

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

ICT-BD [ICT-1] Case No.04 OF 2015

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

The Chief Prosecutor

Versus

- 1. Md. Sakhawat Hossain**
- 2. Md. Billal Hossain Biswas**
- 3. Md. Lutfor Morol [died during trial]**
- 4. Md. Ibrahim Hossain alias Ghungur Ibrahim [absconded]**
- 5. Sheikh Mohammad Mujibur Rahman alias Mujibur Rahman [absconded]**
- 6. Md. A. Aziz Sardar son of late Ful Miah Sardar [absconded]**
- 7. Abdul Aziz Sardar son of late Ahmmad Sardar [absconded]**
- 8. Kazi Ohidul Islam alias Kazi Ohidus Salam [absconded], and**
- 9. Md. Abdul Khaleque Morol [absconded]**

Present:

Mr. Justice Anwarul Haque, Chairman
Mr. Justice Md. Shahinur Islam, Member
Mr. Justice Md. Shohrowardi, Member

Prosecutors:

Mr. Golam Arif Tipu, Chief Prosecutor with
Mr. Syed Haider Ali
Mr. Rana Das Gupta
Mr. Zead-Al-Malum
Mr. Hrishikesh Saha
Mr. Md. Altab Uddin
Ms. Tureen Afroz
Mr. Abul Kalam
Ms. Rezia Sultana

Defence Counsels:

Mr. Abdus Sattar Palwan
... For accused Md. Sakhawat Hossain and Md. Billal Hossain Biswas as engaged defence counsel, and for

accused Abdul Aziz Sardar son of late Ahmmad Sardar, Kazi Ohidul Islam alias Kazi Ohidus Salam and Md. Abdul Khaleque Morol as State defence counsel.

Mr. Abdus Sukur Khan

....For accused Md. Lutfor Morol [now dead], Md. Ibrahim Hossain alias Ghungur Ibrahim, Sheikh Mohammad Mujibur Rahman alias Mujibur Rahman and Md. A. Aziz Sardar son of late Ful Miah Sardar as State defence counsel.

Date of delivery of Judgment: 10 August, 2016.

JUDGMENT

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

Justice Anwarul Haque, Chairman

Justice Md. Shahinur Islam, Member

I. Introductory Words

01. Accused (1) Md. Sakhawat Hossain son of late Omar Ali and late Anowara Begum of Village Hijoldanga, Police Station Keshobpur, District Jessore, (2) Md. Billal Hossain Biswas son of late Yakub Ali Biswas alias Akabbar alias Akbor and late Rupban Bibi of Village Nehalpur, Police Station Keshobpur, District Jessore, (3) Md. Lutfor Morol [died on 06.05.2016 during trial] son of late Joynal Morol and late Mekarjan of Village Porchokra, Police Station Keshobpur, District Jessore, (4) Md. Ibrahim Hossain alias Ghungur Ibrahim son of late Yakub Ali Biswas alias Akabbar alias Akbor and late Rupban Bibi of Village Nehalpur, at present Boga, Police Station Keshobpur, District Jessore,(5) Sheikh Mohammad Mujibur Rahman alias Mujibur Rahman son of Sheikh Mohammad Afazulla alias Effaztulla and late Pachibibi of Village Sheikhpara , Police Station Keshobpur, District Jessore, (6) Md. A.

Aziz Sardar son of late Ful Miah Sardar and late Nurjahan Begum of Village Mominpur, Police Station Keshobpur, District Jessore, (7) Abdul Aziz Sardar son of late Ahmmad Sardar and late Sakina of Village Boga, Police Station Keshobpur, District Jessore, (8) Kazi Ohidul Islam alias Kazi Ohidus Salam son of late Kazi Motiassalam alias Motiar Salam and late Hosneara Begum of Village Sheikhpara, Police Station Keshobpur, District Jessore, and (9) Md. Abdul Khaleque Morol son of late Hachan Ali Morol and late Rebeya Begum of Village Altapoul [72 No. Altapoul], Police Station Keshobpur, District Jessore have been put on trial before this Tribunal-1 at the instance of the Chief Prosecutor to answer charges under section 3(2)(a)(f)(g)(h) read with section 4(1) of the International Crimes (Tribunals) Act, 1973.

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

such, no one could be brought to justice under the Act of 1973 until the government established the Tribunal on 25 March, 2010.

