

International Crimes Tribunal-1 [ICT-1]

[Tribunal constituted under section 6 (1) of the Act No. XIX of 1973]
Old High Court Building, Dhaka, Bangladesh

ICT-BD [ICT-1] Case No. 08 of 2016

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

Present:

Justice Md. Shahinur Islam, Chairman

Justice Amir Hossain, Member

Justice Md. Abu Ahmed Jamadar, Member

The Chief Prosecutor

Vs

(1)Md. Akmal Ali Talukder, (2) Abdun Nur Talukder @ Lal Miah [absconding] , (3) Md. Anis Miah [absconding] and (4) Md. Abdul Mosabbir Miah [absconding]

For the Prosecution:

Mr. Golam Arief Tipoo, Chief Prosecutor

Mr. Syed Haider Ali, Prosecutor

Mr. Mukhlesur Rahman, Prosecutor

Mr. Hrishikesh Saha, Prosecutor

Mr. Tapas Kanti Baul, Prosecutor

Mr. Abul Kalam, Prosecutor

Ms. Sabina Yesmin Khan, Prosecutor

Mr. Sheikh Mosfeq Kabir, Prosecutor

Mr. Abdus Sobhan Tarafdar, Advocate, Bangladesh Supreme Court: For the Accused (1) Md. Akmal Ali Talukder

Mr. Mohammad Abul Hasan, Advocate, Bangladesh Supreme Court: For three absconding Accused (2) Abdun Nur Talukder @ Lal Miah, (3) Md. Anis Miah and (4) Md. Abdul Mosabbir Miah

Date of delivery of Judgment: 17 July, 2018

JUDGMENT

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

I. Introductory Words

1. Four accused (1)Md. Akmal Ali Talukder, (2) Abdun Nur Talukder @ Lal Miah [absconding], (3) Md. Anis Miah [Absconding] and (4) Md. Abdul Mosabbir Miah[absconding] have been indicted on two counts for the atrocious criminal activities constituting the offences of ‘genocide’ and ‘murder’, ‘abduction’, ‘confinement’, ‘torture’ and ‘other inhuman acts’ as crimes against humanity committed in the locality under police station- Rajnagar of District[now]-Moulvibazar, in 1971, during the war of liberation of Bangladesh, as arraigned in charge nos. 01 and 02.

2. Prosecution alleges that in 1971 the accused persons got themselves affiliated in locally formed Razakar Bahini, an ‘auxiliary force’, as its members, created intending to collaborate with the Pakistani occupation armed force in carrying out its criminal activities aiming to annihilate the pro-liberation Bengali civilians, civilians belonging to Hindu religious group in

furtherance of policy and plan of resisting the Bengali nation in achieving its self-determination and independence.

3. The trial took place in presence of the accused (1) Md. Akmal Ali Talukder. Out of four accused only this accused has been in detention since pre-trial stage. Three other accused (2) Abdun Nur Talukder @ Lal Miah, (3) Md. Anis Miah and (4) Md. Abdul Mosabbir Miah remained absconded and thus trial against them took place in their absentia after compliance with necessary legal requirements including publication of notification in two national daily news papers directing them to surrender before the Tribunal to which these three accused did not respond.

4. Pursuant to issuance of production warrant the prison authority has produced the accused Md. Akmal Ali Talukder today before this Tribunal [ICT-1].

5. Today, this Judgment is being rendered by this Tribunal [ICT-1] for the prosecution of persons belonging to an auxiliary force allegedly responsible for the serious offences as enumerated in the International Crimes (Tribunals) Act, 1973[hereinafter referred to as the 'Act of 1973'] committed in violation of international humanitarian law in the territory of Bangladesh in 1971, during the war of liberation. Having jurisdiction under section 10(1) (j), section 20(1) and section 20(2) of the International Crimes

(Tribunals) Act, 1973[Act No. XIX of 1973] this ‘Tribunal’ known as International Crimes Tribunal-1 [ICT-1] hereby renders and pronounces the following unanimous judgment.

II. Formation and Jurisdiction of the Tribunal

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

7. We reiterate that the Act of 1973 has been enacted to prosecute, try and punish not only the 'armed forces' but also the perpetrators who belonged to ‘auxiliary forces’, or who committed the offence in the capacity of an ‘individual’ or a ‘group of individuals’ or ‘organisation’. It is manifested from section 3(1) of the Act of 1973 that even any person (individual), if he is *prima facie* found accountable either under section 4(1) or 4(2) of the Act of 1973 for the perpetration of offence(s), can be prosecuted and tried under the Act.

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

III. Historical backdrop and Context

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

10. We consider it expedient to note that the verdict of the Tribunal, a court of law is not only meant to render its decision on the arraignment brought. It must also reflect the truth, behind the commission of horrific criminal acts which shall create youth quake to go ahead with the spirit of the war of liberation.

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

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

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

14. The history goes on to portray that in the general election of 1970, the Awami League under the leadership of Bangabandhu Sheikh Mujibur Rahman, the father of the nation became the majority party of Pakistan. But deliberately defying the democratic norms Pakistan Government did not care to respect this overwhelming majority. As a result, movement started in the

territory of this part of Pakistan and Bangabandhu Sheikh Mujibur Rahman, the father of the nation in his historic speech of 7th March, 1971, called on the Bangalee nation to struggle for independence.

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

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

17. In the War of Liberation that ensued in 1971, all people of the then East Pakistan unreservedly supported and participated in the call to make their motherland Bangladesh free but a small number of Bangalees, Biharis, other pro-Pakistanis, as well as members of a number of different religion-based political parties, particularly Jamat E Islami (JEI) and its student wing Islami Chatra Sangha

(ICS), Muslim League, Convention Muslim League joined and/or culpably collaborated with the Pakistani occupation army to aggressively resist the conception of independent Bangladesh and most of them committed and facilitated as well the commission of atrocious activities directing the pro-liberation civilian population.

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

19. The Pakistani occupation army's widespread appalling brutality directing civilian population of Bangladesh was planned and in furtherance of policy-- the policy to wipe out the pro-liberation Bengali civilians. The Appellate Division, in the case of **Abdul Quader Molla** has observed that –

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

20. History testifies that Pakistani army who started its monstrous 'mayhem' since 25 March 1971 intending to liquidate the pro-liberation Bengali civilians, to resist their aspiration of self-determination. Grave and recurrent horrific atrocities committed directing the Bengali civilians in the territory of Bangladesh starting since 25 March 1971 did not thrive to foil the highest sacrifice to which the nation always pays tribute and homage to the blood of millions of patriotic martyrs and innocent defenceless people.

21. It is now an undisputed history that the local collaborators, knowing consequences, actively assisted the Pakistani occupation army in accomplishing their policy and plan to annihilate the pro-liberation Bangalee civilians. The local collaborators truly had acted as traitors. It is now a settled history which needs no further document to prove.

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

Razakar, Al-Badar-- Para militia forces, intending to collaborate with them.

23. Prosecution avers that the accused persons being the potential members of Razakar Bahini, a para militia force did not keep them distanced from the strategy of JEI to further the policy and plan of the Pakistani occupation army in carrying out barbaric atrocities against the non combatant pro-liberation civilians that resulted in commission of offences enumerated in the Act of 1973, in grave breach of Geneva Convention. It is rather now a settled history

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

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

26. The author of the book titled '**History of the Liberation War**', citing **Jagjit Singh Aurora** states an statistics showing the strength of locally formed para militia and other forces intending to provide collaboration with the Pakistani occupation army in 1971--

“During the liberation war in Bangladesh, there were about eighty thousand Pakistani soldiers, twenty five thousand militia, twenty five thousand civilian forces, and fifty thousand Razakars, Al-Badr, and Al-Shams members”

[Source: Figures from the Fall of Dacca by Jagjit Singh Aurora in the Illustrated Weekly of India, 23 December, 1973]

27. In the present-day world history, conceivably no nation paid as extremely as the Bangalee nation did for its self-determination and for achieving independent motherland. The nation shall remain ever indebted to those best sons and daughters of the soil who paid supreme sacrifices for an independent motherland – **Bangladesh**. The nation always pays tribute and homage to the blood of millions of patriotic martyrs and innocent defenceless people.

IV. Brief Account of the Accused Persons

28. Before we move to adjudicate the alleged arraignments brought and accountability of the accused persons therewith we consider it

necessary to focus on the brief account of the accused person which is as below:

(i) Md. Akmal Ali Talukder

Accused Md. Akmal Ali Talukder [73], son of late Ameer Ali Talukder and late Kulsuma Bibi of Village Pachgaon, Police Station-Rajnagar, District-Moulavibazar was born on 01.12.1939 [as per voter list]. Since prior to 1971 he was associated with the politics of Muslim League. During the war of liberation in 1971, he became a member of Pachgaon Union Peace Committee and also joined the local Razakar Bahini. He was engaged in committing the offences of genocide and crimes against humanity, prosecution alleges.

(ii) Abdun Nur Talukder alias Lal Miah [absconded]

Accused Abdun Nur Talukder alias Lal Miah [63], son of late Abdul Gafur Talukder and late Samarun Begum of Village-Jalalpur, Police Station-Rajnagar, District-Moulavibazar was born on 10.12.1952 [as per voter list]. Since prior to 1971 he was actively involved in the politics of Muslim League. During the war of liberation in 1971, he got enrolled in locally formed Razakar Bahini and collaborated with the Pakistani occupation army in carrying out the offences of genocide and crimes against humanity, prosecution alleges.

(iii) Md. Anis Miah

Accused Md. Anis Miah [76], son of late Babru Miah and late Subeja Khatun of Village-Paschimbag [Kanikiyari], Police Station-Rajnar, District [now]- Moulavibazar was born on 20.12.1938 [as per voter list]. Prosecution alleges that during the war of liberation in 1971, he was a potential member of locally formed Razakar Bahini and he was involved in the commission of offences of genocide and crimes against humanity.

(iv) Md. Abdul Mosabbir Miah

Accused Md. Abdul Mosabbir Miah [64], son of late Babru Miah and late Subeja Khatun of village-Paschimbag [Kanikiyari], Police Station-Rajnar, District [now]-Moulavibazar was born on 12.06.1951 [as per voter list]. In 1971, during the war of liberation he was a member of locally formed Razakar Bahini and he was involved in the commission of offences of genocide and crimes against humanity, prosecution alleges.

V. Procedural History

29. The Investigation Agency of the Tribunal constituted under section 8 of the Act of 1973 initiated the task of investigation by appointing Hari Debnath as Investigation Officer pursuant to information recorded as complaint register serial no.36 dated 12.10.2014, in respect of commission of offences enumerated in

section 3(2) of the Act of 1973 allegedly perpetrated by the six suspected accused persons. Of them suspected Alauddin Chowdhury and Md. Matin Miah died before completion of investigation.

30. During investigation, the IO prayed for arrest of the four suspected accused (1) Md. Akmal Ali Talukder, (2) Abdun Nur Talukder @ Lal Mia, (3) Md. Anis Miah and (4) Md. Abdul Mosabbir Miah through the Chief Prosecutor. The Tribunal on hearing the application issued warrant of arrest [WA] against those four suspected accused on 26.11.2015.

31. In execution of warrant of arrest issued the enforcement agency arrested Md. Akmal Ali Talukder and produced him before the Tribunal when he was sent to prison as prayed by the prosecution, for the purpose of proper and effective investigation. The three other suspected accused persons were on run.

32. The IO on permission of the Tribunal interrogated the detained accused Md. Akmal Ali Talukder at the safe home of the Investigation Agency on 20.12.2015, for the purpose of carrying effective and proper investigation.

33. During investigation, the Investigation Officer examined witnesses, collected documents and materials and found

involvement of the four accused persons with the offences enumerated in section 3(2) of the Act of 1973 and thus the IO submitted its report together with documents collected and statement of witnesses, on conclusion of investigation, before the Chief Prosecutor on 23.03.2016 against four accused (1) Md. Akmal Ali Talukder, (2) Abdun Nur Talukder @ Lal Mia, (3) Md. Anis Miah and (4) Md. Abdul Mosabbir Miah.

34. Afterwards, the Chief Prosecutor, on the basis of the report and documents submitted therewith by the Investigation Agency, on completion of investigation, submitted the 'Formal Charge' under section 9(1) of the Act of 1973 before this Tribunal on 23.03.2016 against the accused (1) Md. Akmal Ali Talukder, (2) Abdun Nur Talukder @ Lal Mia, (3) Md. Anis Miah and (4) Md. Abdul Mosabbir Miah as sufficient materials were found in support of their culpability and participation in committing the commission of the offences of 'crimes against humanity' and 'genocide' during the period of War of Liberation in 1971 around the locality under police station-Rajnagar of District[now]-Moulavibazar, as narrated in the formal charge.

35. The 'formal charge' submitted discloses that the accused persons allegedly participated, facilitated and had complicity in the commission of the alleged diabolical offences by launching systematic attack directing civilian population and Hindu religious

group of the locality under police station-Rajnagar of District [now] Moulavibazar and they appear to have had allegedly acted in furtherance of common purpose and design in accomplishing such offences, being part of JCE and therefore, the 04[four] accused persons have been recommended for prosecution jointly as permissible under Rule 36 of the Rules of Procedure[ROP], 2010 of this Tribunal-1.

36. Thereafter, on 15.06.2016 the Tribunal, under Rule 29(1) of the Rules of Procedure [ROP], took cognizance of offences as mentioned in section 3(2) (a)(c)(g)(h) of the Act of 1973 having found *prima facie* case in consideration of the formal charge and the documents submitted therewith and the statement of witnesses.

37. At this stage, it was found that three [03] accused Abdun Nur Talukder @ Lal Mia, Md. Anis Miah and Md. Abdul Mosabbir Miah could not be arrested yet in execution of warrant of arrest issued earlier by the Tribunal and as such the Tribunal directed the enforcement agency to submit report in execution of warrant of arrest issued at pre-trial stage against them.

38. On getting the report in execution of W/A it appeared that the accused Abdun Nur Talukder @ Lal Mia, Md. Anis Miah and Md. Abdul Mosabbir Miah remained absconded and there was no chance of causing their immediate arrest and thus for holding trial

in *absentia*, the Tribunal on 18.10.2016 ordered publication of notification in 02 national daily newspapers as required under law.

39. After publication of such notification asking those three accused to surrender before this Tribunal within the period mentioned therein the Tribunal proceeded to keep up the proceedings in *absentia* against them and fixed the date for hearing the charge framing matter.

40. On 06.12.2016 the Tribunal appointed Mr. Mohammad Abul Hasan, Advocate to defend the three absconding accused as state defence counsel, at the cost of the Government. Prosecution was directed to provide the copy of formal charge to the appointed state defence counsel so that he can get preparation.

41. On conclusion of hearing about the charge framing matter on 28.02.2017 , the Tribunal framed charges on two counts against four accused (1) Md. Akmal Ali Talukder, (2) Abdun Nur Talukder @ Lal Mia, (3) Md. Anis Miah and (4) Md. Abdul Mosabbir Miah, by rendering decision on 07.05.2017 . The charges so framed were read over and explained in Bangla to the accused Md. Akmal Ali Talukder present on dock, as brought from prison when he pleaded not guilty and claimed to be tried according to law. The charges so framed however could not be read over and explained to the three

other accused persons as they remained absconded. With this the trial of the case commenced.

42. In course of trial prosecution adduced in all 13 witnesses including the Investigation Officer [IO] and of them 10 witnesses have been examined intending to substantiate the arraignments brought in the charges framed. One witness [P.W.07] has been tendered and the learned state defence counsel declined to cross-examine her. Defence however duly cross-examined all the witnesses examined.

43. On 27.03.2018, at the phase of placing summing up the learned counsel defending the accused Md. Akmal Ali Talukder prayed permission to submit some papers in support of defence. For ends of justice Tribunal allowed the appeal and accordingly some papers have been submitted, though at belated stage and the same have been kept with the record.

44. On closure of prosecution evidence, defence refrained from adducing and examining any witness. And thus, date was fixed for placing summing up which started on 27.03.2018 when both parties advanced their respective argument. The summing up phase got ended on the same day.

45. The Tribunal then kept the case in CAV, for delivery and pronouncement of its judgment and sent the accused Md. Akmal Ali Talukder back to prison with direction to produce him on call.

VI. Summing up

Summing up by the prosecution

46. Mr. Syed Haider Ali the learned prosecutor started placing summing up by drawing attention to the historical context in which the atrocious activities were committed in 1971 directing the non-combatant civilian population including the Hindu community as narrated in the charges framed in this case. Next, he submitted that the accused persons were notorious Razakars around the locality under Rajnagar Police Station of District-Moulavibazar and the accused persons in exercise of their affiliation with the said auxiliary force actively collaborated with the Pakistani occupation army in carrying out atrocious activities.

47. Even in absence of any documentary evidence it has been proved by the unshaken testimony of competent witnesses who are from the crime locality that all the four accused belonged to locally formed Razakar Bahini and they were engaged in conducting the horrific prohibited acts constituting the offences of crimes against humanity and genocide as well, the learned prosecutor added.

48. The learned prosecutor further submitted that the prosecution witnesses being the locals of the same locality were quite competent to be acquainted with the accused persons beforehand. Besides, their notoriety made them commonly known to the locals, the learned prosecutor added. Defence could not shake credibility and practicability of knowing the accused beforehand and thus merely for the reason of absence of any documentary evidence it cannot be said that the accused did not belong to Razakar Bahini.

49. The learned prosecutor then moved to argue on charges brought, drawing attention to the evidence tendered and settled legal proposition. We consider it appropriate to address the argument so made at the time of adjudicating the charges independently.

Summing up by the Defence

50. Mr. Abdus Sobhan Tarafdar the learned counsel defending the accused Md. Akmal Ali Talukder chiefly concentrated his summing up on defence case as has been extracted from the trend of cross-examination and suggestion put to witnesses on part of accused Md. Akmal Ali Talukder. The learned defence counsel submitted that this accused had not been in Bangladesh in 1971, he had been in India along with his family and he migrated to Bangladesh long after independence of Bangladesh. He has been implicated in this case out of rivalry with one Jitu Malakar, one of his neighbours.

51. On the date of placing summing up Mr. Abdus Sobhan Tarafdar the learned counsel defending the accused Md. Akmal Ali Talukder chiefly stressed on the issue of 'plea of alibi'. Accordingly, he with the leave of the Tribunal submitted some documents, allegedly issued by the concerned authority of Assam, India showing the marriage of this accused and his son's birth and death in India.

52. It transpires from above that the core of defence case is the 'plea of alibi' i.e at the relevant time this accused had not been in the locality and thus he deserves exoneration, it has been contended on part of accused Md. Akmal Ali Talukder. Since this accused had been staying in India in 1971 along with his family his affiliation with the locally formed Razakar Bahini is not true and thus he was not associated with the crimes alleged in any manner, the learned counsel defending this accused also submitted.

53. Mr. Mohammad Abul Hossain the learned state defence counsel defending the three absconding accused in placing his summing up argued that the witnesses examined by the prosecution had no reason to recognize these accused, that these accused were not with the gang as testified by the witnesses, that the evidence tendered lacks of credibility and that the testimony tendered did not specify the act of any of these accused in committing the alleged crimes. The other members of Razakar Bahini who allegedly accompanied

the gang have not been prosecuted and it reflects that these accused persons have been selected for prosecution with ulterior motive.

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

54. Prosecution alleges that the accused persons were the active members of locally formed Razakar Bahini, an auxiliary force as defined in section 2(a) of the Act of 1973.

