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International Crimes Tribunal-2 (ICT-2)

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

Old High Court Building, Dhaka, Bangladesh

ICT-BD Case No. 04 of 2012

[Charges: crimes against Humanity and aiding & complicity to commit such crimes as specified in section 3(2)(a)(g)(h) of the Act No. XIX of 1973]

The Chief Prosecutor

Vs

Ali Ahsan Muhammad Mujahid

Before

Justice Obaidul Hassan, Chairman

Justice Md. Mozibur Rahman Miah, Member

Judge Md. Shahinur Islam, Member

For the Prosecution:

Mr. Golam Arief Tipoo, Chief Prosecutor

Mr. Mokhlesur Rahman Badal, Prosecutor

Ms. Tureen Afroz, Prosecutor

Mr. Abul Kalam, Prosecutor

Ms. Sabina Yesmin Khan, Prosecutor

Mr. Tapas Kanti Baul, Prosecutor

For the Accused:

Mr. Abdur Razzak, Senior Advocate, Bangladesh Supreme Court

Mr. Syed Mizanr Rahman, Advocate, Bangladesh Supreme Court

Mr. Munshi Ahsanul Kabir, Advocate, Bangladesh Supreme Court

Mr. Emran Siddique, Advocate, Bangladesh Supreme Court

Mr. Gazi M.H Tamim, Advocate,

Date of delivery of Judgment: 17 July 2013

JUDGEMENT

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

I. Opening words

Before we render our verdict we should not be failing to recall the efforts extended by both sides, at all stages of proceedings. We extend our

appreciation to the commendable performance presented particularly on legal issues advanced by both sides. Ali Ahsan Mohammad Mujahid has been arraigned of internationally recognized crimes i.e. crimes against humanity perpetrated in 1971 in the territory of Bangladesh, during the War of Liberation, under the International Crimes (Tribunals) Act, 1973. After conclusion of trial this Tribunal [ICT-2], a domestic court of law constituted under the International Crimes (Tribunals) Act, 1973 is sitting today to render its unanimous Judgement and verdict.

In addition to legal and factual aspects involved, we consider it necessary and relevant to address and resolve the historical and contextual background, characterization of crimes, commencement of proceedings, procedural history reflecting the entire proceedings, charges framed, in brief, and the laws applicable to the case for the purpose of determining culpability of the accused. It is to be noted that particularly in resolving legal issues we will make reiteration on our earlier deliberations and finding on it given in the case of *Chief Prosecutor v. Abdul Quader Molla* [ICT-BD Case No. 02 of 2013 Judgment: 05 February 2013] and *Chief prosecutor v. Muhammad Kamaruzzaman* [ICT-BD Case No. 03 of 2012 Judgment: 09 May 2013] with necessary addition. Finally, on cautious appraisal of evidence adduced, we have penned our finding on alleged culpability of the accused, in relation to charges, by making independent adjudication.

Now, having regard to 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-2 (ICT-2) hereby renders and pronounces the following unanimous judgment. **II. Commencement of proceedings**

1. On 18 December 2011, the Prosecution filed the ‘formal charge’ in the form of petition as required under section 9(1) and Rule 18(1) of the Rules of Procedure 2010 [ICT-1] against accused Ali Ahsan Muhammad Mujahid. After affording due opportunity of perpetration to accused, the Tribunal[ICT-1] , took cognizance of offences as mentioned in section 3(2) (a)(b)(g)(h) of the Act of 1973. On receipt of the case record on transfer this Tribunal [ICT-2], after hearing both sides and on perusal of the formal charge, documents

and statement of witnesses framed seven charges on distinct event of criminal acts constituting the offence of ‘crimes against humanity’ and ‘genocide’ as specified in the Act of 1973. The charges so framed were read out and explained to the accused Ali Ahsan Muhammad Mujahid in open court when he pleaded not guilty and claimed to be tried and thus the trial started.

III. Introductory Words

2. The 2nd Tribunal [ICT-2] has been set up on 22 March 2012. The notion of fairness and due process as have been contemplated in the Act and the Rules of Procedure, 2012 (ROP) formulated by the Tribunal [ICT-2] under the powers conferred in section 22 of the principal Act is to be assessed with reference to the national wishes such as, the long denial of justice to the victims of the atrocities committed during war of liberation 1971 and the nation as a whole, together with the recognized norms and jurisprudence evolved.

3. The Act XIX enacted in 1973 which is meant to prosecute crimes against humanity, genocide and system crimes committed in violation of customary international law is *ex-post facto* legislation. It is fairly permitted. It is to be noted that the ICTY, ICTR and SCSL the adhoc Tribunals backed by the United Nations (UN) have been constituted under their respective retrospective Statute. Only the International Criminal Court (ICC) is founded on prospective Statute [Rome Statute]. The 1973 Act of Bangladesh has the merit and means of ensuring the standard of safeguards recognized universally to be provided to the person accused of crimes against humanity.

IV. Jurisdiction of the Tribunal

4. The Act of 1973 is meant to prosecute, try and punish not only the armed forces but also the perpetrators who belonged to ‘auxiliary forces’, or who committed the offence as an ‘individual’ or a ‘group of individuals’ or ‘organisation’[as amended with effect from 14.7.2009]. 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. We reiterate that the Tribunal set up under the Act of 1973 is absolutely a

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

V. Brief Historical Background

5. Atrocious and dreadful crimes were committed during the nine-month-long war of liberation in 1971, which resulted in the birth of Bangladesh, an independent state and the motherland of the Bengali nation. Some three million people were killed, nearly quarter million women were raped and over 10 million people were forced to take refuge in India to escape brutal persecution at home, during the nine-month battle and struggle of Bangalee nation. The perpetrators of the crimes could not be brought to book, and this left a deep scratch on the country's political awareness and the whole nation. The impunity they enjoyed held back political stability, saw the rise of militancy, and destroyed the nation's Constitution.

6. 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.

7. 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.

8. The history goes on to portray that in the general election of 1970, the Awami League under the leadership of Bangabandhu Sheikh Mujibur Rahman became the majority party of Pakistan. But 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 in his historic speech of 7th March, 1971, called on the Bangalee nation to struggle for independence if people's verdict is not respected. In the early hour of 26th March, following the onslaught of "Operation Search Light" by the Pakistani Military on 25th March, Bangabandhu declared Bangladesh independent immediately before he was arrested by the Pakistani authorities.

9. The 'operation' was designed to disarm and liquidate Bengali policemen, soldiers and military officers, to arrest and kill nationalist Bengali politicians, soldiers and military officers, to arrest and kill and round up professionals, intellectuals, and students. Afterwards, actions in concert with its local collaborator militias, Razakar, Al-Badar and the key pro-Pakistan political organisation Jamat E Islami (JEI) were intended to stamp out the Bengali national liberation movement and to mash the national feelings and aspirations of the Bangalee nation.

10. A well-known researcher on genocide, **R.J. Rummel**, in his book '*Statistics of Democide: Genocide and Mass Murder Since 1900*', states:

"In East Pakistan [General Agha Mohammed Yahya Khan and his top generals] also planned to murder its Bengali intellectual, cultural, and political elite. They also planned to indiscriminately murder hundreds of thousands of its Hindus and drive the rest into India. And they planned to destroy its economic base to insure that it would be subordinate to West Pakistan for at least a generation to come."

11. In the War of Liberation that ensued, all people of East Pakistan unreservedly supported and participated in the call to free Bangladesh but a small number of Bangalees, Biharis, other pro-Pakistanis, as well as members of a number of different religion-based political parties, particularly Jamat E Islami (JEI) and its student wing Islami Chatra Sangha (ICS) joined and/or collaborated with the Pakistan occupation army to aggressively resist the conception of independent Bangladesh and most of them committed and facilitated the commission of appalling atrocities in violation of customary

international law in the territory of Bangladesh. It also experienced unprecedented devastation of properties all over Bangladesh.

12. The Pakistan government and the military formed number of auxiliary forces such as the Razakars, the Al-Badar, the Al-Shams, the Peace Committee etc, essentially to act as a team with the Pakistani occupation army in identifying and eliminating all those who were perceived to be pro-liberation, individuals belonging to minority religious groups especially the Hindus, political groups belonging to Awami League and Bangalee intellectuals and unarmed civilian population of Bangladesh.

13. A report titled ‘A Country Full of Corpses’ published in SUMMA Magazine, Caracas, October 1971[Source: Bangladesh Documents- Volume II, page 76] speaks that

“The extermination of the Jewish people by the Nazi regime, the atomic crime of Hiroshima and Nagasaki, the massacre of Biafra, the napalm of Vietnam, all the great genocides of humanity have found a new equivalent: East Pakistan.A pathetic view of the tragedy is given to us by the fact that in a single night in the city of Dacca were killed 50,000 persons by the invading army. Between 26 March—the date of invasion—and this moment, the dead reach more than a million, and every day 30,000 persons leave East Pakistan and take refuge in Indian territory. “

14. Incontrovertibly the ways to self-determination for the Bangalee nation was strenuous, swabbed with enormous blood, strive and sacrifices. In the present-day world history, conceivably no nation paid as extremely as the Bangalee nation did for its self-determination.

15. Jamat E Islami (JEI), as an organization, substantially contributed in creating the para-militia forces (auxiliary force) for combating the unarmed

Bangalee civilians, in the name of protecting Pakistan. Al- Badar is believed to have been the 'action section' of Jamat-e-Islami, carefully organised after the Pakistani crackdown last March [**Fox Butterfield** in the **New York Times**- January 3, 1972: **Source:** Bangladesh Documents Vol. II Ministry of External Affairs New Delhi]

VI. Brief account of the Accused

16. Accused **Ali Ahsan Muhammad Mujahid** son of late Moulana Abdul Ali and late Begum Nurjahan of '*Paschim khabashpur*' under Kotwali police station district Faridpur, at present Road No. 10, House No. 05, Flat No. 2/A, Sector-11, Police Station Uttara, Dhaka Metropolitan Police, Dhaka was born on 02 January 1948. He obtained SSC in 1964 and thereafter studied in Faridpur Rajendra College when he joined the Islami Chatra Sangha. During 1968-1970 he was the president of Faridpur district Islami Chatra Sangha. In 1970 he got himself admitted in the department of Law, University of Dhaka. He was nominated as the President of Dhaka district Islami Chatra Sangha and in the same year, in the month of August/September he was assigned with the responsibility of Secretary, East Pakistan Islami Chatra Sangha. Thereafter, in the month of October, 1971 he was elected Provincial President of the organization and also became the Chief of Al-Badar Bahini, as alleged. Ali Ahsan Muhammad Mujahid belonged to a political family. His father late Moulana Abdul Ali was a member of 'Provincial Assembly' of the then East Pakistan since 1962-1964. Ali Ahsan Muhammad Mujahid contested the parliamentary election in 1986, 1991, 1996 and 2008 but could not succeed even for once. He was the social welfare Minister of the BNP-Jamat alliance government during 2001-2006.

VII. Procedural History

Tribunal-1

(i) Detention & Interrogation of the Accused

17. Since pre-trial stage, on an application under Rule 9(1) of the Rules of Procedure initiated by the Chief Prosecutor seeking arrest, accused Ali Ahsan Muhammad Mujahid has been in detention in connection with this case, for the purpose of effective and proper investigation. In course of hearing the matter, it was learnt that the accused was already in custody in connection

with some other cases. As a result, pursuant to the production warrant (PW) issued by the Tribunal (Tribunal-1) the accused was produced before the Tribunal (Tribunal-1) by the prison authority and then he was shown arrested /detained as an accused before the Tribunal. Accordingly, since 02.10.2010 the accused Ali Ahsan Muhammad Mujahid has been in custody in connection with the case before us.

18. The Tribunal (Tribunal-1), since his detention, has entertained a number of applications seeking his release on bail and the same were disposed of in accordance with law and on hearing both sides. The Tribunal[ICT-1] also allowed the learned defence counsels to have privileged communication with the accused detained in prison. To prohibit coercion and torture of any kind, the Tribunal[ICT-1] also ordered the presence of engaged counsel and a doctor at a room adjacent to the room of the 'safe home' where the Investigation Agency was allowed to interrogate the accused.

(ii) Submission of Formal Charge

19. Finally, the Chief Prosecutor submitted the Formal Charge under section 9(1) of the Act on 11.12.2011. But on considering it the Tribunal directed the prosecution by its order dated 28.12.2011 to submit it afresh in an arranged and systematic form.

(iii) Defence application seeking dismissal of the case

20. On 04.1.2012 an application was filed on behalf of the accused seeking dismissal of the case on the grounds stated therein. The Tribunal[ICT-1] on hearing the matter rejected the application by its order dated 09.1.2012 finding that the application was premature and not tenable in law.

(iv) Re-submission of Formal Charge

21. As directed, the prosecution re-submitted the 'formal charge' on 16.01.2012 on accepting of which the Tribunal [ICT-1] fixed 26.1.2012 for passing order on cognizance matter. Meanwhile, on 25.1.2012 defence filed an application seeking privileged communication between the accused and his counsel in prison. The Tribunal [ICT-1] on hearing the matter allowed the privileged communication as prayed for.

(v) Taking Cognizance of Offences [By the ICT-1]

22. On 26.1.2012, the Tribunal, considering the Formal Charge and documents submitted therewith, having found prima facie case, took cognizance of offences under the International Crimes (Tribunals) Act 1973 against the accused Ali Ahsan Muhammad Mujahid and fixed 23.2.2012 for hearing the charge matter with direction to submit documents for providing the same with the accused within 31.1.2012. Meanwhile, the defence filed an application praying for shifting the date of privileged communication as ordered earlier. The Tribunal [ICT-1] however, allowing the prayer re-scheduled 25.2.2012 for having privileged communication.

(vi) Charge Hearing Matter [Commenced in ICT-1]

23. On 23.2.2012, prosecution prayed an adjournment of 04 weeks on charge hearing matter. The Tribunal [ICT-1] allowing the prayer fixed 11.3.2012 for hearing charge matter. Accordingly hearing on charge framing matter commenced on 11.3.2012 and 20.3.2012 was fixed for further hearing on the matter. On the date fixed prosecution concluded its hearing and considering the submission made by the defence the Tribunal [ICT-1] fixed 22.3.2012 for further hearing on charge matter. Argument, on charge framing matter, on part of the accused took place on 22.3.2012, 28.3.2012, 02.4.2012.

Tribunal-2**(vii) Transmission of the case to ICT-2**

24. At the stage of charge hearing matter the case record of ICT-BD Case No. 04 of 2011[ICT-1] was transmitted to this Tribunal [ICT-2] by its order dated 25.4.2012 under section 11A (1) of the Act, for expeditious trial and disposal of the case, on prayer of Chief Prosecutor.

(viii) Charge Framing [In ICT-2]

25. This Tribunal [ICT-2] received the case record on 10.5.2012. Earlier, the case was at stage of hearing the charge framing matter. Thus, this Tribunal had to hear the matter afresh as required under section 11A (2) of the Act. The

hearing took place on 16 May, 21 May, 24 May, 29 May, 30 May, 31 May and 05 June 2012. The Tribunal-2, on consideration of deliberations made by both sides and the formal charge together with the materials and statement of witnesses submitted by the prosecution, finally framed as many as 07 charges against the accused Ali Ahsan Muhammad Mujahid on 21 June 2012 which were read over and explained to the accused, in open court, to which he pleaded not guilty and claimed to contest the charges so framed. At the same time the Tribunal fixed 19.7.2012 for opening statement and examination of witnesses by the prosecution with direction to the accused to submit a list of witnesses along with documents which the defence intended to rely upon.

(ix) Review Application by the defence & Privileged Communication

26. The defence preferred review [application filed on 01.7.2012] of the order framing charges under Rule 26(3) of the ROP on hearing which the Tribunal by its order dated 15.7.2012 rejected the application with observations that the issues raised at that stage would be better resolved at trial.

27. The Tribunal once again allowed privileged communication by its order dated 14.8.2012 as prayed by the accused. Prosecution started examining its witnesses on 26.8.2012 and on the same day Defence submitted a list of witnesses along with documents which the defence intended to rely upon.

(x) Examination of prosecution Witnesses

28. On 07.4.2013 the Tribunal rejected an application initiated by the prosecution under section 19(2) of the Act of 1973 with prayer to receive statement of one witness on the grounds stated therein. However, prosecution adduced and examined in all 17 witnesses including Investigating Officer and two seizure list witnesses. Examination and cross-examination of prosecution witnesses have been concluded on 22.4.2013. On the same day by a separate order the defence was allowed to have privileged communication for third occasion as prayed for.

(xi) Examination of Defence Witnesses

29. Meanwhile, the Tribunal [ICT-1] by its order dated 16.4.2013 allowed the defence to adduce and examine three witnesses preferably from the list

submitted under section 9(5) of the Act of 1973. It is to be noted that the defence submitted a list of 1315 witnesses. However, keeping consonance with the section 11(3) of the Act of 1973 and Rule 43(5) of the ROP the Tribunal in exercise of its inherent powers contained in Rule 46A of the ROP together with the powers given under section 22 of the Act of 1973 the Tribunal considered it just and appropriate to pass such an order regulating the number of defence witnesses.

30. 05 May 2013 was fixed for examination of defence witnesses. Defence duly produced and examined one witness who mainly proved and exhibited some of documents and books which have been marked as well. As the defence informed the Tribunal that it did not intend to examine any more witness the Tribunal fixed 07.5.2013 for summing up of the prosecution case as required under section 10(1)(i) of the Act of 1973.

(xii) Summing up of cases

31. The summing up of case by the prosecution continued for four days [07 May, 12 May, 15 May and 16 May 2013]. Defence placed its summing up for couple of days starting from 22 May 2013 and it ended on 05 June 2013. Prosecution was allowed to reply on law points only, for one hour. After closing the summing up of cases the Tribunal kept the case under CAV for rendering and pronouncement of its Judgment.

VIII. Applicable laws

32. The proceedings before the Tribunal shall be guided by the International Crimes (Tribunals) Act 1973, the Rules of Procedure 2012 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]. 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)]. 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)]. Defence shall have right to examine witnesses [Section 10(1) (f) of the Act of 1973].

33. Cross-examination is significant in confronting evidence. The Act of 1973 provides right of accused to cross-examine the prosecution witnesses. The Tribunal may receive in evidence statement of witness recorded by Magistrate or Investigation Officer only when the witness who has subsequently died or whose attendance cannot be procured 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 despite prayer on part of the prosecution.

34. Both the Act of 1973 and the Rules (ROP) have adequately ensured the universally recognised rights of the defence. Additionally, the Tribunal, in exercise of its discretion and inherent powers as contained in Rule 46A of the ROP, has adopted numerous practices for ensuring fair trial by providing all possible rights of the accused. Since the Act of 1973 is meant to prosecute and try the persons responsible for the offence of crimes against humanity, committed in violation of customary international law, the Tribunal however is not precluded from seeking guidance from international reference and relevant jurisprudence, if needed to resolve legal issues related to adjudication of charges and culpability of the accused.

IX. The Universally Recognised Rights of Accused Ensured by the Act of 1973

35. Ensuring rights of accused is a pertinent issue involved in any criminal trial. Fair trial concept stems from the recognized rights of accused. The Tribunal [ICT-2], a domestic judicial forum constituted under our own legislation enacted in the Parliament and is obliged to guarantee the rights of the accused and key elements of fair trial which are (i) right to disclosure (ii) public hearing (iii) presumption of innocence (iv) adequate time to prepare defence (v) expeditious trial (vi) right to examine witness (vii) right to defend by engaging counsel. All the rights including these ones have been provided to the accused so that the fair trial requirements are satisfied.

Right to Disclosure

36. Article 9(2) ICCPR contains-“Anyone who is arrested shall be informed, at the time of arrest, of the reasons for his arrest and shall be promptly informed of any charges against him.” This provision compatibly reflects in the Rule 9(3) of ROP that provides-“At the time of executing the warrant of arrest under sub-rule (2) or later on, copy of allegations is to be served upon such person.” Further, Rule 18 (4) of ICT-BD provides “The Chief prosecutor shall file extra copies of formal charge and copies of other documents for supplying the same to the accused(s) which the prosecution intends to rely upon in support of such charges so that the accused can prepare his defence.”

37. Thus, right to disclosure has been adequately ensured so that the suspect person can have fair opportunity to defend his own interest. The Tribunal has allowed privileged communications between the accused and his engaged counsels, in prison as and when prayed for.

To be presumed innocent till found guilty

38. The right to be presumed innocent until proven guilty is one of the cornerstones of fair trial proceedings and is related to the protection of human dignity. It is universally accepted settled jurisprudence. In common law system, defence is to prove nothing and he or she shall be presumed innocent till found guilty. No one can be convicted unless the charge brought against him is proved 'beyond reasonable doubt'. This is the standard and universally settled criminal jurisprudence that all the courts constituted under valid legislation will follow. In ICT-BD the provision that the burden of proving the charge shall lie upon the prosecution (Rule 50) amply implicates the theory of innocence of an accused until and unless he is held guilty through trial. Besides, a person charged with crimes as described under section 3(2) of the Act shall be presumed innocent until found guilty [Rule 43(2) of the ROP].

Adequate time to prepare defence

39. The key element of fair trial notion is the right of an accused to have adequate time and facilities for the preparation of his defense during all stages of the trial. What time is considered adequate depends on the circumstances of

the case. The concept of fairness is the idea of doing what's best and level-headed.

40. The 'three weeks' time is given to the defense to prepare. Section 9(3) of the Act of 1973 explicitly provides that 'at least three weeks' before the commencement of the trial, the Chief Prosecutor shall have to furnish a list of witnesses along with the copies of recorded statement and documents upon which it intends to rely upon. Additionally, what time is considered adequate depends on the circumstances of the case. The ICT-BD is in practice not to deny any of accused's right to have time necessary for preparation of his defense or interest.

Expediiousness of the proceedings

41. The expediiousness and fairness of the proceedings are intertwined. It is an important element of the right to a fair trial, namely the right to be tried without undue delay. Provisions contained in sections 11(3) and 13 of the Act of 1973 require the Tribunal for ensuring expediious proceedings. Tribunal also notes that parties cannot cause setback the proceedings at will or by seeking unjustified adjournments. In this regard we may recall the observation made in the case of *Kayishema and Obed Ruzindana* by The ICTR Appeals Chamber which is as below:

“Procedural time-limits are to be respected, and . . . they are indispensable to the proper functioning of the Tribunal and to the fulfillment of its mission to do justice. Violations of these time-limits, unaccompanied by any showing of good cause, will not be tolerated.” [*Prosecutor v. Clément Kayishema and Obed Ruzindana*, Case No. ICTR-95-1-A, Judgment (Reasons), 46 (June 1, 2001).]

42. In the case in hand, both parties were afforded adequate time in conducting their respective case. The principle of equality of arms means that the Prosecution and the Defence must be equal before the Tribunal. Keeping the notion in mind the Tribunal was mindful in providing every practicable

facility it was capable of granting under the Rules and the Act of 1973 when faced with a request by either party for assistance in presenting its case.

Right to examine witnesses

43. Under section 10(1) (f) of the Act of 1973 defence shall have right to examine witness, if any. In the case in hand, defence submitted a list of 1315 witnesses under section 9(5) of the Act of 1973 at the commencement of trial. Submitting such a long list is indeed unheard of. However, eventually considering the defence case extracted from the trend of cross-examination of prosecution witnesses the Tribunal [ICT-2] permitted the defence to produce and examine only 03 witnesses preferably from their list, in exercise of power given in section 22 of the Act and Rule 46A of the ROP. But however, defence produced and examined only one(01) witness who has mainly proved and exhibits some documents.

44. Therefore the ICT-2 guarantees the required procedural protections of the accused's right to fair trial both in pre-trial phase and during trial as well. The Act of 1973 and the Rules [ROP] framed there under are explicitly compatible with the fair trial concept as contained in the ICCPR. We have given a portrayal on compatibility of provisions in ICT Act with the ICCPR in the case of *Muhammad Kamaruzzaman* [ICT-BD Case No.03 pf 2012, Judgement 09 May 2013, para 63].

45. Additionally, it will be evident from above procedural account that the Act of 1973 does indeed adhere to most of the rights of the accused enshrined under Article 14 of the ICCPR. However, from the aforementioned discussion it reveals that all the key rights have been adequately ensured under the International Crimes (Tribunals) Act, 1973 and we will find that those fairly correspond to the ICCPR.

X. Universally Recognised Rights of Victims

46. The Tribunal notes that the State has an obligation to remedy serious human rights violations. Bangladesh recognizes Article 8 of the Universal Declaration of Human Rights [UDHR] and Article 2(3) of the International

Covenant of Civil and Political Rights [ICCPR] which ensure the right to an effective remedy for the violation of human rights.

47. We reiterate our reasoned observation recorded in the case of *Muhammad Kamaruzzaman* [ICT-BD Case No.03 pf 2012, Judgement 09 May 2013, para 66, 67] with reference to **Article 2(3) ICCPR** that

“the victims of systematic and organised diabolical atrocities committed in 1971 within the territory of Bangladesh in violation of customary international law need justice to heal. Bangladesh considers that the right to remedy should also belong to victims of crimes against humanity. It is also to be kept in mind together with the rights of accused, for rendering justice effectively”.

XI. Summing up of cases

a. Summing up of the Prosecution

48. Mr. Mukhlesur Rahman Badal, the learned Prosecutor in course of summing up of prosecution case has submitted a brief portrayal of historical background that had enthused the Bengali nation to the movement of self-determination which eventually got shape of War of Liberation. The learned prosecutor went on to submit that the then Pakistani government and the occupation troops’ policy was to resist the war of liberation in its embryo and as such ‘**operation search light**’ was executed in Dhaka causing thousands of killing and mass destruction, with the aid and organizational support mainly from Jamat-E-Islam (JEI), its student wing Islami Chatra Sangha (ICS) and pro-Pakistan political bodies and individuals. Respecting the preamble of the International Crimes (Tribunals) Act 1973 (The Act XIX of 1073) the government has constituted this Tribunal for prosecution and punishment of persons responsible for genocide, crimes against humanity committed in the territory of Bangladesh in 1971.

49. Next, the learned Prosecutor, in continuation of his summing up presentation, by drawing attention to the documents exhibited submitted that the accused Ali Ahsan Muhammad Mujahid has been indicted for committing

criminal acts forming part of systematic attack that resulted in the commission of the offences of crimes against humanity and genocide, as listed in 07 charges framed. Al-Badar, an 'auxiliary force' was formed of workers of Islami Chatra Sangha [ICS] the student wing of JEI and the accused, during the war of liberation was in position of president of ICS, Dhaka district, then secretary of the then East Pakistan ICS and finally was in position of president of the then East Pakistan ICS till 16 December 1971. As the chief of Al-Badar[AB] accused Ali Ahsan Muhammad Mujahid had acted in the capacity of 'superior' of the Al-Badar force and was actively concerned with the criminal acts for which he has been charged with.

50. It has been further submitted that oral testimony as well as the documentary evidence presented will go to prove it beyond reasonable doubt that the accused Mujahid as the head of Al-Badar and also a member of group of individuals abetted, facilitated the actual commission of crimes as narrated in charge nos. 1, 5 and 6 which happened in Dhaka. Prosecution has been able to prove beyond reasonable doubt by adducing witnesses that the accused also committed and actively participated the crimes as described in charge nos. 2,3,4 and 7 which took place in his home town Faridpur.

51. As regards **charge no.1** the learned prosecutor submitted that notable journalist was abducted and afterwards killed as a part of planned killing of intellectuals. The accused by his acts, conducts and inciting statement and speeches encouraged and abetted the commission of abduction by the principals, the Al-Badar men.

52. Ms. Tureen Afroz in advancing an added argument on **charge no.1** has submitted that the event of Journalist Seraj Uddin Hossain abduction was a part of pattern crime and in furtherance of common policy and design that occurred at the verge of nation's victory on 16 December. Conduct and act of the accused coupled with his position of authority in ICS and culpable association with the AB demonstrates beyond reasonable doubt that the accused also had significant contribution to the commission of the crime under charge no.1 which was actually perpetrated by AB men. A defence document [a report: Defence Documents Volume 14, page 463-464] proves it too that the accused Mujahid was in a position of authority of AB at the relevant period

and as such it can be inferred validly that he was also a party to the common plan and purpose of collective criminal enterprise in accomplishing the crime of abduction of Seraj Uddin Hossain.

53. In respect of **charge no.2** it has been argued that the accused accompanied the group of perpetrators to the crime site and thereby he facilitated and provided moral support to the commission of crimes of mass killing of civilians belonging to Hindu community. Prosecution witnesses have testified it and there is no reasonable ground to discredit their credibility. Some relevant facts showing accused's conduct as testified by P.W.8 and P.W.10 lends corroboration to the fact that the accused accompanied the group of perpetrators to the crime site. Accused made inciting speech in Faridpur, his home town, to target the Hindu community.

54. In making argument on **charge no.3** the learned prosecutor has submitted that the victim of the offence of confinement and torture himself has testified the presence of the accused at the army camp where he [P.W.7] was brought by the group of perpetrators and the accused by his conduct had encouraged and facilitated to the commission of the crime narrated in charge no.3.

55. On arguing on **charge no. 4** Ms. Tureen Afroz , the learned prosecutor submitted that the event of confining and causing torture to Abu Yusuf Pakhi has been proved in the case of *Abul Kalam Azad*. Tribunal's finding made therein together with statement of P.W.6 and P.W.8 on relevant facts made in the present case sufficiently proves accused's collective criminal association and culpability.

56. In respect of **charge no.5** it has been argued that P.W.2 Jahiruddin Jalal testified that he was forcibly brought to the army camp set up at old MP hostel at Nakahlpara, Dhaka city where he found accused Mujahid present who physically tortured him and he also found him telling to liquidate the other detainees whom he could recognize. This relevant fact together with the conduct of accused as revealed from evidence of P.W.5 proves it beyond reasonable doubt that the accused was linked with the event of killing of persons detained at the army camp.

57. As regards **charge no. 6** which relates to ‘intellectuals killing’ it has been argued by the prosecution that the event of abduction and killing took place in between 10 to 16 December 1971. The principal perpetrators were the Al-Badar men. It was an organized and planned killing intended to liquidate the best sons of the soil to cripple the Bengali nation. As a leader of AB force accused Ali Ahsan Muhammad Mujahid cannot evade liability of perpetration of the event of killings. From evidence of P.W.5 Md. Rustom Ali Molla on some relevant facts it would reveal that the accused was closely affiliated with the activities carried out by the Al-Badar headquarters and the Al-Badar men. He was a part of common purpose of the organization and accused’s conduct demonstrates that he knew or had reason to know about the commission of the crime of large scale killing as alleged. At the same time the accused is liable under section 4(1) of the Act of 1973 which conforms with the concept of Joint Criminal Enterprise [JCE].

58. In advancing argument on **charge no.7** the learned prosecutor Mr. Mukhlesur Rahman Badal has submitted that it has been proved beyond reasonable doubt by the evidence of P.W.12 and P.W.13 that the accused accompanied the group of perpetrators to the crime village *Bakchar* and actively participated to the commission of killing of Hindu civilians, by sharing common intent. P.W.13 Shakti Saha, an eye witness, has narrated how the event was committed and how the accused participated to its commission.

b. Summing up of case by the defence

59. Mr. Syed Mizanur Rahman, the learned defence counsel, on arguing on charge no.1, has submitted that as Mujahid was not involved with Al-Badar, responsibility of the force does not fall upon him. The Charge No.1 describes that accused Mujahid wrote an article in the daily Sangram on September 16, 1971, countering a write-up of Seraj Uddin Hossain, the then executive editor of daily Ittefaq terming Seraj Uddin Hossain an “agent of India” and thus Seraj Uddin Hossain became the target of Al-Badar and was abducted by seven to eight armed men on December 10, 1971. He had never returned and his body could not be found even.

60. The learned defence counsel went on to submit that P.W.4 Shaheen Reza Noor the son of victim Seraj Uddin Hossain had testified before the Tribunal

that he did not know who wrote the 'counter article'. Investigation officer Abdur Razzaque Khan [P.W.17] also said that he did not "verify" the identity of the article writer. Thus this part of narration made in the charge no.1 does not go against the accused and as such the accused cannot be said to have abetted and facilitated the commission of alleged abduction.

61. Mr. Mizanur further submitted that one Khalil was prosecuted tried and convicted under the Collaborators Order 1972 for the offence of killing Seraj Uddin Hossain and he was sentenced to imprisonment for life. But present accused's name was not even mentioned in that case. It indicates that 40 years ago he [Mujahid] was an unfamiliar figure and he was a student leader of ICS which was a merely name-only organization.

62. As regards **charge no.1** the learned senior counsel has argued that assuming that alleged counter article was written by the accused, as described in charge no.1, it had no substantial effect on act of abduction of Seraj Uddin Hossain and as such the accused cannot be held guilty for abetting the crime.

63. In respect of **charge no.2** Mr. Mizanur submitted that three prosecution witnesses had given testimonies supporting the charge. But of them Abdul Malek Mia is an "anonymous hearsay witness" who testified that he had visited the affected Hindu villages and heard about Mujahid and others from the survivors. P.W.9 Narayan Chandra Sarkar had not mentioned before the investigation officer what he testified before the Tribunal. His version made in court is subsequent embellishment and cannot be relied upon. P.W.11 Fayez Uddin's testimony is contradictory to what he had stated during his cross-examination. Thus the charge could not be proved at all.

64. In respect of **charge no. 2** it has been submitted too that 'mere presence' of the accused at the crime site does not form part of attack Prosecution needs to prove that accused's presence had a significant effect on commission of the crimes alleged. Similar argument has been presented to justify presence of the accused at the army camp, Faridpur circuit house as narrated in charge no.3.

65. Inquiring the extent and nature of the alleged conduct of accused, in relation to **charge no.3** the learned defence counsel has submitted that

‘involvement’ of accused should have been such that it significantly contributed to the commission of the criminal act alleged. Act of alleged utterance made by accused cannot be considered to have had ‘substantial effect’ on actual commission of the offence. It could not be proved that being aware of foreseeable consequence the accused made the alleged utterance. Prosecution has failed to show that the accused by his alleged conduct intended to perpetration of the criminal act of confinement of Ranjit Kumar Nath. In support of this submission the learned defence counsel relied upon the decision in the case of **Prosecutor v. Radoslav Brdanin** [ICTY Trial Chamber, Judgment, 1 September 2004, para 263].

66. In respect of **charge 4** the learned defence counsel argued that the prosecution has failed to adduce and examine none in support of this charge. The victim also did not come on dock, for no valid reason whatsoever.

67. The learned defence counsel Mr. Emran Siddique in advancing argument in respect of **charge no.5** has submitted that prosecution has failed to prove that there was a common plan of causing murder of detainees at the army camp, as alleged. Act of causing torture to the detainees at the camp cannot be treated as part of activities carried out by JCE as there is no proof of nexus between the alleged conduct of the accused and the actual commission of murder of the detainees. Besides victims, manner of committing murder has not been described and proved and as such the accused cannot be held to have participated or contributed to the commission of murder, in furtherance of concerted effort.

68. Mr. Abdur Razzak, the learned senior counsel, in respect of **charge no.6**, also submitted that the prosecution has failed to prove that the accused was with Al-Badar in 1971. Prosecution mainly relies upon **Exhibit-2** a report published in The daily Azad on 11.12.1971 [prosecution documents volume 9 page 2826-2829] and the book titled “**Al-Badar**”[Bengali translated text] – **Material Exhibit-V** [relevant page 135-138 of Bengali translated text]. But excepting the caption of the photo published with the report the contents thereof do not show that the accused Ali Ahsan Muhammad Mujahid was addressing the rally as commander of Al-Badar. The report thus carries little probative value.

69. In respect of credibility of the book titled ‘Al-Badar’ the learned counsel went on to submit that the alleged ‘last speech’ as narrated in the Bengali text of the book titled “Al-Badar” is devoid of sufficient sources and it suffers from inherent weaknesses e.g. the alleged ‘last speech’ does not cite any reference, absence of disclosure as to identification of the Al-Badar men from whom the author claims to have heard about the speech, and how, when and where the ‘Nazem’[President] allegedly endorsed the so-called speech as one he allegedly addressed at Al-Badar headquarters. Finally, accused’s name does not find place anywhere in the book. Thus, the alleged book, though admissible, does not carry probative value. Mere fact that the accused was a leader of ICS cannot make him liable for the alleged atrocities committed by the perpetrators over whom he had no ‘effective control’. The Prosecution has utterly failed to prove any of charges brought by adducing ‘hard evidence’ and witnesses’ testimony suffers from credibility.

70. It has been further submitted that the **charge no.6** does not describe detail particulars as to mode of liability which has caused deprivation to notice of necessary for preparing defence. As regards ‘aiding’ and ‘abetting’ the learned senior counsel has submitted that the act of abetment is to be directed to assist, encourage or lend moral support which had substantial effect to perpetration of crimes by the principals[**Prosecutor v. Blagojevic and Jokic**, ICTY Trial Chamber, Case No. IT-02-60-T, Judgment, 17 January 2005, para 726]. By contrast, in the case of acting in pursuance of a ‘common purpose or design’, it is sufficient for the participant to perform acts that in some way are directed to the furthering of the ‘common plan or purpose’. But the prosecution has failed to establish how and by which encouraging acts the accused significantly abetted the perpetrators of the alleged killing of intellectuals. Even it could not be proved how the accused participated to common plan or purpose.

71. It has been argued, in respect of **charge no.7** that the prosecution has failed to prove by evidence or circumstance that there had been co-operation between the members of the group and the accused; that mere presence of accused, as stated by P.W.9 does not amount to his participation. Presence of accused at the crime site with the group of perpetrators provides ‘encouragement’ or ‘support’ only when such presence is combined with the

authority of accused. P.W.13's version is not reliable and as such it cannot be taken into account for corroborating testimony of P.W.9, the hearsay witness.

Prosecution's Rebuttal

72. Ms. Tureen Afroz, the learned prosecutor, in reply to defence argument, has submitted that '**hard evidence**' concept is not applicable to prosecute and try the crimes committed in violation of customary international law. The Tribunal [ICT-2] is not bound by the technical rules of evidence and it is obliged to assess the probative value of evidence presented and admitted. Section 19 does not exclude 'editorial' published in newspapers and as such the same is admissible.

73. Learned prosecutor went on to submit that the book titled '**Ekattur er Dinguli**' [Material Exhibit-VI] has been presented to substantiate the incident of torture, detention of the author's son and other detainees and not to substantiate the involvement of the accused with the criminal activities. Thus non description of accused's involvement in the book does not *ipso facto* discredit the evidence of P.W.2 who has testified what he witnessed and experienced at the army camp set up at Nakhalpara MP hostel incriminating the accused and his accomplice co-leader of the ICS

74. It has been further argued that assessment of witness's credibility should be done only to the extent of the oral testimony made by the witness on relevant and material facts and not by incorporating facts irrelevant to the charge framed. The translated text of the book titled '**Al-Badar**' has been questioned by the defence on two grounds: quality of translation [in Bengali] and lack of sources of footnotes. But the contents of the translated Bengali text could not be refuted. The research based book in its original Urdu version is a publication of Jamat E Islami which has not been challenged.

75. The learned prosecutor has argued that the defence will not be prejudiced if the Tribunal arrives at finding as to commission of the offence of 'extermination' as crimes against humanity on the same set of facts narrated in charge no.6. Besides, there has been no substantial difference between the offence of '**murder**' as crimes against humanity and '**extermination**' as crimes against humanity. The only difference is the 'scale of killing' [Kristic,

ICTY Trial Chamber, August 2, 2001, para 501 and *see also Ntakirutimana*, ICTR Appeal Chamber, December 13, 2004, para 516].

76. On JCE doctrine, the learned prosecutor has submitted that section 4(1) and first two parts of section 4(2) of the Act of 1973 incorporates the doctrine of JCE in our legislation. Fundamentally the JCE requires that a group of individuals had a common plan, design, or purpose to commit a crime, that the accused participated in some way in the plan and that the accused intended the accomplishment of common plan or purpose. JCE thus needs three elements which are: (i) plurality of persons (ii) the existence of a common plan, design or purpose and (iii) participation of the accused in the common design.

XII. The way of adjudicating the charges

77. The evidence produced by the prosecution in support of its respective case was mainly testimonial. Some of prosecution witnesses allegedly directly experienced the dreadful events and material facts they have narrated in court and that such trauma could have an impact on their testimonies. Some of witnesses were allegedly kept detained at the army camps in Dhaka and Faridpur which provided them alleged occasion to experience the criminal activities carried out by the camps and the accused and his accomplices. However, their testimony seems to be invaluable to the Tribunal in its search for the truth on the alleged atrocious events that happened in 1971 war of liberation directing the Bangalee civilian population, after duly weighing value, relevance and credibility of such testimonies.

78. We reiterate that it is required to examine whether the alleged facts constituted the offences alleged and involvement of the accused therewith in a most dispassionate manner, keeping in mind that the accused is presumed innocent. In this regard the Tribunal (ICT-2) recalls the provisions contained in section 6(2A) of the Act of 1973 together with the observation of **US Justice Frankfurter [Dennis v. United States (341 US 494-592) para 525]** , as cited by the learned senior defence counsel which is as below:

“ Courts are not representative bodies. They are not designed to be a good reflex of a democratic society. Their judgemnt is best

informed, and therefore most dependable, within narrow limits. Their essential quality is detachment, founded on independence. History teaches that the independence of the judiciary is jeopardized when courts become embroiled in the passions of the day and assume primary responsibility in choosing between competing political, economic and social pressures.”

79. It should be kept in mind that the alleged incidents took place 42 years back, in 1971 and as such memory of live witness may have been faded. Invaluable documents could have been destroyed. Collecting and organizing evidence was a real challenge for the prosecution. Therefore, in a case like one in our hand involving adjudication of charges for the offence of crimes against humanity we are to depend upon **(i)** facts of common knowledge **(ii)** available documentary evidence **(iii)** old reporting of news paper, books etc. having probative value **(iv)** relevant facts **(v)** circumstantial evidence **(vi)** careful evaluation of witnesses’ version **(vii)** Political status, position and conduct of the accused at the relevant time and **(viii)** the jurisprudence evolved on these issues in the *ad hoc* tribunals, if deemed necessary to adjudicate any point of law.

80. We have already recorded our observation in the case of *Muhammad Kamaruzzaman* [ICT-BD Case No.03 pf 2012, Judgement 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.”

81. The prosecution, in the light of the charges framed, is burdened to prove- **(i)** commission of the crimes alleged **(ii)** who were the principal perpetrators **(iii)** The accused had authority of position over the perpetrators **(iv)** mode of

participation of the accused in committing any of crimes alleged (v) how he acted in aiding or providing encouragement or moral support or approval to the commission of any of alleged crimes (vi) was he a part of Joint Criminal Enterprise[JCE] (vii) context of committing the alleged crimes (viii) the elements necessary to constitute the offence of crimes against humanity (ix) liability of the accused.

XIII Backdrop and Context

82. The backdrop and context of commission of untold barbaric atrocities in 1971 war of liberation is the conflict between the Bangalee nation and the Pakistani government that pushed the Bangalee nation for self determination and eventually for freedom and emancipation. War of Liberation started following the ‘operation search light’ in the night of 25 March 1971 and lasted till 16 December 1971 when the Pakistani occupation force surrendered. Ten millions (one crore) of total population took refuge in India under compelling situation and many of them were compelled to deport.

83. What was the role of the accused Ali Ahsan Muhammad Mujahid during the period of nine months in 1971? What were his activities? What he did and for whom? Had he link, in any manner, with the Pakistani occupation force or pro-Pakistan political party Jamat E Islami (JEI) and the militia forces formed intending to implement organizational policy or plan or common purpose?

84. We take into notice the fact of common knowledge which is not even reasonably disputed that, during that time Razaker Bahini, Al-Badar Bahini, Peace Committee, Al-Shams were formed as accessory forces of the Pakistani occupation armed force for providing moral supports, assistance and they substantially contributed to the commission of atrocious activities throughout the country. In 1971 thousands of incidents happened within the territory of Bangladesh as part of organized or systematic and planned attack. Target was the pro-liberation Bangalee population, Hindu community, political group, freedom fighters, civilians who provided support to freedom fighters and finally the ‘intellectuals’ the best sons of the soil. The charges against the accused arose from some particular events during the War of Liberation in 1971 and the accused Ali Ahsan Muhammad Mujahid is alleged to have participated in different manner, by his act and conduct.

XIV. Addressing legal issues agitated

85. The learned senior counsel for the defence, at the beginning of summing up of case, has submitted that he did not intend to reiterate argument that he made on the legal issues which have been resolved in the case of *The Chief Prosecutor v. Abdul Quader Molla* [ICT-BD Case No. 02 of 2012: ICT-2: Judgment 05 February 2013] and in the case of *The Chief Prosecutor v. Muhammad Kamaruzzaman* [ICT-BD Case No. 03 of 2012: ICT-2, Judgment 09 May 2013,] and thus he insisted to adopt his earlier argument on those legal issues. Therefore, we prefer to reiterate our findings recorded in the said case on the issues in brief, by adopting the argument made by the defence on those legal issues in the above mentioned case.

Summary of Argument by the defence Counsel on legal aspects [as adopted]

86. The argument on legal issues considered to have been reiterated by the defence may be succinctly categorized as below, for the sake of convenience of rendering our findings:

(i) Inordinate and unexplained delay of 40 years in prosecution the accused creates doubt and fairness of the trial; (ii) that the expression ‘individual’ and ‘group of individuals’ have been purposefully incorporated in the Act of 1973 by way of amendment in 2009 and as such the accused cannot be brought to jurisdiction of the Tribunal as an ‘individual’; (iii) that the Act of 1973 was enacted to prosecute , try and punish 195 listed Pakistani war criminals who have been exonerated on the strength of ‘tripartite agreement’ of 1974 and as such without prosecuting those listed war criminals present accused cannot be brought to justice as merely aider and abettor; (iv) that the accused could have been prosecuted and tried under the Collaborator Order 1972 if he actually had committed any criminal acts constituting offences in concert with the Pakistani occupation army; (v) that it is not claimed that the accused alone had committed the offences alleged and thus without bringing his accomplices to justice the accused alone cannot be

prosecuted; **(vi)** that the crimes alleged are isolated in nature and not part of widespread or systematic attack ; **(vii)** that the offences have not been adequately defined in the Act of 1973 and for characterizing the criminal acts alleged for constituting offence of crimes against humanity the Tribunal should borrow the elements as contained in the Rome Statute as well as from the jurisprudence evolved in adhoc Tribunals.

Summary of Prosecution reply to argument by the Defence on Legal Points [as adopted]

87. In reply to the above reiterated argument on legal aspects, prosecution has also submitted to adopt their earlier submission made in the above noted cases [*Chief Prosecutor v. Abdul Quader Molla and Chief prosecutor v. Muhammad Kamaruzzaman*]. Accordingly, prosecution's argument on the legal issues agitated by the defence may thus be categorized as below:

(i) there is no limitation in bringing criminal prosecution, particularly when it relates to 'international crimes' committed in violation of customary international law; **(ii)** that the 'tripartite agreement' which was a mere 'executive act' cannot bung up in bringing prosecution under the Act of 1973 against 'auxiliary force, an 'individual' or 'group of individuals'; **(iii)** the context of committing crimes proves that those were committed as part of systematic attack committed against civilian population; **(iv)** that even without prosecuting the 195 Prisoners of War [POWs] the person responsible can be brought to book under section 3(2) of the Act of 1973; **(v)** that there is no legal bar in prosecuting a person who acted to facilitate the commission of the crimes even without bringing the principal perpetrators or accomplices **(vi)** that the phrase '*committed against civilian population*' as contained in section 3(2)(a) of the Act of 1973 itself patently signifies that acts constituting offences specified therein are perceived to have been committed as part of 'systematic attack'. The context of war of liberation is enough to qualify the acts as the offences of crimes against humanity which were perpetrated in violation of customary international law.