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

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

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

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

(a) Crimes against Humanity: namely, murder, extermination, enslavement, deportation, imprisonment, abduction, confinement , torture, rape or other inhumane acts committed against any civilian population or persecutions on political, racial, ethnic or religious grounds,

whether or not in violation of the domestic law of the country where perpetrated;

(b) Crimes against Peace: namely, planning, preparation, initiation or waging of a war of aggression or a war in violation of international treaties, agreements or assurances;

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

(i) killing members of the group;

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

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

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

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

(d) War Crimes: namely, violation of laws or customs of war which include but are

not limited to murder, ill-treatment or deportation to slave labour or for any other purpose of civilian population in the territory of Bangladesh; murder or ill-treatment of prisoners of war or persons on the seas, killing of hostages and detainees, plunder of public or private property, wanton destruction of cities, towns or villages, or devastation not justified by military necessity;

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

(f) any other crimes under international law;

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

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

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

04. Crimes against humanity can be committed even in peace time; existence of armed conflict is, by definition, not mandatory. Neither in the preamble nor in the jurisdiction sections of the Act of

1973 was it mentioned that crime against humanity requires the existence of an armed conflict. Indiscriminate attack on civilian population based on their political, racial, ethnic or religious identity can be termed as crimes against humanity even if it takes place after 1971. However, no one denies the fact that there was an armed conflict in 1971.

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

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

Article-7 of the Rome Statute

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

- (a) Murder; (b) Extermination; (c) Enslavement; (d) Deportation or forcible transfer of population; (e) Imprisonment or other severe deprivation of physical liberty in violation of fundamental rules of international law; (f) Torture; (g) Rape, sexual slavery, enforced

prostitution, forced pregnancy, enforced sterilization, or any other form of sexual violence of comparable gravity;

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

Article 3 of the ICTR

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

Article 5 of the ICTY

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

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

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

"Whereas, under our Act, 1973 the tribunal has jurisdiction to prosecute and punish any person irrespective of his nationality who being a

member of any armed, defence or auxiliary forces commits, whether before or after the commencement of the Act, Crimes against Humanity, Crimes against Peace, Genocide and other crimes connected therewith during the period of war of liberation. The offences of murder, extermination, rape or other inhumane acts committed against civilian population or persecutions on political, racial, ethnic or religious grounds are included in the offence of crimes against Humanity. "

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

upon unarmed civilian with the aim of frustrating the result of 1970 National Assembly election and to deprive the fruits of the election result." [Pages: 241-242].

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

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

13. As per section 3(2) of the Act of 1973 to constitute an offence of crime against humanity, the element of attack directed

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

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

15. However, for our better understanding it is needed to know the meaning and scope of 'widespread' and 'systematic' attack.

'*Widespread*' refers to the large-scale nature of the attack which is primarily reflected in the number of victims. '*Systematic*' refers to the organized nature of the acts of violence and the '*non-accidental repetition of similar criminal conduct on a regular basis.*'

Widespread is quantitative while systematic is qualitative.

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

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

per rule-53(2) of the ROP, 2010. Accused deserves right to conduct his own case or to have assistance of his counsel [section 17 of the Act of 1973]. The Tribunal may release an accused on bail subject to conditions as imposed by it as per rule 34(3) of the ROP, 2010. The Tribunal may, as and when necessary, direct the concerned authorities of the government to ensure protection, privacy, and well-being of the witnesses and victims as per rule 58 A of the ROP, 2010.

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

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

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

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

Muhammad Kamaruzzaman vs. The Chief Prosecutor [Criminal Appeal No. 62 of 2013], Ali Ahsan Muhammad Mujahid vs. The Chief Prosecutor [Criminal Appeal No. 103 of 2013], Salauddin Qader Chowdhury vs. The Chief Prosecutor [Criminal Appeal No. 122 of 2013], Allama Delwar Hossain Sayedee vs. The Government of the People's Republic of Bangladesh and vis-a-vis [Criminal Appeal Nos. 39-40 of 2013] and Motiur Rahman Nizami vs. The Government of Bangladesh [Criminal Appeal No. 143 of 2014] has also decided the legal issues involved in the cases under the Act of 1973.