55. The 'plea of alibi' taken by the accused Md. Akmal Ali Talukder may be well addressed as relevant, taking the papers filed at belated stage into account at the time of adjudicating the charges. Now, we consider it appropriate to determine whether this accused and three other absconding accused belonged to locally formed Razakar Bahini. Prosecution relied upon oral testimony to prove this matter. And the plea of alibi being relevant to the arraignments brought may be well determined only at the time of adjudicating the charges framed.

56. The Act of 1973 permits to prosecute even an individual for the crimes enumerated in section 3(2) of the Act. In the case in hand, prosecution avers that the accused persons got engaged in committing the crimes narrated in the charges framed in exercise of

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

57. Prosecution chiefly relied upon oral testimony of direct witnesses of whom some are rape victims. In addition to it, prosecution drew attention to the documents [the role showing disbursement of salary to Razakars] which demonstrates the names of accused Abdun Nur Talukder @ Lal Miah [serial no. 69 of the role], Md. Mosabbir Miah [serial no.113 of the role] and Md. Anis Miah [serial no.114 of the role]. However, name of accused Md. Akmal Ali Talukder does not find place in this role [attested photocopy of which has been annexed in the prosecution documents volume page nos. 41-45].

58. The accused persons have been brought to justice long 46 years after the atrocious events happened in 1971, during the war of liberation. With the lapse of long passage of time it is now challenging indeed to collect evidence, especially documentary in nature to substantiate any crucial fact related to the mass atrocities and genocide committed in 1971 in the territory of Bangladesh. Besides, after the brutal assassination of the Father of Nation Bangabandhu Sheikh Mujibur Rahman on 15 August 1975 the pro-

Pakistani quarter who took visible stance against the war of liberation started destroying evidence of their complicity with the perpetration of mass atrocities and genocide.

59. Keeping the above as an inevitable reality in mind we are to concentrate on weighing the ocular testimony tendered with respect to the fact as to the accused persons' affiliation with an auxiliary force. The witnesses testified how they saw the accused persons acting in launching the attack. At this phase of deliberation we are not going to resolve the issue of commission of the crimes alleged and liability of the accused persons therewith. But we may have fair indication, from the evidence of witnesses, as to identity of the accused persons.

60. P.W.01 Sajol Kumar Chakrovarty is a hearsay witness. He heard that the Pakistani occupation army and local Razakars accused Akmal Ali Talukder, Abdun Nur Talukder, Anis Miah, Mosabbir Miah and their accomplices committed devastating activities, killing and sexual violence at village Pachgaon. Defence does not deny that the accused persons were Razakars. In cross-examination, it has been unveiled that all the three accused persons excepting accused Md. Akmal Ali Talukder are associated with the politics of Jamaat-e-Islami.

61. In 1971, during the war of liberation it was quite practicable indeed of knowing who got enrolled in locally formed Razakar Bahini. This Bahini was an auxiliary force [armed *para militia* force] created to use it for static purpose of the Pakistani occupation army and to have assistance from it in conducting mayhem directing the unarmed pro-liberation civilians. Current affiliation of three accused persons with the politics of Jamaat-e-Islami is chained to the fact of their association in Razakar Bahini in forming which JEI played active and potential role in 1971.

62. P.W.02, P.W.03, P.W.04, P.W.05, P.W.06, P.W.08 and P.W.09 are the witnesses who testified the event of attack as narrated in charge no.01. All of them stated that they saw the Razakars accused persons accompanying the Pakistani occupation army in launching attack at their houses at village Pachgaon.

63. That is to say, the accused persons remained present at the crime site with the gang, in exercise of their membership in Razakar Bahini. How the witnesses knew such identity of the accused persons?

64. Accused Md. Akmal Ali Talukder was a neighbouring resident of P.W.05. It transpires from evidence of P.W.06, a rape victim and P.W.09 that accused persons including the accused Md. Akmal Ali

Talukder were their neighbours. It also reveals from evidence of P.W.10 and P.W.11, the witnesses examined in support of the event narrated in charge no.02 that all the accused persons were the residents of the locality nearer to their house.

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

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

67. In cross-examination P.W.13 the IO stated that the Rajnagar Police Station cases being nos. 11(3)72 and 8(4) 72 did not find place the name of accused Md. Akmal Ali Talukder. It appears on perusal of the investigation report that those two cases were against two other accused persons. Presumably, they were so prosecuted under the Collaborators Order, 1972, although the IO did not take

effective attempt in obtaining more and sufficient papers in relation to the arraignment brought in those two cases and the fate thereof.

68. However, prosecuting the two other accused under the Collaborators Order, 1972 suggests the conclusion that they remaining engaged with a para militia force got associated in carrying out criminal acts in violation of customary international law and the laws of war. It lends assurance to the testimony of prosecution witnesses who consistently described that the accused persons the Razakars were with the gang when it had attacked the village-Pachgaon [as narrated in charge no.01].

69. Who were the local collaborators of the Pakistani occupation army in 1971? Taking active assistance on part of whom the Pakistani occupation army used to carry out attack targeting a particular rural locality and civilians belonging to a particular group, in 1971?

70. The Razakar force was composed of mostly pro-Pakistani Bengalis. Razakars were actively associated with many of the atrocities committed by the Pakistani occupation army during the 9-month war of liberation in 1971. If an individual, being part of a criminal enterprise, is found to remain present at the crime site with the group of Pakistani occupation army, it may be deduced

justifiably, in absence of anything contrary, that of course he accompanied the gang, in exercise of his membership or affiliation with any of *para militia* forces. Settled history prompts to deduce it.

71. In 1971, during the war of liberation mostly the pro-Pakistan people opted to get enrolled in Razakar Bahini, Al-Badar Bahini, and Peace Committee under the active guidance of pro-Pakistan political parties like Jamaat-e-Islam [JEI], Convention Muslim League, and Muslim League etc. Intention of creating such para militia forces were to carry out atrocious activities on having assistance and contribution from the members of those forces. And after providing training the members of those para militia forces were equipped with fire arms. It is found in a report titled “Pakistani Regime is Preparing For Long Guerrilla War in East” published in the **New York Times** , **July30 1971** issue (By MALCOLM W. BROWNE) that-

After brief training the recruit is given a rifle.....The Government says it has already recruited more than 22,000 Razakars of a planned force of 35,000.

72. The accused persons were thus given rifle after their training as members of the auxiliary force--‘Razakar Bahini’ and in this way they became infamous armed members of local Razakar Bahini for

‘operational purpose’ maintaining ‘static relation’ with the armed force i.e the Pakistani occupation army, we conclude.

73. Naturally, the Pakistani occupation army would not have preferred to be accompanied by individuals having no training and who were not equipped with fire arms or rifle when they were on move to execute their designed criminal mission particularly in rural locality of which they were not familiar at all.

74. We may therefore arrive at a safe and an unerring conclusion that the accused (1) Md. Akmal Ali Talukder, (2) Abdun Nur Talukder @ Lal Miah, (3) Md. Anis Miah and (4) Md. Abdul Mosabbir Miah had acted as the members of an ‘auxiliary force’ under control of Pakistani occupation army for their operational and other purposes.

75. Defence argued that prosecution failed to prove accused persons’ membership in locally formed Razakar Bahini by presenting authoritative and sufficient documents. But the Tribunal notes that it is not imperative to prove accused persons’ formal membership in Razakar Bahini by providing more and more documents for determining their nexus with the commission of the offences alleged. Besides, status and association of accused persons who were allegedly engaged in the commission of horrific atrocious

activities became an anecdote around the crime locality. Therefore, testimony made by the witnesses the victims and residents of the crime localities in respect of accused persons' engagement in locally formed Razakar Bahini inspires credence. Mere inadequacy of documentary evidence as averred by the defence by itself does not turn down the fact of accused persons' affiliation with the locally formed Razakar Bahini.

76. Whether the accused persons incurred liability for the crimes narrated in charge nos.01 and 02 shall be resolved in respective segment of the judgment. But now in view of above deliberation based on evidence and settled history it stands proved firmly that accused Md. Akmal Ali Talukder and three other accused were with the group of army men when the attack was launched at village Pachgaon. This fact together with the reasoning as stated above impels to conclude it unerringly that the accused persons belonged to locally formed Razakar Bahini, a para militia force.

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

77. Before concentrating on adjudication of charges we consider it expedient to focus on the settled factors to be kept in mind in evaluating evidence tendered as the case involves the offences of

‘genocide’ and ‘crimes against humanity which are known as internationally recognised crimes and not the isolated crimes.

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

79. The present case as far as it relates to the alleged facts of criminal acts forming part of systematic attack constituting the alleged offences of ‘genocide’ and ‘crimes against humanity’ chiefly rested upon oral evidence presented by the prosecution. It appears that mostly the victims and direct witnesses came on witness dock to testify what they experienced and observed which are materially related to the commission of principal crimes.

80. The horrific crimes were perpetrated in context of war of liberation in 1971 and those were not isolated crimes. Section 23 of the Act of 1973 expressly provides that provisions of the Criminal

Procedure Code, 1898(V of 1898), and the Evidence Act, 1872(I of 1872), shall not apply in any proceedings under the Act of 1973.

81. Further, Section 19(1) of the Act provides that the Tribunal shall not be bound by technical rule of evidence and it shall adopt and apply to the greatest possible extent non-technical procedure and may admit any evidence which it deems to have probative value.

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

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

84. It is to be noted that the testimony of even a single witness on a material fact does not, as a matter of law, require corroboration. The established jurisprudence makes it clear that corroboration is not a rule of requirement for a finding to be rendered.

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

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

87. Appraisal of the evidence is to be made based on the totality of the evidence presented in the case before us. The Tribunal, however, is not obliged to address all insignificant inconsistencies, even if occur in witnesses' testimony. We require separating the grains of acceptable truth from the chaff of exaggerations and improbabilities which cannot be safely or prudently accepted and acted upon, in determining accused's accountability.

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

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

90. Finally, it is now well settled too that even hearsay evidence is not inadmissible *per se*. However, mere admission of hearsay evidence does not render it carrying probative value. Such hearsay

evidence is to be weighed and assessed in context of its credibility, relevance, and circumstances and also together with other evidence tendered.

IX. Adjudication of Charges

Adjudication of Charge No. 01

[Genocide and abduction, confinement, torture, rape, looting and arson committed at Pachgaon village under Rajnagar Police Station of the then Moulavibazar Sub-Division]

91. Charge: That on 07.05.1971 at about 03.00 A.M. a group of about 70/80 Pakistani occupation army men and Razakars along with the Razakars accused (1) Md. Akmal Ali Talukder (2) Abdun Nur Talukder alias Lal Miah (3) Md. Anis Miah, and (4) Md. Abdul Mosabbir Miah attacked Hindu populated Pachgaon village under Rajnagar Police Station of the then Moulavibazar Sub-Division and assaulted numerous women including Provasini Malakar, Geetarani Shobdokar, Mayarani Shobdokar wife of Subodh Shobdokar, Mayarani Shobdokar wife of Shibu Shobdokar, Promodini [Ful Bibi] and Sharala Rani Shobdokar who were then raped by the Pakistani occupation army men and Razakars.

In conjunction with the said attack the accused persons and their cohort Razakars and Pakistani occupation army men looted about 102 houses including the houses of Subol Malakar and Surendra Malakar and put more than 132 houses on fire.

In conjunction with the same attack, the accused persons and their cohort Razakars and Pakistani occupation army men on the same day [07.05.1971] having captured about 60/65 unarmed pro-liberation Hindu people from the said village Pachgaon made them assembled at the south-west part of Sarkar dighi situated at the house of Advocate Horikinkor Das and tortured them there and, thereafter, with intent to destroy the Hindu religious group, in whole or in part, **killed 59 Hindu** civilians [list of martyrs has been stated in the formal charge] of the detained 60/65 unarmed pro-liberation Hindu people on the bank of the Sarkar dighi of Pachgaon village. However, 6/7 detained Hindu people could manage to escape. Subsequently, a memorial has been established on the bank of Pachgaon Sarkar dighi memorizing the sacrifices of the martyrs.

Thereby, the accused (1) Md. Akmal Ali Talukder (2) Abdun Nur Talukder alias Lal Miah (3) Md. Anis Miah, and (4) Md. Abdul Mosabbir Miah have been charged for participating, abetting, facilitating, contributing and complicity in the commission of offences of genocide and abduction, confinement, torture, rape and other inhumane acts [looting and arson] as crimes against humanity as part of systematic attack directed against unarmed civilians as enumerated in section 3(2)(a)(c)(g)(h) of the Act of 1973 which are punishable under section 20(2) of the said Act for which the

accused persons have incurred liability under section 4(1) of the said Act.

Evidence of witnesses examined

92. This charge, as it transpires, involves killing of huge number of Hindu civilians, by launching deliberate and systematic attack against a segment of Hindu community of village-Pachgaon under police station-Rajnagar of District [now]-Moulavibazar. Prosecution, for the purpose of substantiating the arraignments brought in this charge adduced nine witnesses of whom 08 have been examined as P.W.01-P.W.06 and P.W.08 and P.W.09. Of them most are survived victims and sufferers of the alleged event of attack that resulted in indiscriminate killing of Hindu civilians, sexual violation, looting and burning down houses. Now, for the purpose of weighing and evaluating the evidence tendered let us see what the witnesses testified in Tribunal.

93. P.W.01 Sojol Kumar Chakraborti [61] is a resident of village-Goyghar under Police Station-Rajnagar of District Moulavibazaar. In 1971 he was a student of class X. He testified what he heard and experienced about the event that resulted in alleged killings and other criminal acts.

94. P.W.01 stated that on 07 May[23 Baisakh], 1971 in the morning he saw many people coming towards their house who were telling that the Pakistani occupation army and the Razakars had attacked the Hindu dominated village- Pachgaon [under Police Station-Rajnagar]. Then he [P.W.01] coming on the bank of the pond, north-east side to their house heard gun firing and saw fire smoke from the end of village-Pachgaon which continued till 10:00 A.M.

95. P.W.01 next stated that on the same day in evening he heard that the army men and Razakars had left the site and thus he along with his friend moved towards Chandan Das's house at village Pachgaon and on their way when they arrived at village-Devipur they heard from Bakul Malakar and Nani Gopal Malakar, residents of that village that on the preceding night the army men and local Razakars accused Akmal Ali Talukder, Abdun Nur Talukder, Anis Mia, Mosabbir Mia, Alauddin Chowdhury and their accomplices took away the residents of the said village on the bank of the pond, looted households, burnt down houses and violated many women. Bakul Malkar and Nani Gopal Malakar told them that they would not find Chandan Das in his village. Then he [P.W.01] went to the north bank of the pond at Sarkar Bazaar where he saw numerous dead bodies lying and many bodies floating in the pond. Then he returned back home.

96. P.W.01 next stated that few days later he deported to the town Koilash in India and took refuge at a camp. Then he received training as a freedom-fighter in Assam and afterwards he came back inside the territory of Bangladesh and joined the freedom-fight under Jalalpur Sub-Sector no.04.

97. P.W.01 went on to state that he went to the village Pachgaon after the country got liberated when he met family inmates of Barendra Malakar, Krishnakanta Chakrovarty and others who described that the accused persons, the Razakars had conducted killings, looting, arson and rape at village-Pachgaon. They also disclosed that Provashini Malakar, Promodini Malakar, Kumudini Malakar, Maya Shabdakar, Sarola Shabdokor and other women were sexually violated and 69 including Subol Malkar, Krishnakanta Chakrovarty were killed.

98. In cross-examination on part of accused Md. Akamal Ali Talukder P.W.01 stated in reply to defence question that this accused was known as a refugee in their locality but he [P.W.01] could not say where he was born. P.W.01 denied the defence suggestion that the family inmates of Barendra Malakar and Krishnakanta Malakar did not disclose anything implicating this accused with the event he testified.

99. But defence however could not impeach what the P.W.01 heard and experienced in relation to the attack and the upshot thereof. It has not been denied even that the accused was a Razakar.

100. In cross-examination on part of three absconding accused P.W.01 stated that he could not say whether any case was initiated by the relatives of victims over the event he testified. P.W.01 denied the defence suggestion that these accused were not Razakars and were not present at the crime site when the event happened.

101. P.W.02 Barindra Malakar [68] is a resident of village-Pachgaon under Police Station- Rajnagar of District- Moulavibazar. He is the son of one of victims and experienced the event of attack. In conjunction with the attack he was also forcibly captured and taken away to the killing site but he however somehow got survived.

102. P.W.02 stated that on 23 Baishakh, 1971 just before the time of *Fajar* prayer [early morning] he heard gun firing and later on after sunrise Alauddin Chowdhury, Akmal Ali Talukder of their village being accompanied by some Pakistani occupation army men coming to their house forcibly captured him, his father, uncle Surendra Malakar [now dead] and took away to the bank of the pond of Sarkar bazaar. Then he saw the accused Mosabbir Mia,

Anis Mia, Alauddin Chowdhury, Akmal Ali Moulana and Modaris Mia dumping the detainees into the pond by beating them with bamboo sticks and then the army men shot them to death. On seeing these killings his [P.W.02] father appealed to army men to set him [P.W.02] free [P.W.02 started shedding tears at this stage of his testimony].

103. What happened on the bank of the pond? P.W.02 next stated that one army men fired gunshot to his father and another army men then kicked him off into the pond and with this he [P.W.02] attempted to run away when the army men fired gunshot directing him that resulted in injury on fingers of his left hand [P.W.02 at this stage demonstrated his left hand's fingers which still retain mark of injuries]. Then an army man kicked him [P.W.02] off to the pond and he became unconscious.

104. Defence could not impeach the above crucial version related to killing of the father of P.W.02 and other detainees. Even this phase of the attack does not appear to have been denied.

105. P.W.02 went on to state that his uncle Surendra Malakar fell down and thus did not receive any bullet hit when gun firing was directed to his father and thus he returned back alive.

106. P.W.02 also stated that in conjunction with this event his sister's husband Rasa Malakar was also shot to death on the bank of the pond taking him there on forcible capture from his house at village-Pachgaon. On that day, the Pakistani occupation army and Razakars had killed about 60/70 civilians including Subal, Bimal, Surendra Malakar, Boishnob Thakur, Putul Thakur, Umesh Malakar, Rabi Malakar of their village by gun shots , taking them on the bank of the said pond. The attackers looted the households and burnt down the houses of their village.

107. P.W.02 further stated that in evening when he got back his conscious he and his father were taken back by his mother to the house of one Selim Haji of their village and local doctor provided treatment to them but about one month later his father succumbed to injuries. P.W.02 finally stated that the bodies of victims were buried in a ditch near the pond. The accused were the locals of their neighbouring locality and thus he knew them beforehand.

108. On cross-examination by the accused Md. Akmal Ali Talukder P.W.02 stated in reply to defence question that he knew that accused Akmal Ali Talukder used to stay in India and he [the accused] migrated to this country in Pakistani regime; at the time of the event happened this accused's brother Makbul Ali @ Mokmil Ali had been in Bangladesh and that he [P.W.02] has been

maintaining his livelihood by begging as he could not do any work for the injuries he sustained due to bullet hit.

109. In cross-examination P.W.02 further stated that Modaris, Alauddin and Anai doctor were also with the Pakistani occupation army on the bank of the pond when the attack was launched and of them two are now dead excepting Anai doctor.

110. P.W.02 denied the defence suggestion that accused Akamal Ali Talukder was not with the group when it attacked their house; that this accused at that time had been in India along with his family and that he was not a Razakar.

111. P.W.03 Adhir Malakar [60] is a resident of village Pachgaon under Police Station-Rajnagar of District Moulavibazar. He is the son of one of victims Narayan Malakar. He is direct witness to the facts materially related to the event of attack that eventually resulted in indiscriminate killing of numerous Hindu civilians of Pachgaon.

