate

victims of the menacing form of violence as the attack in its entirety caused serious mental abuse to them.

564. It has been proved too that the attack that resulted in taking away the unlawfully detained victims and devastating activities continued for couple of hours. Such length of first phase of attack [**as listed in charge no.04**] which ended in wiping out the Hindu detainees also aggravates the crimes committed and liability of convicted accused persons who remained stayed with the gang at all aspects of the attack.

565. The deliberate brutality and depravity the convicted accused persons had shown, being conscious part of the criminal enterprise and sharing ‘specific intent’ of the criminal mission deserve to be taken into consideration as ‘aggravating factor’.

566. The offences [**as listed in charge nos.02, 03 and 04**] for which the convicted accused persons have been found guilty were of gravest nature that shakes human conscience, the humanity and civilization. The nation can never forget the lugubrious scar it experienced in 1971. Global community is now expected to stand up and recognize the ‘genocide’ happened in Bangladesh in 1971 and also to raise voice by saying –‘NEVER AGAIN’.

567. The proved crimes [**as listed in charge nos.02, 03 and 04**] are found to be of such kind of gravest crimes which trembles the collective conscience of mankind. At the same time, the victims and relatives of victims and sufferers have been waiting for justice, with enduring cry and trauma. Just and only just punishment may reduce their untold pains to some extent. Only awarding just sentence commensurate to the extreme and intrinsic gravity of the crimes shall also leave space of raising voice against such horrendous acts against humankind.

568. In dealing with the issue of awarding sentence in a case involving the gravest nature of crimes committed in violation of international humanitarian law and the laws of war and the Genocide Convention ,1948 we recall the observation of **Appellate Division of Bangladesh Supreme Court** in the review petition of Ali Ahsan Muhammad Mujahid 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.....It is the duty of the court to impose proper punishment depending upon the criminality and proportionate to the gravity of the offence.’

**[Ali Ahsan Muhammad Mujahid Case,  
Criminal Review Petition No. 62 of 2015,  
Appellate Division, page, 28, 29]**

569. 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 **UNANIMOUS** view that justice would be met if the convicted accused persons who have been found guilty beyond reasonable doubt for the crimes proved are condemned and sentenced as below, under the provision of section 20(2) of the Act of 1973:

**Hence it is**

**ORDERED**

Two [02] accused (1) Hidaetulla @ Anju @ Md. Hadaetullah @ Anju B.Sc, son of late Montaz Uddin Talukder alias Montaz Ali and late Sunneter Nessa @ Akramunnesa of village- Kulosree under Police Station-Atpara of the then Sub-Division Netrokona [now District] and (2) Sohrab Fakir @ Sohrab Ali @ Sorab Ali son of late Suruj Ali and late Liajer Ma of village-Kulosree under Police Station-Atpara of the then Netrokona Sub-Division[ now District] are found guilty of the offences of **‘other inhumane acts’** as **‘crime against humanity’** [as listed in charge no.01] as enumerated in section 3(2) (a) (g) (h) of the International Crimes

(Tribunals) Act, 1973 and they be convicted accordingly and sentenced there under to suffer '**imprisonment for ten[10] years**'.

Accused Sohrab Fakir @ Sohrab Ali @ Sorab Ali is found guilty of the offences of **abduction**, **confinement** and **torture** as 'crimes against humanity' [as listed in charge no.05] as enumerated in section 3(2) (a) (g) (h) of the International Crimes (Tribunals) Act, 1973 and he be convicted accordingly and sentenced there under to suffer '**imprisonment for ten [10] years**'.

Two [02] accused (1) Hidaetulla @ Anju @ Md. Hadaetullah @ Anju B.Sc and (2) Sohrab Fakir @ Sohrab Ali @ Sorab Ali are found guilty of the offences of **deportation** and **other inhumane act** as 'crimes against humanity' [as listed in charge no.06] as enumerated in section 3(2) (a) (g) (h) of the International Crimes (Tribunals) Act, 1973 and they be convicted accordingly and sentenced there under to suffer '**imprisonment for ten[10] years**'.