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

- i. Customary International Law [CIL] shall not be applied if it is contrary to the Act of 1973;
- ii. There is no rule of CIL that prohibits our domestic Tribunal to proceed with the trial as per our domestic legislation;
- iii. Our domestic Tribunal has the jurisdiction to continue with the trial in any manner acting in derogation of rules of public international law;
- iv. There is nothing repugnant to CIL in the Act of 1973, rather it is consonant with the provisions of CIL;

- v. The inordinate delay in commencing any proceedings under the Act of 1973 *ipso facto* can not be a ground to doubt the truth or veracity of the prosecution case;
- vi. By the amendment of section 3(1) of the Act of 1973 through Act No.LV of 2009 the jurisdiction of the Tribunal has been extended to try and punish 'any individual,' 'organization' or 'group of individuals' besides any member of any armed, defence or auxiliary forces, irrespective of his nationality who has committed crimes against Humanity mentioned in section 3(2) of the Act of 1973;
- vii. The Act of 1973 is a protected law and the moment, sub-section (1) of section 3 was amended by way of substitution, it became part of the Statute and it got the protection of any legal challenge to be void or unlawful or even to have become void or unlawful in view of the provisions of Article 47(3) of our Constitution;
- viii. The clemency given to the admitted prisoners of War, pursuant to the tripartite agreement of 1974, in no way, either match the Act of 1973 or any of its provisions ineffective, invalid or void;
- ix. Mere failure of the successive governments to act in accordance with the Act of 1973 for last more than forty years, in no way, gave any right to the accused to be

exonerated from being tried for the commission of crimes against Humanity as mentioned in section 3(2) of the Act of 1973;

x. In the Act of 1973, no limitation has been prescribed for initiating proceedings against any individual or group of individuals or organization or any member of any armed, defence or auxiliary forces irrespective of his nationality for the commission of crimes mentioned in section 3(2) of the Act of 1973;

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

xii. The Act of 1973 is a codified law, thus, it is not needed to travel to seek assistance from other trials held or is being held by the tribunals/ courts either under the charter of agreements of the nations or under other arrangements under

the mandate of United Nations or other International body, such as Nuremburg trial and the Balkan trials.

VI. Historical Backdrop and Context

21. In August, 1947 the partition of British India based on two-nation theory, gave birth to two new States, one a secular State named India and the other the Islamic Republic of Pakistan of which the western zone was eventually named as West Pakistan and the eastern zone as East Pakistan, which is now Bangladesh.

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

23. In the general election of 1970, the Awami League under the leadership of Bangabandhu Sheikh Mujibur Rahman became the majority party of Pakistan. Despite this overwhelming majority, Pakistan government did not hand over power to the leader of the majority party as democratic norms required. As a result, movement started in this part of Pakistan and Bangabandhu Sheikh Mujibur Rahman in his historic speech of 7 March, 1971, called on the Bangalee people of the eastern zone to strive for independence if people's verdict would not be respected and power was not

handed over to the leader of the majority party. On 26 March, 1971 following the onslaught of "**Operation Search Light**" by the Pakistani Military on 25 March, Bangabandhu Sheikh Mujibur Rahman declared Bangladesh independent immediately before he was arrested by the Pakistani army.

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

25. The Pakistan government and the military with the help of some pro-Pakistani leaders set up a number of auxiliary forces, such as, the Razakar Bahini, the Al-Badar Bahini, the Al-Shams, the Peace Committee etc, essentially to collaborate with the Pakistani army in identifying and eliminating all those who were

perceived to be sympathized with the liberation of Bangladesh, individuals belonging to minority religious groups especially the Hindus, political groups belonging to Awami League and other pro-independence political parties, Bangalee intellectuals and civilian population of Bangladesh. Undeniably the road to freedom for the people of Bangladesh was arduous and torturous, smeared with blood, toil and sacrifices. In the contemporary world history, perhaps no nation paid as dearly as the Bangalees did for their emancipation.

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

VII. Brief Account of the Accused Persons:

(i) Accused Md. Sakhawat Hossain son of late Omar Ali and late Anowara Begum of Village Hijoldanga, Police Station Keshobpur, District Jessore was born on 01.03.1954. He passed Alim Examination in 1967 and Fazil Examination in 1969. He got his Kamil degree from Alia Madrasha, Khulna in 1971, but that examination was cancelled. Thereafter, he again got his Kamil degree in 1972. He also obtained M.A. degree in 1976 from the department of Islamic Studies of the University of Dhaka. In 1966, he joined Islami Chhatra Sangha [ICS], the student wing of Jamaat-e-Islami [JEI], prosecution alleges. After independence of Bangladesh he joined the Motijheel Ideal School as an Assistant Teacher. Subsequently, he resigned from that school and joined Accountant General [A.G] Office in 1981. He became the 'Rukan' of Jamaat-e-Islami in 1986, prosecution also alleges. He was elected as a Member of Parliament in 1991. Thereafter, he joined the Bangladesh Nationalist Party [BNP]. He was also elected as a Member of Parliament in 1996. In 2008 he joined the Jatio Party [JP] and since then he has been holding the post as a 'Presidium Member' of the JP till now.