112. P.W.03 stated that on 23 Baishakh 1971 just before the Fajar prayer [early morning] he awakened on hearing gun firing from the south end of their house. He then was coming out of their house and saw Razakars Alauddin Chowdhury [now dead], Razakar Md.

Akmal Ali Talukder, Razakar Matin, Razakar Lal Mia, Razakar Mosabbir Mia, Razakar Anis, Razakar Nur Mia [now dead], Modaris Mia and 15/20 Pakistani army men at the courtyard of their house. Then Razakar Alauddin Chowdhury asked his [P.W.03] father to come out for attending a meeting on the bank of Sarkar bazaar pond. Then the army men took away his father Narayan Malakar, uncles Rangu Malakar and Bidhu Malakar towards the bank of the said pond.

113. P.W.03 also stated that in conjunction with the attack, the army men sexually violated his [P.W.03] mother Provasini, aunties Shanti Rani and Basanti Rani and his [P.W.03] elder sister Sudevi Rani as identified by Razakar Alauddin Chowdhury at his father's dwelling hut. The tormented and violated women started shouting when he [P.W.03] remained stood outside his father's room. Then the Pakistani occupation army and Razakars looted their households and set the house on fire and then moved towards the pond.

114. P.W.03 next stated that he then standing on the bank of their pond saw the army men and Razakars keeping 59/60 Hindu civilians including his father, uncles, neighbours Bimal Malakar, Subol Malakar, Badal Malakar, Sukesh Malakar, Putul Goswami, Surendra Malakar, Barendra Malakar, Narendra Malakar, Lalit Das,

Avi Shobdokar, Sadhu Shabdokar, Basanta Nomosudra, Monai Shobdokar, Nagari Shobdokar detained on the bank of Sarkar bazaar pond. Then the army men and Razakars tied them up with their wearing apparels and kicked them off on the bank of the pond and Razakars including Alauddin Chowdhury, Akmal Ali, Matin, Anis, Lal Mia, Nur Mia started them beating with sticks and bamboos and finally the Pakistani army men shot them to death [at this stage of deposition the P.W.03 began crying on dock].

115. P.W.03 also stated that the Pakistani army men and Razakars looted households and burnt down houses of their village. At about 08:00 A.M Pakistani army and Razakars had left the site and then he along with his mother and aunties had gone to Nanjura village.

116. P.W.03 next stated that on the following day he found the pond's water blood-spattered and bodies of his father and uncles floating in the pond and they dumped those in a ditch on the bank of the pond. The Razakars he named were the locals of their neighbouring localities and thus he knew them beforehand.

117. In cross-examination P.W.03 stated in reply to defence question put on part of accused Md. Akmal Ali Talukder that accused Akamal Ali Talukder was known as a refugee in their locality and he however had been staying in their locality since long; that he could not say whether there had been any land conflict

between this accused and Jitu Malakar; his neighbour; that Razakar Alauddin Chowdhury [now dead] was also known as refugee in their locality.

118. P.W.03 denied the defence suggestions that this accused had been in India along with his family on the date of the event he testified; that this accused was born in India; that he was not a Razakar and that what he testified implicating this accused was untrue and tutored.

119. On cross-examination on part of the absconding accused persons P.W.03 stated that he did not initiate any case over the event of the killing of his father and uncles. However, any effort does not seem to have been made to cross-examine this P.W.03 to refute what he testified in relation to the event, in examination-in-chief.

120. P.W.04 Shukhomoy Shobdokar [70] is a resident of village-Pachgaon under Police Station-Rajnagar of District Moulavibazar is a direct witness to the acts related to launching attack and forcible capture of some of victims. He is the son of one of victims. The charge also arraigns the act of sexual violation committed upon his wife and wives of his [P.W.04] brothers.

121. P.W.04 stated that on 23 Baishakh, 1971 about ¾ A.M he had been sleeping at his house. Akmal Ali, Mosabbir, Lal member, Anis Mia being accompanied by Pakistani occupation army besieging their house forcibly captured his father Nirod, his brother Shyam and Dinesh and made them assembled at the courtyard along with 25/30 other detainees including his[P.W.04] uncle Monai, Abid, Nabuk Shobdakar, Ramon, Nagari, Mahendra Shobdakar when his mother was pushed down in the courtyard and then the Razakars facilitated the Pakistani army men to enter inside his father's room where the army men violated and tortured the wives of his two brothers and his wife Geeta[P.W.06].

122. P.W.04 next stated that afterwards he[P.W.04] and his brother Subodh went into hiding inside a waste ditch wherefrom he could see the Pakistani army men and Razakars taking away his detained father, uncles and others towards west of the Sarkar Bazar pond.

123. In respect of activities carried out on the bank of the pond P.W.04 stated that then the attackers made the civilians kept detained on the bank of the said pond, undressed and tied them up with their wearing apparels and thrown them to the pond when the Razakars he named started them beating with stick and bamboo and Pakistani occupation army men fired gun shots directing them which resulted in death of all excepting Mahendra, Kathi Dhopa,

Subodh Malakar, Sadhan Shobdakar and Charitra. Only Subodh Malakar among those survived victims is still alive.

124. P.W.04 stated too that the Pakistani army men and Razakars brunt down their house and the houses of their village and then at about 08:00 A.M had left the site and then at about 11:00 A.M they got sheltered at the house of Kashem Master of their neighbouring village Roktai. They saw many Hindu civilians taking shelter at the house of Kashem.

125. P.W.04 next stated that on the following day he came to the pond of Sarkar Bazaar and found many bodies floating in the pond. The bodies were then dumped in a ditch without any religious ritual. The accused persons were the residents of their neighbouring localities and as such he knew them beforehand.

126. P.W.04 on cross-examination by the accused Md. Akmal Ali Talukder stated that this accused was not a refugee; that Jitu Malakar is a neighbour of accused Akmal Ali Talukder. P.W.04 also stated in reply to defence question that Sarkar Bazaar pond was about 20/25 hands far from their house.

127. P.W.04 denied defence suggestion that at the relevant time this accused had not been in Bangladesh; that what he testified was untrue and tutored and that he was not a Razakar.

128. In cross-examination by the absconding accused persons P.W.04 stated that these accused were the residents of village Paschimbag and he could not say whether they are now involved with the politics of Jamaat e Islami. P.W.04 denied the defence suggestion that he testified falsely for political reason.

129. P.W.05 Goura Malakar [60] is a resident of village-Pachgaon under Police Station-Rajnagar of District Moulavibazaar. He is the son of one of victims. He experienced the attack and facts materially related to the principal crimes as narrated in charge no.01.

130. P.W.05 stated that on 23 Baisakh [Bengali month] in 1971 in early morning Pakistani army and Razakars besieged their village and he awakened with sudden gun firings. Then accused Md. Akmal Ali Talukder and his cohort Razakars including Lal Mia, Md. Anis Mia, Abdul Musabbir Mia and army men coming to their house forcibly captured his [P.W.05] father Gopesh Malakar, uncle Nari Malakar, Umesh Malakar and cousin brother Iresh Malakar

and took them away to the bank of the pond of Hiron Babu, one of their neighbour.

131. P.W.05 next stated that he[P.W.05] then remained stayed in the field near their house wherefrom he saw other men looting their house and also saw the accused persons and their cohorts dumping the detainees into the pond, tying up their hands and legs and at a stage they started beating them with stick and fired gun shot.

132. P.W.05 next stated that the accused, their accomplice Razakars and army men gunned down 20/25 of 60/70 civilians bringing them there on forcible capture from their village to death and other detainees were also beaten and shot to death after dumping them into the pond. The accused he named and their cohorts and army men burnt down their house and violated the 'honour' of his mother and sister. Afterwards the gang had left the site at about 10:00 A.M.

133. P.W.05 then stated that after the event happened, he and family inmates moved to his elder sister's house, one kilometer far when they found his sister's house and the houses of her neighbours ablaze. Then they got sheltered inside the cowshed behind his sister's house.

134. P.W.05 went on to state that on the following day he saw many dead bodies floating in the pond and found his father's body. His mother and villagers too saw the bodies floating in the pond. The villagers then buried the bodies in a big ditch.

135. In respect of reason of knowing the accused persons P.W.05 stated that he used to see the accused persons moving around the Haat bazaar and they were their neighbouring inhabitants and thus he knew them beforehand.

136. In cross-examination by the accused Md. Akmal Ali Talukder P.W.05 stated in reply to question that he, his mother, brother and sister went to the field nearer to their house, after the attack was launched by the Pakistani army men and the Razakars he named ; that he and his mother, younger brother and sister moved to his maternal uncle's house at village Noagaon, 4/5 days after the dead bodies were buried; that in evening on the day of the event , they moved towards his elder sister's house and they remained stayed in the field till the army men and Razakars had left the site at 10:00 A.M.

137. P.W.05 denied the defence suggestion that he did not know this accused; that this accused was not a Razakar and that this accused along with his family used to stay in India till 1978.

P.W.05 in cross-examination on part of the absconding three accused denied the suggestion that these accused were not engaged in conducting the killings he testified and that these accused have been falsely implicated in this case.

138. P.W.06 Geeta Rani Shabdokar [60] is a resident of village Pachgaon under Police Station-Rajnagar of District Moulavibazar. She is a victim of sexual violence committed in conjunction with the attack at Pachgaon, a Hindu dominated locality.

139. P.W.06 stated that in 1971 she had been staying at her conjugal home at village Pachgaon. On 23 Baishakh, 1971 in early morning accused Akmal Ali Talukder, Abdun Nur Talukder @ Lal Mia, Md. Anis Mia and Mosabbir Mia being accompanied by the Pakistani occupation army besieging their house dragged out the male inmates on forcible capture and committed looting. They took away her father-in-law Nirod, husband's elder brother Bires and Shyam, husband's uncle Monai and Avi on the bank of the pond near their house.

140. P.W.06 also testified that then the accused persons she named came to their house along with some army men and they caused 'torture' to her and her husband's elder brother's wife who then had been with her at the same room. Later on, they [P.W.06 and her

husband's elder brother's wife] came out through the back door when they saw their house ablaze.

141. P.W.06 also stated that the male detainees who were taken away on the pond were beaten and shot to death. Later on, the bodies were dumped in a ditch. The accused persons were the locals of their neighbouring localities.

142. In cross-examination on part of accused Md. Akmal Ali Talukder P.W.06 stated that accused Akmal Ali Talukder's father's house was west to their house; that the Sarkar Bazaar pond was east to their house. P.W.06 denied the defence suggestion that Akmal Ali Talukder had been in India along with his family in 1971; that this accused was not involved with the event she narrated; that she and her husband's brother's wife were not violated.

143. Defence however does not seem to have denied the event of attack that eventually resulted in brutal killing of numerous Hindu civilians taking them on the bank of a nearby pond, as testified by the P.W.06.

144. On cross-examination done on part of absconding accused persons P.W.06 stated that houses of accused Abdun Nur @ Lal Mia, Md. Anis Mia and Mosabbir Mia were less than one mile far

from her conjugal home. P.W.06 denied the suggestion put to her that she did not know these accused and that what she testified was untrue.

145. P.W.07 Maya Rani Shabdokar [70] is one of victims. She is the wife of Geeta Rani Shabdakar's husband's brother. Prosecution tendered her.

146. In cross-examination by accused Md. Akmal Ali Talukder P.W.07 stated that her husband died two months after the war of liberation ensued and that during the war of liberation they all had been staying in a common room. No more cross-examination the P.W.07 faced. The learned state defence counsel declined to cross-examine this P.W.07.

147. P.W.08 Maya Rani Shabdokar [65] is a victim of sexual violence committed upon her and others, in conjunction with the attack. In 1971 she had been staying at her conjugal home at village Pachgaon. She stated that on 23 Baishakh, 1971 in early morning accused Akmal Ali Talukder, Abdun Nur Talukder @ Lal Mia, Md. Anis Mia and Abdul Mosabbir being accompanied by their cohorts and Pakistani occupation army attacked their house, detained seven male members of their family and took them away to the west of Hiron Babu's pond where 60 civilians including them and other

detainees were beaten and shot to death and were thrown into the pond, tying them up.

148. P.W.08 also stated that the Pakistani army men and the accused she named came to their house and committed 'torture upon her and the wives of her husband's two brothers and then they looted their houses and set those on fire. Then she and others came out and moved towards north of the house.

149. P.W.08 also stated that the Pakistani army men and the accused Razakars had beaten and shot her father-in-law Nirod, husband's brother Shyam, husband's uncle Avi, Monai, Ramon and Nabo to death taking them forcibly on the bank of the pond along with other detainees. She heard that afterwards the bodies of victims were made dumped in a nearby ditch. The accused persons were from their neighbouring localities and as such she knew them beforehand.

150. In cross-examination P.W.08 denied the defence suggestion that accused Md. Akmal Ali Talukder had not been staying at village-Pachgaon; that he at the relevant time had been in India along with his family; that this accused was not involved with the event she narrated; that what she testified was untrue and tutored out of rivalry between the accused and one Jitu Malakar. P.W.08

also denied defence suggestion put on part of the absconding accused persons that these accused were not engaged in conducting the attack she testified and what she narrated was untrue.

151. P.W.09 Subodh Malakar [80] is a resident of village Pachgaon under Police Station-Rajnagar of District Moulavibazar. He is the son of victim Shobal Malakar. He is a direct witness to the attack and the facts materially related to it as he too was detained along with other Hindu civilians who were beaten and shot to death on the bank of the pond of Sarkar Bazar.

152. P.W.09 stated that on 23 Baishakh 1971 in early morning Razakar Akmal Ali Talukder, Abdul Mosabbir Mia, Anis, Lal Member being accompanied by Pakistani occupation army by launching attack at their house forcibly captured him[P.W.09], his father Subol, brother Sukesh Malakar, maternal uncle Rabi Malakar, Atul Malakar, uncle Surendra Malakar, Boishnaba Malakar, and took them away to the bank of the pond of Hiron Babu where they made them undressed and tied their hands and legs up with their wearing apparels [P.W.09 started crying and shedding tears , at this stage of his sworn testimony] and they were thrown into the pond and were subjected to beating. He [P.W.09] and detainee Jamini Malakar were tied up together. Throwing them into the pond the Razakars and army men fired gunshot to them that

resulted in injury on the below of his [P.W.09] right ear and he lost his sense.

153. P.W.09 further stated that at about 2:00/2:30 P.M when he regained sense he saw the pond's water blood-spattered. Coming out of the pond he came to one's house at Sarkar bazaar wherefrom he collected wearing apparel and got the injured place bandaged with cloth. He was then taken away therefrom by his relatives coming from the house of his [P.W.09] father-in-law.

154. P.W.09 also stated that in conjunction with the attack the Pakistani army and the accused Razakars looted their houses, set those on fire and violated the women. His father, uncles and others who were taken to the bank of the pond on forcible capture were killed there and were thrown into the pond. He knew the accused persons as they were from their neighbouring locality.

155. On cross-examination by the accused Md. Akmal Ali Talukder P.W.09 stated in reply to defence question that he could not say where this accused was born but he was a refugee; that in 1971 their house was a bit far from that of this accused. P.W.09 denied defence suggestion that this accused was not a Razakar and he had been in India in 1971 and migrated to Bangladesh long after independence in 1971.

156. In cross-examination on part of three absconding accused P.W.09 stated that accused Anis Mia and Mosabbir Mia were the residents of village Jalalpur, a bit far from their house. P.W.09 denied the suggestion that he did not know these accused and that what he testified was untrue.

157. Defence however does not appear to have made any effort to controvert the truthfulness of the attack that resulted in killing numerous Hindu civilians, committing rape upon Hindu women, conducting devastating activities at Pachgaon.

Finding with Reasoning on Evaluation of Evidence Presented

158. The attack as narrated in this charge no.01 was organized and systematic. It was conducted at Pachgaon, a Hindu populated village on 07.05 1971 in the early morning. The charge framed alleges that the accused (1) Md. Akmal Ali Talukder (2) Abdun Nur Talukder alias Lal Miah (3) Md. Anis Miah, and (4) Md. Abdul Mosabbir Miah accompanied the gang formed of Pakistani occupation army and Razakars and facilitated and substantially contributed in carrying out the attack, sharing common intent.

159. The gang allegedly looted households, burnt down houses of Hindu civilians, sexually ravished a number of Hindu women under

coercion and terror and annihilated 60/65 Hindu civilians including the residents of village-Pachgaon.

160. Prosecution alleges that all these criminal and prohibited acts were calculated with intent to destroy the Hindu religious group, in whole or in part. That is to say, all those deliberate criminal acts cumulatively constituted the offence of 'genocide', the charge framed arraigns.

161. Mr. Syed Haider Ali, the learned prosecutor submitted that this charge involves the arraignment of killing numerous Hindu civilians, committing rape upon Hindu women and conducting wanton devastating activities in the Hindu dominated village. Prosecution relied upon testimony of 09 witnesses of whom 08 have been examined as P.W.01-P.W.06, P.W.08 and P.W.09 and of them all are direct witnesses and survived victims excepting one, the learned prosecutor added.

162. The learned prosecutor submitted that all the P.W.s examined in support of this charge knew the accused persons beforehand for valid reason and their unshaken testimony has proved it unerringly that the attack launched by the gang formed of Pakistani occupation army and the accused persons belonging to Razakar Bahini eventually resulted in killing huge number of Hindu civilians of

village-Pachgaon. In conjunction with the attack numerous Hindu women were sexually violated which have been proved by the uncontroverted testimony of some of victims.

163. The learned prosecutor went on to submit that the defence could not refute the facts materially related to the principal crimes. Rather, defence does not deny the event of attack, as it appears from the trend of cross-examination. The brutal and deliberate attack directing Hindu religious group with intent to destroy it, in whole or in part, constituted the offence of 'genocide', the learned prosecutor added. The pattern and extent of the attack itself indubitably was to destroy the Hindu community and at the same time committing sexual attack was intended to be used as a weapon to terrorize the Hindu community which also reflects the intent of the perpetrators, the learned prosecutor added.

164. Defence case as has been extracted from the trend of cross-examination and suggestion put to witnesses on part of accused Md. Akmal Ali Talukder is that this accused had not been in Bangladesh in 1971, he had been in India along with his family and he migrated to Bangladesh long after independence of Bangladesh. He has been implicated in this case out of rivalry with one Jitu Malakar, one of his neighbours.

165. It transpires from above that core of defence case is the 'plea of alibi' i.e at the relevant time this accused had not been in the locality and thus he deserves exoneration, it has been contended on part of accused Md. Akmal Ali Talukder. Since this accused had been staying in India in 1971 along with his family his affiliation with the locally formed Razakar Bahini is not true and thus he was not associated with the crimes alleged in any manner, the learned counsel Mr. Abdus Sobhan Tarafdar defending this accused argued.

166. We consider it expedient to address and resolve the issue of 'plea of alibi' as has been emphatically agitated by the learned defence counsel Mr. Abdus Sobhan Tarafdar defending the accused Md. Akmal Ali Talukder. Burden to prove the plea of alibi lies upon the defence. However, failure to prove it does not by itself establish the prosecution case. Plea of alibi, if found to be true, may simply impact upon the prosecution case. Now, let us see what effort has been made to prove the plea of alibi, on part of the defence.

167. Mr. Abdus Sobhan Tarafdar the learned counsel defending the accused Md. Akmal Ali Talukder drawing attention to the papers in relation to this accused's marriage and birth of his son and daughter in India filed at the stage of summing up submitted that this accused had been in India in 1971, not in Bangladesh along with his

family and that he has been falsely implicated out of rivalry with one of his neighbours.

