

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

ICT-BD Case No.01 OF 2014

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

**The Chief Prosecutor
Versus
Md. Abdul Jabbar Engineer**

Present:

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

Date of delivery of Judgment on 24 February, 2015.

Prosecutors:

Mr. Golam Arief Tipoo, Chief Prosecutor

Mr. Syed Haider Ali

Mr. Hrishikesh Saha

Mr. Abdur Rahman Howlader

Mr. Altaf Uddin Ahmed

Mr. Md. Zahid Imam

Mr. Taposh Kanti Baul and

Mr. Sheikh Mosfeq Kabir

State Defence counsel:

Mr. Mohammad Abul Hasan

Judgment

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

I. Introductory Words

01. Accused Md. Abdul Jabbar, locally known as Abdul Jabbar Engineer, son of late Saden Ali alias Somed Ali Howlader and late Shawhar Banu of villatge-Khetachira, Police Station Mothbaria, District-Pirojpur and House No.136/A, West [Paschim] Nakhalpara, Police Station Tejgaon, Dhaka has been put on trial before this Tribunal at the instance of the Chief Prosecutor to answer charges under section 3(2)(a)(c)(g)(h) read with section 4(1) of the International Crimes (Tribunals) Act, 1973.

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

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

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

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

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

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

- (b) *Crimes against Peace: namely, planning, preparation, initiation or waging of a war of aggression or a war in violation of international treaties, agreements or assurances;*
- (c) *Genocide: meaning and including any of the following acts committed with intent to destroy, in whole or in part, a national, ethnic, racial, religious or political group, such as:*
- (i) *killing members of the group;*
 - (ii) *causing serious bodily or mental harm to members of the group;*
 - (iii) *deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part;*
 - (iv) *imposing measures intended to prevent births within the group;*
 - (v) *forcibly transferring children of the group to another group;*
- (d) *War Crimes: namely, violation of laws or customs of war which include but are not limited to murder, ill-treatment or deportation to slave labour or for any other purpose of civilian population in the territory of Bangladesh; murder or ill-treatment of prisoners of war or persons on the seas, killing of hostages and detenués, plunder of public or private property, wanton destruction of cities, towns or villages, or devastation not justified by military necessity;*
- (e) *violation of any humanitarian rules applicable in armed conflicts laid down in the Geneva Conventions of 1949;*

- (f) *any other crimes under international law;*
- (g) *attempt, abetment or conspiracy to commit any such crimes;*
- (h) *complicity in or failure to prevent commission of any such crimes."*

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

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

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

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

Article-7 of the Rome Statute

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

- (a) Murder; (b) Extermination; (c) Enslavement; (d) Deportation or forcible transfer of population; (e) Imprisonment or other severe

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

Article 3 of the ICTR

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

Article 5 of the ICTY

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

09. Under the Rome Statute [Article 7] and Statute of the International Criminal Tribunal for Rwanda [Article 3] the jurisdiction of the Tribunals were given to try offences of 'crimes against humanity' such as murder,

extermination, deportation, torture, rape etc. of the person/ persons when the offences committed as a **widespread or systematic attack directed against any civilian population or national, ethnic, racial or religious grounds**. According to ICTY [Article 5] existence of armed conflict is the key element to try offences of crimes against humanity, directed against the civilian population.

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

"Whereas, under our Act, 1973 the tribunal has jurisdiction to prosecute and punish any person irrespective of his nationality who being a member of any armed, defence or auxiliary forces commits, whether before or after the commencement of the Act, Crimes against Humanity, Crimes against Peace, Genocide and other crimes connected therewith during the period of war of liberation. The offences of murder, extermination, rape or other inhumane acts committed against civilian population or persecutions on political, racial, ethnic or religious grounds are included in the offence of crimes against Humanity. "

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

11. In view of the above observation of the Appellate Division it is now well settled that in our jurisdiction for constituting the offence of crimes against

Humanity the element 'the attack must be widespread and systematic against civilian population' is not at all necessary or mandatory.

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

13. As per section 3(2) of the ICT Act of 1973 to constitute an offence of crimes of humanity the element of attack directed against any civilian population is required. The "*population*" element is intended to imply crimes of a collective nature and thus exclude single or isolated acts. Thus, the emphasis is not on the individual victim but rather on the collective, the individual being victimized not because of his individual attributes but rather because of his membership of a targeted civilian population. This has been interpreted to mean that the acts must occur on a large scale basis [widespread] or, that there must be some form of a governmental, organizational or group policy to commit these acts [systematic, targeted] and that the perpetrator must know the context within which his actions are taken [knowledge and intent], and finally that attack must be committed on discriminatory grounds in case of persecution.

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

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

15. However, for our better understanding it is needed to know the meaning and scope of 'widespread' and 'systematic' attack. '*Widespread*' refers to the large-scale nature of the attack which is primarily reflected in the number of victims. '*Systematic*' refers to the organized nature of the acts of violence and the '*non-accidental repetition of similar criminal conduct on a regular basis.*' Widespread is quantitative while systematic is qualitative.

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

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

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

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

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

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

20. Before going into discussion and evaluation of the evidence on record, it is needed to be mentioned here that the Tribunal has already resolved

some common legal issues agitated by the defence in the following cases of the Chief Prosecutor vs. Delwar Hossain Sayeedi [ICT-BD Case No. 01/2011], The Chief Prosecutor Vs. Professor Ghulam Azam [ICT-BD case No. 06/2011], the Chief Prosecutor Vs. Salauddin Quader Chowdhury [ICT-BD Case No. 02/2011] and the Chief Prosecutor Vs. Motiur Rahman Nizami [ICT-BD Case No.03 of 2011]. Apart from this, the Appellate Division of our Supreme Court in the cases of Abdul Quader Mollah Vs Government of Bangladesh and Bangladesh Vs Abdul Quader Mollah has also decided the legal issues involved in the cases under the Act of 1973.

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

- i. Customary International Law [CIL] shall not be applied if it is contrary to the Act of 1973;
- ii. there is no rule of CIL that prohibits our domestic Tribunal to proceed with the trial as per our domestic legislation;
- iii. our domestic Tribunal has the jurisdiction to continue with the trial in any manner acting in derogation of rules of public international law;
- iv. there is nothing repugnant to CIL in the Act of 1973, rather it is consonant with the provisions of CIL;
- v. the inordinate delay in commencing any proceedings under the Act of 1973 *ipso facto* can not be a ground to doubt the truth or veracity of the prosecution case;
- vi. by the amendment of section 3(1) of the Act of 1973 through Act No.LV of 2009 the jurisdiction of the Tribunal has been extended to try and punish 'any individual,' 'organization' or 'group of individuals' besides any member of any armed, defence or auxiliary forces, irrespective of his nationality who have committed crimes against Humanity mentioned in the Act of 1973;
- vii. the Act of 1973 is a protected law and the moment, sub-section 3(1) was amended by way of substitution, it became part of the Statute and it got the protection of any legal

challenge to be void or unlawful or even to have become void or unlawful in view of the provisions of Article 47(3) of our Constitution;

- viii. the clemency given to the admitted prisoners of War, pursuant to the tripartite agreement of 1974, in no way, either match the Act of 1973 or any of its provisions ineffective, invalid or void;
- ix. mere failure of the successive governments to act in accordance with the Act of 1973 for last more than forty years, in no way, gave any right to the accused to be exonerated from being tried for the commission of crimes against Humanity as mentioned in section 3(2) of the Act;
- x. in the Act of 1973, no limitation has been prescribed for initiating proceedings against any individual or group of individual or organization or any member of any armed, defence or auxiliary forces irrespective of his nationality for the commission of crimes mentioned in section 3(2) of the Act of 1973;
- xi. the Collaborators Order 1972 was a different legislation aiming to prosecute the persons for the offences punishable under the Penal Code, were scheduled in the Collaborators order 1972, while the Act of 1973 has been enacted to prosecute and try the persons for crimes against Humanity, genocide and other crimes committed in violation of customary international law [CIL] and as such there is no scope to characterize the offences indulging in the Collaborators Order 1972 to be the same offences as specified in the Act of 1973;
- xii. the Act of 1973 is a codified law, thus, it is not needed to travel to seek assistance from other trials held or being held by the tribunals/ courts either under the charter of agreements of the nations or under other arrangements under the mandate of United Nations or other International body, such as Nuremburg trial and the Balkan trials.

VI. Historical Backdrop and Context

21. In August, 1947 the partition of British India based on two-nation theory, gave birth to two new states, one a secular state named India and the

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

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

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

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

million [one crore] people deported to India as refugees and million others were internally displaced. It also experienced unprecedented destruction of properties all over Bangladesh.

25. The Pakistan government and the military with the help of some pro-Pakistani leaders set up a number of auxiliary forces such as the Razakar Bahini, the Al-Badr Bahini, the Al-Shams, the Peace Committee etc, essentially to collaborate with the military in identifying and eliminating all those who were perceived to be sympathized with the liberation of Bangladesh, individuals belonging to minority religious groups especially the Hindus, political groups belonging to Awami League and other pro-Independence political parties, Bangalee intellectuals and civilian population of Bangladesh. Undeniably the road to freedom for the people of Bangladesh was arduous and torturous, smeared with blood, toil and sacrifices. In the contemporary world history, perhaps no nation paid as dearly as the Bangalees did for their emancipation.

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

VII. Brief Account of accused Md. Abdul Jabbar Engineer

27. Accused Md. Abdul Jabbar, locally known as Md. Abdul Jabbar Engineer, son of late Saden Ali alias Samed Ali Hawlader and late Sawhar Banu of village-Khetachira, Police Station Mathbaria, District-Pirojpur and House No.136/A, West [Paschim] Nakhalpara, police station Tejgaon, Dhaka was born on 30.11.1932. He having obtained BSC Engineering degree from Dhaka joined the politics of Muslim League and became an influential leader of that political party and elected as an MPA [Member of Provincial Assembly] in 1964. He was also elected as a Member of Parliament [MP] in 1986 and 1988 respectively as a nominee of Jatio Party and was also a Vice chairman of central committee of Jatio Party. Later on he joined Bangladesh Nationalist Party [BNP]. In 1971 when the Liberation War was started he being an influential leader of Muslim League formed Peace [Shanti] Committee in Mothbaria area under presently Pirojpur District and became its chairman to collaborate the Pakistani occupation Army and its auxiliary forces like Razakar Bahini, Al-Badr, Al-Shams etc. Under his patronization Razakar Bahini was formed in Mothbaria area, and as per his direction, plan and conspiracy the Pakistani Army, Razakar Bahini and members of Peace Committee committed genocide and crimes against Humanity in 1971 in that locality.

VIII. Procedural History

28. The Chief Prosecutor submitted formal charges under section 9(1) of the Act of 1973 in the Tribunal on 11.05.2014 on the basis of Investigation Report of the Investigation Agency. It has been alleged in the formal charges that during the War of Liberation in 1971, the accused as Chairman of Peace Committee of Mothbaria Police Station, Pirojpur had committed crimes against Humanity and genocide including abetting, aiding, participating and providing moral support to commit such crimes in different places of Mothbaria Police Station. The Tribunal on 12.05.2014 on perusal of formal charges, statement of witnesses and the documents submitted by the

prosecution, took cognizance of offences as specified in section 3(2) read with section 4(1) of the Act of 1973 against the accused. The Tribunal issued warrant of arrest against him and the same was found unserved as he was absconding. Thereafter, the Registrar of the Tribunal by order dated 12.06.2014 was directed to take necessary measures as per provision of rule 31 of the ROP 2010. Accordingly, it was complied with as it appears from order no.3 dated 06.07.2014. As the accused did not turn up after publication of its context in the two daily national news papers, the Tribunal by its order dated 20.07.2014 appointed Mr. Mohammad Abul Hasan as State defence counsel to defend absconding accused Md. Abdul Jabbar Engineer and fixed the date for hearing on charge matter.

29. The prosecuton was then directed to furnish copies of formal charges and documents submitted therewith which it intends to rely upon for supplying the same to the learned State defence lawyer for preparation of the defence.

30. Before this Tribunal, in course of hearing the charge matter, the learned Prosecutor Mr. Rishi Kesh Shaha assisted by Mr. Md. Zahid Imam made submissions in support of framing charge against the accused in the light of the formal charges together with statements of witnesses and documents submitted therewith. While Mr. Mohammad Abul Hasan, the learned State defence counsel by filing an application for discharge of the accused, made elaborate submissions in support of discharging the accused from the charges brought against him. The Tribunal having rejected the application for discharge by its order dated 14.08.2014 framed as many as 05[five] charges against accused Md. Abdul Jabbar Engineer.

IX. Witnesses adduced by the parties

31. The prosecution submitted a list of 40[forty] witnesses along with formal charges and documents. But at the time of the trial, the prosecution has examined in all 24 [twenty four] witnesses including the investigation

officer. The prosecution has also adduced some documentary and material evidence which were duly marked as exhibits 1-11 and exhibits I-II respectively.

32. The learned State defence lawyer has cross-examined all the prosecution witnesses but did not adduce any defence witness.

X. Defence Case

33. It is the defence case that accused Abdul Jabbar Engineer was not the chairman of Peace Committee of Mothbaria Thana Unit in 1971 during the Liberation War. He never aided, abetted, facilitated or participated in any offence of crimes against Humanity or genocide as listed in the charges. The accused has been implicated in the case by the present Government for political victimization.

XI. Burden of the Prosecution

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

XII. Points to be determined

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

- (i) whether the accused was a potential leader of Peace Committee in 1971 during the Liberation War;
- (ii) whether the accused was substantially associated with Pakistani army and his activities for facilitating the commission of offences.
- (iii) whether the accused physically participated in the commission of crimes as alleged, and
- (iv) whether the allegations against the accused constitute a serious case of 'crimes against Humanity' and 'genocide'.

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

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

XIV. Summing up the prosecution Case

37 Mr. Md. Zahid Imam, the learned prosecutor referring to the evidence on record has submitted that the prosecution has proved all the charges brought against accused Md. Abdul Jabbar Engineer beyond all reasonable doubt by adducing both oral and documentary evidence and examining 24 live witnesses including the investigation officer [P.W-24]. Most of the live

witnesses are not only the eye witnesses of various atrocious acts of the accused but they are also the members of the victim families and some of them are also victims. As such their credible, corroborative and unimpeachable evidence sufficiently have proved that accused Md. Abdul Jabbar Engineer being the leader of Peace Committee physically participated and conspired, aided and facilitated in killing unarmed civilian people, plundering, setting fire to the houses, forcefully converted the Hindu religious people, accompanied his accomplice Rajakars and Pakistani occupation army during the Liberation War in 1971. And the atrocious acts of the accused and his accomplices were part of systematic attack directed against civilian population, which qualify the offences of murder and other inhumane acts [plundering and arson] as crimes against Humanity as specified in section 3(2) (a) (g) and (h) of the Act of 1973.

38. Mr. Tapos Kanti Baul, the learned prosecutor has submitted that the prosecution has also proved beyond reasonable doubt that the accused along with his accomplice Rajakars also committed offence of persecution as they committed such atrocious acts with discriminatory intent on religious ground to annihilate the Hindu religious people treating them as the enemy of Pakistan.

39. Mr. Baul, has also argued that it has been well proved from the testimonies of the witnesses that the accused had directly and indirectly [conspiracy, aiding and facilitating] participated in the commission of crimes as listed in charges along with other Rajakars and he guided and aided the Rajakars and Pakistani occupation forces at his locality to commit atrocious acts and thus the accused is also liable for those crimes in the same manner as if those were done by him alone in view of the provision of section 4(1) of the Act of 1973. Thus, accused Md. Abdul Jabbar Engineer deserves highest punishment under section 20(2) of the Act of 1973.

XV. Summing up the defence Case

40. State defence counsel Mr. Mohammad Abul Hasan reiterating the defence case has submitted that the prosecution has failed to prove that accused Md. Abdul Jabbar Engineer was the chairman of Mothbaria thana Peace Committee and he formed the Razakar Bhini in his locality to collaborate the Pakistani army. Mr. Hasan showing to many discrepancies from the evidence of prosecution witnesses has submitted that such contradiction and discrepancies in the evidence of the witnesses has made the prosecution case doubtful and shaky and as such the accused can not be convicted on the basis of such doubtful evidence. Mr. Hasan has also submitted that most of the witnesses are interested and partisan witnesses as they belong to the rival group of the accused, who was elected an M P A and M P on several occasions and as such their evidence bears no evidentiary value and thus, in absence of any legal evidence the accused is liable to be acquitted from the charges brought against him.

XVI. Status of the accused and the role played by him in committing horrific atrocities during the Liberation War in 1971

41. It has been a common knowledge to all at large in the birth history of Bangladesh that during the Liberation War in 1971 Pakistani occupation force on getting assistance from anti-liberation supporters organized auxiliary forces popularly known as Razakar Bahini, Al-Badr Bahini, Al-Shams and Peace Committee for the purpose of their operational support in executing its atrocious activities in furtherance of common plan and design to succeed their missions. In the case in hand the defence has claimed throwing suggestions to the prosecution witnesses that accused Md. Abdul Jabbar Engineer was not involved with the horrific atrocious acts taken place in the areas of Mothbaria police station as alleged by the prosecution as the chairman of Mothbaria Thana Peace Committee or a member of any auxiliary forces. State defence counsel has further claimed that the accused

did not stay at Mothbaria rather he used to stay in Dhaka during the Liberation War in 1971.

42. Now let us scrutinise and evaluate both the oral and documentary evidence presented by the prosecution as to the involvement of the accused in any manner in committing the horrific atrocities as the chairman of Peace Committee of Mothbaria or a direct perpetrator, abettor, aider or a member of the said any auxiliary forces during the Liberation War in 1971.

43. It has been revealed from the evidence of P.W-01 Md. Shoabur Rahman that accused Abdul Jabbar Engineer took over the charge of Peace Committee at Mothbaria Thana unit and he had given appointment to local Iskander Ali Mridha as Razakar commander. P.W-02 Abdul Quddus Matabbor has narrated that he heard from publicity through miking that accused Abdul Jabbar being the chairman of Mothbaria thana Peace Committee would hold a meeting at Tushkhali High School field at 11.00 A.M, on 16 May, in 1971. From the evidence of P.W-03 Abdul Maker it is found that accused Abdul Jabbar as a leader of Peace Committee held a meeting in Tushkhali High School field while P.W-04 Md. Siddique Matabbor has claimed that accused Md. Abdul Jabbar Engineer as an associate of Pakistani occupation force held a meeting at Tushkhali High School field and he also formed Razakar Bahini at Mothbaria. P.W-05 Abul Kalam Shorif has narrated that in support of existence of Pakistan accused Abdul Jabbar Engineer held a meeting at Mothbaria area and he also formed Razakar Bahini and Peace Committee while P.W-06 Shontosh Kumar Mitro has told that a meeting was held in front of Tushkhali School and many atrocious acts took place in and around the Mothbaria thana area under the leadership of accused Abdul Jabbar. P.W-07 Most. Nurjahan Begum and P.W-08 Mozammel Hoque Shorif both have narrated that accused Abdul Jabbar held a meeting in Tushkhali High School field which he heard from

the mouth of local people. P.W-09 Ahmed Mia has narrated that he knows accused Abdul Jabbar Engineer who was an MPA of their locality. After forming Peace Committee of the then Pirojpur Sub-Division accused Abdul Jabbar had been chairman of Mothbaria thana Peace Committee and having gone to Mothbaria he formed a Razakar Bahini headed by his relative Iskander Mridha. P.W-10 Bimol Chandra Bepari has stated that he knows the accused of the case since his boyhood and his [accused] house was at Khetachira village under Mothbaria police station. He [accused] had been elected MPA once during the regime of Pakistan. He was the chairman of Mothbaria Thana Peace Committee in 1971 and also formed Razakar Bahini at the area of which his relative Iskander Mridha was made commander. P.W-12 Dilip Kumar Paik has stated that he knows accused Abdul Jabbar who was involved with the politics of Muslim League in their locality. During the Liberation War in 1971 he constituted Peace Committee at Mothbaria thana of which he became chairman. At the same time he also formed Razakar Bahini comprising around 100/200 people under the leadership of Iskander Mridha. Jonoproshad Paik as P.W-13 has stated that accused Abdul Jabbar was a leader of Muslim League. He was the chairman of Mothbaria thana Peace Committee in 1971. Iskander Mridha had been Razakar commander of Mothbaria Thana unit under direction of accused Md. Abdul Jabbar Engineer. P.W-14 Mohandra Audhikari has stated that he knows accused Md. Abdul Jabbar Engineer of this case who was a leader of Muslim League. He formed Peace Committee at Mothbaria and he had been chairman of that committee when the Liberation War was started in 1971. He had also given appointment to Iskander Mridha as Razakar commander of his locality. P.W-15 Bokuli Rani Halder has narrated that on 16 October in 1971 at about 12.00 P.M a group of Razakars made an attack in their village at the instigation of accused Md. Abdul Jabbar Engineer. P.W-16 Tikendra Nath Mojumder has stated that during the Liberation War accused

Md. Abdul Jabbar Engineer had been the chairman of Mothbaria thana Peace Committee and under the leadership of Iskander Mridha a Razakar Bahini was formed by the instruction of the accused. Members of Peace Committee and Razakar Bahini committed heinous offences like killing, genocide, arson, looting and forceful conversion in the Mothbaria areas under instruction of accused Md. Abdul Jabbar Engineer. P.W-17 Birendra Nath Biswas has stated that accused Md. Abdul Jabbar Engineer was a leader of Convention Muslim League during Pakistan regime. Supporting Pakistani occupation force he [accused] assumed office of Peace Committee of Mothbaria thana unit as chairman and under his instruction Razakar Bahini was formed at Mothbaria. P.W-18 Dipok Kummar Biswas has stated that accused Md. Abdul Jabbar Engineer was a leader of Muslim League. During the Liberation War he was an associate of Pakistani invading force and he had been made chairman of Mothbaria Thana Peace Committee after its formation. He himself formed a Razakar Bahini at Mothbaria of which his relative Iskandar Mridha was made commander. P.W-19 Shontosh Kumar Khorati has narrated that accused Abdul Jabbar Engineer was a leader of Muslim League in 1971 and also formed Razakar Bahini in the locality during the Liberation War. P.W-20 Md. Bachchu Akond has stated that accused Md. Abdul Jabbar Engineer was an influential leader of Muslim League at Mothbaria area in 1971 and he had been elected an MPA before the election of 1970. He took steps in favour of Pakistan against the Liberation War after 26 March, 1971. Accused Md. Abdul Jabbar Engineer constituted a Peace Committee at Mothbaria of which he had made himself as chairman. His relative Iskander Mridha had been made Razakar commander after its formation by him. By his instigation and direct participation many occurrences such as genocide and crimes against Humanity took place in the areas of Mothbaria. P.W-21 Keshob Chandra Biswas has also narrated that before the Liberation War accused Md. Abdul

Jabbar Engineer was a leader of Muslim League. During the Liberation War he constituted Mothbaria Peace Committee of which he became chairman and after forming Razakar Bahini he appointed Iskandar Mridha as its commander. P.W-22 Bidhan Chandra Kirtonia has stated that he knows accused Md. Abdul Jabbar Engineer who was a leader of Muslim League before 1971. During the Liberation War the accused had been made chairman of Mothbaria Peace Committee and Razakar Bahini of that area was also formed under his instruction. Accused Md. Abdul Jabbar Engineer and his accomplice Razakar forces made attacks in their locality at different places during the Liberation War. P.W-24 Md. Helal Uddin who is the investigating officer of this case, seized a list [exhibit no.07] of Mothbaria Upozila Razakars and members of Peace Committee prepared by Pirojpur District Unit Command of Bangladesh Mukti Juddha Songshad where in serial no. 01 the name of accused Md. Abdul Jabbar Engineer has been mentioned as the chairman of thana Peace Committee. A photo copy of paper clipping of Daily Janakantha dated 23.01.2001 under the caption **"gVewoqv AWU tgavex QvI mn AmsL" gublyK nZv KtiQ ReIvi BiAbqvi ewmbx"** has been marked as exhibit 01 in which the role and involvement of the accused in the commission of offences of atrocious acts during the Liberation War at Mothbaria area, have been narrated clearly. Prosecution has submitted a book named Associates of Pakistan Army, 1971 compiled and edited by S.M Shamsul Arifin [first publication in December, 2008 and 2nd publication in February, 2009] which has been marked as material exhibit-II wherein a list of names of 45 anti-liberation leaders has been given including the name of accused Md. Abdul Jabbar Engineer in serial no. 39.

44. Upon scrutiny of the evidence presented by the aforesaid witnesses coupled with documentary proof as discussed above, it is found that all the witnesses by corroborating and supporting each other have deposed against

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46. Getting such invitation and instruction from the leaders of Central Peace Committee the accused formed a Peace Committee at Mothbaria. Thereafter, he along with his followers started committing atrocious acts accompanied by Pakistani invading forces in the locality.