(ii) Accused Md. Billal Hossain Biswas son of late Yakub Ali Biswas alias Akabbar alias Akbor and late Rupban Bibi of Village Nehalpur, Police Station Keshobpur, District Jessore was

born on 10.05.1940. He joined the Razakar Bahini during the war of liberation in 1971, prosecution alleges.

(iii) Accused Md. Lutfor Morol son of late Joynal Morol and late Mokarjan of Village Porchokra, Police Station Keshobpur, District Jessore was a Member of local Razakar Bahini and an accomplice of accused Md. Sakhawat Hossain, prosecution alleges. He died on 06.05.2016 during trial.

(iv) Accused Md. Ibrahim Hossain alias Ghungur Ibrahim son of late Yakub Ali Biswas alias Akabbar alias Akbor and late Rupban Bibi of Village Nehalpur, at present Boga, Police Station Keshobpur, District Jessore was a member of local Razakar Bahini and an accomplice of accused Md. Sakhawat Hossain, prosecution alleges.

(v) Accused Sheikh Mohammad Mujibur Rahman alias Mujibur Rahman son of Sheikh Mohammad Afazulla alias Effaztulla and late Pachibibi of Village Sheikhpara , Police Station Keshobpur, District Jessore was a member of local Razakar Bahini and an accomplice of accused Md. Sakhawat Hossain, prosecution alleges.

(vi) Accused Md. A. Aziz Sardar son of late Ful Miah Sardar and late Nurjahan Begum of Village Mominpur, Police Station Keshobpur, District Jessore was a member of local Razakar Bahini

and an accomplice of accused Md. Sakhawat Hossain, prosecution alleges.

(vii) Accused Abdul Aziz Sardar son of late Ahmmad Sardar and late Sakina of Village Boga, Police Station Keshobpur, District Jessore was a member of local Razakar Bahini and an accomplice of accused Md. Sakhawat Hossain, prosecution alleges.

(viii) Accused Kazi Ohidul Islam alias Kazi Ohidus Salam son of late Kazi Motiassalam alias Motiar Salam and late Hosneara Begum of Village Sheikhpara, Police Station Keshobpur, District Jessore was a member of local Razakar Bahini and an accomplice of accused Md. Sakhawat Hossain, prosecution alleges.

(ix) Accused Md. Abdul Khaleque Morol son of late Hachan Ali Morol and late Rebeya Begum of Village Altapoul [72 No. Altapoul], Police Station Keshobpur, District Jessore was a member of local Razakar Bahini and an accomplice of accused Md. Sakhawat Hossain, prosecution alleges.

VIII. Brief Procedural History

27. The Chief Prosecutor submitted 'formal charge' against 12 [twelve] accused persons on having considered the investigation report and documents submitted therewith by the Investigating Agency. Out of twelve accused persons this Tribunal on 08.09.2015 discharged three accused persons namely, Md. Akram Hossain,

Ojihar Morol alias Ojiwar Morol and Moshiar Rahman and took cognizance of offences against rest 9[nine] accused persons as mentioned above. Out of said nine accused persons only accused Md. Sakhawat Hossain and Md. Billal Hossain Biswas have been in detention. Accused Md. Lutfor Morol, who was in detention, died on 06.05.2016 during trial. The other six accused persons neither could have been arrested nor did they surrender.

28. On 08.09.2015 this Tribunal took cognizance of offences, perpetration of which has been unveiled in course of investigation and on 30.09.2015 ordered publication of notice in two daily newspapers as required under Rule 31 of the International Crimes (Tribunal-1) Rules of Procedure, 2010 against the six absconded accused (1) Md. Ibrahim Hossain alias Ghungur Ibrahim (2) Sheikh Mohammad Mujibur Rahman alias Mujibur Rahman (3) Md. A. Aziz Sardar son of late Ful Miah Sardar (4) Abdul Aziz Sardar son of late Ahmmad Sardar (5) Kazi Ohidul Islam alias Kazi Ohidus Salam, and (6) Md. Abdul Khaleque Morol as the execution of warrant of arrest issued against them earlier was found unserved.