XV. Determination of Legal Aspects

(i) Does Unexplained Delay frustrate prosecution case

88. There has been no controversy as to the settled legal proposition that mere delay does not create any clog in bringing criminal prosecution. But the defence argued that unexplained inordinate delay of long 40 years occurred in prosecuting the accused impairs the truthfulness of the case. Such inordinate delay of long 40 years should have been explained in the formal charge submitted under section 9(1) of the Act which is the foundation of the case. Such unexplained delay not only casts doubt on the allegations brought but leads to acquittal of the accused as well.

89. The Tribunal first notes that time bar should not apply to the prosecution of human rights crimes. Neither the Genocide Convention of 1948, nor the Geneva Conventions of 1949 contain any provisions on statutory limitations to war crimes and crimes against humanity. Article I of the Convention on the Non-Applicability of Statutory Limitations to War Crimes and Crimes Against Humanity adopted and opened for signature, ratification and accession by General Assembly resolution 2391 (XXIII) of 26 November 1968 provides protection against even any statutory limitation in prosecuting crimes against humanity, genocide etc. Thus, criminal prosecutions are always open and not barred by time limitation.

90. Next, we have already recorded our reasoned finding in the case of Muhammad Kamaruzzaman that

“Indubitably, a prompt and indisputable justice process cannot be motorized solely by the painful memories and aspirations of the victims. Indeed it requires strong public and political will together with favourable and stable political situation. Mere state inaction, for whatever reasons, does not render the delayed prosecution readily frustrated and barred by any law. [**The Chief Prosecutor v. Muhammad Kamaruzzaman**, ICT-BD(ICT-2)

Case No. 03 of 2012, Judgment 09 May, 2013,
para 102]

91. We reiterate that there can be no recognised hypothesis to insist that such a ‘system crime’ can only be pursued within a given number of years. Therefore, delayed prosecution does not rest as a clog in prosecuting and trying the accused and creates no mystification about the atrocities committed in 1971. Considerations of material justice for the victims should prevail when prosecuting crimes of the severe enormity is on the process. Justice delayed is no longer justice denied, particularly when the perpetrators of core international crimes are brought to the process of justice [**Muhammad Kamaruzzaman**, ICT-BD(ICT-2) Case No. 03 of 2012, Judgment 09 May, 2013, para 102]

92. Finally we are persuaded to record our further observation that the mere delay occurred in bringing prosecution, taking the context prevailed since last couple of decades into account, does not lead accused’s acquittal or impairs the prosecution case the effective adjudication of which fundamentally rests on evaluation of totality of evidence presented.

(ii) Legislative Intention in enacting the Act of 1973 and subsequent incorporation of ‘Individual’ or group of individuals’ to the Act by amendment of the Act in 2009

93. Defense’s argument on this legal issue, by drawing attention to the Parliamentary debate dated 13 July 1973 on the issue of passing the Bill for promulgating the International Crimes (Tribunals) Act 1973, as already made in the case of *Abdul Quader Molla*[ICT-BD Case No. 02 of 2012, Judgement 05 February 2013] and also in the case of *Muhammad Kamaruzzaman*[ICT-BD Case No. 03 of 2012, Judgment 09 May], is that the Act of 1973 and first amendment of the constitution will go to show that intention of the framers of the legislation was to prosecute and try the 195 listed war criminals of Pakistan armed force and not the civilians as the phrase ‘including any person’ was replaced by the phrase ‘any person’ belonging to armed force or auxiliary force. The first amendment of the constitution was brought so that no ‘civilian person’ could be prosecuted and tried under the Act of 1973.

94. On contrary, prosecution's argument [as advanced in two earlier cases of ICT-2] is that the Act of 1973 is meant to prosecute, try and punish any 'individual' or 'group of individuals', or any member of armed, defence or auxiliary force for the offences specified in section 3(2) of the Act of 1973. Prosecuting the accused even in the capacity of an 'individual' is lawful even if he is not found to have had membership of any 'auxiliary force'.

95. The Tribunal first reiterates that it cannot shut its eyes to the history which says, for the reason of state obligation to bring the perpetrators responsible for the crimes committed in violation of customary international law to justice and in the wake of nation's demand the Act of 1973 has been amended for extending jurisdiction of the Tribunal for bringing the local perpetrator to book if he is found involved and concerned with the commission of the criminal acts constituting offences of crimes against humanity and genocide as enumerated in the Act of 1973 even in the capacity of an 'individual' or member of 'group of individuals'.

96. Next, it is to be noted that it is rather admitted that even under retrospective legislation (Act enacted in 1973) initiation to prosecute crimes against humanity, genocide and system crimes committed in violation of customary international law is quite permitted, as we have already observed.

97. We are to perceive the intent of enacting the main Statute together with fortitude of section 3(1) of the Act. At the same time we cannot deviate from extending attention to the protection provided by the Article 47(3) of the Constitution to the Act of 1973 which was enacted to prosecute, try and punish the perpetrators of atrocities committed in 1971 War of Liberation.

98. In the case of **Muhammad Kamaruzzaman** we have given our specific and considered finding that

“The legislative modification that has been adopted by bringing amendment in 2009 has merely extended jurisdiction of the Tribunal for bringing the perpetrator to book if he is found involved with the commission of the criminal acts even in the capacity of an 'individual' or member

of 'group of individuals'. The right to move the Supreme Court for calling any law relating to internationally recognised crimes in question by the person charged with crimes against humanity and genocide has been taken away by the provision of Article 47A(2) of the Constitution. Since the accused has been prosecuted for offences recognised as international crimes as mentioned in the Act of 1973 he does not have right to call in question any provision of the International Crimes (Tribunals) Act 1973 or any of amended provisions thereto.

[Muhammad Kamaruzzaman, ICT-BD(ICT-2) Case No. 03 of 2012, Judgment 09 May, 2013, para 110, 111]

99. Thus, we echo our earlier finding that the contention raised by the defence is of no consequence to the accused in consideration of his legal status and accordingly the defence objection is not sustainable in law, particularly in the light of Article 47(3) and Article 47A(2) of the Constitution.

(iii) Tripartite Agreement and immunity to 195 Pakistani war criminals

100. We may recall the argument advanced by the learned senior defence counsel, on this legal issue, advanced in the case of *Abdul Quader Molla* [ICT-BD case No. 02 of 2012, Judgment 05 February 2013] and also in the case of *Muhammad Kamaruzzaman* [ICT-BD case No. 03 of 2012, Judgment, 09 May 2013] that pursuant to the 'tripartite agreement' dated 09.4.1974, 195 listed war criminals belonging to Pakistani armed force have been given clemency. Thus the matter of prosecuting and trying them under the Act of 1973 ended with this agreement. The local perpetrators who allegedly aided and abetted the Pakistani occupation armed force in committing atrocities including murder, rape, arson the government enacted the Collaborators Order 1972.

101. It is to be noted first that the Tribunal has already resolved this pertinent issue by giving its reasoned finding, in the case of *Abdul Quader Molla* and

also in the case of *Muhammad Kamaruzzaman*. Deliberations made therein, on this issue, may briefly be reiterated in the case in hand too.

102. The backdrop of entering into the ‘tripartite agreement’ needs to be considered. Bangladesh’s decision was to prosecute and try 195 Pakistani POWs who were detained in India. Finally they were repatriated to Pakistan followed by the ‘tripartite agreement’. **N. Jayapalan**, in his book titled ‘**India and Her Neighbours**’ has attempted to give a light on it, by narrating

“.....India left no stone unturned for helping Bangladesh to get recognition from other countries and its due place in the United Nations. India gave full support to the August 9, 1972 application made by Bangladesh for getting the membership of the United Nations. However, the Chinese veto against Bangladesh prevented success in this direction. In February 1974, Pakistan gave recognition to Bangladesh and it was followed by the accord of recognition by China. This development cleared the way of Bangladesh’s entry into United Nations. In the context of Indo-Pak-Bangladesh relations, the April 1974 tripartite talks between India, Pakistan and Bangladesh produced an important agreement leading to the repatriation of 195 Pakistani POWs who were still being detained in India because of Bangladesh’s earlier decision to try them on charges of genocide and war crimes.”

[Source: **India and Her Neighbours**: N. Jayapalan: Atlantic Publishers & Distributors, Jan 1, 2000: B-2, Vishal Encalve, Opp. Rajouri Garden, New Delhi-27]: ISBN 81-7156-921-9]

103. Besides, a closer look at the repatriation process of 195 Pakistani War Criminals [tripartite agreement] suggests that the political direction of the day had to put on hold the trial process at that time, but intended not to terminate

the option of any future trial. The Tripartite Agreement visibly mentioned Bangladesh's position on the 195 Pakistani War Criminals in the **Article 13** of the agreement which is as below:

“There was universal consensus that persons charged with such crimes as 195 Pakistani prisoners of war should be held to account and subjected to the due process of law”.

104. However, the **Article 15** of the tripartite agreement says:

“Having regard to the appeal of the Prime Minister of Pakistan to the people of Bangladesh to forgive and forget the mistakes of the past” Government of Bangladesh had decided not to proceed with the trials as an act of clemency.

105. Thus the scope of clemency is evidently limited to Bangladesh's decision on not to try them here. Rather, it keeps the option open for trial of those Pakistani war criminals. Additionally, such agreement was an 'executive act' and it cannot create any clog to prosecute member of 'auxiliary force' or an 'individual' or member of 'group of individuals' as the agreement showing forgiveness or immunity to the persons committing offences in breach of customary international law was disparaging to the existing law i.e the Act of 1973 enacted to prosecute those offences.

106. It is thus not good enough to say that no 'individual' or member of 'auxiliary force' as stated in section 3(1) of the Act of 1973 can be brought to justice under the Act for the offence(s) enumerated therein for the reason that 195 Pakistani war criminals belonging to Pak armed force were allowed to evade justice on the strength of 'tripartite agreement' of 1974[[**Muhammad Kamaruzzaman**, ICT-BD(ICT-2) Case No. 03 of 2012, Judgment 09 May, 2013, para 114]

107. It is now settled that one of the main justifications for prosecuting crimes against humanity, or genocide is that they violate the jus cogens norms. As

state party of Universal Declaration of Human Rights (UDHR) and Geneva Convention Bangladesh cannot evade obligation to ensure and provide justice to victims and sufferers of those offences and their relatives who still suffer the pains sustained by the victims and as such an ‘executive act’ (tripartite agreement) can no way derogate this internationally recognized obligation. Thus, any agreement or treaty if seems to be conflicting and derogatory to *jus cogens* (compelling laws) norms does not create any hurdle to internationally recognized state obligation.

108. Amnesty shown to 195 listed war criminals are opposed to peremptory norms of international law. It is to be noted that any agreement and treaty amongst states in derogation of this principle stands void as per the provisions of international treaty law convention [**Article 53 of the Vienna Convention on the Law of the Treaties, 1969**] *Jus cogens* norms were first identified in the international law of treaties. The Vienna Convention on the Law of Treaties said that certain treaties should not be respected since these treaties violated “peremptory norms of general international law.” The Vienna Convention then said that “a peremptory norm of general international law is a norm accepted and recognized by the international community of States as a whole as a norm from which no derogation is permitted.” Here is what is said in Article 53 of the Vienna Convention:

“A treaty is void if at the time of its conclusion it conflicts with a peremptory norm of general international law. For the purposes of the present Convention, a peremptory norm of general international law is a norm accepted and recognized by the international community of States as a whole as a norm from which no derogation is permitted and which can be modified only by a subsequent norm of general international law having the same character.”

109. Therefore, we emphatically reiterate our finding [in the case of **Muhammad Kamaruzzaman**, Judgment 09 May 2013, para, 122] that

“.....despite the immunity given to 195 listed war criminals belonging to Pakistani armed force on the strength of ‘tripartite agreement’ the Act of 1973 still provides jurisdiction to bring them to the process of justice. Provisions as contained in section 3(1) of the Act of 1973 has kept the entrance unbolt to prosecute, try and punish them for shocking and barbaric atrocities committed in 1971 in the territory of Bangladesh. Of course in order to prosecute and try those 195 war criminals belonging to Pakistani army a unified, bold and national effort would be required”.

110. Finally, we affirm our earlier observation that the perpetrators of crimes against humanity and genocide are the enemies of mankind and the ‘tripartite agreement’ is not at all a barrier to prosecute even a local civilian perpetrator under the Act of 1973.

(iv) The accused could have been prosecuted and tried under the Collaborators Order 1972 and prosecution under the Act of 1973 is malafide

111. Defence avers [as presented in the case of *Abdul Quader Molla*] that the cumulative effect of intention of enacting the Act of 1973, unexplained delay in bringing instant prosecution and bringing amendment of the Act of 1973 in 2009 by incorporating the phrase ‘individual’ or ‘group of individuals’ inevitably shows that bringing prosecution against the accused under the Act of 1973 is *malafide* and politically motivated. The accused could have been prosecuted and tried under The Collaborators Order 1972, if actually he had committed any offence of collaborating with the Pakistani army.

112. First, we reiterate that the Collaborators Order 1972 was a piece legislation aiming to prosecute the persons responsible for the offences enumerated in the schedule thereof. The offences punishable under the Penal Code were scheduled in the Collaborators Order 1972. While the Act of 1973 was enacted to prosecute and try the ‘crimes against humanity’, ‘genocide’

and other system crimes which are recognised as international crimes committed in violation of customary international law. There is no scope to characterize the offences underlying in the Collaborators Order 1972 to be the 'same offences' as specified in the Act of 1973.

113. We have given our considered finding in the case of *Muhammad Kamaruzzaman* that

“The elementary truth and message that we have got from the example of delayed prosecution of a Nazi war criminal **Maurice Papon** that a person whoever may be or whatever position he occupied he cannot be relieved from being prosecuted for the crimes committed in violation of customary international law even after long lapse of time and thus merely for the reason of delayed prosecution it cannot be readily branded as political and *malafide* prosecution”.

114. In the case in hand, the accused has been indicted for his alleged participation to the perpetration of the offences enumerated in the 1973 Act, in the capacity of head of Al-Badar force. The alleged offence took place in 1971, during the war of liberation. Accused's present political status and affiliation is of no consequence in adjudicating the charges and his alleged culpability. Besides, a person accused of an offence cannot be relieved by his subsequent act, and position or status.

115. Therefore, we reiterate our earlier view we have given in the case of *Muhammad Kamaruzzaman* [ICT-BD 03 of 2012, Judgment 09 May 2013, **para 126**] that merely for the reason that since the accused was not brought to justice under the Collaborators Order 1972 now he is immune from being prosecuted under the Act of 1973 and he has been prosecuted for malafide and for political vengeance.

(v) Definition and Elements of Crime

116. On this legal aspect, defence argument is that the offences specified in section 3(2) are not well defined and the same lack of elements. Section 3(2)

of the ICTA 1973 does not explicitly contain the ‘widespread or systematic’ element for constituting the crimes against humanity. In this regard this Tribunal may borrow the elements and definition of crimes as contained in the Rome Statute. It has been further argued that an ‘attack’ may be termed as ‘systematic’ or ‘widespread’ if it was in furtherance of policy and plan. The offence, if actually happened, in absence of context, and policy or plan, cannot be characterized as crimes against humanity. Similar argument was made by the defence, on this issue, in the case of *Abdul Quader Molla* and *Muhammad Kamaruzzaman*. Thus we consider it appropriate to have glance to the finding recorded in those cases, on this issue

117. First, it is now settled that ‘policy’ and ‘plan’ are not the elements to constitute the offence of crimes against humanity. It is true that the common denominator of a ‘systematic attack’ is that it is carried out pursuant to a preconceived policy or plan. But these may be considered as factors only and not as elements [*Kamaruzzaman*, Judgment 09 May 2013, para 128] .

118. The above view finds support from the observation made in paragraph 98 of the judgment in the case of *Prosecutor v. Kunarac* [Case No. IT-96-23/1-A: ICTY Appeal Chamber 12 June 2002] which is as below:

“ Neither the attack nor the acts of the accused needs to be supported by any for of “policy’ or “plan’.Proof that the attack was directed against a civilian population and that it was widespread or systematic, are legal elements to the crime. But to prove these elements, it is not necessary to show that they were the result of the existence of a policy or plan.....Thus, the existence of a policy or plan may be evidently relevant, but it is not a legal element of the crime.”

119. Section 3(2) (a) of the International Crimes (Tribunals) Act, 1973 (as amended in 2009) [henceforth, 1973 Act] defines the ‘Crimes against Humanity’ in the following manner:

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

120. It is now settled that the expression '*committed against any civilian population*' is an expression which specifies that in the context of a crime against humanity the civilian population is the primary object of the attack. The definition of 'Crimes against humanity' as contemplated in Article 5 of the ICTY Statute 1993 neither requires the presence of 'Widespread or Systematic Attack' nor the presence of 'knowledge' thereto as conditions for establishing the liability for 'Crimes against Humanity'. It is the jurisprudence developed in ICTY that identified the 'widespread' or 'systematic' requirement [*Kamaruzzaman*, Judgment 09 May 2013, para 131].

121. We will find that the Rome Statute (a prospective statute) definition differs from that of both ICTY and ICTR Statutes. However, the Rome Statute says, the definition etc. contained in the Statute is '*for the purpose of the Statute*'. So, use of the phrase "*for the purpose of the Statute*" in **Article 10 of the Rome Statute** means that the drafters were not only aware of, but recognized that these definitions were not the final and definitive interpretations, and that there are others.

122. Thus, our Tribunal (ICT-2) which is a domestic judicial body constituted under a legislation enacted by our Parliament is not obliged by the provisions contained in the Rome Statute. The Rome Statute is not binding upon this Tribunal for resolving the issue of elements requirement to characterize the offence of crimes against humanity [*Kamaruzzaman*, Judgment 09 May 2013, para 132].

123. We reiterate 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. 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 into a crime against humanity and the accused must be aware of this context in order to be culpable of crime alleged.

124. The section 3(2)(a) of the Act states the 'acts' constituting the offences of crimes against humanity is required to have been ‘committed against any civilian population or 'persecution on political, racial, ethnic or religious grounds'. To qualify as a crime against humanity, the acts enumerated in section 3(2)(a) of the Act must be committed against the ‘civilian population’.

125. We have already recorded our reasoned finding in the case of *Muhammad Kamaruzzaman* that

“An “attack against a civilian population” means the perpetration against a civilian population of a series of acts of violence, or of the kind of mistreatment referred to in sub-section (a) of section 3(2) of the Act of 1973. Conducts constituting ‘Crimes’ ‘directed against civilian population’ thus refers to organized and systematic nature of the attack causing acts of violence to the number of victims belonging to civilian population.”

126. Therefore, the claim as to the non-existence of a consistent international standard for the definition of the offence of ‘crimes against humanity’ as enumerated in the Act of 1973 is manifestly baseless[*Kamaruzzaman*, Judgment 09 May 2013, para 135].

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

127. The case, as it transpires, is founded on oral evidence and documentary evidence as well. The evidence adduced by the prosecution is to be evaluated

together with the circumstances revealed, relevant facts and facts of common knowledge. It would be expedient to have a look to the facts of common knowledge of which Tribunal has jurisdiction to take into its judicial notice [Section 19(3) of the Act of 1973]. Inevitably determination of the related legal issues will be of assistance in arriving at decision on facts in issues.

128. Section 22 of the Act of 1973 provides that the provisions of the Criminal procedure Code, 1898 [V of 1898], and the Evidence Act, 1872 [I of 1872] shall not apply in any proceedings under this Act. Section 19(1) of the Act provides that the Tribunal shall not be bound by technical rule of evidence and it shall adopt and apply to the greatest possible extent non-technical procedure and may admit any evidence which it deems to have probative value. Reason of such provisions is to be perceived from the preamble of the Act of 1973 which speaks that the Act has been enacted to provide for the detention, prosecution and punishment of persons for genocide, crimes against humanity, war crimes and other crimes under international law.

129. It is to be kept in mind that the term '**context**' refers to the events, organizational structure of the group of perpetrators, para militia forces, policies that furthered the alleged crimes perpetrated in 1971 during the war of liberation. Context prevailing in 1971 within the territory of Bangladesh will adequately illuminate as to whether it was probable to witness the atrocities as spectator. Totality of its horrific profile of atrocities committed in 1971 naturally leaves little room for the people or civilians to witness the events of the criminal acts. Due to the nature of international crimes, their chaotic circumstances, and post-conflict instability, these crimes are usually not well-documented by post-conflict authorities.

130. It is to be noted that the testimony even of a single witness on a material fact does not, as a matter of law, require corroboration. The established jurisprudence is clear that corroboration is not a legal requirement for a finding to be made. "*Corroboration of evidence is not necessarily required and a Chamber may rely on a single witness' testimony as proof of a material fact. As such, a sole witness' testimony could suffice to justify a conviction if the Chamber is convinced beyond all reasonable doubt.*" [**Nchamihigo**, (ICTR Trial Chamber), November 12, 2008, para. 14]. Similar view has been

adopted in the case of **Kordic and Cerkez**, wherein it has been observed that, “*The Appeals Chamber has consistently held that the corroboration of evidence is not a legal requirement, but rather concerns the weight to be attached to evidence*”. [**Kordic and Cerkez** ICTY Appeal Chamber December 17, 2004, para. 274]

131. Undeniably hearsay evidence is admissible but it is to be corroborated by ‘other evidence’. That is to say, hearsay evidence is to be considered together with the circumstances and relevant material facts depicted. Hearsay evidence is admissible and the court can act on it in arriving at decision on fact in issue, provided it carries reasonable probative value [Rule 56(2) of the ROP]. 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]

132. It is to be noted too that an insignificant discrepancy does not tarnish witness’s testimony in its entirety. Any such discrepancy needs to be contrasted with surrounding circumstances and testimony of other witnesses. In this regard, in the case of **Nchamihigo** it has been observed by the Trial Chamber of ICTR that

“The events about which the witnesses testified occurred more than a decade before the trial. Discrepancies attributable to the lapse of time or the absence of record keeping, or other satisfactory explanation, do not necessarily affect the credibility or reliability of the witnesses.....The Chamber will

compare the testimony of each witness with the testimony of other witness and with the surrounding circumstances.” [The Prosecutor v. Simeon Nchamihigo, ICTR-01-63-T, Judgment, 12 November 2008, para 15]

133. Further, inconsequential inconsistency by itself does not taint the entire evidence made by witness before the Tribunal. This principle adopted in trial of crimes against humanity is compatible with the evolved jurisprudence as well as with the Act of 1973. It has been observed by the ICTY trial Chamber in the case of **Prosecutor v. Mico Staisic & Stojan Jupljan** that

“In its evaluation of the evidence, in assessing potential inconsistencies, the Trial Chamber took into account: the passage of time, the differences in questions put to the witnesses at different stages of investigations and in-court, and the traumatic situations in which many of the witnesses found themselves, not only during the events about which they testified, but also in many instances during their testimony before the Trial Chamber. Inconsequential inconsistencies did not lead the Trial Chamber to automatically reject evidence as unreliable.” [Prosecutor v. Mico Staisic & Stojan Jupljan Case No. IT-08-91-T 27 March 2013]

134. The alleged events of atrocities were committed not at times of normalcy. The offences for which the accused has been charged with occurred during war of liberation. Requirement of production of body as proof to death does not apply in prosecuting crimes enumerated under the Act of 1973. A victim’s death may be established by circumstantial evidence provided that the *only* reasonable inference is that the victim is dead as a result of the acts or omissions of the accused constituting the offence.

135. It is to be noted that ‘*participation*’ may occur before, during or after the ‘act’ is committed. Second, the intent requirement may be well deduced from

the mode of ‘*participation*’, by act or conduct of the accused forming part of the ‘attack’, and it can consist of providing assistance to commit the crime or certain acts once the crime has been committed. Physical presence or participation to the actual commission of the principal offence is not indispensable to incur culpable responsibility. It has been observed in the case of *Tadic*, [Trial Chamber: ICTY, May 7, 1997, para. 691] that :

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

136. However, according to universally recognised jurisprudence and the provisions as contained in the ROP of the ICT-2 onus squarely lies upon the prosecution to establish accused’s presence, acts or conducts, and omission forming part of attack that resulted in actual commission of the offences of crimes against humanity as enumerated in section 3(2) of the Act of 1973 for which he has been arraigned.

137. In the case in hand, most of the prosecution witnesses have testified the acts, conducts of the accused claiming him as the head of Al-Badar having significant influence and effective control over the Al-Badar men. Naturally considerable lapse of time may affect the ability of witnesses to recall facts they heard and experienced with sufficient and consistent precision. Thus, assessment of the evidence is to be made on the basis of the totality of the evidence presented in the case before us and also considering the context prevailing in 1971 in the territory of Bangladesh.

138. It would be thus appropriate and jurisprudentially logical if, in the process of appraisal of evidence, we separate the grains of acceptable truth from the chaff of exaggerations and improbabilities which cannot be safely or prudently accepted and acted upon.

139. Both sides concede that hearsay evidence is 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.

XVII. Relevant and Decisive Factual Aspect: Who Was Ali Ahsan Muhammad Mujahid in 1971 and his activities

140. Who was Ali Ahsan Muhammad Mujahid in 1971? What was his role during the period of nine months in 1971? What were his activities? What he did and for whom? Had he link, in any manner, with the Pakistani occupation force or pro-Pakistan political party Jamat E Islami (JEI) and the militia forces formed intending to implement organizational policy or plan or common purpose?

141. Admittedly Mujahid was the president of Islami Chatra Sangha [ICS] the student wing of Jamat E Islami [JEI] of Faridpur district, his home town in 1970. Afterwards during early part of 1971 he became the president of ICS, Dhaka district. In the month of July 1971 he became the secretary of the then East Pakistan ICS and finally he occupied the position of president of the organization [ICS] since October to 16 December 1971. Thus, the accused was in a key position of ICS.

142. Admittedly, ICS was the student wing of JEI and thus naturally its stand was against the war of liberation and self-determination of Bengali nation. Choosing certain stand intending to preserve own political belief and Pakistan itself was one's own decision. But the criminal activities, carried out in the name of establishing political belief, was crime, especially in context of war of liberation that ensued followed by the 'operation search light'.

143. Determination of the role played by the accused Mujahid in the capacity of potential ICS leader is essentially required to assess his alleged culpable attitude towards the pro-liberation Bangalee civilians. Accused Mujahid is alleged to have acted as a mighty person having position of authority on Al-Badar who collaborated with the Pakistani occupation army. The accused is also alleged to have encouraged the activities carried out by Al-Badar by substantially assisting and providing moral support to them, by exercising his position of authority on it.

144. Al-Badar was a *para militia* force formed of ICS workers. It is not disputed. However, defence claims that all ICS members did not belong to ICS. It is found proved that

“the workers belonging to purely Islami Chatra Sangha were called Al-Badar, the general patriotic public belonging to Jamaat-e-Islami, Muslim League, Nizam-e-Islami etc were called Al-Shams and the Urdu-speaking generally known as Bihari were called al-Mujahid.”

[Source: ‘Sunset at Midday’ , *Mohi Uddin Chowdhury* , a leader of Peace committee , Noakhali district in 1971 who left Bangladesh for Pakistan in May 1972 [(Publisher’s note): Qirtas Publications, 1998, Karachi, Pakistan, paragraph two at page 97 of the book]

145. We have already observed in the case of *Chief prosecutor v. Muhammad Kamaruzzaman* that Al-Badar which was created by JEI and had acted as its ‘**action section**’, ‘**fascist body**’ and ‘**armed wing**’ in 1971[ICT-BD case No.03 of 2012, Judgment 09 May 2013, para 605] . We also made our observation in the case of *Kamaruzzaman* based on sourced information that Jamat E Islami was thus indulged in indiscriminate massacre of their political opponents belonging to Bengali nation, in the name of liquidating ‘*miscreants*’, ‘*infiltrators*’ for which they were using Razakars, Al-Badar comprising with the workers of Islami Chatra Sangha [ICS], its student wing [*Muhammad Kamaruzzaman*, ICT-BD case No.03 of 2012, Judgment 09 May 2013, para 601].

146. Material Exhibit-I [the book titled ‘**Ekattorer Ghatok Dalalra Ke Kothai**’, page 56, 57] offers undisputed information that head quarter of Al-Badar was set up at Mohammadpur Physical training College, Dhaka and potential leaders of JEI used to visit the HQ to coordinate training of Al-Badar and Razakars. This fact appears to have been corroborated by evidence of P.W.5 Md. Rustom Ali Molla.

147. Referring a report published in **The daily Sangram** 24 April 1971 a report titled “মুজাহিদের কুকীর্তি গাঁথা আছে দৈনিক সংগ্রামের পাতায়” published in **The Daily Bhorer Kagoj**, 31 October 2007 which speaks as below:

”দৈনিক সংগ্রামের ২৪ এপ্রিল তারিখের সংখ্যায় প্রকাশিত খবরে আরো বলা হয়, ২২ এপ্রিল (১৯৭১) তারিখে ময়মনসিংহে জামাত ও ইসলামী ছাত্র সংঘের (বর্তমান ইসলামী ছাত্রশিবির) নেতা ও কর্মীদের এক সভা হয়। তাতে সভাপতিত্ব করেন মুহম্মদ আশরাফ হোসাইন এবং সভায় উপস্থিত ছিলেন মতিউর রহমান নিজামী ও আলী আহসান মুজাহিদ। এই সভায় বক্তৃতা দিতে গিয়ে আলী আহসান মুজাহিদ বলেন, ‘আল-বদর একটি নাম, একটি বিস্ময়। আল-বদর একটি প্রতিজ্ঞা। যেখানেই তথাকথিত মুক্তিবাহিনী, সেখানেই থাকবে আল-বদর। মুক্তিবাহিনী তথা ভারতীয় চরদের কাছে আল-বদর হবে সাক্ষাৎ আজরাইল’।

148. The above report unerringly demonstrates that goals and activities of JEI, ICS and Al-Badar were chained together. By delivering such inflammatory and inciting speech accused Ali Ahsan Muhammad Mujahid, the then President of East Pakistan ICS with the workers of which Al-Badar was formed, categorically termed the pro-liberation people and freedom fighters as the ‘agents of India’. The speech also triggered the Al-Badar to act as ‘Azrail’ [The Angel of Death] to liquidate pro-liberation Bangalee people and freedom fighters wherever they [Al-Badar] get them.

149. In this way accused Mujahid explicitly disseminated the unholy organizational purpose, objective and common intent to its [Al-Badar] members, over whom he had authority and effective control. Common sense goes to say that only a person holding superior position and authority can deliver such inciting and infuriating speech to his followers. The accused Mujahid was thus in leading position of Al-Badar in 1971.

150. Testimony of P.W.2 , P.W.5 and P.W.7 shows that accused Mujahid was a close and active affiliate of Pakistani army and provided them substantial support and assistance in carrying out criminal activities, in furtherance of

common policy and plan. He is alleged to have participated in committing crimes occurred in Faridpur, as narrated in charge no. 2, 3, 4 and 7. Admittedly, Faridpur is the home town of accused Mujahid. From evidence of P.W.7 Ranjit Kumar Nath it is found that the group of individuals forcibly brought him [P.W.7] to army camp set up at Faridpur circuit house where he found Mujahid [accused] sitting and holding meeting with army.

151. P.W.2 Jahir Uddin Jalal testified that on being forcibly brought to the army camp set up at Nakhalpara MP hostel, Dhaka city he found there accused Mujahid, Nijami having arms in hand and heard the accused uttering and advising to liquidate the detainees. P.W.2 could recognize the detainees and they were subjected to unkind physical torture. P.W.2 also found the accused having talk with army officials of the camp.

152. P.W.10 A.K.M Habibul Haque [64] was a student of Bangladesh Agricultural University and had been staying at his residence in Faridpur town. According to him on 14 August 1971 at about 11:00 am Pakistani army raided their house and he saw the accused Mujahid with the army and the gang eventually picked up his [P.W.10] brother Serajul Haque Nannu. The gang came by a jeep and truck.

153. P.W.8 Mir Lutfar Rahamn has corroborated the fact of abducting Serajul Haque nannu. P.W.8 further stated in cross-examination, in reply to question put to him, that he and many other people saw the accused Mujahid moving by a jeep around Faridpur town having a sword in hand.

154. The above uncontroverted version of P.W.8 and P.W.10 offers unerring inference that the accused Mujahid used to maintain active and culpable affiliation with the Pakistani army which is fair indicia as to his role and act of providing assistance and support in carrying out criminal activities in Fairdpur.

155. The conducts of the accused Mujahid as depicted above explicitly portrays his attitude, position, access to army camp and act of providing assistance to the Pakistani occupation army not only in Dhaka city but also in his home town Faridpur as well. Accused's access to army and holding meeting and sharing things are strong indicators of his culpable position and

intent. It may be validly presumed that at war time situation a civilian cannot be expected to be affiliated with army at war unless he is a part of policy and plan of the army, in furtherance of common purpose.

156. Who can be called a leader? An individual is termed as a ‘leader’ when his activity involves establishing a goal and common purpose by sharing the vision with others so that they will follow or obey him willingly. Leadership is a process whereby an individual influences a group of individuals to achieve a common goal. Leadership is a process by which a person influences others to accomplish an organizational objective.

157. From the book titled ‘Al-Badar’ [**Material Exhibit-V**: Bengali translated text] authored by Selim Mansur Khalid and published from Pakistan describes the formation of Al-Badar including its activities and speeches of some leading Al-Badar men including the last speech of ‘**Nazim**’ [President] of ICS addressed to Al-Badar men at Al-Badar HQ in Dhaka city` urging the AB members to spread wherever they liked without being ‘ashamed’ of their deeds. It is true that the speech does not state the name of accused. But who was ‘Nazim’ [president] of the ICS at the relevant time? Admittedly, accused Mujahid was the president of ICS till 16 December 1971.

XVIII. Al-Badar: Armed para militia force acted as ‘auxiliary force’

158. We reiterate that it is a fact of common knowledge now that Al-Badar was an armed *para militia* force which was created for ‘operational’ and ‘static’ purpose of the Pakistani occupation army. Al-Badar was one of two wings of Razakar force. Another wing was Al-Shams. Under the government management and supervision Al-Badar and Razakars were provided with training and allocated fire arms. Why these para militia forces were created? Of course, objective was not to guard lives and properties of civilians. Rather, it is reasonably undisputed that the Al-Badar force had acted in furtherance of policy and plan of Pakistani occupation army and in so doing it had committed atrocities in a systematic manner against the unarmed Bengali civilians through out the territory of Bangladesh in 1971. Pro-liberation civilians, intellectual group, Hindu community were their key targets.

159. Exhibit-14 series, the attested photocopy of statements of Razakars of Netrokona subdivision [prosecution documents volume 8, page 2493-2496, 2499] demonstrates the detail of allocation of fire arms and ammunitions to Al-Badar and Razakar forces which is indicator that Al-Badar force was under co-ordination of the government.

160. Al-Badar acted as the Pakistan army's '**death squads**' and exterminated leading left wing professors, journalists, litterateurs, and even doctors [Source: **Pakistan Between Mosque And Military: Hussain Haqqani**: published by Carnegie Endowment For International Peace, Washington D.C, USA first published in 2005, page 79]. Acting as 'death squad' of Pakistan occupation army in furtherance of policy and plan unequivocally proves that the Al-Badar force was a *para militia* force created to assist the Pakistan army as its auxiliary force.

161. Lawrence Lifschultz in his book titled "Bangladesh: The Unfinished Revolution" narrates that

"The Al-Badhr organization, a fanatical religious group which operated as a paramilitary arm to the Pakistan Army in 1971, was responsible for some of the worst killings during the war, particularly of nationalist intellectuals." [Source: **Bangladesh: The Unfinished Revolution**, Published in 1979, London, page 126]

162. That is to say, Al-Badar was a '*paramilitary arm*' to the Pakistan Army and it acted as its '*death squad*', in furtherance of policy and plan to annihilate the Bengali pro-liberation civilians, nationalist intellectuals, civilians belonging to Hindu community and freedom fighters [whom they called *miscreants*]. Additionally, by putting suggestion to the IO [P.W.17] defence has re-affirmed it that Al-Badar and Al-Shams were two wings of Razakar force. In reply to question elicited to him by the defence P.W.17 further stated that salary and allowances were paid to Razakars and Al-Badar by the then East Pakistan government. **Exhibit-14 series**, the attested photocopy of statements of Razakars of Netrokona subdivision also shows that the Al-Badar men were provided with arms under the supervision of the then East Pakistan

government. These two facts are indicative to conclude that the Al-Badar force too was an ‘auxiliary force’ as it acted for ‘operational’ and ‘static’ purpose of the Pakistani occupation army.

163. The freedom fighters and pro-liberation Bengali people were treated as ‘*miscreants*’. Even reward was announced for the success of causing their arrest or to provide information about their activities. Objective of such announcement was to wipe out the pro-liberation Bengali civilians to resist and defy the war of liberation which was the core policy of the Pakistani occupation armed forces. A report titled “সরকারের সিদ্ধান্ত : দুষ্কৃতিকারীদের গ্রেফতার বা খবরের জন্য পুরস্কার দেওয়া হবে” published on 25 November 1971 in **The Daily Pakistan** [দৈনিক পাকিস্তান] demonstrates it patently. The report, pursuant to a government press note, classified the ‘*miscreants*’ in five categories as below:

দুষ্কৃতিকারীদের শ্রেণীবিভাগ নিম্নরূপ হবেঃ

ক. তথাকথিত মুক্তিবাহিনীর নিয়মিত সদস্য, তথাকথিত মুক্তিবাহিনী ভর্তিতে সহায়কারীরা।

খ. স্বেচ্ছায় বিদ্রোহীদের খাদ্য, যানবাহন ও অন্যান্য দ্রব্য সরবরাহকারী।

গ. স্বেচ্ছায় বিদ্রোহীদের আশ্রয়দানকারী।

ঘ. বিদ্রোহীদের ‘ইনফরমার’ বা বার্তাবাহকরূপে যারা কাজ করে এবং

ঙ. তথাকথিত মুক্তিবাহিনী সম্পর্কিত নাশকতামূলক লিফলেট, প্যাম্পলেট প্রভৃতির লেখক বা প্রকাশক।

[Source: Sangbadpatre Muktijuddher Birodhita: Ekattorer Ghatakder Jaban Julum Sharajantra: Edited by Dulal Chandra Biswas: Bangladesh Press Institute: March 2013 Page 324]

164. Therefore, we reiterate our earlier finding [in the case of *Muhammad Kamaruzzaman*] that when it is established that the Al-Badar force was an armed *para militia* force created under the active vigilance of Jamat E Islami and Pakistani occupation army it may be unerringly concluded that it acted as an ‘auxiliary force’ for ‘operational’, ‘Static’ and ‘other purposes’ of the occupation armed force. It is also found from the book titled ‘**Muktijuddhe Dhaka 1971**’ that in 1971, Jamat E Islami with intent to provide support and assistance to the Pakistani occupation army formed armed Razakar and Al-Badar force and obtained government’s recognition for those *para militia* forces. The relevant narration reflected in the book is as below:

“জামায়াতে ইসলামী মুক্তিযুদ্ধের শুরু থেকে শেষ পর্যন্ত সামরিক জাভাকে সমর্থন করে। তাদের সহায়তার জন্য অন্যান্য ধর্মীয় দল নিয়ে প্রথমত গঠন করে শান্তি কমিটি। পরবর্তী সময়ে সশস্ত্র বাহিনী রাজাকার ও আলবদর গঠন করে এবং সরকারী স্বীকৃতি আদায় করে। যুদ্ধকে ধর্মযুদ্ধ হিসেবে প্রচারণা চালিয়ে উগ্র ধর্মীয় উন্মাদনা সৃষ্টির চেষ্টা করে। আর এর আড়ালে সৈন্যদের সহায়তায় চালায় নির্বিচারে নৃশংস গণহত্যা, লুট, নারী নির্যাতন, অপহরণ ও চাঁদা আদায়। সর্বশেষ জাতির বিবেক বুদ্ধিজীবীদের হত্যা করা হয়।”

[Source: **Muktijudhdhe Dhaka 1971**: edited by Mohit Ul Alam, Abu Md. Delowar Hossain, Bangladesh Asiatic Society, page 289 : Prosecution Documents Volume 03 page 583]

165. The narrative extracted from the old report of **Fox Butterfield** published in the **New York Times- January 3, 1972** unambiguously establishes that the Al-Badar was equipped and acted as directed by the Pakistani occupation forces.

“.....There is growing evidence that Al Badar was equipped and directed by a special group of Pakistani army officers. Among papers found in the desk of Maj-Gen. Rao Farman Ali, the military adviser to the Governor of East Pakistan, were a series of cryptic references to Al Badar..... **“Captain Tahir, vehicle for Al Badar”**, and **“use of Al Badar”**, one scrawled note said. Captain Tahir is believed to have been the almost legendary Pakistani Commander of the Razakars, the Bihari militia used by the Pakistani army to terrorise Bengalis.”

[Source: **Bangladesh Documents Vol. II** page 576, Ministry of External Affairs, New Delhi].

166. We have already recorded our reasoned finding in the case of **Muhammad Kamaruzzaman** that

“Since the Al-Badar force was an armed *para militia* force and it acted in furtherance of policy and plan of Pakistani occupation armed forces no formal letter of document needs to be shown to prove that it was under placement and control of Pakistani occupation armed forces, for designating it as ‘auxiliary force’. Relying on the old reports as conversed above it can be safely concluded that the ‘Al-Badar’ was an ‘auxiliary force’ as defined in section 2(a) of the Act of 1973. Besides, the information depicted from documents, as referred to above, are considered to be the necessary constituents of the phrases ‘placement under the control’ of armed force.” [Muhammad Kamaruzzaman, ICT-BD case No.3 of 2012, Judgment 09 May 2013, para 495]

167. In the case in hand, we do not find any reason whatsoever to deviate from our earlier finding. Al-Badar was created not to maintain peace and public order. Rather it is proved beyond reasonable doubt that it had carried out series of untold criminal activities, in furtherance of policy and plan of the Pakistan occupation army in a systematic manner and the members of the organisation were provided training and arms. Al-Badar, one of two wings of Razakars, was thus acted as an auxiliary force of Pakistan army in 1971.

XIX. Had the Accused position of Authority or Superior Position over the Al-Badar

168. The accused has been indicted to have incurred liability also as ‘superior’ i.e head or a leader of Al-Badar force, chiefly in respect of the crimes narrated in charge no.1 and 6. The Tribunal notes that mere fact that the accused was a ‘superior’ or ‘leader’ of AB force does not make him responsible for the alleged criminal acts unless the same are proved to have been committed by the AB men. The pertinent question that who were the actual perpetrators and whether the actual perpetrators belonged to AB force is an issue to be addressed and resolved while adjudicating the charges framed independently.

169. But however, the issue whether the accused was in a position of authority of AB force is a single and common issue that may be conveniently addressed and resolved separately which will be of assistance in determination of accused's culpability, if any, with the crimes alleged, before we enter into the segment of adjudication of charges framed against him. In resolving this issue it would be appropriate to evaluate relevant documentary evidence, sourced information together with the testimony of oral witnesses on material facts and circumstances.

Prosecution Argument

170. Ms. Tureen Afroz, the learned prosecutor went on to argue on how accused Ali Ahsan Muhammad Mujahid incurred "superior responsibility" for the crimes committed by the villainous Al-Badar force. She argued that Al-Badar was formed of only the members of Islami Chatra Sangha [ICS], the then student wing of Jamat E Islami [JEI]. Accused Mujahid as the president of ICS was thus also in commanding position of Al-Badar, which was especially responsible for the killings of intellectuals during the war of liberation. In order to show one's "superior responsibility" there should be a superior-subordinate relationship and the superior should have "effective control" over their subordinates. A superior might incur responsibility only after having failed to take "necessary and reasonable measures" to prevent or punish a crime committed by subordinates. But the accused Mujahid despite having effective control over the Al-Badar men failed to prevent them in committing crimes.

171. The learned prosecutor went on to argue that not necessarily the 'superior-subordinate relationship' must be formal. It may be informal as well and can be well perceived from relevant facts and circumstances constituting his *de facto* authority or commanding position over the perpetrators. In portraying accused's superior position Ms. Tureen Afroz, the learned prosecutor mainly drew attention to the speech made by the accused on 22 April 1971 [published in The Daily Sangram 24 April, 1971] and the 'closing speech' made to Al-Badar members at the AB headquarter in the city of Dhaka [source: **the book titled Al-Badar [translated text], page 135-138, Salim Mansur Khalid**, a Jamat leader [now in Pakistan]. Salim Mansur Khalid

authored the book in Urdu. It has been proved that accused Mujahid provoked and incited Al-Badar to play the role of “**Azrail**” during the nine-month-long war and the killing of the intellectuals was a part of the organized and planned atrocities committed by them.

Defence Argument

172. Mr. Abdur Razzak, the senior counsel for the accused has argued that admittedly all the Al-Badar members were from ICS but all the ICS workers were not Al-Badar members and there has been no evidence to show that the accused was the head of Al-Badar or he was in a position of authority. Even the book titled ‘Al-Badar’ does not describe accused’s name as Al-Badar. It has been further argued that the superior-subordinate relationship must be formal for holding an accused liable under the theory of superior responsibility. Since the accused was a civilian section 4(2) of the Act does not come into effect. Mere taking political stand by dint of his position in ICS does not make him criminally liable under section 4(2) of the Act of 1973 for the crimes allegedly committed by the Al-Badar men.

173. It has been further argued that the charges do not plead the detail particulars as to the superior-subordinate relationship and the acts for which the accused is allegedly responsible under the doctrine of superior responsibility. As such the charges framed fail to reflect due notice to the accused to prepare his defence. In support of this argument a decision in the case of **Muvunyi** has been cited [**Muvunyi**, ICTR Appeal Chamber, Case No. ICTR-2000-55A-A, Judgment 29 August 2008, para 19-22]

174. For holding liable under the doctrine of superior responsibility it must be proved that the accused had material ability to control the actual perpetrators. Effective control over the subordinate is a key requirement as well [**Prosecutor v. Delalic**, ICTY Appeal Chamber, Case No.IT-96-21-A, Judgment 20 February 2001, para197]. ‘*Knowledge*’ of a superior must be actual knowledge and it may not be presumed [**The Prosecutor v. Tihomir Blaskic**, ICTY Trial Chamber, Case No. IT-95-14-T, Judgment 3 march 2000, para 307-309: Defence arguments pack-3]. Prosecution has failed to prove too that the accused ‘had reason to know’ about the perpetration of crimes alleged. In case of failure to prove that the accused had ‘duty to know’ he cannot be liable as ‘*superior*’

[Prosecutor v. Delalic & others, ICTY Appeal Chamber, Case No. IT-96-21-A, Judgment, 20 February 2001, para 228-235]

Deliberations on the issue of Position of Authority

175. It appears that the accused has been arraigned to have incurred liability under section 4(2) of the Act of 1973 which correspond to the notion of ‘superior responsibility’ chiefly in respect of charge nos. 1 and 6. Both the charges relate to ‘**intellectuals killing**’. Admittedly accused Ali Ahsan Muhammad Mujahid was a top ranking leader of the then East Pakistan Islami Chatra Sangha [ICS]. Defence however denies the averment that the accused was a commander of Al-Badar force.