168. It appears that for ends of justice on the day of placing summing up the Tribunal, considering submission made by the learned defence counsel, permitted to submit those papers, even at belated stage for ends of justice. The papers the defence submitted appeared to have been allegedly issued by the concerned authority of Assam, India. However, Tribunal readily ordered to keep those papers with the record.

169. Now some questions inevitably come forward which are (i) First, how, through whom and when those alleged documents have been collected, (ii) Second, those were not submitted as required under section 9(5) of the Act of 1973, as ordered after rendering decision on charge framing matter, (iii) Third, the same appear to have been issued in 2015. But no reason whatsoever has been shown as to why those papers were not submitted in compliance with section 9(5) of the Act of 1973, and (iv) Finally, the alleged papers are found to have been allegedly issued by the authority of another country [India] and as such the same should have been authenticated by the Bangladesh Mission in that country together with due endorsement of the Ministry of Foreign Affairs, Bangladesh.

170. The above flaws indubitably create grave doubt as to genuineness and authoritativeness of those alleged papers. The learned defence counsel failed to satisfy as to how when and by whom those alleged papers have been collected from a foreign country. The learned counsel eventually conceded that those papers should have been duly authenticated by the Bangladesh Mission in India.

171. In view of above, those papers, filed at belated stage do not deserve to be taken into account as relevant particularly to resolve the issue of plea of alibi. For the reasons as stated above the alleged papers do not carry any evidentiary value and are liable to be discarded from consideration. Besides, we have already rendered reasoned finding based on evidence presented that this accused and three other absconding accused-- all they belonged to locally formed Razakar Bahini. Thus, defence failed to prove the plea of alibi taken.

172. The alleged horrendous offences for which the accused persons have been indicted occurred in context of war of liberation. The targeted segment of Hindu population was defenceless. Naturally, it was not practicable of seeing all the phase of the event of attack as it was horrific in nature in fear of which the civilians under attack would have attempted to flee wherever they could. But

nevertheless the survived victims and many of sufferers might have opportunity of observing some crucial acts materially related to the commission of principal offences.

173. In the case in hand , it appears that intending to substantiate the arraignment brought in charge no.01 involving the offence of genocide prosecution adduced in all 09 witnesses of whom 08 have been examined and 01[P.W.07] has been tendered. Most of those witnesses are survived victims and sufferers of the alleged event of attack that resulted in wanton destructive activities, grave sexual violation and indiscriminate killing of numerous Hindu civilians. Now, let us weigh and assess the evidence tendered in proving the event of attack and complicity and participation of the accused persons therewith.

174. It transpires that after launching attack at the Hindu dominated village- Pachgaon P.W.01 Sojol Kumar Chakraborti, resident of village- Goyghar under Police Station-Rajnagar of District Moulavibazar coming out of their house heard gun-firings and saw fire smoke from the end of village-Pachgaon which continued till 10:00 A.M. It remained unrefuted.

175. Defence does not deny the attack launched at village-Pachgaon at the relevant time. Hearing gun-firing and seeing fire

smoke from the end of village Pachgaon, as testified by P.W.01 impels the conclusion that the perpetrators by launching attack started carrying out devastating destructive activities by setting houses of villagers on fire.

176. The above gets firm corroboration from the unimpeached testimony of P.W.02 and P.W.03 the residents of the crime village-Pachgaon as they too consistently testified that in conjunction with the attack the attackers looted the households and burnt down the houses of their village.

177. After the troops accompanied by the accused persons had left the site P.W.01 started moving towards village Pachgaon and on the way he heard from the residents of village Devipur that local Razakars accused Akmal Ali Talukder, Abdun Nur Talukder, Anis Mia, Mosabbir Mia, Alauddin Chowdhury and their accomplices took away the residents of the said village on the bank of the pond, looted households, burnt down houses and violated many women and later on, P.W.01 saw numerous dead bodies lying there and many bodies floating in the pond.

178. P.W.01 also heard from the family inmates of Barendra Malakar, Krishnakanta Chakrovarty and others that the accused persons, the Razakars had conducted killings, looting, arson and

rape at village-Pachgaon and Provasini Malakar, Promodini Malakar, Kumudini Malakar, Maya Shabdakar, Sarola Shabdokor and other women were subjected to sexual violation and 69 civilians including Subol Malakar, Krishnakanta Chakrovarty were killed.

179. On part of three other absconding accused P.W.01 in reply to defence question stated that he could not say whether any case was initiated by the relatives of victims over the event he testified. Presumably, by putting such defence question it has been attempted to show that the accused were not involved with any of offences alleged as none of them were prosecuted earlier over the event alleged.

180. We reiterate that mere non-prosecution immediate after the event occurred or delay in prosecuting an individual for the crimes happened in 1971 during the war of liberation cannot create any clog in prosecuting him now under the Act of 1973. That is to say, delayed prosecution or non-prosecution of an individual even under the Collaborators Order, 1972 cannot exonerate an individual of being prosecuted and tried now under the Act of 1973.

181. P.W.02 Barindra Malakar is the son of one of victims. He was also forcibly captured and taken away to the killing site, the bank of

the pond nearer to their house but he somehow got survived. Naturally, he had opportunity of experiencing the phases of attack.

182. It has been found from evidence of P.W.02 that on 23 Baishakh just before the time of fajar prayer [early morning] he heard gun firing and later on after sunrise a group of Pakistani occupation army accompanied by accused Alauddin Chowdhury, Akmal Ali Talukder came to their house and took him, his father and uncle away to the bank of the pond of Sarkar bazaar.

183. What happened next? Testimony of P.W.02, a direct witness, demonstrates that on the bank of the pond accused Mosabbir Mia, Anis Mia, Alauddin Chowdhury, Akmal Ali Moulana and Modaris Mia started dumping the detainees into the pond by beating them with bamboo and then the army men shot them to death.

184. The above indisputably leads to the unerring conclusion that the accused persons substantially assisted and facilitated the commission of the principal crimes by the gang. It may also be inferred that the accused persons in exercise of their affiliation in auxiliary force thought the act of accompanying the Pakistani occupation army as a task of pride which made them imbued and culpably enthused to provide assistance and substantial contribution to the Pakistani occupation army in carrying out barbaric mass

atrocities directing civilian population belonging to Hindu religious group.

185. It has been affirmed too in cross-examination of P.W.02 that the ending phase of attack happened on the bank of the pond by the Pakistani occupation army and their local collaborators. Defence suggestion that accused Md. Akmal Ali Talukder was not with the group when it attacked their [P.W.02] house being accompanied by Modaris, Alauddin and Anai doctor rather affirms too that by launching attack P.W.02, his father and uncle were taken to the bank of the pond, on forcible capture.

186. What happened on the bank of the pond? Testimony of P.W.02 impels that one army men fired gunshot to his [P.W.02] father and another army men then kicked off his father into the pond and with this he [P.W.02] attempted to run away when the army men fired gunshot directing him that resulted injury on fingers of his left hand and then an army man kicked him [P.W.02] off to the pond and he became unconscious.

187. Defence could not impeach the above crucial version related to killing of the father of P.W.02 and other detainees. Even this phase of the attack does not appear to have been denied.

188. It also transpires from uncontroverted testimony of P.W.02 that in conjunction with the attack Rasa Malakar was also shot to death on the bank of the pond taking him there on forcible capture from his house at village-Pachgaon and on the day the attack was launched Pakistani occupation army and Razakars had killed about 60/70 civilians including residents of their village by gun shots, taking them on then bank of the said pond.

189. Killing numerous Hindu civilians taking them on the bank of the pond remained totally unshaken and testimony tendered in this regard inspires credence as it gets corroboration also from the testimony of P.W.01 who saw numerous dead bodies lying and many bodies floating in the pond.

190. We also find it from the version of P.W.02 a direct witness that the attackers, in conjunction with the attack carried out looting the households and burnt down the houses of their village.

191. It appears that intending to negate the participation and complicity of the accused Md. Akmal Ali Talukder with the event of attack defence cross-examined P.W.02 when he stated that accused Akamal Ali Talukder migrated to this part of Pakistan [now Bangladesh] during the regime of Pakistan i.e before the war of liberation that ensued in 1971. Be that as it may, we do not find

any reason to accept the plea of alibi to be true. Rather, what has been stated in cross-examination by P.W.02 prompts to conclude that in 1971 this accused had been in the territory of Bangladesh.

192. P.W.03 Adhir Malakar, P.W.04 Shukhomoy Shobdakar and P.W.05 Goura Malakar are the residents of crime village-Pachgaon. They are the sons of three victims and they had fair opportunity of witnessing the criminal activities materially related to the act of killing of their fathers and near relatives. They all consistently testified how the gang formed of Pakistani occupation army, accused persons and their cohort Razakars carried out the horrendous attack that resulted in looting, arson, destructive activities, sexual violation and indiscriminate killing the ending phase of the attack.

193. It is found from unimpeached testimony of P.W.03 that the gang took away his father and other relatives on forcible capture to the bank of the pond where the army men and Razakars tied the 59/60 Hindu detainees including his[P.W.03] father tied up with their wearing apparels and kicked them off on the bank of the pond and Razakars including Alauddin Chowdhury, Akmal Ali , Matin, Anis, Lal Mia, Nur Mia started them beating with sticks and bamboos and finally the Pakistani army men shot them to death[at this stage of deposition the P.W.03 began crying on dock].

194. P.W.03 saw the barbaric act of annihilation of numerous defenceless Hindu civilians including his father and relatives standing on the bank of their pond. P.W.03 could not control emotion while he made the account of the brutal episode that he witnessed. Any effort does not seem to have been made to cross-examine this P.W.03 to refute what he testified in examination-in-chief. Besides, the demeanor of the P.W.03 as the Tribunal observed when he deposed on dock has made the narrative he made credible and true.

195. The accused persons were from their neighbouring localities and thus he knew them beforehand, as testified by the P.W.03. Defence could not shake this pertinent version in cross-examination. Additionally, it may be justifiably inferred that also for the reason of affiliation with an auxiliary force formed locally, in context of war time situation made the accused persons widely known to the residents of the crime locality.

196. The above proves that the act of launching attack at village-Pachgaon was against the Hindu population and the gang of perpetrators was accompanied by the accused persons who played a culpable and active role in accomplishing the crimes.

197. Testimony of P.W.03 in relation to core fact chained to the attack gets corroboration from the testimony of P.W.04 and P.W.05, the two other direct witnesses, the sons of two victims. P.W.04 witnessed the perpetrators forcibly capturing his father Nirod, his brother Shyam and Dinesh besieging their house and they were made assembled at the courtyard along with 25/30 other detainees.

198. P.W.04 also saw, remaining in hiding inside a bush, the Pakistani army men and Razakars taking the detainees on the bank of the pond [Sarkar bazaar pond] where the detainees were subjected to beaten by the accused Razakars and finally the army men fired gun shots that resulted in death of all the detainees excepting Mahendra, Kathi Dhopa, Subodh Malakar, Sadhan Shobdakar and Charitra and of them Subodh Malakar is still alive.

199. In cross-examination it has been unveiled that the Sarkar bazaar pond was about 20/25 hands far from their [P.W.04] house. Thus, it was practicable of seeing the act of causing torture and killing the detainees taken there, on forcible capture. Besides, the event of killing numerous Hindu civilians does not appear to have been disputed in any manner.

200. Unshaken testimony of P.W.04 demonstrates too that in conjunction with the attack the Razakars accompanying the gang facilitated the Pakistani army men to enter inside his[P.W.04] father's room where the army men violated and tortured the wives of his [P.W.04] two brothers and his wife Geeta[P.W.06].

201. The act of committing sexual ravishment upon the women of Hindu community of village-Pachgaon as testified by P.W.04 remained uncontroverted. Besides, due to social ostracism a person shall not opt to stain the supreme worth of his near ones by bringing an untrue story of sexual violation upon them.

202. The attack, as it appears was systematic and organised. It was intended to cripple the normal livelihood of Hindu community of village-Pachgaon and in doing so the perpetrators deliberately used the act of rape as a tool of war together with the devastating act of looting, arson and killing the defenceless Hindu male civilians. Rational evaluation of evidence leads to this conclusion.

203. How the P.W.04 could recognize the accused persons accompanying the Pakistani occupation army in conducting the criminal acts? It transpires that the accused persons were the residents of their neighbouring localities and as such he [P.W.04]

knew them beforehand. It remained unimpeached. Besides, there has been no reason whatsoever to disbelieve this version.

204. Be that as it may, testimony implicating the accused persons as made by the P.W.04 inspires credence. The Tribunal notes too that no effort has been made to controvert what the P.W.04 testified in examination-in-chief and even the act of their accompanying the gang in launching attack remained undenied.

205. Testimony of P.W.05 Goura Malakar, a direct witness and the son of one of victims narrated how his father Gopesh Malakar, uncle Nari Malakar, Umesh Malakar and cousin brother Iresh Malakar were taken away to the bank of the pond of Hiron Babu, one of their neighbours, on forcibly capture by the accused Md. Akmal Ali Talukder and his cohort Razakars including Lal Mia, Md. Anis Mia, Abdul Musabbir Mia and the army men, besieging their house.

206. Remaining stayed in the field near their house P.W.05 saw committing looting their house and also saw the accused persons and their cohorts dumping the detainees into the pond, tying up their hands and legs and at a stage they started beating them with stick and then fired gun shot. 20/25 of 60/70 detained civilians were forcibly brought there from their [P.W.05] village and they

were shot to death there. Defence does not dispute it. The version made by P.W.05 provides assurance to what has been testified by the P.W.04 with regard to causing death of numerous detained Hindu civilians by gun shots on the bank of the pond.

207. In respect of accomplishing the act of sexual violation upon the women of the crime village-Pachgaon P.W.05 also narrated that the accused persons he named and their cohorts and army men burnt down their house and violated the 'honour' of his[P.W.05] mother and sister.

208. What a tragedy! P.W.05 had to come on dock to narrate the traumatic episode of violating the supreme honour of his mother and sister. As the Trier of fact we are not ready to accept that P.W.05 has made an untrue story in exchange of the 'honour' of his mother and sister. It has already been revealed patently that in conjunction with the attack the perpetrators being substantially facilitated by the accused persons and their cohort Razakars committed grave sexual violation upon the wives of two brothers of P.W.04.

209. How the P.W.05 could recognise the accused persons at the time of accomplishing the attack? We have found it from the evidence of P.W.05 that he [P.W.05] used to see the accused persons moving around the local Haat bazaar and they were their

neighbouring inhabitants and thus he knew them beforehand. Defence could not impeach it in any manner.

210. Besides, it may also be inferred that notoriety the accused persons achieved by their act and conduct in exercise of their affiliation with the auxiliary force became an anecdote which naturally made them known in the locality. Therefore, testimony of P.W.05 so far as it relates to seeing and recognizing the accused persons present at the crime site by accompanying the Pakistani occupation army, in launching attack inspires rational credence.

211. The Tribunal notes that in carrying out attack in a rural area, in context of war, it was not practicable for the Pakistani occupation army to target the victims and in accomplishing the brutal act of sexual violation upon the Hindu women without the substantial contribution and facilitation of the accused persons and their cohort Razakars. The act of facilitation and assistance are sufficient to incur liability for the crimes committed. It is not required to show that the accused persons were the actual perpetrators of the sexual violence.

212. It remained uncontroverted too that on the following day P.W.05 saw many dead bodies floating in the pond where he found his father's body too. This fact adds assurance to the act of barbaric killing that was conducted on the bank of the pond, taking the

detained Hindu civilians there on forcible capture. It transpires from cross-examination of P.W.05 by the accused Md. Akmal Ali Talukder that the fact of launching attack at village-Pachgaon by the Pakistani army men and the Razakars he named i.e the accused persons has been affirmed.

213. In the case in hand, many of the witnesses who testified before the Tribunal had fair opportunity of seeing phases of atrocities committed against the members of their families and /or themselves have been the victims of such atrocities. Some of these witnesses naturally became very emotional and started shedding tears in the witness box when they testified what they experienced at the time of launching attack.

214. Sworn testimony of P.W.02, P.W.03, P.W.04 and P.W.05 carries much credence and value as they are the sons of victims and had natural occasion of seeing the phases of the attack that resulted in looting, setting houses on fire, inflicting grave sexual violation upon their near ones and killing their father and near ones. Defence could not bring anything by cross-examining them which may reasonably lead to conclude that these witnesses have testified untrue story implicating the accused persons falsely.

215. P.W.02 experienced the horrific tragedy of his father's killing which happened in his presence. Obviously P.W.02 has been carrying the trauma he sustained, till today. Mother, sister and near ones of P.W.03 were sexually violated, in conjunction with the attack. P.W.03 Adhir Malakar is direct witness to the facts relevant to this grave wrong done on the supreme honour of his mother, sister and near ones. Defence could not refute it.

216. It is also found that P.W.04 Shukhomoy Shabdokar, another direct witness saw the troops taking away his father, brother and others, on capture to the killing site, the bank of the pond. On the following day he [P.W.04] saw numerous dead bodies floating in the pond. P.W.05 Goura Malakar, son of one victim not only witnessed how his father, uncles and near ones away to the bank of the pond, the killing site but he also saw the accused persons and their cohorts dumping the detainees into the pond, tying up their hands and legs and beating them with stick and fired gun shot.

217. The above piece of version of a direct witness demonstrating participation of accused persons in perpetrating the killing, the principal crimes gets corroboration also from the narrative made by P.W.09 Subodh Malakar who himself is a survived victim. He [P.W.09] saw the accused Razakar Akmal Ali Talukder, Abdul Mosabbir Mia, Anis, and Lal Member accompanying the Pakistani

occupation army in launching attack at their house took. He knew the accused persons as they were from their neighbouring locality. It remained unshaken. Besides, in 1971 Razakars were commonly known to the locals for their notoriety and infamous activities they used to carry out around the locality.

218. It reveals from his [P.W.09] uncontroverted testimony that the attack resulted in forcible capture of him, his father Subol, brother Sukesh Malakar, maternal uncle Rabi Malakar, Atul Malakar, uncle Surendra Malakar, Boishnaba Malakar who were taken away to the bank of the pond of Hiron Babu where they were subjected to berating throwing into the pond and the Razakars and army men then fired gunshot to them that resulted in injury on the below of his right ear and thus he lost his sense. Regaining sense he [P.W.09] saw the pond's water blood-spattered.

219. The above uncontroverted tear-jerking fact as unveiled together with seeing numerous dead bodies floating in the pond, on the following day, as testified by P.W.04 and P.W.05 indisputably proves accused persons' conscious, active and culpable participation in accomplishing the principal crimes. Seeing numerous dead bodies floating in the pond as unveiled from testimony of all the witnesses examined itself proves the horrific act of indiscriminate killing occurred on the bank of the said pond.

220. It appears that two of rape victims have been examined as P.W.06 and P.W.08 and one victim has been tendered as P.W.07. P.W.06 Geeta Rani Shabdokar is the wife of P.W.04. She is a rape victim who also saw the phases of conducting the attack and presence of accused persons with the gang. The accused persons were the locals of their neighboring localities. Accused Akmal Ali Talukder, Abdun Nur Talukder @ Lal Mia, Md. Anis Mia and Mosabbir Mia being accompanied by the Pakistani occupation army besieging their house forcibly captured the male inmates and committed looting---testimony of P.W.06 demonstrates it indisputably.

221. It stands proved that the gang of attackers took away Nirod the father-in-law of P.W.06, her husband's elder brother Bires and Shyam, her husband's uncle Monai and Avi on the bank of the pond near their house, on forcible capture. Then the accused persons she [P.W.06] named came to their house along with some army men and caused 'torture' to her and her husband's elder brother's wife who then had been with her at the same room. This version remained unshaken and thus in absence of anything contrary inspires credence which impels the unerring conclusion that the accused persons provided active and substantial contribution and facilitation to the actual offenders in committing

sexual abuse upon the Hindu women under coercion and intimidation.