47. Consisting of around 150/200 members a Razakar Bahini of Mothbaria unit was also formed under his leadership and he rendered an

appointment to his relative Iskander Mridha as the commander of that unit. It also finds support from the exhibit nos. 01 and 07 and material exhibit no II that the accused was the chairman of Mothbaria Peace Committee during the Liberation War in 1971 and under his leadership many atrocious activities were taken place. As the above mentioned three documents were made before commencement of the trial against the accused, it can be considered as true documents which have also substantial values. From the evidence of eye witnesses and documentary proof it has revealed that the accused had directly participated in the commission of offences of mass killing in addition to aiding, facilitating and abetting the members of auxiliary forces to have committed atrocious acts during the Liberation War. In view of the facts and circumstances as narrated above we are constrained to hold that the prosecution has successfully proved the role and status of the accused as a leader of Peace Committee of Mothbaria Thana unit and an influential person of Razakar Bahini, an auxiliary force of Pakistani army, as specified in section 2(a) of the Act of 1973 at the time of commission of offences for which the accused has been charged. Besides, even in the capacity of an individual or 'a member of group of individuals' the accused is liable to be prosecuted under section 3(1) of the Act if he is found to have committed the offences as specified under section 3(2) of the Act of 1973.

Adjudication of charge no. 01

[Murder, plundering, arson and deportation committed at Fuljhuri, Kulupara and Nathpara on 16 May, 1971]

48. **Summary charge:** Accused Md. Abdul Jabbar Engineer was a leader of Muslim League, an anti-liberation political party, and had been a member of Peace Committee of Pirojpur district. He took over charge of the Peace Committee of Mothbaria as chairman during the War of Liberation in 1971. At his instigation a Razakar Bahini was formed under the leadership of

Iskandar Ali Mridha. The accused being the chairman of Peace Committee and his accomplice Iskandar Ali Mridha along with armed members of Razakar Bahini held a public meeting at Tushkhali High School field on 16 May, 1971 at about 10.00 /11.00 A.M. and he gave a speech directing his followers to bring freedom-fighters Abdur Razzak Biswas and Motaleb Sharif after apprehending them. According to his instruction Razakars and other anti-liberation people under the leadership of Iskandar Ali Mridha went to the houses of those two freedom-fighters of village Fuljhuri at about 4.00 P.M. and gun fired at them seeing them in their houses. On the spot Motaleb Sharif succumbed to his bullet injuries while Abdur Razzak Biswas died three days later due to sustaining bullet injuries. In continuation to that incident, at the instance of the accused, on the same day in the evening armed Razakars and others made an attack and plundered the houses of around 100/150 Hindu people at Kulupara and Nathpara and set fire to those houses before their departure. Subsequently, many Hindus as well as freedom loving people of the aforesaid Kulupara and Nathpara were deported to India. Thus, the accused has been charged for abetting, instigating, aiding and facilitating the commission of offences of murder, plundering, arson and deportation as crimes against Humanity as specified in section 3(2)(a)(g) and (h) read with section 4(1) of the Act of 1973 which are punishable under section 20(2) of the said Act.

Discussion and evaluation of evidence and findings:

49. To prove charge no. 01, the prosecution has examined as many as fifteen live witnesses [P.Ws-01 to 10, 12 to 14, 20 and 24].

50. **P.W-01 Md. Shoabur Rahman Golder** has deposed that during the War of Liberation in 1971 he was 35 years old. Then he was an employee of Pakistan Administrative Staff College in Lahore. On 29 February, 1971 he came to Dhaka and on 4 April he went to his village home at Tushkhali. In

1971, after the '7th March Speech' of Bangabandhu Sheikh Mujibur Rahman and '26th March Declaration of Independence' everywhere in Bangladesh 'Sangram Parishad' was established even in Tushkhali union. He gave training to about 60/65 students, youths, farmers, workers and general people in the field of Tushkhali Dak Banglow [Rest House]. Similarly, Abdur Razzak Biswas and Motaleb Sharif of village Fuljhuri and Dulu of village Jhalokati, who were the members of the army working in Comilla cantonment, were also giving training to the local people at Sarojani High School field situated at village Fuljhuri. He has further deposed that the then leader of Pakistan Muslim League accused Md. Abdul Jabbar Engineer was elected as an MPA in 1967-68. During the Liberation War, 1971 the accused took over charge of the Mothbaria Thana Peace Committee and he made Iskandar Ali Mridha as Razakar commander. On 15 May, 1971 an announcement was made through mike that on the following day i.e. on 16 May accused Md. Abdul Jabbar Engineer and his accomplices would hold a meeting at Tushkhali High School field. On 16 May at about 10.00 A.M. the accused and his accomplices came to that school field and at about 11.00 A.M. the meeting was started. Behind the said school there was a small room from where he [P.W-01] keeping himself hidden saw and listened to the meeting. The accused in his speech declared the Awami League and its supporters, freedom-fighters and their supporters and the Hindu community as the enemies of Pakistan and then ordered Razakar commander Iskandar Ali Mridha to bring Abdur Razzak Biswas and Motaleb Sharif, whether dead or alive, before him after apprehending them. After the meeting, the accused went to Tushkhali Dak Banglow to form Peace Committee and, as per his said order Iskandar Ali Mridha along with armed Razakars went to village Fuljhuri to apprehend Abdur Razzak Biswas and Motaleb Sharif. At about 4.00 P.M. they came to know that Abdur Razzak Biswas and Motaleb Sharif had been killed. He has also deposed that as per order of the accused, on the

same day just before dusk the local members of Razakar Bahini having gone to Kulupara and Nathpara plundered the valuables of Hindu people and then set fire to their houses.

51. In cross-examination, this witness has stated that Muslim League leaders namely, Khorshed Ali Loskor and Julfikar Ali, now dead, also addressed the meeting held in the Tushkhali High School field. On 16 May 1971, he did not meet any person at Tushkhali bazaar, but on that day he keeping himself hidden in a room behind the said school observed the meeting. He has denied the defence suggestion that he has deposed falsely.

52. **P.W-02 Abdul Kuddus Matabbor** has stated that during the War of Liberation in 1971 he was 16 years old and a student of class IX in Tushkhali High School. On 16 May, 1971 at dawn he heard miking that accused Abdul Jabbar Engineer, the chairman of Mothbaria Thana Peace Committee, would address a meeting to be held at Tushkhali High School field at 11.00 A.M. on that day. Accordingly, on that day at about 10.30 A.M. he [P.W-02] went to the place of meeting and found 200/300 people present there and at about 11.00 A.M. the meeting was started and many leaders of Muslim League addressed the meeting. At the end of the meeting accused Abdul Jabbar Engineer addressed the meeting and said that supporters of Awami League and the Liberation War, freedom-fighters and the members of Hindu community were the enemies of Pakistan and all of them would have been annihilated and, he ordered the local Razakar commander Iskandar Ali Mridha to bring the freedom-fighters Razzak Biswas and Motaleb Sharif of village Fuljhuri, whether alive or dead, before him after apprehending them. Thereafter, the accused asked the people present in the said meeting to go with him to the local Dak Banglow where union Peace Committee would be formed. Then he [P.W-02] and other people along with the accused went to the Dak Banglow from where they came to know that Razzak Biswas and Motaleb Sharif were shot dead. Thereafter, he came to know that Razzak

Biswas died 2/3 days later sustaining bullet injuries. Before leaving the Dak Banglow the accused ordered the Razakars present there to plunder the houses of the supporters of Awami League, freedom-fighters, supporters of the War of Liberation and Hindus and set them on fire. He has further stated that then the members of Razakar Bahini as per said order of the accused having plundered 100/150 houses of Hindus including the houses of Debu Nath , Tutu Nath and Suresh Kulu of Kulupara and Nathpara set them on fire.

53. In cross-examination, this witness has stated that Azahar Miah, now dead, was the head-master of Tushkhali High School in 1971. On 16 May, 1971 at dawn an announcement was made through mike from a rickshaw in front of his house. The houses of Razzak Biswas and Motaleb Sharif are about one kilometer away from his house. He has further stated that on 16 May, 1971 including himself Siddique Matubbar, Khaleque Talukder and many others were present in the meeting held at Tushkhali High School field. He has denied the defence suggestions that the accused was not the chairman of Mothbaria Thana Peace Committee and in 1971 the accused used to live at Dhaka and he never went to Mothbaria and he has deposed falsely.

54. **P.W-03 Abdul Maker** has testified that in 1971 he was 35 years old and he had a shop in Tushkhali bazar. On 15 May, 1971 while he was in his shop he heard an announcement through mike that accused Abdul Jabbar Engineer would address a meeting to be held on 16 May at 11.00 A.M. at Tushkhali High School field. He attended the meeting in the afternoon while the accused was addressing the meeting. The accused in his speech said that the members of Awami League, freedom-fighters and the people of Hindu community were the enemies of Pakistan and they would be annihilated. The Hindus could only survive if they converted themselves to Muslims. In the said speech, the accused ordered local Razakar commander

Iskandar Ali Mridha to bring freedom-fighters Razzak Biswas and Motaleb Sharif of Fuljhuri village whether alive or dead, before him after apprehending them. Thereafter, the accused asked the people present in the meeting to go to Tushkhali Dak Banglow where Peace Committee would be formed and, accordingly he [P.W-03] also went to that Dak Banglow along with other people. He has further testified that after sometime they came to know that Razzak Biswas and Motaleb Sharif were shot dead. Thereafter, he came to know that Razzak Biswas died 2/3 days later sustaining bullet injuries. Before leaving the Dak Banglow the accused ordered the Razakars and the members of Peace Committee present there to plunder the houses of Awami League's agents and the Hindu people of Kulupara and Nathpara and set them on fire. After having received the said order from the accused local Razakars and the members of Peace Committee plundered the houses of Hindus of Kulupara and Nathpara and then set them on fire. About 100/150 houses of Kulupara and Nathpara were plundered and set on fire including the houses of Debu Nath, Tutu Nath and Suresh Kulu.

55. In cross-examination P.W-03 has stated that he is not a member of any political party. He knows accused Abdul Jabbar Engineer who was at Mothbaria in 1971. After the meeting held in Tushkhali High School field he went to the Dak Banglow following the accused. He has denied the defence suggestions that on 16 May 1971 the accused did not go to Tushkhali Dak Banglow to form Peace Committee and he has deposed falsely.

56. **P.W.04 Md. Siddique Matubbor** has deposed that on 15 May, 1971 he heard that accused Abdul Jabbar Engineer would address a meeting to be held on 16 May at 11.00 A.M. at Tushkhali High School field. On 16 May in the afternoon he attended the meeting while the accused was addressing the meeting. In his speech the accused told that the supporters of Awami League, freedom-fighters and the people of Hindu community were the enemies of the country and he ordered the persons present in the meeting to

prepare a list of freedom-fighters. The Hindus could only survive if they converted themselves to Muslims. In the said speech the accused ordered local Razakar commander Iskandar Ali Mridha to bring freedom fighters Razzak Biswas and Motaleb Sharif of village Fuljhuri, whether alive or dead, before him after apprehending them. Thereafter, Iskandar Ali Mridha along with some Razakars started to go towards village Fuljhuri and the accused asked the persons present in the meeting to go to Tushkhali Dak Banglow where Peace Committee would be formed. Accordingly, he [P.W-04] went to the Dak Banglow. When they reached Dak Banglow they came to know that freedom -fighters Razzak Biswas and Motaleb Sharif of village Fuljhuri were shot dead by Razakars. Thereafter, he knew that Razzak Biswas did not die on the spot but he died 2/3 days later. P.W-04 has further deposed that while the accused was staying at Tushkhali Dak Banglow he ordered the Razakars present there to plunder and set fire to the houses of Hindu people of Kulupara and Nathpara. After having received the said order Razakars and the members of Muslim League attacked Kulupara and Nathpara and plundered about 100/150 houses of Hindu people including the houses of Debu Nath, Tuku Nath, Sona Nath and Suresh Kulu and then they set fire to those houses.

57. In cross-examination this witness has stated that though he is not a freedom-fighter but he has knowledge about the incidents taken place in 1971. He has six daughters and one son and his eldest son is 25 years old. He has denied the defence suggestion that he has deposed falsely.

58. **P.W-05 Abul Kalam Sharif** has testified that he is 60 years old. On 15 May, 1971 there was a miking in Tushkhali bazar that on 16 May at 11.00 A.M. accused Abdul Jabbar Engineer would address a meeting to be held at Tushkhali High School field . On 16 May, 1971 at about 12.30 P.M. he went to the place of meeting where he found 200/300 persons present there. The accused was presiding over the meeting and some other leaders were

sitting beside him. Accused Abdul Jabbar Engineer in his speech asked the persons present in the meeting to annihilate the supporters of Awami League, freedom-fighters and the members of Hindu community. The Hindus could only survive if they converted themselves to Muslims. At one stage the accused ordered local Razakar commander Iskandar Ali Mridha to bring freedom-fighters Abdur Razzak Biswas and Motaleb Sharif of village Fuljhuri, whether alive or dead, before him after apprehending them. Thereafter, the accused asked the persons present in the meeting to go to Tushkhali Dak Banglow where Peace Committee would be formed. Then he [P.W-05] along with others went to Tushkhali Dak Banglow following the accused. At about 4.00 P.M. one message came to Dak Banglow that Abdur Razzak Biswas and Motaleb Sharif of village Fuljhuri were shot dead. The accused ordered the Razakars and the persons present in the Dak Banglow to attack Hindu Kulupara and Nathpara. P.W-05 has further stated that after the said order the Razakars and their accomplices attacked Kulupara and Nathpara and having plundered the houses set them on fire.

59. In cross-examination P.W-05 has stated that he himself witnessed the incident of arson. He has denied the defence suggestions that he went to Dak Banglow following the accused to become a member of Peace Committee and he has deposed falsely.

60. **P.W-06 Shontosh Kumar Mitra** has stated that he is now 63 years old and he is a freedom-fighter. On 16 May, 1971 in the morning having gone to Mothbaria he came to know that accused Abdul Jabbar Engineer, Razakar commander Iskandar Ali Mridha and their accomplices had been going to Tushkhali High School field to attend a meeting. Then he came back to his house. While he was in his house, before evening he saw flame of fire in Kulupara and Nathpara. He has further stated that on 16 May, 1971 in the evening he came to know that accused Abdul Jabbar Engineer ordered Razakar commander Iskander Ali Mridha to bring freedom-fighters Abdur

Razzak Biswas and Motaleb Sharif of village Fuljhuri before him after apprehending them and, then Iskander Ali Mridha along with other Razakars having gone to village Fuljhuri fired shots at Razzak Biswas and Motaleb Sharif of whom Motaleb Sharif died on the spot sustaining bullet injuries and Abdur Razzak Biswas was severely injured .

61. In cross-examination he has denied the defence suggestion that the accused did not order Razakar commander Iskandar Ali Mridha to bring Razzak Biswas and Motaleb Sharif of village Fuljhuri before him after apprehending them. He has also denied the defence suggestion that as per the order of the accused Iskandar Ali Mridha along with other Razakars did not go to Fuljhuri village and did not fire shots at Razzak Biswas and Motaleb Sharif and the later one did not die on the spot sustaining bullet injury and the former one was not severely injured. He has also denied the defence suggestion that he has deposed falsely.

62. **P.W-07 Most. Nurzahan Begum** has testified that she is 70 years old and a house wife. Her husband Abdur Razzak Biswas was in Pakistan army posted in West Pakistan. In 1971 in the month of February her husband came to his village home on three months leave. In the meantime the Liberation War was started. Then her husband Abdur Razzak Biswas, Motaleb Sharif who was also an Army man and Dulu of Jhalokati came to their village and started to give training to freedom-fighters. She has further testified that on 16 May, 1971 at noon she heard that accused Abdul Jabbar Engineer, when he was addressing a meeting held in Tushkhali High School field, ordered the Razakars to bring her husband Abdur Razzak Biswas and Motaleb Sharif, whether alive or dead, after apprehending them. On that day at about 4.00 P.M. Razakar Iskandar Ali Mridha and Moslem along with many other Razakars surrounded their house and at that time they killed Motaleb Sharif by gun shot and they also fired shot at her husband Abdur Razzak Biswas and as such he was severely injured sustaining bullet

injuries. After three days her husband died and thereafter they buried her husband's dead body.

63. In cross-examination P.W.07 has stated that her husband used to give training to local youths at the local school field. She has denied the defence suggestion that her husband Abdur Razzak Biswas was injured in a battle with Pakistani army and Motaleb Sharif was also killed in the said battle. She has also denied the defence suggestion that she has deposed falsely.

64. **P.W-08 Mozzammel Haque Sharif** has deposed that in 1971 he was a student and at that time his age was 23 years. In 1971 his elder brother Motaleb Sharif was working in Comilla cantonment and Abdur Razzak Biswas of his village was in the Pakistan army. His brother came to their village home on three months leave. After enjoying the leave his brother could not go to Pakistan and as such he joined at Dhaka and the concerned authority transferred him to Comilla cantonment. In 1971, when the Liberation War was started his brother Motaleb Sharif , Razzak Biswas and Dulu @ Dulal having escaped from Comilla cantonment came to their village and started to give training to local students and youths in the local school field for joining the Liberation War. Having heard about such training the accused arranged a meeting at Tushkhali High School field on 16 May, 1971. In the said meeting accused Abdul Jabbar Engineer ordered Razakars to bring freedom-fighters Abdur Razzak Biswas and Motaleb Sharif, whether alive or dead, before him after apprehending them. He has further stated that on that day in the afternoon local Razakars and the members of Muslim League attacked their village and surrounded the houses of his brother Motaleb Sharif and Abdur Razzak Biswas. In the meantime Motaleb Sharif tried to run away but he was shot dead by the Razakars. Thereafter, they went to a nearby house where Abdur Razzak Biswas was in hideout but they caught hold of him and shot. He has further stated that Abdur Razzak

Biswas died three days later sustaining bullet injuries. On the following day the dead body of his brother Motaleb Sharif was buried.

65. In cross-examination P.W-08 has stated that in 1971 he was a student of class VIII. He has denied the defence suggestion that his brother Motaleb Sharif and Abdur Razzak Biswas sustained bullet injuries in a battle held in their village between the members of Razakar Bahini and the freedom-fighters. He has also denied the defence suggestion that he has deposed falsely.

66. **P.W-09 Ahmed Miah** has stated that in 1971 he was a student. He knew accused Abdul Jabbar Engineer who was their local MPA. In 1971 Abdur Razzak Biswas and Motaleb Sharif worked in the Pakistan army. On 15 May, 1971 an announcement was made with mike in Tushkhali bazar that on 16 May 1971 at 11.00 A.M. accused Abdul Jabbar Engineer would address a meeting to be held at Tushkhali High School field and accordingly a meeting was held on that day. In that meeting the accused came to know that a group of freedom-fighters was established in Fuljhuri village and Abdur Razzak Biswas and Motaleb Sharif were the leaders of that group. Then the accused ordered Razakars present in the meeting to bring Abdur Razzak Biswas and Motaleb Sharif, whether alive or dead, before him after apprehending them. After that order, on that day at about 4.00 P.M. a group of Rajakars went to their village Fuljhuri and shot Motaleb Sharif dead and also shot Abdur Razzak Biswas.

67. In cross-examination this witness has denied the defence suggestion that he has deposed falsely.

68. **P.W-10 Bimol Chandra Bepari** has deposed that during the Liberation War, 1971 he was a student of Tushkhali High School and at that time his age was 17 years. He knew accused Abdul Jabbar Engineer from his boyhood. During Pakistan period the accused was once elected as an MPA. In 1971, accused Abdul Jabbar Engineer was the chairman of Mothbaria

Thana Peace Committee. The accused established Razakar Bahini in Mothbaria and he made his relative Iskandar Ali Mridha as the commander of that Bahini. On 15 May, 1971 an announcement was made by mike in Tushkhali bazar that on 16 May the accused would address a meeting to be held at Tushkhali High School field. He has further deposed that on 16 May, 1971 at 11.00 A.M. the accused held a meeting at Tushkhali High School field along with 200/300 people. In that meeting the accused told that the freedom-fighters and Hindus were the enemies of Pakistan. He also told that the goods of Hindus [Gonimoter Mal] could be taken used by Muslims without price. He has further deposed that their relatives and villagers having come back to their village from the meeting told them about the speech of the accused and as such they became frightened. On that day at about 4.00 P.M they heard the sounds of 3/ 4 shots coming from Fuljhuri village. Thereafter, Razakar commander Iskandar Ali Mridha along with 70/80 Razakars attacked Kulupara and Nathpara and plundered their seven houses and then set them on fire. He saw the incidents from inside a nearby bush where they kept themselves hidden. Besides their houses, the Razakars plundered more than 100 houses of Kulupara and 50 houses of Nathpara and then set those houses on fire.

69. In cross-examination P.W-10 has stated that he is not involved with any political party. He has denied the defence suggestion that on the date of occurrence there was a battle between Pakistan army and freedom-fighters and as such the casualties took place. He has also denied the defence suggestions that he did not see the occurrence and he has deposed falsely.

70. **P.W-12 Dilip Kumar Paik** has testified that in 1971 he was a student and at that time his age was 17 years and at present he is a lawyer. In 1971 accused Abdul Jabbar Engineer formed Mothbaria Thana Peace Committee and he made himself the chairman of that Peace Committee. At the same time he also formed a Razakar Bahini consisting of 150/200 Razakars and

he made Iskandar Ali Mridha as the commander of that Bahini. He has further testified that on 16 May 1971 at about 11.00 A.M. accused Abdul Jabbar Engineer and Razakar commander Iskandar Ali Mridha along with others held a meeting at Tushkhali High School field. In that meeting the accused in his speech ordered to annihilate the supporters of Awami League, freedom-fighters, the pro-liberation people and Hindus and plunder their houses and set them on fire. He also ordered to bring the freedom-fighters Abdur Razzak Biswas and Motaleb Sharif, whether alive or dead, after apprehending them. After the meeting the accused along with his accomplices went to Tushkhali Dak Banglow and formed Peace Committee there. On that day at about 4.00 P.M. as per the order of the accused, Iskandar Ali Mridha along with a group of Razakars having gone to Fuljhuri village attacked the houses of Abdur Razzak Biswas and Motaleb Sharif and shot both of them. Motaleb Sharif instantly died on the spot sustaining bullet injuries and Abdur Razzak Biswas was severely injured and he died three days later sustaining bullet injuries. He has further testified that he himself saw the incident of killing of Abdur Razzak Biswas and Motaleb Sharif. On that day just before evening the members of Razakar Bahini having attacked Kulupara and Nathpara plundered about 150 houses and then set them on fire.

71. In cross-examination this witness has stated that he is a freedom-fighter. In 1971 accused Abdul Jabbar Engineer used to live in Mothbaria. He has denied the defence suggestions that the accused did not order to apprehend Abdur Razzak Biswas and Motaleb Sharif or that Razakars did not kill them or that Razakars did not plunder or set fire to any house of Kulupara and Nathpara. He has also denied the defence suggestion that he has deposed falsely.

72. **P.W-13 Jonoprosad Paik** has stated that during the War of Liberation, 1971 he was a student of H.S.C in Mothbaria College and at that

time his age was 19 years and he is a freedom-fighter. Accused Abdul Jabbar Engineer was a leader of Muslim League in 1971 and he was the chairman of Mothbaria Thana Peace Committee and he made Iskandar Ali Mridha as commander of Mothbaria Thana Razakar Bahini. He has further stated that he knew that on 16 May, 1971 accused Abdul Jabbar Engineer would address a meeting to be held at Tushkhali High School field. On that day [16.05.1971] at about 11.00 A.M. he went to Tushkhali and he kept himself hidden in a shop nearby Tushkhali High School and heard the speeches of the orators. The accused in his speech said that freedom-fighters, the members of Awami League and Hindu community would have been annihilated and if the Hindus wanted to live in the country they had to be Muslims. The accused ordered to bring freedom-fighters Abdur Razzak Biswas and Motaleb Sharif, whether alive or dead, before him after apprehending them. Having heard the speech of the accused he [P.W-13] came back to his house. He has further stated that on that day at about 4.00 P.M. he heard sound of shots coming from the houses of Abdur Razzak Biswas and Motaleb Sharif. At night he came to know that Motaleb Sharif was shot dead and Abdur Razzak Biswas was injured sustaining bullet injuries and he died three days later.

73. In cross-examination he has stated that in 1971 at the end of September he went to India to participate in the War of Liberation. He has denied the defence suggestions that he did not see any occurrence nor did he hear about any occurrence. He has also denied the defence suggestion that he has deposed falsely.

74. **P.W-14 Mohendra Adhikari** has deposed that in 1971 he was 41 years old and at that time he was a teacher in Tushkhali High School as 'Pandit'. He knows accused Abdul Jabbar Engineer who was a leader of Muslim League in Mothbaria. When the Liberation War was started in 1971 the accused formed Peace Committee in Mothbaria and he himself became

the chairman of that Peace Committee. The accused made Iskandar Ali Mridha as the commander of local Razakar Bahini. He has further stated that on 16 May 1971 at about 11.00 A.M. he went to Tushkhali bazar and came to know that the accused would address a meeting to be held in Tushkhali High School field. Then he went into hiding in a nearby shop from where he heard the speech of the accused. The accused Abdul Jabbar Engineer in his speech told that the Awami League, freedom-fighters and the Hindu people were the enemies of Pakistan and they would be annihilated and the Hindus could only survive if they converted themselves to Muslims. At the end of the speech the accused ordered the Razakars to bring before him the freedom-fighters Abdur Razzak Biswas and Motaleb Sharif, either alive or dead, after apprehending them. After the meeting accused Abdul Jabbar Engineer along with his accomplices went to Tushkhali Dak Banglow to form Peace Committee. At that time under the leadership of Razakar commander Iskandar Ali Mridha a group of Razakars started to go towards Fuljhuri village. Then he [P.W-14] came back to his house. On that day at about 4.00 P.M. he heard the sound of firing shots coming from the house of Razzak Biswas and at night he came to know that those Razakars shot Motaleb Sharif dead and Abdur Razzak Biswas was injured by sustaining bullet injuries and he died three days later.