176. It has been argued by the defence that section 4(2) of the 1973 Act only provides for holding military commanders and superiors responsible for criminal acts of subordinates; and it does not provide for civilian superiors to be held similarly accountable.

177. But as per the amendment of section 3 of the Act of 1973, the Tribunal now has jurisdiction to try and punish any non-military person [civilian], whether superior or subordinate, who has direct or indirect involvement with the relevant crimes. In other words, the Tribunal now has jurisdiction to try any accused who is a non-military person, including a civilian superior. We have already recoded our finding in the case of *Muhammad Kamaruzzaman* that

“.....the Tribunal notes that a civilian superior will be held liable under the doctrine of superior criminal responsibility if he was part of a superior-subordinate relationship, even if that relationship was an indirect one. No formal document is needed to prove this relationship. It may be well inferred from evidence presented and relevant circumstances revealed [ICT-BD Case no. 03 of 2012, Judgment 09 May 2013, para 628]

178. The doctrine of superior responsibility is applicable even to civilian superiors of paramilitary organizations. As a matter of policy, civilians should also be subject to the doctrine. The elements to be proven for a person to be held responsible under the theory of superior responsibility are (1) crime has been perpetrated (2) crime has been perpetrated by someone other than the accused (3) the accused had material ability or influence or authority over the activities of the perpetrators (4) the accused failed to prevent the perpetrators in committing the offence.

179. We are not convinced with the contention that the charges especially charge no.1 and charge no. 6 are defective for mere non description of details as to acts of the accused for holding him liable under the theory of ‘superior responsibility’. First, charges have been framed in compliance of provisions contained in section 16(1). Second, after framing charges defence preferred review and this question was not raised at that stage and the accused did not contend as to why further specificity was required in this case to prepare his defence and thus now we do not find any substantial reason to consider this contention agitated at this stage.

180. Besides, the above charges have narrated as to why and how the accused has been indicted and have incurred liability. Thus, in no way, defence cannot be said to have been materially impaired. Neither the identification of the principal perpetrators by their name nor the accused’s knowledge of their identity and number are needed to be specified in the charge framed. It is to be considered whether the individuals who are responsible for the actual commission of the crimes were within a group or organisation under the effective control of the accused for the purpose of ascribing criminal responsibility under section 4(2) of the Act of 1973.

181. Next, it is now settled that the doctrine of superior responsibility extends to civilian superiors only to the extent that they exercise a degree of control over their subordinates [the principal perpetrators] which is similar to that of military commanders. It cannot be expected that civilian superiors will have disciplinary power over their sub-ordinates equivalent to that of military superiors in an analogous command position. Even no formal letter or

document is needed to show the status of ‘superior’. In the case of **Blagojevic and Jokic** it has been observed that –

“A de facto commander who lacks formal letters of appointment, superior rank or commission but does, in reality, have effective control over the perpetrators of offences could incur criminal responsibility under the doctrine of command responsibility.” [Trial Chamber: ICTY, January 17, 2005, para. 791]

182. From the principle enunciated in the above decision of ICTY Trial Chamber it is clear that for establishing *de facto* superior position no formal letter of appointment or any such related document is needed. In this regard we may recall the decision of the ICTR Trial Chamber in the case of **Zigiranyirazo** which is as below:

“It is not necessary to demonstrate the existence of a formal relationship of subordination between the accused and the perpetrator; rather, it is sufficient to prove that the accused was in some position of authority that would compel another to commit a crime following the accused’s order.[Zigiranyirazo, ICTR Trial Chamber, December 18, 2008, para. 381]

183. Thus it suffices that the superior had effective control of his subordinates, that is, that he had the material capacity to prevent the criminal conduct of subordinates. For the same reasons, it does not have to be established that the civilian superior was vested with ‘excessive powers’ similar to those of public authorities.

184. It is true that ICS and AB [Al-Badar] were two distinct organizations. We have already recorded our reasoned finding as to creation and organizational nature of AB in the case of *Muhammad Kamaruzzaman*. AB was formed of ICS workers. In 1971, accused Mujahid was the Secretary and subsequently

the President of ICS the student wing of JEI. AB acted as an **‘action section’** of JEI and **‘death squad’** of army. A single chain was thus created through the collective activities carried out by those organizations, in furtherance of common purpose and policy.

185. P.W.4 Shaheen Reja Noor had testified that Mujahid [accused], as the Al-Badar commander, ordered and supervised the killings of intellectuals at the fag end of the war of liberation in 1971. He also said that Al-Badar, formed with the activists of Islami Chatra Sangha [ICS], was then compared to Hitler’s Gestapo.

186. P.W.1 Shahriar Kabir, a notable researcher, stated that Al-Badar was a semisecret organization like Hitler’s Gestapo. On 07 November 1971, accused Mujahid addressed a rally on eve of ‘Badar day’ and administered oath to liquidate the ‘enemies of Islam’, ‘agents of India’, as a leader of Al-Badar force. In reply to question elicited to him P.W.1 stated that Islami Chatra Sangha [ICS] was transformed to ‘Al-Badar’ and accused Ali Ahsan Muhammad Mujahid was its deputy-chief.

187. Now we are to see how far the above versions conform to the circumstances and facts for establishing accused’s position of authority or superior position, as claimed by the prosecution. What is authority position? It is the power to act. Position of authority is meant to enable its holder to effectively carry out his aim and intention and position of authority includes a right to command a situation by act or conduct. Synonyms of the expression ‘authority’ include ‘command’, ‘domination’, ‘influence’, ‘permit’ etc. Accused Mujahid’s statement on **“Daily Sangram” on October 15th, 1971** speaks that

“The youths of the Razakars and al-Badar forces and all other voluntary organizations have been working for the nation to protect it from the collaborators and agents of India. But, recently it was observed that a section of political leaders like ZA Bhutto, Kawsar Niazi, Mufti Mahmud and Asgar Khan have been making objectionable remarks about the patriots.”

188. Such statement is a fair indicator to conclude that the accused by virtue of holding top position in the ICS was actively concerned with organizational activities of Al-Badar and he even did not allow criticism against the Al-Badar which was known as the ‘action section’ of JEI. Thus it may be said that it was his ‘authority’ that permitted him to make such statement defending the Al-Badar force which is significant to infer that he had a position of authority on the Al-Badar force.

189. Accused’s commanding position in the ICS naturally placed him in a position of authority even of AB the creation of JEI which was formed of ICS workers. It appears that the sources of the accused’s power and authority were twofold. First, the accused Mujahid possessed power by virtue of his political position that he occupied during the war of liberation in 1971 within the territory of Bangladesh. Second, it has been depicted from various sources, reports and evidence that he was entrusted with political power of addressing the Al-Badar men, although he was not the sole leader of the Al-Badar force.

190. Apart from this rationale there have been some relevant facts which sufficiently offer fair indicative as to accused’s involvement with the activities of AB. Thus, mere absence of formal designation referring to his commanding position the accused cannot be held to be a person having no authority and control over the AB. The IO P.W.17 in reply to question put to him by the defence has re-affirmed that Al-Badar Head Quarter was set up at Mohammadpur Physical Training Institute [now college] in 1971.

191. P.W.5 Md. Rustom Ali Molla son of an employee of the institute had been staying at his father’s quarter inside the institute premises. P.W.5 stated that accused Mujahid used to come to the Al-Badar head quarter, sometimes being accompanied by the top brasses of JEI and ICS. Naturally it was not possible for a civilian to know the purpose of accused’s visit to the Al-Badar head quarter. But circumstances, other relevant facts and accused’s position in ICS offer unambiguous notion that in exercise of his position of authority the accused used to visit Al-Badar head quarter to co-ordinate the activities of Al-Badar. We have found from evidence of P.W.5 that 6-7 months after the war of liberation ensued Pakistani army, Razakars, Al-Badar started picking up

intellectuals, artists, lawyers to the Al-Badar head quarter and they were subjected to torture at the dining hall of the institute that resulted in their death and afterwards their bodies were dumped at the mass grave at Rayer Bazar and different places. This version portrays a transparent picture as to activities carried out at the AB HQ and by its members. This barbaric portrayal sufficiently offers the culpable purpose of visit of AB HQ by the accused Ali Ahsan Muhammad Mujahid.

192. The learned senior counsel for the defence has submitted that superior-subordinate relationship must be formal to establish that the accused was superior. We disagree. Now it has been a settled jurisprudence that such relationship may be informal, particularly when the civilian superior responsibility comes forward.

193. From the principle enunciated in the above decision of ICTY Trial Chamber that for establishing *de facto* superior position no formal letter of appointment or any such related document is needed. The ability to exercise effective control is necessary for the establishment of *de facto* superior responsibility, in civil setting. The superior-subordinate relationship need not have been formalized or necessarily determined by formal status alone [Celibici trial Judgment. Para 370].

194. Thus, the absence of formal appointment is not fatal to a finding of criminal responsibility, under the theory of civilian superior responsibility, provided certain conditions are met. Formal position or designation as a commander is not required, particularly in case of a *de facto* superior. This view finds support from the decision in the case of *Prosecutor v. Milan Milutinovic & others* [ICTY Trial Chamber, Case No. IT-05-87-T, Judgment 26 February 2009, para 117] which is as below:

“Formal designation as a commander or a superior is not required in order to trigger Article7(3) responsibility: such responsibility can arise by virtue of a superior’s de facto as well as de jure power over those who committed the crime or underlying

offence.[*Čelebići* Appeal Judgement, paras. 191–192; *Kajelijeli* Appeal Judgement, para. 85.]

195. The key to establishing the existence of a superior-subordinate relationship for any accused superior—whether *de facto* or *de jure*, military or civilian—is that he exercised effective control over the actions of the alleged subordinates.[*Bagilishema* Appeal Judgement, para. 56] In other words, the accused must have had the material ability to prevent or punish the alleged subordinates’ commission of offences.[*Kordić* Appeal Judgement, para. 840]

196. Undeniably, effective control requirement is a key factor in determining one’s superior position. The notion of ‘effective control’ to prove one’s superior position on a particular group is to be perceived from circumstances of each case. “The indicators of effective control are more a matter of evidence than of substantive law [*Blaskić* (ICTY Appeals Chamber), July 29, 2004, para] as to whether the superior has the requisite level of control; this is a matter which must be determined on the basis of the evidence presented in each case.

197. It is now settled both in ICTR and ICTY jurisprudence that the definition of a ‘superior’ is not limited to military superiors; it also may extend to *de jure* or *de facto* civilian superiors. [*Bagilishema*, Appeals Chamber, July 3, 2002, para. 51]. It suffices that the superior had effective control of his subordinates, that is, that he had the material capacity to prevent the criminal conduct of subordinates. For the same reasons, it does not have to be established that the civilian superior was vested with ‘excessive powers’ similar to those of public authorities.

198. The fortnightly Secret Report (April–November 1971) –**Exhibit 18 series** [prosecution documents volume 9, relevant page 2777, para 21–23] goes to show that the accused Ali Ahsan Muhammad Mujahid at workers conference of ICS held in Rangpur on 17.10.1971 *urged the workers to form Al-Badar at different levels asking them to ensure that no person of un-Islamic attitude gets access in the Al-Badar bahini.* The Tribunal notes that of course a significant level of authority in position makes a person able to insist his party

[ICS] workers. It also demonstrates that the accused had a substantial authority and control over the Al-Badar force.

199. The inflammatory and extremely provoking speech by the accused Ali Ahsan Muhammad Mujahid as quoted above [in paragraph 147] that “**Al-Badar is a name! A wonder! A-Badar is a commitment! Where there is the so called freedom fighter, there is the Al-Badar. Where there is the miscreant, there is the Al-Badar. Al-Badar is the Azrail [Angel of death] in presence to the ‘Indian agents’ or the ‘miscreants’** indeed offers sufficient indication as to his significant position of authority on the Al-Badar. It is also evident from a report titled “হিন্দুস্থানী হামলার বিরুদ্ধে গণসমাবেশ” and a picture published in the **Daily Azad** on **11.12.1971- Exhibit 2 Series** [prosecution documents volume 9, page 2826] that the accused Ali Ahsan Muhammad Mujahid as the ‘**chief of Al-Badar**’ addressed a public rally. The caption of the photo published together with the report bears the name of the accused Mujahid as the ‘Chief of Al-Badar’.

200. Next, it could not be refuted in any manner that ‘**Nazem**’ [**President**] of ICS made the speech at Al-Badar headquarters on 16 December 1971 addressing the Al-Badar men. Who was ‘**Nazem**’ of ICS at the relevant time? Admittedly, it was accused Mujahid who was in position of ‘**Nazem**’ [**President**] of the then East Pakistan ICS. Thus, it may be unerringly concluded that the accused by virtue of his leading position of ICS, the student wing of JEI exercised his authority of addressing the AB men.

201. The translated text of the book titled ‘**Al-Badar**’ has been questioned by the defence on ground of quality of its Bangla translated text and lack of sources of footnotes in this translated text. But the contents of the translated Bengali text however could not be refuted and challenged. The book appears to be research based and its original Urdu version is a publication of Jamat E Islami which has not been challenged. Therefore, we are not agreed with defence submission that the book titled ‘**Al-Badar**’ carries no value and its worst than anonymous hearsay evidence. We do not find rationale to negate the value of the book readily. Mere non disclosure of name of accused Ali Ahsan Muhammad Mujahid in the alleged ‘**last speech**’ [*Akhri Khitaab*] narrated in the book does not reverse the fact that the speech was made by

accused himself on 16 December. The ‘last speech’ depicts that the Nazim’ [President] of the then East Pakistan ICS addressed the Al-Badar members at Al-Badar headquarter. Admittedly, at the relevant time accused Mujahid was the president of ICS. Be that as it may, we find no reason to say that the ‘last speech’ was not made by the accused Mujahid.

202. We are not convinced with the defence argument that in absence of any documentary evidence the accused cannot be termed as a ‘commander’ or ‘superior’ of Al-Badar. The Tribunal notes that considering the circumstances of the case, it is to be shown that the accused was in a position of authority and his position of ‘commander’ is not needed to be proved strictly. Such position of authority can be well perceived from circumstances revealed.

203. For establishing accused’s ‘effective control’ over the Al-Badar force which had acted as an ‘action section’ of JEI no formal document is needed. Under the ‘effective control’ test, there is no requirement that the ‘control exercised by a civilian superior must be of the same *nature* as that exercised by a military commander. What is essential is that the *de facto* civilian superior possessed the requisite *degree* of effective control. It could have been well articulated from circumstances and relevant material facts revealed in a particular case. This view finds support from the observation made by the ICTR Appeal Chamber in the case of **Nahimana** which is as below:

“Effective control is primarily a question of fact, not of law, to be determined by the circumstances of each case [Nahimana ICTR Appeal Judgement, para. 605].

204. Formal document may not necessarily be indicative of ‘actual authority’ of the accused over the Al-Badar force. Tribunal notes that an individual is termed as a ‘leader’ when his activity involves establishing a goal and common purpose by sharing the vision with others so that they will follow or obey him willingly. Leadership is a process whereby an individual influences a group of individuals to achieve a common goal. Leadership is a process by which a person influences others to accomplish an organizational objective. We have already recorded our finding that Al-Badar was an auxiliary force [**Muhammad Kamaruzzaman**, ICT-BD Case

No. 03 off 2012, Judgment 09 May 2013] and was formed of ICS workers and it acted as ‘action section’ and ‘armed wing’ of JEL.

205. Why the accused preferred to address the AB men at its headquarters just few hours before the Pakistani occupation army surrendered by sharing pains and frustration and also with future guidelines? The fact of addressing the ‘last speech’ and its substances demonstrate unmistakably that the accused was not only concerned with the organizational policy of AB but he had a position of authority on it too that made him enable to address such speech. Who can be called a leader or a person of authority in position? The Tribunal notes that authority is the position of control someone has over another person or group. The word authority is used to give orders, support, and encouragement and influence people what to do. If one has authority, he or she is in control and able to make others listen.

206. The accused need not have a formal position in relation to the perpetrator, but rather that he has the ‘**material ability**’ to prevent the crime [**Celibici** Appeal judgment, ICTY Appeal Chamber, Judgment 20 February 2001, para 197,256,266 and 303] . The ICTY Trial Chamber in the case of **Celibici** held that in the absence of direct evidence, circumstantial evidence may be used to establish the superior’s actual knowledge of the offences committed, or about to be committed, by his subordinates.[**Celibici** Trial Chamber, ICTY, Judgment 16 November 1998, para 386].

207. ‘Al Badar’ [AB] , an extremist Muslim group, carried out the heinous crimes of intellectual killings just before the surrender of Pakistani forces in Dacca. [Source: **The Hindustan Times**, New Delhi, 21 December, 1971: published in **Bangladesh Documents, Volume II**, Ministry of External Affairs, New Delhi, page 572]. It reflects a notorious organizational intent and common purpose of the AB force’s ‘last speech’ addressed to the AB men at its headquarters validly prompt us to conclude that he[accused] had reason to know the activities carried out by the AB men.

208. Referring a report published in **The daily Sangram** 24 April 1971 a report titled “মুজাহিদের কুকীর্তি গাঁথা আছে দৈনিক সংগ্রামের পাতায়” published in **The**

Daily Bhorer Kagoj, 31 October 2007 which speaks that accused Ali Ahsan Muhammad Mujahid by making speech provoked the Al-Badar to act as ‘**Azrail**’ [The Angel of Death] to liquidate pro-liberation Bangalee people and freedom fighters wherever they [Al-Badar] get them. In this way accused Mujahid explicitly disseminated the unholy organizational purpose, objective and common intent to its [Al-Badar] members, and thereby he exercised his authority and effective control on them. Conceivably accused’s power of authority stemmed from his leading position in the ICS.

209. The notion of ‘power or authority’ of an accused is to be assessed on a case-by-case basis considering the cumulative effect of accused’s conduct and attitude and activities together with his affiliation with the group or organisation. It has been observed in the case of **Prosecutor v. Brdanin** that

“In all circumstances, and especially when an accused is alleged to have been a member of collective bodies with authority shared among various members, it is appropriate to assess on a case-by-case basis the power of authority actually devolved on the accused, taking into account the cumulative effect of the accused’s various functions”[*Prosecutor v. Brdanin*, ICTY Trial Chamber, case No. IT-99-36-T, Judgment, 1 September 2004, para277]

210. What we see in the case in hand? Total evaluation of evidence, circumstances and conduct of the accused prompt us to conclude that the accused was very much aware of the activities carried out by the AB force. The conduct of the accused that he had started showing even since the formation of Al-Badar force together with the fact of last moment killing of intellectuals and other relevant circumstances inevitably establishes his level of effective control on the Al-Badar force. Besides, his ‘last speech’ as narrated in the book titled ‘Al-Badar’ demonstrates his position of authority and material ability to control the Al-Badar force and that he failed to prevent commission of atrocities by the AB men, despite his material ability.

211. To establish superior responsibility under the Act of 1973 the prosecution is not required to prove that the accused superior either had any 'actual knowledge' (knew) or 'constructive knowledge' (should have known) about commission of the subordinate's crime. The 'knowledge' requirement is not needed to prove accused's superior position within the ambit of the Act of 1973. However an individual's superior position *per se* is a significant *indicium* that he had knowledge of the crimes committed by his subordinates. Additionally, 'knowledge' may be proved through either direct or circumstantial evidence.

212. In view of above discussion based on relevant circumstances and conduct of accused was not mere part of his innocent political activities. Mere taking political stand by dint of his position in ICS cannot make the accused a person of position of authority or a superior or a leader of the Al-Badar force, as submitted by the defence, does not seem to be convincing. Might be there had been some more persons having position of authority over the AB force. But it cannot absolve the accused of his liability as a 'superior', particularly when he is found to have acted as a leading person exercising his own authority of position on AB force.

213. However, we are convinced to pen our finding that the prosecution has been able to prove it beyond reasonable doubt that there had been a *de facto* and informal superior-subordinate relationship between the accused Ali Ahsan Muhammad Mujahid and the Al-Badar force and that he had effective control on the AB men and had reason of being remained aware of the activities carried out by them [Al-Badar], chiefly by virtue of his position in ICS.

XX. Adjudication of charges

214. Charge no.1 and charge no.6 relate to the event allegedly occurred in the capital city of Dhaka in between 10 December to 14 December 1971. The former involves the event of abduction and murder of notable journalist Seraj Uddin Hossain, while the later one involves the tragic and barbaric atrocity of large scale killing of notable intellectuals. Accused Ali Ahsan Muhammad Mujahid has been indicted for abetting the commission of the crimes narrated in these two charges framed which allege that the accused also incurs liability as superior under section 4(2) of the Act of 1973. However, he is not alleged

to have physically participated to the commission of crimes alleged. The principal crimes described in two charges [charge nos. 1 and 6] are alleged to have been actually committed by the armed Al-Badar men in furtherance of a concerted plan and common purpose. The crimes are perceived to have been accomplished in a similar pattern in between 10 December to 16 December 1971.

215. The events narrated in charge nos. 1, 5 and 6 allegedly took place in Dhaka city. The accused has been indicted to have abetted, facilitated, and involvement in designing plan to the commission of crimes alleged in charge nos. 1,5 and 6. Charge nos. 2,3,4 and 7 relate to the events allegedly committed in Faridpur, the home town of the accused and he has been indicted to have abetted, facilitated, contributed substantially and participated to the commission of crimes narrated in these four charges.

Adjudication of Charge No.1

[Event of notable Journalist Seraj Uddin Killing in Dhaka]

216. Summary Charge: Accused Ali Ahsan Mohammad Mujahid being the leader of Islami Chatra Sangha and subsequently the head of Al-Badar Bahini and or as a member of group of individuals wrote a counter article which was published on 16th September 1971 in the 'Daily Sangram' opposing the article written by Seraj Uddin Hossain, the then Executive Editor of the daily 'Ittefaq', portraying the untold sufferings caused to unarmed civilians by the local agents of Pakistani Army and also criticizing Seraj Uddin Hossain as an 'agent of India' (ভারতের দালাল). During that period the Pakistan Government had instructed to publish articles branding the freedom fighters as 'miscreants'. Seraj Uddin Hossain, a notable journalist of the country being a member of 'group of intellectuals', became target of the Jamat-E-Islami and Al-Badar Bahini and as such at 03:00 am, in the night following 10 December 1971, 7/8 youths having their face covered by 'monkey cap' equipped with rifles abducted Seraj Uddin Hossain from his rented house at 5, Chamelibag, Dhaka and he never returned nor his body was found and thereby Ali Ahsan Mohammad Mujahid has been charged for abetting, facilitating and contributing the actual commission of offence of '**abduction as crime against humanity**' or **in the alternative**, for abetting, facilitating and contributing the actual commission of offence of '**murder as crime against**

humanity, by his conduct which was part of attack against civilian population and also targeting a notable member of 'intellectuals' as specified in section 3(2) (a) (g) of the Act for which the accused has incurred liability under section 4(1) and 4(2) of the Act.

Witnesses

217. P.W.4 Shahin Reja Noor, the son of martyr Seraj Uddin Hossain, a notable journalist testified how his father was abducted from their house. The accused has been indicted to have abetted, facilitated and contributed, in the capacity of head of Al-Badar force, to the commission of 'abduction' or in the alternative 'murder' of Seraj Uddin Hossain. The event took place on 10 December 1971. After the alleged abduction the victim never returned and his dead body could not be found even. The charge describes that 7/8 youths having their face covered by 'monkey cap' and equipped with rifles abducted the victim Seraj Uddin Hossain. Thus, no one had occasion to witness the fate of Seraj Uddin subsequent to his abduction. P.W.4 narrated how his father Seraj Uddin was abducted from their home on the date and time.

Evidence

218. P.W.4 stated that his father went into journalism with the Daily Azad during his student life and joined the progressive Daily Ittefaq as news editor in 1954. In September 1971, his father wrote some articles in the daily and one of these was "*Thag Bachte Ga Ujar*" [ঠগ বাছতে গাঁ উজার], which was mainly a criticism of the Pakistani military forces and their supporters. On September 16, 1971, an article was published in Daily Sangram, the mouthpiece of Jamaat E Islami, countering his father's article, titled "*Atoeb Thag Bachio Na*" [অতএব ঠগ বাছিওনা]. This article, which was actually a threat attacking his father terming him a collaborator of India and favouring Brahmanism.

219. The above version remained unshaken, in cross-examination and it fairly demonstrates the reason of targeting Seraj Uddin Hossain as part of planned attack. It is immaterial to deduce whether the alleged counter article was written by the accused.

220. P.W.4, in describing the event of his father's abduction stated that on December 11, 1971, between 3:00am and 3:30am, someone knocked on their

door vehemently and with this he woke up and he could hear the voice of their house owner Dr. Shamsul Huda, who asked him to open the door. With this when he opened the door, five or six gun barrels came through and then seven or eight armed people stormed into the room shouting, 'Hands up'. He raised his hands and his younger brother and a brother-in-law also raised their hands over their heads. Almost all the faces were covered with monkey caps and scarves. They were wearing shirts, trousers, jumpers and had tennis shoes on.

221. P.W. 4 further stated that at gun-point, they [the gang] took them to the bedrooms and asked his [P.W.4] father to raise his hands after finding him in a room. They [the gang] asked his father, 'What is your name? What do you do?' and his father replied, 'Seraj Uddin Hossain and Executive Editor of Daily Ittefaq.' With this, pointing a gun at his father's back they said, 'Come with us' and they took his father. P.W.4 stated that the family after a few seconds understood that his father was being taken away on a microbus. He [P.W.4] informed barrister Moinul Hossain, the editor of Daily Ittefaq at the time, of the matter and that the abductors were not from the military force as they were not in any uniform.

222. The narration made on the event of abduction could not be refuted in any manner. At the same time it remains undisputed too that the perpetrators were not from Pakistani occupation army and definite target of the gang was his [P.W.4] father.

223. P.W.4 stated that on 18 December 1971, after the independence on 16 December as advised by Advocate Aminul Haque [father's friend] he [P.W.4] rushed to 'Rayer Bazar' where he found numerous dead bodies, mostly decomposed and the dead body of Dr. Fazle Rabbi, Selina Parveen and possibly Munir Chowdhury could be identified. But he [P.W.4] did not find his father's dead body. He also found 10-15 dead bodies in a ditch. On interaction with them who came there in search of their dear ones he knew that the armed perpetrators who had abducted their near and dear ones were dressed and equipped in similar pattern.

224. The fact of finding numerous dead bodies of notable intellectuals at 'Rayer Bazar', an outskirts of Dhaka city and the perpetrators while abducting

the victims were similarly dressed and equipped, as stated by P.W.4 could not be refuted by the defence. These unshaken facts demonstrate the existence of common purpose and plan in furtherance of which the pattern crime of abduction and large scale killing was accomplished in between 10-14 December 1971.

225. P.W.4 stated that they [killers] were members of Al-Badar Bahini and the Al-Badar was formed with the leaders and activists of Jamat E Islami's then student wing Islami Chatra Sangha [ICS]. Razakar, Al-Badar and Al-Shams forces were formed as the collaborationist force of the Pakistani army in besieged Bangladesh and Prof Ghulam Azam, then Ameer of East Pakistan Jamat E Islam, played a vital role in this regard. The Al-Badar force was known as a killer force or Gestapo force. Mujahid [accused] was its East Pakistan president between October and December 1971.

226. P.W.4 further stated that Chwodhury Mueen Uddin was the 'operation-in-charge' and his accomplice Ashrafuzzaman Khan was an active member of Al-Badar, an the auxiliary force of Pakistan occupation army, carried out the operation to liquidate the intellectuals. Accused Ali Ahsan Muhammad Mujahid was the Al-Badar commander and under his supervision, direction and instruction the operation of killings of intellectuals were carried out.

227. On cross-examination, P.W.4 explained why he could not mention the accused Mujahid as commander of Al-Badar earlier. However, the above version could not be refuted.

Deliberations

228. The learned defence counsel argued that the prosecution has not been able to prove that the 'article' alleged was written by Seraj Uddin Hossain. At the same time the article which is alleged to have been published in The daily Sangram to counter the former 'article' was not written by the accused and as such the accused had no reason of being hostile to Seraj Uddin Hossain. Prosecution has failed to prove that the accused abetted the group of unknown persons who allegedly abducted Seraj Uddin Hossain. Besides, after liberation, on lodgment of formal allegations on the event of abduction and murder of Seraj Uddin Hossain one Khalil was prosecuted, tried and convicted

and sentenced under the Collaborators Order 1972. The present accused also could have been prosecuted together with the actual offender under the Collaborators Order 1972. P.W.4 the son of Seraj Uddin Hossain did not bring allegation in course of trial of the said case on the event of abduction and killing his father. Now the accused has been arraigned for the same offence as an abettor simply on political ground.

229. The learned Prosecutor in reply to above argument has submitted that the present accused has not been accused of committing the actual offence. He has been charged for the offence of abetting the commission of the offence of abduction and murder as crimes against humanity and ‘abetting’ to the commission of such offence is a distinct offence enumerated in the Act of 1973. The offence tried for the criminal acts under the Collaborators Order 1972 was ‘murder’ under the Penal law. But the offence of abetting to the commission of abduction and murder is an internationally recognised crime committed in violation of customary international law.

230. The Tribunal notes that the ultimate outcome of the criminal acts narrated in the charge was murder of an intellectual. Dead body of the victim could not be traced even. To prove the offence of murder as crime against humanity locating dead body is not necessary, as such crime is committed in a context and as a part of pattern based attack and not as an isolated crime. The act of abduction was followed by murder of victim Seraj Uddin Hossain. The commission of the alleged criminal event causing abduction and murder remained totally undisputed.

231. According to charge framed the accused is alleged to have incurred liability under section 4(1) and section 4(2) of the Act of 1973. The first segment of description made in the charge refers to the reason of targeting Seraj Uddin Hossain. The accused cannot necessarily be absolved of responsibility even if he is not found to have written article countering the ideas reflected in writings of Seraj Uddin Hossain. The accused has not been arraigned for physical or direct commission of the crime alleged. The accused may be held criminally liable if he is found to have had connection with any plans and activities involving the commission of such crimes.

232. In order to prove accused's connection or involvement with the perpetrators of activities committed by them, first it is to be identified who were the perpetrators of the offence of abduction alleged. Next, it is to be seen as to whether the perpetrators belonged to any particular group of organization. And finally, it is to be resolved as to whether the accused Mujahid had any relationship or link with the perpetrators and the group or organization they belonged, and the accused had material ability to control or position of authority on the principals.

233. Defence avers that the accused was not connected with the alleged criminal acts, in any manner, as the prosecution failed to produce any evidence in support of any conduct or act of the accused constituting the offence of 'abetment' to the commission of principal crimes. Besides, P.W.4 Shahin Reja Noor, the son of martyr Seraj Uddin Hossain admits the fact of lodgment of a case under the Collaborators Order 1972, for the same criminal event and one Khalil was prosecuted and after trial he was sentenced to imprisonment for life. The present accused could have been prosecuted and tried together with Khalil under the Collaborators Order 1972, if actually the accused had any link or participation to the actual commission.

234. The Tribunal notes that prosecuting an individual or individuals under the Collaborators Order 1972 was for the event of abduction and murder of Seraj Uddin Hossain [father of P.W.4], as defined in Penal Code. Prosecution does not claim that the present accused Ali Ahsan Muhammad Mujahid directly participated to the commission of the crimes. Conceivably for this reason he was not brought to justice under the Collaborators Order 1972. Now he has been arraigned for the charge of abetting the criminal acts that resulted in abduction and murder of Seraj Uddin Hossain. And 'abetting' to commit an offence of murder as crime against humanity enumerated in section 3(2)(a)(g) of the Act of 1973 is a distinct offence under the Act of 1973. Thus, we are not persuaded with the argument that the present accused cannot be prosecuted and tried for abetting the commission of the criminal acts for which one Khalil was prosecuted, tried and punished under a different law i.e the Collaborators Order 1972.

235. In finding culpability of the accused with the commission of the offence of murder of Seraj Uddin Hossain and Intellectuals killing [as narrated in charge no.1 and charge no.6] we are to see (i) whether the event of alleged killing of intellectuals took place(ii) who were the actual perpetrators (iii) whether the perpetrators belonged to any organised group or force (iv) why the perpetrators targeted the ‘intellectuals (v) Whether accomplishment of such crimes was in implementation of common plan and design (vi) What was the relationship of the accused with the perpetrators (vii) was the accused part of such common plan and design (viii)had the accused effective control and authority over the principal perpetrators (ix) how the accused acted in encouraging, endorsing or approving the criminal acts causing the extreme diabolic killing of intellectuals.

236. Seraj Uddin Hossain, father of P.W.4 was a notable journalist who continued to contribute favouring and inspiring the war of liberation by his valued writings. Indubitably he belonged to Bengali intellectual class maintaining pro-liberation ideology. He was abducted at dead of night on 10 December from his home in Dhaka city. Defence does not dispute it. In fact, event of abduction and killing of Seraj Uddin was a part of ‘intellectual killing’ that took place in between 10 to 14 December although the accused has been arraigned of this criminal acts as abettor and facilitator by framing a distinct charge.

237. The event took place on 10 December 1971 i.e at the verge of victory on 16 December 1971. All these facts as narrated by P.W.4 remained unshaken and the defence could not deny it even. Admittedly Khalil, an Al-Badar man , was prosecuted tried and punished under the Collaborators Order 1972 for the murder of Seraj Uddin Hossain was a member of Al-Badar. Thus it leads us to infer conclusively that the group of the perpetrators belonged to Al-Badar the ‘action section’ of JEL.

238. Naturally no one had least opportunity to recognize the perpetrators and to know how the abducted victims were killed. At the time of event of abduction they kept their faces masked having fire arms with them. Who were they? Why they targeted the intellectuals like Seraj Uddin Hossain? Was there any common design and plan in launching such attack?

239. We have found it from evidence of P.W.4 that writing articles by his father made him [Seraj Uddin Hossain] target of threat and attack and his father Seraj Uddin Hossain through such writings had strong stand in favour of war of liberation and self-determination of Bengali nation and with this the local pro-Pakistan people who took stand to assist Pakistani army became antagonistic to his father.

240. From the unimpeached version of P.W.4 it appears quite evident that on asking, when the gang satisfied as to identity of Seraj Uddin Hossain they abducted him without causing any kind of instant harm to any of his [victim] family inmates. The manner the gang abducted Seraj Uddin Hossain and conduct of the gang as testified by P.W.4, the eye witness son of the victim unambiguously indicates that target of the armed gang's attack was Seraj Uddin Hossain.

241. According to P.W.4 on 18 December 1971 he [P.W.4] rushed to 'Rayer Bazar' where he found numerous dead bodies, mostly decomposed and the dead body of Dr. Fazle Rabbi, Selina Parveen and possibly Munir Chowdhury could be identified. But he [P.W.4] could not find his father's dead body. He also found 10-15 dead bodies in a ditch there. On interaction with them who came there in search of their dear ones he [P.W.4] learnt that the armed perpetrators who had abducted their near and dear ones were dressed and equipped in similar pattern.

242. First thing is found proved beyond reasonable doubt that the intelligentsias were abducted particularly targeting them by the perpetrators belonging to same group or organization [AB], in furtherance of common plan and design and in similar way and pattern. Second, the abducted intellectuals were then brought to the outskirts of the city where they were killed. Intention of abduction was thus to kill. It is also proved from the above evidence that the armed gang did not belong to Pakistani occupation army.

243. Referring a report published in The daily Sangram 24 November, 1971 the report titled "মুজাহিদের কুকীর্তি গাঁথা আছে দৈনিক সংগ্রামের পাতায়" published in The Daily Bhorer Kagoj, 31 October 2007 which speaks as below:

“ দৈনিক সংগ্রামের ২৪ নভেম্বর , ১৯৭১ সংখ্যায় প্রকাশিত তথ্য থেকে জানা যায়, ২৩ নভেম্বর পাকিস্তানের তৎকালীন সামরিক শাসক জেনারেল আগা মোহাম্মদ ইয়াহিয়া খান সারা দেশে জরুরী অবস্থা ঘোষনার পরপরই আলী আহসান মোহাম্মদ মুজাহিদ ও মীর কাশেম আলী এক যুক্ত বিবৃতিতে ভারতীয় গুপ্তচরসহ দুশমনদের খতমের জন্য সৈনিক হিসেবে প্রস্তুত হাতে যুব সমাজের প্রতি আহ্বান জানান। তাদের এ বিবৃতি প্রকাশের পর থেকে শুরু হয় বিভিন্ন স্থানে বুদ্ধিজীবী হত্যা। এ সময় ঢাকার বুদ্ধিজীবীদের কাছে হুঁশিয়ারি দেওয়া আল-বদরদের চিঠিও আসতে শুরু করে।

244. Thus it becomes unequivocally proved even from a report published in the **Daily Sangram** [the mouth piece of JEI] , **24 November 1971** that instantly after issuing a joint statement by the accused and one other urging to wipe out the ‘agents of India’, the horrific killing of intellectuals started and at that time the intellectuals were getting note of thtreat from Al-Badar.

245. Rabindra Nath Trivedi authored a book titled “৭১ এর দশমাস” [Ten months in 1971] published in 1997. The author compiled the book mainly on the basis of information obtained from various sources including the daily news papers of the relevant time. The book reflects information narrating events in brief including situation he experienced during the war of liberation. The author joined as mass communication officer of the Bangladesh government since 17 April 1971.

246. From the narration that relates to 10 December 1971 made in the book titled “৭১ এর দশমাস” [Ten months in 1971] it appears that curfew was imposed in Dhaka city. The killers of Al-Badar and al-Shams abducted notable journalist of the daily Ittefaq **Seraj Uddin Hossain**, journalist Nijam Uddin Ahmed and journalist of Columbia Broadcasting System Syed Najmul Haque from their homes and subsequently they could not be traced even. The Al-Badar force formed of armed members of Jamat E Islami started abducting Bangalee intellectuals selecting in furtherance of plan designed by General Rao Farman Ali under the leadership of army Captain Qayum [Source: “৭১ এর দশ মাস”, **Rabindra Nath Trivedi, 1997, page 595,596**].

247. The act of ‘abetment’ and ‘facilitating’ to the actual commission of crime may not always be tangible. It is to be inferred from facts and circumstances. Naturally no one had least opportunity to recognize the perpetrators and to know how the abducted victims were killed. At the time of event of abduction they kept their faces masked having fire arms with them.

248. We have already concluded that the group of the perpetrators belonged to Al-Badar the ‘action section’ of JEI. Now, relationship between the accused and the perpetrators and the organization they belonged is to be determined. In doing so, inevitably we are to take the activities of JEI, its student wing ICS and Al-Badar together into account.

249. We have already observed in the case of *Chief prosecutor v. Muhammad Kamaruzzaman* that Al-Badar which was created by JEI and had acted as its ‘**action section**’, ‘**fascist body**’ and ‘**armed wing**’ in 1971[ICT-BD case No.03 of 2012, Judgment 09 May 2013, para 605] . We also made our observation in the case of *Kamaruzzaman* based on sourced information that Jamat E Islami was thus indulged in indiscriminate massacre of their political opponents belonging to Bengali nation, in the name of liquidating ‘*miscreants*’, ‘*infiltrators*’ for which they were using Razakars, Al-Badar comprising with the workers of Islami Chatra Sangha [ICS], its student wing [*Muhammad Kamaruzzaman*, ICT-BD case No.03 of 2012, Judgment 09 May 2013, para 601].

250. *Hussain Haqqani*, in his book titled ‘**Pakistan between mosque and military**’ citing sources narrated that

“**The Jamaat-e-Islami and especially its student wing, the Islami Jamiat-e-Talaba [IJT], joined the military’s effort in May 1971 to launch two paramilitary counterinsurgency units. The IJT provided a large number of recruits.....The two special brigades of Islamists cadres were named Al-Shams[the sun, in Arabic] and Al-Badr [the moon].....A separate Razakars**

Directorate was established.....Two separate wings called Al-Badr and Al-Shams were recognized. Well educated and properly motivated students from the schools and madrasas were put in Al-Badr wing, where they were trained to undertake “Specialized Operations, where the remainder were grouped together under Al-Shams, which was responsible for the protection of bridges, vital points and other areas.....Bangladeshi scholars accused the Al-Badr and Al-Shams militias of being fanatical. They allegedly acted as the Pakistan army’s death squads and “exterminated leading left wing professors, journalists, litterateurs, and even doctors.”

[Source: Pakistan Between Mosque And Military: Hussain Haqqani: published by Carnegie Endowment For International Peace, Washington D.C, USA first published in 2005, page 79]

251. Thus it is found that the Al-Badar men were trained to carry out ‘Specialized Operations’ and it acted as a ‘death squad’ and exterminated leading professors, journalists, litterateurs, and even doctors. The book titled “Ekattorer Ghatok Dalalra Ke Kothai”[একাত্তরের ঘাতক দাললরা কে কোথায়] that

“সেপ্টেম্বর মাসের ১৭ তারিখে রাজাকারবাহিনীর প্রধান ও শান্তি কমিটির লিয়াজো আফিসারকে নিয়ে গোলাম আজম মোহাম্মদপুরে ফিজিক্যাল ট্রেনিং সেন্টারে যে রাজাকার ও আল-বদর শিবির পরিদর্শন করেছিলেন সেটি ছিল আল-বদরদের হেডকোয়ার্টার। স্বাধীনতামনা বুদ্ধিজীবীদের বেশীরভাগকে আল-বদররা প্রথমে চোখ বেঁধে এখানেই নিয়ে আসে। নির্যাতনের পর এখান থেকেই তাদের রায়ের বাজারে ও মীরপুরের শিয়াল বড়িসহ অন্যান্য বধ্যভূমিতে নিয়ে গিয়ে হত্যা করা হয়।

[Source : একাত্তরের ঘাতক ও দালালরা কে কোথায়, প্রকাশ ১৯৮৯, পৃষ্ঠা ৫৬]

252. It is evident that abducting the intellectuals blindfolded the perpetrators first brought them to the ‘Al-Badar Head Quarters’ set up at the Mohammadpur Physical Training College and afterwards they were butchered at the nearby mass graves. It is also revealed that JEI was actively involved with the affairs carried out by the ‘headquarter’ of Al-Badar.

253. The narrative made in the book titled “৭১ এর দশমাস” [Ten months in 1971] published in 1997 **authored by Rabindra Nath Trivedi** further shows that there had been a plan designed with intent to annihilate the selected intellectuals in order to cripple the Bangalee nation and the criminal activities were carried out by the fascist Al-Badar . The narrative states that

“পাকিস্তান বাহিনীর সহযোগী চরম দক্ষিণপন্থী উগ্র সাম্প্রদায়িক ফ্যাসিস্ট গেস্টাপো আল-বদর বাহিনীর ঘাতকের ঢাকা শহরে যুদ্ধ ও কারফিউর মধ্যে ১০ ডিসেম্বর থেকে ১৪ ডিসেম্বরের মধ্যে খুঁজে খুঁজে সেরা বাঙালী অধ্যাপক, চিকিৎসক, সাংবাদিক, সাহিত্যিকদের রায়েরবাজার ও মীরপুর অবাঙালী অধ্যুষিত এলাকায় নিয়ে গিয়ে নৃশংসভাবে হত্যা করে। উল্লেখ্য পাক সামরিক অফিসারদের আদেশে এ জঘন্য হত্যাকাণ্ড সম্পন্ন হলেও এ হত্যার পরিকল্পনা তালিকা প্রণয়ন, আত্মগোপনকারী বুদ্ধিজীবীদের খুঁজে বের করা, তাদের ধরে নিয়ে নৃশংস অত্যাচারের মধ্য দিয়ে হত্যা করার কাজটি আল-বদর ও রাজাকার বাহিনীর বাঙালী সদস্য ও তাদের নেতাদের দ্বারা সম্পন্ন হয়।” [Source: “৭১ এর দশমাস”, **Rabindra Nath Trivedi, 1997, page 620**]

254. For the offence of abduction and killing of Journalist Seraj Uddin Hossain a distinct charge has been framed alleging that the accused abetted and facilitated the commission of the crimes alleged. The event took place on 10 December 1971. Predictably this criminal event was carried out as a part of execution of same common design and plan of killing the intellectuals with

intent to cripple the Bengali nation. **Material Exhibit-I** [একাত্তরের ঘাতক দালালরা কে কোথায়, relevant page 124,125] narrates that

“সেই অতি নৃশংস হত্যাযজ্ঞ সম্পন্ন করার জন্য আলবদররা ব্যাপকভাবে বুদ্ধিজীবীদের অপহরণ করা শুরু করে ১০ ডিসেম্বর থেকে। কার্ফু এবং ব্লাক আউটের মধ্যে জীপে করে আলবদররা দিন রাত বুদ্ধিজীবীদের বাড়ী বাড়ী যেয়ে তাদেরকে প্রথমে সারা গায়ে কাদা মাখা একটি বাসে তোলে। এরপর বাস বোঝাই বুদ্ধিজীবী সহ নানা স্তরের বন্দীকে প্রথম মোহাম্মদপুরের ফিজিক্যাল ট্রেনিং কলেজের আলবদর হেডকোয়ার্টারে নির্যাতন ও জিজ্ঞাসাবাদ করার জন্য নিয়ে যাওয়া হয়। আলবদরদের এই অপহরণ স্কোয়াডের নেতৃত্ব দিত হয় কোন আলবদর কমান্ডার নতুবা পাকবাহিনীর অনধিক ক্যাপ্টেন মর্যাদার কোন অফিসার। সম্ভবতঃ পাক বহিনীর নিজস্ব টার্গেট বুদ্ধিজীবীদের অপহরণের ব্যাপারে নিশ্চিত হবার জন্যই পাক সেনা অফিসার অপহরণ স্কোয়াডের নেতৃত্ব দিত।”

255. Thus it is evinced from the above narration that the act of abducting the intellectuals in Dhaka city started from 10 December 1971, in furtherance of common design and plan. The gang of perpetrators was mostly led by Al-Badar members. The victims were first brought to Al-Badar head quarter at Mohammadpur Physical Training College where they were subjected to torture. At the same time mere leading the gang by an army captain, a junior level officer does not suggest to conclude that the Pakistani occupation army command alone was aware of the plan and criminal activities carried out by the Al-Badar to annihilate the intellectuals.

256. It is evident from the version made by P.W.4 that Chwodhury Mueen Uddin was the ‘**operation-in-charge**’ and his accomplice Ashrafuzzaman Khan was an active member of Al-Badar who carried out the ‘operations’ to liquidate the intellectuals is suffice to infer that the ‘operations’ carried out targeting the intellectuals in between 10 to 16 December were ‘planned and designed’ with intent to execute ‘common purpose’.

257. Further, the version of P.W.4 that accused Ali Ahsan Muhammad Mujahid was the Al-Badar commander and under his supervision, direction

and instruction the operation of intellectuals killing were carried out lends support further support to other circumstances and relevant facts depicted from various reports, as discussed above.