222. P.W.08 Maya Rani Shabdokar is another victim of sexual violence. She too testified how the accused persons being accompanied by the Pakistani occupation army took away seven male inmates of their house on forcible capture to the west of Hiron Babu's pond where 60 civilians including those detainees were gunned down to death. Defence does not appear to have been able to impeach it.

223. At the phase of launching attack P.W.08 saw the accused persons with the gang while it carried out atrocious activities, it is found from evidence of P.W.08. Had the P.W.08 reason of recognizing the accused persons accompanying the gang? The accused persons were from their neighbouring localities and as such she [P.W.08] knew them beforehand, P.W.08 testified. Thus, and since the core of her testimony gets assurance from testimony of other direct witnesses the reason of knowing the accused persons beforehand as claimed by P.W.08 inspires credence.

224. What more happened in conjunction with the attack? Uncontroverted testimony of P.W.08, a rape victim demonstrates that three Pakistani army men and the accused persons she named

came to their house and committed 'torture' upon her and the wives of her husband's two brothers and then they looted their houses and set those on fire.

225. It appears that defence simply denied accused persons' presence at the crime site with the gang of attackers. But truthfulness of the testimony presented on material particular could not be impeached in any manner by cross-examining the P.W.06 and P.W.08. We do not find any reason whatsoever to keep their testimony aside.

226. Besides, we are not at all convinced to agree with the argument that the P.W.06 and P.W.08 have opted to narrate untrue story by bringing fabricated arraignment of sexual abuse under coercion implicating the accused persons falsely. No woman is believed to taint her supreme honour by exposing false accusation of sexual ravishment upon her. Ignoring extreme social ostracism the P.W.06 and P.W.08 came on witness box to disclose the untold trauma and pain they sustained due to grave wrong done to their supreme worth, causing serious bodily and mental harm.

227. It appears that attested photocopy of relevant pages of a publication titled *০৮ম বিবৃতি*, forming part of the prosecution documents volume relied upon by the prosecution demonstrates

ঊতঁরতঁি চিত্তি কঁচো লতঁ ঔঁরব ঔঁরব কঁি নঁZ- চঁ
 তেতা ততঁ | ZLb mgq ন্তে Aৱগম্বK তঁবি 6Uৱ| 75
 ঊবঁন MөгevmতঁK নঁZ-চঁ এবাৱ Ae-ৱq GতঁK GতঁK j ৱ
 তঁগতঁি ঔঁNতঁZ ততঁ তঁq| Gi চঁ ঊবেPৱতঁি ঔঁj Kতঁি নঁZ'ৱ
 Kতঁি 69 ঊবঁন MөгevmতঁK| 69 Mөгevmxi িতঁ³ তঁৱb
 ঔঁNi চঁৱb jvj ন্তq ৱMতঁqৱQj | mg-ৱ ৱb ঊbnZতঁি
 gZতঁ'ন চঁto ৱতঁK তঁLৱতঁb|Gি চঁ
 চঁৱK ঔঁmb'ৱ Ges Zতঁ'ৱ তঁ'ৱmi ৱ tঁB চঁৱMৱLতঁq Pৱj ৱq
 j ৱZিৱR, a1 ৱ I AৱMৱstঁhৱM| ৱবিৱ Mөг চঁৱতঁq QৱB Kতঁি
 তঁq| তঁB ঔঁk' AৱRI গতঁb ন্তj Mৱ ৱkDতঁি I তঁV|

229. Attested photocopy of the narrative made at page 143 of the book [prosecution documents volume page-26] patently demonstrates the event of massacre was carried out at village-Pachgaon by a group formed of Razakars and Pakistani occupation army that resulted in indiscriminate killing of huge number of Hindu Civilians, rape upon Hindu women and destructive activities causing serious mental harm. It also speaks that Razakars led by Razakars Alauddin Chowdhury and Abdul Matin and 50/60Pakistani occupation army were actively engaged in accomplishing the mayhem. There has been no reason of questioning the authoritativeness of the narrative made in this publication. The narrative made in this report confirms the commission of diabolical indiscriminate killing, grave sexual

violence and wanton destruction at village Pachgaon which has been unfolded too from evidence of prosecution witnesses.

230. The above narrative depicts that Razakar Alauddin Chowdhury and Abdul Matin were with the group formed of Razakars and army men that had carried out the mayhem by launching deliberate and designed attack at village-Pachgaon. P.W.02 and P.W.03 testified the presence of these two potential Razakars with the gang while it carried out the attack.

231. It appears from the investigation report and the formal charge as well that the Investigation Officer started investigation against six suspected accused including said Razakars Alauddin Chowdhury and Abdul Matin. But afterwards, pending investigation Alauddin Chowdhury and Abdul Matin died and thus eventually they could not be recommended for prosecution.

232. The author of the report might have had limitation in portraying the detail exactitude in respect of the event of killing and the name of the members of the gang of perpetrators. And thus the narration made therein cannot be treated as the whole truth so far as it relates to presence of accused persons who also belonged to Razakar Bahini. But merely for any such inadequacy the narrative made therein on the event happened at village-Pachgaon cannot be

kept aside in its entirety, we conclude. Rather, the narration, on some material facts, made therein however provides strong corroboration to the commission of the crimes constituting the offence of genocide as has been unveiled from the consistent and reliable evidence of the witnesses examined.

233. It is true that none of the four accused persons has been named in the narrative as stated above, as a member of the group of perpetrators. But simply because of this reason the evidence tendered by the direct witnesses and victims depicting participation of the accused persons in the commission of crimes shall not go on air.

234. It cannot be brushed aside that the reporter entrusted to get the above narrative compiled readily might not have sufficient materials or information about the complicity of all the Razakars including the accused persons with the event of massacre happened at village-Pachgaon or the author of the report did not think it indispensable also to state the name of all other Razakars who were with the group under the leadership of Razakar Alauddin Chowdhury and Abdul Matin.

235. But the above narrative however lends corroboration as to the commission of the crimes on 07 May 1971 at village-Pachgaon that

resulted in killing of huge number of Hindu civilians, rape upon Hindu women, looting their households and burning down houses. And in absence of anything contrary it may thus be reasonably inferred based on evidence tendered by direct witnesses and victims that none but the accused persons, in exercise of their membership in locally formed Razakar Bahini got engaged with the group led by Razakars Alauddin Chowdhury and Abdul Matin in conducting the diabolical attack.

236. On integrated evaluation of evidence tendered we may safely conclude that most of the witnesses examined in support of this charge are rape victims and direct witnesses who testified in a forthright manner in narrating the event of attack when they saw the accused persons accompanying the gang. The witnesses stood firm even under cross-examination, and the narrative they made in examination-in-chief was persuasive. It is to be noted too that human episodic memory is a long-term memory which allows one to consciously recall personal experiences and specific events that happened in the past. Episodic memory includes recalling information regarding when an event took place, where the event happened, what occurred during the event.

237. In the case in hand, testimony of witnesses who are victims and direct witnesses to crucial facts involve their episodic memory

through which they recounted what they experienced. Defence could not bring anything by cross-examining them which may diminish its value. And therefore, their testimony carries much value and credence.

238. Thus, the only reasonable inference to be drawn from their testimony presented before the Tribunal is that the accused persons took conscious participation in accomplishing the act of looting household, burning down houses, sexual abuse upon Hindu women and indiscriminate killing – which were indisputably intended to destroy the Hindu religious group of village Pachgaon, the upshot of the horrific attack.

239. In the **Akayesu** case the **ICTR** Trial Chamber found that acts of rape and sexual violence formed an integral part of the process of destruction of the Tutsi as a group and could therefore constitute genocide. In particular, the Trial Chamber stated that:

‘These rapes resulted in physical and psychological destruction of Tutsi women, their families and their communities. Sexual violence was an integral part of the process of destruction, specifically targeting Tutsi women and specifically contributing to their destruction and to the destruction of the

Tutsi group as a whole [...] Sexual violence was a step in the process of destruction of the Tutsi group – destruction of the spirit, of the will to live, and of life itself’.

240. On cumulative evaluation of evidence tendered what we find?

It transpires patently that in conjunction with the attack together with destructive activities the gang committed rape upon numerous Hindu women and indiscriminately annihilated the Hindu civilians.

241. Committing rape, destroying houses by burning, looting households formed parts of one single 'murderous scheme'. Those criminal acts were the constituents of the offence of 'genocide' as same were deliberately calculated to destroy the normal livelihood of a particular protected religious group.

242. It is now jurisprudentially settled that inhuman treatment, torture, rape and sexual abuse are among the acts which may cause 'serious bodily or mental injury'. The killings, together with a determined effort to capture others for killing, the forced internal displacement of the survived members of the group, and the destruction of their homes and households constituted a single criminal mission which was executed with intent to destroy a group in whole or in part of the group, we conclude.

243. In the case in hand, it stands proved that many of members of Hindu religious group sustained 'serious bodily harm', in conjunction with the attack. Additionally, the suffering of the survived people of the Hindu community of village Pachgaon and the horror created forced them to be displaced, and the terrible consequences that this had on their life, reaches the threshold of 'serious mental harm'.

244. The trauma and torment the witnesses the victims and survivors sustained caused serious mental harm to them which they have been still carrying. The massacre they faced and observed indisputably fall within the ambit of 'serious bodily and mental harm' which constituted the offence of 'genocide as enumerated in section 3(2)(c)(ii) of the Act of 1973.

245. In the case of **Krstic**, a Trial Chamber of the International Criminal Tribunal for the former Yugoslavia [ICTY] considered the ordeal inflicted on the few who survived the Srebrenica massacres to fall within the ambit of bodily and mental harm. This view refers to section 3(2)(c)(ii) of the Act of 1973 which speaks of 'causing serious bodily and mental harm' constituting the offence of 'genocide'.

246. The expression deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or

in part, should be construed as the methods of destruction by which the perpetrator does not immediately kill the members of the group, but which, ultimately, seek their physical destruction constituting the offence of 'genocide' which is distinct from other crimes because it requires *dolus specialis*, a special intent.

247. The **Akayesu** [ICTR] judgment constitutes a major contribution to the progressive development of the law of genocide. In the Akayesu judgment, a Trial Chamber of the Rwanda Tribunal [ICTR] explained that rape and sexual violence may constitute genocide on both a physical and a mental level.

248. In the case in hand, rape committed upon detained women belonging to Hindu community, in conjunction with the attack, was rather a constituent part of genocide as it was committed as part of the genocidal *actus reus* and with genocidal intent, we conclude it emphatically. Act of rape was committed against the Hindu women was rather a deliberate weapon in fulfilling the policy and plan of cleansing a protected religious group, we conclude.

249. Pattern and extent of the attack lead to the conclusion that the rape and sexual aggression committed upon Hindu women was systematic and in true sense was perpetrated against the honour and rights of entire Hindu community of particular geographical

vicinity. Genocide includes sexual aggression. Sexual violence and rape, in war time situation may in fact have the effect of contributing in a significant manner to the destruction of a group in whole or in part. The accused persons by their act of assistance and encouragement felt culpably enthused in presenting the Hindu women as sexual objects.

250. The Pakistani occupation armies naturally were not familiar with the rural locality and the location of targeted group. The question is whether an accused's conduct was as much an integral part of the genocide as were the killings which it enabled. For holding the accused persons liable it is not required to show that they physically participated in committing the crimes.

251. It is now well settled that physical perpetration need not only mean physical killing -- other acts can constitute direct participation in the crime. The event happened in rural vicinity. It has been proved that the accused persons, being active part of the criminal enterprise culpably and enthusiastically, by their act of substantial assistance, made space to get the Hindu women captured under intimidation to satisfy the beastly lust of the army men and also to locate the Hindu civilians for annihilation.

252. How the massacre impacted on the group conditions of life of Hindu community of village Pachgaon? It is now well settled that the expression deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part, should be construed as the methods of destruction by which the perpetrator not only kills the members of the group, but which, ultimately, seek their physical destruction.

253. The phrase ‘intent to destroy’, an element to constitute the offence of genocide does not refer to actual destruction of a protected group by causing death of all of its members. ‘Intent’ is to be inferred from the facts and circumstances unveiled from the magnitude and pattern of the attack. A Trial Chamber of the International Criminal Tribunal [ICTY] gave as examples of ‘serious mental harm’ as below:

The trauma and wounds suffered by those individuals who managed to survive the mass executions . . . The fear of being captured, and, at the moment of the separation, the sense of utter helplessness and extreme fear for their family and friends’ safety as well as for their own safety, is a traumatic experience from which one will not quickly – if ever – recover. Furthermore, the Trial Chamber finds that the men suffered mental harm having their identification documents taken away from them, seeing that they would not be exchanged as

previously told, and when they understood what their ultimate fate was. Upon arrival at an execution site, they saw the killing fields covered with bodies of the Bosnian Muslim men brought to the execution site before them and murdered. After having witnessed the executions of relatives and friends, and in some cases suffering from injuries themselves, they suffered the further mental anguish of lying still, in fear, under the bodies – sometimes of relative or friends – for long hours, listening to the sounds of the executions, of the moans of those suffering in pain, and then of the machines as mass graves were dug.

[Prosecutor v. Blagojevic, ICTY (IT-02-60-T), Judgment, 17 January 2005, para. 647]

254. What we see in the case in hand? What was the special intent in carrying out such devastating atrocious activities? How such special intent is to be proved? It appears that P.W.02--P.W.05 and P.W.09 are direct witnesses to the horrific atrocities committed upon their near ones that resulted in brutal killings that they had to observe as mere defenseless spectators with untold pain and trauma.

255. P.W.06 and P.W.08 the two rape victims too witnessed how their near ones were taken away on forcible capture to the bank of the pond, the killing site. But none of them was in position to resist.

The coerced and devastating situation did not allow it. Rather, they and the entire Hindu community of village-Pachgaon were made terrorized as the gang started looting the household burning down the houses by setting fire. The witnesses had to see the dead bodies of their dear ones floating in the blood-spattered pond. The mayhem eventually forced them to internal displacement.

256. All the above grave criminal acts collectively constituted the inherent intent of the gang which was to destroy and cripple the normal livelihood of Hindu community, in whole or in part. Jurisprudence evolved on the issue of ‘special intent’ says that ‘intent to destroy’ is to be logically inferred from the context of the crime, its massive scale, and pattern of its perpetration which suggest hatred of the gang and a desire for its devastation.

257. ‘Intent to destroy’ may sometimes have nexus with plan.. Although the plan to destroy does not constitute an element of the offence of genocide, true. But in the case in hand, facts and pattern of the attack lead us to conclude that the attack was conducted in execution of a murderous plan intending to destroy the Hindu religious group of village-Pachgaon.

258. It is now settled that the ultimate victim of the offence of genocide is the ‘group’, although its destruction necessarily requires the commission of crimes against its members, that is, against individuals belonging to that group. The genocidal intent

may be inferred, among other facts, from evidence of ‘other culpable acts’ systematically directed against the group under attack.

259. In the case in hand, the magnitude and the pattern of killings carried out at village-Pachgaon is a patent manifestation of the intent to destroy the Hindu community. It had an impact on the Hindu religious group beyond the death of the civilians killed-- it also sent a message to the remaining members of the Hindu religious group of their fate – that they were at the mercy and that their lives, too, could be taken at any moment and such message eventually forced the survived Hindu civilians to be displaced and naturally it caused serious mental harm to them.

260. The pattern and magnitude of the attack thus leads to the inference that the intent of the gang culpably accompanied by the accused persons and their cohort Razakars and Pakistani occupation army was to cause destruction of Hindu community of village Pachgaon, a protected group, in whole or in part. It is not necessary to show that the group targeted was actually destroyed. We are to see what the intent of the attack was.

261. On integrated evaluation of all the evidence tendered, it appears that the acts of rape and sexual violence described by the victims were committed solely against Hindu women, in

conjunction with the systematic attack. It was the worst humiliation inflicted deliberately upon Hindu women of village-Pachgaon.

262. The sexual ravishment resulted in physical and psychological destruction of Hindu women, their families and their communities as well. Sexual violence, committed in war time situation, obviously was an integral part of the process of destruction, specifically targeting women belonging to a particular protected group and specifically contributing to their destruction and to the destruction of the group, as a whole or in part, we conclude.

263. The trauma and torment the witnesses the victims and survivors sustained caused serious mental harm to them which they have been still carrying. The massacre they faced and observed indisputably fall within the ambit of bodily and mental harm which constituted the offence of 'genocide as enumerated in section 3(2)(c) of the Act of 1973. In the case of **Krstic**, a Trial Chamber of the International Criminal Tribunal for the former Yugoslavia [ICTY] considered the ordeal inflicted on the few who survived the Srebrenica massacres to fall within the ambit of bodily and mental harm.

264. Sexual violence committed upon the Hindu women, in conjunction with the attack was a constituent of the offence of

genocide as it too substantially caused serious bodily and mental harm as well to the victims of who two described the untold trauma they sustained, coming on witness box of the Tribunal.

265. Thus, we are of the view, in light of facts and the pattern and extent of the violence done, that intent of launching attack was thus to cause group conditions of life of Hindu community of village Pachgaon which was calculated to bring about its physical destruction in whole or in part, by causing indiscriminate killing, looting households, burning down houses and by committing sexual violence extending immense terror which compelled the survivors to internal displacement, we conclude it emphatically.

266. On appraisal of evidence tendered in relation to charge no.01 it has been depicted that the victims of the killing were perceived by the accused persons and their co-perpetrators of the crime as members belonging to a particular group i.e 'Hindu religion or community' targeted for destruction. Hindu community is a group sharing common beliefs and thus it is a group to be protected under the Genocide Convention 1948 and the Act of 1973 as well. It is clear that the victims were targeted on account of their membership in this religious group.

267. All the criminal acts, against the Hindu community of village-Pachgaon, that resulted in wanton destruction, indiscriminate

killing and sexual ravishment collectively constituted the offence of 'genocide' as those were intended to cripple and destroy the Hindu religious group of village- Pachgaon, in whole or in part.

268. Now the question arises for what acts the accused persons can be held responsible for the crimes committed. In the case in hand, it stands proved that the accused persons in exercise of their affiliation in locally formed auxiliary force, a *para militia* force consciously aided, abetted, facilitated and substantially assisted the gang of Pakistani occupation army in carrying out the attack at village-Pachgaon directing the Hindu community and thus incurred liability even for the actual commission of crimes for which they have been arraigned in charge no.01. This view finds support from the observation made by the **ICTR** in the case of **Rutaganda** which is as below:

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

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

269. With respect to this mode of participation, the Prosecution requires to demonstrate that the level of participation of the accused persons was substantial. It has been found that the attacks resulted

from the assistance and moral support stirred up by the accused persons in conducting the criminal mission. Regardless of the role the each member of the enterprise played in committing the crimes, all the participants forming part of the enterprise are guilty of the same crime.

270. The accused persons remained present with the gang in conducting all phases of the attack and participated culpably in accomplishing the killings, sexual invasion and wanton destruction, the evidence presented proves it. All the accused thus participated in the joint criminal enterprise through their act and conduct as found proved. The accused persons thus being part of a criminal enterprise are found to have had acted together and in concert with each other, in the implementation of a common objective.

271. We reiterate that the use of the term 'participation' is intended to address the question of culpability when many people are killed, but their deaths cannot be traced to individual responsibility. In the case in hand, participation of all the four accused persons in the attack, by their culpable conduct and act, not only facilitated to constitute the attack but also contributed to constitute the atmosphere favourable for the commission of crimes by the gang.