75. In cross-examination P.W-14 has stated that there were other shops around the shop from where he heard the meeting, but he cannot remember the names of the owners of those shops. Before accused Abdul Jabbar Engineer many others delivered speeches including Moslem commander. He has denied the defence suggestions that during the War of Liberation in 1971 accused Abdul Jabbar Engineer used to live at Dhaka, and he did not live at his village home. He has also denied the defence suggestion that he has deposed falsely.

76. **P.W-20 Md. Bachchu Akon** has testified that in 1971 he was a student and at that time he was 18 years old and at present he is a businessman and he has been discharging his duties as the commander of freedom-fighters of Mothbaria Upozilla Muktijodha command for long 38 years. In 1971 the accused was an influential leader of Muslim League and once he was elected as an MPA before the election of 1970. When the Liberation War was started accused Abdul Jabbar Engineer formed Peace Committee at Mothbaria and he himself became the chairman of that Peace Committee. He also locally formed Razakar Bahini and he made his near relative Iskandar Ali Mridha [now dead] as the commander of that Razakar Bahini. He has further testified that on 16 May 1971 accused Abdul Jabbar Engineer along with his accomplices held a meeting at Tushkhali High School field. In that meeting the accused ordered Razakar commander Iskandar Ali Mridha to kill freedom-fighters Abdur Razzak Biswas and Motaleb Sharif of Fuljhuri village. Having received the said order from the accused, Razakar commander Iskandar Ali Mridha along with other Razakars went to Fuljhuri village and with the intention of killing they shots Abdur Razzak and Motaleb Sharif and as a result Motaleb Sharif died on the spot and Abdur Razzak Biswas died three days later sustaining severe bullet injuries. As per the direction of the accused on the same day in the evening Razakars having attacked Kulupara and Nathpara plundered 100/150 houses and set them on fire.

77. In cross-examination he has stated that after hearing the news of attack on Motaleb Sharif and Abdur Razzak Biswas by the order of accused Abdul Jabbar Engineer they did not try to make defence because they did not have any preparation. He has denied the defence suggestions that Motaleb Sharif and Abdur Razzak Biswas were killed in a battle took place between Pakistan army and freedom-fighters in Fuljhuri village. He has also denied the defence suggestion that he has deposed falsely.

78. **P.W-24 Md. Helal Uddin** is the investigation officer of this case. He has stated that during investigation he seized a list of Mothbaria Upozilla Rajakars [Exhibit-07], sent by District Magistrate, Pirojpur where in serial no. 1 the name of accused Abdul Jabbar Engineer has been mentioned as the chairman of Thana Peace Committee. He has further stated that after thorough investigation it has been proved prima facie that accused Abdul Jabbar Engineer was a leader of Muslim League in 1971 during the War of Liberation. To oppose the Liberation of Bangladesh and to support the Pakistan occupation force the accused formed Mothbaria Thana Peace Committee and he made himself the chairman of that committee. He also formed armed Razakar Bahini in Mothbaria Thana. In different meetings the accused gave declaration openly that freedom-fighters, pro-liberation people, Awami League and the members of Hindu community were the enemies of Pakistan and all of them would be annihilated and the Hindus could only survive if they converted themselves to Muslims. He has further stated that accused Abdul Jabbar Engineer being involved directly and indirectly committed murder, genocide, plundering, arson, conversion and other crimes against Humanity.

79. In cross-examination he has denied the defence suggestions that during the Liberation War in 1971, accused Abdul Jabbar Engineer was not the chairman of Mothbaria Peace Committee nor was he a leader of Muslim League. He has also denied the defence suggestion that to ensure punishment he has submitted a perfunctory investigation report against the accused.

80. On perusal of the formal charges and evidence on record it appears that there are three counts in the instant charge no.01. The first count of the charge is that accused Md. Abdul Jabbar Engineer being the chairman of Mothbaria Thana Peace Committee and his accomplice Razakars held a meeting at Tushkhali High School field on 16 May, 1971 at about

10.00/11.00 A.M. and, in that meeting the accused delivered a speech directing his followers to bring freedom-fighters Abdur Razzak Biswas and Motaleb Sharif after apprehending them and he also declared the freedom-fighters, the members of Awami League and Hindu community as the enemies of Pakistan and asked his accomplices to annihilate them. In support of this count the eye-witnesses i.e P.Ws-01, 02, 03, 04, 05, 13 and 14 have deposed. Besides, some other hearsay witnesses have also deposed supporting this count.

81. P.W-01 has deposed that on 16 May, 1971 at about 11.00 A.M. the meeting was started at Tushkhali High School field and in that meeting accused Abdul Jabbar Engineer in his speech ordered Rajakar commander Iskandar Ali Mridha to bring Abdur Razzak Biswas and Motaleb Sharif, whether alive or dead, before him after apprehending them. He has further deposed that behind the said school there was a small room from where he keeping himself hidden saw and listened to the meeting. P.W-02, P.W. 03, P.W-04 and P.W-05 have also testified that on 16 May, 1971 they attended the meeting held at Tushkhali High School field at about 11.00 A.M. In that meeting accused Abdul Jabbar Engineer ordered local Razakar commander Iskandar Ali Mridha to bring freedom-fighters Razzak Biswas and Motaleb Sharif of village Fuljhuri, whether alive or dead, before him after apprehending them. P.W. 13 and P.W. 14 have also stated that they attended the meeting held at Tushkhali High School field on 16 May, 1971 at about 11.00 A.M. and, in that meeting the accused ordered Razakars present there to bring freedom-fighters Abdur Razzak Biswas and Motaleb Sharif, whether alive or dead, before him after apprehending them. P.W-07 [wife of Abdur Razzak Biswas] and P.W. 08 [younger brother of Motaleb Sharif] have also deposed corroborating the evidence of the above mentioned eye-witnesses in respect of count no. 01 of the instant charge. Besides, the hearsay witnesses i.e P.W-06, P.W. 09, P.W. 10 and P.W-12 have also corroborated the evidence

of the above mentioned eye-witnesses including the evidence of P.Ws-07 and 08.

82. The second count of the instant charge is that according to above mentioned order of accused Md. Abdul Jabbar Engineer, Razakars under the leadership of Iskandar Ali Mridha on the same day i.e 16-05-1971 at about 04.00 P.M. went to the houses of those freedom-fighters Abdur Razzak Biswas and Motaleb Sharif of Fuljhuri village and gun fired at them in their houses and on the spot Motaleb Sharif succumbed to his severe injuries while Abdur Razzak died three days later sustaining bullet injuries. In support of this count the eye-witnesses i.e. P.Ws-07, 08 and 12 have testified. Besides these eye-witnesses, some other hearsay witnesses have also testified supporting this count. P.W-07 is the wife of said freedom-fighter Abdur Razzak Biswas. She has testified that on 16 May, 1971 at about 04.00 P.M. Razakar Iskandar Ali Mridha and Moslem along with many other Razakars surrounded their house and then killed Motaleb Sharif by gun shot and they also shot her husband Abdur Razzak Biswas and as such he was injured sustaining severe bullet injuries. She has further testified that three days later her husband also died and thereafter they buried his dead body. P.W-08 is the younger brother of aforesaid Motaleb Sharif. He has stated that on 16 May, 1971 in the afternoon local Razakars and the members of Muslim League attacked their village and surrounded the houses of his elder brother Motabeb Sharif and Abdur Razzak Biswas. In the meantime Motaleb Sharif tried to run away but he was shot dead by Razakars. He has further stated that thereafter the Razakars went to a nearby house wherein freedom-fighter Abdur Razzak Biswas was in hidden and they caught hold of him from inside that house and shot him. He has also stated that Abdur Razzak Biswas died three days later sustaining bullet injuries. Another eye-witness P.W-12 supporting the evidence of said two eye-witnesses [P.Ws-07 and 08] has also deposed that on 16 May, 1971 at

about 04.00 P.M. as per the order of accused Abdul Jabbar Engineer, Iskandar Ali Mridha along with a group of Razakars having gone to Fuljhuri village attacked the houses of Abdur Razzak Biswas and Motaleb Sharif and shot both of them. Motaleb Sharif instantly died on the spot and Abdur Razzak Biswas was severely injured and he died three days later sustaining bullet injuries. Besides these three eye-witnesses, the hearsay witnesses i.e. P.Ws-01, 02, 03, 04, 05, 06, 09, 10, 13, 14 and 20 have also corroborated the evidence of the above mentioned three eye-witnesses. There is a list of the martyrs of Mothbaria Upazilla in exhibit-06 sent by the District Magistrate, Pirojpur where the names of Abdur Razzak Biswas and Motaleb Sharif are present.

83. The third count of the instant charge no. 01 is that in continuation to said two incidents mentioned in count nos. 01 and 02, on the same day [16-05-1971] at the eve of the evening Razakars and others made an attack and plundered the houses of around 100/150 Hindu people at Kulupara and Nathpara and set fire to those houses before their departure by the instance of accused Abdul Jabbar Engineer. In support of this count P.Ws-10 and 12, the eye-witnesses, have stated that on 16 May, 1971 at 04.00 P.M. Razakar commander Iskandar Ali Mridha along with other Razakars having killed Motaleb Sharif and Abdur Razzak Biswas went to Kulupara and Nathpara and attacked there and then they plundered their seven houses and set them on fire. They have further stated that besides their houses, Razakars also plundered more than 100 houses of Kulupara and 50 houses of Nathpara and then set fire to those houses. Besides these two eye-witnesses, the hearsay witnesses i.e. P.Ws-01, 02, 03, 04, 05, 06 and 20 have also deposed in line with the testimonies of above mentioned two eye-witnesses [P.Ws-10 and 12] in respect of count no. 03 of the instant charge.

84. At the time of summing up the case by way of argument, the learned prosecutor Mr. Zafar Imam submitted that as per the order of accused Md.

Abdul Jabbar Engineer, Razakar commander Iskandar Ali Mridha along with other Razakars on 16 May, 1971 killed freedom-fighters Motaleb Sharif and Abdur Razzak Biswas of Fuljhuri village and committed plundering and arson in Kulupara and Nathpara as alleged in charge no.01 and, as such, the accused is liable for the commission of those atrocities. Per contra, Mr. Abul Hossain, the learned State defence counsel contended that there is no allegation that accused Md. Abdul Jabbar Engineer himself committed those murders, plundering and arson. The simple allegation brought in the instant charge against the accused is that by the order of the accused the said atrocities were committed by Razakars under the leadership of Razakar commander Iskandar Ali Mridha, but there was no formal superior-subordinate relationship between accused Md. Abdul Jabbar Engineer and Iskandar Ali Mridha and other Razakars. Mr. Abul Hossain further contended that the accused did not give any order directly to Iskandar Ali Mridha and other Razakars who allegedly committed those atrocities and the so called order was not in writing or in any particular form. Lastly, the learned State defence counsel contended that the accused had no effective control over Iskandar Ali Mridha and other Razakars who allegedly committed those atrocities mentioned in the instant charge.

85. The above mentioned legal issues raised by the learned counsels of both parties are very important in the instant charges which require to be addressed. To address the issues we like to refer to some decisions and observations made by other international crimes Tribunals.

86. In the case of **Prosecutor v. Limaj, Bala and Musliu the ICTY Trial Chamber [Case No. IT-03-66-T, November 30, 2005, para-515]** has observed that-

"It is not necessary to demonstrate the existence of a formal superior- subordinate command structure or relationship between the orderer and the perpetrator; it

is sufficient that the orderer possesses the authority, either de jure or de facto, to order the commission of an offence, or that his authority can be reasonably implied."

87. In the case of **Prosecutor v. Kordic and Cerkez the ICTY Trial Chamber [Case No. IT-95-14/2, February, 26, 2001, para-388]** held to the effect-

"No formal superior-subordinate relationship is required for a finding of 'ordering' so long as it is demonstrated that the accused possessed the authority to order."

88. The **ICTY Appeals Chamber in the case of Prosecutor v. Kordic and Cerkez [Case No. IT-95-14/2-A, December 17, 2004, para-28]** also held as under-

"A formal superior-subordinate relationship between the accused and the perpetrator is not required."

89. In the case of **Prosecutor v. Seromba the ICTR Appeals Chamber [Case No. ICTR-2001-66-A, March 12, 2008, paras-201-202]** recalled that-

" superior responsibility under Article 6 (3) of the Statute is a distinct mode of responsibility from individual responsibility for ordering a crime under Article 6(1) of the Statute. Superior responsibility under Article 6(3) of the Statute requires that the accused exercise 'effective control' over his subordinates to the extent that he can prevent them from committing crimes or punish them after they committed the crimes. To be held responsible under Article 6(1) of the Statute for ordering a crime, on the contrary, it is sufficient that the accused have authority over the perpetrator of the crime, and that

his order have a direct and substantial effect on the commission of the illegal act."

90. **The ICTR Appeals Chamber in the case of Kamubanda v. Prosecutor [Case No. ICTR-99-54A-A, September 19, 2005, para-75]** also observed as below-

"Superior responsibility under Article 6(3) of the Statute requires that the accused exercise 'effective control' over his subordinates to the extent that he can prevent them from committing crimes or punish them after they committed the crimes. To be held responsible under Article 6(1) of the Statute for ordering a crime, on the contrary, it is sufficient that the accused have authority over the perpetrator of the crime, and that his order have a direct and substantial effect on the commission of the illegal act. In the Semanza Appeal Judgment, the Appeals Chamber made clear that no formal superior-subordinate relationship is required."

91. After consideration of the above mentioned decisions / observations made by the **ICTY** and **ICTR** Trial / Appeals Chambers it appears that to be held responsible a formal superior-subordinate relationship between the accused and the perpetrator is not required. It is sufficient that the order giver possesses the authority, either *de jure* or *de facto*, to order the commission of an offence, or that his authority can be reasonably implied.

92. The next point is that whether order needs to be given directly to person who performs the offences. In this respect we may refer to the case of **Prosecutor v. Strugar [Case No. IT-01-42-T, January 31, 2005, para-331]** where the **ICTY Trial Chamber** observed that-

"The order need not be given 'directly' to the individual executing it"

93. The ICTY Trial Chamber also took the same view in the case of **Prosecutor v. Blaskic** [Case No. IT-95-14, March 3, 2000, para-282] as under-

"An order does not need to be given by the superior directly to the person (s) who perform(s) the actus reus of the offence."

94. It is clear from the above mentioned two observations made by the ICTY Trial Chamber that order need not be given directly to person who performs the offence.

95. Another point raised by the learned State defence Counsel is that whether order needs to be in writing or in any particular form. The answer is simply 'no'. In this regard we may refer to the case of **Prosecutor v. Limaj, Bala and Musliu** [Case No. IT-03-66-T, November 30, 2005, para-515] where the ICTY Trial Chamber observed that-

"There is no requirement that the order be given in writing, or in any particular form....."

96. The ICTY Trial Chamber also took the same view in the case of **Prosecutor v. Brdjanin** [Case No. IT-99-36-T, September 1, 2004, para-270] which is as follow-

"The order does not need to be given in any particular form."

97. The ICTR Appeals Chamber also took the same view in the case of **Kamubanda v. Prosecutor** [Case No. ICTR-99-54A-A, September 19, 2005, para-76] which is quoted below-

" There is no requirement that an order be given in writing or in any particular form....."

98. It may be reiterated that to be held responsible a formal superior-subordinate relationship between the accused and the perpetrator is not required. It is sufficient that the orderer possesses the authority, either *de*

jure or *de facto*, to order the commission of an offence, or that his authority can be reasonably implied. Now the question arises whether accused Md. Abdul Jabbar Engineer possessed the authority, either *de jure* or *de facto*, to order the commission of the offences mentioned in the instant charge.

99. It may be mentioned here that it has already been revealed from the evidence of the prosecution witnesses as discussed earlier that the offences of murder, plundering and arson mentioned in charge no. 01 were committed by the Razakar commander Iskandar Ali Mridha and his accomplice other local Razakars by the order of accused Md. Abdul Jabbar Engineer. We have already noticed that a good number of prosecution witnesses have stated that the accused was a leader of Muslim League and he was once elected as an M P A and, during the Liberation War, 1971 the accused was the chairman of Mothbaria thana Peace Committee and he locally established Razakar Bahinai in Mothbaria and he made his relative Iskandar Ali Mridha as the commander of that Bahini. If this fact is true, then we can infer that accused Md. Abdul Jabbar Engineer possessed the authority, both *de jure* and *de facto*, to order local Razakar Commander Iskandar Ali Mridha and other local Razakars for the commission of alleged murder, plundering and arson as listed in charge no. 01. The above mentioned circumstances also prove the existence of the said order of the accused. **The ICTR Trial Chamber in the case of Kamubanda v. Prosecutor [Case NO. ICTR-99-54A-A, September 19, 2005, para-76]** and **the ICTY Trial Chamber in the case of Prosecutor v. Limaj, Bala and Musliu [Case No. IT-03-66-T, November 30, 2005 para-515]** observed that the existence of an order may be proven through circumstantial evidence.

100. Upon scrutiny of the testimonies of the prosecution live witnesses as discussed earlier, we find that the evidence of the witnesses are very much corroborative to each other and of them some eye-witnesses are the members of victim families. Most of the witnesses have directly implicated

accused Md. Abdul Jabbar Engineer with the offences of murder, plundering and arson as listed in the instant charge, but they have not implicated the accused with the offence of deportation as alleged in the instant charge. The learned State defence counsel has cross-examined these live witnesses, but could not shake their evidence, and as such, there is no reason to disbelieve their evidence.

101. Considering all the facts, circumstances and the evidence on record as discussed above, we are led to arrive at a decision that the prosecution has been able to prove beyond reasonable doubt that on 16 May, 1971 as per order of accused Md. Abdul Jabbar Engineer local Razakar commander Iskandar Ali Mridha and his accomplice local Razakars killed freedom-fighters Motaleb Sharif and Abdur Razzak Biswas of Fuljhuri village when they were unarmed residing at their respective houses and committed plundering and arson in a large scale in Kulupara and Nathpara. Thus, the accused is criminally liable under section 4(1) of the Act of 1973 and found him guilty for substantially abetting and facilitating the actual commission of the offences of murder, plundering and arson as crimes against Humanity as specified in section 3(2)(a)(g) and (h) of the Act of 1973 which are punishable under section 20(2) of the said Act.

Adjudication of charge no. 02

[Murder, plundering and arson committed at Fuljhuri on 17 May, 1971]

102. **Summary charge:** Accused Md. Abdul Jabbar Engineer being the chairman of Mothbaria Peace Committee along with 30/35 Pakistani army men and another group of around 40/50 armed members of Razakar Bahini under the leadership of Iskandar Ali Mridha went to Fuljhuri village on 17 May, 1971. On that day from 09.00 A.M. to till night in a pre-planned manner the accused and his aforementioned accomplices jointly again made attack on the houses of freedom-fighters Abdur Razzak Biswas and Motaleb Sharif and set fire to both the houses after plundering. During arson dead

body of Motaleb Sharif was in his house and burnt to ashes. Accused Md. Abdul Jabbar Engineer ordered his armed accomplices to kill Saroda Kanta Paik seeing him to flee away and according to his order his armed Bahini shot him dead in front of his house. Under the leadership of the accused Pakistani army men along with Razakars cordoned Fuljhuri village and set fire to around three hundred sixty houses after plundering them. Thus, the accused has been charged for abetting, instigating, aiding, facilitating and substantially contributing to the commission of offences of murder, plundering and arson as crimes against Humanity as specified in section 3(2)(a)(g) and (h) read with section 4(1) of the Act of 1973 which are punishable under section 20(2) of the said Act.

Discussion and evaluation of evidence and finding:

103. **P.W-01 Md. Shoabur Rahman Golder** has deposed that on 17 May, 1971 at 9.00 A.M. Mothbaria thana Razakar commander Iskandar Ali Mridha along with 40/45 other Razakars went to Fuljhuri village from Gudighata and then accused Abdul Jabbar Engineer having come to Tushkhali also went to Fuljhuri village along with 30/35 Pakistani army men. At that time they having seen Saroda Kanta Paik to run away, accused Abdul Jabbar Engineer ordered his accomplices to shoot him and, according to his said order Saroda Kanta Paik was shot dead by the Pakistani army men on the spot. He has also deposed that at the same time Pakistani army men and Razakars jointly plundered 360 houses of Fuljhuri village and set them on fire and, at that time the dead body of freedom-fighter Motaleb Sharif was burnt to ashes.

104. In cross-examination he has denied the defence suggestions that on 17 May, 1971 at 9.00 A.M. Mothbaria thana Razakar commander Iskandar Ali Mridha along with 40/45 Razakars did not go to Fuljhuri village and the accused did not order to kill Saroda Kanta Paik when he was running away. He has also denied the defence suggestion that he has deposed falsely.

105. **P.W-02 Abdul Kuddus Matabbor** has testified that on 17 May, 1971 at about 8.00 A.M. he went to Tushkhali School and at about 9.00 A.M. he came to know that Razakar commander Iskandar Ali Mridha along with 40/50 Razakars went to Fuljhuri village from Gudighata. At the same time accused Abdul Jabbar Engineer along with 30/35 Pakistani army men went to Fuljhuri village from Tushkhali. He has further testified that they also went to Fuljhuri village following the accused. Razakar commander Iskandar Ali Mridha and his accomplices and accused Abdul Jabbar Engineer and his accomplice Pakistani army men met to each other in front of the house of Paik situated at Fuljhuri village. Then accused Abdul Jabbar Engineer ordered his accomplice army men to kill Saroda Kanta Paik seeing him to flee away and, according to his order Pakistani army men shot him dead. He has also testified that thereafter they plundered 360 houses including the houses of Razzak Biswas, Motaleb Sharif, Kumud Paik and Dilip Paik of Fuljhuri village and then set them on fire. At that time the dead body of Motaleb Sharif was burnt to ashes.

106. In cross-examination P.W-02 has stated that the houses of Motaleb Sharif and Razzak Biswas are about one kilometre away from his house. On 17 May, 1971 he went to school to attend his class. He has denied the defence suggestions that accused Abdul Jabbar Engineer was not the chairman of Mothbaria thana Peace Committee and the accused did not order Pakistani army men to kill Saroda Kanta Paik seeing him to flee away and according to his order Pakistani army men did not shoot him dead. He has also denied the defence suggestion that he has deposed falsely.

107. **P.W-03 Abdul Maker** has stated on 17 May, 1971 at about 9.00 A.M. accused Abdul Jabbar Engineer along with Pakistani army men from Tushkhali bazar and Razakar commander Iskandar Ali Mridha along with 40/50 Razakars having gone attacked Fuljhuri village. At that time accused Abdul Jabbar Engineer ordered Pakistani army men to kill Saroda Kanta

Paik seeing him to flee away and as per his order Pakistani army men shot him dead. Thereafter, they plundered about 360 houses including the houses of Kumud Paik, Dilip Paik, Razzak Biswas and Motaleb Sharif and then set them on fire. At that time the dead body of Motaleb Sharif was burnt to ashes in his house.

108. In cross-examination he has stated that he is not a member of any political party. He knows accused Abdul Jabbar Engineer who was in Mothbaria area in 1971. He has denied the defence suggestion that on 17 May, 1971 at 9.00 A.M. accused Abdul Jabbar Engineer and Razakar commander Iskandar Ali Mridha along with their accomplice Razakars and Pakistani army men did not attack Fuljhuri village. He has also denied the defence suggestion that the accused did not order Pakistani army men to kill Saroda Kanta Paik seeing him to flee away and as per his order Pakistani army men did not shoot him dead. He has further denied that he has deposed falsely.

109. **P.W-04 Md. Siddique Matabbor** has deposed that on 17 May , 1971 at about 10.00/11.00 A.M. Razakar commander Iskandar Ali Mridha along with his 40/45 accomplices started to go to Fuljhuri village from Gudighata and at that time he [P.W-04] was in Tushkhali bazar. At the same time under the leadership of accused Abdul Jabbar Engineer 30/35 Pakistani army men also started to go to Fuljhuri village from Tushkhali. He has further deposed that they themselves also started to go following the accused and Pakistani army. When the accused and Pakistani army arrived at in front of the house of Paik, Saroda Kanta Paik seeing them was attempting to run away and then the accused ordered to kill him and as per his order Pakistani army men shot him dead on the spot. He has also deposed that the accused and Razakar commander Iskandar Ali Mridha and their said accomplices jointly plundered about 360 houses including the houses of Razzak Biswas, Motaleb Sharif, Kumud Paik and Dilip Paik of Fuljhuri village and set fire to

those houses and at that time the dead body of Motaleb Sharif was burnt by fire.

110. In cross-examination this witness has stated that though he is not a freedom-fighter but he has knowledge about the incidents taken place in 1971. He has denied the defence suggestion that he has deposed falsely.