258. A report titled “**Country could not care less**” published in a daily on 14.12.2010 [**defence documents volume no. 14**, page 463-464] if read and examined in its entirety it would reveal that the armed gang who abducted Seraj Uddin Hossain was led by the accused Ali Ahsan Muhammad Mujahid. ‘*Leading*’ a gang does not always necessarily need to show physical presence of the ‘leader’ at the crime site with the group. A group of individuals or perpetrators can be even led by many other means. Instruction, direction, provocation or providing substantial instigation by a person who is reasonably placed in position of authority may form the act of ‘leading’ a group or gang.

259. In view of above discussion it is quite evident that the group of perpetrators who allegedly abducted Seraj Uddin Hossain belonged to Al-Badar which was the ‘*action section*’ of Jamat E Islami and ‘*death squad*’ of the army. Besides, prosecuting, trying and convicting one Khalil, an Al-Badar man under the Collaborators Order 1972 lends further assurance to it. At the same time it is lawfully presumed that for publishing write ups reflecting his pro-liberation ideology journalist Seraj Uddin Hossain became one of targets of the Al-Badar, the ‘**killer group**’ and as such it is immaterial whether any counter article was really written by the accused terming the victim an ‘Indian agent’ and ‘agent of Brahmanism’, as described in the charge no.1.

260. P.W.4 Shaheen had testified that Mujahid, as the Al-Badar commander, ordered and supervised the killings of intellectuals at the fag end of the War of Independence in 1971. He also said Al-Badar, formed with the activists of Islami Chatra Sangha, was then compared to Hitler’s Gestapo. The above discussion based on old authoritative reports unambiguously suggests that the event of alleged abduction of Seraj Uddin Hossain took place on the date and in the manner alleged and afterwards he was killed, although his dead body could not be traced even. In this regard the Tribunal recalls the settled jurisprudence that a victim’s death may be established by circumstantial evidence provided that the only reasonable inference is that the victim is dead as a result of the acts or omissions of the accused who was in a substantial

position of authority of Al-Badar force, by dint of his leading position in ICS. In the case in hand, totality of evidence and circumstances forces to lawfully infer the death of Seraj Uddin Hossain which was the outcome of the criminal act of his abduction.

261. It has been proved beyond reasonable doubt that Al-Badar men were the actual perpetrators and the Al-Badar was an organised group or force. Al-Badar, para militia force was formed by the leaders of ICS the strident wing of JEI. It was formed purely of workers of ICS. [**Sunset at Midday:** Mohiuddin Chowdhury, page 97] Activities of Al-Badar were carried out under the control and co-ordination of Jamat E Islami. It is thus validly inferred that the accused being the president of East Pakistan ICS was in a superior position of AB. Additionally, by virtue of his top position in ICS he encouraged the AB by his speech, statement to combat the ‘**miscreants**’, ‘**Indian agents**’. We have already recorded our reasoned finding [*see this judgment*: paragraph nos. 212-213] that –

“.....Might be there had been some more persons having position of authority over the AB force. But it cannot make the accused absolved of his liability as a ‘superior’, particularly when he is found to have acted as a leading person exercising his own authority of position on AB force.that there had been a *de facto* and informal superior-subordinate relationship between the accused Ali Ahsan Muhammad Mujahid and the Al-Badar force and that he had effective control on the AB men and had reason of being remained aware of the activities carried out by them [Al-Badar], chiefly by virtue of his position in ICS [*see this judgment*, Para 212-213].

262. It is to be noted that on vivid discussion made in earlier segment of this judgment we have given our considered and reasoned finding which is as below:

“Total evaluation of evidence, circumstances and conduct of the accused prompt us to conclude that the accused was very much aware of the activities carried out of the AB force. The above conduct of the accused that he had started showing even since the formation of Al-Badar force together with the fact of last moment killing of intellectuals and other relevant circumstances inevitably establishes his level of effective control on the Al-Badar force. Besides, his ‘last speech’ as narrated in the book titled ‘Al-Badar’ demonstrates his position of authority and material ability to control the Al-Badar force and that he failed to prevent commission of atrocities by the AB men, despite his material ability”. [*See this judgment*, para 210]

263. Since the defence does not dispute the event of abduction followed by murder and it has been proved beyond reasonable doubt that the perpetrators were the AB men who carried out the common planned and designed operation directing the intellectuals with intent to cripple the Bengali nation the accused Mujahid being the person in position of authority of Al-Badar had sufficient reason to know the common purpose and plan and also the commission of crime alleged. He was thus a part of the common plan and design in execution of which series of events of intellectual killing was accomplished As such he cannot be absolved of criminal responsibility.

264. It has been proved beyond reasonable doubt that the alleged pattern of criminal acts was accomplished in implementation of common plan and design. We have already given our finding, by resolving the issue independently, that accused Mujahid by virtue of his position in the ICS had a substantial position of authority over the Al-Badar force and thus he can lawfully be said to have approved, endorsed and encouraged and provided moral support to the actual commission of criminal acts including the abduction of Seraj Uddin Hossain who was admittedly killed afterwards, instead of preventing crimes committed by Al-Badar men. Accordingly the accused incurs liability as ‘superior’ of Al-Badar the principal perpetrators of

the criminal act of abduction followed by killing of Seraj Uddin Hossain, as part of systematic plan and design , with intent to accomplish common purpose.

265. Besides, Conduct, act, behaviour and the level of influence and authority of the accused together, which have been convincingly proved, are thus qualified to be the constituent of ‘*participation*’ too, in furtherance of common purpose, the accomplishment of the crimes as it substantially contributed to, or have had a substantial effect on the perpetration of the crimes for which the accused has been charged with. Section 4(1) refers to Joint Criminal Enterprise [JCE] .

266. It is not necessary to show that the JCE members explicitly agreed to expand the common objective to other crimes. JCE is an agreement or understanding to execute a “common criminal plan. For joint criminal enterprise [JCE] liability an accused can participate in a joint criminal enterprise by passive, rather than active, conduct. Accused’s conduct, as discussed above, lends us to infer that he as a person in position of authority or superior of Al-Badar came to an understanding or agreement, express or implied that a planned crime of killing selected intellectuals would be committed. The accused was thus a part of collective criminality and as such he also incurs liability under section 4(1) of the Act. Therefore, the accused Ali Ahsan Muhammad Mujahid, as superior of the principals [Al-Badar], is held responsible for abetting the criminal acts committed against the journalist Seraj Uddin Hossain, an unarmed civilian by the Al-Badar men causing his murder as crimes against humanity as enumerated in section 3(2)(a)(h) of the Act of 1973 and thus the accused incurs criminal liability under sections 4(1) and 4(2)of the Act of 1973.

Adjudication of Charge No. 02

[Mass killing (Persecution or in the alternative Genocide) at village Baidyadangi, Bhangidangi, Baladangi, Majhidangi, Faridpur]

267. One day in the middle of May 1971 during the War of Liberation accused Ali Ahsan Mohammad Mujahid being the leader of Islami Chatra Sangha and subsequently the head of Al-Badar Bahini and or as a member of

group of individuals being accompanied by one Hammad Moulana of Faridpur town, 8-10 non Bengalese including one Isahaque and Pakistani Army, with discriminatory and persecutory intent, launched attack directed against the Hindu Populated villages e.g. *Baidyadangi*, *Majhidangi*, *Baladangi* with intent to destroy the 'Hindu Community' either whole or in part and caused killing of 50/60 Hindus by indiscriminate gun firing and also burnt their houses by setting fire and thereby Ali Ahsan Mohammad Mujahid has been charged for abetting and substantially contributing the actual commission of offence of 'persecution as crime against humanity' by directing attack against the Hindu civilian population as specified in section 3(2) (a) (g) of the Act or in the alternative, for abetting and substantially contributing the commission of offence of 'genocide' with intent to destroy the 'Hindu Community', either whole or in part as specified in section 3(2)(c)(g) of the Act which are punishable under section 20(2) read with section 3(1) of the Act for which he is alleged to have incurred liability under section 4(1) of the Act.

Witnesses

268. Prosecution, in support of this charge, produced three witnesses who have been examined as P.W.6, P.W.9 and P.W.11. They claim to have witnessed the event and P.W.9 and P.W.11 further claim to have seen the accused Ali Ahsan Muhammad Mujahid accompanying the group of perpetrators towards the crime site.

Evidence

269. PW 6 Abdul Malek Mia [75] stated that on a Jaistha morning, his wife informed him that the Pakistani army was approaching towards their village and with this he hid himself in a ditch beside his home. Their village was Muslim-dominated. They [attackers] didn't do any harm to their village. But they [group of perpetrators] entered the Hindu-dominated *Bhangidangi*, *Baidyadangi*, *Baladangi* and *Majhidangi* nearer to his own village, set the houses on fire and killed people shooting indiscriminately. The fact of committing massacre as stated remained unshaken in cross-examination.

270. P.W.6 further stated that on the following day Aftab Uddin, a Muslim league leader and the then chairman of their union, whilst going past their

home asked him [P.W.6] to go to the affected crime villages with him. With this, he accompanied him and visited the affected areas and found all houses of the villages were burnt down; dead bodies were lying here and there. When they reached the villages some 50-60 people came out of hiding. The chairman ordered the people to bury the bodies and they followed his order. There were approximately 30-40 bodies there. These facts also remained undenied and unimpeached in cross-examination. No inherent inconsistencies are found on the above statement and even it does not appear to be materially contradictory to what has been stated to the Investigation officer.

271. P.W.6 also stated that he came to know from the locals that the Pakistani army along with armed Razakars, some Biharis, one Hammad Moulana and Mujahid [accused] had gone to the crime villages from Faridpur and these people were involved in committing looting, arson and killings.

272. P.W.9 Narayan Chandra Sarker [54] an inhabitant of crime village *Baladangi* in 1917 stated what he experienced on the event of alleged attack causing massacre. He stated that on morning in the mid of *Jaistha* in 1971 while he was going on the road for tying up his cow he found the people running around and telling that military was coming. With this one Siddeswar brought him inside a bush to hide and asked not to speak as Razakars were coming. Siddeswar identifying Mujahid [accused] and Gafur Razakar along with the Pakistan army told that Mujahid was going. P.W.9 further stated that they remained in hiding for two hours and then coming out of the bush he found the villages *Bhangidangi*, *Baidyadangi*, *Majhidangi* burnt and heard gun firing and with this one Prafulla of their locality was killed and about 200-300 houses were burnt. However, their [P.W.9] village was not burnt.

273. In cross-examination, P.W.9 stated that two days after the event he found a dead body when was coming to his house through the bank of the river and the locals were telling that numerous dead bodies were buried but they could not say their name. With this the fact of alleged attack causing numerous killings has been re-affirmed.

274. P.W.11 Fayeuddin [80], was a resident of village *Char Harirampur*, neighbouring to crime villages. He came to his native village 7-8 days after

the Pakistani army rolled into Faridpur town on 21 April 1971. One day he saw a group of people including Biharis, Hammad Moulana, Ali Ahsan Muhammad Mujahid, peace committee members coming from the end of Hindu populated crime villages i.e *Baidyadangi*, *Majhidangi*, *Baladangi*, *Sarkerdangi* and he [P.W.11] saw the crimes villages set on fire and in conjunction with the event of massacre they killed 15-20 Hindu civilians when they attempted to flee by crossing river Padma.

275. P.W.11 further stated that he knew Ali Ahsan Muhammad Mujahid[accused] since earlier and he exchanged ‘salam’ with Mujahid when he saw them moving forward.

276. On cross-examination, P.W.11 stated that he conveyed his ‘salam’ to Hammad Moulana and others of the group when they were on move at a distance of 25-30 hands from him. He [P.W.11] could not recognise anybody of the group excepting Hammad Moulana.

Deliberations

277. The learned defence counsel has argued that P.W.6’s testimony as regards involvement of the accused with the alleged event is anonymous hearsay evidence which needs to be corroborated by other evidence. P.W.9 claims to have seen the accused accompanying the group of perpetrators as identified by one Siddeswar while they were in hiding. Siddeswar is now dead, as stated by P.W.9. But P.W.9 has made intelligent improvement by stating it that he saw the accused accompanying the gang, as identified by said Siddeswar. Because, P.W.9 omitted to state it to the IO. The IO has stated while contradicting to P.W.9’s above piece of evidence that he [P.W.9] did not state it to him. Thus, it is a glaring omission amounting to serious contradiction on material particular and as such P.W.9’s testimony cannot be relied upon as credible. P.W.11 has made self contradictory statement before the Tribunal on material particular i.e, as regards his seeing the accused accompanying the group of perpetrators. Thus, his testimony deserves exclusion.

278. The learned prosecutor has submitted that hearsay evidence is admissible and such the Tribunal can act on P.W.6’s hearsay evidence, provided if it

carries probative value and relevance. P.W.9 is an eye witness who had occasion of seeing accused, as identified by one Siddeswar, accompanying the gang towards the crime site which is indicative as to accused's participation to the commission of the crimes alleged in charge no.2. It cannot be discarded merely for the reason that he omitted to state it to IO. Statement made to IO is not evidence and the Tribunal is to act on sworn testimony. Evidence of P.W.11 so far it relates to recognition of accused is not materially contradictory and can be relied upon.

279. It is to be noted that the prosecution is to prove it beyond reasonable doubt that (i) the event of alleged murder as crimes against humanity was committed against civilian population belonging to Hindu population, with discriminatory intent (ii) that the accused abetted and facilitated the commission of crimes alleged by accompanying then group of perpetrators. As regards first part i.e the commission of crimes causing murders, arson, looting has not been challenged by the defence.

280. It is not alleged that the accused directly participated to the perpetration of the crimes committed. The charge framed alleges that the accused accompanied the group of perpetrators to the crime site as a leader of ICS the student wing of JEI and subsequently a leader of Al-Badar and abetted the commission of crimes alleged. Defence however cross-examined the P.W.6, P.W.9 and P.W.11 who have stated the involvement of the accused with the commission of criminal acts as he [accused] allegedly accompanied the group of perpetrators.

281. The event of massacre and killing Hindu civilians of the crime villages is not disputed. P.W.11, according to him, saw the crime villages in ablazing condition. But he does not claim to have witnessed actually by whom and how the massacre and killing the Hindu civilians were committed. From evidence adduced by P.W.6, P.W.9 and P.W.11 it stands proved that the attack was launched with discriminatory intent and also with intent to destroy the Hindu community, a religious group, in part, in furtherance of policy and plan. Neighbouring Muslim dominated villages remained untouched by the group of attackers. This significant feature of the attack demonstrates further that only the Hindu dominated villages were attacked with discriminatory intent. Thus,

committing the offence of persecution as crimes against humanity and the offence of genocide as narrated in the charge no. 2 has been proved beyond reasonable doubt.

282. Now the question is whether the accused participated to the commission of crimes by accompanying the group of attackers to the crime sites and provided any act of abetment which had substantial effect to the commission of crimes. The charge framed does not speak of accused's physical participation to the commission of crime. Mainly for the act of accompanying the group the accused has been arraigned for abetting the commission of crimes alleged. Now let us see what the P.W.s have stated as regards this pertinent fact.

283. P.W.6's testimony involves three parts. First part relates to experiencing the event of setting the Hindu dominated villages ablaze and indiscriminate gun fire that resulted numerous killing of Hindu civilians. The second part relates to the fact that their village which was not Hindu dominated was free from any harm. It fairly indicates that the target of the perpetrators was the civilians belonging to Hindu community. The third part speaks of his experience of seeing 30-40 dead bodies at the crime village, on the following day and learning about the perpetrators from the local people.

284. As to first two parts, P.W.6 is the eye witness. But as to involvement of the accused with the perpetration of the crimes alleged his testimony is anonymous hearsay evidence. P.W.6 was an inhabitant of a neighbouring village and for the reason of reigning massive terror naturally he also could not know the detail of the event readily. On the following day, as stated by him, on making visit to the crime village he found numerous dead bodies of Hindu civilians and had heard about the perpetrators whom the accused Mujahid accompanied. We do not find to discard and disbelieve his hearsay testimony in this regard. Admittedly, hearsay evidence is admissible. But it is to be corroborated by 'other evidence'.

285. P.W.9 Narayan Chandra Sarker's testimony involves three parts. The first part relates to attacking the crime villages which were Hindu dominated. The second part speaks of the fact of his hiding inside a bush along with one

Siddeswar. The third part relates to his learning from Siddeswar who identified the accused Mujahid and Gafur Razakar had accompanying the attackers towards the crime villages.

286. Now we are to see whether evidence of two other P.W.s i.e P.W.9 and P.W. 11 have provided corroboration to the hearsay evidence of P.W.6. It appears that P.W.9 did not know the accused since earlier.

287. It appears that at the time of the alleged attack P.W.9 remained in hiding with one Siddeswar and he [P.W.9] saw accused Mujahid accompanying the gang as told and identified by Siddeswar. Seeing the accused Mujahid accompanying the gang of perpetrators as stated by P.W.9 is significantly pertinent for determination of accused's culpability. But it appears that the IO [P.W.17] while contradicting to the above piece of evidence of P.W.9 has stated that he [P.W.9] did not state it to him.

288. It is true indeed that earlier statement made to IO is not 'evidence' and only sworn testimony is to be evaluated. Rule 53(ii) of the ROP of the ICT-2 provides provision that the accused shall be at liberty to take contradiction of the evidence given by a witness. Intent of such Rule is to assess truthfulness and credibility of evidence presented before the Tribunal. In absence of any reasonable explanation we consider such omission to be a glaring and fatal contradiction on material particular. P.W.9, to our cautious consideration, has made intelligent improvement and embellishment on material particular. It would not be safe to act and rely upon this piece of evidence incriminating the accused.

289. What about evidence of P.W.11 so far it relates to seeing the accused accompanying the group of attackers, as stated by him? It appears that on this material particular P.W.11 has made self contradictory version and thus statement made in examination-in-chief become reasonably unreliable and unsafe. Surprisingly P.W.11 did not state anything as to the means of moving of the attackers towards the crime sites. That is to say, he remained silent as to whether the group was moving on foot or by any mechanized vehicle. Presumably they were moving on foot. Be that as it may, P.W.11 had fair occasion to recognise the accused if really he knew him since earlier. But his

glaringly contradictory statement made on cross-examination makes his statement made in examination-in-chief tainted by reasonable doubt.

290. That is to say, P.W.11 made a grave self-contradictory version as to the fact of seeing the accused accompanying the group of individuals approaching towards the crime sites. Such glaring contradiction makes his version narrated in examination-in-chief rationally suspicious and we consider it precarious to rely upon such self-contradictory version, on material particular to determine accused's culpability.

291. According to P.W.9 he saw the accused accompanying the group of attackers including Mujahid [accused] and Gafur Razakar and the Pakistan army. But P.W.11 surprisingly has not stated to have seen the group was also accompanied by the Pakistan army, although he claims to have seen the group moving within the range of his sight.

292. It is now settled that hearsay evidence is admissible and deserves consideration if it is corroborated by other evidence. The phrase 'other evidence' includes direct evidence, circumstantial evidence and material relevant fact inspiring credence to such hearsay evidence. But from above discussion it appears that anonymous hearsay evidence of P.W.6 remains uncorroborated as evidence of P.W.,9 and P.W.11, for reasons stated above, deserves exclusion. As a result unanimous hearsay evidence of P.W.6 stands uncorroborated and as such deserves exclusion. In this regard we find substance in what has been argued by the defence. Prosecution has failed to prove accused's involvement with the event of committing the crimes alleged under charge no.2. Although the commission of the event of massacre, and killing directing the Hindu civilians, as part of systematic attack, has been proved beyond reasonable doubt.

293. Of three witnesses P.W.9 and P.W.11 claim to have witnessed the accused accompanying the group of attackers towards the crime villages. And P.W.6's testimony on material particular is anonymous hearsay evidence. But in view of above evaluation we find that anonymous hearsay evidence of P.W.6 remains uncorroborated and prosecution failed to corroborate it by 'other evidence'. Evidence of P.W.9 on material particular seems to be

glaringly contradictory and thus inspires no reasonable credence. Evidence of P.W.11 is patently and significantly self contradictory on material particulars.

294. On total and rational evaluation of evidence of the witnesses it appears that the event of mass killing directing the Hindu unarmed civilians constituting the offence alleged has been proved. From evidence it stands proved too that a group of Razakars, peace committee members, Pakistani army committed the crimes alleged. But prosecution has failed to prove that the accused Ali Ahsan Muhammad Mujahid accompanied the group towards the crime sites. Reasonable doubt has been created as to the fact of accompanying the group of perpetrators by the accused the benefit of which goes in favour of him. Apart from the fact of accompanying the group of attackers prosecution does not allege that the accused by his any other act or conduct had abetted the principals in perpetration of the crimes alleged. Therefore, the accused Ali Ahsan Muhammad Mujahid cannot be held liable under section 4(1) of the Act for the offence under charge no.2 enumerated in section 3(2)(c)(g) of the Act of 1973 and thus he be accordingly acquitted thereof.

Adjudication of Charge 03

[Event of confinement of Ranjit Kumar Nath in Faridpur]

295. Summary Charge: One morning in the first week of June 1971 during the War of Liberation the Razakars, as a part of attack against the civilian population and also with discriminatory intent, apprehending one Ranjit Nath @ Babu Nath son of late Ramesh Chandra Nath of *Rathkhola* under Kotwali Police station, district Faridpur from near the *Khabashpur* mosque of Faridpur town brought him to Pakistani Major Akram at Faridpur Old Circuit House where accused Ali Ahsan Muhammad Mujahid being the leader of Islami Chatra Sangha and subsequently the head of Al-Badar Bahini and or as member of group of individuals were also present and then on getting signal from you, after having your talk with that Major, some Razakars and non-bengaleese, with intent to kill brought him to the house of one Abdur Rashid situated to the eastern side of the 'Bihari camp' wherein he was kept confined and tortured . Later on, during night Ranjit Nath @ Babu Nath managed to escape. Therefore, Ali Ahsan Mohammad Mujahid has been charged for

abetting and facilitating the commission of offence of ‘**confinement as crime against humanity**’ by his conduct which was part of attack against the Hindu civilian population as specified in section 3(2) (a) (g) of the Act which are punishable under section 20(2) read with section 3(1) of the Act and thereby he incurs liability under section 491) of the Act.

Witness

296. Victim Ranjit Kumar Nath has testified as P.W.7. Prosecution relies only upon his testimony together with what has been stated by P.W.8, on some relevant facts. Considering the nature of offence and context in which it occurred, no one had occasion to witness the event. The accused is not alleged to have physically participated to the crime. Rather, he is alleged to have abetted and facilitated the perpetration of the criminal act of confinement of the victim Ranjit Kumar Nath, as described in the charge.

Evidence

297. P.W.7 Ranjit Kumar Nath [58] narrated how he was abducted and brought to army camp at Faridpur circuit house. He stated that during first week of June 1971, he went to the town to collect information about the Liberation War. When he [Ranjit] was approaching the town, one Habi Matabbar, terming him a freedom fighter, handed him over to Abul Kalam Azad, Abul Mia and Kalu Bihari at East Khabashpur and they by beating him up took him to Faridpur Circuit House where he saw Major Koraisi, a Pakistani army official, Mujahid [accused], Afzal and other Razakars were holding a meeting there. Getting a signal [ইসকো হটাও] from Mujahid [accused], Azad [accused of ICT-BD Case No. 05 of 2012, Judgement, 21 January, 2013] and his associates blindfolded him [Ranjit] and took him to Faridpur Zilla School ground and put him under a palm tree. P.W.7 continued to narrate how he was tortured and confined in a house inside the Bihari colony and finally and around midnight he [Ranjit] escaped there from breaking through a window.

298. Defence does not appear to have been able to impeach what has been stated by P.W.7, on material facts. Even his statement does not suffer from

inherent inconsistencies. There has been no glaring or material contradiction between the statement made in Tribunal and that he made to the IO.

299. P.W.8 Mir Lutfar Rahman [58] narrated some facts relevant to activities of accused Mujahid in Faridpur. He stated that since after arrival of Pakistani army in Faridpur town accused Ali Ahsan Mohammad Mujahid, Abul Kalam Azad @ Bachchu Razakar, Kalu Bihari started providing assistance to the army.

300. He [P.W.8] found the accused Ali Ahsan Mohammad Mujahid [accused] moving around the town by a jeep. He [accused] used to conspire with the army at Faridpur circuit house camp as to who were to be apprehended and he [accused] used to carry a sword with him and move like a villain. This version has been re-affirmed in cross-examination when the P.W.8 replied to question put to him that many people of Faridpur town saw the accused carrying a sword when he used to get down from the jeep.

Deliberations

301. Admittedly, for the self same event and criminal acts Abul Kalam Azad @ Bachchu Razakar was also charged and tried in an earlier case [ICT-BD Case No. 05 of 2012, Judgment 21 January 2013] and he was found guilty and convicted for physical participation and also for providing substantial contribution to the commission of offence of abduction, confinement and causing torture to victim Ranjit Kumar Nath as crime against humanity as specified in section 3(2) (a) of the Act.

302. It has been found proved beyond reasonable doubt in the case of *Abul Kalam Azad* that “on direction of Mujahid [present accused] the accused *Abul Kalam Azad @ Bachchu* and his associates blindfolded him (P.W.5 Ranjit) and took him to Faridpur Zilla School ground and put him under a palm tree and had beaten him up for one hour and then he was kept confined in a house inside the Bihari colony” [*Abul Kalam Azad @ Bachchu*, ICT-BD Case No. 05 of 2012, Judgment 21 January 2013, para 183.]

303. In the case of *Abul Kalam Azad @ Bachchu* victim Ranjit Kumar Nath while testifying as P.W.5 stated that he was, on abduction, brought to Faridpur Circuit House where he saw Major Akram Koraishi, a Pakistani army official, Mujahid [accused], Afzal and other Razakars holding a meeting there. On seeing him Mujahid[accused] had told “ *he is a freedom fighter, he is a Hindu*” and asked Azad (accused of earlier case) to take him away and then Azad and his associates blindfolded him (P.W.5 Ranjit) and took him to Faridpur Zilla School ground and put him under a palm tree. After a few minutes a jeep went there and someone in the jeep said in Urdu: “*Don't shoot him. Hand him over to the Biharis and slaughter him in the morning*”.

304. In the earlier case, accused *Abul Kalam Azad* was found to have ‘*physically participated*’ to the commission of the offence of torture, confinement and inhuman acts [**Abul Kalam Azad**, Judgment 21 January 2013, para 184]. But in the case in hand accused Ali Ahsan Muhammad Mujahid has been arraigned for ‘abetting’ and ‘facilitating’ the commission of offence of ‘confinement’ only. He is not alleged to have participated to the actual commission of the offence.

305. As we see from Evidence of victim Ranjit Kumar Nath made in both cases on same event, the victim was not kept confined at the circuit house army camp. Rather he was taken out of the camp on ‘*direction*’ of the present accused Ali Ahsan Muhammad Mujahid and following such direction the victim Ranjit Kumar Nath was subjected to the criminal acts of ‘confinement’ and ‘torture’. Therefore, accused Mujahid also cannot evade liability of mistreatment done to Ranjit Kumar Nath.

306. Evidence of victim Ranjit Kumar Nath made before us clearly demonstrates that accused Ali Ahsan Muhammad Mujahid was also present at the army camp at Faridpur circuit house when he [victim] was brought there. In fact P.W.7 has echoed the statement he made in the earlier case being ICT-BD Case No.5 of 2012 [*Abul Kalam Azad @ Bachchu*, Judgment 21 January 2013]. Why accused Mujahid was there? It is proved that Mujahid was the top brass of Islami Chatra Sangha [ICS], the student wing of Jamat E Islami [JEI] and it started assisting the Pakistani occupation army in committing atrocities, in furtherance of policy and plan to annihilate the Bangalee nation, Hindu

community, and pro-liberation people, intellectual, since the war of liberation ensued.

307. Holding meeting with army officials at the army camp is a fair indication as to extent of accused's position and authority even over the occupation army and connection of the accused with the common purpose as well. 'Order' may be verbal or written. It may also, however, be expressed through signs and gestures. It is possible, therefore, to distinguish two tiers of orders. The first tier would include *formal orders*, so defined because they take the form of *provisions, directives, and commands*. A second tier, in contrast, includes *orders based on real effectiveness*, in other words *signals, gestures, concrete actions, or various similar expressions*. It is important to note that the accused may, depending on the case and the circumstances of his intervention, express his orders in either of the two ways described herein.

308. The very utterance [ইসকো হটাও] by accused Mujahid at the army camp, on seeing the victim there, was not an 'innocent utterance'. Rather, it was a signal providing an 'order' or 'instruction'. If the utterance was really an innocent one, the victim would have been released at once from the camp. But Mujahid's cohorts on getting the signal [ইসকো হটাও] brought the victim out of the camp, inflicted torture and kept him confined at Bihari colony which manifestly demonstrates that to the principal perpetrators such utterance was an 'order' or 'instruction'. Therefore, the accused Mujahid knowing the foreseeable consequence of such '**order**' or '**instruction**' he made through the utterance [ইসকো হটাও] abetted the commission of criminal act of 'confinement' of the victim.

309. It is true that mere presence at the army camp and position of authority alone are not constitutive of the act of aiding and abetting unless it is shown to have a significant encouraging and approving effect on the principals. It is thus indispensably pertinent to assess the impact of the accused's presence and conduct at the army camp to determine whether it had a substantial effect on the perpetration of the criminal acts occurred after the victim was taken out of the camp, on accused's 'order' or 'direction'.

310. Conceivably for the reason of his access even to the army camp by dint of his position in his party and political ideology accused Mujahid uttered the words ‘ইসকো হটাও’ forming ‘direction’ when he found the victim brought at the camp. The very utterance, considering the context in its entirety and position of the accused, tantamount to ‘ordering’ which substantially facilitated the principals to commit the criminal act of confinement of the victim at the ‘Bihari colony’ as narrated in the charge. In a particular circumstance and context, ‘ordering’ entailed a person in a position of authority using that position to convince or instigate or encourage another to commit an offence; and it was not necessary that the order be issued in some special form. The accused’s ‘subjective intent’ need not be explicitly expressed, but can be derived from circumstances. The criminal acts done to the victim after he was taken out of the camp amply shows the subjective intent of the accused Mujahid.

311. The Tribunal reiterates that one of the requirements of the *actus reus* of abetting is that the support or endorsement or provocation of the abettor had a substantial effect upon the actual perpetration of the crime and the abettor is considered to have had awareness of consequence of his act or conduct of ‘abatement’. Conduct of accused that he had shown being present at the army camp, in light of the positions of authority that he held, amount to encouragement and moral support to the physical perpetrators of crimes. Therefore, the accused by his conduct abetted the criminal activities by the principals causing unlawful confinement of victim Ranjit Kumar Nath.

312. Why Ranjit Kumar Nath was targeted by the Pakistani army and their local aides? The reply is simple. Ranjit Kumar Nath was targeted as a part of attack with discriminatory intent on religious and political ground as well. It is a fact of common knowledge that Pro-liberation Bengali civilians, Hindu Community, were the main target of the perpetrators in 1971. This was the reason of atrocious acts of accused forming part of attack targeting P.W.5 Ranjit Kumar Nath.

313. We have already given our view that the context itself as reflected from policies adopted by the Pakistani army and its local pro-Pakistan political organization, chiefly the Jamat E Islami (JEI) and ‘auxiliary forces’ is

sufficient to prove the existence of the notion of ‘systematic attack’ on Bangladeshi self-determined population in 1971, during the War of Liberation. This context unerringly prompts us in arriving at decision that the criminal acts committed to P.W.7 Ranjit Kumar Nath, a member of civilian population belonging to Hindu community was a part of systematic attack constituting the offences of crimes against humanity as specified in section 3(2)(a) of the Act of 1973.

314. It has been stressed by the defence that the testimony of P.W.7 has not been corroborated by other evidence. But we reiterate that the Tribunal may arrive at decision even on the basis of single testimony and ‘corroboration’ is simply one of factors to be considered in assessing witness’ credibility. It has been held by the ICTR trial chamber that :

“There is no requirement that convictions be made only on evidence of two or more witnesses.Corroboration is simply one of potential factors in the Chamber’s assessment of a witness’ credibility. If the Chamber finds a witness credible, that witness’ testimony may be accepted even if not corroborated. [Nyiramasuhuko, ICTR Trial Chamber, 24 June 2011, para 174]

315. The Tribunal thus comes to a finding that the fact of abducting Ranjit Kumar Nath and causing torture to him by keeping confined has been proved beyond reasonable doubt. Besides, on the same event this Tribunal has given its finding in its earlier case [**Abul Kalam Azad @ Bachchu Razakar**, ICT-BD-05 of 2012, Judgment 21 January 2013] that Ranjit Nath was abducted, confined and subjected to torture and for physical participation to the commission of crimes **Abul Kalam Azad @ Bachchu Razakar** was found guilty and convicted.

316. It would be wrong to argue that no other person can be prosecuted and tried separately and held liable for abetting and facilitating the commission of the same criminal acts. In the case in hand accused Ali Ahsan Muhammad

Mujahid has been charged for abetting and facilitating the commission of offence of ‘confinement’ as crime against humanity and not on allegation of abduction and causing torture.

317. The Tribunal notes that the offence of crimes against humanity is known as ‘system crime’ or ‘group crime’ which is committed not by a single individual. This type of crime is committed by group of individuals and not necessarily all the individuals have to be shown to have physically participated to the actual commission of crime. The attack formed of individual’s distinct act eventually causes the accomplishment of crime. Therefore, there has been no bar in prosecuting and trying a person separately for the same offence for which another person has already been prosecuted and tried for his own responsibility.

318. The evidence presented before us, in the case in hand, together with the earlier finding on the same event and pattern of culpability of Abul Kalam Azad @ Bachchu in the earlier case we are persuaded to conclude that the accused Ali Ahsan Muhammad Mujahid too incurs liability for ‘abetting’ and ‘facilitating’ the commission of the offence of ‘confinement’ of Ranjit Kumar Nath. Testimony of P.W.7 gets further assurance from the testimony of P.W.8 Mir Lutfar Rahman, on significant relevant conduct of accused in Faridpur town. Accused Ali Ahsan Mohammad Mujahid is thus criminally liable under section 4(1) of the Act of 1973 for abetting and facilitating the commission of offence of ‘**confinement**’ as crime against humanity as specified in section 3(2)(a)(g) of the Act which are punishable under section 20(2) read with section 3(1) of the Act

Adjudication of Charge No. 04

[Confinement of Abu Yusuf @ Pakhi]

319. Summary Charge: on 26 July in the morning during the War of Liberation in 1971 the local Razakars abducted Md. Abu Yusuf @ Pakhi of east *Goalchamat Khoda Bakshpur* PS Kotwali district Faridpur from the locality of Alfadanga under district Faridpur and brought him to the army camp set up in Faridpur Stadium suspecting him to be a freedom fighter. On the same day, at about 11:00 am accused Ali Ahsan Muhammad Mujahid

being the leader of Islami Chatra Sangha and subsequently the head of Al-Badar Bahini and or as a member of group of individuals came to the camp and saw Abu Ysusf @ Pakhi confined there with other detainees and then he told something to the army Major following which Abu Ysusf @ Pakhi was subjected to torture severely. The victim Abu Yusuf @Pakhi was kept confined there for 01 month and 03 days and during the period of such confinement he was subjected to inhuman torture that resulted severe physical injury causing fracture of bones and at one stage he was shifted to the Jessore cantonment. Therefore, Ali Ahsan Mohammad Mujahid has been charged for abetting and facilitating the commission of offence of '**confinement as crime against humanity**' by his conduct which was a part of attack against the civilian population or in the alternative, for abetting and facilitating the commission of offence of 'other **inhuman act as crime against humanity**' as specified in section 3(2) (a) (g) of the Act which are punishable under section 20(2) read with section 3(1) of the Act for which the accused incurs liability under section 4(1) of the Act.

Witnesses

320. Victim Abu Yusuf @ Pakhi could not be produced and examined by the prosecution and it however chiefly depends on victim's statement made in earlier case together with statement made by P.W.6 Abdul Malek Mia and P.W.8 Mir Lutfar Rahman, on relevant fact. The learned prosecutor insisted to consider the testimony of P.W.6 and P.W.8 made on relevant facts together with Tribunal's earlier finding [**Abul Kalam Azad @ Bachchu**, ICT-BD Case No. 05 of 2012, Judgment 21 January 2013] on commission of the event of criminal acts narrated in charge no. 4 which was based on testimony of victim Abu Yusuf @ Pakhi and thus the cumulative evaluation will effectively enable the Tribunal in arriving at finding as to involvement of the accused Ali Ahsan Muhammad Mujahid.

Evidence

321. P.W.6 Abdul Malek Mia[75] an inhabitant of Faridpur in 1971 stated that after the Pakistan army entered into Faridpur town they had set up camps at Police Line, Stadium, Rajendra college and started committing atrocious activities by engaging Biharis and Razakars.

322. P.W.8 Mir Lutfar Rahman [58] an inhabitant of Faridpur town in 1971 stated that Ali Ahsan Muhammad Mujahid[accused], Abul Kalam Azad @ Bachchu Razakar, Kalu Bihari used to assist the Pakistan army and he saw accused Mujahid moving around the town by a jeep.

Deliberations

323. Ms. Tureen Afroz, the learned Prosecutor submitted that liability mode contained in section 4(1) of the Act of 1973 refers to ‘common plan of collective criminality’ which corresponds to ‘systematic form of JCE’. Exhibit- 20 shows common plan and deliberate policy of Al-Badar the criminal organisation. Accused, being the leader and one of superiors was part of common plan and the criminal organisation. The event of confining and causing torture to Abu Yusuf Pakhi has been proved in the case of *Abul Kalam Azad*. Tribunal’s finding made therein together with statement of P.W.6 and P.W.8 who have proved accused’s collective criminal association with the army camp renders the accused liable for the event narrated in charge no. 4

324. The Tribunal notes that prosecution could not produce and examine the victim Abu Yusuf @ Pakhi as witness. As submitted by Ms. Tureen Afroz, the learned Prosecutor, in order to prove this charge, prosecution relies upon the finding given by this Tribunal in the case of *Abul Kalam Azad @ Bachchu* [ICT-BD Case No. 05 of 2012, judgment 21 January 2013, para, 191.193 and 208] together with statement made on relevant facts by the P.W. 6 and P.W.8. Drawing attention to the judgment in the case of *Abul Kalam Azad @ Bachchu* the learned Prosecutor has further argued that the event of abduction, confinement and causing torture to Abu Yusuf @ Pakhi has been found proved[ICT-BD Case No. 05 of 2012, Judgment 21 January 2013, para 213] although *Abul Kalam Azad @ Bachchu* was not found guilty and liable for the criminal acts .

325. Admittedly, for the same event of criminal acts [for which *Abul Kalam Azad @ Bachchu* was prosecuted and tried in the ICT-BD Case No. 05 of 2012] *Ali Ahsan Muhammad Mujahid* has also been charged in the case in hand. In the former case the commission of the offence was found proved, although accused’s guilt was not proved.

326. The victim has not been examined by the prosecution. Evidence of P.W.6 and P.W.8 suffers from specificity as to the event under charge no.4. Hardly it demonstrates a general conduct of the accused but does not link him with the commission of any part of the offence alleged in any manner. Merely on the basis of earlier finding as to commission of the event of alleged criminal acts of which Abul Kalam Azad @ Bachchu was also found not guilty the present accused Ali Ahsan Muhammad Mujahid cannot be tied with it, particularly in absence of evidence or relevant indicative facts and circumstances.

327. True, even a single act of an accused forming part of attack is sufficient to impact substantially to the commission of the principal crime. But such act must be shown to have been done by accused. In the case in hand, the prosecution has utterly failed to show by evidence as to which act of the accused abetted and facilitated the commission of the offence of abduction, confinement and torture to Abu Yusuf @ Pakhi.

328. Tribunal notes that Abu Yusuf @ Pakhi was allegedly subjected to torture and degrading treatment at the camp army camp set up at Faridpur stadium. It is quite impractical to think that it was really possible to see such event by any one else, excepting the detainee victim himself. Thus he [victim] could have been the best and competent witness to prove the arraignment brought against the accused. We are, in no way, persuaded by the argument advanced by the learned prosecutor that even failure to produce and examine the victim in support of the charge the accused Ali Ahsan Muhammad Mujahid is liable to be found guilty of the criminal acts narrated in the charge no.4.

329. We disagree with the argument that the accused, being the leader and one of superiors of Al-Badar was part of common plan and the criminal organisation [Al-Badar] his [accused] collective criminal association with the army camp renders the accused liable under section 4(2) of the Act of 1973. Accused has been specifically charged for abetting and facilitating the commission of the offence alleged and the charge framed describes specific acts on part of the accused which allegedly abetted and facilitated the principals in committing the crimes. The fact that accused in exercise of his political position made a substantial contribution towards creating a climate of

terror in Faridpur does not give rise to an unerring conclusion that he facilitated or abetted the commission of all crimes occurred at the army camps set up in Faridpur.

330. The finding given on an issue adjudicated in earlier case may be considered as relevant in a subsequent case. But it is not suffice to prove the guilt of the accused. Prosecution is obliged to prove accused's involvement beyond reasonable doubt by adducing evidence and materials. Prosecution has utterly failed to discharge the burden. As a result the accused Ali Ahsan Muhammad Mujahid is not found guilty of the offence of confinement as crimes against humanity as specified in section 3(2) (a) (g) of the Act of 1973 [as listed in the charge no.4] and therefore he be accordingly acquitted thereof.

Adjudication of Charge No. 05

[Killing of Badi, Rumi, Jewel, Azad, Altaf Mahmud at Nakhalpara Army camp, Dhaka]

331. Summary charge: That on 30 August at about 08:00 pm during the War of Liberation in 1971 accused Ali Ahsan Muhammad Mujahid being the Secretary of East Pakistan Islami Chatra Sangha and subsequently the head of Al-Badar Bahini and or as a member of group of individuals being accompanied by Matiur Rahman Nizami the Al-Badar Chief came to the army camp at old MP Hostel, Nakhalpara, Dhaka where you started scolding Altaf Mahmud, Jahir Uddin Jalal, Badi, Rumi, Jewel and Azad who were kept confined there and then you told one army captain that before proclamation of clemency by the President the detainees would have to be killed. Following this decision you with the assistance of your accomplices killed the above civilian detainees by causing inhuman torture. Dead bodies of the victims could not be traced even. Therefore, accused Ali Ahsan Mohammad Mujahid has been charged for participating, abetting and facilitating the commission of offence of '**murder as crime against humanity**' by his conduct forming part of attack against the civilian population as specified in section 3(2) (a) (g) of the Act which are punishable under section 20(2) read with section 3(1) of the Act has incurred criminal liability for the above offences under section 4(1) and 4(2) of the Act.

Witnesses

332. For proving the charge, prosecution produced and examined P.W.2 Jahir Uddin Jalal who allegedly had occasion to witness the victims detained at the army camp at Nakhlapara old MP hostel, Dhaka as he [P.W.2] was also taken there and kept detained for couple of hours. He [P.W.2] also allegedly found the accused and his accomplices present there when he [accused] had mistreated him [P.W.2]. Apart from P.W.2, prosecution relies upon P.W.5 and P.W.3 who have testified some facts relevant to establish accused's activities and position of authority on the Al-Badar force. Now let us see what these P.W.s have testified before the Tribunal.

Evidence

333. P.W.2 Jahir Uddin Jalal(57) son of Haji Alauddin used to live at his father's government residence at Eskaton Garden, New Circuit House, Dhaka. According to him, in 1971 his father was Superintendent of Police [SP], Special Branch, Dhaka. Top ranking bureaucrats and police officials had been the residents of the same building. In 1971, P.W.2 was about 15 years of age. He made a vivid description what he witnessed during the early part of war of liberation. A Panjabi ADC was their neighbor in the same building.

334. One day he [P.W.2] found some people having cap on head coming from the army camp set up at opposite to the main gate of their building were entering into the residence of SP Azizul Haque Bachchu [of Pabna] and later on they came out there from and then his [P.W.2] father indicating two persons told that they were Matiur Rahman Nijami and Ali Ahsan Mujahid[accused] and they were men of infamous nature, according to intelligence report and they had started acting as agents of army and thus his[P.W.2] father cautioned him to be aware of those men.

335. From above versions, it appears that one Panjabi ADC was their neighbor in the same building and that he [P.W.2] saw the accused Mujahid and his accomplice Nijami during the early part of war of liberation when he was continuing his staying with his parents at his father's governmental residence.

336. P.W.2 stated that on 12 April he went to Ashuganj 4th and 2nd Bengal Regiment and joined the freedom fight and on 14 April, crossing Tripura border joined 'Moti Nagar' camp organized by Sector Commander Khaled Mosharraf, Sector-2. Abdul Aziz of Dhaka College, Maya, Ulfat, Badi, Rumi, Jewel, Azad, Tultul, Gaji, Alam and many others joined the camp. He also found Captain Haider at the camp who directed them to carry out operation in Dhaka city. Thus, they received guerilla and commando training and got prepared. Thereafter, P.W.2 added, on planning of Major Khaled Mosharraf he[P.W.2] and some other freedom fighters splitted into small groups entered Dhaka city during the first part of June, 1971 and started creating fright by hurling furtive attack , adopting 'heat and run' technique, directing the army and their accomplice Razakars on their way and camps. They continued their guerilla operations in Dhaka city.

337. Defence could not refute the above narration. Thus, it stands proved that P.W.2 received guerilla training in India under Major Khaled Mosharraf, Sector Commander, Sector-2 and victims were his co- guerilla fighters. It also remained unshaken that the P.W.2 backed to Dhaka city during first part of June, 1971 to carry out guerilla actions.

338. P.W.2 in describing the event of his abduction and confinement at army camp at Nakahlpara old MP hostel has stated that on 30 August, 1971 in the evening on instruction of his company commander Abdul Aziz he [P.W.2] moved towards 200 yards north to their own residence for preparation of carrying an action at the residence of one Dolly Asad at 19, New Eskaton Road as the Razakars were about to sit for meeting with the army there. Suddenly some armed Razakars surrounded him and army also came there by a jeep from Mogbazar end. The Razakars handed him [P.W.2] to army by scolding him using slangs. The army brought him to one building through the MP hostel lane at Tejgaon, P.W.2 added. Later on, he knew that it was 112, Nakhhalpara. Some army entered his room and after a short while 8-10 detainees were also brought there and on seeing them he [P.W.2] became disbelieved as they were freedom fighters who also received training at 'Moti Nagor' camp in India with him. Among them he could recognize Badi, Jewel, Azad, Rumi and Altaf Mahmud in tortured and wounded condition.

339. The above is the version that has been made by P.W.2 as to how he was abducted and taken up to the army camp where he found some of his co-guerilla fighters detained in severely wounded and mistreated condition. It is also found that they were so kept detained to extract information.

340. Rather, on cross-examination, P.W.2 has re-affirmed the fact of apprehending and bringing the victims to police station first. In reply to question put to him P.W.2, on cross-examination, stated that 29 August 1971 on seeing a news published in the Daily Sangram that some Al-Badar men apprehended some 'miscreants [freedom fighters] and brought them to Ramna police station he [P.W.2] went there [police station] and found 20-25 detainees including Badi, Jewel, Azad, Rumi and Altaf Mahmud. The fact of bringing the victims to the police station first remains totally undisputed.