272. Remaining present with the killing enterprise till it ended its designed mission by causing death of numerous Hindu civilians, committing sexual abuse upon a number of women belonging to Hindu community suggests that the accused persons were knowingly agreed with the common intent and as such they are equally liable as participants in a joint criminal enterprise [JCE-Basic From].

273. Therefore, it is immaterial to show that the level of contribution of accused persons was much grave in nature. In the case in hand, the contribution of the accused persons as has been found proved had made them principals in committing the crimes. It has been settled jurisprudentially that those who make their contribution with the shared intent to commit the offence can be held equally liable, regardless of the level of their contribution to its commission.

274. It is now well settled jurisprudence that encouragement or moral support may consist of, in some cases, even mere presence as an ‘approving spectator.’ The Tribunal notes that aider and abettor needs only be aware of the criminal intent of the principal whom he assists or encourages. But 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.

275. It is to be noted further that abetting involves an act of facilitating the commission of an offence by being sympathetic to the actual perpetrator[s] thereto. In the case in hand, it may be unerringly inferred that the accused persons being part of the enterprise felt culpably enthused to consciously collaborate with the Pakistani occupation army in accomplishing the horrendous atrocities. Aiding and abetting include all acts of 'assistance' in either physical form or in the form of moral support. Totality of evidence tendered impels the conclusion that the accused persons substantially contributed to the gang, knowingly and sharing its common intent.

276. It already stands proved from the evidence of direct witnesses that the accused persons did not make them distanced from the killing gang till it ended its mission by liquidating numerous Hindu civilians. Such act, knowing the consequence made the accused persons 'concerned' with the attack. Their culpable presence with the killing enterprise in all phases of the attack indisputably had a 'substantial effect' on the commission of the principal crimes by the actual perpetrators.

277. It has been found from the account of direct witnesses that the accused persons remained present with the Pakistani occupation army on the bank of the pond where the detained Hindu civilians were made assembled before accomplishing their liquidation. Defence could not diminish its credibility in any manner by cross-examining the witnesses.

278. The role the accused persons had played on the bank of the pond, the killing site just before the detainees were gunned down to death amounted not only to 'substantial assistance' which justifiably refers to 'aiding' and abetting' but also 'tacit approval' and 'encouragement' to the actual commission of the crimes. Conduct of the accused persons substantially contributed to the perpetration of the crimes. This view finds support from the observation made by the **ICTR Appeal Chamber** in the case of **Muvunyi** which is as below:

“An accused may be convicted of aiding and abetting when it is established that his conduct amounted to tacit approval and encouragement of the crime and that such conduct substantially contributed to the crime”.

[Muvunyi,(Appeals Chamber), August 29, 2008, para. 80]

279. Additionally, the settled jurisprudence is that an accused is liable as an accomplice to 'genocide' if he knowingly aided or abetted or instigated one or more persons in the commission of genocide, while knowing that such a person or persons were committing genocide, even though the accused himself did not have the specific intent to destroy, in whole or in part, a protected group.

280. The facts and circumstances unveiled from the narrative made by competent direct witnesses suggest the inference that the accused persons had complicity with the commission of the offence of genocide as they had acted knowingly. The collectivity of crimes proved impels it. It is to be noted that the mental element of complicity implies in general that at the moment of launching attack the accused knew of the consequence of assistance he was providing in the commission of the principal offence.

281. In the case in hand, we may safely deduce, taking the facts divulged from evidence of direct witnesses into consideration that the accused persons knew well of the consequence of their act and conduct by which they intended to provide and facilitate assistance in the commission of the principal offence.

282. In the case of *Furundžija*, an **ICTY Trial Chamber** held that complicity consists of practical assistance, encouragement, or moral

support which has a substantial effect on the perpetration of the crime. In the case in hand, we have already found it proved that all the accused persons by their culpable act and presence at the crime sites provided substantial assistance, encouragement and moral support to the gang in accomplishing the purpose of the criminal mission.

283. In view of above we may safely arrive at decision that the accused persons by providing such encouragement and moral support as aider and abettor were consciously concerned and had ‘complicity’ with the event of killing directing a protected group, the ending phase of the systematic attack against the Hindu community of village-Pachgaon.

284. It has been settled in the case of **Édouard Karemera [Case No. ICTR-98-44-T, para1427]** that ‘instigation’ implies prompting another person to commit an offence. This proposition seems to be compatible with the facts and circumstances chained to the event of attack narrated in charge no.01. It is not necessary to prove that the crime would not have been perpetrated without the involvement of the accused. It is sufficient to show that the instigation substantially contributed to the conduct of another person committing the crime.

285. In the case in hand, it stands proved that the accused persons being part of a criminal enterprise are found to have had acted together and in concert with each other, in the implementation of a common objective. All the four accused in all phases of attack provided substantial contribution to the gang in accomplishing the crimes. Their act of assistance, providing moral support in other words 'instigated' the actual perpetrators.

286. The crimes were committed against the civilians belonging to Hindu religious group of village-Pachgaon after causing their unlawful detention, keeping them under coercion and terror. The accused persons and their cohorts accompanying the gang at the crime site belonged to Razakar Bahini, an auxiliary force. It indisputably suggests the conclusion that the accused persons were consciously concerned with the criminal acts forming part of the systematic attack designed, agreeing with the common intent.

287. As a result, the accused persons were equally liable also for perpetration of the grave wrongs done to the Hindu women, in conjunction with the attack. It is not required to show that the accused were the actual offenders in carrying out sexual abuse upon the women detainees under coercion. This view finds support from the observation of the **ICTY Trial Chamber** in the case of *Vasiljevic* which is as below:

“If the agreed crime is committed by one or other of the participants in a joint criminal enterprise such as has already been discussed, all of the participants in that enterprise are equally guilty of the crime regardless of the part played by each in its commission.” [Vasiljevic, (Trial Chamber), November 29, 2002, para. 67]

288. Why the accused persons remained stayed with the gang at crime sites? It may safely be inferred that they too were conscious part of the enterprise, in exercise of their membership in auxiliary force and being aware of the consequence provided assistance and aid to the gang in carrying out horrific mass killing. Knowledge of the vast ‘murderous enterprise’ is sufficient for holding the accused persons criminally responsible for the offence committed.

289. The accused persons knowingly remained engaged as part of the enterprise for the purpose of having the civilians of a particular protected group killed and in this way the accused persons, by their act of presence with the group, as encouragement and assistance substantially facilitated numerous Hindu civilians being killed brutally.

290. Another question has been agitated by the learned state defence counsel defending the three absconding accused. It has been submitted that according to the charge framed it will reveal that apart from these accused, some other armed persons, as co-perpetrators, accompanied the gang at the crime scene in committing the crimes. But excepting these accused, none of their accomplices have been brought to justice which makes accused persons' complicity with the crimes committed reasonably doubtful.

291. We are not convinced with the above submission although it is true that the other cohorts of these three accused have not been prosecuted. But that by itself does not make the horrendous episode of mass atrocities directing the Hindu civilians constituting crimes against humanity and genocide untrue or give immunity to these accused persons. If these accused persons are found guilty beyond reasonable doubt, inaction in prosecuting any of their accomplices cannot be the reason for holding the former innocent.

292. In the case in hand, it thus stands proved that the accused persons were part of the common plan and design to wipe out of defenceless civilians belonging to Hindu religious group of village Pachgaon, a particular geographical territory. The accused persons had conscious concern with the 'killing squad'.

293. It would not have been possible to accomplish the mass atrocities and genocide without a plan designed by the perpetrators. The accused persons were conscious part of the plan as they are found to have had active participation in accomplishing the crimes, being part of the criminal enterprise. The accused persons were aware of the genocidal intent of the criminal enterprise; it may legitimately be inferred from the fact and pattern of the attack.

294. Existence of such plan is thus seemed to be a strong indication of ‘specific intent’ requirement to constitute the crime of genocide. In this regard we may concentrate on the observation made by the **ICTR** trial Chamber in the case of **Kayishema** and **Ruzindana** [**Prosecutor v. Kayishema and Ruzindana (Case No. ICTR-95-1-T), Judgment, 21 May 1999**] which is as below:

‘Although a specific plan to destroy does not constitute an element of genocide, it would appear that it is not easy to carry out a genocide without a plan or organization [**para 94 of the judgment**]. Furthermore, it said that ‘the existence of such a plan would be strong evidence of the specific intent requirement for the crime of genocide’ [**para 276 of the judgment**].

295. On integrated evaluation of evidence and circumstances before us we are of the view that the perpetrators intended to effect destruction of the civilians belonging to Hindu religious group by causing indiscriminate killing on a 'massive scale', sexual abuse, wanton looting and burning down houses.

296. The devastating pattern of the attack, size and number of the groups of attackers, members of the groups clearly indicate that the intent of the perpetrators was to kill civilians on 'massive scale'.

297. The Tribunal is convinced to record its finding that the accused (1) Md. Akmal Ali Talukder, (2) Abdun Nur Talukder @ Lal Miah , (3) Md. Anis Miah and (4) Md. Abdul Mosabbir Miah , for their culpable participation to the attack in question and also for their acts, conduct and culpable engagement with the criminal enterprise are criminally responsible for all the criminal acts resulting from the criminal plan and design of annihilating the Hindu community of village-Pachgaon, irrespective of whether and in what manner they themselves directly participated in the commission of any of these acts forming the concurrent and systematic attack. This view is in conformity to the provisions in respect of 'liability' contained in section 4(1) of the Act of 1973.

298. On totality of evidence as discussed above we eventually arrive at decision that the accused (1) Md. Akmal Ali Talukder, (2)

Abdun Nur Talukder @ Lal Miah, (3) Md. Anis Miah and (4) Md. Abdul Mosabbir Miah are found criminally liable under section 4(1) of the Act of 1973 for participating, abetting, assisting, substantially contributing and also for complicity, by their act and conduct forming part of systematic attack, to the accomplishment of devastating criminal activities and mass killing directing Hindu civilians of village-Pachgaon constituting the offence of 'genocide' as enumerated in section 3(2)(c) ((i)(ii)(g)(h) of the Act of 1973.

Adjudication of Charge No. 02

[Abduction, confinement, torture, murder, looting and arson committed at Paschimbag village, Rajnagar Police Station and Moulavibazar town]

299. Charge: That on 24.11.1971 at about 01.00 A.M. a group of about 50 Pakistani occupation army men and Razakars along with the Razakars accused (1)Md. Akmal Ali Talukder (2) Abdun Nur Talukder alias Lal Miah (3) Md. Anis Miah, and (4) Md. Abdul Mosabbir Miah having attacked the house of Binod Chakraborty of village Paschimbag under Rajnagar Police Station of the then Moulavibazar Sub-Division looted the valuables of his house and captured Binod Chakraborty and Nikhil Ranjan Chakraborty therefrom and tortured Niranjan Chakraborty, younger brother of said Nikhil Ranjan Chakraborty and then put four dwellings on fire.

Thereafter, on the same day at about 05.00 A.M. the accused persons and their cohort Razakars and Pakistani occupation army having taken the detainees i.e. Binod Chakraborty and Nikhil Ranjan Chakraborty away to the Rajnagar Police Station kept them confined and tortured there. Thereafter, the two detainees were taken away to the Moulavibazar army camp and subsequently the accused persons and their cohort Razakars and Pakistani occupation army men killed them [two detainees] at the ' Bodhdhovumi' [slaughtering place] on the bank of Monu river nearby Moulavibazar town . Even though their relatives searched their dead bodies in all the probable areas including the bank of Monu river, but they were in vein.

Thereby, the accused (1) Md. Akmal Ali Talukder (2) Abdun Nur Talukder alias Lal Miah (3) Md. Anis Miah, and (4) Md. Abdul Mosabbir Miah have been charged for participating, abetting, facilitating, contributing and complicity in the commission of offences of **abduction, confinement, torture, murder and other inhumane acts [looting and arson]** as crimes against humanity as part of systematic attack directed against unarmed civilians as enumerated in section 3(2)(a)(g)(h) of the Act of 1973 which are punishable under section 20(2) of the said Act for which the accused persons have incurred liability under section 4(1) of the said Act.

Evidence of Witnesses Examined

300. This charge involves an attack that finally ended in killing of two Hindu civilians. In order to prove the arraignment brought in this charge prosecution adduced three witnesses who have been examined as P.W.10, P.W.11 and P.W.12. Of them two are direct witnesses to the facts materially related to the alleged principal crimes. Before we act upon it, considering credibility and probative value let us focus on what has been testified by these witnesses.

301. P.W.10 Bibhash Chakraborti Bipul [60] is a resident of village Paschimbag under Police Station-Rajnagar of District-Moulavibazar. He is the son of a victim. He experienced how his father and cousin brother were unlawfully abducted by launching attack at their house.

302. P.W.10 stated that on 24 November 1971 at about 01:00 A.M [in the night] some people started calling them coming to their house and with this they opened the door when Razakar Akmal Ali Talukder, Lal Mia, Matin Mia, Mosabbir Mia, Anis Mia and their cohorts unlawfully detained him, his brothers and started beating them taking at the courtyard, in front of the temple for extracting information about the freedom-fighters. But they expressed their ignorance and then the said Razakars looted their houses and set

those on fire. This phase of attack was conducted by the group formed of accused persons and their cohort Razakars.

303. P.W.10 also stated that at about 05:00 A.M, on the same day those Razakars being accompanied by Pakistani occupation army took away his father Binod Chakraborty and cousin brother Nikhil Chakraborty to Rajnagar Police Station, on forcible capture. Later on, on the same day he along with his brother and uncle moved to Rajnagar Police Station and appealed for release of his father and cousin brother. But they did not respond. The Razakars then took away his father and cousin brother to Moulavibazar by a vehicle.

304. P.W10 next stated that 7/8 days later he heard that his father and cousin bother were killed. On 08 December, on the following day when Moulavibazar got liberated they moved to Moulavibazar to have trace of dead bodies of his father and cousin brother but did not get. P.W.10 also stated that the accused persons were from their neighbouring locality and as such he knew them beforehand.

305. In cross-examination on part of accused Md. Akmal Ali Talukder P.W.10 stated in reply to defence question that Akmal Ali Talukder's father's house was adjacent to the house of Hiron Babu; he knew Momin the son of Akmal Ali Talukder's brother and they had not been in India in 1971. P.W.10 denied the defence

suggestion that this accused was not a Razakar; that in 1971 he had been in India along with his family and that he was not affiliated with the event he narrated.

306. In cross-examination done by the stated defence counsel for three absconding accused P.W.10 stated that the houses of accused Md. Anis Mia and Mosabbir Mia were about 50/60 hands far from that of their own and accused Lal Mia's house was about half kilometer far from their house and that he did not initiate any case earlier over the event he described.

307. P.W.10 denied the defence suggestion that these accused were not Razakars and were not involved with the event of attack he narrated.

308. P.W.11 Niranjan Chakraborti [70] is a resident of village-Paschimbag under Police Station-Rajnagar of District-Moulavibazar. He witnessed the attack launched at their house.

309. P.W.11 stated that on 24 November 1971 at about 12 in the night 3-4 people started calling his father coming to their house. His father opened the door and instantly Razakars Anis Mia, Mosabbir Mia, Lal Mia, Akmal Ali Talukder[accused persons] being accompanied by the Pakistani occupation army entered their

room and finding no freedom-fighter Razakar Matin inflicted a blow on his[P.W.11] knee and then made them all assembled in the courtyard in front of the temple and started them beating. At a stage, said Razakars looted their house and set it on fire and then took away his younger brother Nikhil Chakraborty and Uncle Binod Chakraborty to Rajnagar Police Station.

310. P.W.11 also stated that afterwards he along with his another brother and father moved to Rajnagar Police Station and called for release of his brother and uncle. But instead of freeing, they took them away to Moulavibazar by a vehicle.

311. P.W.11 went on to state that on 08 December 1971, after Moulavibazar got liberated they moved to Moulavibazar to have trace of his brother and uncle but they did not get it. The accused Razakars he named were from their neighbouring locality and as such he knew them beforehand.

312. In cross-examination, P.W.11 stated that accused Akmal Ali Talukder migrated to Bangladesh [the then East Pakistan] during Pakistan regime and long before the war of liberation ensued. P.W.11 denied that the accused persons were not Razakars and were not involved with the commission of the event he narrated.

313. P.W.12 Binayak Chakraborti [51] is the son of victim Binod Chakraborty. He is a hearsay witness. He stated that he heard from his mother that the Pakistani army men being accompanied by Razakars accused Akmal Ali Talukder, Lal Mia, Anis Mia and Mosabbir Mia took away his father forcibly by launching attack at their house in 1971. His cousin brother Nikhil Chakraborty was also forcibly taken away along with his father and they were killed in Moulavibazar.

314. In cross-examination, defence simply suggested to P.W.12 that he did not learn the event he narrated. P.W.12 denied it.

Finding with Reasoning on Evaluation of Evidence Presented

315. This charge relates to the commission of murder on abduction of two pro-liberation Hindu civilians constituting the offences of crimes against humanity. Prosecution relied upon testimony of three witnesses—P.W.10, P.W.11 and P.W.12 to substantiate the arraignment brought in this charge.

316. Of these three witnesses P.W.10 and P.W.11 are relatives of victims and they had occasion of seeing the attack and experiencing how the squad accompanied by the accused persons took away the victims on forcible capture and carried out devastating activities.

P.W.12 is a hearsay witness. He is the son of one of victims. He heard the event from his mother when he grew up.

317. P.W.10 Bibhash Chakraborti Bipul is the son of victim Binod Chakraborty. The crime site was their house at village Paschimbag under Police Station-Rajnagar of District Moulavibazar. Another victim Nikhil Chakraborty was his [P.W.10] cousin brother.

318. Testimony of P.W.10 demonstrates that both the victims were forcibly captured by launching attack at their [P.W.10] house on 24 November 1971 at about 01:00 A.M [in the night]. Defence could bring anything attacking credibility of the event as has been testified by the P.W.10, by cross-examining him.

319. How the act of forcible capture of unarmed victims was accomplished and by whom? It transpires from uncontroverted testimony of P.W.10 that some people coming to their house started calling them and with this they opened the door when the accused Razakars Md. Akmal Ali Talukder, Lal Mia, Matin Mia, Mosabbir Mia, Anis Mia and their cohorts unlawfully detained him [P.W.10], his brothers and started beating them taking at the courtyard, in front of the temple for extracting information about the freedom-fighters.

320. The attack was launched in the mid of night, it appears from the above version of P.W.10 and the squad was accompanied by the accused persons and their cohort Razakars. What was the goal of conducting such attack in the mid of night targeting the house of particular Hindu civilians? Why the accused persons were with the gang and felt imbued in launching attack?

321. We have already found that the accused persons belonged to locally formed Razakar Bahini, an armed para militias force the objective of creating which was to act to further policy and plan of the Pakistani occupation army. What was the policy and plan of the Pakistani occupation army?

322. The history says that resisting the Bengali nation in achieving its independence was the key goal of the Pakistani occupation army and in doing so it started committing mass atrocities and genocide since the 'operation search light' which continued for long nine-months. Being imbued by such policy and plan the members of para militia forces did not keep them aloof from carrying out atrocious activities directing unarmed civilians even by joining the group of Pakistani occupation army.

323. It has been unveiled from evidence of P.W.10 that the accused persons and their cohorts, just after attacking the house first

unlawfully detained him [P.W.10], his brothers and started beating them taking at the courtyard, in front of the temple for extracting information about the freedom-fighters.

324. P.W.11 Niranjan Chakraborti is the elder brother of one of victims Nikhil Chakraborty. Another victim Binod Chakraborty was his uncle. P.W.11 had been at the same house at the time of initiating attack. He [P.W.11] consistently corroborated the P.W.10 in narrating the first phase of the attack that resulted in unlawful capture of the victims.