111. **P.W-05 Abul Kalam Sharif** has testified that on 17 May, 1971 at about 9.00/9.30 A.M. he having gone to Tushkhali bazar heard that as per the order of accused Abdul Jabbar Engineer, under the leadership of Razakar commander Iskandar Ali Mridha a group of Razakars from Gudighata and the accused himself along with 30/35 Pakistani army men from Amur Bunia were going to Fuljhuri village and when they reached in front of the house of Paik they saw Saroda Kanta Paik there and then Saroda Kanta Paik seeing them tried to flee away and, at that time the accused ordered the Pakistani army men to shoot him and accordingly the Pakistani army men shot him dead. He has also testified that accused Abdul Jabbar Engineer and Razakar commander Iskandar Ali Mridha and their accomplices thereafter jointly plundered about 360 houses including the houses of Dilip Paik, Roycharan Paik, Razzak Biswas and Motaleb Sharif and then set fire to those houses and by that fire the dead body of Motaleb Sharif was burnt to ashes in his house.

112. In cross-examination he has stated that he himself witnessed the incident of arson. He has denied the defence suggestion that on 16 and 17 May, 1971 Pakistani army went to Fuljhuri village to recover arms. He has denied the defence suggestion that he has deposed falsely.

113. **P.W-06 Shontosh Kumar Mitra** has stated that on 17 May, 1971 he came to know that Pakistani army having been directed by accused Abdul Jabbar Engineer went to Fuljhuri village and shot Saroda Kanta Paik dead when he was trying to flee away.

114. In cross-examination this witness has denied the defence suggestion that on 17 May, 1971 he did not come to know that Pakistan army being directed by accused Abdul Jabbar Engineer went to Fuljhuri village and shot Saroda Kanta Paik dead when he was trying to flee away. He has also denied the defence suggestion that he has deposed falsely.

115. **P.W-07 Most. Nurzahan Begum** has testified that she is 70 years old and a housewife. Her husband Abdur Razzak Biswas was in Pakistan army posted in West Pakistan. In 1971 in the month of February her husband came to his village home on three months leave. In the meantime the Liberation War was started. Then her husband Abdur Razzak Biswas , Motaleb Sharif who was also an army man, and Dulu of Jhalokati came to their village and started to give training to freedom-fighters. She has further stated that on 17 May, 1971 Razakars and Pakistani army plundered their houses and set them on fire. Thereafter, they also having plundered the house of Motaleb Sharif set it on fire. The dead body of Motaleb Sharif was burnt by fire in his house. At one stage the said Razakars and Pakistani army shot Saroda Kanta Paik dead and having plundered about 360 houses of Fuljhuri village they set them on fire. Her husband Abdur Razzak Biswas died three days later sustaining bullet injuries.

116. In cross-examination she has stated that she keeping herself hidden in the house of another person witnessed the incidents of plundering and arson of the houses including their house. She has denied the defence suggestion that she did not witness the incidents of plundering and arson. She has also denied the defence suggestion that she has deposed falsely.

117. **P.W-08 Mozzammel Haque Sharif** has deposed that in 1971, his elder brother Motaleb Sharif was working in Comilla cantonment and Abdur Razzak Biswas of his village was in the Pakistan army. His brother came to their village home on three months leave. After enjoying the leave his brother

could not go to Pakistan and as such he joined at Dhaka and the concerned authority transferred him to Comilla cantonment. In 1971, when the Liberation War was started his brother Motaleb Sharif, Razzak Biswas and Dulu alias Dulal having escaped from Comilla cantonment came to their village and started to give training to local students and youths in the local school field for joining the Liberation War. He has further deposed that having heard about such training the accused arranged a meeting in Tushkhali High School field on 16 May, 1971. In the said meeting accused Abdul Jabbar Engineer ordered Razakars to bring his brother Motaleb Sharif and Abdur Razzak Biswas, whether alive or dead, before him after apprehending them. On that day in the afternoon local Razakars and the members of Muslim League attacked their village and surrounded their house and the house of Abdur Razzak Biswas. In the meantime his elder brother Motaleb Sharif tried to flee away but he was shot dead by the Razakars and Abdur Razzak Biswas died three days later sustaining bullet injuries caused by them. He has further stated that on the following day i.e. on 17 May, 1971 at about 9.00 A.M. Razakar Bahini and Pakistan army came to their Fuljhuri village from two separate directions and accused Abdul Jabbar Engineer, Razakar commander Iskandar Ali Mridha and Moslem Mridha were with them. When they were coming to their village, on the way they killed Saroda Kanta Paik by gun shot. Thereafter they having come to their house plundered and set the house on fire and due to such fire the dead body of his elder brother Motaleb Sharif was burnt to ashes. Thereafter, they plundered about 360 houses including the house of freedom-fighter Razzak Biswas and then they set them on fire. At the time of that incident he and his brother Sattar Sharif keeping hidden themselves in a paddy field witnessed the said incident therefrom. He has also deposed that after the departure of the accused and his accomplices they came back to their house and buried the dead body of his brother Motaleb Sharif.

118. In cross-examination P.W-08 has stated that in 1971 he was a student of class VIII. He has denied the defence suggestion that his brother Motaleb Sharif and Abdur Razzak Biswas died sustaining bullet injuries in a battle held in their village between the members of Razakar Bahini and the freedom-fighters. He has also denied the defence suggestion that he has deposed falsely.

119. **P.W-09 Ahmed Miah** has stated that in 1971 he knew accused Abdul Jabbar Engineer who was their local MPA. In 1971, Abdur Razzak Biswas and Motaleb Sharif used to work in the Pakistan Army. In 1971, accused Abdul Jabbar Engineer was the chairman of Mothbaria thana Peace Committee and Iskandar Ali Mridha was the Razakar commander of Mothbaria thana. On 17 May, 1971 at about 9.30 A.M. under the leadership of accused Abdul Jabbar Engineer a group of Pakistani army men and under the leadership of Razakar commander Iskandar Ali Mridha another group of Razakars again attacked Fuljhuri village. At that time accused Abdul Jabbar Engineer ordered to kill Saroda Kanta Paik seeing him to run away and according to his order Pakistani army shot him dead. He has further deposed that then they went to the house of Motaleb Sharif and plundered his house and set it on fire and due to such fire the dead body of Motaleb Sharif was burnt to ashes inside his house. Thereafter, the accused and his accomplices plundered about 360 houses of their village including the house of Razzak Biswas and thereafter they set fire to those houses.

120. In cross-examination he has denied the defence suggestion that on 17 May, 1971 Pakistan army did not go to Fuljhuri village. He has also denied the defence suggestion that in 1971 accused Md. Abdul Jabbar Engineer never lived at Mothbaria, but he used to live at Dhaka. He has also denied the defence suggestion that he has deposed falsely.

121. **P.W-12 Dilip Kumar Paik** has deposed that in 1971, accused Abdul Jabbar Engineer formed Mothbaria thana Peace Committee and he made himself chairman of that Peace Committee. At the same time he also formed a Razakar Bahini consisting of 150/200 Razakars and he made Iskandar Ali Mridha as the chairman of that Bahini. He has further deposed that on 17 May, 1971 at about 9.00 A.M. accused Abdul Jabbar Engineer along with 30/35 Pakistani army men and Razakar commander Iskandar Ali Mridha along with 40/45 Razakars attacked their village Fuljhuri. By the order of the accused Pakistani army men and Razakars plundered about 360 houses including their house, and the houses of Motaleb Sharif and Abdur Razzak Biswas of Fuljhuri village, and then set them on fire. At that time Pakistani army killed his cousin Saroda Kanta Paik by gun shot as per the order of the accused. Due to said fire the dead body of Motaleb Sharif was burnt inside his house.

122. In cross-examination he has stated that in 1971 accused Abdul Jabbar Engineer used to live at Mothbaria. He has denied the defence suggestion that since his father was a contestant of the accused in the election he has deposed falsely against him.

123. **P.W-13 Jonoprosad Paik** has stated that accused Abdul Jabbar Engineer was a leader of Muslim League in 1971 and he was the chairman of Mothbaria thana Peace Committee and he made Iskandar Ali Mridha as the commander of Mothbaria thana Razakar Bahini. He has further stated that on 17 May, 1971 at about 9.00 A.M. accused Abdul Jabbar Engineer along with 30/40 Pakistani army men and Razakar commander Iskandar Ali Mridha along with 40/50 Razakars having attacked their village Fuljhuri, plundered about 360 houses including their house and set them on fire. At that time his uncle Saroda Kanta Paik being afraid of was trying to flee away and then as per order of the accused Pakistani army killed him by gun shot.

He has further stated that after the departure of the accused and his accomplices in the evening, they came back to their house at 9.00 P.M. and buried the dead body of his uncle Saroda Kanta Paik.

124. In cross-examination he has stated that in 1971 at the end of September he went to India to participate in the War of Liberation. He has denied the defence suggestions that he did not see any occurrence nor did he hear about any occurrence. He has also denied the defence suggestion that he has deposed falsely.

125. **P.W-14 Mohendra Adhikari** has testified that when the Liberation War was started in 1971, the accused formed Peace Committee in Mothbaria and he himself became the chairman of that Peace Committee. The accused made Iskandar Ali Mridha as the commander of local Razakar Bahini. He has further testified that on 17 May, 1971 he was staying in his house. On that day at about 9.00 A.M. under the leadership of local Razakar commander Iskandar Ali Mridha 40/45 Razakars and under the leadership of accused Abdul Jabbar Engineer 30/35 Pakistani army men attacked their village Fuljhuri and at that time he and other villagers to save their lives started to run hither and thither. At that time their neighbour Saroda Kanta Paik was trying to run away, then Pakistani army shot him dead by the order of the accused. Thereafter, the Razakars and Pakistani army men plundered about 360 houses of their village and then set fire to those houses. He has also testified that they keeping themselves in hidden in a nearby bush witnessed the said incidents therefrom. After the departure of the accused and his accomplices, the villagers buried the dead body of Saroda Kanta Paik.

126. In cross-examination he has denied the defence suggestion that during the War of Liberation in 1971 accused Abdul Jabbar Engineer used to live in

Dhaka, and he did not live at his village home. He has also denied the defence suggestion that he has deposed falsely.

127. **P.W-20 Md. Bachchu Akon** has deposed that in 1971, the accused was an influential leader of Muslim League and once he was elected as an MPA before the election of 1970. When the Liberation War was started accused Abdul Jabbar Engineer formed Peace Committee in Mothbaria and he himself became the chairman of that committee. He also locally formed Razakar Bahini and he made his near relative Iskandar Ali Mridha [now dead] as the commander of that Bahini. He has further deposed that on 17 May, 1971 at about 9.00 A.M. under the leadership of accused Abdul Jabbar Engineer 30/35 Pakistani army men and under the leadership of Iskandar Ali Mridha 40/45 Razakars jointly attacked their village Fuljhuri. At that time by the order of the accused Pakistani army killed Saroda Kanta Paik of their village by gun shot. He has further deposed that thereafter by the order of the accused, Pakistani army men and Razakars plundered 360 houses of their village including their house and then set them on fire. He has also testified that he keeping himself hidden witnessed the said incidents committed in their village.

128. In cross-examination he has denied the defence suggestion that accused Abdul Jabbar Engineer was a popular man in his locality. He has also denied the defence suggestion that he has deposed falsely.

129. **P.W-24 Md. Helal Uddin** is the investigation officer of this case. He has stated that during investigation he seized a list of Mothbaria Upozilla Rajakars [Exhibit-7] where in serial no. 1 the name of accused Abdul Jabbar Engineer has been mentioned as the chairman of Thana Peace Committee. He has further stated that after thorough investigation it has been proved prima facie that accused Abdul Jabbar Engineer was a leader of Muslim League in 1971 during the War of Liberation. To oppose the Liberation of

Bangladesh and to support the Pakistan occupation force the accused formed Mothbaria Thana Peace Committee and he made himself the chairman of that committee. He also formed armed Razakar Bahini in Mothbaria Thana. In different meetings the accused gave declaration openly that freedom-fighters, pro-liberation people, Awami League and the members of Hindu community were the enemies of Pakistan and all of them would be annihilated and the Hindus could only survive if they converted themselves to Muslims. He has further stated that accused Abdul Jabbar Engineer being involved directly and indirectly committed murder, genocide, plundering, arson, conversion and other crimes against Humanity.

130. In cross-examination he has denied the defence suggestions that during the Liberation War in 1971, accused Abdul Jabbar Engineer was not the chairman of Mothbaria Peace Committee nor was he a leader of Muslim League. He has also denied the defence suggestion that to ensure punishment he has submitted a perfunctory investigation report against the accused.

131. It appears from the formal charges and evidence on record that there are also three counts in charge no. 02. The first count of the charge is that accused Md. Abdul Jabbar Engineer along with 30/35 Pakistani army men and another group of 40/45 Razakars under the leadership of Iskandar Ali Mridha went to Fuljhuri village on 17 May, 1971. On that day from 9.00 A.M. to till night the accused and Iskandar Ali Mridha and their accomplices jointly made attack on the houses of Abdur Razzak Biswas and Motaleb Sharif and set fire to their houses after plundering. During arson the dead body of Motaleb Sharif was burnt to ashes in his house. In support of this count the eye-witnesses [P.Ws-02, 04, 08, 14 and 20] have deposed in the Tribunal. Besides, some other hearsay witnesses have also deposed supporting this count.

132. P.W-02 has stated that on 17 May, 1971 at about 8.00 A.M. he went to Tushkhali School and at about 9.00 A.M. he came to know that Razakar commander Iskandar Ali Mridha along with 40/50 Razakars and accused Abdul Jabbar Engineer along with 30/35 Pakistani army men went to Fuljhuri village and then he [P.W-02] also went to Fuljhuri village following the accused. Thereafter the accused and Iskandar Ali Mridha and their accomplices plundered 360 houses including the houses of Razzak Biswas and Motaleb Sharif of Fuljhuri village and then set them on fire. He has also stated that at that time the dead body of Motaleb Sharif was burnt to ashes in his house. P.W-04 has testified that on 17 May, 1971 at about 10.00/11.00 A.M. Razakar commander Iskandar Ali Mridha along with his 40/50 accomplices started to go to Fuljhuri village from Gudighata and at that time he [P.W-04] was at Tushkhali bazar. At the same time under the leadership of accused Abdul Jabbar Engineer 30/35 Pakistani army men also started to go to Fuljhuri village from Tushkhali. He has further testified that then he [P.W-04] also started to go following the accused and his accomplices. The accused and Razakar commander Iskandar Ali Mridha and their accomplices having arrived at Fuljhuri village jointly plundered about 360 houses including the houses of Razzak Biswas and Motaleb Sharif and then set fire to those houses and at that time the dead body of Motaleb Sharif was burnt by fire. P.W-08 is another eye-witness who is the younger brother of said Motaleb Sharif. He has also stated supporting the count no. 02 under discussion that on 17 May, 1971 at about 9.00 A.M. Razakar Bahini and Pakistani army came to their Fuljhuri village from two separate directions and accused Abdul Jabbar Engineer , Razakar commander Iskandar Ali Mridha and Moslem Mridha were with them. They having come to their village plundered their house and then set the house on fire and due to such fire the dead body of his elder brother Motaleb Sharif was burnt to ashes in his house. He has also stated that at the time of that incident he

and another brother Sattar Sharif keeping hidden themselves in a paddy field witnessed the said incident therefrom. P.W.14 has deposed that on 17 May, 1971 he was staying in his house at Fuljhuri village. On that day at about 9.00 A.M. under the leadership of local Razakar commander Iskandar Ali Mridha 40/50 Razakars and under the leadership of accused Abdul Jabbar Engineer 30/35 Pakistani army men attacked their village and plundered about 360 houses and then set them on fire. He has further deposed that he [P.W-14] and others keeping themselves in hidden in a nearby bush witnessed the said incidents therefrom. Another eye-witness P.W-20 has stated that on 17 May, 1971 at about 9.00 A.M. under the leadership of accused Abdul Jabbar Engineer 30/35 Pakistani army men and under the leadership of Iskandar Ali Mridha 40/45 Razakars jointly attacked Fuljhuri village and by the order of the accused, Pakistani army men and Raakars plundered 360 houses including their house and then set them on fire. He has further stated that he keeping himself hidden witnessed the said incidents committed in their village. It appears that the evidence of the above mentioned eye-witnesses are corroborative to each other. Besides the said eye -witnesses, the hearsay witnesses i.e. P.Ws-01, 03, 05, 07, 09, 12 and 13 have also corroborated the evidence of the above mentioned eye-witnesses.

133. The second count of the instant charge is that at the time of commission of the offences as mentioned in count no. 01 as discussed above, accused Md. Abdul Jabbar Engineer ordered his accomplices to kill Saroda Kanta Paik of Fuljhuri village seeing him to flee away, and as per his order his accomplices shot him dead in front of his house. In support of this count the above mentioned five eye-witnesses [P.Ws-02, 04, 08, 14 and 20] have also deposed in the Tribunal. P.W-02 has testified that on 17 May, 1971 at about 9.00 A.M. accused Abdul Jabbar Engineer ordered his accomplice army men to kill Saroda Kanta Paik seeing him to flee away, and

according to his order Pakistani army men shot him dead. P.W. 04 has deposed that on 17 May, 1971 when the accused and his accomplice Pakistani army men arrived at in front of the house of Paik, Saroda Kanta Paik seeing them was attempting to run away and then the accused ordered to kill him and according to his order Pakistani army men shot him dead on the spot. P.W-08 has stated that on 17 May, 1971 at about 9.00 A.M. when accused Abdul Jabbar Engineer and Razakar commander Iskandar Ali Mridha along with Razakars and Pakistani army men were coming to their Fuljhuri village, on the way they killed Saroda Kanta Paik by gun shot. Other two eye-witnesses i.e. P.W-14 and P.W-20 have also testified that on 17 May, 1971 at about 9.00 A.M. under the leadership of Razakar commander Iskandar Ali Mridha 40/45 Razakars and under the leadership of accused Abdul Jabbar Engineer 30/35 Pakistani army men attacked their Fuljhuri village and at that time their neighbour Saroda Kanta Paik was trying to run away, then Pakistani army shot him dead by the order of the accused. The evidence of above mentioned five eye-witnesses are very much corroborative to each other in respect of count no. 02 of the instant charge. Besides these eye-witnesses, the other hearsay witnesses [P.Ws-01, 03, 05, 06, 07, 09, 12 and 13] have also stated in line with the testimonies of the above mentioned five eye-witnesses in respect of count no. 02 under discussion. There is a list of the martyrs of Mothbaria Upazilla in exhibit 6 sent by the District Magistrate, Pirojpur where the name of Saroda Kanta Paik is one of them.

134. The third count of charge no. 02 is that at the time of commission of the offences as mentioned in count nos. 01 and 02 as discussed above, under the leadership of accused Abdul Jabbar Engineer Pakistani army along with Razakars set fire to around three hundred sixty houses of Fuljhuri village after plundering them. The above mentioned five eye-witnesses [P.Ws-02, 04, 08, 14 and 20] have also deposed implicating the accused with the count no-03. P.W. 02 has deposed that on 17 May, 1971 at

the time of occurrence the accused and his accomplice Pakistani army and Razakars plundered 360 houses including the houses of Razzak Biswas, Motaleb Sharif , Kumud Paik and Dilip Paik of Fuljhuri village and then set them on fire. P.W-04 has testified that on 17 May, 1971 when other offences took place, accused Abdul Jabbar Engineer and Razakar commander Iskandar Ali Mridha and their accomplices jointly plundered about 360 houses including the houses of Razzak Biswas, Motaleb Sharif , Kumuk Paik and Dilip Paik of Fuljhuri village and then set fire to those houses. The other eye-witnesses i.e. P.Ws-08, 14 and 20 have also stated in line with the testimonies of above mentioned two eye-witnesses [P.Ws-02 and 04] in respect of count no. 03 of the instant charge. The hearsay witnesses [P.Ws-01, 03, 05, 07, 09, 12 and 13] have also corroborated the testimonies of the above mentioned five eye-witnesses in respect of count no. 03.

135. At the time of summing up the case by way of argument, the learned State defence counsel Mr. Abul Hasan contended that the allegations brought against accused Md. Abdul Jabbar Engineer in the instant charge is that the accused and Razakar commander Iskandar Ali Mridha and their accomplice Pakistani army and Razakars on 17 May, 1971 from 9.00 A.M. to till night committed plundering and arson at Fuljhuri village, but it is not alleged specifically in the charge that the accused directly participated in the commission of those offences nor did he order any particular person(s) to commit the same. It is further alleged in the instant charge that as per the order of the accused his accomplice Pakistani army killed Saroda Kanta Paik in front of his house, but the accused had no authority over the Pakistani army who allegedly killed Saroda Kanta Paik. As such the accused cannot be held liable for the commission of the offences of plundering, arson and murder. In reply to the said contention of the learned State defence counsel, Mr. Zafar Imam , the learned prosecutor argued that in the instant charge, the accused has been charged for abetting, instigating, aiding, facilitating

and substantially contributing to the commission of offences of murder, plundering and arson as crimes against Humanity as specified in section 3(2)(a)(g) and (h) read with section 4(1) of the Act of, 1973, and as such, direct participation of the accused in the commission of those offences is not necessary, though the accused had direct participation in the commission of those offences. The learned prosecutor further argued that since against the accused there is allegation of aiding and abetting the commission of those offences, it was not necessary that the accused had authority over his accomplice Pakistani army who killed Saroda Kanta Paik as per his order. As such the accused is liable for the commission of the offences of murder, plundering and arson as listed in charge no. 02.

136. **The ICTR Trial chamber in the case of Prosecutor Vs. Kamubanda [Case No. ICTR-95-54A-T, January 22, 2004, para -588] observed that-**

“ Article 6(1) reflects the principle that criminal responsibility for any crime in the Statute is incurred not only by individuals who physically commit that crime, but also by individuals who participate in and contribute to the commission of a crime in other ways, ranging from its initial planning to its execution, as specified in the five categories of acts in this Article: planning, instigating, ordering, committing, or aiding and abetting. ”

137. Similar observation was also made by the **ICTR Trial Chamber in the cases of Prosecutor V. Bisengimana [Case No. ICTR-00-60-T, April 13, 2006, para-31] and Prosecutor V. Kajelijeli [Case No. ICTR 98-44A-T, December 1, 2003, para - 757]**.

138. In respect of responsibility for acts committed by others the **ICTR Trial Chamber in the case of Prosecutor v. Rutaganda [Case No. ICTR - 96-3, December 6 , 1999, para-35]** also observed as under-

“ The Accused may..... be held criminally [responsible] for criminal acts committed by others if, for example, he planned such acts, instigated another to commit them, ordered that they be committed or aided and abetted another in the commission of such acts.”

139. **The ICTY Appeals Chamber in the case of Prosecutor v. Vasiljevic [Case No. IT-98-32-A, February 25, 2004]** set out the *actus reus* and *mens rea* of aiding and abetting which is as follows-

“ (i) The aider and abettor carries out acts specifically directed to assist, encourage or lend moral support to the perpetration of certain specific crime (murder, extermination, rape, torture, wanton destruction of civilian property, etc.), and this support has a substantial effect upon the perpetration of the crime.[.....]

(ii) In the case of aiding and abetting, the requisite mental element is knowledge that the acts performed by the aider and abettor assist [in] the commission of the specific crime of the principal. [.....]”

140. According to above observation, ‘aiding and abetting’ is an act of rendering practical assistance, encouragement or moral support, which has substantial effect on the perpetration of certain crime. **The ICTY Trial**

Chamber in the case of **Prosecutor v. Strugar** [Case No. IT-01-42-T, January 31, 2005, para-349] observed that –

“ Aiding and abetting has been defined in the case-law of the Tribunal as the act of rendering practical assistance, encouragement or moral support, which has substantial effect on the perpetration of a crime, before, during or after the commission of the crime, and irrespective of whether these acts took place at a location other than that of the principal crime. ”

141. Proof that the conduct of the aider and abettor had a causal effect on the act of the principal perpetrator is not required. Even actual physical presence of the accused is not required. **The ICTY Trial Chamber in the case of Prosecutor v. Tadic** [Case No. IT-94-1, May 7, 1997, para-691] observed as under-

“ Accused 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. ”

142. The **ICTR Appeals Chamber in the case of Nahimana, Barayagwiza and Ngeze v. Prosecutor** [Case No. ICTR-99-52-A, November 28, 2007, para-660] also observed that-

“ The Appeals Chamber..... recalls that, contrary to what the Appellant appears to contend, the accused does not need to be actually present when the instigated crime is committed.”

143. From the foregoing discussions it appears that it is not presupposed that the accused must be present at the scene of the crime, nor that his contribution be direct one. That is to say that the role of the individual in the commission of the offence need not always be a tangible one. This is particularly pertinent where the accused is charged with 'aiding' or 'abetting' of a crime. In support of this view we may refer to the case of **Prosecutor v. Kayisbema and Ruzindana** [Case No. ICTR-95-1-T, May 21, 1999, para-200].