341. P.W.2 further stated that it was about 08:00 pm when Jewel told him [P.W.2] not to disclose anything despite torture and Jewel described how he was subjected to torture and mistreatment. At that time i.e at about 08:00 pm Jewel showing Captain Qayum accompanied by Mujahid [accused], Nijami and 3-4 armed men, while they were moving to Captain's room passing through their room, told that they mistreated and tortured them and Mujahid , Nijami might have killed them any time.

342. Defence merely denied the above version. But it could not impeach it in any manner by cross-examining P.W.2. As a result what the P.W.2 has testified as regards his seeing the accused Mujahid, Nijami and 3-4 armed men accompanying the army Captain Qayum at the camp remains admitted, in other words.

343. Next, P.W.2 further stated that he was taken to Captain Qayum's room and his signature was obtained on a plain paper and they started him scolding indecently and asked since when and how he [P.W.2] knew the detainees and had hit on his wrists by a pistol. But he [P.W.2] remained quiet. At that time Mujahid[accused] standing there called some Mueen Uddin who entered into the room and then Mujahid[accused] snatching the sten gun from him[Mueen Uddin] started hitting on back of his head. With this he fell down on floor and he [Mujahid] started kicking him. Afterwards, Mujahid [accused] and Nijami took him to the room of detainees and coerced to disclose as to who were with

him in carrying out operation on 25 August targeting army and which arms they had carried with them.

344. From the above unimpeached version it has been depicted that object of abducting P.W.2 was to extract information in respect of guerilla operations carried out in Dhaka city by causing torture and accused Mujahid also participated actively in mistreating him. At that time another top brass of ICS Nijami was with the accused.

345. P.W.2 also heard Mujahid [accused] telling Captain Qayum that traitor Badi, Rumi, Jewel, Azad, Altaf Mahmud would have to be killed before the President's clemency that would come into effect from 05 September 1971. Within a short while Captain Qayum with his two army men brought him to the room of Lt. Col. Hejaji at MP Hostel where he [P.W.2] found Panjabi ADC Afzal [neighbour of P.W.2]. Lt. Col. Hejaji obtained his signature on a plain paper and handed him over to ADC Afjal who brought him back to home by his vehicle. He [P.W.2] learnt that ADC Afjal saw him [P.W.2] taking by an army jeep after picking him up at a place 'Bangla Motor' and thus he rushed to rescue him. However, he [P.W.2] stayed two days at the residence of ADC Afjal and then again went to Sector-2 head quarter in Meghalaya, India and described what he witnessed at the army camp, old MP hostel, Dhaka. And they again came back to Dhaka but could not have any trace of the victims he saw detained at the army camp.

346. Thus the P.W.2 has narrated what he witnessed and experienced during his confinement at the army camp at Nakhalpara MP Hostel since his picking up by the army as handed over by Razakars. Punjabi ADC Afjal was their close neighbour and naturally he might have affection to P.W.2 and thus he rushed to the army camp to get him back. This version could not be dislodged by the defence. Therefore, according to P.W.2 he had occasion to see the presence of accused Mujahid and his accomplices one of whom was armed Mueen Uddin.

347. P.W.3 Mahbub Kamal [59] used to live at their rented house at 210[old] Fakirapul, Dhaka during 1971. In between 19 April to 30 June he had been at his native village and on 30 June 1971 he came back to Dhaka. In 1971, he

was student of Notre Dame College. P.W.3 stated that Razakar camp was set up at Firoz member's house, 150-200 yards far from their [P.W.3] house. He [P.W.3] knew accused Mujahid who was a leader of Islami Chatra Sangha [ICS] as he used to come at the said Razakar camp.

348. Defence could not refute the above version. Besides, on cross-examination, P.W.3 has re-affirmed that at the house of Firoz member a Razakar camp was set up in July 1971. It is a fact of common knowledge that Razakar was an auxiliary force created to assist the Pakistani occupation army to further their policy and plan and Al-Badar formed of members of ICS. At the relevant time the accused had been in a leading position of ICS, the student wing of JEI.

349. P.W.5 Md. Rustom Ali Molla [58] used to stay at his father's quarter inside the premises of Mohammadpur Physical Training College, Dhaka. His father Md. Raham Ali Molla was a fourth class employee of the college. In narrating what he experienced and witnessed occasionally for the reason of his staying at the college premises with his parents. P.W.5 stated that training activity for Razakar and al-Badar was started in the college field since 3-4 months after the war of liberation ensued. One day he saw Ghulam Azam, Nijami and Muhammad Mujahid [accused] were getting down at college gate from a vehicle of Punjabi [army]. He could not recognise them. But he heard the Razakars, Al-Badar men guarding the college gate telling that they were Ghulam Azam, Nijami and Mujahid [accused] and they moved towards the Al-Badar, Razakar office inside the college.

350. Defence could not dislodge the above version showing the link of accused with the Al-Badar and its activities. Such link was mainly by virtue of his leading position in the ICS. Visiting the Al-Badar head quarter by accompanying the top brass of JEI Ghulam Azam and Top leader of ICS speaks a lot. A person without authority or influence or position surely would not have accompanied Ghulam Azam the top brass of JEI in visiting the Al;-Badar head quarter which was known as 'torture center'.

351. On cross-examination, P.W.5 has re-affirmed it that the accused Mujahid used to visit the college [Al-Badar head quarter] frequently. P.W.5 also stated

in reply to question put to him that he heard that the persons who were subjected to torture at the 'torture cell' at the college were intellectuals.

Deliberations

352. The learned prosecutor has argued that P.W.2 Jahir Uddin Jalal testified that he was forcibly brought to the army camp set up at old MP hostel at Nakahlpara, Dhaka city where he found accused Mujahid present who physically tortured him and he [P.W.2] also found him telling the army official at the camp to liquidate the detainees whom he could recognize, before the President's clemency came into effect. The body of victims could not be traced even. This fact together with the culpable conduct of accused as revealed from evidence of P.W.5 proves it beyond reasonable doubt that the accused was linked with the event of killing of persons detained at the army camp, in furtherance of common plan and design.

353. The learned defence counsel Mr. Emran Siddique in advancing argument in respect of charge no.5 has submitted that prosecution has failed to prove that there was a 'common plan' of causing murder of victim detainees at the army camp, as alleged. Act of causing torture to the detainees at the camp cannot be treated as part of activities carried out by JCE as there is no proof of nexus between the alleged conduct of the accused and the actual commission of murder of the detainees. P.W.2 is not a credible witness and his statement is contradictory and inconsistent. Besides, his evidence does not show involvement of the accused with the actual commission of the alleged killing.

354. Mr. Abdur Razzak, the learned senior counsel for the defence has submitted that there has been no evidence whatsoever to show participation of accused with the commission of killing of persons kept detained at the army camp at old MP hostel, Nakhalpara, Dhaka. P.W.2 claims to have witnessed accused's presence at the said camp. He could have disclosed it to Jahanara Imam, the mother of victim Rumi and author of the book titled '**Ekattorer Dinguli**'. Non-disclosure of this fact in the said book naturally makes version of P.W.2 untrue.

355. At the outset, the Tribunal notes that from the evidence it is found that the victims were valiant and brave guerilla fighters and at the relevant time

they were in Dhaka city for the purpose of carrying out guerilla actions targeting army and its auxiliary forces. This was the reason of apprehending the victims, the bright and brave sons of the soil, and presumably on failure to extract information from those bravest sons even by causing extreme torture and inhuman treatment they were killed. Their body could not be traced even.

356. There has been no evidence who committed the offence of actual killing of victims kept captive at the army camp. In absence of evidence, we thus conclude, on the basis of circumstances and relevant facts revealed that the victims were liquidated by the army either at the camp or some where else. The actual commission of crime might have been perpetrated by the army alone or by the army with the assistance and support of non-military individual or group of individuals.

357. Accused Ali Ahsan Mohammad Mujahid has been charged for participating, abetting and facilitating the commission of the offence of ‘murder’ of the victims kept detained and tortured at the army camp at Nakhlapara old MP hostel, Dhaka constituting the offence of crimes against humanity’ by his conduct forming part of attack. Why accused Ali Ahsan Mujahid was at the army camp at Nakhlapara old MP Hostel. During war time situation the army usually does not act with the encouragement and ideas of civilians, true. But in 1971 the situation prevailing in the territory of Bangladesh was quite different. A segment of Bengali civilians belonging to pro-Pakistan ideology and religion based political parties had their stand to further the policy and plan of Pakistan army, in the name of preserving Pakistan. This situation compelled the army to invite and receive assistance, support from such segment of civilians, by infringing the norms of a disciplined force. Next, accused Ali Ahsan Mujahid at the relevant time was in a leading position [secretary] of the ICS the student wing of JEI. Nijami was the president of ICS, at that time.

358. We have recorded our findings in the case of *Muhammad Kamaruzzaman* that the Al-Badar was formed of workers of ICS, the student wing of JEI and it acted as its ‘action section’. We have also observed that

“Since the Al-Badar force was an armed para militia force and it acted in furtherance of policy

and plan of Pakistani occupation armed forces no formal letter of document needs to be shown to prove that it was under placement and control of Pakistani occupation armed forces, for designating it as ‘auxiliary force’”

[**Muhammad Kamaruzzaman**, Judgment 09 May, 2013, para 495]

359. We consider it relevant to retell our earlier reasoned observation in the case of *Muhammad Kamaruzzaman* that

“ It is quite coherent from the facts of common knowledge involving the backdrop of our war of liberation for the cause of self determination that the Pakistani occupation armed force, in execution of government’s plan and policy in collaboration with the local anti liberation section belonging to JEI and its student wing ICS and auxiliary forces and other religion based pro-Pakistan political parties , had to deploy public and private resources and target of such policy and plan was the unarmed civilian Bangalee population, pro-liberation people, Hindu community, intellectuals and pursuant to such plan and policy atrocities were committed to them as a ‘part of a regular pattern basis’ through out the long nine months of war of liberation in 1971”.

[**Muhammad Kamaruzzaman**, Judgment 09 May, 2013, para 515]

360. Thus it stands proved that Al-Badar was a para militia auxiliary force and reasonably it had close and active and culpable affiliation with the Pakistan occupation army which enabled the accused and his accomplices belonging to ICS having substantial position of authority on Al-Badar to provide assistance,

support to the accomplishment of criminal activities, in furtherance of plan and policy.

361. What is meant by ‘**participation**’? ‘Participation’ encompasses ‘*approval*’ or ‘*instigation*’ or ‘*encouragement*’ or ‘*aiding*’ or ‘*abetment*’. The acts of the accused do not always need to be committed in the midst of the attack provided that if they are sufficiently connected to the attack. This view finds support from the decision of Trial Chamber, ICTY in the case of **Limaj** [November 30, 2005, para 189]. The judicial pronouncements of *ad hoc* tribunals have established that the accused himself need not have participated in all aspects of the alleged criminal conduct. The *actus reus* of aiding and abetting a crime may occur before, during, or after the principal crime has been perpetrated. It is thus not needed to prove that the accused himself directly participated to the actual commission of crimes.

362. In the case in hand, conscious conduct, act and behaviour of the accused Ali Ahsan Muhammad Mujahid knowing the foreseeable consequence, which have been convincingly proved, are thus qualified to be the constituent of ‘participation’ to the actual accomplishment of the crimes as it substantially contributed to, or have had a substantial effect on the perpetration of the principal crimes for which the accused has been charged with. The principal offence of murder remains unimpeached. Thus by act of being present at the army camp and behaving brutally with detained victims even in presence of army official and providing ‘advice’ to liquidate the victims before the President’s clemency came into effect, as stated by P.W.2, inevitably formed part of attack which had substantial effect to the actual commission of the crime committed by the principals and as such he [accused] was ‘concerned with the commission’ of the killing alleged in charge no. 5.

363. Testimony of P.W.2 as to hearing the accused Ali Ahsan Muhammad Mujahid telling that detainee Rumi, Badi Jewel and others would have to be killed before President’ clemency seems to be reliable, relevant and consistent to what he stated to IO in this regard. Such utterance providing ‘*advice*’ by the accused at the army camp signifies accused’s influence and substantial moral support over the activities carried out by the army.

364. The Tribunal notes that the act of providing ‘*advice*’, in other word, was a substantial kind of assistance and explicit approval of orchestrating a common plan to facilitate the actual commission of the crime. The act of providing ‘*advice*’ entails a person in a position of authority using that position to convince and approve another to commit an offence. We are convinced to pen our finding, considering the facts and context, that involving with designing plan or providing ‘*advices*’ constitutes the act of ‘abetment’ and ‘instigation’ which makes him [accused] liable for being ‘concerned’ with the commission of substantive crime.

365. It is now settled that the acts of aiding and abetting need not be tangible, but may consist of moral support or encouragement of the principals in the commission of the crime. His [accused] acts and conducts at the army camp displayed towards the detained victims clearly constitute instigation or abetment to the principal perpetrators of the crime. For holding the accused Mujahid criminally responsible for the crimes it is immaterial to show that he physically participated to the actual commission of crimes. We have observed in the case of **Muhammad Kamaruzzaman** that

“It is immaterial to argue that the accused was not the actual perpetrator or he himself physically participated to the commission of the criminal acts. It is to be noted that in furtherance of attack directed against the civilian population the alleged crimes as enumerated in section 3(2)(a) of the Act of 1973 were committed. It is not the ‘act’ but the ‘attack’ is to be systematic in nature and even a single act forms part of the ‘attack’.”

[**Muhammad Kamaruzzaman**, Judgment 09 May, 2013, para 533].

366. It is now settled that earlier statement made to Investigation officer is not evidence and any non significant omission in stating any fact to the IO which does not necessarily affect witness’s sworn testimony is not fatal and cannot be treated as glaring contradiction. Additionally, failure to describe precise detail about an event that took place four decades back rather makes witness’

testimony more reliable. However, On perusal of cross-examination of the Investigation Officer P.W.17 it appears that the version made by P.W.2 that he saw the victims who were his co-guerilla fighters of Sector-2 in his room at the army camp does not seem to be contradictory, on material particular, to what he stated to him [IO]. Thus the P.W.2 cannot be said to have made any exaggeration or intelligent improvement in his testimony before the Tribunal.

367. Besides, defence could not refute the narration as made by P.W.2 as to when he went to India and under whom he received guerilla training and who were his co-fighters. Thus, it stands proved that P.W.2 on receipt guerilla training in India under Major Khaled Mosharraf, Sector Commander, Sector-2 backed to Dhaka city during first part of June, 1971 to carry out guerilla actions targeting the army and their accomplices on their way and at camps as well. The above version also patently demonstrates that Badi, Rumi, Jewel, Azad the victims of the criminal events narrated in charge no.5 were his co-guerilla fighters.

368. On cross-examination, P.W.2 has re-affirmed the fact of apprehending and bringing the victims to police station first. In reply to question put to him P.W.2, on cross-examination, stated that 29 August 1971 on seeing a news published in the Daily Sangram that some Al-Badar men apprehended some ‘miscreants [freedom fighters] and brought them to Ramna police station he[P.W.2] went there [police station] where he found 20-25 detainees including Badi, Jewel, Azad, Rumi and Altaf Mahmud. Might be the P.W.2, due to memory failure could not state the exact date of his seeing the victims at police station. But it stands proved that prior to taking the victims at the army camp they were apprehended by Al-Badar men and handed over to the police station. It patently demonstrates that Al-Badar played a significant role which had substantial effect to the act of their confinement, torture and murder. The accused Mujahid cannot evade responsibility of such acts of Al-Badar as already he has been found to have had substantial position of authority on Al-Badar force, by virtue of his position in ICS. The fact of bringing the victims to the police station first remains totally undisputed. Additionally, it gets support from the defence document a book titled “**বুমী স্মারক গ্রন্থ**” [Defence documents volume 14, relevant page 324,325; Book’s relevant page 89-90].

369. The above relevant and pertinent fact lends support to the statement of P.W.2 that at the army camp he found the accused Ali Ahsan Muhammad Mujahid and his accomplices and that the accused ‘advised’ to liquidate them [victims] before President’s clemency came into effect. Both the facts are chained together and conclusively offer indicia of substantial contribution of the accused Mujahid to the actual perpetration of the killing.

370. Defence merely denied the above version. But it could not impeach it in any manner by cross-examining P.W.2. As a result what the P.W.2 has testified as regards his seeing the accused Mujahid, Nijami and 3-4 armed men accompanying the army Captain Qayum at the camp stands proved. The version also depicts the object of apprehending and causing torture to guerilla fighters by keeping them captive at the army camp was to extract information from them and that armed civilian people even had access to the army camp for assisting to carry out their activities, in furtherance of policy and plan.

371. The unimpeached version of P.W.2 demonstrates that the object of abducting P.W.2 and bringing him at the army camp was also to extract information in respect of guerilla operations carried out in Dhaka city by causing torture. Accused’s conduct, as stated by P.W.2, even in presence of army official at the army camp is a significant *indicium* to prove accused’s authority, active affiliation with army and that he was in a position of providing effective assistance to the army, in carrying out its criminal activities.

372. The P.W.2 has narrated what he witnessed and experienced during his confinement at the army camp at Nakhhalpara MP Hostel since his picking up by the army as handed over by Razakars. Punjabi ADC Afjal was their close neighbour and naturally he might have affection to P.W.2 and thus he rushed to the army camp to get him back. Getting release, in any way, even after being confined and tortured at the army camp may not always be incredible. From the documents submitted by the defence [**Defence Documents volume no. 14**, page 240] it appears that extremely mistreated father of martyr Rumi was finally released from the clutches of army, and not Rumi. Thus it is not correct to presume that P.W.2 also would have been killed if actually he was

so abducted and confined for couple of hours at the army camp where he was subjected to mistreatment. Therefore, the evidence of P.W.2 that he had occasion to see the presence of accused Mujahid and his accomplices one of whom was armed Mueen Uddin is credible and relevant.

373. Defence could not refute the version made by the P.W.3 Mahbub Kamal that the accused Mujahid used to visit the Razakar camp set up at Firoz member's house, 150-200 yards far from their [P.W.3] house at 210[old] Fakirapul, Dhaka. It has not been denied even. Besides, on cross-examination, P.W.3 has reaffirmed that at the house of Firoz member a Razakar camp was set up in July 1971. Be that as it may, why the accused opted to make frequent visit to the said Razakar camp? It is a fact of common knowledge that Razakar was an 'auxiliary force' created to assist the Pakistani occupation army to further their policy and plan and Al-Badar was an wing of Razakar force and acted as 'death squad' of Pakistani army. It is now decided that Al-Badar was formed of members of ICS. At the relevant time the accused Mujahid had been in a leading position of ICS, the student wing of JEI. Presumably, to coordinate the activities of Razakars, the accused used to visit the Razakar camp, by virtue of his position in the ICS.

374. P.W.5, on cross-examination, has re-affirmed it that the accused Mujahid used to visit the Al-Badar headquarter at Mohammadpur Physical training College. P.W.5 also stated in reply to question put to him that he heard that the persons who were subjected to torture at the 'torture cell' at the college were intellectuals. It could not be refuted that P.W.5 at the relevant time had been residing at his father's quarter inside the college premises as his father was a fourth class employee there. We do not find any reason to disbelieve P.W.5. Rather, we consider that he had rare occasion to see and experience horrific activities carried out by Al-Badar men inside the camp and culpable affiliation of top brasses of JEI and ICS with the Al-Badar.

375. The above relevant fact as to role and position of the accused Mujahid by virtue of his position in ICS inevitably adds further and strong impression that he [accused] had been at the army camp at Nakhalpara old MP Hostel with culpable intent to assist the army in carrying out the criminal acts the outcome of which was killing of some brave civilians detained there.

376. It is true that P.W.2 is the sole witness who came on dock testifying what he witnessed and experienced during his confinement at the army camp for couple of hours. But his testimony together with other material facts sufficiently inspires credence as to presence of accused at the army camp and his culpable conduct and acts which truly formed part of attack in perpetration of the actual commission of the killing. It is to be noted that the testimony of a single witness on a material fact does not, as a matter of law, require corroboration. The established jurisprudence is clear that corroboration is not a legal requirement for a finding to be made. It has been observed by the IVTR Trial Chamber that

“Corroboration of evidence is not necessarily required and a Chamber may rely on a single witness’ testimony as proof of a material fact. As such, a sole witness’ testimony could suffice to justify a conviction if the Chamber is convinced beyond all reasonable doubt.”

[Nchamihigo, ICTR Trial Chamber, November 12, 2008, para. 14]

377. Thus, we are persuaded to conclude that the accused Mujahid’s act of ‘presence’ at the army camp and providing ‘advice’ to liquidate the detainees formed part of ‘attack’ that resulted in commission of the principal criminal acts directing the non combatant civilians, the detained victims. Prosecution even is not required to identify the actual perpetrator. This has been now a settled jurisprudence and it finds support from the principle enunciated in the case of **Akayesu** which is as below:

“A person may be tried for complicity in genocide “even where the principal perpetrator of the crime has not been identified, or where, for any other reasons, guilt could not be proven.” [Akayesu, ICTR Trial Chamber, September 2, 1998, para. 531: See also Musema, ICTR Trial Chamber, January 27, 2000, para 174]

378. It is to be seen whether the accused's acts and conduct at the army camp provided substantial assistance and moral support for accomplishment of the crime, although his acts had not actually caused the commission of the crime of killing alleged. In this regard, we may rely upon the decision of the Trial Chamber of ICTR in the case of *Kamubanda* [January 22, 2004, para 597] which runs as below:

“Such acts of assistance..... Need not have actually caused the commission of the crime by the actual perpetrator, but must have had a substantial effect on the commission of the crime by the actual perpetrator”.

379. The Tribunal notes that the individual actor accused of crime against humanity is not required to be the one who directs the attack on the civilian population. Rather it is enough to show that his act or conduct formed part of the attack. It appears that the accused Mujahid was certainly a heinous individual, as proved from evidence of P.W.2 and P.W.5, who was substantially concerned with the commission of truly horrific acts narrated in charge no.5. Accused Mujahid for his acts which were part of the specific context identified above and which substantially contributed to committing a crime against civilians might be recognized as guilty of a crime against humanity.

380. We are convinced with the argument advanced by Ms. Tureen Afroz the learned prosecutor that the book titled ‘**Ekattur er Dinguli**’[**Material Exhibit VI**] presented by the prosecution to substantiate the incident of torture, detention of the author's son Rumi and other detainees and not to substantiate the involvement of the accused with the criminal activities that formed part of attack which resulted in killing of detainees. Thus non description of accused's involvement in the book does not *ipso facto* discredit the evidence of P.W.2 who has testified what he witnessed and experienced at the army camp set up at Nakhhalpara old MP hostel incriminating the accused and his accomplice co-leader of the ICS and their culpable conduct.

381. Considering the facts narrated in the charge and evidence presented and circumstances revealed we are not convinced to conclude that the accused had

a superior position over the said army camp. Perceptibly it is found to have been proved that the accused used to maintain a close, active and culpable affiliation with the army. However, it stands proved that by virtue of his position in ICS and Al-Badar he [accused] had ‘access’ and affiliation to the army camp and used to act providing assistance in carrying out activities of the army, in furtherance of plan and policy. As already observed, it remains not proved as to who actually committed the offence of killing. There has been no evidence to show that afterwards the victims were handed over to any other group. Since the victims were kept captive at the army camp wherein they were subjected to brutal torture and mistreatment, as stated by P.W.2, the eye witness it may be lawfully presumed that the actual killing might have been perpetrated by the army. Thus, the accused cannot be held liable as a ‘superior’ under section 4(2).

382. But in committing such crimes, the accused had played a significant role, as stated above. Accused’s culpable presence at the army camp and his conduct and antagonistic utterance and ‘advice’ to liquidate the victims before the President’s clemency came into effect are quite fair indicative as to accused’s participation to the commission of crime alleged by ‘abetment’ and providing facilitation. The accused was thus ‘concerned with the commission’ of actual commission of the event of killing. It has been observed in the case of Tadic, [ICTY Trial Chamber), May 7, 1997, para. 69] that

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

383. Cumulative effect of the conduct of the accused prior to the event of killings witnessed by P.W.2 and that of the accused at different times and place i.e Al-Badar head quarters and Razakar camp are the unequivocal corroboration of his [accused] complicity to the actual commission, beyond reasonable doubt and thus the accused Ali Ahsan Muhammad Mujahid had ‘participated’ to the commission of the crimes alleged.

384. It is to be noted that section 4(1) of the Act of 1973 refers to the concept of JCE. Fundamentally the JCE requires that a group of individuals had a common plan, design, or purpose to commit a crime, that the accused participated in some way in the plan and that the accused intended the accomplishment of common plan or purpose. We have found that the accused's culpable conduct and acts at the army camp and directing the victim detainees are sufficient indicative as to the fact that he was part of the 'common plan and design' in furtherance of which the crimes were committed.

385. Prosecution has been able to prove beyond reasonable doubt that the accused, for his substantial act and culpable conduct of providing abetment is equally accountable for the crimes as listed in charge no.5 in the same manner as if it were done by him alone. Thus, he is held to have participated to the actual commission of the offence of killing of numerous unarmed civilians most of whom were valiant and brave guerilla fighters constituting the offence of murders as crimes against humanity as enumerated in section 3(2)(a)(g) of the Act of 1973 and thus the accused Ali Ahsan Muhammad Mujahid incurs criminal liability under section 4(1) of the Act of 1973.

Adjudication of Charge No. 06

[Event of Intellectuals Killing in Dhaka]

386. Summary Charge: During the War of Liberation in 1971 the members of Razaker and Al-Badar Bahini used to receive their 'training' at the camp known as 'torture camp' set up at Mohammadpur Physical Training Institute, Dhaka. Accused Ali Ahsan Muhammad Mujahid being the Secretary of the then East Pakistan Islami Chatra Sangha and subsequently the head of Al-Badar Bahini and or as member of group of individuals used to visit the camp regularly with his co-leaders with intent to annihilate the 'Bangalee population', used to design planning and conspired with the senior army officers at the camp and following such conspiracy and planning, 'intellectuals killing' was started from 10 December and thereby accused Ali Ahsan Mohammad Mujahid has been charged for abetting and facilitating the commission of offence of 'murder as crime against humanity' by his conduct which was a part of planned attack against the civilian population as specified

in section 3(2) (a) (g) of the Act or in the alternative, for abetting and facilitating the commission of offence of ‘genocide’ committed targeting the ‘intellectual group’ with intent to destroy it either whole or in part as specified in section 3(2) (c) (g) of the Act which are punishable under section 20(2) read with section 3(1) of the Act for which the accused has incurred liability under section 4(1) and 4(2) of the Act.

Witness

387. P.W.1, P.W.2 and P.W.5 have testified on some martial facts in relation to charge no.6. None of them claims to have witnessed the commission of any of criminal acts constituting the offence of mass killing. Thus, their statement made before the Tribunal refers to circumstances and relevant facts. P.W.4 the son of martyr Seraj Uddin Hossain, a notable journalist testified how his father was abducted from their house. Independent charge has been framed on this event [charge no.1]. But the event was a part of mass killing [charge no.6] in furtherance of same organized plan. That is why testimony of P.W. 4 is also relevant to have a portrayal about the pattern of the crime of intellectuals killing.

Evidence

388. P.W.1 Shahriar Kabir, a researcher stated that planned intellectuals killing was most atrocious criminal acts committed by Al-Badar in 1971. In between 15 November to 15 December 1971 the killers of Al-Badar wiped out thousands of intellectuals and professionals. University teachers, journalists, writers, doctors, engineers, lawyers the best scholars of Bangladesh were the listed targets of the killers and of them Professor Munir Chowdhury, Professor Anwar Pasha, Professor Mofazzal Haider Chowdhury were his [P.W.1] direct teachers. P.W.1 stated in cross-examination that accused Ali Ahsan Muhammad Mujahid was the deputy chief of Al-Badar formed of ICS workers and Al-Badar was a semi-secret organisation.

389. P.W.2. Jahir Uddin Jalal a guerilla fighter who had occasion to see the tortured victims [his co-guerilla fighters] detained at army camp at Nakhalpara old MP hostel as he was also picked up there and kept confined for couple of hours stated that on 04 December 1971 he saw the Al-Badar commander

accused Mujahid addressing a rally at the locality of *Chwakhbazar*, Dhaka city and he[accused] was threatening not to spare the supporters of war of liberation, intellectuals, doctors, journalists.

390. P.W.2 further stated that following his headquarters' plan they targeted the AB HQ at Mohammadpur Physical Training College as Al-Badar Commander Mujahid, Nijami and others used to provide training to Al-Badar men there. Intellectuals, journalists, freedom fighters, artists were brought there and subjected to torture and afterwards killing them their dead bodies were dumped at Rayer Bazar. Rustom [P.W.5] of physical college provided all these secret information to them [P.W.2]. However, they could not carry out operation at AB HQ as there had been Pakistan army. On 17 December, the following day of victory he [P.W.2] came to Physical Training College where he found nine human skulls and clotted blood at western side of college gymnasium. The above pertinent version relating to activities carried out by the Al-Badar at their headquarter at Mohammadpur Physical Training College remains unshaken.

391. P.W.4 Shaheen Reja Noor while testifying the event of his father's [Journalist Seraj Uddin Hossain] abduction on 10 December, 1971 stated that they [killers] were members of Al-Badar Bahini and the Al-Badar was formed with the leaders and activists of Jamat E Islami's then student wing Islami Chatra Sangha [ICS]. Razakar, Al-Badar and Al-Shams forces were formed as the collaborationist force of the Pakistani army in embattled Bangladesh and Professor Ghulam Azam, then Ameer of East Pakistan Jamat E Islami, played a vital role in this regard. The Al-Badar force was known as a 'killer force' or Gestapo force. Mujahid [accused] was its [ICS] East Pakistan president between October and December 1971.

392. P.W.5 Md. Rustom Ali Molla son of an employee of Mohammadpur Physical training Institute had been residing at his father's quarter inside the institute campus. Naturally he had opportunity to see and experience the activities carried out at the AB HQ set up there.

393. P.W.5 stated that some intellectuals, artists, freedom fighters were brought to college camp[AB HQ] by Al-Badar, Razakar and army, 7-8 days

before the victory. He [P.W.5] found hundreds of gouged human eyes abandoned at the brick field behind the Physical College [AB HQ]. Defence could not refute this version by cross-examining the P.W.5. Besides, since P.W.5 had been staying at his father's quarter inside the college campus it was rather possible of being aware of the activities carried out there [AB HQ].

394. P.W.5 stated too that Al-Badar, Razakars before fleeing from the camp at Physical College, after the victory, had slaughtered the Bengali doctor who used to live inside the camp and he [P.W.5] recovered his body. On the following day of independence he [P.W.5] found nine distorted human skulls at a place nearer to the college gymnasium.

395. The above versions made by the P.W.5 could not be impeached by cross-examining him. Defence, drawing attention to these versions, suggests that he [P.W.5] did not state it to IO which P.W.5 denied. But it has not been contradicted by the IO [P.W.17], as it appears. As such the above natural version made by the P.W.5 inspires fullest credence.

Deliberations

396. The ultimate outcome of the criminal acts was causing death of large number of intellectuals which was truly 'mass killings' as narrated in the charge. Dead body of most of the victims could not be traced even. To prove the offence of murder as crime against humanity locating dead body is not necessary. For such crime is committed in a context and as a part of pattern based attack in furtherance of common plan and design and not as an isolated crime. In adjudicating charge no.1 we have found that the act of abduction was followed by murder of victim Seraj Uddin Hossain. The commission of the alleged criminal event causing abduction and murder remained totally undisputed and it was a part of 'intellectuals killing', as already observed.

397. Defence does not dispute the tragic event of 'intellectuals killing' that took place in between 10-14/15 December 1971. But it has been submitted that the charge does not narrate as to which intellectuals were so abducted and killed and where the actual commission of crimes took place. However, defence avers that the accused was not connected with the alleged criminal acts, in any manner as the prosecution failed to produce any evidence in

support of any conduct or act of the accused constituting the offence of ‘abetment’ to the commission of principal crimes. There has been no evidence to show that the accused was concerned with designing plan and he had no link and affiliation with Al-Badar. Mere visit to AB HQ [Al-Badar Headquarter] at Mohammad Physical Training Institute does not prove that the accused was connected with the activities carried out by AB.

398. The Tribunal notes that an act of ‘abetment’ may not always be tangible. It is to be inferred from facts and circumstances. It is alleged that Al-Badar men committed the offence of abduction and murder of intellectuals following a common plan and design. Considering context and situation prevailing at the relevant time it was not possible to see or know where the victims were brought by picking them up from their residence. Since the fact of ‘intellectuals killing’ is a part of our undisputed history, we are to see, in the case in hand, whether the accused abetted, planned and facilitated the actual commission of killings. He need not be shown to have physically participated to the commission of crimes alleged.

399. In finding culpability of the accused with the commission of the offence of intellectuals killing we are to adjudicate

- a. The commission of the killing of intellectuals
- b. Who or which group of individuals or organisation committed the crimes
- c. Whether the accused had affiliation with perpetrator organisation
- d. The extent and nature of accused’s affiliation with the organisation that could sufficiently prompt a person of normal prudence to infer his involvement with the activities of the organisation.
- e. Whether such involvement makes the accused criminally liable for the crimes committed

Intellectuals Killing

400. It is quite undisputed that our history remorse 14th December 1971 with highest tribute for the killings of numerous intellectuals, the best sons and daughters of Bangladesh. At the fag end of war of liberation, sensing the

inevitable defeat the killers the local collaborators of Pakistani occupation army in furtherance of common plan and design strived to snap the psychological potency of freedom fighters and to cripple the Bengali nation as well by carrying out brutal killing of numerous intellectuals of Bangladesh.

401. It is now the history of common knowledge that particularly in between 10 -14 December 1971 a group of notable intellectuals belonging to diverse professions were picked up forcibly from their homes by armed men belonging to Al-Badar, an auxiliary force created of workers of ICS the student wing of JEI for collaborating with the Pakistani army. It stands proved that Mohammadpur Physical Training Institute was the AB HQ and it was known as ‘torture camp’. Most of the great sons and daughters did not return and their dead body could not be identified and traced even, although many of the distorted corpses were barely recognizable at different killing fields at outskirts of Dhaka city. The nation with highest and solemn tribute still remembers their sacrifice, their contribution for the cause of independence and liberation of our motherland.

402. It is now well settled that in a case of ‘mass killing’ or large scale killing’ proof beyond reasonable doubt that a person was murdered does not necessarily require proof that the dead body of that person has been recovered. The fact of a victim’s death can be inferred circumstantially from all of the evidence presented to the Trial Chamber.

403. The event of intellectuals killing which was a ‘large scale killing’ and culpability of the accused Mujahid with its perpetration mostly depend on documentary evidence including old reports, sourced information and the relevant facts as testified by the witnesses. At the outset let us evaluate the oral testimony made on some material facts.

404. The unshaken fact of discovering nine distorted human skulls at a place nearer to the college gymnasium at the AB HQ and 100-150 gouged human eyes behind the camp[AB HQ], on 17 December 1971 i.e on the following day of independence after the Al-Badars and Razakars had fled from the camp, as stated by P.W.5, are considered to be vital and material which prove beyond reasonable doubt that the Al-Badar men exterminated the intellectuals with

extreme brutality at their HQ at Mohammadpur Physical Training Institute in Dhaka city. The fact of discovering nine human skulls at western side of Institute gymnasium as stated by P.W.5 [AB HQ] has been corroborated by P.W.2.

405. P.W.4 Shaheen Reja Noor stated that the Al-Badar force was known as a 'killer force' or Gestapo force. Mujahid [accused] was its [ICS] East Pakistan president between October and December 1971. According to P.W.1 Shahriar Kabir, a researcher that University teachers, journalists, writers, doctors, engineers, lawyers the best scholars of Bangladesh were the listed targets of the killers.

406. The unimpeached versions made by the P.W.5 inspiring fullest credence proves that intellectuals were brought to the AB HQ at Mohammadpur Physical training Institute where they were subjected to torture and many of them were brutally killed there and afterwards their bodies were dumped to nearby killing fields or mass grave.

407. Cumulative evaluation of above evidence unerringly proves that (i) Al-Badar headquarter was set up at Mohammadpur Training College (ii) Intellectuals were brought to the AB HQ after picking them up from their residence and were subjected to torture (iii) After causing their death their dead bodies were dumped nearer to AB HQ (iv) Gouging eyes shows the untold and barbaric pattern of mass killing (v) Many killings took place inside the AB HQ.

408. The report titled '**Butchery By Al-Badar**' published in **PATRIOT**, New Delhi, 23 December 1971 also demonstrates an appalling depiction of the role of Jamat E Islam[JEI] and its 'armed wing' Al-Badar that perpetrated the murder of leading intellectuals, the best sons of our soil. The report speaks that

“When the Pakistanis were overpowered, they left the killing to the fascist ‘Al Badar’, the armed wing of the Jamat-e-Islami. This fascist body has already butchered about 200 leading

intellectuals, doctors, professors and scientists, including such eminent men like Sahidulla Kaiser and Munir Chowdhury.”

[Source: PATRIOT, New Delhi, 23 December, 1971: see also, Bangladesh Documents, Volume II, Ministry of External Affairs, New Delhi, page 573]

409. Mr. John Stonehouse, British Labour M.P told to PTI in an interview in New Delhi on 20 December 1971 as to who were responsible for organising the murders of large number of intellectuals in Dacca, although he declined to name the officers responsible for the murders. **Mr. John Stonehouse** however told that

“.....during his visit to Dacca yesterday (December 19), he got the names of these Pakistani army officers who organised the murders, and members of ‘Al Badar’, an extremist Muslim group, who carried out these heinous crimes just before the surrender of Pakistani forces in Dacca.”

[Source: **The Hindustan Times**, New Delhi, 21 December, 1971: published in Bangladesh Documents, Volume II, Ministry of External Affairs, New Delhi, page 572]

410. It is thus proved that about 200 leading intellectuals, doctors, professors and scientists, including such eminent personalities were brutally murdered. Al-Badar the fascist body of JEI committed such untold butchery. Thus, it stands proved beyond reasonable doubt that the Al-Badar men were the perpetrators of the horrific and untold pattern of intellectuals killing which took place in between 10 December to 16 December 1971.

Al-Badar ‘Headquarter’ & how the intellectuals were abducted

411. Where the Al-Badar ‘head quarter’ situated in Dhaka city in 1971? Who used to coordinate and control its activities? What activities were carried out at this ‘head quarter? **Material Exhibit-I** [the book *Ekattorer Ghatok Dalalra*

ke Kothai, page 56, 57] offers undisputed information in this regard. Referring to reports describing barbaric atrocities published in the dailies of the relevant time it has been narrated in the book titled “Ekattorer Ghatok Dalalra Ke Kothai” that

“সেপ্টেম্বর মাসের ১৭ তারিখে রাজাকারবাহিনীর প্রধান ও শান্তি কমিটির লিয়াজো আফিসারকে নিয়ে গোলাম আজম মোহাম্মদপুরে ফিজিক্যাল ট্রেনিং সেন্টারে যে রাজাকার ও আল-বদর শিবির পরিদর্শন করেছিলেন সেটি ছিল আল-বদরদের হেডকোয়ার্টার। স্বাধীনতামনা বুদ্ধিজীবীদের বেশীরভাগকে আল-বদররা প্রথমে চোখ বেঁধে এখানেই নিয়ে আসে। নির্যাতনের পর এখান থেকেই তাদের রায়ের বাজারে ও মীরপুরের শিয়াল বড়িসহ অন্যান্য বধ্যভূমিতে নিয়ে গিয়ে হত্যা করা হয়।

[Source : একাত্তরের ঘটক ও দালালরা কে কোথায়, প্রকাশ ১৯৮৯, পৃষ্ঠা ৫৬]

412. It is evident that abducting the intellectuals blindfolded the perpetrators first brought them to the ‘Al-Badar Head Quarters’ set up at the Mohammadpur Physical Training College and afterwards they were butchered at the nearby mass graves. It is also revealed that JEI was actively involved with the affairs carried out by the ‘headquarter’ of Al-Badar.

413. Charge no.6 describes the Mohammadpur Physical Training College as the Al-Badar headquarters. Prosecution witnesses especially P.W.5 by testifying before us has proved it. He is a competent witness in this regard. For at the relevant time he along with his parents had been staying in the staff quarter inside the college premises. Naturally he had occasion to see and experience many things happened there. P.W.5 testified the visit of the camp which was known as ‘torture camp’ by the accused Mujahid accompanied by other high profile JEI and ICS leaders.

414. Rabindra Nath Trivedi authored a book titled “৭১ এর দশমাস” [Ten months in 1971] published in 1997. The author compiled the book mainly on the basis of information obtained from various sources including the daily news papers of the relevant time. The book reflects information narrating events in brief including situation he experienced during the war of liberation.

The author joined as mass communication officer of the Bangladesh government since 17 April 1971.

415. From the narration that relates to 10 December 1971 made in the book titled “৭১ এর দশমাস” [Ten months in 1971] it appears that curfew was imposed in Dhaka city. The killers of Al-Badar and Al-Shams abducted notable journalist of the daily Ittefaq Seraj Uddin Hossain, journalist Nijam Uddin Ahmed and journalist of Columbia Broadcasting System Syed Najmul Haque from their homes and subsequently they could not be traced even. The Al-Badar force formed of armed members of Jamat E Islami’s student wing ICS started abducting Bangalee intellectuals selecting in furtherance of plan designed by General Rao Farman Ali under the leadership of army Captain Qayum [Source: “৭১ এর দশমাস”, Rabindra Nath Trivedi, 1997, page 595,596].

416. From the narrative made in the above book further shows that there had been a plan designed with intent to annihilate the selected intellectuals in order to cripple the Bangalee nation and the criminal activities were carried out by the fascist Al-Badar. The narrative states that

“পাকিস্তান বাহিনীর সহযোগী চরম দক্ষিণপন্থী উগ্র সাম্প্রদায়িক ফ্যাসিস্ট গেস্টাপো আল-বদর বাহিনীর ঘাতকের ঢাকা শহরে যুদ্ধ ও কারফিউর মধ্যে ১০ ডিসেম্বর থেকে ১৪ ডিসেম্বরের মধ্যে খুঁজে খুঁজে সেরা বাঙালী অধ্যাপক, চিকিৎসক, সাংবাদিক, সাহিত্যিকদের রায়েরবাজার ও মীরপুর অবাঙালী অধ্যুষিত এলাকায় নিয়ে গিয়ে নৃশংসভাবে হত্যা করে। উল্লেখ্য পাক সামরিক অফিসারদের আদেশে এ জঘন্য হত্যাকাণ্ড সম্পন্ন হলেও এ হত্যার পরিকল্পনা তালিকা প্রণয়ন, আত্মগোপনকারী বুদ্ধিজীবীদের খুঁজে বের করা, তাদের ধরে নিয়ে নৃশংস অত্যাচারের মধ্য দিয়ে হত্যা করার কাজটি আল-বদর ও রাজাকার বাহিনীর বাঙালী সদস্য ও তাদের নেতাদের দ্বারা সম্পন্ন হয়।”

[Source: “৭১ এর দশমাস”, Rabindra Nath Trivedi, 1997, page 620]

417. Referring to information made in the book titled “Bangladesh: Birth by fire” [page 277], Rabindra Nath Trivedi in his book titled “৭১ এর দশমাস” narrated that

“.....Squads of al badar, armed Bihari irregulars, toured the city in buses and rounded up Bengali intellectuals. At gun point, doctors, lawyers, University professors, and writers were taken from their homes and driven to a swamp on the edge of the city. There they were tortured and killed.....It seemed that the Pakistani military was determined to destroy the future of Bengal”.

[Source: “৭১ এর দশমাস”, Rabindra Nath Trivedi, 1997, page 615, 616]

418. We have thus got picture as to how the intellectuals were picked up from their homes and by individuals of which criminal organisation. Considering the context and pattern of designed collective criminality it was not possible for the inmates of the victim intellectuals to witness the activities of the perpetrators after committing the act of abduction. Besides, from evidence of P.W.4 who saw the event of his father’s [Seraj Uddin Hossain] abduction it is found that the armed perpetrators kept their face masked. In this backdrop the Tribunal considers it appropriate to rely mostly upon the documentary evidence particularly the reports published in the dailies during that period together with relevant circumstances and material facts. This effort may constitute a reasonable chain of facts that could ably portray the events and accused’s culpability therewith.

Who were perpetrators?

419. Naturally the crimes were perpetrated in organized manner by a group of individuals who acted in unison or in pursuance of common plan and purpose. Who were the participants in the collective criminal enterprise? In case of a crime carried out by collective criminal enterprise the participants do not act in the same manner. The principal crimes committed by collective criminal enterprise are the outcome of different acts and roles played by the

participants aiming to the accomplishment of a common purpose. In the case in hand the accused Mujahid has been charged of having involvement in designing plan and for abetting and facilitating the offence of intellectuals killing. The accused is alleged to have participated in such manner to the collective criminal enterprise in the capacity of leader of AB.

420. We have already observed in the case of *Chief prosecutor v. Muhammad Kamaruzzaman* that Al-Badar which was created by JEI and had acted as its ‘action section’, ‘fascist body’ and ‘armed wing’ in 1971[ICT-BD case No.03 of 2012, Judgment 09 May 2013, para 605] . We also made our observation in the case of *Kamaruzzaman* based on potential sourced information that Jamat E Islami was thus indulged in indiscriminate massacre of their political opponents belonging to Bengali nation, in the name of liquidating ‘miscreants’, ‘infiltrators’ for which they were using Razakars, Al-Badar comprising with the workers of Islami Chatra Sangha [ICS], its student wing [*Muhammad Kamaruzzaman*, ICT-BD case No.03 of 2012, Judgment 09 May 2013, para 601].

421. Fox Butterfield wrote in the *New York Times*- January 3, 1972 that

“Al Badar is believed to have been the action section of Jamat-e-Islami, carefully organised after the Pakistani crackdown last March”

[Source: *Bangladesh Documents Vol. II* page 577, Ministry of External Affairs, New Delhi].

422. How the Al-Badar bahini was formed and manned with? Al-Badar was formed with the workers of Islami Chatra Sangha [ICS] the student wing of Jamat E Islami [JEI] and it provided support to the occupation armed forces. A report published in *The Economist* 01 July, 2010 speaks as below:

“Bangladesh, formerly East Pakistan, became independent in December 1971 after a nine-month war against West Pakistan. The West's army had the support of many of East Pakistan's Islamist parties. They included Jamaat-e-Islami, still Bangladesh's largest

Islamist party, which has a student wing that manned a pro-army paramilitary body, called Al Badr.”

[Source: The Economist: 01 July 2010: see also <http://www.economist.com/node/16485517?zid=309&ah=80dcf288b8561b012f603b9fd9577f0e>]

423. The vital role of jamat E Islami [JEI] in creating the Al-Badar is also reflected from the narrative of the book titled ‘Sunset at Midday’ [Material Exhibit-III] which articulates as below:

“To face the situation Razakar Force, consisting of Pro-Pakistani elements was formed. This was the first experiment in East Pakistan, which was a successful experiment. Following this strategy Razakar Force was being organized through out East Pakistan. This force was, later on Named Al-Badr and Al-Shams and Al-Mujahid. The workers belonging to purely Islami Chatra Sangha were called Al-Badar, the general patriotic public belonging to Jamaat-e-Islami, Muslim League, Nizam-e-Islami etc were called Al-Shams and the Urdu-speaking generally known as Bihari were called al-Mujahid.”