325. From his [P.W.11] evidence too it has been found proved that the accused persons and their accomplice Razakars being accompanied by the Pakistani occupation army entered their room and finding no freedom-fighter Razakar Matin [now dead] inflicted a blow on his [P.W.11] knee and then made them all assembled in the courtyard in front of the temple and started them beating, Razakars looted their house and set it on fire. P.W.11 appears to have echoed the version as has been made by P.W.10, another direct witness to this phase of the attack.

326. The above piece of pertinent version remained uncontroverted in cross-examination. Thus, it is patent that the gang was extremely hostile to the freedom-fighters and it considered the detainees and

their family inmates as potential pro-liberation civilians and thus the accused persons accompanying the gang attempted to extract information about the freedom-fighters from them under coercion and intimidation. Such prohibited act affecting defenseless civilians' fundamental rights was consistent with the policy and plan of the Pakistani occupation army.

327. What happened next when the detainees expressed ignorance in providing information about freedom-fighters? It transpires from the testimony made by P.W.10 that with the ignorance they expressed the Razakars looted their house and set it on fire. The gang of attackers was thus extremely aggressive and notorious to the pro-liberation civilians and they did not prefer to care even in refraining from carrying out devastating activities affecting civilians' normal livelihood.

328. What happened next to failure of extracting information about the freedom-fighters from the detainees including the P.W.10? He is the son of a victim. He experienced how his father and cousin brother were then unlawfully abducted by launching attack at their house. Next phase of attack involving the act of taking away two civilians – father and cousin brother of the P.W.10 happened in conjunction with the attack which was conducted by the accused persons and the Pakistani occupation army.

329. It is found from evidence of P.W.10 that afterwards, few hours later the accused Razakars, their accomplices being accompanied by Pakistani occupation army took away his [P.W.10] father Binod Chakraborty and cousin brother Nikhil Chakraborty to Rajnagar Police Station, on forcible capture.

330. The above unshaken version suggests the conclusion that the gang of attackers was formed of Pakistani occupation army, accused persons and their accomplice Razakars. And the phase of detaining P.W.10 and his brother, beating them to extract information happened on active participation of all the four accused persons.

331. Detaining P.W.10 and his brother, beating them for extracting information, looting and burning down their houses and then taking away the father and cousin brother of P.W.10 were chained together. All these collectively formed part of systematic attack to which the accused persons were active and conscious part. They in fact conducted all those prohibited criminal acts to further the policy and plan of the Pakistani occupation army, we may safely conclude.

332. Defence questioning credibility of testimony the P.W.10 made in relation to the reason of knowing the accused persons argued that

there had been no reason of recognizing the accused persons and that the accused were not at all with the group while it launched the alleged attack.

333. On this crucial issue, first we see that no suggestion on part of defence has been put to P.W.10 that it was not practicable of seeing or recognizing the perpetrators when they launched the attack at their house. Rather, it appears from the version made in cross-examination of P.W.10, an inmate of the house under attack that the accused persons were from their neighboring locality and as such he knew them beforehand.

334. The above version becomes strengthened when it is found too in cross-examination that the houses of accused Md. Anis Mia and Mosabbir Mia were about 50/60 hands far from that of their own and accused Lal Mia's house was about half kilometer far from their house.

335. Consistent testimony of P.W.10 and P.W.11 the near relatives of victims and direct witnesses to the facts materially related to the event impels that eventually the gang took away the detained victims Nikhil Chakraborti and Binod Chakraborti to Rajnagar Police Station. We got it evinced too that on the following day an appeal was made to release the detained victims. But the relatives of victims did not get any response. And the accused persons

culpably and substantially assisted and contributed the Pakistani army men in taking away the victims to Moulavibazar from Rajnagar police station where the victims were kept detained first.

336. The accused Razakars were from the neighbouring locality of P.W.11 and as such he knew them beforehand. Thus and being an inmate of the same house which was attacked P.W.11 naturally could recognize the accused persons and testimony he made in this regard inspires credence.

337. In view of above we find no earthly reason of disbelieving the P.W.10 and P.W.11. Their testimony demonstrates that the accused persons were with the gang when it attacked the house of P.W.10 and P.W.11 in the mid of night. Besides, it has already been found, in adjudicating the charge no.01 that the accused persons in exercise of their affiliation with the para militia force, locally formed Razakar Bahini substantially facilitated and contributed the Pakistani occupation army in carrying out the mass atrocities and genocide directing the Hindu civilians of village Pachgaon and it event happened on 07 May 1971.

338. The event narrated in charge no.02 occurred on 24 November 1971 i.e almost at the ending part of the war of liberation. The history says that at this stage of the war of liberation the people

belonging to pro-Pakistan political parties, members of para militia forces became extremely arrogant and aggressive particularly to freedom-fighters, Hindu civilians and intellectuals.

339. The event as narrated in charge no.02 was carried out intending to extract information about the freedom-fighters and presumably the gang thought that the victims they took away on forcible capture to Rajnagar police station were closely connected with the freedom-fighters and their location.

340. The proved fact of accused persons' participation, being part of the criminal enterprise in committing the offence of genocide [as narrated in charge no.01] rather lends assurance also to the fact of their participation and nexus even with the event as narrated in charge no.02 which relates to the acts of unlawful detention, torture, abduction and killing of two non combatant Hindu civilians.

341. Accused Md. Akmal Ali Talukder had been in India in 1971 and not in the locality under Rajnagar Police station ---this is specific defence case which is in other words a plea of alibi. In reply to defence question, P.W.10 stated that Akmal Ali Talukder's father's house was adjacent to the house of Hiron Babu; he [P.W.10] knew Momin the son of Md. Akmal Ali Talukder's

brother and they had not been in India in 1971. With this the credence of the plea of alibi is diminished.

342. P.W.11 in cross-examination stated in reply to defence question that accused Md. Akmal Ali Talukder migrated to Bangladesh [the then East Pakistan] during Pakistan regime and long before the war of liberation ensued. Thus, it stands affirmed that at the relevant time accused Akmal Ali Talukder had been in Bangladesh and not in India.

343. Eventually what fate the detainees had to face? It is found from the corroborative evidence of P.W.10 and P.W.11 who experienced the act of unlawful abduction of the victims that on the following day the detainees were taken away to Moulavibazar by a vehicle from Rajnagar police station, defying the appeal to release them. And 7/8 days later they heard that the victims were killed.

344. Dead bodies of the victims could not be traced even when the relatives of victims moved to Moulavibazar after 08 December 1971 when Moulavibazar got liberated. The detainees were thus killed taking them to Moulavibazar. Besides, defence does not dispute the fact of killing the victims.

345. Dead bodies of the victims could not be traced. The killing happened not in normalcy. It was the upshot of systematic attack carried out in war time situation. Therefore, the fact of a victim's death can be inferred circumstantially from all of the evidence presented to the Tribunal. In this regard the **ICTY** Trial Chamber observed in the case of **Krnojelac** that--

“Proof beyond reasonable doubt that a person was murdered does not necessarily require proof that the dead body of that person has been recovered. [T]he fact of a victim's death can be inferred circumstantially from all of the evidence presented to the Trial Chamber.”

[Krnojelac, ICTY Trial Chamber, March 15, 2002, para. 326]

346. The attempt of getting the detainees released by making appeal moving to Rajnagar police station on the following day as testified consistently by P.W.10 and P.W.11 could not be controverted in any manner, by cross-examining them.

347. There is no evidence whatsoever to show when the killing of the victims happened and by whom and exactly at which place, true. But the act the accused persons did till shifting away the detained victims to Moulavibazar from Rajnagar police station was

significantly chained to the actual commission of the killing the victims, it may be irresistibly concluded.

348. Merely for the reason of absence of any evidence as to actual commission of the killing after taking away the detainees to Moulavibazar it cannot be deduced that the accused persons had no concern and nexus with the killing. It is not necessary to show that the accused persons physically acted in causing death of the detainees, after taking them to Moulavibazar.

349. Since it has been proved that the accused persons were actively engaged in taking away the victims to Rajnagar Police Station on forcible capture by launching attack at their house it may justifiably concluded that they had nexus even to the act of causing the death of the detained victims, the upshot of the attack.

350. P.W.12 Binayak Chakraborti is the son of victim Binod Chakraborti. He is a hearsay witness. He heard from his mother that the Pakistani army men being accompanied by Razakars the accused persons took away his father and cousin brother Nikhil Chakraborti in 1971 and they were killed in Moulavibazar.

351. Hearing the event from mother was quite natural. His hearsay testimony cannot be kept aside terming 'anonymous hearsay'

evidence. Besides, it is now well settled that even ‘anonymous hearsay’ evidence is admissible and is considered for arriving at a decision if it is corroborated by ‘some other evidence’.

352. It is to be noted that the phrase ‘some other evidence’ includes circumstance, relevant fact and eye witness’s testimony. In the case in hand, hearsay evidence of P.W.12 stands corroborated by the evidence of two direct witnesses—P.W.10 and P.W.11. Therefore, hearsay evidence of P.W.12 cannot be excluded from consideration, treating it having probative value. Besides, defence does not appear to have made effort to impeach his hearsay evidence.

353. We reiterate that the Tribunal may arrive at decision even on the basis of single testimony and ‘corroboration’ is simply one of factors to be considered in assessing witness’ credibility. In this regard it has been held by the ICTR trial chamber in the case of **Nchamihigo** that:

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

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

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

355. But in the case in hand it patently transpires that the fact of attack that resulted in killing of two defenceless civilians taking them away on forcible capture, to further common purpose and participation and complicity of the accused persons therewith have been found proved by credible and corroborative evidence of P.W.10 and P.W.11. Additionally, their testimony provides corroboration to hearsay evidence of P.W.12.

356. It may irresistibly be inferred that the attack against the pro-liberation civilians of the crime village was intended to abduct, confine and torture leading to brutal killing of non combatant pro-liberation civilians, intending to further policy and plan of the Pakistani occupation army. The accused persons actively and culpably took part in launching the attack, knowing consequence and sharing common intent.

357. It has been found proved that the attack was conducted in collaboration with the local Razakar members including the

accused persons. The attack was designed indeed, we presume unerringly. It was an aggressive attempt aiming to narrow down the significant local influence of pro-liberation Bengali civilians who took stance with the freedom-fighters of the crime locality. **Husain Haqqani** made it clear in the narratives made in his book titled '**Pakistan-between Mosque and Military**'. It reads as below:

“.....The Razakars were mostly employed in areas where army elements were around to control and utilize themThis force was useful where available, particularly in the areas where the rightist parties were in strength and had sufficient local influence.”

[Husain Haqqani, Pakistan-between mosque and military, page 79]

358. Forcible capture of two potential pro-liberation civilians would not have been possible without the active assistance and contribution of the accused persons. The accused persons had done the criminal acts not pursuant to the policy and plan of their own. They were the members of an 'auxiliary force' which was under command of the Pakistani occupation armed force and as such they had consciously and actively participated to the accomplishment of the 'group crime' knowing well about the policy and purpose. Pattern of the acts of accused persons in effecting forcible capture

of two unarmed civilians were well fitted into a group's plan, we conclude.

359. Prosecution has been able to prove that the accused persons actively participated in conducting the act of forcible capture and beating the family inmates of victims intending to extract information about freedom-fighters. This unlawful act the accused persons had played is sufficient for holding them liable even for the killing of detainees, the upshot of the attack.

360. The history says that in 1971 during the liberation war the freedom-fighters and pro-liberation Bengali people assisting them were treated as 'miscreants'. They were the target of the Pakistani occupation army.

361. Thus, plan of the gang of perpetrators was not only to liquidate the freedom-fighters or to extract information about them but to wipe out the pro-liberation Bengali people who were in favour of freedom-fighters. The accused persons being part of the criminal enterprise provided support and assistance to the Pakistani occupation army in carrying out its activities to cause forcible capture of two unarmed civilians of village-Paschimbag with intent to combat and liquidate the pro-liberation civilians terming them 'miscreants',

362. In the case in hand, the killing of two non combatant civilians was the part of a designed plan, and that plan had widespread or systematic effects and thus the killing constituted the offence of crime against humanity.

363. It is to be noted here that the offence of murder as crime against humanity need not be carried out against a multiplicity of victims. The appeal Chamber of ICTR has observed in the case of **Nahimana, Barayagwiza and Ngeze**, that –

“A crime need not be carried out against a multiplicity of victims in order to constitute a crime against humanity. Thus an act directed against a limited number of victims, or even against a single victim, can constitute a crime against humanity, provided it forms part of a ‘widespread’ or ‘systematic’ attack against a civilian population”.

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

364. The acts of the accused persons up to the phase of taking away the victims at Rajnagar police station were not isolated but had nexus even with the upshot of the attack launched. It is now well settled that even a single act of accused person forms part of the

‘attack’. It has been propounded by the ICTY Appeal Chamber in the case of **Deronjic** that—

All other conditions being met, a single or limited number of acts on [the accused’s] part would qualify as a crime against humanity, unless those acts may be said to be isolated or random’.

[Deronjic, ICTY Appeals Chamber, July 20, 2005, para.109]

365. Accused persons’ participation in the initial phase of attack that resulted in abduction of victims and then keeping them confined in Rajnagar police station are quite fair indicative as to their participation even to the phase of commission of the killing the detainees which happened later on in Moulavibazar. The accused persons were thus consciously ‘concerned with the commission’ of actual perpetration of the event of killing. It has been observed in the case of **Tadic**, that—

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

[Tadic, ICTY Trial Chamber), May 7, 1997, para. 69]

366. There has been no evidence as to causing death of detained victims and that the accused persons actually perpetrated the act of

their killing in Moulavibazar. But till taking away the detainees from Rajnagar police station to Moulavibazar the accused persons played a substantial role. Thus, the accused persons being part of the criminal enterprise participated in an integral part of the attack that ended in annihilation of victims. This mode is significantly culpable indeed. Thus, all the four accused persons acted being part of JCE [Basic form].

367. It is to be noted that the mode of liability need not involve the physical commission of a specific crime by all the members of JCE but may take the form of assistance in or contribution to, the execution of the common purpose [**Stakic (IT-97-24-A), ICTY Appeals Chamber, 22 March 2006, para. 64**]. Thus, ‘once a participant in a joint criminal enterprise shares the intent of that enterprise, his participation may take the form of assistance or contribution with a view to carry out the common plan or purpose [**Krnjelac (IT-97-25-A), Appeals Chamber, 17 September 2003, para81**].

368. In the case in hand too we are convinced in arriving at an irresistible decision that the act and conduct of the accused persons assisted and contributed to the actual perpetrators of the killing, the upshot of the attack to further common purpose and plan.

369. The accused persons knew it well that their assistance and contribution impacted substantially to the actual commission of

crimes. And it irresistibly prompts to the reasonable conclusion that they got engaged in launching the attack in furtherance of common purpose of the group and therefore they incurred equal liability as co-perpetrators. The **ICTY** in the case of **Limaj** has observed that--

“Where, however, the accused knows that his assistance is supporting the crimes of a group of persons involved in a joint criminal enterprise and shares that intent, then he may be found criminally responsible for the crimes committed in furtherance of that common purpose as a co-perpetrator.”

[Limaj, ICTY Trial Chamber, November 30, 2005, para. 510 (similar).

370. On cumulative evaluation of evidence presented before us, we conclude that it has been proved beyond reasonable doubt that by launching systematic and planned attack, first family inmates of the victims were detained and were subjected to beating for extracting information about the freedom-fighters and next the gang took away two victims on forcible capture to Rajnagar police station and therefrom the accused persons facilitated taking away of the victims to Moulavibazar, defying appeal to set the victims free. And since then the victims could not be traced. The relatives of victims heard that the victims were killed and they could not find their dead

bodies when they moved to Moulavibazar after it got liberated on 08 December 1971.

371. It also stands proved from the evidence presented that all the four accused persons were part of the 'common plan' as they knowing consequence had accompanied the group formed of army men and local Razakars in accomplishing the act of abduction of pro-liberation civilians and taking them away and that the attack ended in their killing which tantamount to their 'participation'.

372. It appears that defence simply avers that the accused persons did not belong to Razakar Bahini and were not involved in perpetrating the alleged crimes. This negative averment does not readily impact adversely the testimony of witnesses who are direct witnesses to the facts materially related to the upshot of the attack, and in absence of anything contrary, does not negate the description made in respect of taking away the victims on forcible capture by launching attack at village Paschimbag.

373. Tribunal notes that not only the status the accused persons had in 1971 but their act and conduct forming part of attack that resulted in commission of the crimes narrated in the charges is to be seen and taken into account, for holding them liable. Even without being in dominating position of a group or organisation one can

incur liability for the commission of crimes under the theory of JCE if it is found that he was an active and conscious part of the enterprise.

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

375. Already we got it established from the evidence presented that all the accused persons remained engaged till significant phase of the event that substantially contributed to the actual killing of victims, taking them to Moulavibazar from Rajnagar police station. Such assistance and contribution the accused persons provided intending to further ‘common purpose’ – the purpose of liquidation of pro-liberation civilians, in execution of common plan is sufficient to prove the guilt of the accused persons.

376. In 1971, during the war of liberation policy of the Pakistani occupation army was to annihilate the self-determined Bangladeshi civilian community. Auxiliary and para militia forces like Razakar Bahini and Al-Badar Bahini were established in aiding the implementation of the policy and in doing so regular and continuous brutal nature of atrocities were committed against the targeted non-combatant civilian population including the protected group, in 1971.

377. The above undeniable context prevailing in 1971 in the territory of Bangladesh forming part of the history by itself is sufficient to prove the existence of a 'widespread and systematic attack' on Bangladeshi self-determined population in 1971.

378. The liability mode contained in section 4(1) of the Act of 1973 refers to 'common plan of collective criminality' which corresponds to JCE [form I]. It is now settled that the expression 'common purpose', 'awareness of foreseeable consequence' of act or conduct, 'intent' are the key factors involved with the notion of JCE liability.

379. In the case in hand, the facts unveiled from the evidence presented before us lead to the conclusion that all the four accused persons had acted with intent to further common purpose, knowing

consequence of their act and conduct and therefore they were indisputably part of the ‘common plan of collective criminality’.

380. On cumulative evaluation of evidence presented before us, we conclude that it has been proved beyond reasonable doubt that by launching systematic and planned attack at the house of victims at village-Paschimgaon the accused persons and their accomplices first apprehended the inmates who were subjected to torture intending to extract information about the freedom-fighters. And then the gang took away the two civilians from that house to Rajnagar police station on forcible capture. The victims could not be traced since they were taken to Moulavibazar and thus it may reasonably be inferred that the intent of causing detention of victims was to liquidate them and in accomplishing it the accused persons substantially contributed and facilitated.

381. It has been thus unequivocally proved that as a part of ‘attack’ the accused (1) Md. Akmal Ali Talukder, (2) Abdun Nur Talukder @ Lal Miah, (3) Md. Anis Miah and (4) Md. Abdul Mosabbir Miah are found criminally liable under section 4(1) of the Act of 1973 for participating, abetting, facilitating, contributing and complicity in the commission of offences of **‘confinement’**, **‘torture’**, **‘abduction’** and **‘murder’** of unarmed civilians constituting the offences of crimes against humanity as enumerated

in section 3(2)(a)((g)(h) of the Act of 1973 which are punishable under section 20(2) of the said Act.