144. The second count of the instant charge is that as per the order of accused Md. Abdul Jabbar Engineer his accomplice Pakistani army killed Saroda Kanta Paik by gun shot in front of his house. In support of this count most of the prosecution witnesses including five eye-witnesses [P.Ws. 02, 04, 08, 14 and 20] have deposed in the Tribunal. In respect of this count the learned State defence counsel Mr. Abul Hasan contended that the accused had no authority over the Pakistani army who allegedly killed Saroda Kanta Paik and as such the accused is not responsible for the murder of Saroda Kanta Paik. It may be mentioned here that we have already taken the view that during the Liberation War, 1971, accused Md. Abdul Jabbar Engineer was the chairman of Mothbaria thana Peace Committee and he locally formed Razakar Bahini in Mothbaria thana and he made his relative Iskandar Ali Mridha as the commander of that Bahini, and as such he possessed the authority, both *de jure* and *de facto*, to order local Razakars for the commission of murder, plundering and arson as listed in charge no. 01. Now the question arises whether the accused had authority to order the Pakistani army to kill Saroda Kanta Paik, or whether it is necessary to prove that the accused had authority over the Pakistani army who allegedly killed Saroda Kanta Paik. It has already been revealed from the evidence of the prosecution witnesses as discussed above that on 17 May 1971 under the

leadership of accused Md. Abdul Jabbar Engineer 30/35 Pakistani army men and under the leadership of Razakar commander Iskandar Ali Mridha 40/45 Razakars having gone to Fuljhuri village jointly committed the atrocities as listed in the instant charge. Since the accused was not a superior army personnel he might not have *de jure* authority over the Pakistani army, but at the time of alleged occurrence, the accused guided the Pakistani army who killed Saroda Kanta Paik and, as such, he had *de facto* authority over them. However, on perusal of some observations made by the **ICTR** Appeals Chamber it appears that it is not necessary to prove that the accused had authority or effective control over the Pakistani army as his acts or omissions substantially contributed to the commission of murder of Saroda Kanta Paik by the Pakistani army. Some of those observations of the **ICTR** Appeals Chamber are quoted below-

(i) " In order to convict a defendant of aiding and abetting another in the commission of a crime, it is unnecessary to prove that he had authority over that other person; it is sufficient to prove that the defendant's acts or omissions substantially contributed to the commission of the crime by the principal perpetrator. "

[Ref: In the case of Nahimana, Barayagwiza and Ngeze v. Prosecutor, Case No. ICTR -99-52-A (Appeals Chamber), November 28, 2007, para-672]

(ii) "For an accused to be convicted of abetting an offence, it is not necessary to prove that he had authority over the principal perpetrator."

[Ref: In the case of Muhimana v. Prosecutor, Case No. ICTR-95-1B-A (Appeals Chamber), May 21, 2007, para-189].

(iii) “ For an accused to be convicted of instigating, it is not necessary to demonstrate that the accused had ‘effective control’ over the perpetrator. The requirement of ‘ effective control ’ applies in the case of responsibility as a superior under Article 6(3) of the Statute. In the case at hand, even though the Trial Chamber found that it had not been proven that the Appellant had effective control over others (and thus refused to convict him on the basis of his superior responsibility), this does not mean that the Appellant could not be convicted for instigating.”

[Ref: In the case of Semanza v. Prosecutor, Case No. ICTR-97-20-A (Appeal Chamber) , May 20, 2005, para-257]

145. Mr. Abul Hasan, the learned State defence counsel argued that none of the prosecution witnesses has stated that accused Md. Abdul Jabbar Engineer himself perpetrated any atrocities, rather most of the witnesses said that the accused only accompanied the Pakistani army, and as such the accused by so-called mere accompanying the principal perpetrators i.e. Pakistani army, did not incur any criminal liability. On the other hand, Mr. Zafar Imam, the learned prosecutor argued that a person who planned, instigated, ordered, committed or otherwise aided and abetted in the planning, preparation or execution of a crime, shall be individually responsible for the crime. He further argued that the Pakistani army in a planned way with intent to destroy, in part, the members of Hindu religions

group, freedom-fighters, pro-liberation people and the supporters of Awami League committed the barbarous atrocities in Fuljhuri village on 17 May, 1971, and accused Md. Abdul Jabbar Engineer participated in some way in the said plan and that he intended the aim of common plan, and as such the accused is criminally responsible for the alleged atrocities committed in Fuljhuri village.

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

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

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

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

“The first (or ‘basic’) category encompasses cases in which ‘all co-perpetrators, acting pursuant to a common purpose, possess the same criminal intention’ to commit the crime that is charged.”

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

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

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

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

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

“ The third category is an ‘extended’ form of joint criminal enterprise . It concerns cases involving a common purpose to commit a crime where one of the perpetrators commits an act which, while outside the

common purpose, is nevertheless a natural and foreseeable consequence of executing that common purpose. An example is a common purpose or plan on the part of a group to forcibly remove at gun-point members of one ethnicity from their town, village or region (to effect 'ethnic cleansing') with the consequence that, in the course of doing so, one or more of the victims is shot and killed. While murder may not have been explicitly acknowledged to be part of the common purpose, it was nevertheless foreseeable that the forcible removal of civilians at gunpoint might well result in the deaths of one or more of the civilians."

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

154. From the above discussions we find some differences between the 'Joint Criminal Enterprise' [JCE] and the 'Aiding and Abetting'. **The ICTR Trial Chamber in the case of Prosecutor v. Mpambara [Case No. ICTR-01-65-T, September 11, 2006, paras-17, 37]** provided guidance on distinguishing between Joint Criminal Enterprise and other forms of liability, such as Aiding and Abetting which are quoted as below-

" Joint criminal enterprise may be distinguished from aiding and abetting in two respects. Aiding and abetting requires a 'substantial effect upon the perpetration of the crime'; by contrast, no minimum threshold of participation is required in a joint criminal enterprise. The extent or significance of the contribution may, however, be important in showing that the perpetrator possessed the requisite criminal intent. The aider and abettor, on the other hand, need only be aware of the criminal intent of the principal whom he assists or encourages. A person who contributes substantially to the commission of a crime by another person, and who shares the intent of that other person, is criminally [responsible] both as a co-perpetrator and as an aider and abettor. "

" Aiding and abetting is a form of accomplice [responsibility], whereas participation in a joint criminal enterprise is a form of direct commission, albeit with other persons. There are important differences in the mental and objective elements for each of these forms of participation..... As the Appeals Chamber has stated, 'it would be inaccurate

to refer to aiding and abetting a joint criminal enterprise.' The fact that the same material facts may prove both aiding and abetting and participation in a joint criminal enterprise does not diminish the importance of distinguishing between the two."

155. In the instant charge [charge no. 02], it is alleged that on 17 May, 1971 accused Md. Abdul Jabbar Engineer and his accomplice Pakistani army and local Razakars having gone to Fuljhuri village jointly committed the offences of plundering and arson and by the order of the accused Pakistani army killed Saroda Kanta Paik in front of his house. In support of this charge almost all the prosecution witnesses including five eye-witnesses as mentioned earlier have deposed in the Tribunal. The prosecution witnesses have directly implicated the accused with the offences as listed in the instant charge. The learned State defence counsel has cross-examined them, but could not shake their evidence, and as such, there is no reason to disbelieve their evidence. The acts of the accused, as it appears from the evidence of the witnesses, had substantial effects upon the perpetration of the said crimes of murder, plundering and arson as crimes against Humanity. The perpetrators possessed the requisite criminal intent to destroy, in part, the members of Hindu religious group, freedom-fighters, pro-liberation people and the supporters of Awami League who were infavour of the Liberation War. The accused was aware of the said criminal intent of the principal perpetrators i.e the Pakistani army men and local Razakars whom he assisted or encouraged. As such the accused who contributed substantially to the commission of the crimes of murder, plundering and arson as listed in charge no. 02 by the Pakistani army men and local Razakars, and who shared above mentioned intent of the said principal perpetrators, is criminally responsible both as an aider and abettor and as a

co-perpetrator through participating in the Joint Criminal Enterprise [the first or basic category].

156. Considering all the facts, circumstances, the evidence on record and the legal aspects as discussed above, we are led to arrive at a decision that the prosecution has been able to prove beyond reasonable doubt that on 17 May, 1971 accused Md. Abdul Jabbar Engineer and his accomplice Pakistani army men and local Razakars having gone to Fuljhuri village committed the offences of murder, plundering and arson as listed in charge no. 02. Thus the accused is criminally liable under section 4(1) of the Act of 1973 and found him guilty for abetting, instigating, aiding, facilitating and substantially contributing to the commission of offences of murder, plundering and arson as crimes against Humanity as specified in section 3(2)(a)(g) and (h) of the Act of 1973 which are punishable under section 20(2) of the said Act.

Adjudication of charge no. 03

[Genocide, murder and other inhumane acts (plundering and arson) at Naligram under Mothbaria police station, Pirojpur.]

157. **Summary charge:** On 22.05.1971 at about 09.00 A.M accused Md. Abdul Jabbar Engineer being the chairman of Mothbaria thana Peace Committee along with his accomplices having gone to Naligram started attacking and firing therein. Being afraid of such attack unarmed innocent villagers were trying to flee away, at the same time the accused shot one Sokha Nath Khorati to death by his own pistol and other accomplices under his direction by firing shots also killed ten other unarmed innocent Hindu religious persons with intent to destroy, in whole or in part the Hindu religious group. Thereafter, they also plundered houses of sixty Hindu families of that village and set them on fire. Thus the accused has been charged for participating, abetting and facilitating the commission of

offences of genocide, murder and other inhumane acts [plundering and arson] as crimes against Humanity as specified in section 3(2)(a)(c)(g) and (h) read with section 4(1) of the Act of 1973.

Discussion and evaluation of evidence and findings

158. Prosecution, in order to prove the event narrated in this charge, relies upon P.Ws-17, 18, 19, 21 and 22 who have been thoroughly cross-examined by the State defence counsel in favour of the fugitive accused and also a photo copy of paper clipping of Daily Janakantha dated 23.01.2001 marked as exhibit no. 01. P.W-17 is a paternal cousin of victim Sokha Nath Khorati who was killed by accused. P.W-18 is the son of deceased Surendra Nath Biswas while P.W-19 is the younger brother of victim Sokha Nath Khorati. Uncle of P.W-21 Nishi Kanta Biswas was killed at the instigation of the accused by Razakar Nur Hossain. P.W-22 is the brother-in-law of victim Surendra Nath Biswas who's two other brothers were also killed with him sustaining bullet injuries.

159. **Birendra Nath Biswas as P.W-17** has testified that he was about 23 years old during the Liberation War. Nali is a traditional village in which most of the inhabitants are from Hindu religious community. During the Liberation War Razakars made attack, at least fifth to seventh times in the said Naligram but went in vain. On 22.05.1971 [7th Joistho, Saturday] around 09 O'clock in the morning accused Abdul Jabbar Engineer, local Razakar commander Iskander Ali Mridha [now dead] and their other accomplices being armed came from west and made attack jointly in their Naligram village. At that time he [P.W-17] along with some youths of the village tried to resist them. At the order of the accused, members of Razakar Bahini started firing shots on them indiscriminately. In order to save life many youths fled the village away. Razakar Nur Hossain Miah [now dead] killed his father Nishi Kanta Biswas with his rifle in hand. At the same time

accused Md. Abdul Jabbar Engineer killed his maternal cousin Sokha Nath Khorati with his pistol and other accomplices under his [accused] instruction by firing shots indiscriminately also killed Suren Biswas, Jitendro Nath Biswas, Upendro Nath Biswas, Gonesh Chandra Mistri, Nepal Chandra Mistri, Bosanto Howlader, Shosti Halder in total 11 Hindu religious persons on the spot with their rifles in hands. One of the Razakars fired shot by rifle aiming at him which hit his right leg and he became injured [at this stage the witness has shown his sign of injury with his right leg before the Tribunal]. Thereafter, at the instruction of the accused, Razakars plundered around sixty houses of the village and set fire on those houses at the time of their departure from the scene. Other local people came back and buried the dead bodies by covering earth at different places after evening. Accused Abdul Jabbar Engineer is not present in the dock of the Tribunal.

160. In cross-examination he has denied the defence suggestions that during the Liberation War he sustained injury with his leg at the time of combat at different places and he had never seen the accused before 1971 and at the instigation of political opponent of the accused he has given false evidence against him.

161. **Dipak Kumar Biswas as P.W-18** has deposed that he was about 22 years old during the Liberation War. On 22 May 1971 [Bangla 7 Joistho] around 09 O'clock in the morning accused Abdul Jabbar Engineer along with members of Shanti Committee and Razakar Bahini having come from west, made an attack in the village and started firing shots. He himself along with some locals assembled together and tried to resist them. Because of heavy firing shots the villagers ran hither and thither to take shelter in different places. At that time accused Abdul Jabbar Engineer by a rifle in hand shot Sokha Nath Khorati to death and at his [accused] instigation Razakar Nur Hossain [now dead] also killed his father Surendra Kanta

Biswas and grand-father Nishi Kanta [father's uncle] by firing shots while other Razakars killed Jitendra Nath Biswas, Gonesh Chandra Mistri, Nepal Chandra Mistri, Upendra Nath Mistri, Bosanto Halder, Boloram Mistri, Shosti Halder and Upendra Nath Biswas of their village by firing shots on them. In the said incident 11 persons in total of their village succumbed to bullet injuries by the accused and his accomplices. They took shelter in the opposite edge of a nearby canal. Thereafter, Razakars having entered the village plundered houses and set fire to those houses. They plundered and set fire to around sixty houses of the village including their house. After their [accused and others] departure from the scene they came back to the village and installed the dead bodies in hollows by covering earth at different places. Accused Abdul Jabbar Engineer is not present in the dock of the Tribunal.

162. In cross-examination he has told that it is not true that accused Abdul Jabbar Engineer used to stay in Dhaka in 1971. Accused used to stay at Mothbaria at that time. He has denied the defence suggestion that he has deposed falsely.

163. **Sontos Kumar Khorati as P.W-19** has testified that he was about 21 years old during the Liberation War in 1971. On 22 May, 1971 [7 Joistho] at about 9.00 A.M members of Razakar Bahini under the leadership of accused Abdul Jabbar Engineer started attacking in their Naligram and accused Abdul Jabbar Engineer killed his [witness] elder brother Sokha Nath Khorati by firing shot. Razakar Nur Hossain [now dead] shot Nishi Kanta Biswas and Surendra Nath Biswas of their village to death under instruction of accused Abdul Jabbar Engineer. He was with his brother Sokha Nath Khorati at the time of occurrence. At the instigation of accused Abdul Jabbar Engineer, Razakars liquidated Jitendra Nath Biswas, Gonesh Chandra Mistri, Nepal Chandra Mistri, Upendra Nath Mistri, Bosanto Halder and others in total 11 persons by firing shots. They took shelter at the opposite side of a canal near

the village in order to save their lives at the time of occurrence. Thereafter, Razakars plundered and set fire to sixty houses of their village under instruction of the accused. After departure of the accused and his accomplice Razakars from the village in the evening, they came back and installed the dead bodies in hole by covering earth. Accused is not present in the dock of the Tribunal.

164. In cross-examination he has denied the defence suggestion that the accused used to stay in Dhaka during the Liberation War in 1971. He has stated at that time he was staying at Mothbaria. He has also denied the defence suggestion that he has deposed falsely.

165. **P.W-21 Keshob Chandra Biswas** has deposed that during the Liberation War he was about 24 years old. On 22 May, 1971 [7 Joistho, Saturday] around 9.00 A.M accused Abdul Jabbar Engineer along with his Razakar forces were coming towards their village from west of Naligram. The villagers including the witness made an attempt to prevent them. At one stage Razakars started firing shots indiscriminately to the unarmed innocent inhabitants of the village under instruction of the accused and while the inhabitants of the village ran hither and thither in order to save their lives, accused Abdul Jabbar by his pistol in hand shot Sokha Nath Khorati of their village to death. Razakar Nur Hossain [presently dead] by his rifle in hand shot his uncle Nishi Kanta Biswas to death under instruction of accused Abdul Jabbar Engineer. Eleven innocent persons of the village had been martyred by shooting of accused Abdul Jabbar Engineer and his accomplices. Among the martyrs there were namely Nishi Kanta Biswas, Jitendra Nath Biswas, Surendra Nath Biswas, Upendra Nath Biswas, Gonesh Chandra Mistri, Sokha Nath Khorati, Nepal Chandra Mistri, Upendra Nath Mistri, Boloram Mistri, Bosanto Halder and Shosti Howlader. He became injured while a Razakar targeted him by firing rifle touching his

upper head slightly and in order to save life he took shelter at the edge of a canal [at this stage the witness has shown sign of bullet injury of his upper head before the Tribunal]. Thereafter, Razakars having plundered sixty houses including their house set fire to them of which there were houses of Birendra Nath Biswas, Dipak Kumar Biswas, Santosh Khorati, Shova Rani Biswas, Tarun Biswas, Jugendra Nath Saojal, Bidhan Kirtonia too. They came back to their village after departure of Razakar along with accused Abdul Jabbar Engineer in the evening and local people of the village installed the dead bodies in cavity by covering earth. He knows the accused, is not present in the dock of the Tribunal.

166. In cross-examination he has replied that the accused was a leader of Muslim League. He has denied the defence suggestion that the accused did not stay at Mothbaria in 1971, he used to stay in Dhaka. His another uncle Jogadish Chandra and cousin Jogendra Chandra Biswas filed a case regarding arson, killing of his uncle Nishi Kanta Biswas but his uncle Jogadish was murdered by miscreants thereafter. No further step was taken in that case after assassination of Jogadish Chandra. He has denied the defence suggestion that he has given evidence falsely.

167. **P.W-22 Bidhan Chandra Kirtonia** has stated that he was 20 years old in 1971. He knows accused Abdul Jabbar Engineer who was a leader of Muslim League before 1971. Accused Abdul Jabbar Engineer and his accomplice Razakar forces made attack in their locality at different times during the Liberation War in 1971. He was at home on 22 May, 1971 [07 Joistho, Bangla] around 09 O'clock in the morning. He went out of the house upon hearing hue and cry. Locals of the village started telling each other that accused Abdul Jabbar and his accomplices of Razakar Bahini made attack in their village. His brother-in-law [Sister's husband] Surendra Nath Biswas, along with his two other brothers namely Jitendra Nath Biswas and Upendra

Nath Biswas were killed on the spot sustaining bullet injuries while the Razakars began firing shots indiscriminately to the innocent villagers under instruction of accused Abdul Jabbar Engineer. Seeing such scenario he, in order to save himself, took shelter at the edge of a canal situated at east side of the village.

168. At the time of occurrence accused Abdul Jabbar Engineer and his accomplice Razakar forces plundered and set fire on various houses including their one of the village. In total 11 persons were shot dead in taking the place of occurrence on that day by accused Abdul Jabbar Engineer and his accomplice Razakars. They came back to the village at the evening hour after departure of the accused along with his accomplice Razakars where they [witness and others] could see the houses burnt. Thereafter, they installed the 11 dead bodies in holes by covering earth at different places. He has recalled the names of dead bodies such as Sokha Nath Khorati, Gonesh Mistri, Boloram Mistri, Upendra Mistri, Shosti Howlader, Nepal Chandra Mistri among the 11 dead bodies excepting three others as mentioned above. The accused is not present in the dock of the Tribunal.

169. In cross-examination he has replied that after independence of the country a criminal case was lodged regarding arson and killing of 1971 but the complainant of that case was killed thereafter. He does not know who were the accused and witnesses in that case. It is not true that accused Abdul Jabbar Engineer used to live in Dhaka, not at Mothbaria during the Liberation War and prior to war he was elected MPA as an independent candidate not as a candidate of Muslim League.

170. Upon scrutiny of the evidence presented by the aforesaid five live witnesses in support of prosecution case it has emerged that all the five witnesses were quite capable being matured when the occurrence took place.

And as such there is no little bit ambiguity in their understanding of any event happened at the crime site during the Liberation War in 1971. The aforesaid witnesses have been thoroughly cross-examined by the state defence counsel in favour of the fugitive accused to ascertain their [witnesses] veracity and credibility as well. Now the question is before us whether the prosecution has been able to prove the instant charge beyond reasonable doubt. From the evidence of P.W-17 it has revealed that on the day of occurrence around 09 O'clock in the morning the accused along with his accomplices being armed went to their village and made attack jointly having started firing shots on the local people indiscriminately. While the locals were trying to flee away the accused himself killed his [P.W-17] maternal cousin Sokha Nath Khorati with his pistol in hand and other accomplices under his [accused] instruction by firing shots indiscriminately also killed Surendra Nath Biswas, Jitendro Nath Biswas, Upendro Nath Biswas, Gonesh Chandra Mistri, Nepal Chandra Mistri, Bosanto Howlader, Shosti Halder in total eleven Hindu religious persons on the spot with their rifles in hands and one of the Razakars fired shot by rifle aiming at him which hit his right leg, therefore, he [witness] sustained bullet injury, the sign of bullet injury with his right leg has been shown by him before the Tribunal as well. It is further evident that the Razakars plundered around sixty houses of the village thereafter and set fire on those houses at the time of their departure from the scene. Thereafter local people came back from the hiding place and buried the dead bodies by covering earth at different places after evening. Corroborating the above evidence, P.W-18 has narrated that on the day of occurrence at about 09:00 A.M after having been attacked and fired by the accused along with his cohorts the villagers ran hither and thither to take shelter in different places. At the same time the accused by a rifle in hand shot Sokha Nath Khorati to death and his accomplice Razakar Nur Hossain killed also his [witness] father Surendra Kanta Biswas and

grand-father Nisi Kanta by firing shots while other Razakars killed Jitendra Nath Biswas, Gonesh Chandra Mistri, Nepal Chandra Mistri, Upendra Nath Mistri, Bosanto Howlader, Boloram Mistri, Shosti Halder and Upendra Nath Biswas of their village by firing shots on them under instruction of the accused which is meant that in total eleven persons of the village succumbed to bullet injuries at a time by the accused and his accomplices. The event of killing eleven Hindu unarmed civilians by launching attack on them appears to have been clearly corroborated by this witness and such version of his evidence in this regard could not be impeached in any way by the defence counsel. From the evidence of this witness it has also emerged that the Razakars looted many houses and set fire to around sixty houses of the village after completion of their killing mission. After their departure from the scene locals came back to the village and installed the dead bodies in hollows by covering earth at different places of the village. This witness observed the incident from the hiding place as an eye witness. Here, it finds no contradictory statement he has given with the evidence of P.W-17 rather his evidence has strongly supported former's version in the same manner. From the evidence of P.W-19 it appears that on the same day and time the accused along with his accomplices made attack in Naligram and accused himself shot his elder brother Sokha Nath Khorati to death with his gun in hand and his accomplice Razakar Nur Hossain shot Nishi Kanta Biswas and Surendra Nath Biswas of their village to death under his [accused] instruction. At the same time other Razakars killed eight other Hindu religious persons by firing shots under his instruction and lastly they also set fire to sixty houses after having been plundered. Dead bodies of eleven persons were buried by covering earth in the evening after their departure. Such evidence have also corroborated and supported with the evidence of P.Ws-18-19 without any iota of contradiction and any claim of events of the incident has not been left out in any way in the given evidence. P.W-21 has

disclosed in his evidence that the accused along with his accomplice Razakars on the day and time of occurrence having gone to their village made an attack and sensing their presence the inhabitants were running hither and thither in order to save their lives but Sokha Nath Khorati of their village was shot dead by the accused with his pistol in hand and his accomplice Razakar Nur Hossain by his rifle in hand also shot his uncle Nishi Kanta Biswas to death under his instruction. In total eleven innocent persons of the village have been martyred by their gun shots. The name of the eleven martyrs has been stated by this witness exactly similar to P.Ws-17-19. This witness also became injured while a Razakar targeted him by shooting rifle touching his upper head slightly. He luckily escaped causality. From his evidence it appears further that Razakars looted around sixty houses including their one and set fire to those houses of the village under instruction of the accused. In the same tune as stated by the aforesaid witnesses he has narrated about the burial of the dead bodies. Nothing has been found contradictory in his evidence with the evidence of former witnesses. It is also found from the evidence of P.W-22 that on the day and time of occurrence the accused having entered the village made attack and on hearing hue and cry this witness went out of his house seeing that his brother-in-law [sister's husband] Surendra Nath Biswas along with his two other brothers namely Jitendra Nath Biswas and Upendra Nath Biswas were killed on the spot sustaining bullet injuries while Razakars started firing gun shots indiscriminately to the innocent villagers under instruction of the accused. The accused along with his accomplice Razakars by their action liquidated eleven persons in total without having any resistance from the victims. This witness and others came back to the crime site at the evening hour after their [accused] departure where they could also see many houses burnt. Thereafter, they installed eleven dead bodies in holes by covering earth at different places. It appears from the said evidence that this witness

has echoed in the manner as if similar to other former witnesses. No contradictory version of his evidence is found with the evidence of other witnesses. Their evidence has established no isolation in proving the events of killing, plundering and arson.