Accused Hidaetulla @ Anju @ Md. Hadaetullah @ Anju B.Sc is found guilty of the offences of **murder** and **other inhumane act** as crimes against humanity [as listed in charge no.02] as enumerated in section 3(2) (a) (g) (h) of the International Crimes (Tribunals) Act , 1973 and he be convicted and condemned to the

**‘sentence of death’** and accordingly he be hanged by the neck till he is dead, under section 20(2) of the International Crimes (Tribunals) Act, 1973.

Two accused (1) Hidaetulla @ Anju @ Md. Hedaetullah @ Anju B.Sc and (2) Sohrab Fakir @ Sohrab Ali @ Sorab Ali are found guilty of the offences of **‘other inhumane act’, ‘torture’ and ‘murder’** as ‘crimes against humanity’ **[as listed in charge no.03]** as enumerated in section 3(2) (a) (g) (h) of the International Crimes (Tribunals) Act , 1973 and they be convicted and condemned to the **‘sentence of death’** and accordingly they be hanged by the neck till they are dead, under section20(2) of the International Crimes (Tribunals) Act, 1973.

Two accused (1) Hidaetulla @ Anju @ Md. Hedaetullah @ Anju B.Sc and (2) Sohrab Fakir @ Sohrab Ali @ Sorab Ali are found guilty of the offences of **‘genocide’ [as listed in charge no.04]** as enumerated in section 3(2)(c)(i)(ii)(iii)(g)(h) of the International Crimes (Tribunals) Act , 1973 and they be convicted and condemned to the **‘sentence of death’** and accordingly they be hanged by the neck till they are dead, under section20(2) of the International Crimes (Tribunals) Act, 1973.

However, as the convict accused persons have been condemned to **‘sentences of death’**, as above, the **‘sentence of imprisonment for ten[10] years’** awarded in respect of charge nos. 01,05 and 06 will get merged into the ‘sentences of death ’ as awarded above. The sentence of imprisonment awarded as above in respect of charge nos. 01, 05 and 06 shall be carried out under section 20(3) of the Act of 1973.

The sentence of imprisonment for ten[10] years as awarded above shall commence from the date of this judgment or from the date of arrest or surrender of the absconded accused as required under Rule 46(2) of the Rules of Procedure, 2010(ROP) of the Tribunal-1[ICT-1].

The ‘sentence of death’ awarded as above under section 20(2) of the International Crimes (Tribunals) Act , 1973 [The Act No.XIX of 1973] shall be carried out and executed in accordance with the order of the Government as required under section 20(3) of the said Act.

Since one convicted accused Hidaetulla @ Anju @ Md. Hedaetullah @ Anju B.Sc has been absconding the ‘sentence of death’ as awarded above shall be executed after causing his arrest or when he surrenders before the Tribunal, whichever is earlier, in

accordance with the order of the Government as required under section 20(3) of the said Act.

The convicted accused Sohrab Fakir @ Sohrab Ali @ Sorab Ali [present on dock as brought from prison] be sent to the prison with conviction warrant accordingly.

Let the conviction warrant against the absconding convicted accused Hidaetulla @ Anju @ Md. Hedaetullah @ Anju B.Sc also be issued at once.

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 Secretary, Ministry of Home Affairs and the Inspector General of Police [IGP], Bangladesh Police are hereby directed to initiate effective and appropriate measure for ensuring arrest of the convict absconding accused Hidaetulla @ Anju @ Md. Hedaetullah @ Anju B.Sc.

Let certified copy of this judgment be provided to the prosecution and the convict accused Sohrab Fakir @ Sohrab Ali @ Sorab Ali free of cost, at once.

If the absconding convict accused persons Hidaetulla @ Anju @ Md. Hedaetullah @ Anju B.Sc is arrested or surrenders within 30[thirty] days of the date of order of conviction and sentence he will be provided with certified copy of this judgment free of cost.

Let a copy of this judgment together with the conviction warrant of the convict accused Sohrab Fakir @ Sohrab Ali @ Sorab Ali be sent to the District Magistrate, Dhaka for information and necessary action.

**Justice Md. Shahinur Islam, Chairman**

**Justice Amir Hossain, Member**

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