X. Task of Investigation

382. Defence argued that the Investigation Officer [IO] failed to carry out its task effectively as he could not obtain any documentary evidence to show the affiliation of accused Md. Akamal Ali Talukder with the locally formed Razakar Bahini and involvement with the offences alleged; that the IO did not prefer to examine the record of the cases lodged against the two other accused persons initiated under the Collaborators Order 1972 and that the IO without adequate evidence submitted report recommending prosecution of the accused persons.

383. We are not agreed with the above submission. The IO, during investigation under the Act of 1973 chiefly examined the victims, sufferers of the atrocious events and made them witnesses to the case. Additionally, it appears that some documents showing affiliation of three other accused persons with the Razakar Bahini have been filed which do form part of prosecution documents volume. We have taken the same into account, in exercise of our jurisdiction, in resolving the issue as to their association and nexus with the locally formed Razakar Bahini. We have already rendered our reasoned finding that accused Md. Akmal Ali Talukder

belonged to locally formed Razakar Bahini, based on evidence presented. Thus, it is not accepted that the investigation was flawed. Besides, any procedural flaw even if found in the task of investigation does not necessarily impair the entire investigation and in no way affects the merit of the case.

384. From the papers forming part of the investigation report it transpires too that two accused Mosabbir Mia and Anis Miah who have been absconding were prosecuted in 1972 for the offences punishable under the Penal Code. But it is not clear as to whether those cases were initiated under The Collaborators Order, 1972, for the 'same offences'. Next, defence too does not aver that these accused were prosecuted for the 'same offences' and those cases were disposed of after trial.

385. Thus, failure to collect detail information and documents in relation to the said cases does not affect the present prosecution brought under the Act of 1973, a quite different legislation which is meant to prosecute, try and punish an individual or a member or a group of individuals or a member or members of an auxiliary force for an offence or offences committed in violation of international humanitarian law during the war of liberation in 1971.

386. Collecting evidence or documents in relation to complicity of an accused with an offence alleged particularly long more than four decades after the events happened in 1971 is a challenging task indeed. Evidence collected by the IO on holding investigation seem to be adequate in prosecuting and trying the offenders. In the case in hand, on total appraisal, we do not find anything flawed in the investigation task.

387. Countless events of mass atrocities happened in the territory of Bangladesh in 1971. It is quite absurd to expect documentary evidence in support of all those events and also as to complicity of perpetrators. The events narrated in the charges occurred in rural vicinity. The accused persons were the residents of the locality under Rajnagar police station of District [now]-Moulavibazar. The victims and sufferers who had natural juncture of witnessing the facts materially related to the principal crimes testified before the Tribunal and their testimony reflects their episodic memory which remains always alive.

388. On total appraisal, we do not find anything flawed in the investigation task. Tribunal notes that fundamentally, investigation under the Act of 1973 relates to the process of procuring documentary evidence, recording statement of witnesses if found available and identifying the event[s], crime site[s] and casualty

caused by the alleged criminal acts and also to identify whether the criminal acts alleged fall within the definition as enumerated in section 3(2) of the Act of 1973.

389. It is evinced that the Investigation Officer [IO] , in compliance with the norms and provisions contemplated in the Act of 1973 and the ROP, carried out its investigation on completion of which he duly submitted 'report' based on materials and evidence obtained during investigation before the Chief Prosecutor recommending prosecution of the accused persons.

XI. Conclusion

390. The blood- bathed history of the birth of our dear motherland—**Bangladesh** says that 'genocide', crimes against humanity' and monstrous mass atrocities in Bangladesh began on the mid-night of 25 March, 1971 with the launch of 'Operation Searchlight' and it continued till the nation achieved its independence on 16 December 1971. It is now settled fact of history that the local collaborators belonging to armed para militia forces – Razakar Bahini, Al-Badar, Al-Shams actively and culpably assisted and facilitated the Pakistani occupation army in conducting horrific mass atrocities and genocide in the territory of Bangladesh in 1971.

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

392. The protected persons staying in the territory of Bangladesh in 1971 had to experience dreadful and untold experience of criminal acts done even by the Razakar Bahini alone as its loyalty to Pakistani occupation army together with extreme antagonistic approach to the war of liberation made them culpably stimulated in launching attack directing civilian population.

393. In the case in hand, the victims of two events of attacks were the defenceless Hindu civilians of villages Pachgaon and Paschimbag under police station Rajnagar. The accused persons despite being Bengali civilians opted to collaborate with the Pakistani occupation army, in exercise of their membership in Razakar Bahini, a para militia force in accomplishing the grotesque mayhem.

394. Victims of both the events as narrated in two charges belonged to Hindu civilian population, evidence presented proves it. Besides, defence does not dispute this pertinent fact. The victims were not directly related to conflict and they the defenceless civilians were made deliberately selected as targets on account of their membership in Hindu community [charge no.01] and for the reason of perceived bond with the freedom-fighters [charge no.2].

395. In the case in hand, the accused (1) Md. Akmal Ali Talukder, (2) Abdun Nur Talukder @ Lal Miah, (3) Md. Anis Miah and (4) Md. Abdul Mosabbir Miah have been indicted in two charges which have been found proved beyond reasonable doubt. Charge no.01 involves the diabolical offence of 'genocide' while the charge no.02 relates to the offences 'confinement,' torture', 'abduction' and 'murder' as crimes against humanity. The crimes of which the accused persons have been indicted were 'group crimes' as the same are found to have been committed in 'systematic' manner and in context of war of liberation.

396. Criminal acts the accused persons are found to have committed to further policy and plan of the Pakistani occupation army in the locality under Rajnagar police station of Moulavibazar [now District] in 1971 constituted the offences of 'genocide' and 'crimes against humanity' which remind once again how

horrendous mass atrocities were committed directing non combatant civilians, on discriminatory grounds by the Pakistani occupation army and their local collaborators belonging to Razakar Bahini during the nine-months war of liberation in 1971 in the territory of Bangladesh.

397. The appalling genocide carried out at village Pachgaon [as narrated in charge no.01] is a mere fragmented depiction of the genocide carried out directing the unarmed protected civilians in 1971 in the territory of Bangladesh. The accused persons are found proved to have had active and substantial role in accomplishing the crimes.

398. The evidence led by the prosecution depicts patently that in conducting attacks at village Pachgaon and Paschimbag the accused persons consciously and knowingly accompanied the group of perpetrators formed of Pakistani occupation army and Razakars.

399. In relation to the event of attack as narrated in charge no.01 constituting the offence of 'genocide' the accused persons not only physically accompanied the gang but they actively participated, by act of assistance, substantial contribution and facilitation to the commission of devastating activities, grave sexual abuse upon

numerous Hindu women and killing a large number of Hindu civilians, to further policy and plan.

400. In the case in hand, it stands proved that the accused persons were conscious and culpable part of the common design and criminal enterprise. Their culpable acts and conduct as have been found proved formed part of attacks [as narrated in both charges] which was intended to wipe out the Hindu civilians, freedom fighters and pro-liberation civilians.

401. The day of 25th March has been declared ‘**Genocide Day**’. This recognition obviously will make the nation and especially the new generation enthused to go with the spirit of the war of liberation and it shall make space to the global community of knowing in exchange of what extent of sacrifice the Bengali nation achieved its long cherished independence.

XII. VERDICT ON CONVICTION

402. Burden of establishing the guilt of the accused squarely lies upon the prosecution. In the case in hand, in proving each count of charges brought against the accused persons, the standard has been found to be legitimately met as all the accused (1) Md. Akmal Ali Talukder, (2) Abdun Nur Talukder @ Lal Miah, (3) Md. Anis Miah and (4) Md. Abdul Mosabbir Miah are found to have incurred

liability for the crimes which have been proved beyond reasonable doubt.

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

(1) Md. Akmal Ali Talukder, (2) Abdun Nur Talukder @ Lal Miah [absconding] , (3) Md. Anis Miah [absconding] and (4) Md. Abdul Mosabbir Miah[absconding]:

Charge No.01: GUILTY of participating, abetting, assisting, substantially contributing and also for complicity to the accomplishment of devastating criminal activities directing Hindu civilians of village Pachgaon constituting the offence of ‘**genocide**’ as enumerated in section 3(2) (c)((i)(ii)(g)(h) of the Act of 1973 and thus the accused persons incurred criminal liability under section 4(1) of the Act of 1973 and they be convicted and sentenced under section 20(2) of the said Act.

Charge No.02: GUILTY of participating, abetting, facilitating, contributing and also for complicity in the commission of offences of ‘**confinement**’, ‘**torture**’, ‘**abduction**’ and ‘**murder**’ of unarmed civilians

constituting the offences of **crimes against humanity** as enumerated in section 3(2)(a)((g)(h) of the Act of 1973 and thus the accused persons incurred criminal liability under section 4(1) of the Act of 1973 and they be convicted and sentenced under section 20(2) of the said Act.

XIII. Verdict on Sentencing

404. Mr. Syed Haider Ali the learned prosecutor submitted that the crimes proved for which the accused persons incurred liability were extremely grave in nature. The arraignment brought in charge no.01 was horrific indeed and it involved the offence of genocide and in conducting the attack the accused persons and their accomplices and army men opted to carry out wanton devastating activities and rape which were the constituents of the offence of genocide. The attack was intended to cripple the Hindu religious group of village-Pachgaon. All these factors deserve to be taken into account in awarding highest punishment.

405. The learned prosecutor next submitted for awarding highest punishment also in respect of the crimes proved which happened at village Paschimbag[as listed in charge no.02] as all the accused persons knowingly substantially contributed to the commission of killing two Hindu civilians.

406. Conversely, the learned counsel Mr. Abdus Sobhan Tarafdar defending the accused Md. Akmal Ali Talukder and also Mr. Mohammad Abul Hasan the learned state defence counsel defending the three absconding accused persons submitted that prosecution failed to prove the accusation brought by adducing credible evidence and thus they deserve acquittal.

407. According to settled jurisprudence the gravity of the offences committed is the deciding factor in the determination of the sentence to be awarded. Gravity entails the particular circumstances of the case, the form and degree of the participation of the accused in the crimes, and the number of victims.

408. The settled legal proposition explicitly suggests taking the gravity of the crime into account as one of the key sentencing factors. The gravity of the offence is to be considered as the starting point for consideration of an appropriate sentence. At the same time the sentence to be awarded should reflect the totality of criminal conduct the accused persons are convicted of.

409. **Charge no.01** involves the offence of ‘Genocide’ which is ‘the greatest crime of all’. Genocide is a denial of the right of existence of entire human groups which shocks the conscience of mankind. In adjudicating this charge we have found it proved that

the group of perpetrators formed of Pakistani occupation army, the accused persons, the members of Razakar Bahini and their accomplices deliberately and with specific intent carried out the massacre at village-Pachgaon directing only the civilians belonging to Hindu religion. Eye witnesses recounted having watched their loved ones killed in a heinous manner, in conjunction with the attack.

410. The Tribunal notes that the main goal of the criminal enterprise to which the accused Md. Akmal Ali Talukder, Abdun Nur Talukder @ Lal Miah, Md. Anis Miah and Md. Abdul Mosabbir Miah were active part was to annihilate huge number of Hindu civilians of targeted vicinity, but killing was not their only activity. A number of Hindu women were also victims of assorted forms of sexual violence under coercive situation and on substantial assistance of the accused persons. The intimate nature of the violence and aggression conducted at village Pachgaon [as narrated in charge no.01] indisputably makes the issue of awarding just punishment extremely imperative.

411. It is to be noted too that ‘punishment’ should become a ‘system of signs’ by which the moral values of the society and nation are communicated. We also consider it that punishment paradox may extend a signal a need for a more structured theory of

the purpose and objective of punishment in the international arena as well for the offence of 'genocide' and 'mass atrocities'.

412. We reiterate that the Tribunal, must eye on the nature and degree of the offences committed, their scale, the role the convicted accused persons had played and mode of their participation to the perpetration of the crimes proved. At the same time the untold trauma and harm sustained by the victims and their families also significantly act in weighing the gravity of offences---letters of law should not forget it.

413. In the case in hand, it stands proved that the event of attacks **[as narrated in charge no.01]** were deliberately and indiscriminately directed against the defenceless Hindu civilians of village-Pachgaon. Apart from the wholesale killing of Hindu male civilians of village-Pachgaon, the Pakistani occupation army being accompanied by the accused persons, the members of a para militia force were engaged in causing wanton devastating destruction of livelihoods of Hindu civilians, rape, serious bodily and mental harm and forced internal displacement.

414. In conjunction with the horrendous event, shameful act of rampant sexual violence upon the Hindu women was also committed and it obviously diagnosed the event more shocking and graver. Such act of sexual violence was a constituent of the offence

of genocide as it was conducted with intent to cripple a particular protected group.

415. Not only the actual perpetrators but all the four accused Md. Akmal Ali Talukder, Abdun Nur Talukder @ Lal Miah, Md. Anis Miah and Md. Abdul Mosabbir Miah who remained consciously concerned with such shocking and horrendous crimes committed against humanity shall be known as the enemies of the mankind.

416. The crimes which included indiscriminate killing, rape and wanton destruction committed in conjunction with the attack collectively constituted the offence of 'genocide'. Tribunal rendered this finding in adjudicating the charge no.01. Genocide is 'the greatest crime of all'. Keeping all these in mind the legal process of the Tribunal must take it as an aggravating factor.

417. Deliberate atrocious activities of wanton destruction never goes with the norm of humanity and it is rather considered as grave violation of international humanitarian law, as it happened during war time situation. Such diabolical systematic attack was thus against humanity and fundamental rights of normal livelihood of civilians of a protected group.

418. The crimes committed at village-Pachgaon [as narrated in charge no.01] must be viewed as the crimes without geographic

boundaries. It was the gravest crime not only against a segment of Hindu community of particular geographic vicinity but against the entire humankind. This view increases the magnitude of the crimes committed and also the culpability of the accused persons.

419. Genocides committed in 1971 in the territory of Bangladesh are made up of many narratives and countless tragic precisions. This Tribunal by holding trials has got occasion of hearing only some of them. The event of massacre constituting the offence of genocide [as listed in charge no.01] for which the accused persons have been found guilty is a minute portrayal of the horrific planned genocide committed in the territory of Bangladesh in 1971.

420. The trial of monstrous and barbaric crimes like ‘genocide’ as enumerated in the Act of 1973 even long more than four decades after those occurred in the territory of Bangladesh in 1971 not only ensures lawful space of coming out from the culture of impunity but also creates an sphere of knowing the truth. At the same time awarding appropriate and just sentence for the offence of ‘genocide’ thus may play the role in voicing—‘**NEVER AGAIN**’.

421. The arraignment brought in **charge no.02** relates to killing two pro-liberation civilians. The killing was the upshot of the attack that resulted in unlawful detention, causing torture and abduction in

committing which all the four accused actively and consciously participated. And thus the act the accused persons had carried out was inevitably chained to the phase of killing, the principal offence.

422. The accused persons have been found equally liable for the offence of planned and deliberate murder as well [as narrated in charge no.02]. On the whole it seems just to deduce that the mode of their participation in committing diabolical crimes reflects their extreme aggressive attitude to the defenceless pro-liberation civilians.

423. The Tribunal as the Trier of fact is aware of its solemn duty in awarding proper and just sentence commensurate with the gravity of the crimes proved. Inappropriate lesser sentence causes injustice not only to the victims of crimes but sometimes to the whole society. Thus, Letters of law cannot remain non responsive to the victims and relatives of martyrs and the nation too who have been still carrying colossal and unspeakable trauma.

424. In view of deliberation as made above and considering the nature and proportion to the gravity of the offences and also keeping the factors as focused above into account we are of the **UNANIMOUS** view that justice would be met if the convicted accused persons who have been found guilty beyond reasonable

doubt for the crimes proved are condemned and sentenced as below, under the provision of section 20(2) of the Act of 1973:

Hence it is
ORDERED

That all the four the accused—

(1) Md. Akmal Ali Talukder, son of late Ameer Ali Talukder and late Kulsuma Bibi of Village Pachgaon, Police Station-Rajnaragar, District[now]-Moulavibazar,

(2) Abdun Nur Talukder alias Lal Miah [**absconding**] , son of late Abdul Gafur Talukder and late Samarun Begum of Village-Jalalpur, Police Station-Rajnaragar, District[now]-Moulavibazar,

(3) Md. Anis Miah [**absconding**], son of late Babru Miah and late Subeja Khatun of Village-Paschimbag [Kanikiyari], Police Station-Rajnaragar, District [now]-Moulavibazar and

(4) Md. Abdul Mosabbir Miah [**absconding**], son of late Babru Miah and late Subeja Khatun of village-Paschimbag [Kanikiyari], Police Station-Rajnaragar, District [now]-Moulavibazar--

Are found guilty of the offences of '**genocide**' as enumerated in section 3(2) (c)((i)(ii)(g)(h) of the International Crimes(Tribunals) Act of 1973 as listed in **charge no.01**. Accordingly, they be convicted and condemned to the '**Sentence of death**' and they be

hanged by the neck till they are dead, under section 20(2) of the International Crimes (Tribunals) Act, 1973; **AND**

Accused (1) Md. Akmal Ali Talukder, **(2)** Abdun Nur Talukder alias Lal Miah [**absconding**], **(3)** Md. Anis Miah [**absconding**] and **(4)** Md. Abdul Mosabbir Miah [**absconding**] are also found guilty of the offences of **‘confinement’, ‘torture’, ‘abduction’ and ‘murder’** as crimes against humanity as enumerated in section 3(2)(a)((g)(h) of the International Crimes(Tribunals) Act of 1973 as listed in **charge no.02**. Accordingly, they be convicted and sentenced to suffer **‘Imprisonment for life till biological death’** under section 20(2) of the said Act.

However, as the convict accused persons have been condemned to **‘sentences of death’**, as above, the **‘sentence of imprisonment for life’** awarded in respect of **charge no.02** will get merged into the **‘sentences of death’** as awarded above. The **‘sentence of death’ awarded** as above in respect of **charge no.01** shall be carried out under section 20(3) of the Act of 1973.

The sentence of imprisonment for life awarded shall commence from the date of this judgment as required under Rule 46(2) of the Rules of Procedure, 2010(ROP) of the Tribunal-1[ICT-1].

The convicted accused Md. Akmal Ali Talukder [present on dock as brought from prison] be sent to the prison with conviction warrant accordingly.

Since the three[03] convicted accused persons have been absconding the **'sentence of death'** as awarded above shall be executed after causing their arrest or when they surrender before the Tribunal, whichever is earlier.

The **'sentence of death'** awarded as above under section 20(2) of the International Crimes (Tribunals) Act , 1973 [The Act No.XIX of 1973] shall be carried out and executed in accordance with the order of the Government as required under section 20(3) of the said Act.

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

Issue conviction warrant against the convicted accused Md. Akmal Ali Talukder, Abdun Nur Talukder alias Lal Miah [**absconding**] , Md. Anis Miah [**absconding**]and Md. Abdul Mosabbir Miah [**absconding**],

The Secretary, Ministry of Home Affairs and the Inspector General of Police [IGP] are hereby directed to initiate effective and appropriate measure for ensuring the apprehension of the three convict absconding accused Abdun Nur Talukder alias Lal Miah , Md. Anis Miah and Md. Abdul Mosabbir Miah.

Let certified copy of this judgment be provided to the prosecution and the convict accused Md. Akmal Ali Talukder, free of cost, at once.

If the absconding convict accused persons are arrested or surrender within 30[thirty] days of the date of order of conviction and sentence they will be provided with certified copy of this judgment free of cost.

Let a copy of this judgment together with the conviction warrant of the convict accused Md. Akmal Ali Talukder be sent to the District Magistrate, Dhaka for information and necessary action.

Justice Md. Shahinur Islam, Chairman

Justice Amir Hossain, Member

Justice Md. Abu Ahmed Jamadar, Member