171. It is also pertinent to state here that all the witnesses are of victim families and one of them i.e P.W-21 is also victim who received bullet injury slightly on his head and they all directly witnessed the incident on their own eyes. Although the occurrence took place in 1971 long after about 43 years ago but all the five witnesses have specified the date and time of the occurrence as well as names of the victims in the given evidence while the defence has failed to discard the evidence of the events. According to the evidence adduced by the said witnesses it has revealed that the accused had a clear intention to vanish a Hindu religious group as it found evaluating evidence to the fact that among the eleven deceased none was from any other religious ideology. The names of the aforesaid eleven victims have been recorded along with others in the martyr's list of Mothbaria sent by Upazila Nirbahi Officer, Mothbaria, Pirojpur to the Deputy Commissioner, Pirojpur District Magistrate, which has been marked as exhibit no. 06. Even then, it is not necessary to have criminal intent within the vicinity of the accused in committing an offence of 'genocide'. This view finds supports from the principle enunciated by the **ICTR** in the case of **Muvunyi** which is as follows:

"[A]n accused can be found guilty of committing genocide even if his personal motivation went beyond the criminal intent to commit genocide." [Muvunyi, (Trial Chamber), September 12, 2006, para. 479]

172. It was also observed by **ICTR** in the case of **Rutaganda** that,

"The Appeals Chamber stresses that, in general, committing crimes as part of a widespread or systematic attack against a civilian population does

not imply that such crimes, or others, were not committed with the intent of destroying, in whole or in part, a group referred to under Article 2 of the statute."

173. It was also a painful tragedy for the members of the victim families that they could not even cremate their relative's dead bodies in accordance with their religious formalities. It is a very rare case to get direct evidence in toto against an accused from all the witnesses examined by the prosecution in proving the charge. The case in hand it finds material evidence from all the witnesses without having any contradiction from each other. Even then, direct involvement of the accused in the killing with his arms has also been found present in the evidence of all witnesses in addition to the instruction to his accomplices in killing other victims, plundering and setting fire to the houses of the village.

174. Defence has raised a question by giving suggestion to the witnesses regarding absence of the accused within the area of place of occurrence that he was not staying there during the Liberation War in 1971 but that has been denied vehemently by all the witnesses saying that he [accused] used to stay at Mothbaria when the occurrence took place at the crime site.

175. It is now settled proposition of law that where an accused takes a plea of alibi denying that he was in a position to commit the crime with which he has been indicted, particularly that he was elsewhere than at the scene of the crime and at the time of its commission. In proving such event, the onus does not lessen for the reason of success or failure to prove the plea of alibi. It was observed by the **ICTR** Appeals Chamber that

"The only purpose of an alibi is to cast reasonable doubt on the Prosecutor's allegations, which must be proven beyond reasonable doubt. In alleging an alibi, the accused merely obliges the Prosecution to

demonstrate that there is no reasonable likelihood that the alibi is true" [Nahimana, Barayagwiza and Ngeze, (Appeals Chamber), November 28, 2007, para. 417]

176. Besides, the defence has also failed to show anything as claimed about his [accused] stay in Dhaka during the Liberation War in 1971. So, the prosecution's claim about his presence at Mothbaria has been established.

177. It is not only an offence of ordinary murder or killing because all the victims who were liquidated by the accused and his cohorts were unarmed innocent inhabitants and civilian population of that village. There was no role or instigation as appeared in evidence on the part of the victims against the perpetrators so that they could be provoked to kill the victims at the crime site. Therefore, it can be said that it was a clear design and policy of the accused with an intent to destroy in whole, or in part against a particular religious group or Hindu community in committing the offence of killing eleven persons. Thus, targeting part of the community qualifies as substantial for the reason of inferring the 'genocide intent'. The pattern of the crime adequately indicates that the intent of the perpetrators was to 'destroy a group' as it has been established that the destruction was related to a significant section of Hindu group. It was held in the case of **Jelisić**, [Trial chamber: ICTY], December 14, 1999, para, 83 that,

"It is accepted that genocide may be perpetrated in a limited geographic zone. The geographical zone in which an attempt to eliminate the group is made may be limited to the size of a region or a municipality."

178. In this respect, it finds more support through the observations made by **ICTR** in the following three cases that,

"[T]he perpetrator must act with the intent to destroy at least a substantial part of the group." [Bagosora, Kabiligi, Ntabakuze and Nsengiyumva, (Trial Chamber), December 18, 2008, para. 2115]

"At the very least, it must be shown that the intent of the perpetrator was to destroy a substantial part of the group, regardless of the number of victims actually involved." [Muvunyi, (Trial Chamber), September 12, 2006, para. 483]

"[I]n part' requires the intention to destroy to considerable of individuals who are part of the group." [Kayishema and Ruzindana, (Trial Chamber), May 21, 1999, para. 97]

179. As it appeared in evidence that the place of occurrence was a village in which most of the villagers were Hindus. More so, to eliminate the group of people particularly the Hindu religious persons the accused had deployed his relative Iskander Mridha as Razakar commander by forming a Razakar Bahini in the locality. It has also emerged from the evidence that the perpetrators went to the place of occurrence with heavy arms and ammunitions to execute their plan. They did not even give any scope to the victims to say anything before firing gun shots to them which meant that the victims knew nothing about the attack on them for their causalities. Nevertheless, corroborating each other all the five witnesses have testified that the perpetrators after killing eleven persons plundered and set fire to sixty houses of the village under instruction of the accused. It is evident that sixty houses were being burnt on his directives to his accomplices after executing killing mission as a mastermind. The entrance of the perpetrators also got substantial proof by evidence of every witness similar to each other. Time of departure of the perpetrators including the accused after incident

has also been proven by the witnesses corroborating each other. So, there is nothing to disbelieve any of the events to find the accused not guilty.

180. It has been evident that the accused directly abetted and facilitated the commission of offences of looting and arson and he had direct participation in the killing of the victims. Now the question arises whether this killing would be within the preview of genocide or murder as crimes against Humanity as specified in section 3(2)(c) or 3(2)(a) of the Act of 1973 respectively. The prosecution has argued that since the eleven deceased persons were from a particular religious group, as there was none of any other group that constitutes a clear case of 'genocide'. It appears from testimonies that the attack was a systematic one on a particular group of religious persons other than the acts of plundering and arson. The acts done on the part of the accused are not found to be isolated. Although, it needs no elaborate discussions over the event as claimed by the prosecution but 'genocide' being a large scale crime it has special meaning which can be shown later part of it. As per section 3(2)(c) of the Act of 1973 'genocide' is the deliberate and systematic destruction of a national, ethnic, racial, religious or political group. The extermination of individuals because of their membership to distinct national, ethnic, racial, religious or political group has been perpetrated during the Liberation War in 1971 within the territory of Bangladesh. It is the history of common knowledge and need not be proved through evidence as per provisions of the Act of 1973.

181. The relevant provisions of section 3(2)(c) of the Act of 1973 are as follows:

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

- *Killing members of the group*
- *Causing serious bodily or mental harm to members of the group;*
- *Deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part;*
- *Imposing measures intended to prevent births within the group;*
- *Forcibly transferring children of the group to another group.*

183. No doubt 'Genocide' is the gravest crime by finding its meaning from the aforesaid provision of law as it exceeds all ingredients of the crime of murder. This type of offence also includes the murder crime as well. Such crime never gives impunity and the perpetrators will have to face justice in accordance with legislation.

184. Accused Abdul Jabbar Engineer has been charged with the offence of genocide as he allegedly acted and participated to the commission of 'killing members of the Hindu religious group' with 'intent to destroy' it, 'in whole or in part'. The meaning of 'genocide' as laid down in the Act of 1973 seems to be in conformity with the Article 6 of the Rome Statute. In the present charge, it may find more support and help for the determination of culpability of the accused from the following two observations made by the **ICTR** in the cases of **Seromban** and **Muhimana**

"To establish specific genocidal intent, it is not necessary to prove that the perpetrator intended to achieve the complete annihilation of a group throughout the world..." [Seromba, (Trial Chamber), December 13, 2006, para. 319]

"In proving the intent to destroy 'in whole or in part,' it is not necessary for the Prosecution to establish that the perpetrator intended to achieve the complete annihilation of a group."
[Muhimana, (Trial Chamber), April 28, 2005, para. 498]

185. As per evidence of all the witnesses in the case it has invited us to hold that the accused Abdul Jabbar Engineer had direct participation as the chairman of Mothbaria Peace Committee as well as a member of group of individuals in committing the offences of killing, plundering and arson with the help of his associate Razakars. It is true that during conflict situation leadership does not act or remain effective and disciplined following organizational hierarchy. On cumulative evaluation of testimonies produced and adduced by the prosecution witnesses it has inferred that accused had a close, active and culpable affiliation with his accomplice perpetrators by virtue of his position. The position of his leadership has also been supported by exhibit no.01, a photo copy of a paper clipping of 'Daily Janakantha' dated 23.01.2001, where his conduct was elaborately stated in committing the offences of various atrocities during the war of Liberation, 1971. Upon scrutiny of both documentary and oral evidence presented by aforesaid witnesses, it is well established that the accused was a leader and influential person of the then Mothbaria Peace Committee during the Liberation War in 1971. This being the status that the accused was holding at the relevant time, his presence at the crime site as an active offender inevitably prompts us to infer that in addition to his direct participation in the killing at the time of commission of offence, he substantially provided practical assistance, encouragement and moral support to his co-perpetrators in perpetration of the offence of genocide that resulted in the killing of eleven persons belonging to 'Hindu community' which is a 'distinct religious group' and

thereby he incurs criminal liability under section 4(1) of the Act. This section 4(1) of the Act defines as follows:

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

186. Considering all aspects along with the views and circumstances as narrated above we, finally conclude that the accused Abdul Jabbar Engineer actively and directly participated in the aforesaid atrocious activities to destroy a Hindu religious group. Therefore, the above mentioned evidence is enough to hold that the prosecution has successfully been able to prove the instant charge beyond reasonable doubt, and found him guilty for substantially participating, abetting, aiding and facilitating the actual commission of the offences of genocide and other inhumane act [plundering and arson] as crimes against Humanity as specified in section 3(2)(a)(c)(g) and (h) read with section 4(1) of the Act of 1973 which are punishable under section 20(2) of the Act.

Adjudication of charge no. 04

[Offence of persecution (conversion) as crimes against Humanity at Hindu para of Fuljhury village]

187. **Summary Charge:** On any day of the last week of May, 1971 at about noon accused Md. Abdul Jabbar Engineer being the Chairman of Mothbaria Thana Peace Committee sent his accomplices along with a Imam of Sapa Mosque to Hindu para of village Fuljhuri with a direction that the Hindus could only survive and reside in the country peacefully if they were converted to Muslims. Accordingly, around 200 Hindus of that village having been threatened assembled on the bank of a pond of the house of Kumud Bandhu where they all were forced to be converted to Muslims against their will by reciting Kalema and wearing Muslim caps and they were also given Muslim names. Therefore, the accused has been charged for abetting and facilitating

the commission of offences of persecution as crimes against Humanity as specified in section 3(2)(a)(g) and (h) read with section 4(1) of the Act of 1973.

Discussion and evaluation of the evidence and findings

188. To prove the instant charge prosecution has brought and relied upon P.Ws-01, 02, 03, 04, 05, 09, 10, 12, 13, and 14 who have been thoroughly cross-examined by the State Defence Counsel in favour of the fugitive accused Abdul Jabbar Engineer to discard their evidence.

189. **Md. Shoabour Rahman as P.W-01** has deposed that he was 35 years old during the Liberation War in 1971 and was serving in Pakistan Administrative Staff College at Lahore. He came to Dhaka on 29 February, 1971 and went to his village home on 04 April, 1971. 08/10 days after 17 May, 1971 incident, Razakars assembled around 150-200 Hindus from different houses under threat by instruction of accused Abdul Jabbar Engineer and they were forcefully converted into Muslims with Muslim names. Razakars compelled them to have meat upon slaughtering cow and also compelled them to offer prayer [namaz]. In cross-examination he has denied that he has given false evidence by instigation of his [accused] political opponent.

190. **Abdul Kuddus Matabbor as P.W-02** has testified that he was sixteen years old and was a student of class IX of Tushkhali High School during the Liberation War in 1971. 08/10 days after 17 May, 1971 incident, a group of Razakars at the instruction of accused Md. Abdul Jabbar Engineer assembled around 150/200 Hindus in front of Paik house where they compelled the said Hindus to convert into Muslims by reciting Kalema and forcefully fed them beef after cooking and they also compelled them to offer prayer while they were given Muslim names. In cross-examination he has denied defence suggestion that he has given false evidence in order to gain over by opponent of the accused.

191. **P.W-03 Abdul Maker** has deposed that he was 35 years old and was a shopkeeper at Tushkhali Bazar in 1971. 8/10 days after 17 May, 1971 incident, a group of Razakars under instruction of accused Abdul Jabbar having entered Fuljhuri village assembled 200 Hindu religious persons and compelled them to accept Muslim religion by reciting Kalema and wearing caps with Muslim names which he heard. In cross-examination he has denied the defence suggestion that he has given false evidence in order to gain over by opponent of the accused.

192. **P.W-04 Md. Siddique Matabbor** has stated in his deposition that 8/10 days after 17 May, 1971 incident, Razakars at the influence of accused Abdul Jabbar Engineer gathered 100/150 Hindu religious persons of Fuljhuri village and forcefully compelled them to convert into Muslim by reciting Kalema and wearing caps. They had also given Muslim names to them who offered prayers under threat. He heard that they [victims] were compelled to have meat of cow. In cross-examination he has denied the defence suggestion that he has given false evidence before the Tribunal in order to gain over.

193. **Abul Kalam Sharif as P.W-05** has testified that 8/10 days after 17 May, 1971 incident, a group of Razakars under instruction of accused Abdul Jabbar Engineer assembled 100/200 Hindu religious people who had been made Muslims under pressure and compelled them to offer prayer and eat meat of cow which he heard. In cross-examination he has denied the defence suggestion that in order to gain over he has given false evidence against the accused under instigation of his opponent before the Tribunal as the accused was a donor and popular person to the people of the locality.

194. **P.W-09 Ahmed Mia** has stated in his deposition that 10/12 days after 17 May, 1971 incident, Razakars under instruction of accused Abdul Jabbar Engineer again came in front of Paik house, west side of Fuljhuri village and

forcefully assembled around 200 Hindu people and compelled them to accept Islam. Eventually, they forced Hindu girls to marry Muslim boys. In cross-examination he has denied the defence suggestions that accused Abdul Jabbar Engineer did not stay at Mothbaria, he used to stay in Dhaka during the Liberation War in 1971 and he has given false evidence against accused Abdul Jabbar Engineer under influence of his opponent.

195. **P.W-10 Bimol Chandra Bepari** has stated in his examination-in-chief that 7/8 days after 17 May, 1971 incident, Razakar commander Iskander Mridha and other Razakars compelled around 150/200 Hindu people of their Kulu Para and Fuljhuri village to accept Islam by reciting Kalema and they put Muslim names on them [victims] in place of their Hindu names. In cross-examination he has denied the defence suggestion that he has given false evidence against the accused in order to gain over and under influence of his [accused] opponent.

196. **Dilip Kumar Paik as P.W-12** has deposed in examination-in-chief that 8/10 days after 17 May, 1971 incident, in order to take shelter in a safe side while he was going towards Telikhali village by a boat on his way at Sapa Bazar, Peace Committee leader Hossain Kerani along with his associates by getting secret information took him and his father Kumud Bandhu Paik, down from the boat and brought them in front of Hossain Kerani's shop at Sapa Bazar at about 10.00 in the morning. His father contested provincial election in 1970 from Mothbaria constituency. Confinement of his father was informed to accused Abdul Jabbar by them as his father was an influential leader of the locality. At about 02:30/03:00 P.M they could understand from conversation of members of Peace Committee that accused Abdul Jabbar directed them [cohorts of the accused] to hand over his father and others to Pakistani army who were staying at Pirojpur. They further realised from conversation of the perpetrators that they could be survived if they converted

themselves to be Muslims. At that time Hossain Kerani along with his accomplices made intimidation to his father to become a Muslim and further told that as per directions of accused Abdul Jabbar they [witness and others] had to be Muslims if they wanted to survive. They had agreed to accept their proposal under consideration of their survival. Failing to recall the name of Imam he has further told that soon after Hossain Kerani, Pesh Imam of local Sapa Mosque, and under leadership of Quader Jamadder of Fuljhuri village a group of 40/50 anti-Liberation people by way of a procession brought his father with him on the bank of a pond of their village. They also brought around 150/200 Hindu religious people on that bank of the pond. The said anti-liberation people forced all of them to be Muslim under threat after reciting Kalema and compelled them to offer prayer. They recited Kalema and offered prayer with the help of that Imam of Sapa Mosque. To keep in memory they recited Kalema for many times and they were compelled to offer prayer for many days. They were given Muslim names in spite of their Hindu names under compulsion. His father's name was given as Qaiyum Khan where his name as Delowar Hossain Khan, his cousin Ashotosh as Nasir Khan and his nephew Jonoproshad as Jabbar Khan. Two or three days later they were compelled to have meat of cow after having been butchered. In cross-examination he has replied that Engineer Abdul Jabbar used to stay at Mothbaria in 1971. He has denied the defence suggestion that he has given false evidence before the Tribunal against the accused who was an opponent candidate of his father in the election.

197. **Jonoproshad Paik as P.W-13** has testified that he was 19 years old during the Liberation War in 1971 and was a H.S.C student of Mothbaria College. He is a freedom fighter. 8/10 days after 17 May, 1971 incident, one afternoon local Peace Committee leader Hossain Kerani, Imam of Sapa Mosque and Quader Jamadder along with 40/50 people apprehended his

elder brother Kumud Bandhu Paik and his son Dilip Kumar Paik from Sapa Bazar and took them with a procession to the bank of a pond of Dilip Paik house at Fuljhuri village. They also brought there around 150/200 Hindu people including himself. Thereafter, Hossain Kerani told all of them that accused Abdul Jabbar Engineer directed to convert them [victims] into Muslim if they wanted to remain in the country otherwise they would be killed. They got frightened upon hearing such undesirable direction and in order to survive they gave tacit support to accept Islam. Then the Imam of Sapa Mosque arranged to convert them into Muslim by reciting Kalema and gave everyone a Muslim name. His name was given as Jabbar Khan, Dilip Paik as Delowar Hossain Khan and Kumud Paik as Quiyam Khan. Thereafter, they compelled them to offer prayer. After two days of the said incident local Razakars butchered a cow and cooked for them and tried to feed the same to them and two of them were compelled to eat beef. Local Razakars followed regularly whether they were offering prayer or not. Under such unbearable circumstances many people of their village including him left the country for India from which he took training for Liberation War at the Naihati camp of Boshir Hat thana of West Bengal and thereafter, he fought in the Liberation War at different places. The accused is not present in the dock of the Tribunal. In cross-examination he has denied the defence suggestions that he did not hear or see the occurrence and has given false evidence against the accused before the Tribunal at the influence of political rival of the accused.

198. **Mohendra Adhikari as P.W-14** has testified that he was about 41 years old during the Liberation War in 1971 while he assumed office as erudite [pandit] at Tushkhali High School. He knows accused Abdul Jabbar Engineer of this case who was a leader of Muslim League.

199. 8/10 days after 17 May, 1971 incident, on one day at about 4.00 P.M local Peace Committee leader Hossain Kerani, Imam of Sapa Mosque and Quader Jamadder brought Kumud Paik and Dilip Kumar Paik who were wearing Muslim cap on their heads against their will, from Sapa Bazar with a procession to the bank of a pond near the Fuljhuri village. They also brought around 200 Hindus including him and assembled them there. Thereafter Hossain Kerani told that as per instruction of accused Abdul Jabbar Engineer they brought all Hindus there to be Muslims if they wanted to survive. They got frightened on hearing such unbearable instruction of the accused but in no way they rendered tacit acquiescence to embrace Islam. Then the Imam of Sapa Mosque converted all of them into Muslims by reciting kalema. He was given name as Mahbub while Kumud Paik as Quaium Khan, Dilip Paik as Delower Hossain Khan and Jonoproshed Paik as Jabbar Khan. Thereafter, Imam of Sapa Mosque compelled them to offer prayer with 'Jamaat'. Two days after, local Razakars butchered a cow and they also compelled some Hindus to eat meat of it. All the time local Razakars followed them whether they were offering prayer and memorising kalema or not. In cross-examination he has denied the defence suggestion that accused Abdul Jabbar was not residing at his village home during the Liberation War rather he was staying in Dhaka. He has denied further that he has given false evidence against the accused under influence of his political opponent.

200. On a careful scrutiny of the testimonies of the aforesaid witnesses it finds that P.Ws. 01-05 and 09-10 have been appeared as hearsay witnesses while P.Ws. 12-14 are eye witnesses as well as victims of the incident. It appears from the evidence of P.W-01 that he heard that after 17 May incident, a group of Razakars with the directives of accused Abdul Jabbar having entered Fuljhuri village assembled 150/200 Hindu religious persons

from different houses under threat and compelled them to embrace Islam by reciting Kalema and wearing caps with Muslim names. They also compelled the above victims to have meat of cow after having been butchered and cooked. Under compelling circumstances they had to offer prayer [namaz]. It appears from the evidence of P.Ws-02, 03, 04, 05 and 09-10 that they have deposed in their examination-in-chief by supporting and corroborating the evidence of P.W-01. Although they all seven are hearsay witnesses but their evidence are 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, 2010]**. Such view finds support from the principle enunciated in the case of Muvunyi which is as beneath:

“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]**

201. P.W-12 who was a victim of the incident has narrated in his evidence that in order to take shelter in a safe place while he along with his father reached Sapa Bazar at about 10:00 O'clock in the morning on the day of occurrence by a boat, a member of Mothbaria Peace Committee named Hossain Kerani along with his associates on the directives of the accused caught hold of them and dragged them in front of Hossain Kerani's shop at Sapa Bazar. At about 02:30/03:00 P.M they could realise from their [perpetrators] conversation that they had been held under instruction of the accused Abdul Jabbar and they were also told under threat if they wanted to

survive they must embrace Islam. On hearing such unbearable instruction of the accused they got frightened and having no way at the time they rendered tacit acquiescence to embrace Islam. Soon after, under leadership of Hossain Kerani, Pesh Imam of local Sapa Mosque and one Quader Jammader of Fuljhuri village, a group of around 40/50 anti-liberation people with a procession took him along with his father to the bank of a pond of their village where they also assembled around 150/200 Hindu religious people who were compelled to recite Kalema and offer prayer with the help of that Imam of Sapa Mosque. They were also given Muslim names instead of their Hindu names under compulsion. His father's name was given as Quiyum Khan while his name as Delowar Hossain Khan, his cousin Ashutosh as Nashir Khan and his nephew Jonoproshad as Jabbar Khan. Two or three days later, some of them were compelled to have meat of cow after having been slaughtered and cooked. P.Ws-13 and 14 by supporting and corroborating the evidence of P.W-12 have narrated in a same voice in their examination-in-chief. From their evidence it has been emerged that all of them were also given Muslim names such as, Delowar Hossain Khan, Jabbar Khan and Mahabub Khan after conversion into Muslim by reciting Kalema. They also offered prayer under threat of the perpetrators who followed them many days whether they were performing the Islamic rituals as per instruction imposed by the accused through his accomplices. Two days after such conversion, Razakars butchered a cow and compelled some Hindus to eat meat of it. These three witnesses namely P.Ws-12, 13 and 14 are the victims of the incident and their evidence are found to be corroborated each other. Their evidence finds support together with the evidence of hearsay witnesses as discussed earlier that is to be taken into account for determination of culpability of the accused in the present charge.

202. Although, in the indictment no specific date of occurrence has been emerged but the witnesses have narrated in their examination-in-chief that it occurred as one day 8/10 days after another incident took place on 17 May, 1971 where the timing of occurrence got similarity such as 'noon' from the evidence of all witnesses. So, there is no ambiguity to be confused in respect of time and manner of the occurrence.

203. Ordering by the accused is very important issue in proving the instant charge because the accused was not present at the scene when a large number of Hindus were forcefully assembled and embraced Islam under threat. Three victims namely, P.Ws-12, 13 and 14 followed and heard from the conversation of the perpetrators about the instruction given by the accused to compel victims to be Muslim by accepting Islam. So, for conversion of the aforesaid Hindus the responsibility of the accused cannot be brushed aside as he ordered his co-perpetrators to do so. This view finds support from the principles enunciated by the **ICTR Appeals Chamber** which is quoted below:

“With respect to ordering, a person in a position of authority may incur responsibility for ordering another person to commit an offence, if the person who received the order actually proceeds to commit the offence subsequently.”
[Nahimana, Barayagwiza and Ngeze, (Appeals Chamber), November 28, 2007, para. 481]

“The Appeals Chamber has on many occasions recalled the constitutive elements of this mode of responsibility [ordering].....the material element (or actus reus) is established when a person uses his position of authority to order another person to commit a crime.....”
[Ntagerura, Bagambiki and Imanishimwe,

(Appeals Chamber), July 7, 2006, para. 365]

204. Islam is a peace loving religion of the Muslims in the world which has been derived from the Holy Al-Quran and Hadith that was preached by the greatest Prophet Hazrat Muhammad [S.M]. It is not disputed by any of the people of the world that around 1400 years ago, Prophet Hazrat Muhammad [S.M] made a historical contract between Muslims and non-Muslims residing in Madina and established a non-communal country. Such contract has become admirably known as 'Medina Charter'. If any one goes through it, he will find many things in favour of mankind. Islam does not allow any Muslim to forcefully convert a man to embrace Islam by reciting Kalema and wearing Muslim cap on head. As per Medina Charter, there is no space and peace for utilizing religion in the name of any unauthorised interest to the person concerned.