[Source: ‘Sunset at Midday’ , Mohi Uddin Chowdhury , a leader of Peace committee , Noakhali district in 1971 who left Bangladesh for Pakistan in May 1972 [(Publisher’s note): Qirtas Publications, 1998, Karachi, Pakistan, paragraph two at page 97 of the book]

424. Why should we place reliance on the book titled ‘Sunset at Midday’? Mostly the profile and credential of the author may be considered as a key indicator for determination of authoritativeness of narration made in a book. *Mohiuddin Chowdhury* the author, in his book has narrated about himself as below:

“I decided to join Jamaat-e-Islami after my education is over. In 1962 I did my M.A and joined Jamaat-e-Islami in January, 1963 as a supporter [page 65 of the book].I was selected Secretary of District PDM and then District DAC. I was selected Secretary and then elected as Amir of District Jamaat-e-Islami in 1968. I was holding the post of District Jamaat till dismemberment of East Pakistan in 1971. In 1971 when peace committee had been formed to cooperate with Pakistan Army to bring law and order in East Pakistan, I was again elected Secretary, District Peace Committee.” [page 66 of the book]

425. Thus it is quite evident that the Al-Badar was formed of ICS workers. The ICS was the student wing of JEI. *Hussain Haqqani*, in his book titled **‘Pakistan between mosque and military’** citing sources narrated that

“The Jamaat-e-Islami and especially its student wing, the Islami Jamiat-e-Talaba [IJT], joined the military’s effort in May 1971 to launch two paramilitary counterinsurgency units. The IJT provided a large number of recruits.....The two special brigades of Islamists cadres were named Al-Shams[the sun, in Arabic] and Al-Badr [the moon].....A separate Razakars Directorate was established.....Two separate wings called Al-Badr and Al-Shams were recognized.....,.....Bangladeshi scholars accused the Al-Badr and Al-Shams militias of being fanatical. They allegedly acted as the Pakistan army’s death squads and “exterminated leading left wing professors, journalists, litterateurs, and even doctors. Al-

Badr reportedly killed 10 professors of Dacca University, five leading journalists including the BBC correspondent, two literateurs and 26 doctors in Dacca alone”

[Source: **Pakistan Between Mosque And Military: Hussain Haqqani**: published by Carnegie Endowment For International Peace, Washington D.C, USA first published in 2005, page 79]

426. *Hussain Haqqani*, the author of the above cited book was the former adviser to Pakistani Prime Ministers Ghulam Mustafa Jatoi, Nawaz Sharif and Benazir Bhutto. He also served as Pakistan’s ambassador to Sri Lanka from 1992 to 1993. The book is an authoritative and comprehensive account of the origins of the relationship between Islamist groups and Pakistani army. However, the above cited sourced account also offers a portrayal of active affiliation and alliance of Jamat E Islami with Pakistani army and also in establishing the Al-Badar, the death squad, in execution of common policy and plan.

427. It is thus found that as one of wings of Razakar force, Al-Badar a fanatical militia force acted as the death squad of Pakistan army aiming to exterminate the intellectuals belonging to Bengali nation. Hamoodur Rahman Commission Report says “ *we consider, therefore, that unless the Bangladesh authorities can produce some convincing evidence, it is not possible to record a finding that any intellectuals or professionals were indeed arrested and killed by the Pakistan Army during December 1971.*” [**Hamoodur Rahman Commission Supplementary Report**, page 31 , para 27].

428. **Hamoodur Rahman** the then Chief Justice of Pakistan was appointed as the head of the commission by the President of Pakistan in December, 1971 to inquire into and find out "the circumstances in which the Commander, Eastern command, surrendered and the members of the Armed Forces of Pakistan under his command laid down their arms and a cease-fire was ordered along the borders of West Pakistan and India and along the cease-fire line in the State of Jammu and Kashmir. After having examined 213 witnesses the Commission submitted its report in July 1972.

429. The above finding of **Hamoodur Rahman Commission Supplementary Report**, in absence of anything contrary, echoes further the fact of non involvement of the Pakistani army with the event of intellectuals killing that took place in between 10 December to 16 December 1971. The dreadful and barbaric event of intellectuals killing is not disputed. Therefore, conceivably relying upon evidence presented before us together with the sourced authoritative information we are convinced in recording our finding that it has been proved beyond reasonable doubt that the Al-Badar men and only the Al-Badar men were the perpetrators who committed the diabolical collective criminal acts, in furtherance of common design and plan endorsed by its creator JEI and its student wing ICS that resulted abduction and killing of more than 200 hundred intellectuals, the best sons and daughters of the nation. The collectivity of such criminal acts was aimed to cripple the nation when the perpetrators' organisation and their masterminds started feeling that the Bengali nation was about to achieve its heard earned victory.

Was there any common Plan and design and whether the Accused was connected with it

430. Accused Ali Ahsan Muhammad Mujahid has been indicted to have connection with designing plan. Act of designing plan usually not tangible and cannot be explicitly known to persons other than the persons involved with it. Prosecution alleges that the intellectual killing was implemented in execution of a plan and it was of pattern of selective mass killing. Thus two pertinent issues are to be resolved and these are **(i)** existence of designed plan and **(ii)** involvement of accused to further the plan.

431. Relying on circumstances and relevant facts revealed we are to arrive at a rationale finding on it. We stress upon the expression 'rationale finding'. Direct evidence is not required to prove the act of designing 'plan' and abetment provided pursuant to it. In this regard we may recall the decision of ICTY Trial Chamber decision in the case of **Prosecutor v. Milan Milutinovic & others** [ICTY Trial Chamber, Case No. IT-05-87-T, Judgment 26 February 2009, para 91] which is as below:

The accused may aid and abet at one or more of three possible stages of the crime or underlying

offence—“planning, preparation or execution”—and the lending of practical assistance, encouragement, or moral support may occur before, during, or after the crime or underlying offence occurs. No evidence of a plan or agreement between the aider and abettor and the physical perpetrator or intermediary perpetrator is required [*Tadić* ICTY Appeal Judgement, para. 229; *Brđanin* ICTY Appeal Judgement, para. 263; *Simić*, ICTY Trial Judgement, para. 162.]

432. Designing plan to implement and carry out criminal activities cannot be a tangible act. So it is quite immaterial to ask for proof to establish as to where, when who and how the plan was designed. It is fairly assumed that without a common design and plan such organized pattern of collective annihilation of ‘intellectual class’ could not have been initiated and executed. What was the plan and who were affiliated with it and why? Designing plan to implement and carry out criminal activities cannot be a tangible act. So it is quite immaterial to ask for proof to establish as to where, when who and how the plan was designed. There may not be documentary evidence as to designing such plan. Existence of plan is to be inferred from totality of circumstances and relevant facts. We are not agreed with the defence submission that conclusion as to existence of plan cannot be taken from circumstances. It may be well inferred and perceived from relevant circumstantial proof, especially depicted from the reports published in the dailies, at the relevant time together with the authoritative books. The book titled “একাত্তরের ঘাতক ও দালালরা কে কোথায়” [Material Exhibit-I, relevant page 100] narrates that

“২৭/১২/৭১ তারিখের দৈনিক আজাদে বিরাট হেড লাইনে বড় বড় হরফে লেখা “আর একটা সপ্তাহ গেলেই ওরা বাংলাদেশী বুদ্ধিজীবীদের সবাইকে মেরে ফেলত ---বদর বাহিনীর মাস্টার প্লান” শীর্ষক দীর্ঘ প্রতিবেদনটির অংশ বিশেষ এখানে উদ্ধৃত হল--

’.....হানাদার পাকিস্তানী বাহিনীর নির্বচার গণহত্যায় সক্রিয় সহযোগীতা করেই জামাতে ইসলামী ক্ষান্ত হয়নি--- বাংলাদেশের বুদ্ধিজীবী সম্প্রদায়কে সম্পূর্ণভাবে নির্মূল করার

উদ্দেশ্যে তারা গড়ে তুলেছিল এক সশস্ত্র গুপ্ত সন্ত্রাসবাদী সংগঠন
 ---বদর বাহিনী নামে যা সর্বসাধারণের কাছে পরিচিত ছিল।
 পকিস্তানী হানাদার বাহিনীর আত্মসমর্পনের শেষ মুহুর্তে এই
 বদর বাহিনী বহুসংখ্যক বুদ্ধিজীবীকে রাতের আঁধারে ধরে নিয়ে
 নৃশংসভাবে হত্যা করেছে---এ খবর এখন সবাই জেনে
 গেছ।.....”

433. Why the Al-Badar targeted the notable members of ‘intellectual class’ of Bangladesh, particularly at the fag end of war of liberation? What was their policy and plan and what devilish intent fueled them to encourage and support in carrying out such barbaric mass killing? In tracing reply to these pertinent questions we are to concentrate attention to some facts and circumstances showing conduct and attitude of the accused as depicted from the reports published in the daily news papers, particularly in the daily Sangram, the mouthpiece of JEI that could make it clear as to the understanding of the present accused with the perpetrators Al-Badar men and his link to the commission of the criminal acts by them as narrated in the charge.

434. For the offence of abduction and killing of Journalist Seraj Uddin Hossain a distinct charge has been framed alleging that the accused abetted and facilitated the commission of the crimes alleged. The event took place on 10 December 1971. Predictably this criminal event was carried out as a part of execution of same common design and plan of killing the intellectuals with intent to cripple the Bengali nation. **Material Exhibit-I** the book titled “একাত্তরের ঘাতক ও দালালরা কে কোথায়” [relevant page 124,125] narrates that

“সেই অতি নৃশংস হত্যাযজ্ঞ সম্পন্ন করার জন্য আলবদররা ব্যাপকভাবে বুদ্ধিজীবীদের অপহরণ করা শুরু করে ১০ ডিসেম্বর থেকে। কার্ফু এবং ব্লাক আউটের মধ্যে জীপে করে আলবদররা দিন রাত বুদ্ধিজীবীদের বাড়ী বাড়ী যেয়ে তাদেরকে প্রথমে সারা গায়ে কাদা মাখা একটি বাসে তোলে। এরপর বাস বোঝাই বুদ্ধিজীবী সহ নানা স্তরের বন্দীকে প্রথম মোহাম্মদপুরের ফিজিক্যাল ট্রেনিং কলেজের আলবদর হেডকোয়ার্টারে নির্যাতন ও জিজ্ঞাসাবাদ করার জন্য নিয়ে যাওয়া হয়। আলবদরদের এই অপহরণ স্কোয়াডের নেতৃত্ব দিত হয় কোন আলবদর কমান্ডার নতুবা পাকবাহিনীর অনধিক ক্যাপ্টেন মর্যাদার

কোন অফিসার। সম্ভবত : পাক বহিনীর নিজস্ব টার্গেট বুদ্ধিজীবীদের অপহরণের ব্যাপারে নিশ্চিত হবার জন্যই পাক সেনা অফিসার অপহরণ স্ফোয়াডের নেতৃত্ব দিত।”

435. Thus it is evinced from the above narration that the act of abducting the intellectuals in Dhaka city started from 10 December 1971, in furtherance of common design and plan. The gang of perpetrators was mostly led by Al-Badar commander. The victims were first brought to Al-Badar head quarter at Mohammadpur Physical Training College where they were subjected to torture. At the same time mere leading the gang by an army captain, a junior level officer does not suggest to conclude that the Pakistani occupation army command was aware of the plan and criminal activities carried out by the Al-Badar to annihilate the intellectuals. This probability is found to have been discarded by the finding of **Hamoodur Rahman Commission Supplementary Report**, [Report, page 31 , para 27], as already discussed.

436. History accuses this group [Al-Badar force] of working like ‘**death squad**’---killing, looting and disgracing Bengalis whom they accused of being ‘anti-Islam’. Thus the brutality of their contribution, as found, to the perpetration of systematic atrocities indeed was no lesser than that of the Pakistan occupation army. But did the atrocities committed against unarmed civilians, killing of targeted intellectuals and abetting and providing support to its commission conform to the ‘spirit of holy religion Islam’ and humanity?

437. Referring a report published in **The daily Sangram 24 April 1971** a report titled “মুজাহিদের কুকীর্তি গাঁথা আছে দৈনিক সংগ্রামের পাতায়” published in The Daily Bhorer Kagoj, 31 October 2007 which speaks as below:

”দৈনিক সংগ্রামের ২৪ এপ্রিল তারিখের সংখ্যায় প্রকাশিত খবরে আরো বলা হয়, ২২ এপ্রিল (১৯৭১) তারিখে ময়মনসিংহে জামাত ও ইসলামী ছাত্র সংঘের (বর্তমান ইসলামী ছাত্রশিবির) নেতা ও কর্মীদের এক সভা হয়। তাতে সভাপতিত্ব করেন মুহম্মদ আশরাফ হোসাইন এবং সভায় উপস্থিত ছিলেন মতিউর রহমান

নিজামী ও আলী আহসান মুজাহিদ। এই সভায় বক্তৃতা দিতে গিয়ে আলী আহসান মুজাহিদ বলেন, 'আল-বদর একটি নাম, একটি বিস্ময়। আল-বদর একটি প্রতিজ্ঞা। যেখানেই তথাকথিত মুক্তিবাহিনী, সেখানেই থাকবে আল-বদর। মুক্তিবাহিনী তথা ভারতীয় চরদের কাছে আল-বদর হবে সাক্ষাৎ আজরাইল'।

438. By delivering such inflammatory and inciting speech accused Mujahid who was a potential leader of East Pakistan ICS with the workers of which Al-Badar was formed, categorically termed the pro-liberation people and freedom fighters as the 'agents of India'. The speech also provoked the Al-Badar to act as '**Azrail**' [*The Angel of Death*] to liquidate pro-liberation Bangalee people and freedom fighters wherever they[Al-Badar] get them. In this way accused Mujahid explicitly disseminated the organizational unholy purpose, objective and common intent to its [Al-Badar] members, over whom he had authority and effective control. Common sense goes to say that only a person holding superior position and authority can deliver such inciting and provoking speech to his followers.

439. We have found that the accused was the President of East Pakistan ICS, the student wing of JEI. It is proved that AB , a *para militia* force was formed of workers of ICS [**Source: Sunset at midday: Mohiuddin Chowdhury**]. It is also established that AB acted as 'action section' of JEI and 'death squad' of Pakistan army. We have already given our reasoned finding that the accused Ali Ahsan Muhammad Mujahid had a substantial position of authority on Al-Badar force and he had reason to know the activities carried out by this semi secret organisation. The authoritative documents demonstrate beyond reasonable doubt that AB used to carry out criminal activities in furtherance of common plan and design, in a regular pattern basis.

Joint Criminal Enterprise [JCE]

440. On Joint Criminal Enterprise [JCE] Ms. Tureen Afroz, the learned Prosecutor submitted that liability mode contained in section 4(1) of the Act of 1973 refers to 'common plan of collective criminality' which corresponds to

JCE'. Accused Mujahid, being the leader and one of superiors was part of common plan and and deliberate policy of AB, a criminal organisation.

441. The learned prosecutor has further submitted that section 4(1) of the Act of 1973 fundamentally corresponds to the concept of JCE and the statute of 1973 does not contemplate categories of JCE. It is the jurisprudence evolved that characterizes JCE into three categories. The Tribunal constituted under the domestic legislation can only accumulate the jurisprudence when any ambiguity or gap is found in our own statute. Thus, according to section 4(1) if an accused is found to have participated to the commission of offence enumerated in the statute of 1973 he incurs liability under section 4(1). At the same time accused incurs liability under section 4(2) of the Act if he is found to have permitted or participated in the commission of the crime specified in section 3(2) or if he is found to have connection with any plans and activities involving the commission of such crimes .

442. The learned Prosecutor went on to submit, that the accused Mujahid was a potential leader of AB at the relevant period and as such it can be inferred validly that he was also a party to the common plan and purpose of collective criminal enterprise in accomplishing the crime of abduction of intellectuals for causing their death.

Deliberation on JCE

443. The Tribunal notes that JCE is a form of co-perpetration that establishes personal criminal liability. In fact section 4(1) of the Act of 1973 refers to JCE liability, although it has not been categorized in our Statute, as evolved through judicial pronouncement in the case of *Tadic* [ICTY]. It is admitted. The expression 'common purpose', 'awareness of foreseeable consequence' of act or conduct, 'intent' are the key factors involved with the notion of JCE liability.

444. The expression '*committed*' occurred in section 4(1) of the Act includes participation in JCE. Section 4(1) tends to cover the necessary elements of JCE, especially JCE category 1 and 3. In line with the recognized principles almost common to all legal systems, a person who takes 'consenting part' in the commission of the crime or who is found to be 'connected with plans or

enterprise' involved in the commission of crime [as enumerated in section 4(2) of the Act] or who is found to 'belong an organisation or group' engaged in the activities of committing crime, is guilty together with the 'principals'.

445. In the case in hand, we are to see whether (i) the accused took 'consenting part' in the commission of the crime(ii) the accused was 'connected' with plans or enterprise(iii) the accused 'belonged to' the perpetrator organisation or group.

446. If the answer is yes then it can be lawfully concluded that the accused Mujahid was 'concerned in the commission' of the alleged event of intellectual killing as narrated under charge 6. The Tribunal notes that 'concerned in the commission' refers to an indirect degree of 'participation' and a person can be held concerned in the commission of an act of criminal offence by an organisation or group of individuals even he is not found to be present at the crime site but took such a part in the preparation of such crime by his act or conduct providing abetment with intent to further its [plan of attack] object.

447. The act of 'consenting part' in the commission of the crime alleged and 'connection' with plans or enterprise or activities involving commission of crimes can be well inferred and perceived from circumstances. The matter of 'belonging' to the perpetrator group or enterprise and occupying position of authority on it need to be inferred from circumstances revealed.

448. We have found it proved from the report of **Fox Butterfield** that Al-Badar had acted as a secret, commando-like organization that murdered several hundred prominent Bengali professors, doctors, lawyers and journalists in a Dhaka brickyard. The event under the charge 6 relates to killing of innumerable intellectuals that took place in Dhaka city in between 10 to 16 December 1971. Intellectuals' killing was a part of calculated policy. Commission of killing targeting specific class of national group perceivably was the outcome of common plan and purpose of the perpetrators. Inherent nature and extent of killing and the class the victims belonged to suggest to conclude that the crimes were perpetrated by a collective enterprise or group i.e Al-Badar.

449. We agree that the liability mode contained in section 4(1) of the Act of 1973 refers to ‘common plan of collective criminality’ which corresponds to JCE’. The concept of JCE incorporates three elements: (i) plurality of persons (ii) the existence of a common plan, design or purpose and (iii) participation of the accused in the common design. **Professor Antonio Cassese** in the case of **Kaing Guek Eav alias Duch** [ECCC Pre-trial Chamber, Case No. 001/18-07-2007-ECCC/OCIJ (PTG 02), Date of Document, 27 October 2008] made an Amicus Curiae Brief on ‘Joint Criminal Enterprise’ [JCE] doctrine. **Paragraph 30-32 of the brief** relates to ‘the import of JCE theory in international criminal law’. **Paragraph 32 of the ‘brief’** states that

“To obscure responsibility in the fog of collective criminality and let the crimes go unpunished would be immoral and contrary to the general purpose of criminal law of protecting the community from deviant behavior that causes serious damages to the general interest. This damage is often all the more severe in the context collective criminality. JCE doctrine, as the systematization of principles of customary international law in existence since the post-World War II period, is a vehicle of accountability against such harm.”

450. This mode of liability need not involve the physical commission of a specific crime by all the members of JCE but may take the form of assistance in, or contribution to, the execution of the common purpose [**Stakic** (IT-97-24-A), ICTY Appeals Chamber, 22 March 2006, para. 64] Thus, ‘once a participant in a joint criminal enterprise shares the intent of that enterprise, his participation may take the form of assistance or contribution with a view to carry out the common plan or purpose [**Krnojelac** (IT-97-25-A), Appeals Chamber, 17 September 2003, para 81].

451. ‘Participation’ may occur in various manners, in furtherance of common plan and design. Obviously the pattern and extent of crimes narrated in charge

no.6 was carried out by a criminal organisation Al-Badar under a common plan to which the accused Mujahid was also a part as at the relevant time he was in leading position of ICS. Making statement in public encouraging to annihilate the ‘Indian agents, ‘miscreants’, visiting the AB HQ, writing article countering the ideology and views of pro-liberation journalist, urging to join Al-Badar force, frequent and easy access to army camps and providing advice even to army [as found in charge no.5] are fair indicative circumstances which amounted to provide ‘moral support’ and ‘assistance’ to target the intellectual group for causing their death. It offers valid and unerring indication that the accused had exercised his position of authority on AB the actual perpetrators of the killing of intellectuals, in furtherance of a common plan and design to liquidate the nationalist intellectuals, anticipating the inevitable defeat.

452. In adjudicating charge no.1 which relates to abduction and murder of Journalist Seraj Uddin Hossain we have recorded finding that it was a part of intellectuals killing which was committed by Armed Al-Badar men. In determining accused’s liability and culpability in respect of the criminal acts narrated in charge no1. We have already recorded our reasoned finding that

“A report titled “**Country could not care less**” published in The Daily Star on 14.12.2010 [**Defence Documents volume no. 14, page 463-464**] if read and examined in its entirety it would reveal that the armed gang who abducted Seraj Uddin Hossain was led by the accused Ali Ahsan Muhammad Mujahid. ‘Leading’ a gang does not always necessarily needs to show physical presence of the ‘leader’ at the crime site. A group of individuals or perpetrators can be even lead by many other means. Instruction, direction, provocation or providing substantial instigation by a person who is reasonably placed in position of authority may form the act of ‘leading’ a group or gang”.

453. Since the criminal act of abduction and murder as narrated in charge no.1 was a part of planned and designed intellectuals killing the above finding offers assurance as to culpability and connection of the accused Mujahid with

the killing of intellectuals for which he has been indicted in charge no.6 as well.

454. In essence, to establish superior responsibility under the Act of 1973 the prosecution is not required to prove that the accused superior either had any 'actual knowledge' (knew) or 'constructive knowledge' (should have known) about commission of the subordinate's crime. Under the 1973 Act, a superior is always responsible for the activities of his subordinates, whether he had any kind of knowledge or not.

455. It would be evident from the report below that the intent of targeting intellectuals was the ending of an 'organized plan' designed and the killer force Al-Badar was assigned to execute the plan. A report titled "এদের ধরিয়ে দিন জল্লাদ বাহিনীর সদস্যদের আরো কয়েকটি নাম" published in The Daily '**Dainik Pakistan**', 29 December 1971 narrates that

"(স্টাফ রিপোর্টার) বাংলাদেশের বুদ্ধিজীবীদের নির্মূল করার জন্যে বাংলার জঘন্যতম শত্রু ফ্যাসিস্ট জামাতে ইসলামী যে মহাপরিকল্পনা গ্রহন করেছিল এবং যে পরিকল্পনা বাস্তবায়নে আল বদর নামে জল্লাদ বাহিনী গঠন করেছিল তাদের সম্পর্কে আরো তথ্য আমাদের হাতে এসেছে। এই জল্লাদদের ট্রেনিং কেন্দ্র হিসেবে পরিচিত লালমাটিয়ার শরীরচর্চা কেন্দ্র থেকে উদ্ধার করা এইসব তথ্যে বদর জল্লাদদের আরো কয়েকজনের নাম-পরিচয়, ঠিকানা পাওয়া গেছে....."

456. Another report titled "আল-বদর সংক্রান্ত নথিপত্র অবিলম্বে সংগ্রহ করা প্রয়োজন" published in The Daily '**Dainik Pakistan**', 29 December 1971 narrates that

"(স্টাফ রিপোর্টার)- বদর জল্লাদদের নৃশংসতম হত্যায়ব্জ সম্পর্কে প্রয়োজনীয় নথিপত্র অবিলম্বে সংগ্রহ করা প্রয়োজন। এ সম্পর্কিত কাগজপত্র বিনষ্ট হয়ে যাচ্ছে। ইতিহাসের এই জঘন্যতম হত্যায়ব্জ সম্পর্কে বিক্ষিপ্তভাবে যেসব কাগজপত্র এখানে ওখানে পাওয়া গেছে তাতে সন্দেহাতীতভাবে এই সত্যই প্রমানিত হয়েছে যে, স্বাধীন বাংলাদেশকে পংগু করে ফেলার জন্যে এবং এদেশের শিল্প-সাহিত্য-সংস্কৃতির ওপর একটি মরণাঘাত হানার

জন্যে এ দেশের মানুষের জঘন্যতম শত্রু জামাতে ইসলামী সামরিক চক্রের সহযোগিতায় একটি সুনির্দিষ্ট পরিকল্পনা গ্রহন করেছিল আর সে পরিকল্পনা বাস্তবায়নে তারা নিয়োগ করেছিল তাদের জল্লাদ বাহিনী আল-বদরকে।”

457. Thus it is proved that Al-Badar was deployed in furtherance of organised master plan designed by the fascist Jamat E Islami to wipe out the ‘socio-cultural intellectual’ group of Bangladesh with intent to paralyze the Bangalee nation. Al-Badar had acted as ‘killing squad’ of Jamat E Islami in accomplishing the plan. Al-Badar, para militia force was formed by the leaders of ICS the student wing of JEI. It was formed purely of workers of ICS. [Sunset at Midday: Mohiuddin Chowdhury, page 97] Activities of Al-Badar were carried out under the control and co-ordination of Jamat E Islami.

458. Another report titled “বদর দিবসের সমাবেশে ইসলামী ছাত্রসংঘ সভাপতির ভাষণ” published in **The Daily Ittefaq**, 8 November 1971 narrates that

” এপিপি ও পিপিআই পরিবেশিত খবরে বলা হয়, আল বদর দিবস উপলক্ষে গতকাল(রবিবার) বিকালে বায়তুল মোকররম প্রাঙ্গনে ইসলামী ছাত্রসংঘের উদ্যোগে আয়োজিত এক সমাবেশে পাকিস্তানের সংহতি ও অখণ্ডতা রক্ষায় জনগণের দৃঢ় সংকল্পের পুনরুজ্জী করা হয়।.....ভারতীয় ও দুষ্কৃতিকারীদের হামলা প্রতিরোধে দৃঢ় সংকল্প ঘোষণা করিয়া বিভিন্ন শ্লোগান দেওয়া হয়।.....সভাপতি জনাব আলী আহসান মোহাম্মদ মোজাহিদ বক্তৃতা প্রসঙ্গে বলেন যে, আজ (সোমবার) হইতে কোন পাঠাগার হিন্দু লেখক ও হিন্দু প্রভাবিত মুসলিম লেখকদের লিখিত কোন পুস্তক রাখিতে দেওয়া হইবে না। তিনি বলেন যে, ইসলামী ছাত্র সংঘের স্বেচ্ছাসেবকগণ অনৈসলামিক প্রভাব হইতে মুসলমানদের রক্ষার জন্য পাঠাগারে ঐ সব বই পাইলে তাহা পুড়াইয়া দিবে। জনাব মুজাহিদ বলেন, বিশ্বের মানচিত্র হইতে ভারতের নাম মুছিয়া না ফেলা পর্যন্ত সংগ্রাম অব্যাহত থাকিবে।.....”

459. All the above materials facts, and conduct and act and inciting statement of accused Mujahid together with his position of President in ICS the student wing of JEI offer an unambiguous inference that he was connected with plans and activities involving the commission of the mass killing of intellectuals. It is to be noted that the accused's act need not directly cause any single victim's death, but as revealed from the above deliberation, accused's acts and conduct and his superior position on Al-Badar as well substantially contributed to the accomplishment of the mass killing event. The accused Ali Ajhsan Muhammad Mujahid being a person having position of authority on Al-Badar had thus reasonable awareness that the principals' actions were targeting the defined [victim] group of intellectuals. And as such the accused as one of superiors of the perpetrators incurs liability for the crimes perpetrated

Intent of killing targeting Intellectuals

460. Already we have found that under a designed plan with intent to cripple the Bengali nation the Al-Badar force had carried out the criminal acts of abducting, torturing and killing of hundreds of intellectuals of various professions. A report of **Fox Butterfield** speaks as below:

“Dressed in the black sweaters and khaki pants, members of the group, known as Al-Badar, rounded up their victims on the last three nights of the war..... Their goal, captured members have since said, was to wipe out all Bengali intellectuals who advocated independence from Pakistan and the creation of a secular, non-Moslem state.....If the war had not ended when it did, many Bengalis believe, Al-Badar would have succeeded. The bodies of 150 persons, many with their fingers chopped off or finger nails pulled out, were found in the brickyard. Hundreds more are believed buried in 20 mass graves nearby fields.[Source: Fox Butterfield, ‘A Journalist is

Linked to Murder of Bengalis', **New York Times**,
Monday, **January 3, 1972]**

461. Laurence Stern, in a report narrates quoting Enayet Ullah Khan, Editor of weekly Holiday that had the war not ended on the 16th, the city of Dhaka would be founded without a politically conscious or educated element. The report states as below:

“One of them was Enayet Ullah Kahn, editor of a left-list weekly called Holiday. Khan said he was contacted by Jamat-e-Islam, the nationalist organisation which had worked in concert with the former government in Dacca.....They said I was an Indian collaborator and did not believe in Islam. They told me, ‘we will eliminate you’. I didn’t take them too seriously at the time.”.....But Khan discovered this month that he, too, was on the al Badar execution list drawn up on the eve of surrender.....” had the war not ended on the 16th, you would find the city of Dacca without a politically conscious or educated element.” He said.

[Source: Report titled ‘Family of Slain Professor Tells of Massacre in Dacca, By Laurence Stern, Washington Post, Dec 27, 1971]

462. In a report on killing of some 150 of Dacca’s leading intellectuals **The Washington Post** accused squarely the al Badar-the extremist action front of the right wing Moslem political party Jamat E Islami of the intellectuals killing. The report says

“Right wing religious fanatics have now been accused of the mass murder of Bengali intellectuals at Mohammadpur on the outskirts of Dacca two days before the surrender of the

Pakistan forces.....Pakistani troops were originally blamed for the killing of some 150 of Dacca’s leading intellectuals including doctors, lawyers, professors, teachers and journalists.....But student groups and local news papers have now laid the blame squarely on the al Badar-the extremist action front of the right wing Moslem political party Jamaat-e-Islam.”

[Source: Report titled “Dacca Massacre Laid to Fanatics” The Washington Post, Dec 26, 1971]

463. The event of killing of intellectuals is found to have been proved beyond reasonable doubt. It was selective large scale killings. It is established that AB men were the perpetrators. Already we have recorded our specific finding that the accused Ali Ahsan Muhammad Mujahid was a person in position of authority of Al-Badar, by virtue of his leading position in ICS. Presumably and in view of facts and circumstances revealed it is proved that the accused had significant influence and effective control on AB force. The book titled মুক্তিযুদ্ধে ঢাকা ১৯৭১ narrates that

“ আলবদররা ছিল মেধা সম্পন্ন সশস্ত্র রাজনৈতিক ক্যাডার। ইসলামী ছাত্র সংঘের নেতৃত্বদে এ বাহিনী গঠন করে এবং কেন্দ্রীয়ভাবে জামায়াতে ইসলামীর নিয়ন্ত্রণে এ বাহিনী পরিচালিত হয়। ১৭ সেপ্টেম্বর পূর্ব পাকিস্তান জামায়াতে ইসলামীর আমীর গোলাম আজম মোহাম্মদপুর ফিজিক্যাল ট্রেনিং কলেজে অবস্থিত এর হেড কোয়ার্টার ও প্রশিক্ষণ কেন্দ্র পরিদর্শন করেন।

[Source: মুক্তিযুদ্ধে ঢাকা ১৯৭১ : পৃষ্ঠা ২৮৪, সম্পাদক মোহীত উল আলম, আবু মো: দেলোয়ার হোসেন: বাংলাদেশ এশিয়াটিক সোসাইটি]

464. From evidence of P.W.5 it has been proved that the accused Mujahid had control on Al-Badar by virtue of his position of President in ICS the student wing of JEI. Additionally the accused Mujahid had incited and encouraged the

AB by his speech , statement to combat the ‘*miscreants*’ , ‘*Indian agents*’ and ‘*enemies of Islam*’.

465. Referring a report published in The daily Sangram 24 November, 1971 the report titled “মুজাহিদের কুকীর্তি গাঁথা আছে দৈনিক সংগ্রামের পাতায়” published in The Daily Bhorer Kagoj, 31 October 2007 which speaks as below:

“ দৈনিক সংগ্রামের ২৪ নভেম্বর , ১৯৭১ সংখ্যায় প্রকাশিত তথ্য থেকে জানা যায়, ২৩ নভেম্বর পাকিস্তানের তৎকালীন সামরিক শাসক জেনারেল আগা মোহাম্মদ ইয়াহিয়া খান সারা দেশে জরুরী অবস্থা ঘোষনার পরপরই আলী আহসান মোহাম্মদ মুজাহিদ ও মীর কাশেম আলী এক যুক্ত বিবৃতিতে ভারতীয় গুপ্তচরসহ দুশমনদের খতমের জন্য সৈনিক হিসেবে প্রস্তুত হাতে যুব সমাজের প্রতি আহ্বান জানান। তাদের এ বিবৃতি প্রকাশের পর থেকে শুরু হয় বিভিন্ন স্থানে বুদ্ধিজীবী হত্যা। এ সময় ঢাকার বুদ্ধিজীবীদের কাছে হুঁশিয়ারি দেওয়া আল-বদরদের চিঠিও আসতে শুরু করে।

466. The report titled “শহীদ বুদ্ধিজীবীদের ঘাতক” published in The Daily Bhorer Kagoj, 30 October 2007 which speaks as below:

“মুজাহিদ যে শুধু নির্ধূর ঘাতক বাহিনীরই প্রধান ছিলেন না তিনি যে বিকৃত মানসিকতা সম্পন্নও ছিলেন ইতিহাসে তারও অনেক প্রামাণ্য নজির খুঁজে পাওয়া গেছে। দৈনিক পূর্বদেশ পত্রিকার ১৯ জানুয়ারী, ১৯৭১ এর সংখ্যায় প্রকাশিত এক প্রতিবেদনে মুজাহিদ গঠিত আল-বদর বাহিনীকে অবিশ্বাস্য নৃশংস উল্লেখ করে বলা হয়, হানাদার পাকিস্তানি বাহিনীর আত্মসমর্পনের পর তাদের সহযোগী আল-বদর বাহিনী যখন পালিয়ে গেলো তখন তাদের হেডকোয়ার্টারে পাওয়া গেলো এক বস্তা চোখ। এদেশের মানুষের চোখ। আল-বদরের খুনীর নিরীহ সাধারণ মানুষকে হত্যা করে তাদের চোখ তুলে তুলে বস্তা বোঝাই করেছে।
.....চূড়ান্ত বিজয়ের ৪ দিন পর দৈনিক বাংলার ২০ ডিসেম্বর, ১৯৭১ সংখ্যায় কালো বর্ডার দেওয়া

হেডিঙে মোটা হরফে প্রকাশিত একটি প্রতিবেদনেও মুজাহিদ ও সাংগপাংগদের বীভৎসতার চিত্র ফুটে ওঠে। ওই প্রতিবেদনে বলা হয়, জামাতে ইসলামীর বর্বর বাহিনী আল-বদরের নিষ্ঠুরতম অভিযানে যারা শহীদ হয়েছেন তাদের লাশ শনাক্তহীন অবস্থায় বধ্যভূমিতে পড়ে রয়েছে। এসব লাশ শনাক্তের অযোগ্য।”

467. It is not correct to argue that since co-perpetrators identity could not be described and as such it cannot be said with whom the accused participated to the commission of crimes. We have already observed that the accused has not been indicted for physical participation to the commission of the crimes alleged. Participation may occur in different ways. Not necessarily that the accused is to be shown to have participated in all aspects of the criminal acts. A single act or conduct may form part of attack facilitating and abetting the actual commission of a crime.

468. An act which is committed before or after the main attack against the civilian population or away from it could still, if sufficiently connected, be part of that attack. Ali Ahsan Muhammad Mujahid has been accused of being part in designing plan and connected with activities involving the commission of crimes. Besides, already it has been proved that the principal perpetrators were the Al-Badar men and the crimes were perpetrated by them in furtherance of common plan and design to which the accused was a party, by virtue of his acts, conduct, behaviour, inciting statement, culpable affiliation with Al-Badar and as such the accused being a member of the ‘enterprise’ is liable for that crime in the same manner as if it were done by him alone.

469. The sourced information as elicited above forces us to conclude that the accused Ali Ahsan Muhammad Mujahid was of course a part of common plan and design and he had reason to be aware of it as he was a person in potential position of authority of the AB. At the relevant time accused Mujahid was the President of the then East Pakistan ICS. A report published in **The Daily Azad** on 11 December 1971 [**Prosecution documents, Volume No.9 , page 2826**] issue shows that accused Mujahid, as the President of East Pakistan ICS, addressed a public meeting organised by Al-Badar bahini at *Baitul Mukarram* premises making a call to resist and liquidate ‘Hindustan’ and ‘Hindu’. The caption of the photo of the meeting published together with the

report also shows that Mujahid had addressed the meeting as the ‘chief’ of Al-Badar. Another report published in The Daily ‘Dainik Pakistan’ of 08 November 1971[Prosecution documents, Volume No.9 , page 2823] issue also demonstrates that accused Mujahid addressed a public meeting on the eve of ‘Badar day’ organised by the ICS in the *Baitul Mukarram* premises in the capacity of the President, the then East Pakistan ICS.

470. It is clear that being aggravated and incited in response to such devilish call, Al-Badar which was known as the ‘action section’ of Jamat E Islami and ‘death squad’ of Pakistan army had intrigued in taking evil steps to exterminate the ‘intellectuals’, as apart of common design and plan.

471. Accused Ali Ahsan Muhammad Mujahid being the secretary general and subsequently President of the then East Pakistan Islami Chatra Sangha [ICS], the student wing of the JEI was one of key leaders of Al-Badar and used to effectively coordinate its activities even till 16 December 1971 , the moment of victory of Bangalee nation.

472. It will be patently evinced from the narration of the book titled “**Al-Badr**” authored by **Salim Mansur Khalid** published in 1985 from Lahore, Pakistan by *Idarah-I Matbu’at –I Talabah*. The original book written in Urdu has been translated in Bangla by a professor of Dhaka University, on requisition of the investigation agency. The translated Bangla text duly endorsed by the translator has been submitted and exhibited as **Material Exhibit-V** by the prosecution.

473. Ms Tureen Afroz drawing attention to page 135-138 [official Bangla translation] corresponding to page 176-178 of the Urdu version of the book ‘Al-Badar’ has submitted that the accused as the president [**Nazim**] of the then East Pakistan ICS even in his ‘last speech’ [*Akhri Khitaab*] addressed to Al-Badar on 16 December 1971 at the Al-Badar headquarter set up at Mohammadpur Physical Training Institute known as ‘torture camp’ proved his superior position having command and authority on the *para militia* force ‘Al-Badar’ and his active affiliation with it too.

474. Why accused Mujahid, in his ‘last speech’ considered 16 December 1971 a ‘**painful day**’ [*Alamnaak din*] when the nation achieved its victory after nine months’ war of liberation? Why the Al-Badar men in Dhaka city assembled at their headquarter in the city just immediate two hours before the surrender of the Pakistani occupation army and why they were worried and tensed considering the event of ‘surrender’ a ‘**tragedy**’? In early part of war of liberation accused by his inciting speech encouraged the Al-Badar men to act as ‘Azrail’, in the name of protecting Islam and Pakistan from the hands of ‘India’s agents’, ‘enemies of Islam’, ‘miscreants’ and pro-liberation Bangalee people.

475. Are the acts of killing unarmed civilians, looting their properties, infringing their fundamental rights, reigning coercive climate by causing physical and psychological harms, in furtherance of common design and plan compatible to the spirit of ‘Islam’ and ‘humanity’? The holy religion ‘Islam’ never suggests such barbaric atrocities and antagonistic and violent attitude to be shown towards human being. But the accused preferred confessing in his ‘**last speech**’ [*Akhri Khitaab*] that they were ‘**not ashamed**’ of the ‘last days’ [**deeds of Al-Badar**]. The speech also depicts that the leaders of Al-Badar since its creation provided substantial encouragement, moral support, approval to the commission of criminal activities by the Al-Badar, in furtherance of organised and designed common plan and accused himself was one of persons who was in superior position of Al-Badar force.

476. Conceivably the accused and his parent organisation JEI meant the pro-liberation Bangalee civilians who took stand in favour of liberation war as ‘*miscreants*’, ‘*Indian agents*’ and ‘*enemies of Islam*’. JEI, its student wing ICS and AB by their activities aimed to liquidate ‘miscreants’, ‘Indian agents’ and ‘enemies of Islam’. The then Pakistan government also had acted in support of the wipe out process. Government press note also speaks as to whom they considered as ‘miscreants’ and ‘Indian agents.’

477. From totality of evaluation of relevant facts and circumstance it is lawfully inferred that the plan involved action which was part of ‘murderous enterprise’ in which a large number of individuals were systematically marked for killing and eventually killed. From the above discussed sourced

information it is proved that the attack were carried out in an ‘organized manner’ which presupposes the existence of plan. Circumstances depicted from accused’s conduct, act, behaviour, visiting Al-Badar headquarter, maintaining active and culpable affiliation with the army strongly suggest that the accused Mujahid had an unspoken understanding or arrangement with the Al-Badar in committing the killing of listed intellectuals

478. It is now settled that the fact of ‘encouragement’ is to be inferred depending on facts and circumstances of particular case. In the case in hand, from the circumstances revealed from old reports published in 1971 it is thus naturally inferred that such encouraging and provoking statement of accused who was AB leader fueled and enthused the AB members in doing whatever criminal acts they felt necessary , in the name of ‘**crusade**’ and to save Pakistan. Such acts of accused had shown approving attitude that encompasses the act of ‘encouragement’, ‘abetment’ and ‘contribution’ to the commission of criminal acts directing the pro-liberation segment of Bangalee civilians, as part of systematic and planned attack.

479. In the case in hand, accused Mujahid , as it appears, was one of persons having superior position who had authority and control over the AB members. But accused alone cannot be said to have had exclusive control over the AB. There were many other significant persons belonging to JEI and its student wing ICS who had considerable control and authority over the AB members. But merely on this ground the present accused, one of persons having position of authority on AB force, cannot be absolved of the responsibility as he has been found to have encouraged prompted and provided moral support and approval to the atrocious activities carried out by AB, even being aware of the foreseeable consequence of his act and conduct of encouragement and approval to the perpetrators AB.

480. In the first place, the accused Mujahid possessed power by virtue of his political position that he occupied in the then East Pakistan ICS, the student wing of JEI. In the second place, he enjoyed a great measure of power to coordinate the activities of AB. Thus it stands proved that the accused was situated near the highest echelons of the AB and JEI leadership and thus wielded great power in the AB.

481. The accused Mujahid's act of conscious encouragement provided substantial support constituting 'abetment' to the AB members to cripple the Bengalis in the area of education and culture. Making frequent visit to 'torture camp' [Mohammadpur AB HQ and training center] accompanied by other senior leaders of JEI and ICS lends unerring assurance that the accused had sufficient reason of being aware of activities and plan of carrying out criminal acts by the AB men, by virtue of his superior position. And thereby he [accused] participated to the commission of organized crimes and failed to prevent crimes, despite his superior position on the AB force.

482. Additionally, the defence document submitted under section 9(5) of the Act of 1973 a report published in The Daily Star narrates about the plan, intellectual killing and involvement of the accused Ali Ahsan Muhammad Mujahid provides further support to prosecution case. The report narrates that

“Sensing defeat, Pakistan occupation forces with the help of their collaborators -- Razakar, Al-Badr and Al-Shams -- prepared an execution list of progressive intellectuals and professionals five months after the start of the Liberation War, said experts quoting the diary of the then Pakistan Army general Rao Farman Ali.

They began executing the list on November 15 in 1971 and killed nearly 12,000 intellectuals and professionals across the country.

The martyred intellectuals include Prof Muneir Chowdhury, Dr Alim Chowdhury, Prof Muniruzzaman, Dr Fazle Rabbi, Shahidullah Kaiser, Prof GC Dev, JC Guhathakurta, Prof Santosh Bhattacharya, Mofazzal Haider Chowdhury, journalists Khandaker Abu Taleb, Nizamuddin Ahmed, SA Mannan (Ladu Bhai), ANM Golam Mustafa and Syed Nazmul Haq.

The then commander-in-chief of Al-Badr and Jamaat Ameer Matiur Rahman Nizami, Jamaat Secretary General Ali Ahsan Mohammad Mojahid, its assistant secretary general Muhammad Kamaruzzaman and Mir Kashim Ali led the killings, according to accounts of both victims and collaborators, various publications and secret documents of Pakistan home department.

[Source: Report titled 'Country could not care less', *The Daily Star* December 14, 2010: Defence Documents Volume 14, page 463-464]

483. In the case in hand, we have found it proved beyond reasonable doubt that the accused Ali Ahsan Muhammad Mujahid had a 'consenting part' and understanding with the Al-Badar the principal perpetrators in the commission of the crime and thus he was 'connected' with plans or enterprise. Finally it has also been proved that the accused 'belonged to' the perpetrator organisation or group i.e Al-Badar, by virtue of his position of authority on it.

484. We agree that there must be a degree of control for holding one liable as 'superior'. But, in respect of informal superior-subordinate relationship such degree of control is to be assessed from circumstances together with the act, conduct, behaviour, extent of affiliation with the group or organisation.

485. Further, it is not correct to say that the accused had no scope to assert his control and authority over the Al-Badar. We have already found that the accused used to make frequent visit to AB headquarters at Mohammadpur Physical training College, he urged the ICS workers to join Al-Badar, he incited the Al-Badar men to liquidate '*miscreants*, '*agents of India*' 'enemies of Islam', he addressed his last speech with immense pain and frustration to the Al-Badar men at their headquarters. All these unerringly demonstrate that the accused had significant degree of control and he was in position to assert it. Chiefly, addressing the '**last speech**' and visiting Al-Badar headquarter frequently are substantial *indicia* of his 'commanding position' of Al-Badar which was formed of workers of ICS to which accused was President, at the relevant time.

486. Tribunal notes that Nazi war criminal Adolf Eichmann didn't kill anyone with his own hand but was one of the main organiser of Nazi atrocities during World War II. Eichmann was charged with membership in criminal organization--the Storm Troopers (SA), Security Service (SD), and Gestapo (all of which had been declared criminal organizations at the 1946 Nuremberg Trial). As head of the Gestapo, Eichmann coordinated with Gestapo chief Heinrich Mueller in various Nazi activities. Adolf Eichmann was enacted a death sentence after his trial.