29. Accordingly, despite publication of the notice in two daily newspapers namely 'Daily Janakantha' and the 'Daily Sun' dated 05.10.2015 the six absconded accused persons did not make them surrendered, and as such, this Tribunal ordered for holding trial *in*

absentia against them and appointed Mr. Abdus Sukur Khan, Advocate to defend accused Md. Ibrahim Hossain alias Ghungur Ibrahim, Sheikh Mohammad Mujibur Rahman alias Mujibur Rahman and Md. A. Aziz Sardar son of late Ful Miah Sardar including accused Md. Lutfor Morol who was in jail custody died on 06.05.2016 during trial and Mr. Qutub Uddin Ahmed, Advocate to defend accused Abdul Aziz Sardar son of late Ahmmad Sardar, Kazi Ohidul Islam alias Kazi Ohidus Salam and Md. Abdul Khaleque Morol, as State defence counsels. This Tribunal also ordered the prosecution for furnishing documents it relies upon to the State defence counsels and fixed 17.11.2015 for hearing the charge framing matter. On 17.11.2015 and 22.11.2015 this Tribunal-1 heard the charge framing matter and fixed on 23.12.2015 for decision on it.

30. Having considered the submissions made by the learned Advocates of the parties and perused the formal charge and other materials on record we were inclined to frame charge against the accused persons. Accordingly, on 23.12.2015 having rejected 7[seven] applications for discharge we framed 05[five] charges in all against the accused persons.

31. Mr. Qutub Uddin Ahmed, the learned Advocate was appointed as State defence counsel to defend three absconding accused namely, Abdul Aziz Sardar son of late Ahmmad Sardar,

Kazi Ohidul Islam alias Kazi Ohidus Salam and Md. Abdul Khaleque Morol. But subsequently on 31.01.2016 his said appointment was cancelled by the Tribunal and Mr. Abdus Sattar Palwan, the learned Advocate was appointed as State defence counsel to defend said three accused Abdul Aziz Sardar son of late Ahmmad Sardar, Kazi Ohidul Islam alias Kazi Ohidus Salam and Md. Abdul Khaleque Morol at the cost of the State.

IX. Fate of the proceeding against accused Md. Lutfor Morol on account of his death during trial.

32. Having regard to the fact that in the instant case 09[nine] accused persons including accused Md. Lutfor Morol [now dead] were jointly charged for committing offences as enumerated in section 3(2) of the Act of 1973.

33. During trial of the instant case Mr. Zead-Al-Malum, the learned prosecutor by filing an application intimated the Tribunal that accused Md. Lutfor Morol, who was in jail custody, had died on 06.05.2016 in Dhaka Medical College Hospital due to cardiovascular disease and in support of his submission he annexed with the application the certified copy of the death certificate of the accused Md. Lutfor Morol, issued by the concerned authority of Dhaka Medical College Hospital.

34. Mr. Abdus Sukur Khan, the learned State defence counsel for accused Md. Lutfor Morol also admitted that accused Md. Lutfor

Morol had died on 06.05.2016 in Dhaka Medical College Hospital due to cardio vascular disease.

35. This Tribunal regretted the death of accused Md. Lutfor Morol.

36. Having considered the submissions of the learned prosecutor, the learned State defence counsel and the settled proposition of law enunciated by the domestic jurisdiction as well as international jurisdiction we had no hesitation to hold that from the moment of the death of accused Md. Lutfor Morol the Tribunal had lost its jurisdiction *ratione personae* against the said accused as the event of death extenuished the Tribunal's jurisdiction.

37. Accordingly, on 15.05.2016 the Tribunal held that the proceeding so far as it relates against accused Md. Lutfor Morol stands abated on account of his death. The Tribunal also held that the proceeding of the instant case would continue as against the remaining other 08[eight] accused persons.

X. Witnesses adduced by the parties

38. The prosecution submitted a list of 34[thirty four] witnesses along with formal charges and documents. But at the time of the trial, the prosecution examined in all 17[seventeen] witnesses including two investigation officers. The prosecution also adduced some documentary evidence which were duly marked as Exhibits 1-16/1.

39. On behalf of accused persons no list of witnesses was submitted under section 9(5) of the Act of 1973 nor any witness was examined on behalf of them. But the learned defence counsels for all the accused persons cross-examined all the prosecution witnesses.