205. It may rely upon an example such as, it is barred by Islam not to have meat of pork, if non-Muslim forces any Muslim to eat pork it would be a fatal crime as it is humiliating the man who has been compelled to have it against his will and religious belief. As per Qur'an and Sunna, everyone is liable for his or her actions. Only the doer of an act of injustice like the above reference is liable to be punished and no one else can be held responsible for that.

206. The Almighty Allah says in Holy Qur'an [**Surah-6, Al-An'am: Verse-164**]:

'And whatever [sin] each soul earns [its evil outcome] falls back upon it. And no bearer of burden will bear another's burden. Then you are to return to your family, friends or tribe.'

207. Islam does not allow anyone to punish common people for the oppressive actions of oppressors. The Prophet Muhammad [SM] said,

'No man amongst them [the peaceful non-Muslim citizens] shall be punished as a penalty for the injustice of a coreligionist'. [Cited by Abu Yusuf al-Khardi; Source: Fatwa on Terrorism and Suicide Bombings; written by Shaykh-UI-Islam Dr. Muhammad Tahir UI-Qadri; Page-106]

208. In Holy Qur'an, the Almighty Allah again says **[Surah-5, Al-Maidah: verse-8]-**

'O you who believe! Stand firm for Allah [God], witness in justice, and do not let the hatred of a people prevent you from being just. Be just; that is closer to righteousness. And fear Allah [God]. Indeed, Allah [God] is Well-Informed of what you do.'

209. The Qur'an threatens with torment those who oppress others, but it gives an ever harsher warning to those who allow oppression to go unchallenged.

210. Islam does not allow any Muslim citizen to encroach upon the rights of non-Muslim citizens or resort to oppression and violence against them, verbally or physically.

211. A Hadith reported in the Sunna of Abu Dawud in which the Prophet Muhammad [S.M] declared that, on the Day of Judgment, he will act as an Advocate for the oppressed. Another Hadith dealing with the same subject has been reported by Abd Allah b. Masud in which the Prophet [S.M] said,

'Whoever hurts a non-Muslim citizen, I shall be his opponent. And when I am someone's adversary. I shall overcome him on the day of

Resurrection.' [Source: **Fatwa on Terrorism And Suicide Bombings; written by Shaykh-UI-Islam Dr. Muhammad Tahir UI-Qadri; page-113]**

212. If anyone willingly accepts Islam lifting his earlier belief that does not tantamount to an offence but forceful conversion is not acceptable in any way rather it is a fatal crime as it strikes his own ideology, belief and also it is detrimental to his religious emotion.

213. It is found true by scanning evidence of witnesses that all 150/200 Hindus including P.Ws-12-14 were compelled to accept conversion by reciting Kalema and wearing Muslim caps on head in fear of life threat but it gave a wrong message to the people at large all over the world against the Muslim community because those who did it were not real Muslims.

214. Per contra, it gives a plenty of hopes by showing honour to a Muslim youth referring to a recent incident that was attacked on a Kosher Supermarket in Porte de Vincennes, Paris on January 9, 2015 where four people were killed by extremists in the name of Islamic ideology. Such news was published in the Daily Star dated 22 January, 2015 under the caption **"France honours 'Hero' Muslim"** which states that

"Lassana Bathily, 24, was praised for his courage and heroism by interior minister Bernard Cazeneuve during a ceremony in the presence of Prime Minister Valls. Cazeneuve said mali-born Bathily's 'act of humanity has become a symbol of an Islam of peace and tolerance."

215. In reply to the above comments Bathily humbly stressed that he does not consider himself a hero saying he is Lassana. He will stay true to himself and further say that people are equal to him and skin colour is not a matter. France is the country of human rights. However, for his opinion and action

in the attack he has been granted France citizenship though he is from Muslim community.

216. Fact remains that bathily, was in the store's underground stockroom when gunman attacked killing four people. He led six people to safety when they ran down he opened the door of the freezer. There were several people who went to him. Then he turned off the light and turned off the freezer. When he turned off the cold, he put them [hostages] in and last of all he escaped using a goods lift and was able to give the police valuable information about what was happening inside and where the hostages were hiding.

217. The question has been raised in the instant case that the accused was not seen present at the crime site when the said Hindus were being compelled to embrace Islam but it has come into evidence that his accomplices did the event by his instigation. Such action does not require proving by his direct participation according to settled jurisprudence. It finds support from a decision held in the case of **Kvocka** 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, 2008, para. 421]

218. The names that had been given to the victim witnesses by the perpetrators have been found corroborating each other. Not a single name has been found contradictory in the evidence of the said witnesses to be disbelieved. It is further evident that the accused was not present at the time

of forceful conversion of around 150/200 Hindus to Muslim but his directives as a mastermind to his cohorts for doing so have been proved without any doubt. The conscious act of leading the perpetrators signifies common intent and is a constituent of participation. It has been proved that accused Abdul Jabbar Engineer by his conduct instigated his accomplices to embrace Islam by the apprehending Hindus. On the score too, the accused is equally liable for the crimes as listed in the instant charge the same manner as if it were done by him alone.

219. Question may be raised that why and how the accused alone is said to be accountable for the crimes narrated in the charge, particularly when the alleged criminal acts could not have been perpetrated by an individual alone. 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 principal crime by his act or conduct, before or midst or after the crime committed. In the case in hand, prosecution has been able to establish that the accused was related to a scheme or system which had a criminal outcome as a potential leader of his accomplice Razakars on them he had significant influence in carrying out criminal acts at the time of occurrence at Mothbaria area during the Liberation War in 1971. In view of the facts and evidence as narrated above, we are constrained to hold that the prosecution has successfully been able to prove the instant charge beyond reasonable doubt. Hence the accused is criminally liable under section 4(1) of the Act of 1973 and found him guilty for substantially aiding, abetting and facilitating the actual commission of offence of conversion [other inhumane acts] as crimes against Humanity as specified in section 3(2)(a)(g) and (h) of the Act of 1973 which is punishable under section 20(2) of the Act.

Adjudication of Charge no.5

[Abduction of 37 persons belonging to Hindu community from village Angulkata and Mothbaria and murder of 22 persons out of them and plunder of the houses of the victims, persecution and other inhumane acts.]

220. **Summary Charge:** Pursuant to the plan, conspiracy and direction of accused Md. Abdul Jabbar Engineer, the then Chairman of 'Peace [Santi] Committee' of Mothbaria Thana, the members of Razakar Bahini in between the sunset of 06.10.1971 and the morning of 07.10.1971 had attacked two Hindu populated villages namely, Angulkata and Mothbaria and abducted 37 persons belonging to Hindu community from their respective houses and eventually, out of them 22 persons were killed by gun shots and 08 persons were injured having received bullet injury by the Razakar Bahini and the Razakar Bahini also plundered the houses of those persons.

221. Therefore, the accused has been charged for conspiracy, abetting and facilitating the commission of offences of abduction, murder, torture, plundering [other in humane act] and persecutions on religious ground as crimes against Humanity as specified in section 3(2)(a)(g) (h) read with section 4(1) of the International Crimes (Tribunals) Act,1973 which are punishable under section 20(2) of the said Act.

Discussion and evaluation of evidence and findings:

222. To prove the instant charge the prosecution has examined 09[nine] live witnesses.

223. **P.W-06 Shontosh Kumar Mitra**, a freedom fighter, has testified that on 6 October 1971 he came to his house secretly from his training camp and having taken dinner he went to sleep at about 11.00-11.30 P.M. At mid night he woke-up from sleep hearing the sound of whistle. At first he thought that the dacoits attacked their house; but immediately he could understand that the armed Razakars had attacked their house. The Razakars looted away the

ornaments and other valuable goods from their house. The Rajakars also having captured him and his father Shurendranath Mitra tied them with rope. At that time the Razakars disclosed that accused Abdul Jabbar Engineer ordered them to apprehend them from their house. There were eight families in their house and all the male members of those families were captured by the Razakars. The Razakars disclosed that they would be taken to Mothbaria Sadar. Thereafter, the Razakars started from their house with all the apprehended persons and on the way he found that the Razakars also captured Nogen Kirtonia from 'Kirtonia Bari', 05[five] persons from 'Halder Bari', 02[two] persons from 'Hawladar Bari', 06[six] persons from 'Bala Bari', 04[four] persons from 'Majhee Bari'. In this way the Razakars in total captured 37 persons and all the abductees were taken to a field in front of the present Poursava office of Mothbaria and stand in a queue. At one stage Razakar commander Iskander Ali Mridha ordered another Razakar to put off the tie of his cousin Monindra Master and separated 07[seven] abductees from them. Thereafter, the Razakars started towards the Police Station with 30 apprehended persons including him. But the Razakars instead of taking them to the Mothbaria Police Station took them at the WAPDA road, west side of 'sluice gate' of Surjomoni village. When the Razakars started making preparation to kill them, then the elderly men started crying. In such a situation Razakars started beating on some abductees. Thereafter, the Razakars took the abductees one after another to the nearer canal and shot them in order to kill them and the victims having received gun shots fell into the river. The Razakars having tied him and his cousin Fonir Mitra together shot them from behind. Receiving the bullet injury his brother Foni died on the spot but he sustained bullet injury. At this stage this witness has shown the mark of bullet injury on his body and started crying. This witness has further testified that on the spot 22 persons including his father Shurandronath Mitra, Zitan Mitra, Foni Mitra, Mukunda Mitra, Parimal

Mitra, Sailan Mitra, Jantu Mitra, Nihar, Sudhir, Birangsu Halder, Sudangsu Halader, Nogen Kirtonia, Madhu Howlader died and 08 others were injured including himself. Ganandra Mitra, Prionath Bala, Khirod Mondal, Prionath Halder, Jitan Majhee, Heran Majhee, Binodh Bihari were the injured persons.

224. In cross-examination this witness has denied the defence suggestions that he did not receive any bullet injury by the Razakars as stated by him and it could not be possible for him to see the actual number of the abductees and he has deposed falsely.

225. **P.W-15 Bokuli Rani Halder** has testified that on 6 October 1971 at about 12.00 at night pursuant to the order of accused Abdul Jabbar Engineer the Razakars attacked their village. The Razakars having plundered their house captured her father-in-law Madhusudhan Halder and brother-in-law Prionath Halder [husband's elder brother]; while his father-in-law asked the Razakars why they apprehended them and then the Razakars disclosed that accused Abdul Jabbar Engineer ordered them to apprehend them. Thereafter, the Razakars took her father-in-law and brother-in-law along with other apprehended persons from their village. On the following morning she came to know from her husband Parimol Chandra Halder that his father-in-law Madhusudhan Halder and brother-in-law along with 20 persons were killed at Surjamoni village.

226. In cross-examination this witness has stated that she could not say the names of the Razakars who came to their house. She heard from others that Abdul Jabbar Engineer and Iskander Mridha were the Razakars. The Razakars abducted 37 persons from their village and adjacent villages.

227. **P.W-16 Tikendra Nath Mojumder**, a freedom fighter, has testified that while he was in training at Bagi camp he came to his house on 6 October 1971. At about 11.30 P.M as per order of accused Abdul Jabbar Engineer under the leadership of Razakar commander Iskander Mridha

100/150 Razakars attacked their village Mothbaria and adjacent village Angulkata. The Razakars having apprehended his father Horendronath Majumder, elder brother Jitendronath Majumder, younger brother Khirendronath Mojumder, uncle Sudhir Mojumder and Hemonta, grand father Sattandronath Roy and domestic aid Birandronath tortured them. The Razakars also plundered their house. When the apprehended persons were taken by the Razakars then his grand mother and two younger sisters asked the Razakars where they [apprehended persons] would be taken. Then the Razakars told them they would be taken at Mothbaria police station before accused Abdul Jabbar Engineer. On that day total 37 persons were captured from villages Angulkata and Mothbaria by the Razakars. He saw the said occurrence from a hidden place. On the following morning he came to know that 22 persons were killed by gun shots including his father Horendronath Mojumder, uncle Hemonto and Sitandronath, grand father Sattandronath Roy and 08[eight] persons including his 02[two] brothers were injured having received bullet injury. He has further testified that the Razakars having taken money released 07[seven] abductees.

228. In cross-examination this witness has stated that he knew accused Abdul Jabbar Engineer and in 1971 he [accused] used to live at Mothbaria. He has further asserted that as per order of accused Abdul Jabbar Engineer under the leadership of Razakar commander Iskander Mridha the Razakars attacked their house.

229. **P.W-20 Md. Bachchu Akon** has testified that he is a freedom fighter and for last 38 years he has been holding the post of commander of Muktijodha Sangsad, Mothbaria Upazila. He has further testified that on 6 December 1971 at the evening he came to know from his source that a meeting was held in the house of Arshad Miah, father-in-law of accused Abdul Jabbar Engineer, where Abdul Jabbar Engineer, Razakar commander Iskander Mridha along with other Razakars were present, and in the said

meeting it was planned to attack the Hindu influential people of village Mothbaria and Angulkata. At 11.00 P.M he saw that under the leadership of Razakar commander Iskander Mridha a group of Razakars were moving towards the village Angulkata and he found the information of his source correct. Maintaining safe distance he along with other freedom fighters followed the said Razakars. He saw that the Razakars attacked 'Mitra Bari' of village Angulkata and having plundered the said house apprehended 19 persons from there. Thereafter, the Razakars started to proceed towards Mothbaria along with the abductees and on the way the Razakars also attacked 'Kirtonia Bari', 'Halder Bari', 'Bala Bari', 'Majhee Bari' and 'Howlader Bari' and also apprehended the male members of those houses. In total the Razakars apprehended 37 Hindu people from the said two villages and they were taken and confined in front of the present Poursava field. After some consultation with the other Razakars, Iskander Mridha the Razakar commander released 07[seven] persons and thereafter they started towards Mothbaria police station with 30 apprehended persons. But suddenly changing the way they took the said abductees to near the 'sluice gate' of Surjomoni village and thereafter the Razakars shot them by gun one after another. He saw the said occurrence from opposite side of the embankment maintaining safe distance. In the early morning he along with 4/5 freedom fighters and the local people came to the place of occurrence and found 20 persons dead and 08 persons in a injured condition. The injured persons were Sontosh, Ganandro, Prionath Bala, Nogandronath Bala, Birandronath Halder. Thereafter, they made arrangement for the injured persons to send them to Sundorban area for treatment.

230. In his cross-examination he has stated that Bachchu is the younger son of accused Abdul Jabbar Engineer and at present his elder son resides in America. He has further stated that the name of his source was Shahajan

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[under lines supplied]

234. This document **[exhibit-1]** has not been challenged by the defence. Section 19(1) of the **ICT** Act of 1973 empowers the Tribunal in admitting any evidence, including reports and photographs published in news papers, periodicals and magazines, films and tape-recordings and other materials as may be tendered before it, which it deems to have probative value.

235. On careful scrutiny and examination of the above evidence it appears that P.W-06 Shontosh Kumar Mitra is not only a victim of the occurrence, his father Surandronath Mitra and brother Foni Mitra were also killed by the Razakars and he luckily survived having received bullet injury. This witness has categorically testified that the Razakars disclosed to them that accused Abdul Jabbar Engineer ordered to apprehend them while they were taken by them [Razakars] from their house.

236. P.W-15 Bokuli Rani Halder has also testified that when her farther-in-law Modhusudon Halder and brother-in-law [husband's elder brother] Prionath Halder were captured by the Razakars, the said Razakars disclosed

that they had come to apprehend them as per instruction of accused Abdul Jabbar Engineer.

237. P.W-16 Tikendra Nath Mojumder has deposed that when his father Horendronath Mojumder, elder brother Jitendronath Mojumder, younger brother Khirendronath Mojumder, uncle Sudhir Mojumder and Hamonto, grand father Sottendranath and domestic aid Birandronath were captured by the Razakars they disclosed that they would be taken at Mothbaria police station before accused Abdul Jabbar Engineer and on the following morning 22 persons were killed including those by the Razakars near Surjomoni village.

238. P.W-20 Md. Bachchu Akon is an eye witness of the occurrence. From his evidence it is proved that a source named Shahajan informed him that on 6 October 1971 at the evening a meeting was held in the house of Arshad Ali, father-in-law of accused Abdul Jabbar Engineer, where it was planned to attack Hindu populated villages Angulkata and Mothbaria by the accused along with the Razakars and accordingly, in the night attack was made in the said two villages and from the said villages 37 persons were abducted out of them 07 were released and rest 30 persons were taken to near the embankment of Surjomoni village and the Rajakars shot them by gun one after another and 20 persons died on the spot and 08 persons sustained bullet injury.

239. If we consider the evidence of P.W-20 Md. Bachchu Akon along with the evidence of P.W-06 Shontosh Kumar Mitra, P.W-15 Bokuli Rani Halder and P.W-16 Tikendra Nath Mojumder and exhibit-1 it is crystal clear that pursuant to a plan made by accused Abdul Jabbar Engineer, Razakar commander Iskander Mridha and other Razakars under the leadership of Rajakar commander Iskander Mridha two Hindu populated villages namely Angulkata and Mothbaria were attacked and the Rajakars apprehended in total 37 persons from said two villages and out of them 22 persons were

killed by gun shots and 08 others were injured receiving bullet injury and rest 07 persons were made free in lieu of money. The said witnesses being the victim and members of victim families as well as eye witnesses of the incidents of abduction and murder are most competent and credible witnesses and there is no cogent ground to discard or disbelieve their respective testimonies.

240. Further, we can also safely rely on the evidence of P.W-01, P.W-02, P.W-03, P.W-04 and P.W-05 though they are the hearsay witnesses; because their testimonies have got probative value as those have corroborated the evidence of P.W-06, P.W-15, P.W-16 and P.W-20 the eye witnesses.

241. It is true that in the instant charge there is no allegation of direct participation against the accused in committing the offences of abduction and murder, rather the accused has been charged for planning, conspiracy and abetting [aiding].

242. In the **ICT Act of 1973** the words '**planning**' and '**conspiracy**' have not been defined. However '**criminal conspiracy**' has been defined in section 120A of the Penal Code and in view of the observations of the Appellate Division of our Supreme Court made in the cases of **Chief Prosecutor Vs. Abdul Quader Mollah vis-a-vis**, we can take the Penal Code in aid in dispensation of justice.

243. Section 120A of the Penal Code runs as follows:

"120A. When two or more persons agree to do, or cause to be done,

(1) an illegal act, or

(2) an act which is not illegal by illegal means, such an agreement is designated a criminal conspiracy:

Provided that no agreement except an agreement to commit an offence shall amount to a criminal conspiracy unless

some act besides the agreement is done by one or more parties to such agreement in pursuance thereof.

Explanation. It is immaterial whether the illegal act is the ultimate object of such agreement, or is merely incidental to that object."

244. The recognized definition of a criminal conspiracy is an **agreement** between two or more persons to engage in an unlawful act. '**Conspiracy**', an inchoate offence, **refers to an act of agreeing to commit a substantive crime to further plan and policy**. Accused's connection with any plan and activities involving the commission of substantive offence as enumerated in the Act of 1973 provides notion that he was in agreement to accomplish the crime. Such act of accused makes him associated with the conspiracy to promote the commission of the principal offence. Conspiracy to commit any offence signifies promoting or encouraging or endorsing the commission of a crime enumerated in the Act of 1973.

245. Designing conspiracy is not a tangible act. It is to be inferred from evidence and circumstances together with relevant facts. A conspiracy even designed at a place where the substantive crime never took place can be punished. All civilized systems recognize conspiracy - or at least agreement, encouragement- as a mode of criminal participation in the commission of substantive offences.

246. Conspiratorial liability extends liability to individuals who entered into an agreement to commit a particular offense, in instances where the planned event was in fact executed by the co-conspirators. Criminal conspiracy includes a theory of **indirect liability** for internationally recognized violations constituting the offence of crimes against humanity.

247. A conspiracy focuses on the '**common purpose**' of multiple persons or group of persons, whether or not they are organized into a single group. A crime against humanity is known as 'group crime'. The elements of the

group offense include a **collective understanding of the criminal purpose**, an aim to prepare for certain criminal acts, and an intent that those criminal acts be brought about elements of criminal conspiracy:

- (i) an **agreement** between the perpetrators,
- (ii) to achieve an **illegal goal**,
- (iii) the members of the group of perpetrators **know the nature of the conspiracy** and participate in it, and
- (iv) **at least one member** of the group commits an **overt act** in furtherance of the conspiracy.

248. Group criminality has to be addressed by a "conspiracy" standard. Under a conspiracy analysis, this Tribunal requires to find that the accused had made an agreement to facilitate the commission of the crime in question against the civilians. We are to determine the accused's participation in the common plan or conspiracy.

249. 'Criminal conspiracy' creates individual liability for actors who may not have participated in the physical perpetration of the crimes themselves, but whose role in the violations is viewed as particularly severe because they were **part of the genesis of** the collective criminal enterprise or **plan**.

250. Because criminal conspiracy hinges on the existence of a 'criminal enterprise' or 'plan' that implicates actors beyond the specific accused, its pleading necessitates a finding of collective planning and action to perpetrate a substantive crime in violation of human rights.

251. The criminal conspiracy doctrine only requires overlapping chains of agreement that link the physical perpetrator to the accused. However, the lack of a direct agreement between the defendant and the physical perpetrator is no bar to applying the conspiracy doctrine as long as the chain of overlapping agreements connects them [the accused and the members of the group of perpetrators].

252. It is quite common in conspiracies for some members to have **agreed** to a **common criminal plan** by virtue of their voluntary participation in the plan when they know what the plan entails and decide to participate in it. That is an 'agreement'. The act of '**agreement**' is to be **inferred** from act and conduct of the accused-amid, prior or subsequent to the commission of the principal offence.

253. A person can be said to have had '**concern**' with a 'criminal conspiracy' along with another person or persons to commit a crime if with the purpose of promoting or facilitating its commission he:

(i) **Agrees** with other person or persons that they or one or more of them will engage in conduct which constitutes such crime or an attempt or solicitation to commit such crime; or

(ii) **Agrees to aid** such other person or persons in the planning or commission of such crime or of an attempt or solicitation to commit such crime.

(iii) That accused's purpose was to promote or **facilitate** the commission of the crime.

254. Therefore, '**criminal conspiracy**' includes '**planning**'. It is now settled that planning occurs when one or more persons contemplate and take any steps towards commission of a crime. We are to see whether the accused was a part of the plan, for determining his involvement with the criminal conspiracy as the act of criminal conspiracy that encompasses 'agreement to plan' of the perpetrators to commit a substantive crime. It gets support from the decision of **Adhoc Tribunals** which are as below:

"The actus reus of 'planning' requires that one or more persons design the criminal conduct constituting one or more statutory crimes that are later perpetrated."

[Nahimana, Barayagwiza and Ngeze, ICTR Appeals Chamber, November 28, 2007, para. 479]

"Participation by 'planning' presupposes that one or several persons contemplate designing the commission of a crime at both the preparatory and execution phases."

[Seromba, ICTR Trial Chamber], December 13, 2006, para,303]

255. In the case of **Major Bazlul Huda Vs. State [Popularly known as Bangabandhu murder case]** His Lordships Justice S. K Sinha [62 DLR (AD), Page-1; para 173] has opined to the effect:

"An act or illegal omission must take place in pursuance of the conspiracy and in order to the doing of the thing conspired for; in the latter offence the mere agreement is enough, if the agreement is to commit an offence. In pursuance of the criminal conspiracy if the conspirators commit several offences, then all of them will be liable for the offences even if some of them had not actively participated in the commission of the offences. It is not required to prove that each and every person who is a party to the conspiracy must do some overt act towards the fulfillment of the object of conspiracy, the essential ingredient being an agreement between the conspirators to commit the crime since from its very nature a conspiracy is hatched in secrecy direct evidence of a criminal conspiracy to commit a crime is not available otherwise the whole purpose may frustrate in most cases only the circumstantial evidence which is available from which an inference giving rise to the commission of an offence of conspiracy may be legitimately drawn."

256. Having considered the above propositions of law along with the evidence as adduced by the prosecution we have no hesitation to hold that the acts and conduct of the accused suggested that the accused was a part of the plan of murder, abduction and other inhumane act [plundering] as alleged by the prosecution which encompasses 'agreement of plan' that is 'criminal conspiracy'.

257. Now another question is whether knowledge of details of the attack and presence of the accused at the scene of crime are required to be proved.

In the case of ***Limaj et al.***, **The Trial Chamber of ICTY** [November 30, 2005, Para. 190] has observed:

"[T]he accused need not know the details of the attack The accused merely needs to understand the overall context in which his or her acts took place."

258. In the case of ***Simic, Tadic and Zaric*** **ICTY** [Appeals Chamber] [October 17, 2003, Para. 45] has also held:

"It is well established that the accused need not know the details of the attack,: It is the attack, not the acts of the accused, which must be directed against the target population, and the accused need only know that his acts are part thereof."

259. In the case of ***Blaskic***, **ICTY [Appeals Chamber]**, [July 29, 2004, Para. 50] has observed as follow:

"The Trial Chamber [in Blaskic] agreed with the statement in the Furunzija Trial Judgment that 'it is not necessary that the aider and abettor ... know the precise crime that was intended and which in the event was committed. If he is aware that one of a number of crimes will probably be committed, and one of those crimes is in fact committed, he has intended to facilitate the commission of that crime, and is guilty as an aider and abettor. The Appeals Chamber concurs with this conclusion."