487. The paper cuttings of reports published in daily news papers during last part of December 1971 and January 1972 [**Exhibit-10, 12 series: rosecution Documents Volume 7 , page 2232, 2271-2277, 2297-2298**] demonstrate a terrible depiction of abduction and killing of hundreds of distinguished intellectuals belonging to various professions. Twenty two days after the abduction on 14 December numerous dead bodies of worthy sons of the land could be found at killing fields and mass graves at outskirts of the city of Dhaka. **The Daily Observer [05 January 1972]** in a report titled “ Al-Badar victims: Bodies of 4 DU teachers identified”[**Exhibit-10**] narrates that

“Four of seven bodies recovered by the police on Tuesday were identified as those of Dacca University teachers Dr. Serajul Huq Khan, Dr, Fazul Mahi, Mr. Santosh Chandra Bhattacharjee and Dacca University Medical Officer Dr. Murtaza.....They were among many intellectuals kidnapped and taken to unknown destination by Pakistan Army-backed Al-Badar goondas on the eve of the surrender of the occupation forces in Bangladesh” [Prosecution Documents Volume 7, page 2232]

488. This report too suggests that the perpetrators were members of infamous Al-Badar. They first kidnapped their targets from their residence and took them to unknown place. Finally hundreds of dead bodies could be found at different mass graves nearer to the city of Dhaka. In a same pattern the

infamous Al-Badar men committed the criminal act of such abduction in between 10 to 14 December.

489. A report published in **The Daily Ittefaq**, **19 December 1971** and in the **Daily Ovsver**, **19 December 1971**. The report narrates that

“The world news, T.V and radio network representatives visited the spot and came across the horrowing scene of brutality. They also located the prison camp at the Physical Training Instiute where rooms are still blood-stained and instruments for torturing the victims scattered around.”

[Source: Report titled “Intellectual murderd in cold blood” published in the Daily Ovsver, 19 December 1971]

490. The above two reports prove again that the AB HQ at Mohammadpur Physical Training Institute was actually a ‘killing camp’ and addressing ‘last speech’ on 16 December 1971 at this ‘killing camp’ by the ‘Nazim’ [President] of the East Pakistan ICS robustly demonstrates his intense infamous role and conduct. Who was president of ICS, at the relevant time? It is none but the accused Ali Ahsan Muhammad Mujahid. In his ‘last speech’ Mujahid urged his fellow Al-Badar men to go away [*Hijrat*] wherever they like.

491. The above reports and conduct of accused together suggest to conclude that the accused Ali Ahsan Muhammad Mujahid made his ‘last speech’, standing on pull of saintly blood of martyrs and thus he was quite aware of the criminal activities carried out by the Al-Badar to cause death of selected intellectuals. The numb revenge and abhorrence which led to these killings in an organized pattern causing death of large number of selected intellectuals, in the final stages of the war of liberation was a dismal epilogue to the record of systematic brutality carried out by Al-Badar in between 10 to 16 December 1971, in Bangladesh.

492. There can be no room to deduce that the accused Mujahid did not have contribution to the commission of crime alleged in any manner and thus he

deserves to walk free. True that evidence does not suggest that accused Ali Ahsan Muhammad Mujahid himself physically participated to the actual perpetration of the substantial crime of intellectual killing. But the Tribunal notes that even a single or limited number of acts on the accused's part would qualify as crimes against humanity, unless those acts may be said to be isolated or random. The accused Mujahid cannot absolve of criminally responsibility for the crime alleged as he has been found to have had '*understanding*' and '*connection*' with plans and activities involving the commission of such crimes, by his acts or conducts, behaviour, culpable speeches and statement.

493. The learned prosecutor Ms. Tureen Afroz submitted that the defence would not be prejudiced if the offence under charge 6 is termed as 'extermination' as crimes against humanity, instead of 'murder' as crimes against humanity. Apart from the '*question of scale*', the core elements of murder or willful killing are same in both cases. In fact the killing of numerous intellectuals was a mass killing targeting a particular class.

494. The accused has been charged for abetting and facilitating the commission of the offence of 'murder' as crimes against humanity or in the alternative for abetting and facilitating the commission of the offence of 'genocide'. No cumulative charge has been framed in relation to the facts narrated in charge no.6. In fact there has been significant difference between 'murder and 'extermination'. For proving the offence of 'murder' it is to be shown that it was committed on 'large scale'. That is to say that the event of murder was 'mass killing'. It is now settled that murder as a crime against humanity does not contain a materially distinct element from extermination as a crime against humanity; each involves killing within the context of a widespread or systematic attack against the civilian population, and the only element that distinguishes these offences is the requirement of the offence of extermination that the killings occur on a 'mass scale'. The ICTR Appeal Chamber has observed in the case of **Ntakirutimana and Ntakirutimana** that

“The Trial Chamber followed the *Akayesu* Trial Judgement in defining extermination as ‘a crime which by its very nature is directed

against a group of individuals. Extermination differs from murder in that it requires an element of mass destruction, which is not required for murder.” [*Ntakirutimana and Ntakirutimana*, (Appeals Chamber), December 13, 2004, para. 516]

495. By its very nature, extermination is a crime which is directed against a ‘group’ of individuals as distinct from murder in that it must be perpetrated on a ‘large scale’. It is now settled that in order to give practical meaning to the offence of ‘extermination’, as distinct from ‘murder’, there must in fact be a large number of killings, and the attack must be directed against a ‘group’. In the case in hand, it has been proved that the large number of killing under charge no.6 was aimed to annihilate the **‘Bangali intellectual group’**, a part of ‘national group’. However, the expression ‘large scale’ or ‘large number’ does not suggest a numerical minimum. Extermination may be committed intending to bring about the death of a large number of individuals. *Mens rea* of the offence of ‘extermination’ refers to measures against individuals intending to cause their death.

496. In the case in hand, in light of discussion as made above it has been found proved that the perpetrators Al-Badar, pursuant to plan and list, caused death of hundreds of intellectuals of various professions. The pattern and feature of the killings lead us to conclude that it was a ‘large scale killing’ having all the required elements to constitute the offence of murder as crime against humanity. Therefore, we are convinced with the argument advanced by the learned prosecutor. Since no prejudice would be caused to defence, the offence of ‘murder’ as crimes against humanity as described in charge no.6 is thus termed as the offence of ‘extermination’ as crimes against humanity, under the same set of facts.

497. In view of above discussion and on totality of evaluation based on evidence, old reports and sourced information together with rationales we come to a finding that it has been proved beyond reasonable doubt that the accused Ali Ahsan Muhammad Mujahid who was a part of designing plan and activities involving the commission of the ‘mass killing’ of intellectuals

constituting the offence of ‘extermination’ as crimes against humanity as enumerated in section 3(2)(a)(g) of the Act of 1973.

498. It is thus validly inferred that the accused Ali Ahsan Muhammad Mujahid who was in superior position[President] of ICS which transformed into Al-Badar was aware of consequence of his act and conduct that substantially encouraged, endorsed, approved, provided moral support to the Al-Badar men in committing the intellectuals killing. The accused’s authoritative position on Al-Badar is a fair *indicia* that he had ‘effective control’ and ability over the members of Al-Badar the ‘*action section*’ of JEI and thus he cannot be relieved from responsibility of planned crimes committed by Al-Badar men with whom he had a ‘*relationship*’. Accused’s act, conduct, inflammatory and provoking speech had substantial impact on the Al-Badar the criminal organisation, in carrying out its activities and ‘operation’ in between 10 to 16 December 1971 directing the selected intellectuals in Dhaka city.

499. Section 4(1) refers to Joint Criminal Enterprise [JCE]. For joint criminal enterprise [JCE] liability an accused can participate in a joint criminal enterprise by passive, rather than active conduct. The Tribunal is convinced to record its finding that the accused Ali Ahsan Muhammad Mujahid, for his acts, conduct, inciting statement, speech and culpable association with Al-Badar is criminally responsible for all the criminal acts resulting from the criminal design of this Al-Badar force and shall be punished as if he himself committed them, irrespective of whether and in what manner he himself directly participated in the commission of any of these acts. This view is in conformity of provisions in respect of liability contained in section 4(1) of the Act of 1973. Accused Ali Ahsan Muhammad Mujahid, by his acts, conducts and act of common ‘understanding’ abetted and facilitated the commission of such crimes. Therefore, the accused who was a part of collective criminality incurs liability under section 4(1) of the Act of 1973 and as ‘superior’ or a ‘person of position of authority’ of the principals [Al-Badar], is held responsible also under section 4(2) of the Act of 1973 for the offence of ‘extermination’ as crimes against humanity as enumerated in section 3(2)(a)(g) of the Act of 1973 which are punishable under section 20(2) read with section 3(1) of the Act.

Adjudication of Charge No. 07

[Bakchar Killing of Hindu Civilians and persecution]

500. On 13 May at about 02:00-02:30 pm during the War of Liberation in 1971 accused Ali Ahsan Muhammad Mujahid being the Secretary of the then East Pakistan Islami Chatra Sangha and subsequently the head of Al-Badar Bahini and or as a member of group of individuals being accompanied by Razaker Kalubihari, Ohab, Jalal and others came to the office of the peace committee at Kahlilpur Bazar Community Center, P.S Kotwali district Faridpur by a jeep where you attended a meeting. At the end of meeting accused along with his accomplices, with discriminatory and persecutory intent, launched attack upon the village 'Bakchar' under Kotwali PS directing against the 'Hindu Community'. By causing such attack villagers namely Birendra Saha, Nripen Sikder, Sanu Saha, Jogobandhu Mitra, Jaladhar Mitra, Satya Ranjan Das, Norod Bandhu Mitra, Prafulla Mitra, Upen Saha were tied up. Wife of Upen Saha requested to release her husband even in exchange of money and jewelries but the attempt became futile. Rather, following accused's instruction his accomplices (Razakars) killed all the apprehended civilians belonging to 'Hindu Community'. The Razakars, during the same transaction of the incident, committed rape upon Jharna Rani, daughter of Sushil Kumer Saha's sister. The accused and his accomplices looted and burnt the house of one Anil Saha and by such discriminatory and persecutory conducts the accused compelled the villagers to deport to India. Therefore, the accused Ali Ahsan Mohammad Mujahid has been charged for participating and facilitating the commission of offence of '**murder as crime against humanity**' or in the alternative, for participating and facilitating the commission of offence of '**persecution as crime against humanity**' by his conduct which was a part of attack against the 'Hindu Community', belonging to the civilian population as specified in section 3(2) (a) (g) of the Act which are punishable under section 20(2) read with section 3(1) of the Act and thus he is liable for the above offences under section 4(1) and 4(2) of the Act.

Witnesses

501. Prosecution produced and examined two witnesses as P.W.12 and P.W.13, in support of this charge. P.W.12 Chittaranjan Saha [80] and P.W.13

Shokti Saha [57] have made an account of the event which they claim to have witnessed. P.W.12 was a resident of the crime village *Bakchar* and P.W.13 allegedly remained at the crime site. The charge alleges that the accused participated and facilitated the commission of the offence of murder as crimes against humanity or in the alternative of the offence of persecution as crimes against humanity. Apart from testimony of these two witnesses prosecution also relies upon some relevant material facts as testified by other witnesses.

Evidence

502. P.W.12 Chittaranjan Saha [80] from Bakchar of Faridpur was involved in the Language Movement in 1952 and took part in the election campaign for an Awami League candidate in the 1970's elections, as he stated.

503. P.W.12 went on to state that the Pakistani army had entered Faridpur town on April 21, 1971 and afterwards, Mujahid[accused] and some other people initiated formation of the Peace Committee and after some days, Razakar and Biharis launching attack burned down houses of their village Bakchar. With this he [P.W.12] left the village and started staying at Deben Ghosh's house at village Laxmipur, although his elder brother remained at village Bakchar. He [P.W.12] used to carry business at Khalilpur Bazar.

504. This part of version that accused Ali Ahsan Muhammad Mujahid was involved with the formation of peace committee in Faridpur and since then the members of peace committee and Razakar started committing atrocities remained unshaken, on cross-examination.

505. In narrating the alleged event P.W.12 stated that around 10:00 to 11:00am on May 13, 1971 he saw 10-12 people passing through his shop by an uncovered jeep towards the nearby board office. With this he got panicked and asked some prominent persons of the market about the matter and identity of those persons. They [prominent persons of the market] informed him that a meeting over formation of Machchar Union Peace Committee will be held at Khalilpur and that's why Peace Committee men Ali Ahsan Muhammad Mujahid, Advocate Afzal, Alauddin Kha, Kalu Bihari and some other people came from Faridpur. On hearing it he [P.W.12] being feared went to Laxmipur

leaving the market [Khalilpur] and afterwards came back to Kahlilpur market around 3:00pm to get information about the Peace Committee meeting. He [P.W.12] was informed by Lokman Kha, Abdus Salam Mollah and Sohrab Sarder that members of the Peace Committee being accompanied by Al-Badar and Biharis had gone to their Bakchar Hindu village.

506. The fact that P.W.12 saw 10-12 people passing through his shop by an uncovered jeep towards the nearby board office appears to have been re-affirmed in cross-examination. Defence, as it appears, could not shake the version of learning from Lokman Kha, Abdus Salam Mollah and Sohrab Sarder of Khalilpur market that members of the Peace Committee being accompanied by Al-Badar and Biharis had gone to their Bakchar Hindu village. This piece of hearsay evidence is admissible and it may be considered together with other evidence, either direct or circumstantial in arriving at a finding. The version that Peace Committee men Ali Ahsan Muhammad Mujahid, Advocate Afzal, Alauddin Kha, Kalu Bihari and some other people came to Kahlilpur Bazar from Faridpur by a jeep also remained unimpeached.

507. P.W.12 stated further that afterwards he got information that the group had gone to their Bakchar Hindu village killed many people. He started for Bakchar to enquire about his brother. When he reached his house, his brother's wife informed him that he was killed [P.W.12 started shedding tears in narrating it before the Tribunal]. Then he found dead body of 8-10 lying at the courtyard of their house including his brother Biren Saha , Prafulla Mitra, Nripen Sikder, Upen Saha, Sanu Saha, and some others who were killed that day. They were shot dead at Bakchar Shree Angan. One of his [P.W.12] cousins' female relative named Jharna, who had taken shelter at his house, was also brutally tortured before being shot dead by the members of the group as he mentioned. On being feared and asked by his brother's wife he [P.W.12] started coming back to Khalilpur market and on the way he found Haider Kha and Monindra Pal and some other people whom he asked to bury his brother's dead body and they accordingly buried his brother's dead bodies at the southern part of 'Sreeangon'. P.W.12 further stated that with such atrocious activities they were forced to be displaced from their own houses.

508. The event of killing civilians belonging to Hindu community of Bakchar village including one Jharna who took shelter there on the date and time alleged and displacement from own village in fear of terror reigned could not be shaken by the defence . Rather this pertinent fact has been re-affirmed on cross-examination.

509. Before narrating the main event P.W.13 stated that camps were set up at different places in Faridpur town followed by entrance of Pakistani army on 21 April 1971 and seven days after some Biharis and other people looted his sister's house at Bakchar village before setting it on fire and with this being terrorized they left the village and afterwards came back.

510. The above version remained unimpeached and as such it indicates fairly that Hindu community was the target of Pakistani army and their affiliate, as a part of systematic policy and plan.

511. P.W.13 Shokti Saha [57] testified that 10-12 people including his father were shot following a signal by Ali Ahsan Mohammad Mujahid near his sister's house at Bakchar village in Faridpur during the war of liberation. He stated that on 29 *Baishakh* in 1971[corresponding to mid of may 1971] at about 10-11 am he came to Khalilpur Bazar and he had seen Mujahid[accused], Alauddin Khan, Chairman Jalil Moulavi coming to the board office by an open jeep to form Peace Committee. Afterwards he returned back to his sister's house at Bakchar village and climbed up a tree [গাব গাছ] to eat fruits and then he saw the people he have mentioned earlier [Mujahid, Alauddin Khan, Jalil Moulavi] getting down from a jeep near the house of Binoy Sarker of Bakchar village around 2:00-2:30pm, after their meeting . At that time, he [P.W.13] saw Mujahid [accused] carrying a revolver in hand and his accomplices the Biharis were carrying rifles. They tied his father Upendra Narayan Saha and some others.

512. In cross-examination, P.W.13 replied to question put to him that his sister's house at Bakchar village was about one to one and half miles far from Khalilpur Bazar and he found pulling cart, Rickshaw and jeep moving through the road of Shibrampur-Khalilpur and there had been an wooden bridge on it

at that time. Thus the possibility of moving by jeep through the road to the crime site has been re-affirmed.

513. P.W.13 went on to narrate that when his mother and sister begged his father's life offering their gold ornaments to them, they said his father would be released. But instead of releasing him, they lined up 10-12 people at 'Sreeangon' and then Mujahid made some signal and with this sounds of gunshots were heard."

514. Bullets hit his father and others and they fell down on the ground. After half an hour, he [P.W.13] getting down from the tree went there and found his father's body lying on the ground [in narrating it P.W.13 became emotion-choked with tears]. One Ohab Bihari, who was a Razakar, hurt his mother with the butt of his rifle.

515. On cross-examination, in reply to question elicited by the defence P.W.13 replied that Razakars, Al-Badars, Mujahid[accused], Ohab killed his[P.W.13] father and others beneath the 'Panchabati tree' near the 'Beribadh' and he saw the event climbing at the top of the fruit tree [Mve MvQ]. Thus the fact of his seeing the event, as stated by him has been re-affirmed.

516. P.W.13 stated that he knew Ali Ahsan Muhammad Mujahid since his childhood as his [P.W.13] brother Khirod Lal Saha was classmate of Mujahid [accused]. This piece of version remained unshaken. As such the witness had reason to recognise the accused accompanying the group of perpetrators at the crime site.

517. P.W.13 further stated that after the event of killings, his family and many other Hindu families of their locality left the country and took shelter in different refugee camps in India. Thus we find that the witness and other dwellers of the crime village were, in other words, were forced to deport.

518. Prosecution relies upon statement made by P.W.8 and P.W.10 on relevant material fact which it claims to have lent assurance to the principal fact that

the accused accompanied the group of perpetrators to the crime village Bakchar.

519. P.W.8 Mir Lutfar Rahman [58] stated that Ali Ahsan Muhammad Mujahid, Abul Kalam Azad @ Bachchu Razakar, Kalu Bihari used to provide assistance to the Pakistan army. Ali Ahsan Muhammad Mujahid used to move around the Faridpur town by a jeep. This version on material and relevant fact remained unimpeached.

520. P.W.10 A.K.M Habibul Haque also stated that on 14 August 1971 at about 01:00 pm one jeep of army and a truck arrived in front of his house and he, at that time might have seen Mujahid in the army jeep. He managed to escape but the Pakistan army apprehended his brother Serajul Haque Nannu and brought him to Faridpur Stadium camp where he was kept confined and subjected to torture. This P.W.10 seems to be natural and credible. He could tell lie by saying that he saw the accused on the army jeep. But he did not make any exaggeration. He simply stated what he saw at the time of alleged raid. His version is to be evaluated together with that of P.W.8.

Deliberations

521. Mr. Mukhlesur Rahman Badal, the learned prosecutor has argued that it has been proved beyond reasonable doubt from the evidence of P.W.12 and P.W.13 that the group of 10-12 perpetrators accompanied by the accused Ali Ahsan Muhammad Mujahid first went to Khalilpur Bazar for forming local peace committee. There from the group approached towards the crime site by a jeep i.e. Bakchar village. Admittedly the crime village was Hindu dominated. At Bakchar village the group of perpetrators committed destructive atrocities including killings, looting, arson, rape and deportation. The attack was intended directing the Hindu community with intent to destroy it in part and thereby committed the offence of genocide and the offence of persecution as crimes against humanity. The destructive criminal acts were carried out with discriminatory intent on religious ground, infringing the fundamental rights of the civilians belonging to the Hindu community.

522. It has been further submitted by the learned prosecutor that the evidence of P.W.8 and P.W.10 made on relevant fact goes to show the close affiliation of the accused with the local pro-liberation people and the Pakistan army in carrying out 'operations'.

523. On contrary, the learned defence counsel argued that there has been no credible evidence to show that the accused accompanied the group of perpetrators and physically participated to the commission of crimes alleged. Evidence of P.W.12 is hearsay in nature and thus cannot be considered without corroboration by other evidence. P.W.13 who claims to have seen the event and presence of accused at the crime site is not a credible witness and his statement made before the Tribunal is contradictory and inconsistent to what he stated to the IO.

524. The Tribunal notes that the charge describes two segments. The first segment of narration made in the charge involves the coming of the group accompanied by the accused at Khalilpur Bazar for forming peace committee. And the second segment that occurred on the same day, after holding meeting at Khalilpur Bazar relates to moving the group there from towards the crime village *Bakchar* for launching the attack directing the civilians belonging to Hindu community, with discriminatory and persecutory intent that resulted in numerous killings, rape, looting, arson and infringement of fundamental rights of civilians.

525. P.W.13 testified as regards both segments narrated in the charge. While P.W.12 testified as to coming of the group accompanied by the accused to Khalilpur Bazar and afterwards the group had left Khalilpur Bazar, and afterwards on getting information he rushed to the crime site and found his brother and others lying dead and heard that the group that came to Khalilpur Bazar had committed the crimes. But the P.W.13 allegedly witnessed the killing by the group accompanied by accused Mujahid.

526. The Tribunal notes that hearsay evidence is admissible and it may be considered together with other evidence, either direct or circumstantial in arriving at a finding. The version of P.W.12 that Peace Committee men, Ali

Ahsan Muhammad Mujahid, Advocate Afzal, Alauddin Kha, Kalu Bihari and some other people came to Khalilpur Bazar from Faridpur by a jeep remained unimpeached.

527. The prominent persons of the market informed him [P.W.12] about a meeting over formation of *Machchar* Union Peace Committee to be held at *Khalilpur* and that's why Peace Committee men, Ali Ahsan Muhammad Mujahid, Advocate Afzal, Alauddin Kha, Kalu Bihari and some other people came to Khalilpur Bazar from Faridpur.

528. The fact that P.W.12 saw 10-12 people [the group of perpetrators] passing through his shop [at Khalilpur Bazar] by an uncovered jeep towards the nearby board office appears to have been re-affirmed in cross-examination. Hearsay evidence is admissible and thus when a piece of hearsay evidence remains unshaken, no further corroboration may be needed for taking it into consideration depending upon the facts and circumstance of the case. Additionally, in the case in hand, hearsay evidence of P.W.12 appears to have been corroborated by evidence of P.W.13, an eye witness to the event.

529. On 29 *Baishakh* in 1971[corresponding to mid of may 1971] at about 10-11 am he came to Khalilpur Bazar and he had seen Mujahid[accused], Alauddin Khan, Chairman Jalil Moulavi coming to the board office by an open jeep to form Peace Committee. P.W.13 stated that he knew Ali Ahsan Muhammad Mujahid since his childhood as his [P.W.13] brother Khirod Lal Saha was classmate of Mujahid [accused]. This piece of version remained unshaken. As such the witness had reason to recognise the accused accompanying the group of perpetrators at the crime site.

530. Therefore, the hearsay evidence of P.W.12 together with the statement of P.W.13 amply proves that accused Mujahid accompanied the group to the Khalilpur Bazar for forming peace committee. What happened afterwards?

531. It is found that later on P.W.12 was informed by Lokman Kha, Abdus Salam Mollah and Sohrab Sarder [of Khalilpur market] that members of the

Peace Committee being accompanied by Al-Badar and Biharis had gone to their Bakchar Hindu village. Why they moved to the village Bakchar?

532. P.W.12 does not claim to have witnessed the event. But he instantly after getting information rushed to Bakchar village and found dead body of his brother including some other Hindu civilians namely Biren Saha , Prafulla Mitra, Nripen Sikder, Upen Saha, Sanu Saha lying at the courtyard of their house who were killed that day. In conjunction of the event, as revealed from evidence of P.W.12 that one of his [P.W.12] cousins' female relative named Jharna, who had taken shelter at his house, was also brutally tortured before being shot dead by the members of the group [the group which came to Khalilpur Bazar on the same day prior to the event].

533. Sequence and time of events as narrated by P.W.12 unmistakably go to prove that no other group but it was the group accompanied by accused Mujahid, Kalu Bihari, Razakars which first came to Khalilpur Bazar for forming peace committee and afterwards raided the crime village *Bakchar* with common intent and criminal purpose. The event of Bakchar massacre is not disputed. Defence however does not claim or suggest that some other group of perpetrators and not the group which came to Kahlilpur Bazar afterwards attacked the crime village on the same day and committed the alleged killings and destructive criminal acts.

534. It is P.W.13 who has proved significantly the commission of the event and participation of the accused therewith. On the day of event, returning from Khalilpur Bazar to his sister's house at *Bakchar* village he climbed up a tree [গাব গাছ] to eat fruits and then he saw Mujahid, Alauddin Khan, Jalil Moulavi getting down from a jeep near the house of Binoy Sarker of *Bakchar* village around 2:00-2:30 pm, after their meeting[at Khalilpur Bazar] . P.W.13 saw Mujahid [accused] carrying a revolver in hand and his accomplice the Biharis were carrying rifles. Defence could not refute this version .Thus the presence of the accused being armed at the crime site becomes proved.

535. It is also proved beyond reasonable doubt from the unimpeachable evidence of P.W.13 that instead of begging life of his father by offering his

mother's gold ornaments to them, the perpetrators lined up 10-12 people at 'Sreeangon' and then Mujahid [accused] made some signal and with this sounds of gunshots were heard. With this his father and others fell down on the ground. After half an hour, he [P.W.13] getting down from the tree went there and found his father's body lying on the ground [in narrating it P.W.13 became emotion-choked with tears].

536. In conjunction with the event one Ohab Bihari, who was a Razakar accompanying the group, hurt his [P.W.13] mother with the butt of his rifle. On cross-examination, in reply to question elicited by the defence P.W.13 replied that Razakars, Al-Badars, Mujahid [accused], Ohab killed his [P.W.13] father and others beneath the '*Panchabati* tree and he could see the event climbing at the top of the fruit tree [গাব গাছ]. Thus the fact of his seeing the event, as stated by him has been re-affirmed. We do not find any earthy reason to disbelieve this witness.

537. Apart from evaluation of evidence of P.W.12 and P.W.13 as above, on totality of appraisal of statement made by P.W.8 and P.W.10 the relevant facts which have been proved beyond reasonable doubt are: (i) Abul Kalam Azad @ Bachchu, Kalu Bihari and Razakars were the accomplices of the accused in Faridpur (ii) accused Mujahid used to move around the town by a jeep and (iii) the accused used to accompany the Pakistan army wherever it used to move.

538. The act of moving of accused by a jeep around the town in Fairdpur as stated by P.W.8 Mir Lutfar Rahamn further indicates his position and authority. And his access to the Pakistani army camps set up in town makes it quite believable that the accused used to accompany the local Razakars, peace committee members and army when they intended to carry out any operation, directing the civilian population, in furtherance of policy and plan.

539. We have already recorded our finding that accused Mujahid was in superior position of ICS [Dhaka district] the student wing of JEI and the Al-Badar was formed of workers of ICS. Although he [accused] was not in position of secretary of the then East Pakistan ICS at the time of committing

the crimes narrated in charge no.7. But however, by his act of making statement and speech he encouraged, provoked the Al-Badar and other pro-Pakistan elements to act as ‘**Azrail**’ in annihilating the ‘miscreants’, ‘Indian agents’.

540. We have already found from the evidence of a detainee witness Ranjit Kumar Nath that he found the accused Mujahid present at the army camp at Faridpur circuit house and holding meeting with the army. This is sufficient *indicia* that the accused used to maintain a close affiliation even with the occupation army and he did so by dint of his substantial and leading position in the ICS. Objective of such affiliation was to provide assistance and support to army in carrying out criminal activities targeting the civilian population, in furtherance of policy and common criminal purpose. It is proved that in committing the event narrated in charge no.7 the accused and his accomplices selected the civilians of village Bakchar because of their membership in specific community i.e. the Hindu community.

541. Evidence of P.W.12 and P.W.13 does not appear to have been suffered from any material contradiction or inconsistencies. It is to be noted too that mere inconsistencies on insignificant particulars occurred in sworn testimony does not necessarily tarnish the credibility of statement before a court of law in its entirety. Statement made to Investigation Officer is not evidence. And a witness is never expected to have stated in detail precision about what he knew or experienced on the fact in issue. Usually it happens due to non-asking the witness on the matter by the IO.

542. We are not persuaded with the argument advanced by the defence that for the reason of mere inconsistencies between sworn testimony and statement made to IO materially impairs the credibility of evidence made before the Tribunal in its entirety. We are to evaluate the evidence presented before us keeping some inevitable factors in mind together with the settled jurisprudence.

543. We reiterate that where a significant period of time has elapsed between the acts charged in the indictments and the trial, it is not always reasonable to expect the witness to recall every detail with precision. Besides, lack of

precision or minor discrepancies between the evidence of different witnesses, or between the testimony of a particular witness and a prior statement, while calling for cautious consideration, is not regarded in general as necessarily discrediting the evidence. Tribunal notes that mere *inter* and *intra* consistency in testimony does not make a witness unreliable and the entire testimony of witness cannot be excluded from consideration.

544. However, on evaluation of evidence presented shows that the cumulative effect of criminal acts by launching attack to *Bakchar* village the perpetrators caused rape and removal of Hindu civilians from their houses on discriminatory ground constituting the offence of persecution. The total event of attack was destructive in pattern infringing fundamental rights of civilians belonging to Hindu community. We have found that after the event the civilians belonging to Hindu community of the crime village being feared for the reason of reigning terror around the crime village were compelled to deport to India. It amounts to the offence of persecution. This view finds support from the decision of the ICTY appeal chamber in the case of *Blaskic* wherein it has been observed that deportation, forcible transfer and forcible displacement could amount to persecution as a crime against humanity [*Blaskic*, ICTY Appeal Chamber, July 29, 2004, paras, 152-153].

545. The Tribunal reiterates that the discriminatory intent of the author of the crime was not only to harm an individual, but also to cause massive damage to the collectivity to which the later belongs. Offenses of such gravest nature bring harm not only to human rights, but also and most especially they undermine the fundamental basis of the social order of a particular group of civilian population [*Abul Kalam Azad*, ICT-BD 05 of 2012, Judgment 21 January 2013, para, 152].

546. We are persuaded to conclude that under the same set of facts narrated in charge no.7 the offence of genocide and offence of ‘persecution’ as crime against humanity were committed. It is found patent that the victims were targeted because on discriminatory grounds. It was part of policy and plan of the Pakistan occupation army in execution of which the local perpetrators assisted and supported them. The minorities of Bangladesh, especially the Hindus, were specific targets of the Pakistan army. [**Source: U.S.**

Consulate (Dacca) Cable, Sitrep: Army Terror Campaign Continues in Dacca; Evidence Military Faces Some Difficulties Elsewhere, March 31, 1971, Confidential, 3 pp and see also Telegram 978 from the Consulate General in Dacca to the Department of State, March 29, 1971, 1130Z].

547. There was widespread killing of Hindu males, and rapes of women. More than 60% of the Bengali refugees who fled to India were Hindus. [**Source:** US State Department, "Foreign Relations of the United States, 1969-1976", Volume XI, South Asia Crisis, 1971", Page 165]. **R.J. Rummel** has stated that

“The genocide and gendercidal atrocities were also perpetrated by lower-ranking officers and ordinary soldiers. These “willing executioners” were fueled by an abiding anti-Bengali racism, especially against the Hindu minority. *“Bengalis were often compared with monkeys and chickens. Said General Niazi, ‘It was a low lying land of low lying people.’* The Hindus among the Bengalis were as Jews to the Nazis: scum and vermin that [should] best be exterminated. As to the Moslem Bengalis, they were to live only on the sufferance of the soldiers: any infraction, any suspicion cast on them, any need for reprisal, could mean their death. And the soldiers were free to kill at will. The journalist **Dan Coggin** quoted one Punjabi captain as telling him, *“We can kill anyone for anything. We are accountable to no one.”* This is the arrogance of Power.”

[**Source:** DEATH BY GOVERNMENT, By **R.J. Rummel** New Brunswick, N.J.: Transaction Publishers, 1994[1] and Link: http://www.thefullwiki.org/1971_Bangladesh_atrocities]

548. We have already recorded our finding in the case of *Abul Kalam Azad @ Bachchu* that “the East Pakistan Police Abstract of Intelligence [Vol XXV No. 18] dated May 1, 1971, so far it relates to ‘Faridpur’ in serial 431 says :

431, Faridpur.—At the instance of the Pakistan democratic Party, Faridpur, a ‘Peace Committee’ has been formed on 27th April , 1971, with Mohammad Afzal Husain (PML), Advocate,

Faridpur town, as convener and 38 others, as members.” It is thus also established that within week the Pakistani army rolled into Faridpur, local peace committee was formed on 27 April with Mohammad Afzal Husain (PML), Advocate, Faridpur town, as convener and 38 others, as members. [**Chief Prosecutor v. Abul Kalam Azad @ Bachchu** , ICT-BD case No. 05 of 2012, Judgment 21 January 2013, para 86, 87].

549. It is not claimed that accused alone himself committed the crimes. The pattern and extent of horrendousness of atrocities adequately demonstrates that the accused joined the gang of perpetrators with *actus reus* of aiding and substantially contributing to the accomplishment of crimes.

550. In the case in hand, it has been proved from evidence of P.W.12 that accused Mujahid being accompanied by Advocate Afzal [Convener of Faridpur Peace Committee], Alauddin Kha, Kalu Bihari and some other people first came to Khalilpur Bazar from Faridpur by a jeep and there from they rushed to crime village *Bakchar*. And this group has been arraigned to commit the mass killing and destructive criminal activities directing the unarmed civilians belonging to Hindu community.

551. It has been proved beyond reasonable doubt from evidence of P.W.3 that accused Mujahid was present at the crime site having arms in hand and on his signal the act of killing was executed. The accused Ali Ahsan Muhammad Mujahid was a person in a position of authority of ICS the student wing of JEI. Al-Badar the ‘action section’ and ‘armed wing’ of JEI was formed of workers of ICS. Peace committee was also formed under significant co-ordination of JEI. Therefore, the group consisting of peace committee members accompanied by the accused Mujahid launched the attack in furtherance of a common criminal purpose and all the persons forming the ‘group’ with a collective objective and being aware of consequence of their acts had launched the attack to village *Bakchar*.

552. It is immaterial which member of the group acted in which manner. Even mere accompanying the group and presence at the crime site are sufficient to convey approval for those crimes committed. Presence of accused at the crime site having arms in hand and his position of authority in ICS obviously had significant amount of encouraging and decisive effect on actual commission of the crimes. However, accused's position of authority [potential leader of ICS] may also be perceived as significant *indicia* of his act of encouragement or moral support to the fellow perpetrators. It is now settled that 'presence', when combined with authority, may constitute 'assistance' (the *actus reus* of the offence) in the form of moral support. Presence of accused Ali Ahsan Muhammad Mujahid at the crime sites with the perpetrators itself conveyed tacit approval for those crimes which amounted to aiding and abetting. Accused's position in ICS lent an encouraging effect too on the principals in committing the crimes.

553. The cumulative effect of the atrocities including killings, rape, deportation and causing mental harms to the Hindu community of the crime village inevitably imprints an unmistakable notion that the aim and intent of the perpetrators was to destroy the 'Hindu group or community'. Thus, targeting a particular community qualifies as substantial, for the purpose of inferring the 'discriminatory intent'.

554. Destruction as transpired from the evidence of P.W.12 and P.W.13 was patently indiscriminate targeting the members of a 'group' i.e Hindu community because they belong to Hindu religion. Indiscriminate and systematic destruction of members of a group because they belong to that group may be lawfully perceived to be the objective for an inference as to constitution of the offence of 'persecution'.

555. It has been argued by the defence that mere presence at the crime site does not constitute 'participation' to the commission of crimes. What we see in the case in hand? We see that the accused accompanied the gang of peace committee members and Razakars. Why? What was the purpose of such accompanying the gang of attackers to the crime sites? No explanation has yet been presented on part of the defence.

556. It is true that presence of an individual at the crime site or the fact that he accompanied the criminal group may not always lead to infer that such acts had substantial effect on the commission of the criminal acts. But we have found that at the relevant time accused Mujahid was a potential leader of ICS, the student wing of JEI. In adjudicating charge no.3 we have found that the accused had access to the army camp and had authority of holding meeting with the army. All these precisely suggest that by sharing intent of the gang of perpetrators the accused accompanied them for providing them moral support, encouragement and approval to the commission of criminal acts. The circumstances depicted from evidence offer unerring conclusion that the accused by his act of accompanying the group of perpetrators to the crime site and his presence there substantially encouraged and contributed on commission of the crimes which is sufficient indicium of his conscious participation.

557. Accused was a potential leader of the then East Pakistan ICS who made inflammatory speeches in Mymensingh expressing explicit hatred to the Hindu community, freedom fighters [whom they termed as ‘miscreants’ and ‘agents of India’], pro-liberation people. A report published in **The Daily Bhorer Kagoj**[**Exhibit- 20 series**], which quoted a report of the Daily Sangram published on April 24, 1971 that says the Al-Badar force was formed in greater Mymensingh on April 22, 1971 and Mujahid [accused] addressed a meeting of Jamat E Islami and its student wing ICS in Mymensingh on April 22, 1971 where he said, *‘Al-Badar is a name, a surprise. Al-Badar is a promise. Wherever the so-called freedom fighters are, Al-Badar will be there. Al-Badar will work as ‘Azrail’ [Angel of death] for the freedom-fighters and Indian-agents’*.

558. Therefore, it cannot be said that the accused was a mere ignorant spectator at the crime site. Accused’s antagonistic attitude together with the totality of evidence and the relevant facts indisputably demonstrates that knowing the foreseeable consequence he [accused] accompanied the group of perpetrators to the crime site, the Hindu dominated village, and consciously and aggressively participated to the commission of criminal acts constituting the offence of murder of Hindu civilians, rape and forcible deportation.

559. It is not necessary to prove that cause-and-effect relationship existed between the act of his accompanying the group to the crime site and the commission of the crime. Rather it is sufficient to establish that the act of accompanying the group and remaining present at the crime site significantly amounts to facilitation to the perpetration of the crime. Considering the event in its entirety, it is obvious that the accused is also responsible for the criminal offense of rape committed in conjunction with the attack by his accomplices, as an accessory. On this score, he incurs accessory liability too. In this way the accused participated to the accomplishment of criminal activities, it has been proved beyond reasonable doubt. The test for proof beyond reasonable doubt is that “the proof must be such as to exclude not every hypothesis or possibility of innocence, but every fair or rational hypothesis which may be derived from the evidence, except that of guilt. We do not find any reason to exclude the hypothesis of accused’s guilty, on evaluation of totality of evidence and circumstances.

560. Thus the displacement of the Hindu civilians that resulted from the attack was not a mere side-effect of the event but rather a primary objective of the attacks. The attacks created such a coercive atmosphere that the Hindu civilians were left with no option but to flee to India. The evidence is clear that accused had acted together with other participants to fulfill the objective of Pro-Pakistan local people belonging to JEI, ICS and their creation Peace committee, Razakars collaborating the Pakistani army, in the name of preserving Pakistan, something which the accused expressed publicly on several occasions in 1971.

561. The abettor needs only be aware of the criminal intent of the principals whom he provides assistance or encouragement. In the case in hand, the accused accompanied the group of perpetrators to the crime site. It is proved. By act of accompanying the attackers the accused substantially approved and contributed to the commission of the event massacre and thereby it is validly inferred that the accused Ali Ahsan Muhammad Mujahid in doing such act shared the intent of the group of perpetrators. Therefore, the accused is criminally liable both as a co-perpetrator and as an abettor.

562. Ms. Tureen Afroz, the learned Prosecutor has contended that the attack was intended directing the Hindu community with ‘discriminatory intent’. Not only the offence of murder of Hindu community took place, but in conjunction with the event women belonging to Hindu community were raped, their properties were destructed and members of the community were forced to deport in fear of brutal mistreatment. All these criminal acts infringed the fundamental rights of the Hindu community. Coercive climate culminating from the attack caused psychological harassment to the Hindu community which was in fact infringement of their recognised fundamental rights. Therefore, two distinct offences i.e ‘murder’ and ‘persecution’ as crime against humanity could be found to have been committed. In support of this argument the learned Prosecutor has cited a decision of ICTY Trial Chamber [**Blagojevic & Jokic**].

563. The Tribunal notes that forced character of displacement of the inhabitants of specific community of a territory gives rise to criminal responsibility. The expression “forcible” describes a situation where individuals of such specific community do not have a free or ‘genuine’ choice to remain in the place where they were present. Discriminatory intent may be inferred from the context of the acts as long as, in view of the facts of the case, circumstances surrounding the commission of the alleged acts substantiate the existence of such intent.

564. Persecution, under the customary international law, is defined as an act or omission which (i) discriminates in fact and which denies or infringes upon a fundamental right laid down in international customary or treaty law (the *actus reus*); and (ii) was carried out deliberately with the intention to discriminate on one of the listed grounds, specifically race, religion or politics (the *mens rea*). Besides, “although persecution often refers to a series of acts, a single act may be sufficient, as long as this act or omission discriminates in fact and was carried out deliberately with the intention to discriminate on one of the listed grounds”[*Blaskić* Appeal Judgement, para. 135, referring to *Vasiljevic* Appeal Judgement, para. 113.].

565. It is now settled that the *mens rea* for persecutions is the specific intent to cause injury to a human being because he belongs to a particular community

or group. Thus, an individual who acts with the awareness of a substantial likelihood that persecution as a crime against humanity will be committed in the execution of the plan or common purpose may be liable for the crime of persecution.

566. In the case in hand, it is quite clear and has been proved beyond reasonable doubt that the target of the attack was the civilians belonging to Hindu community. The attack resulted not only in killing of individuals. It has been proved that rape, destructive activities were also committed, in conjunction with the attack and finally the remaining inhabitants of the community were compelled to deport in fear of coercive climate reigned by such attack. Such atrocities were committed to further the policy and plan. **Paragraph 18** of the **Hamoodur Rahman Commission Supplementary Report** demonstrates patently that Hindu community was a key target of the Pakistani occupation armed force and in execution of annihilation of civilians belonging to Hindu community the para militia forces Razakar and its two wings Al-Badar and Al-shams the creations of JEI actively collaborated and assisted the army. The relevant paragraph of the report states that

“The statements appearing in the evidence of Lt. Col. Aziz Ahmed Khan (Witness no 276) who was Commanding Officer 8 Baluch and then CO 86 Mujahid Battalion are also directly relevant. "Brigadier Arbbab also told me to destroy all houses in Joydepur. To a great extent I executed this order. General Niazi visited my unit at Thakurgaon and Bogra. He asked us how many Hindus we had killed. In May, there was an order in writing to kill Hindus. This order was from Brigadier Abdullah Malik of 23 Brigade."

567. Evidently such criminal activities were carried out with discriminatory intent as well. Infringement of fundamental rights of remaining at own place was done with discriminatory intent. The discriminatory intent of the author of the crime was not only to harm an individual, but also to cause massive damage to the collectivity to which the later belongs. Offenses of such gravest

nature bring harm not only to human rights, but also and most especially they undermine the fundamental basis of the social order of a particular group of civilian population. This view finds support from the following observation made in the case of **Kupreškić** [ICTY Trial Chamber] and **Blaskić** [ICTY Appeal Chamber]:

The comprehensive destruction of homes and property” that constitutes “a destruction of the livelihood of a certain population” and may have the “same inhumane consequences as a forced transfer,” could constitute a blatant denial of fundamental rights, and if committed on discriminatory grounds, could amount to persecutions.[*Kupreškić* Trial Judgement, para. 631; *Blaskić* Appeal Judgement, para. 146]

568. Thus we are convinced with the submission advanced by Ms. Tureen Aforz that all these criminal acts infringed the fundamental rights of the Hindu community of the crime villages. Such discrimination resulted not only in killing and bodily harm but it caused severe psychological harassment to the Hindu community which was in fact infringement of their recognised fundamental rights. It is found that the group of perpetrators preferred to launch the attack targeting only the locality or village which was Hindu dominated. On this score, two distinct offences i.e ‘murder’ and ‘persecution’ as crime against humanity are found to have been committed by launching the alleged attack directed against the civilians of Hindu community.

569. We consider that finding commission of two distinct offences under the same set of facts narrated in the charge framed does not cause prejudice to the defence, in any manner. Cumulative convictions for ‘murder’ and ‘persecution’ as crimes against humanity based on the same conduct are permitted.

570. In conclusion, it has been proved beyond reasonable doubt that **(i)** the event of the attack directing the civilians belonging to Hindu community of the crime village resulted in killing of numerous civilians, destruction of properties, sexual violence and deportation **(ii)** the group perpetrators was

accompanied by the accused Ali Ahsan Muhammad Mujahid (iii) accused's position in the ICS the student wing of JEI together with his presence at the crime site had a substantial effect in committing the crimes (iv) the accused being aware of the foreseeable consequence, actively accompanied the group of perpetrators to the crime site (v) accused's conduct as stated by P.W.13 offers fair indication of his explicit approval to the commission of the crimes. Therefore, the accused cannot be absolved of liability of committing the criminal activities carried out by the group which he consciously accompanied.

571. However, the accused, for the criminal acts committed cannot be held liable under the theory of superior responsibility. Because, prosecution has failed to prove that the group of perpetrators was led by the accused. The group of perpetrators, as it appears, consisted of Razakars, Biharis and peace committee men and the accused accompanied it. Prosecution could not be able to show that accused had substantial authority and effective control over them. Rather as an individual member of the group of perpetrators the accused Ali Ahsan Muhammad Mujahid by his conduct and act substantially facilitated and participated to the perpetration of the crimes, by sharing common intent.

572. It is not necessary to prove that cause-and-effect relationship existed between the act of his [accused] accompanying the group to the crime site and the commission of the crime. Rather it is sufficient to establish that the act of accompanying the group and remaining present at the crime site significantly amounts to facilitation to the perpetration of the crime. The facts, circumstances and evidence presented inspire us to conclude that the accused Ali Ahsan Muhammad Mujahid had an understanding with the group of perpetrators to commit the alleged crimes by launching attack directing Hindu civilians of *Bakchar* village because of their membership of specific community and the crimes eventually perpetrated by the physical perpetrators was a natural and foreseeable consequence of the 'understanding' between the accused and the principal perpetrators of the group in furtherance of which he participated and substantially facilitated the commission of crimes narrated in charge no.7 and thereby the accused Ali Ahsan Mohammad Mujahid is held criminally liable under section 4(1) of the Act of 1973 for the offence of 'murder' and 'persecution' as crimes against humanity enumerated in section

3(2)(b) of the Act of 1973 cumulatively which are punishable under section 20(2) read with section 3(1) of the Act.

XXI. Contextual requirement to qualify the offences proved as crimes against humanity

573. The reason for the inclusion of a context element in crimes against humanity is to distinguish ordinary crimes under national law from international crimes which are criminal under international criminal law even if national law does not punish them. The definition of crimes against humanity requires that the individual criminal act, for example, a murder, be committed within a broader setting of specified circumstances and context.

574. To qualify as a crime against humanity, the crimes enumerated in section 3(2)(a) of the Act of 1973 must be committed against the ‘civilian population’. An “attack against a civilian population” means the perpetration against a civilian population of a series of acts of violence, or of the kind of mistreatment referred to in sub-section (a) of section 3(2). Conducts constituting ‘Crimes’ committed against ‘civilian population’ refers to organized and systemic nature of the attack causing acts of violence to the number of victims. A particular conduct forming part of ‘attack’ may constitute one or more crimes. It leaves no doubt that the attack need not be a military attack and an attack need not consist of a multiplicity of the *same* crimes(for example murder) but can also consist of an accumulation of *different* crimes.

575. The ‘attack’ is the event in which the enumerated crimes must form part. Indeed, within a single attack, there may exist a combination of the enumerated crimes, for example murder, rape and deportation.[*Prosecutor v. Kayishema & Ruzindana* (Case no. ICTR-95-1-T, Judgment, 12 May1999, para. 122] In the case in hand , so far it relates to charge no.7 we have found that in conjunction with the ‘attack’ directed against the Hindu dominated villages there had been a combination of offences enumerated in the Act of 1973 i.e. murder, rape and persecution.

576. The accused Ali Ahsan Muhammad Mujahid has been prosecuted and tried for the offences enumerated in section 3(2)(a)(g)(h) of the Act of 1973 which are not punishable under the normal penal law of the country. The offences enumerated in the Act of 1973 are known as ‘system crimes’ committed in violation of customary international law. Murder punishable under Penal law is isolated crime and needs no ‘contextual requirement’. But murder as ‘crime against humanity’ must be shown to have been committed within a context so that it can be distinguished from isolated crime. In the commission of an offence of crimes against humanity ‘attack’ is the event of which the enumerated crimes must form part of ‘attack’ to be committed against ‘civilian population’ and the ‘attack’ must be systematic, in furtherance of policy or plan. These requirements make the offence of crimes against humanity distinguished from the offences punishable under normal penal law.

577. The offences proved as narrated in charge nos. 1,3,5,6 and 7 took place during the period of war of liberation in 1971 directing the unarmed Bengali civilians belonging to pro-liberation ideology.

578. It has been proved that the accused Ali Ahsan Muhammad Mujahid a potential leader of Islami Chatra Sangha (ICS) and was one of persons in command or in position of authority of Al-Badar. It is also proved that he was concerned with the commission of crimes alleged in charge nos. 1 and 6 in the capacity of a ‘superior of Al-Badar and he acted and urged significantly in the formation of Al-Badar. We have also found from the book titled ‘**Sunset at Midday**’ [paragraph two at page 97] that “*The workers belonging to purely Islami Chatra Sangha were called Al-Badar*”.

579. We have already deduced that Al-Badar was an ‘auxiliary force’ within the meaning of section 2(a) of the Act of 1973. Therefore, it becomes patent that the accused Ali Ahsan Muhammad Mujahid had participated to the commission of crimes proved by his acts, culpable conducts, statements encouraging the Al-Badar an ‘armed wing’ meant to provide aid and assistance in committing atrocities, by exercising his authority and influence over the members of Al-Badar. Next we need to have look to the ‘contextual

backdrop’ of perpetration of such crimes in furtherance of ‘operation search light’ on 25 March 1971.

580. From reading and interpretation of section 3(2) of the Act of 1973 a crime must not, however, be an isolated act. A crime would be regarded as an “isolated act” when it is so far removed from that ‘attack’. Now, it is to be considered whether the alleged criminal acts committed in violation of customary international law constituting the offences enumerated in section 3(2)(a) of the Act of 1973 were connected to policy or plan of the government or an organization. It is to be noted too that such policy and plan are not the required elements to constitute the offence of crimes against humanity. These may be taken into consideration as factors for the purpose of deciding the ‘context’ upon which the offences were committed.

581. The expression ‘**committed** against civilian population’ as contained in section 3(2) of the Act of 1973 itself is an expression which specifies that in the context of a crime against humanity the civilian population is the primary object of the ‘attack’. As regards elements to qualify the ‘attack’ as a ‘systematic character’ the Trial Chamber of ICTY in the case of **Blaskic** [ICTY Trial Chamber , March 3, 2000, para 203] has observed as below:

“The systematic character refers to four elements which.....may be expressed as follows: [1] the existence of a political objective, a plan pursuant to which the attack is perpetrated or an ideology, in the broad sense of the word, that is, to destroy, persecute or weaken a community; [2] the perpetration of a criminal act on a very large scale against a group of civilians or the repeated and continuous commission of inhuman acts linked to one another; [3] the perpetration and use of significant public or private resources, whether military or other; [4] the implementation of high-level political and/or military authorities

in the definition and establishment of the methodical plan””

582. Thus, the term ‘context’ stemmed from ‘policy or plan’ in furtherance of which ‘attack’ was committed in ‘systematic’ manner which characterizes the offence, the outcome of the attack, as crime against humanity.

XXII. Context prevailing in 1971 in the territory of Bangladesh

583. We reiterate our reasoned finding given in the case of Muhammad Kamaruzzaman that the Pakistani occupation army with the aid of its auxiliary forces, pro-Pakistan political organizations implemented the commission of atrocities in 1971 in the territory of Bangladesh in furtherance of following policies:

(i) Policy was to target the self-determined Bangladeshi civilian population

(ii) High level political or military authorities, resources military or other were involved to implement the policy

(iii) Auxiliary forces were established in aiding the implementation of the policy

(iv) The regular and continuous horrific pattern of atrocities perpetrated against the targeted non combatant civilian population.

[Muhammad Kamaruzzaman, Judgment 09 May 2013, para, 513]

584. The above facts in relation to policies are beyond reasonable dispute. The context itself reflected from above policies sufficiently suggests that the offences of crimes against humanity as specified in section 3(2)(a) of the Act of 1973 were the predictable effect of part of ‘*systematic attack*’ ‘*committed against civilian population*’.

585. We reiterate that it is quite coherent from the facts of common knowledge involving the backdrop of our war of liberation for the cause of self determination that the Pakistani occupation armed force, in execution of government's plan and policy in collaboration with the local anti liberation section belonging to JEI and its student wing ICS and auxiliary forces and other religion based pro-Pakistan political parties , had to deploy public and private resources and target of such policy and plan was the unarmed civilian Bangalee population, pro-liberation people, Hindu community, intellectuals and pursuant to such plan and policy atrocities were committed to them as a 'part of a regular pattern basis' through out the long nine months of war of liberation in 1971[*Muhammad Kamaruzzaman*, Judgment 09 May 2013, para 515] .

586. It is fact of common knowledge that the basis for planning of the 'operation search light' master plan, which was carried out with brute force by Pakistan army to annihilate the Bengalis reads as below:

'OPERATION SEARCH LIGHT'

BASIS FOR PLANNING

1. A.L [Awami League] action and reactions to be treated as rebellion and those who support or defy M.L[Martial Law] action be dealt with as hostile elements.

2. As A.L has widespread support even amongst the E.P [East Pakistan] elements in the Army the operation has to be launched with great cunningness, surprise, deception and speed combined with shock action.

[Source: **A Stranger In my Own Country: East Pakistan, 1969-1971**, Major General (Retd) Kahdim Hussain Raja, Oxford University Press, 2012, page 114. See also '**Songram Theke Swadhinata**'(সংগ্রাম থেকে স্বাধীনতা) : Published in December 2010, By ; Ministry of Liberation War Affairs, Bangladesh; Page 182]

587. Anthony Mascarenhas in a report titled '**Genocide**' published in **The Sunday Times**, June 13, 1971 found as below:

“SO THE ARMY is not going to pull out. The Government’s policy for East Bengal was spelled out to me in the Eastern Command headquarters at Dacca. It has three elements: (i) The Bengalis have proved themselves “unreliable” and must be ruled by West Pakistanis (ii) The Bengalis will have to be re-educated along proper Islamic lines. The “Islamisation of the masses” – this is the official jargon – is intended to eliminate secessionist tendencies and provide a strong religious bond with West Pakistan (iii) When the Hindus have been eliminated by death and flight, their property will be used as a golden carrot to win over the under-privileged Muslim.”

[Source:http://www.docstrangelove.com/uploads/1971/foreign/19710613_tst_genocide_center_page.pdf : See also: **Bangladesh Documents Volume I**, page 371: Ministry of External Affairs, New Delhi]

588. Therefore, the crimes for which the accused has been found guilty were not isolated crimes. Those were part of ‘systematic’ and ‘planned’ ‘attack’ intended to the accomplishment of offence of crimes against humanity as enumerated in section 3(2) of the Act, in furtherance of policy and plan. It is thus quite evident that the atrocious criminal acts proved were ‘committed against civilian population’ within a context forming part of ‘systematic attack’. The context element is the “international element” in crimes against humanity which renders certain criminal conduct a matter of international concern. Thus, the rationale of the context element can be summarized as the protection of human rights against the most serious and most dangerous violations. This rationale at the same time serves to distinguish crimes against humanity from the less serious national law crimes.[**KAI AMBOS** and **STEFFENWIRTH**, *THE CURRENT LAW OF CRIMES AGAINST HUMANITY*, *An analysis of UNTAET Regulation 15/2000*, PAGE 13,15]

589. The notion of ‘attack’ thus embodies the notion of acting purposefully to the detriment of the interest or well being of a civilian population and the ‘population’ need not be the entire population of a state, city, or town or village. Thus a single act of an accused forming part of attack committed

against even a single unarmed civilian causing criminal act constituting the offence enumerated in the Act of 1973 is sufficient for holding him criminally responsible.

590. The phrase ‘acts committed against any civilian population’ as occurred in section 3(2)(a) clearly signifies that the acts forming attack must be directed against the target population to the accomplishment of the crimes against humanity and the accused need only know his acts are part thereof. Therefore, the facts and circumstances unveiled before us unmistakably have proved the ‘contextual requirement’ to qualify the offences for which the accused has been charged with as crimes against humanity.

XXIII. The accused need not participate in all aspects of the crime

591. As regards participation of accused Ali Ahsan Muhammad Mujahid to the commission of crimes alleged it has been argued by the learned defence counsel that prosecution has not been able to establish that the accused Ali Ahsan Muhammad Mujahid was directly involved with the commission of any of principal criminal acts constituting the offence as narrated in the charges. No witness claims to have witnessed the accused committing the criminal acts constituting the offences alleged. Without proving participation of accused in the commission of offences as listed in the charges he cannot be held guilty.

592. The Tribunal notes that to incur criminal liability, in a case of crimes against humanity, the accused himself need not have participated in all aspects of the alleged criminal conduct. [**Stakic**, ICTY Trial Chamber, July 31, 2003, para. 439]. The *actus reus* of aiding and abetting a crime may occur before, during, or after the principal crime has been perpetrated [**Blaskic**, ICTY Appeals Chamber, July 29, 2004, para. 48]. Participation may occur before, during or after the act is committed.

593. We reiterate that the case relates to trial of internationally recognised crimes committed in violation of customary international law. The offences are alleged to have been committed in context of war of liberation in 1971. Section 22 of the Act of 1973 provides that provisions of the Criminal Procedure Code, 1898(V of 1898), and the Evidence Act, 1872(I of 1872),

shall not apply in any proceedings under the Act of 1973. Thus, in the case in hand, if we keep the provision of section 22 together with section 19 of the Act of 1973 in mind it would be clear that the task of determination of culpability of a person accused of offences enumerated in section 3 of the Act of 1973 involves a quite different jurisprudence. Proof of all forms of criminal responsibility, through participation in any manner can be given by direct or circumstantial evidence. It is now settled jurisprudence.

594. It is now settled that the offence of crimes against humanity is considered as ‘**group crime**’ and it is not perpetrated by a single individual. But however, an individual may participate to the actual commission of the principal crime by his act or conduct, before or midst or after the crime committed. In this regard, the Tribunal notes that in adjudicating culpability of the person accused of criminal acts, context and situations prevailing at the relevant time i.e the period of war of liberation in 1971[March 25 to December 16 1971] together with acts, conducts of the accused is to be considered.

595. The acts of the accused do not always need to be committed in the midst of the attack provided that if they are sufficiently connected to the attack. This view finds support from the decision of Trial Chamber, ICTY in the case of **Limaj**[November 30, 2005, para 189]. The judicial pronouncements of *ad hoc* tribunals have established that the accused himself need not have participated in all aspects of the alleged criminal conduct. The *actus reus* of aiding and abetting a crime may occur before, during, or after the principal crime has been perpetrated.

596. ‘**Participation**’ includes both direct participation and indirect participation. It has been observed in the case of **Kvočka** that

“It is, in general, not necessary to prove the substantial or significant nature of the contribution of an accused to the joint criminal enterprise to establish his responsibility as a co-perpetrator: it is sufficient for the accused to have committed an act or an omission which contributes to the common criminal purpose.”

[Kvocka et al., (Appeals Chamber), February 28, 2005, para. 421]

597. In the case in hand, conscious conduct, culpable act, behaviour or omission to act of the accused Ali Ahsan Muhammad Mujahid knowing the foreseeable consequence, which have been convincingly proved, are thus qualified to be the constituent of ‘participation’ too to the actual accomplishment of the crimes as it substantially contributed to, or have had a substantial effect on the perpetration of the crimes for which the accused has been charged with.

598. The criminal act of abduction and killing of journalist Seraj Uddin Hossain as listed in **charge no.1** was committed by the gang of armed Al-Badar men on 10 December 1971, as a part of concerted plan. Accused Mujahid by his speeches and statement and acts substantially encouraged the perpetrators by endorsing the concerted plan to the commission of the crime and he as a person having position of authority on Al-Badar cannot be absolved of responsibility for the crimes as he failed to prevent its commission. Besides, on consideration of the defence document a **report titled “Country could not care less”** published in a daily on 14.12.2010 [defence documents volume no. 14, page 463-464] in its entirety together with other relevant facts and circumstances it reveals that the armed gang who abducted Seraj Uddin Hossain was led by the accused Ali Ahsan Muhammad Mujahid and the accused was ‘concerned’ with the criminal acts that resulted in abduction and death of Seraj Uddin Hossain.

599. It has been proved, in relation to **charge no.3**, that the accused Ali Ahsan Muhammad Mujahid by his explicit acts approved or instigated or abetted the perpetrators in committing the offence of confinement of Ranjit Kumar Nath by taking him out of the army camp at Faridpur circuit house where the accused was found holding meeting with the army. ‘Participation’ encompasses ‘approval’ or ‘instigation’ or ‘encouragement’ or ‘aiding’ or ‘abetment’. The accused who was a potential leader of ICS having influence even over the army thus had substantially contributed to the commission of offence narrated in charge no.3, by his culpable acts.

600. As regards **charge no.5** [killing of numerous civilians at the army camp at Nakahlpara old MP hostel] the actual perpetrators could not be identified. The accused is not alleged to have physically participated to the actual perpetration of killing the detainees. But the accused, as already proved, by his acts, culpable conduct rendered substantial support, encouragement in committing the principal crimes. By remaining present at the army camp the accused advised to kill the detainees before president's clemency came into effect. On this score too, the accused is equally liable for participating to the commission of the crimes as listed in charge no.3 in the same manner as if it were done by him alone.

601. We have already found it proved that the accused Ali Ahsan Muhammad Mujahid has incurred criminal liability for the crimes as listed in **charge no.6** [intellectuals killing] mainly for his position of authority on Al-Badar and his culpable affiliation with the Al-Badar head quarter in Dhaka city. Besides, in different times he had made inciting speech urging to join Al-Badar for annihilating 'miscreants' [freedom fighters] 'Indian agents' [pro-liberation Bengali civilians]. By addressing 'last speech' at AB HQ on 16 December the accused expressed that they were '**not ashamed**' of their '**deeds**' [atrocities].

602. The accused is proved to have acted consciously and in such a manner in exercise of his influence and authority over the members of Al-Badar that eventually facilitated and contributed to the actual commission of the crimes of intellectuals killing, in furtherance of a concerted plan and common purpose. His acts and culpable conducts clearly constitute instigation or abetment to the perpetrators of the crime which makes him to be co-perpetrators under section 4(1) of the Act. At the same time he incurs liability under section 4(2) of the Act as he as a superior or a person in position of authority of Al-badar by virtue of position in ICS was a part of the concerted plan and concerned with activities involving the commission of crimes by the Al-Badar men.

603. In respect of **charge no. 7** which relates to Hindu civilians killing at Bakchar village in Faridpur, the accused has been indicted for his physical participation. By accompanying the group of individuals to the crime site and remaining present there tantamount to tacit approval constituting 'participation' which has been found proved beyond reasonable doubt by

direct evidence and thus the accused has incurred liability under section 4(1) of the Act.

604. Thus by act of accompanying the gang in the capacity of potential leader of ICS the student wing of JEI, as part of attack, the accused is found to have substantially contributed and facilitated the actual commission of the crime committed by the principals and as such he was ‘concerned with the commission’ of the offence of murder alleged. The conscious act of accompanying and leading the gang of perpetrators signifies common intent and is a constituent of ‘participation’.

605. It is immaterial to argue that the accused was not the actual perpetrator or he himself physically participated to the commission of the criminal acts. It is to be noted that the alleged crimes as enumerated in section 3(2)(a) of the Act of 1973 were committed in furtherance of attack directed against the civilian population. It is not the ‘act’ but the ‘attack’ is to be systematic in nature and even a single act forms part of the ‘attack’. Thus, we are to see how the accused acted or conducted forming part of ‘attack’ that resulted in commission of the principal criminal acts directing the non combatant civilians. Prosecution even is not required to identify the actual perpetrator.

606. In the case in hand, prosecution has been able to prove that the accused Ali Ahsan Muhammad Mujahid was related to a scheme or system and concerted plan which had a criminal outcome. The evidence indisputably suggests that the accused consciously and being aware of the foreseeable consequence of his acts and conducts aided, encouraged and provided moral supports and approval to the principals for committing crimes alleged.

XXIV. Investigation Procedure

607. No substantial argument has been advanced on part of the defence attacking legality of investigation procedure. On question of fairness the learned defence counsel submitted that the Investigation Officer did not make any effective investigation and he took significantly short span of time in carrying investigation as regards events allegedly took place in Faridpur; that the IO did not prefer to examine the case record of Seraj Uddin Hossain Killing brought under the Collaborators Order 1972; that the IO did not find

accused's name in any list of Al-Badar; that he did not examine some vital witnesses.

608. However, we deem it expedient to address the issue, in light of provisions contemplated in the Act of 1973 and the ROP together with the deposition made by the IO before the Tribunal. Investigation officer [P.W.17] is a mere formal witness. Any procedural flaw even if found in the task of investigation does not necessarily impair the entire investigation and in no way affects the merit of the case. Besides, it is to be remembered that the investigation under the Act of 1973 is a quite unique job for the officer assigned with it. The 'report' submitted by the Investigator arraigning the accused does not relate to the offence under the normal Penal Law. In fact the Investigation Officer had to deal with the alleged offence of crimes against humanity committed in violation of customary international law and *prima facie* involvement of the accused therewith.

609. P.W.17 Md. Abdur Razzak Khan PPM, an Investigation Officer of the Investigation Agency constituted under section 8(1) of the Act of 1973 was entrusted with the task of investigation. As stated by P.W.18 the information obtained through the record of Pallabi Police Station case no. 60 dated 25.1.2008 and Keraniganj Police Station case No. 34 dated 31.12.2007 was registered as 'complaint' on 21.7.2010 by the Investigation Agency of the Tribunal under Rule 5 of the ROP. During investigation P.W.18 prayed through the Chief Prosecutor for detention of the accused Ali Ahsan Muhammad Mujahid for the purpose of effective and proper investigation; visited the crime sites; examined the witnesses and recorded their statement; seized documents and materials from different organisations. On conclusion of investigation he [P.W.18] submitted report on 30.10.2011 in the office of the Chief Prosecutor.

610. Non perusal of the case record of Seraj Uddin Hossain Killing brought under the Collaborators Order 1972 is not a flaw and does not affect the present prosecution brought under the Act of 1973, a quite different legislation. The offence of murder tried in that case was punishable under Penal Code. Besides, we may have idea about the said case from a defence document, a report published in the Daily Star **[Defence Documents Volume**

14, page 463,464]. It cannot be treated as a flaw of the task of investigation that the IO did not find accused's name in any list of Al-Badar. It is to be seen whether the prosecution has been able to prove that accused belonged to Al-Badar or had a position of authority on it by evidence and circumstances.

611. Rule 2(6) of the ROP defines; 'complaint' on the basis of which investigation is to be done. Under Rule 2(6) a 'compliant' is defined as "*any information oral or in writing obtained by the Investigation Agency including its own knowledge relating to the commission of a crime under section 3(2) of the Act*". That is to say, the Investigation Agency is authorized to initiate investigation predominantly on information it obtains. There has been no legal bar in obtaining information even from the said compliant petitions of Pallabi and Keraniganj police stations cases, as stated by P.W.17. But that does not mean that those compliant petitions were the sole foundation of investigation into the alleged criminal acts of the accused allegedly committed during the war of liberation in 1971. Information obtained however merely allows the investigation agency to initiate the investigation process.

612. For the reason of absence of any legal sanction of transferring those two cases to ICT the same, after receiving by the Registry of ICT, were in fact simply sent to the Investigation Agency of the ICT as the information relating to allegations brought therein falls within the jurisdiction of the Act of 1973, as observed by the Magistrate Court. Rule 5 of the ROP speaks of procedure of maintaining 'complaint register' and not the procedure of initiating investigation. Rather Section 8 and Rule 4 contemplate the procedure of holding investigation and it appears that the IO (P.W.17) accordingly has done the task of investigation. The 'report' submitted by the Investigation Agency before the Chief Prosecutor under Rule 11 of the ROP, in true sense, is the foundation of the case. On receipt of such 'report' the Chief Prosecutor is authorized to examine it and documents, materials submitted therewith and to decide whether 'Formal Charge' is to be submitted under section 9(1) of the Act of 1973.

613. On total appraisal, we do not find anything flawed in the investigation task. Fundamentally, investigation under the Act of 1973 on information obtained relates to the process of procuring documentary evidence, recording

statement of witnesses if found available and identifying the event[s], crime site[s] and casualty caused by the alleged criminal acts and also to identify whether the criminal acts alleged fall within the definition as enumerated in section 3(2) of the Act of 1973. The Tribunal notes that the Investigation Officer [P.W.17] , in compliance with the norms and provisions contemplated in the Act of 1973 and the ROP, carried out its investigation on completion of which he duly submitted 'report' before the Chief Prosecutor.

XXV. Defence Documents and Witness

614. Defence in fact has not pleaded any specific case excepting 'innocence'. No plea of alibi has been taken on part of the accused. However, defence adduced and examined only one witness, Ali Ahmad Mabrur, the son of the accused who simply proved and exhibited some books and paper cuttings submitted as required under section 9(5) of the Act of 1973. But however no argument has been extended by the defence, drawing attention to the exhibited documnts.

615. Understandably, the alleged books and paper cuttings have been submitted and exhibited in support of 'negative assertion'. The narrative of atrocities in those books does not appear to have been exploited from authoritative sources.

616. The effort on part of the accused by proving those documents aims to aver that the accused Ali Ahsan Muhammad Mujahid was 'not involved' with any of crimes alleged. That is to say, merely in support of a 'negative assertion' those documents have been proved and exhibited. But an assertion relating to 'innocence' shall have to be adjudicated on weighing prosecution evidence.

617. We have already recorded our considered finding in the case of *Muhammad Kamaruzzaman* that

“First, according to settled norms of criminal jurisprudence, a negative assertion is not needed to be proved by adducing evidence. Second, the history of the war of liberation of Bangladesh and

atrocities committed during 1971 directing unarmed civilians is not a mere piece of petite tale that it can be narrated or documented in couple of paragraphs of a book containing hundred pages.”[*Muhammad Kamaruzzaman*, Judgment 09 may 2013, para 551]

618. Therefore, mere non description of accused’s involvement with any of crimes alleged does not necessarily confront the prosecution case for excluding complicity of the accused. Defence is not needed to prove innocence and any negative assertion. But the settled jurisprudence does not require a ‘negative assertion’ to be proved by adducing evidence. The Tribunal notes that mere non-describing the name of the accused involving him with the commission of the event in those books and reports published in news papers from Faridpur does not *ipso facto* helps the defence to disprove prosecution case.

XXVI. Role of JEI in 1971

619. We deem it indispensable to get a scenario on the role and stand of Jamat E Islami [JEI] in 1971, particularly when it has already been established that the Al-Badar was an ‘*action section*’, ‘*armed wing*’ of Jamat E Islami and the Al-Badar was formed mainly of the workers of its student wing Islami Chatra Sangha [ICS].

620. Already we have made intricate deliberation on the role of JEI in 1971 in the case of **Muhammad Kamaruzzaman** based on various impending sourced information and evidence. Without reiterating vivid discussion on it we prefer to endorse the observation we have rendered in the case of *Muhammad Kamaruzzaman*, in brief. We have observed in the said case that

“ Jamat E Islami [JEI] had played substantial role in organising and establishing its two wings conceivably to join the military’s efforts. Therefore, it is now history based on old authoritative documents that chiefly it was Jamat E

Islami (JEI) that played substantial role in formation of Al-Badar, Razakar, Al-Shams and Peace Committees and of course not with intent to guard the civilians and their property”.

621. We consider it expedient to endorse further observations made in the said case [*Muhammad Kamaruzzaman*] that

“Jamat E Islami was thus indulged in indiscriminate massacre of their political opponents belonging to Bengali nation, in the name of liquidating ‘miscreants’, ‘infiltrators’ for which they were using Razakars, Al-Badar comprising with the workers of Islami Chatra Sangha [ICS], its student wing”. [Muhammad Kamaruzzaman, Judgment 09 May 2013 para **601**]

622. We have already recorded our observation based on sourced information and documents that

“.....Jamat E Islami [JEI] had allowed their creation Al-Badar and Razakars to operate an assembly line of incalculable atrocities in the territory of Bangladesh in 1971. The nation will be failing to acknowledge the sacrifices of millions of people who laid their lives and honour for the cause of our heard earned independence if individuals like the present accused are not brought to book for their notorious role and active contribution and endorsement for committing the systematic atrocities in 1971, in the territory of Bangladesh. ” [Muhammad Kamaruzzaman, Judgment 09 May 2013 para **607**]

623. It was Jamat E Islami [JEI] and its student wing which joined the military’s effort to launch two paramilitary counterinsurgency units [**Musa Khan Jalalzai**, *Sectarianism and Politico-Religious Terrorism in Pakistan*,

Lahore: Tarteeb Publishers, 1993, page 258]. By September, a force of fifty thousand *razakars* had been raised. Secular West Pakistani politicians complained about “an army of Jamaat-e-Islami nominees”[Source: **Salik**, *Witness to surrender*, page 105]. The above sourced information offers a picture as to stand the JEI opted to wipe out the pro-liberation Bangladeshi people terming them ‘*miscreants*’ ‘*agents of India*’, ‘*enemies of Islam*’, simply in the name of preserving Pakistan. Jamat E Islami [JEI] cannot be relieved from the accountability of unspeakable mayhem, atrocities and murders committed by the Al-Badar which was created by it and had acted as its ‘**action section**’, ‘**fascist body**’ and ‘**armed wing**’ in 1971. Though JEI used to preach that Islam was its ideology, the slightest proof of humanity and tolerance which the great and holy religion Islam acknowledges could not have been witnessed in its activities in 1971. The victims and sufferers of the diabolical atrocities do have right to know the role of Jamat E Islami played in 1971. And that is why considering it quite pertinent; we have preferred to endorse our observations, in brief, rendered in the former case.

XXVII. Conclusion

624. Despite lapse of long 40 years’ time the testimony of P.W.s of whom some had fair occasion to see and experience actual commission of criminal event including the acts and conducts of accused, and the activities carried out by the Al-Badar men and at the Al-Badar head quarter in Dhaka city, army camps in Dhaka and in Faridpur on approval and encouragement of accused, the then potential leader of ICS and a person of in position of authority on Al-Badar leader. Some of P.Ws have also testified on substantial facts relevant and material to the event of atrocities and culpability of the accused and their testimony does not appear to have been suffered from any material infirmity. Besides, no significant inconsistencies between their testimony made before the Tribunal and their earlier statement made to the Investigation Officer could be found that may smash their credibility.

625. Section 3(1) provides jurisdiction of trying and punishing even any ‘individual’ or ‘group of individuals’ including any ‘member of auxiliary force’ who commits or has committed, in the territory of Bangladesh any of crimes mentioned in section 3(2) of the Act, apart from member of armed or defence forces. We have already resolved in our foregoing deliberations that

‘Al-Badar’ was an ‘auxiliary force’ and the accused Ali Ahsan Muhammad Mujahid was a potential leader of Al-Badar having position of authority which makes him criminally liable also under the theory of superior responsibility as contemplated in section 4(2) of the Act of 1973, in relation to charge nos. 1 and 6.

626. We are convinced from the evidence, oral, documentary and circumstantial, led by the prosecution and the sourced documents that the accused, at the relevant time had acted as an atrocious and potential leader of Al-Badar to the actual accomplishment of the crimes charged and his access to the army camps is a fair indicative of his active and culpable affiliation even with the Pakistan occupation army. Accused's conscious and culpable conduct---antecedent, contemporaneous and subsequent, as have been found--all point to his guilt and are well consistent with his 'complicity' and 'participation' in the commission of the crimes proved. As a result, we conclude that the accused Ali Ahsan Muhammad Mujahid was ‘concerned’ with and had ‘complicity’ to the commission of the offences in relation to charge nos. 1, 3,5,6 and 7 for which he has been charged in the capacity of leader/head of Al-Badar which was truly an ‘action section’ of Jamat E Islami[JEI].

627. According to section 4(1) of the Act of 1973 the accused Ali Ahsan Muhammad Mujahid, being equally responsible, has incurred individual criminal liability for the commission of crimes proved, in relation to charge nos. 1, 3, 5,6 and 7. It also stands proved that the accused, by his acts and conduct, also incurs superior responsibility under section 4(2) of the Act of 1973 for the crimes described in the charge nos. 1 and 6. However, we refrain from convicting him cumulatively for both mode of liability, in relation to charge nos. 1 and 6, excepting taking it into account as an aggravating factor. Accordingly, the accused is held criminally responsible under section 4(1) of the Act of 1973 for the commission of crimes proved as listed in charge nos. 1,2,3,4 and 7.

628. The Tribunal [ICT-2] is not precluded from considering both forms of responsibility in order to get a full reflection of culpability of the accused, in light of the facts revealed from evidence and materials. But however, we

consider that ‘cumulative convictions’ under section 4(1) and 4(2) of the Act of 9173 is inappropriate for the same conduct or act forming part of attack that resulted in actual commission of the crimes alleged.

629. We reiterate that ‘no innocent person be convicted, let hundreds guilty be acquitted’—the principle has been changed in the present time. In this regard it has been observed by the Indian Supreme Court that

“A judge does not preside over a criminal trial, merely to see that no innocent man is punished. A Judge also presides to see that a guilty man does not escape. Both are public duties.”

[Per Viscount Simon in *Stirland vs. Director of Public Prosecution*: 1944 AC (PC) 315: quoted in *State of U.P Vs. Anil Singh* : AIR 1988 SC 1998]

630. **C.L. Sulzberger** wrote in the *New York Times*, **June 16, 1971** describing the horrific nature and untold extent of atrocities committed in the territory of Bangladesh. It shakes the conscious of mankind. It imprints colossal pains to the Bangalee nation. **C.L. Sulzberger** wrote that-

“Hiroshima and Nagasaki are vividly remembered by the mind’s eye primarily because of the novel means that brought holocaust to those cities. Statistically comparable disasters in Hamburg and Dresden are more easily forgotten; they were produced by what we already then conceived of as “conventional” methods. Against this background one must view the appalling catastrophe of East Pakistan whose scale is so immense that it exceeds the dolorimeter capacity by which human sympathy is measured. No one can hope to count the dead, wounded, missing, homeless or stricken whose number grows each day. “

[Source: **Bangladesh Documents: Volume I**, page 442: Ministry of External Affairs, New Delhi]

631. The above observation made on **16 June 1971** reflects an impression as to the tragic scale and dreadful nature of atrocities which were carried out through out the war of liberation in 1971. The offences for which the accused Ali Ahsan Muhammad Mujahid has been found responsible are the part of such atrocities committed in context of the war of liberation 1971 in the territory of Bangladesh, in collaboration with anti-liberation and antagonistic political organisations namely Jamat E Islami, Muslim League, Nejam E Islami, group of pro-Pakistan people and the Pakistani occupation army with objective to annihilate the Bengali nation by resisting in achieving its independence.

632. Therefore, bearing it in mind the Tribunal notes that no guilty man should be allowed to go unpunished, merely for any faint doubt, particularly in a case involving prosecution of crimes against humanity committed in 1971 in violation of customary international law during the War of Liberation. Because, wrong acquittal, merely for any faint or unreasonable doubt, has its chain reactions, the law breakers would continue to break the law with impunity.

XXVIII. VERDICT ON CONVICTION

633. For the reasons set out in this Judgement and having considered all evidence and arguments, the Tribunal unanimously finds the accused **Ali Ahsan Muhammad Mujahid**

Charge No.1: GUILTY of the offence of ‘abetting’ and facilitating the commission of the offence of ‘**murder**’ as ‘**crime against humanity**’ as specified in section 3(2)(a)(g) of the Act of 1973 and he be convicted and sentenced under section 20(2) of the said Act.

Charge No.2: NOT GUILTY of the offence of ‘abetting’ to commit ‘genocide’ as specified in section 3(2)(c)(g) of the Act of 1973 and he be acquitted thereof accordingly.

Charge No.3: GUILTY of the offence of ‘abetting’ and facilitating the commission of offence of ‘**confinement**’ as ‘**crime against humanity**’ as specified in section 3(2)(a)(g) of the Act of 1973 and he be convicted and sentenced under section 20(2) of the said Act.

Charge No.4: NOT GUILTY of offence of ‘abetting’ and ‘facilitating’ the commission of offence of **confinement** and causing **inhuman act** as ‘**crimes against humanity**’ as specified in section 3(2)(a)(g) of the Act of 1973 and he be acquitted thereof accordingly.

Charge No.5: GUILTY of the offence of ‘abetting’ and facilitating the commission of offence of **murders** as ‘**crimes against humanity**’ as specified in section 3(2)(a)(g) of the Act of 1973 and he be convicted and sentenced under section 20(2) of the said Act

Charge No.6: GUILTY of the offence of ‘abetting’ and ‘planning’ and facilitating the commission of offence of ‘**extermination**’ as ‘**crimes against humanity**’ as specified in section 3(2)(a)(g) of the Act 1973 and he be convicted and sentenced under section 20(2) of the said Act

Charge No.7: GUILTY of offence of ‘participating’ and ‘facilitating’ the commission of offence of ‘**murders**’ and ‘**persecution**’ as ‘**crimes against humanity**’ as specified in section 3(2)(a)(g) of the Act of 1973 and he be convicted and sentenced under section 20(2) of the said Act

XXIX. VERDICT ON SENTENCING

634. Mr. Mukhlesur Rahamn Badal and Ms. Tureen Afroz, the learned Prosecutors finally insisted that accused Ali Ahsan Muhammad Mujahid should face the highest sentence, being a sentence of death, as he is proved to

have abetted, facilitated and participated to the commission of barbaric criminal acts constituting the offence of crimes against humanity and genocide. Accused's superior position of authority on the Al-Badar force together with the intrinsic gravity and degree and pattern of criminal acts constituting the offence of extermination of civilians belonging to intellectual class [charge no.6] and killing and persecution of civilians belonging to Hindu community as crimes against humanity [charge no.7] deserves to be considered as an 'aggravating factor' in awarding the highest sentence. The act of remaining present at the army camp and providing '*advising*' to the army to liquidate the detainees [charge no.5] constitutes substantial contribution to the killing of some brave sons of the land. Abduction and murder of Seraj Uddin Hossain, a notable journalist [charge no.1] was a part of intellectuals killing which carries similar gravity. For only such sentence would be just and appropriate to punish those crimes at such a level that corresponds to their overall magnitude. Only the highest sentence shall reflect the extent of the untold torment inflicted upon the millions of victims in 1971.

635. It is now settled that determination of gravity predominantly requires consideration of the particular circumstances of the case, as well as the form and degree of the accused's participation. The Tribunal notes that gravity of offence is to be considered together with aggravating circumstances, in arriving at a finding in respect of sentence. In the case in hand, considering the charges proved and facts relevant thereto we take some factors into account as the key requirement of aggravating circumstances for the purpose of sentence to be imposed and these are (i) the position or leadership of the accused on Al-Badar and his level of influence and control on the Al-Badar and their headquarter at Dhaka city (ii) the accused's role and mode of participation as fellow perpetrator (iii) culpable affiliation with the army and holding meeting with them at the army camp, and (iii) the violent, and humiliating nature of the acts and the vulnerability of the victims.

636. The Tribunal notes that the forms of punishment must reflect both the calls for justice from the persons who have directly or indirectly been victims and sufferers of the crimes, chiefly considering the gravity of crimes. The crimes proved were massive human rights violations committed during the war of liberation 1971.

637. However, with due respect for the letter of the law, in order to ensure the legitimacy of the decisions, the Tribunal solely respects to the legal nature of the offences committed, their scale, the role and position of the accused played and exercised in their commission, and the shock sustained by the victims and their families together with the preamble of the Act of 1973.

638. The preamble of the Act of 1973 unequivocally demonstrates that this piece of legislation was enacted for the detention, prosecution and punishment of persons for genocide, crimes against humanity, war crimes and other crimes under international law. Thus the accused has been arraigned not for committing any isolated offence as codified in normal penal law and as such the charge brought under the Act of 1973 itself portrays magnitude, gravity and diabolical nature of the crime and in the event of success of prosecution in proving the charge the accused must and must deserve just and highest punishment.

639. At the same time a 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 accused in the crime. Active abuse of a position of authority, which would presumably include participation in the crimes of subordinates, can aggravate liability arising from superior authority. The conduct of the accused in the exercise of his superior authority could be seen as an aggravating circumstance.

640. We have already recorded our finding that the event of Abduction followed by murder of journalist Seraj Uddin Hossain [charge no.1] took place on 10 December 1971 which was predictably an atrocious event carried out as a part of execution of same common design and plan of killing the intellectuals[charge no.6] . And the accused Ali Ahsan Muhammad Mujahid having position of authority on the Al-Badar men, the principal perpetrators, was thus a part of the common plan and design and as such he cannot be absolved of criminal responsibility.

641. Charge no.6 relates to killing of numerous intellectuals by picking them up from their residence on gun point. However, an independent charge being charge no.1 has been framed on the event of abduction and murder of journalist Seraj Uddin Hossain and the accused has been found guilty of

abetting the commission of the crimes under charge no.1. It is not alleged that the accused himself physically participated to the perpetration of crimes as narrated under charge no.1.

642. Additionally, admittedly one Kahlil was prosecuted, tried, convicted and sentenced to imprisonment for life under the Collaborators Order 1972 for the event of same criminal acts, as narrated in charge no.1. But this fact does not preclude the Tribunal's jurisdiction in finding the accused guilty of the offence of abetting the principal crimes under the International Crimes (Tribunals) Act, 1973, a different legislation. However, this admitted fact deserves to be taken into account together with the fact that the event under charge no.1 which is found proved to be a part of 'intellectuals killing' as narrated in charge no. 6.

643. Since the event as narrated in charge no. 1 justifiably deserves to be merged with the event of 'intellectuals killing' as listed in charge no.6, as a part of planned and selective killing, in furtherance of common purpose we do not deem it indispensable to award break up sentence despite finding the accused Mujahid guilty of the crimes narrated in charge no. 1, on independent adjudication.

644. As regards crimes narrated in charge no.5, the accused is not alleged to have physically participated to the commission of crimes. But we have found it proved beyond reasonable doubt that the accused Ali Ahsan Muhammad Mujahid substantially encouraged and supported to the commission of the offence of murder of numerous brave unarmed guerilla fighters and civilians who were kept detained at the army camp. The event was enormously appalling indeed. However, mode of participation of the accused, as has been found, deserves justifiable consideration, in awarding sentence in respect of charge no.5.

645. Therefore, we deem it apposite to render our agreed decision that justice would be met if for the crimes as listed in **charge no. 5** the accused Ali Ahsan Muhammad Mujahid who has been found guilty beyond reasonable doubt is condemned to the sentence of '**imprisonment for life**' under section 20(2) of the Act of 1973.

646. Considering the gravity of offence and mode of participation of the accused for the offence of ‘confinement’ narrated in **charge no.3** accused Ali Ahsan Muhammad Mujahid deserves to be condemned to the sentence of ‘**imprisonment for five years**’ under section 20(2) of the Act of 1973.

647. Now let us have a glance to the gravity of the crimes under **charge nos. 6 and 7** together with mode of participation of the accused therewith. We have already deduced that the accused has incurred criminal liability also under the ‘theory of civilian superior responsibility’, in respect of charge no. 6 which is covered by section 4(2) of the Act of 1973 and it may legitimately be taken into account as an ‘aggravating factor’, for the purpose of determining the degree of accused’s culpability and awarding sentence.

648. We have taken the intrinsic magnitude of the offence of ‘extermination’ [**charge no. 6**] and ‘murders’ and ‘persecution’ [**charge no.7**] as ‘crimes against humanity’ being offences which are predominantly shocking to the conscience of mankind into our consideration. We have also carefully considered accused’s position of authority through which he asserted his effective influence and control over the Al-Badar men and the Al-Badar headquarter in Dhaka city and also the mode of participation of the accused to the commission of crimes proved and the the gravity of offences.

649. The fierceness of the event of the ‘**intellectuals killing**’ and the attack which was launched directing the unarmed civilians belonging to Hindu community causing numerous death, rape, persecution were grotesque and diabolical in nature and extremely detrimental to basic humanness. The accused by his acts, conducts, inciting statement, and speech substantially encouraged and abetted the Al-Badar men the principal perpetrators of intellectuals killing [**charge no.6**] to further an organized plan and common purpose, by virtue of his substantial position of authority on Al-Badar force .

650. The accused has been proved to have accompanied the principals to the crime sites and thereby participated by substantially contributing to the horrendous systematic attack that resulted in murder and persecution of numerous unarmed civilians belonging to Hindu civilians [**charge no.7**] and also creating a coercive climate with discriminatory intent. Accused Ali Ahsan Muhammad Mujahid consciously opted to participate in the systematic

killings of civilians belonging to Hindu community and he actively supported and encouraged the commission of killings, rape and persecution through his presence and acts at the crime sites. These crimes deserve to be evaluated as ‘crimes of serious gravity’.

651. Next, particularly the event of ‘large scale killing of intellectuals’ to further a common purpose under a designed plan that took place just few days before the victory on 16 December 1971 terribly shocks the conscience of humankind and the Bangalee nation . The martyr intellectuals were the best sons and daughters of the soil. Intent to kill the listed intelligentsias was to cripple the Bangalee nation. Designed plan, pattern of such selective but large scale killing of intellectuals belonging to different professions inescapably aggravate the extent of the criminal acts and liability of the accused as well. Letters of law cannot remain non responsive to the relatives of hundreds of martyr victims and the nation too who have been still carrying colossal and unspeakable trauma.

652. As for extermination, a particularly large number of victims can be an aggravating circumstance in relation to the sentence for this crime. Mass killing of large number of individuals belonging to the intelligentsia class of Bengali nation was ‘extremely serious’ offence of crimes against humanity indeed, as the attack was systematic, planned and designed which was aimed to cripple the Bengali nation just at the verge of victory on 16 December 1971. Such ‘extreme seriousness’ inevitably is considered as an aggravating factor in awarding sentence for the crimes of extremiantion.

653. The nation pays its humble homage and tribute to the martyr intellectuals on 14 December each year for the sacrifice they laid for the cause of our independence. If this act forming systematic attack directed against civilian population causing ‘large scale killing of intellectuals’ [charge no.6] and the attack directing the Hindu community with discriminatory intent causing killing of numerous civilians and persecution [charge no.7] are not repellent or dastardly, it is beyond comprehension as to what other act can be so.

654. Superior position in itself does not constitute an aggravating factor, true. But abuse of a position of influence and authority on Al-Badar force and it’s headquarter can be legitimately taken into account as an aggravating factor in awarding sentence. Additionally, the manner in which the accused exercised

his position of authority on Al-Badar men, the principal perpetrators in executing the planned and designed mass killing of intellectuals can justify a finding of accused's substantial position of authority as an aggravating circumstance. The authority the accused Ali Ahsan Muhammad Mujahid therefore exercised over the Al-Badar men and their headquarter which was known as 'torture camp', and his active role in encouraging them to liquidate the pro-liberation Bangali civilians terming them 'miscreants', 'agents of India' are indeed aggravating factors.

655. Therefore, accused's 'superior position' or 'position of authority' on infamous Al-Badar force and its headquarter at Dhaka city [**as listed in charge no.6**] and his mode of participation in committing the crimes [**as listed in charge nos. 7**] justifiably increase his culpability which deserves to be taken into account as tangible 'aggravating factor'.

656. In view of above discussion, we are of the unanimous view that there would be failure of justice in case 'capital punishment' is not awarded for the crimes, as listed in **charge nos. 6 and 7** as the same indubitably falls within the kind of such gravest crimes which tremble the collective conscience of mankind.

657. Keeping the factors as conversed above in mind we are of agreed view that justice would be met if for the crimes as listed in **charge nos. 6 and 7** the accused Ali Ahsan Muhammad Mujahid Muhammad who has been found guilty beyond reasonable doubt is condemned to a '**single sentence of death**' under section 20(2) of the Act of 1973.

658. Accordingly, we do hereby render the following **ORDER** on **SENTENCE**.

Hence, it is

ORDERED

That the accused **Ali Ahsan Muhammad Mujahid** son of late Moulana Abdul Ali and late Begum Nurjahan of '*Paschim khabashpur*' under Kotwali police station district Faridpur, at present Road No. 10, House No. -05, Flat No. 2/A, Sector-11, Police Station Uttara, Dhaka Metropolitan Police, Dhaka found **guilty** of the offences of '**crimes against humanity**' enumerated in

section 3(2) of the International Crimes (Tribunals) Act, 1973 as **listed in charge no.s 1, 3,5,6 and 7.**

The accused **Ali Ahsan Muhammad Mujahid** be convicted and condemned to the sentence of **‘imprisonment for 05 (five) years’** for the crimes as listed in charge **no. 3** and **to** the sentence of **‘imprisonment for life’** for the crimes as listed in **charge no. 5** under section 20(2) of the Act of 1973.

The accused Ali Ahsan Muhammad Mujahid be convicted and condemned to a **‘single sentence of death’** for the crimes as listed in **charge nos. 6 and 7** and he be hanged by the neck till he is dead under section 20(2) of the International Crimes (Tribunals) Act, 1973.

However, as the convict **Ali Ahsan Muhammad Mujahid** is **‘sentenced to death’**, the sentence of **‘imprisonment for life’** and the sentence of **‘imprisonment for 05 years’** will naturally get merged into the **‘setntence of death’**. This sentence shall be carried out under section 20(3) of the Act of 1973.

Accused **Ali Ahsan Muhammad Mujahid** is found not guilty of offences as listed in **charge nos. 2 and 4** and thus he be acquitted thereof.

The sentence awarded shall commence from the date of this judgment as required under Rule 46(2) of the Rules of Procedure, 2012(ROP) of the Tribunal-2(ICT-2) and the convict be sent to the prison with a conviction warrant accordingly.

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

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

Justice Obaidul Hassan, Chairman

Justice Md. Mozibur Rahman Miah, Member

Judge Md. Shahinur Islam, Member