260. The ICTY [Appeals Chamber] in the case of *Krnjelac* [September 17, 2003, Para. 33] also has observed:

"[I]n the Tadic Appeals Judgment, the Appeals Chamber made a clear distinction between acting in pursuance of a common purpose or design to commit a crime and aiding and abetting the commission of a crime].

(i) The aider and abettor is always an accessory to a crime perpetrated by another person, the principal.

(ii) In the case of aiding and abetting no proof is required of the existence of a common concerted plan, let alone of the pre-existence of such a plan. No plan or agreement is required: indeed, the principal may not even know about the accomplice's contribution.

(iii) The aider and abettor carries out acts specifically directed to assist, encourage or lend moral support to the perpetration of a certain specific crime (murder, extermination, rape, torture, wanton destruction of civilian property, etc), and this support has a substantial effect upon the perpetration of the crime. 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"

[Also Tadic (Appeals Chamber) July 15, 1999, Para-229]

261. In the case of **Prosecutor Vs. Charles 'Ghankay Taylor**: Trial Chamber II SCSL: [Judgment 26 April 2012 Paragraph 166] it has been observed to the effect:

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

262. Acts and conduct of accused Abdul Jabbar Engineer suggested his intent and knowledge that he had conspired, planned, aided and

substantially encouraged and abetted the real perpetrators, in committing the crimes of abduction of 37 persons and murder of 22 persons out of them. It is also lawfully presumed that the accused had *actus reus* in providing moral support and aid to the commission of those offences. The *actus reus* of abetting requires assistance, encouragement or moral support which has a substantial effect on the perpetration of the crimes.

263. The defence has raised a question that the principal offenders have not been brought to the process of justice and thus the accused cannot be held responsible as conspirator, aider and abettor.

264. It has been held by **the Appeals Chamber of ICTY, in the case of Krstic [April 19, 2004 Para 143 of the judgment]** that-

"A defendant may be convicted for having aided and abetted a crime which requires specific intent even where the principal perpetrators have not been tried or identified."

265. The same Trial Chamber in the case of **Kayishema and Razindana** [May 21 1999; Para 200] has also observed that-

"It is not presupposed that scene of the crime, nor that his contribution be a direct one. Trial is to say the role of individual in the commission of the offence need not always be a tangible one. This is particularly pertinent where the accused is charged with 'aiding' or abetting of a crime."

266. It has also been observed by **ICTR [Trial Chamber] in the case of Bagilishema [Para-33]** that-

"[T]he Participation in the commission of crime does not require actual physical presence or physical assistance."

267. Besides, the charges of murder, abduction, plundering and the accused has also been charged for persecutions in the instant charge. In absence of any definition of persecution in **ICT Act of 1973** we can take aid from the Statutes of International Criminal Tribunals.

268. The crime of persecution specifically requires a finding of discriminatory intent on racial, religious or political grounds. This requirement has been broadly interpreted by the **ICTY**.

269. In the case of **Kvočka et al.**, **ICTY [Trial Chamber]**, November 2, 2001, para. 186 has observed:

*"[T]he **ICTY** have found that the following acts may constitute persecution when committed with the requisite discriminatory intent: imprisonment, unlawful detention of civilians or infringement upon individual freedom, murder, deportation or forcible transfer, 'seizure, collection, segregation and forced transfer of civilians to camps', comprehensive destruction of homes and property, the destruction of towns, villages and other public or private property and the plunder of property, attacks upon cities, towns and villages, trench digging and the use of hostages and human shields, the destruction and damage of religious or educational institutions, and sexual violence."*

270. The **ICTY [Appeals Chamber]**, in the said case February 28, 2005, para 460 has also observed:

*"With regard to the required mens rea [for persecution], the Appeals Chamber reiterates that persecution as a crime against humanity requires evidence of a specific intent to discriminate on political, racial or religious grounds."**[also Kordic and Cerke (ICTY Appeals Chamber), December 17, 2004]**.*

271. In the **Simic, Tadic, and Zaric**, **ICTY [Trial Chamber]**, October 17, 2003, para 52 has held:

"Although the Statute refers to the listed grounds in the conjunctive ["persecution on political, racial and religious

grounds"], it is settled in the jurisprudence of the Tribunal that the presence of discriminatory intent on any one of these grounds is sufficient to fulfil the mens rea requirement for persecution."

272. The **ICTY [Appeals Chamber]** in the case of **Blaskis July 29, 2004**, para 165 has observed that:

"Pursuant to the jurisprudence of the International Tribunal, the Appeals Chamber holds that a showing of a specific persecutory intent behind an alleged persecutory plan or policy, that is, the removal of targeted persons from society or humanity, is not required to establish the mens rea of the perpetrator carrying out the underlying physical acts of persecutions. The Appeals Chamber further dismisses the Appellant's allegation that a discriminatory purpose alone is insufficient to establish the mens rea for the crime of persecutions. The Trial Chamber was correct when it held at paragraph 235 of the Trial Judgment 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.' The Appeals Chamber stresses that there is no requirement in law that the actor possess a 'persecutory intent' over and above a discriminatory intent."

273. **ICTR [Trial Chamber]** in the case of **Bagorora, Kabiligi, Natbakuza and Nsengiyu muva** [para 2208] has observed that-

"The required discriminatory intent can be inferred from circumstantial evidence, such as the nature of the attack and the circumstances surrounding it."

274. At the time of adjudication of charge nos.01 and 02, on considering the evidence on record, we have already held that on 16 May 1971 a public

meeting was held at the Tushkhali High School field as convened by accused Abdul Jabbar Engineer, and in the said meeting he publicly declared that the freedom fighters, freedom loving people as well as the members of Hindu community were the enemies of Pakistan, and the accused also asked the Razakars to annihilate those people. Pursuant to the said common plan and design on 06.10.1971 the accused and his associate Razakars having held a secrete meeting in the house of Arshad Miah, the father-in-law of the accused, the Razakars attacked two Hindu populated village Angulkata and Mothbaria with discriminatory intent on religious ground and it is evidenced that the Razakars having plundered the houses of those two villages in total abducted 37 Hindu civilian people and eventually out them 22 persons were killed 08 were injured sustaining bullet injury and 07 were freed in lieu of money. Evidence clearly shows that the said attack was made by the Razakars at the instance and plan of the accused targeting the Hindu religious people with discriminatory intent.

275. If we consider the evidence on record coupled with the above propositions of law of International Criminal Tribunals we can reasonably, legally and validly infer that the accused had committed the crime with requisite 'discriminatory intent' on religious grounds.

276. Thus, the accused Abdul Jabbar Engineer also conspired, aided and facilitated to commit the offence of persecutions in committing the offences of murder, abduction, plundering as crimes against Humanity.

Further, the accused has been charged for the joint criminal responsibility; commonly know as, Joint Criminal Enterprise [**JCE**].

277. The Joint Criminal Responsibility or commonly known as, Joint Criminal Enterprise [**JCE**] is a widely used 'liability doctrine' that has been playing a vital role in the allocation of guilt in International Criminal Tribunals. It is to be noted that section 4(1) of the **ICT** Act, 1973 refers to the concept of **JCE** that when any crime as specified in section 3 is committed

by several persons each of such person is liable for that crime in the same manner as if it were done by him alone. 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. For **JCE** liability an accused can participate in a Joint Criminal Enterprise by passive, rather than active conduct.

278. Joint Criminal Enterprise is a means of committing a crime, not a crime in itself. In the case of **Kvočka et al, the ICTY [Appeals Chamber]**, February 28, 2005, para, 91 has observed:

"The Appeals Chamber emphasizes that joint criminal enterprise is simply a means of committing a crime; it is not a crime in itself."

279. At the time of adjudication of charge no.02 we have elaborately discussed the **JCE** 'liability doctrine' and as such we refrain ourselves to reiterate those.

280. If we consider the evidence adduced by the prosecution coupled with the propositions of law with regard to the **JCE** liability doctrine we have no hesitation to hold that prosecution has also been able to prove that in committing the offences of abduction, murder, persecution and other inhumane act [plundering] as listed in the instant charge accused Abdul Jabbar Engineer also incurred liability under section 4(1) of the **ICT** Act of 1973.

281. Having discussed and considered as above we are of the opinion that the prosecution has been able to prove the instant charge that the accused Abdul Jabbar Engineer conspired, abetted, facilitated the commission of abduction, murder, other inhumane act [plundering] and persecution on religious ground as crimes against Humanity as specified in section

3(2)(a)(g)(h) read with section 4(1) of the **ICT** Act of 1973 and thus liable to be convict under section 20(2) of the said Act.

XXVI. Conclusion

282. It is now, indeed, a history that the Pakistani army with the aid of its auxiliary forces, pro-Pakistan political organizations including Peace Committee implemented the commission of atrocities in 1971 in the territory of Bangladesh in furtherance of following policies:

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

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

284. It is quite coherent from the facts of common knowledge involving the backdrop of our War of Liberation for the cause of self determination that the Pakistani armed force, in execution of its plan and policy in collaboration with the local anti liberation section belonging to different groups of Muslim League, Jamaat-e-Islami[JEI] and its student wing Islami Chhattra Sangha [ICS], Nezam-e-Islami, Pakistan Democratic Party [PDP] and auxiliary forces, had to deploy public and private resources and target of such policy and plan was the unarmed civilian Bangalee population, pro-liberation people,

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

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

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

287. Despite lapse of long 43 years time the testimonies of PWs most of whom are live witnesses to the incidents of atrocities narrated in the charges do not appear to have been suffered from any material infirmity. Besides, no significant inconsistencies appear between their examination-in-chief made before the Tribunal and cross-examination.

288. It has been proved from the testimonies of witnesses that the accused had directly participated in the commission of crimes as a leader of Local Peace Committee. According to section 3(1) of the Act of 1973 it is manifested that even any person [**individual or a member of group of individuals**] is liable to be prosecuted if he is found to have committed any of the offences specified in section 3(2) of the Act of 1973. Thus, accused Md.

Abdul Jabbar Engineer even in the capacity of an 'individual' or a member of 'group of individuals' comes within the jurisdiction of the Tribunal as per provision of section 3(1) of the Act of 1973.

289. We are convinced from the evidence both oral and documentary led by the prosecution that accused Md. Abdul Jabbar Engineer was a potential leader of Peace Committee [Chairman of Mothbaria Thana Unit] of Pirojpur Sub-Division [now District] and he carried fire arms with him when he led the armed gang to the crime sites for committing crimes.

290. In the case in hand, it is abundantly clear that the accused absconded to evade the process of justice though he was a public representative [MPA & MP] and well educated and responsible man. It may be presumed that had the accused not been involved in the crime he would have certainly appeared before the Tribunal to face the trial.

XVII. Verdict on conviction

291. For the reasons set out in the judgment and having considered all the evidence and arguments advanced by both the parties, this Tribunal unanimously finds accused Md. Abdul Jabbar Engineer guilty in the following charges framed against him.

Charge no. 01:

292. The accused is found **GUILTY** of the offences of murder, plundering and arson as crimes against Humanity as specified in section 3(2)(a)(g) and (h) read with section 4(1) of the Act of 1973 and he be convicted and sentenced under section 20(2) of the said Act.

Charge no. 02:

293. The accused is found **GUILTY** of the offences of murder, plundering and arson as crimes against Humanity as specified in section 3(2)(a)(g) and (h) read with section 4(1) of the Act of 1973 and he be convicted and sentenced under section 20(2) of the said Act.

Charge no. 03:

294. The accused is found **GUILTY** of the offences of genocide and other inhumane acts [plundering and arson] as crimes against Humanity as specified in section 3(2)(a)(c)(g) and (h) read with section 4(1) of the Act of 1973 and he be convicted and sentenced under section 20(2) of the said Act.

Charge no. 04:

295. The accused is found **GUILTY** of the offence of conversion [other inhumane act] as crimes against Humanity as specified in section 3(2)(a)(g) and (h) read with section 4(1) of the Act of 1973 and he be convicted and sentenced under section 20(2) of the said Act.

Charge no. 05:

296. The accused is found **GUILTY** of the offences of abduction, murder, persecutions and other inhumane act [plundering] as crimes against Humanity as specified in section 3(2)(a)(g) and (h) read with section 4(1) of the Act of 1973 and he be convicted and sentenced under section 20(2) of the said Act.

XVIII. Verdict on sentence

297. Mr. Md. Zahid Imam and Mr. Taposh Kanti Baul, the learned prosecutors have submitted that accused Md. Abdul Jabbar Engineer should face the highest sentence, being a sentence of death, as he is proved to have participated in the commission of barbaric criminal acts constituting the offences of genocide and crimes against Humanity. The intrinsic gravity and extent and pattern of criminal acts constituting the offences of genocide and crimes against Humanity deserve to be considered as an 'aggravating factor' in awarding the highest sentence. They have also submitted that only such sentence would be just and appropriate to punish, deter those crimes at a level that corresponds to their overall magnitude and reflect the extent of the suffering inflicted upon the million of victims. The learned prosecutors have lastly submitted that in addition to a sentence of death a heavy fine should be imposed upon the accused.

298. Per contra, Mr. Mohammad Abul Hasan, the learned State defence counsel has sought for acquittal of the accused mainly on the grounds that the accused is an extremely old man and the prosecution has failed to prove his culpability with any of the events of atrocities. He has also submitted that there is no provision of imposing fine upon the accused in the International Crimes (Tribunals) Act, 1973 and as such this Tribunal has no jurisdiction to impose any fine upon the accused.

299. As a cursory review of the history of punishment reveals that the forms of punishment reflect norms and values and aspiration of a particular society at a given time. Distressed victims may legitimately insist appropriate and highest sentence while the defence may demand acquittal, in a criminal trial. But either of such demands is never considered as a catalyst in deciding the sentence to be inflicted upon the person found guilty of a criminal charge, in a court of law. Undeniably, the punishment must reflect both the calls for justice from the persons who have directly or indirectly been victims and sufferers of the crimes, as well as respond to the call from the nation as a whole to end impunity for massive human rights violations and crimes committed during the War of Liberation in 1971.

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

301. We have already found in our foregoing discussions that the accused is guilty of the offences mentioned in all the five charges in the commission of those offences as specified in section 3(2) of the Act of 1973.

302. On perusal of both oral and documentary evidence as discussed earlier it is found in charge no. 01 that on 16 May, 1971 as per the order of accused Md. Abdul Jabbar Engineer local Razakar commander Iskandar Ali Mridha

and his accomplice local Razakars killed freedom-fighters Motaleb Sharif and Abdur Razzak Biswas of Fuljhuri village when they were unarmed residing at their respective houses, and also committed plundering and arson in a large scale at Kulupara and Nathpara. The accused substantially abetted and facilitated the actual commission of the said offences of murder, plundering and arson as crimes against Humanity.

303. As regards crimes narrated in charge no. 02, it is proved beyond reasonable doubt that on 17 May, 1971 the accused and his accomplice army men and local Razakars having gone to Fuljhuri village committed murder of Saroda Kanta Paik, plundering and arson. The accused substantially contributed to the commission of those offences of murder, plundering and arson as crimes against Humanity.

304. Charge no. 03 relates to genocide and crimes against Humanity. The summary of the said charge is that on 22 May, 1971 accused Md. Abdul Jabbar Engineer along with his accomplices having gone to Naligram village he himself shot one Sokha Nath Khorati to death by his own pistol and his accomplices under his direction by firing shots also killed 10(ten) other unarmed innocent Hindu people with intent to destroy, in whole or in part, the Hindu religious group. They also plundered houses of sixty Hindu families of that village and then set them on fire. Thus, the accused participated, abetted and facilitated the actual commission of offences of genocide, murder and other inhumane acts [plundering and arson] as crimes against Humanity.

305. It is found in charge no. 05 that pursuant to a plan, conspiracy and direction of accused Md. Abdul Jabbar Engineer, the members of local Razaker Bahini in between the sunset of 06 October and the morning of 07 October, 1971 having attacked two Hindu populated villages Angulkata and Mothbaria abducted 37 Hindus from their respective houses and eventually, out of the said abductees 22 persons were killed by gun shots and 08

persons were injured having received bullet injuries by the Razakars and the Razakar Bahini also plundered the houses of those persons. The accused conspired, abetted and facilitated the commission of those offences of abduction, murder, persecutions and other inhumane act [plundering] as crimes against Humanity.

306. All the crimes listed in the said four charges [charge nos. 01, 02, 03 and 05] relating to genocide and crimes against Humanity were massive human rights violations committed during the War of Liberation in 1971. The fierceness of the events of genocide and crimes against Humanity were extremely detrimental to basic humanness. It deserves to be evaluated as 'crimes of serious gravity' intending to demean the human civilization. Designed plan and pattern of such heinous crimes inescapably aggravate the magnitude of the criminal acts and liability of the accused as well.

307. The Appellate Division of the Supreme Court of Bangladesh in interpreting section 20(2) of the Act of 1973 relating to sentencing has recently observed in **Criminal Review Petitions of Abdul Quader Mollah V. The Chief Prosecutor, International Crimes Tribunal, Dhaka** that-

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

308. We have weighed up the gravity of offences proportionately which had been committed by the accused during the War of Liberation of Bangladesh in 1971 as discussed earlier. All the crimes, particularly listed in charge nos. 01, 02, 03 and 05 relating to genocide, murder of un-armed innocent civilians and other inhumane acts as crimes against Humanity were worst

and barbarous types of crimes and are particularly shocking to the conscience of mankind. It is well proved that accused Md. Abdul Jabbar Engineer had direct complicity and substantially contributed and facilitated in the commission of such barbarous types of crimes and as such no punishment other than death will be equal to the said horrendous crimes for which the accused has been found guilty beyond reasonable doubt in the above mentioned four charges.

309. Having considered the attending facts, legal position and the gravity and magnitude of the offences, listed in charge nos. 01,02,03 and 05, committed by accused Md. Abdul Jabbar Engineer, we unanimously hold that the accused deserves the highest punishment i.e. capital punishment, particularly in those four charges, as provided in section 20(2) of the Act of 1973. But in the same breath, we cannot overlook the advanced age of the accused, the mitigating factor, which has come up before us for its due consideration.

310. Undisputedly, accused Md. Abdul Jabbar Engineer is now an old man of more than 82 years. Mitigating factor of advanced age, particularly more than 82 years of the accused is taken into consideration by this Tribunal for taking lenient view in the matter of awarding punishment to the accused. Having regards to the above facts and circumstances, we are of agreed view that ends of justice would be met if mitigating punishment is awarded, instead of capital punishment for the crimes as listed **in charge nos. 01, 02, 03 and 05** and, accordingly, accused Md. Abdul Jabbar Engineer who has been found guilty beyond reasonable doubt is sentenced to suffer **'imprisonment for life till his natural death'** for each of the said four charges under section 20(2) of the Act of 1973. It may be mentioned here that a finding of mitigating circumstances relates to assessment of sentence

and in no way derogates from the gravity of the crime. It mitigates punishment, not the crime.

311. **Charge no. 04** relates to conversion of religion at Hindu Para of Fuljhuri village. It has been proved beyond reasonable doubt that accused Md. Abdul Jabbar Engineer by his conduct instigated his accomplice Razakars to embrace Islam by apprehending Hindus. Considering the proportionate to the gravity of the offence of conversion [other inhumane act] as crimes against Humanity as listed **in charge no. 04**, the ends of justice would be met **if the accused is sentenced to suffer rigorous imprisonment for 20[twenty] years and to pay a fine of Tk. 10,00,000/- [ten lakh] in default to suffer further simple imprisonment for 2(two) years.**

312. But the question arises whether this Tribunal has jurisdiction to impose any fine upon the accused. It may be reiterated here that the learned State defence counsel Mr. Mohammad Abul Hasan contended that this Tribunal has no jurisdiction to impose any fine upon the accused, which is denied by the learned prosecutors. It may be mentioned here that section 20(2) of the Act of 1973 deals with punishment, which the Tribunal can award to an accused. The said provision is as under-

"Upon conviction of an accused person, the Tribunal shall award sentence of death or such other punishment proportionate to the gravity of the crime as appears to the Tribunal to be just and proper."

313. As per provision of section 20(2) of the Act of 1973, the Tribunal shall award sentence of death or 'such other punishment' proportionate to the gravity of the crime, but which are 'such other punishment' have not been defined or explained in the said Act. Section 53 of the Penal Code provides the punishments to which offenders are liable under the provisions of that Code which are as follows:

"Firstly- Death;

Secondly- Imprisonment for life;

Thirdly- Omitted;

Fourthly- Imprisonment, which is of two descriptions, namely-

(1) Rigorous, that is, with hard labour;

(2) Simple;

Fifthly- Forfeiture of property;

Sixthly- Fine.

Explanation- In the punishment of imprisonment for life, the imprisonment shall be rigorous."

314. Now, the question will arise whether the Tribunal may take the Penal Code in aid in the dispensation of justice. The answer is in the affirmative form because the Appellate Division of the Supreme Court of Bangladesh very recently has observed the same view **in the cases of Chief Prosecutor V. Abdul Quader Mollah vis-a-vis** that-

"The offences of murder and rape mentioned in the Act have been defined in our Penal Code and the definition of those offences given in the Penal Code may be taken in aid since this code has not been excluded by the Act. Besides, almost all laws prevailing in our country are codified laws, there laws have been promulgated following the concepts, principles, rules and traditions of English common law, or in the alternative, it may be said that the concepts, principles, rules and traditions of English common law, have penetrated into our jurisprudence and the fabric of our judicial system. The definitions given in respect of these offences in those laws are identical. Therefore, there is no bar to taking the definitions of those laws mentioned in the Act, 1973."
[Italic supplied]

315. In the light of the above observations made by the Appellate Division the Tribunal may take the Penal Code in aid in the dispensation of justice.

Thus, section 20(2) of the Act of 1973 shall be construed in the light of the provision of section 53 of the Penal Code.

316. Accordingly, the Tribunal may award any punishment i.e. sentence of death, imprisonment for life, rigorous or simple imprisonment, forfeiture of property or fine. We do not find any expressed provision relating to 'fine' in the Act of 1973. But after considering the legal provisions and the observations made by our Apex Court as discussed above, we are of the view that this Tribunal has jurisdiction to impose a fine upon the accused in a fit case like the instant one. It may be reiterated that for the offence listed **in charge no. 04**, the ends of justice would be met if the accused is sentenced to pay a fine in addition to imprisonment which we have already held as above. Accordingly, we do hereby render the following **ORDER ON SENTENCE**.

Hence, it is
ORDERED

317. That **accused Md. Abdul Jabbar Engineer** son of late Saden Ali alias Samed Ali Hawlader and late Sawhar Banu of village- Khetachira, Police Station- Mothbaria, District- Pirojpur and House No. 136/A, West [Paschim] Nakhalpara, Police Station- Tejgaon, Dhaka is held guilty of the offences of '**crimes against Humanity**' enumerated in section 3(2)(a)(g) and (h) of the International Crimes (Tribunals) Act, 1973 as listed **in charge nos. 01, 02 and 05** and he is also held guilty of the offences of '**genocide and crimes against Humanity**' enumerated in section 3(2)(a)(c)(g) and (h) of the said Act as listed **in charge no.03** and he be convicted accordingly and sentenced thereunder to suffer **imprisonment for life till his natural death**, for each of the said four charges mentioned above under section 20(2) of the said Act of 1973.

318. **Accused Md. Abdul Jabbar Engineer** is held guilty of the offence of '**crimes against Humanity**' enumerated in section 3(2)(a)(g) and (h) of the International Crimes (Tribunals) Act, 1973 as listed **in charge no. 04** and he be convicted accordingly and sentenced thereunder **to suffer rigorous**

imprisonment for 20[twenty] years and to pay a fine of Tk.10,00,000/- [ten lakh] in default to suffer further simple imprisonment for 02[two] years for the said charge [**charge no. 04**] under section 20(2) of the said Act of 1973.

319. However, the above mentioned five sentences shall run **concurrently**.

320. Since the convict Md. Abdul Jabbar Engineer has been absconding, the '**sentence of imprisonment for life till his natural death**' and the '**sentence of rigorous imprisonment for 20[twenty] years**' as awarded above shall be executed after causing his arrest or when he surrenders before the Tribunal, whichever is earlier.

321. The sentence awarded as above under section 20(2) of the International Crimes (Tribunals) Act, 1973 shall be carried out in accordance with the order of the government as required under section 20(3) of the said Act of 1973.

322. The convict is at liberty to prefer appeal to the Appellate Division of the Supreme Court of Bangladesh against the conviction and sentence within 30 [thirty] days of the date of order of conviction and sentence as per provision of section 21 of the Act of 1973 if he is arrested or surrenders within said stipulated period and in that event certified copy of this judgment and order will be provided to the accused, free of cost.

323. Issue conviction warrant accordingly.

324. The Secretary, Ministry of Home Affairs and the Inspector General of Police are hereby directed to ensure the apprehension of the fugitive convict Md. Abdul Jabbar Engineer with the help of the Inter-Pol, if necessary.

325. Let a copy of the judgment be transmitted together with the conviction warrant to (1) **the Secretary, Ministry of Home Affairs, Bangladesh Secretariat, Dhaka** (2) **the Inspector General of Police, Bangladesh**

Police, Police Head Quarters, Dhaka, and (3) **the District Magistrate, Dhaka** and **Pirojpur** for information and necessary action and compliance.

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

(M. Enayetur Rahim, Chairman)

(Jahangir Hossain, Member)

(Anwarul Haque, Member)