XI. Burden of the prosecution

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

XII. Summing up of the prosecution case

41. Mr. Zead-Al-Malum, the learned prosecutor started summing up by placing the background of the case including the phase of investigation, submitting formal charge, taking cognizance of offences and commencement of trial on framing charges. The

learned prosecutor submitted that in all 17 [seventeen] witnesses including the investigation officers and seizure list witnesses have been examined in this case to prove the five charges framed against nine[09] accused persons of whom one Md. Lutfor Morol, who had been in prison, died during trial and thus proceedings against him stood abated. Now, out of eight[08] accused persons two accused have been in prison and the other six accused persons have been tried *in absentia* in compliance with the provision contained in the Act of 1973 and the ROP, 2010.

42. Next, Ms. Rezia Sultana, the learned prosecutor started placing argument first on the alleged status the accused persons had in the local Razakar Bahini in 1971, accused Md. Sakhawat Hossain's position on the Razakar camp set up at Chingra bazaar, by drawing attention to the documents exhibited and oral evidence tendered. It has been submitted that accused Md. Sakhawat Hossain was in commanding position of the Chingra Razakar camp with which his cohorts, the other accused persons were actively affiliated in the capacity of members of Razakar Bahini of Sagardari union under Keshobpur Police Station of District Jessore. The competent witnesses testified in this regard knew the accused persons beforehand.

43. Ms. Rezia Sultana, the learned prosecutor then moved in laying argument on charges framed. Drawing attention to the

evidence tendered the learned prosecutor placed argument in respect of all the five charges when she emphatically submitted that the prosecution has been able to prove all the charges by adducing lawful evidence tendered. However, we deem it appropriate to address the argument advanced in categorized manner when the charges will be taken up for independent adjudication, on evaluation of evidence tendered.

XIII. Suming up of the defence case

[On behalf of accused Md. Sakhawat Hossain, Md. Billal Hossain Biswas and three other absconded accused]

44. Before arguing on the charges framed, Mr. Abdus Sattar Palwan, the learned defence counsel for the accused Md. Sakhawat Hossain, Md. Billal Hossain Biswas and three others, submitted that the accused persons did not belong to Razakar Bahini; that the accused Md. Sakhawat Hossain was not the commander of Chingra Razakar camp or Sagardari Union no.2. He further submitted that prosecution failed to substantiate that accused Md. Sakhawat Hossain was the Razakar commander by adducing any reliable documentary evidence. The list of Razakars Exhibit-6 is not an authoritative and sourced document and it has been fabricated and created one simply to implicate the accused persons falsely with the alleged events. In fact one Aminuddin was the Razakar commander of Keshobpur Police Station and he should have been brought to justice for the alleged atrocities. The persons responsible for the

alleged crimes might have been prosecuted and tried under the Collaborators Order, 1972 but the Investigation Agency refrained from unearthing it during investigation.

45. The learned defence counsel further submitted that the order framing charges goes to show that the accused Md. Sakhawat Hossain obtained Kamil degree from Khulna in 1971. However, the said examination was subsequently cancelled. But it indicates that in 1971 accused Md. Sakhawat Hossain had been in Khulna and not in the locality under Police Station Keshobpur, and as such, he had no reason being associated with Razakar Bahini and its camp at Chingra bazaar. The investigation officer admitted that he could not collect any document in support of this accused's commanding position in the locally formed Razakar Bahini, the learned defence counsel added.

46. Mr. Abdus Sattar Palwan, then started placing argument on each charge. Drawing attention to the evidence tendered by the prosecution the learned defence counsel first pressed his argument on charge nos.02 and 03 and then went on to argue on charge nos. 01,04 and 05. However, the argument advanced by the learned defence counsel may be well addressed while adjudicating the charges independently.

[On behalf of absconded accused Md. Ibrahim Hossain alias Ghungur Ibrahim, Sheikh Mohammad Mujibur Rahman alias Mujibur Rahman and Md. A. Aziz Sardar son of late Ful Miah Sardar]

47. Mr. Abdus Sukur Khan, the learned State defence counsel for the three absconded accused namely, Md. Ibrahim Hossain alias Ghungur Ibrahim, Sheikh Mohammad Mujibur Rahman alias Mujibur Rahman and Md. A. Aziz Sardar son of late Ful Miah Sardar in advancing summing up submitted that history says that in 1971 during the war of liberation Razakar Bahini was formed in the territory of Bangladesh on intervention and guidance of Pakistani occupation army as its auxiliary force. But in the instant case the prosecution could not adduce any evidence whatsoever to show when and under the guidance of which organization Razakar Bahini was formed in Keshobpur Police Station in 1971 and how the setting up of the Razakar camp at Chingra bazaar was initiated.

48. The learned State defence counsel further submitted that the said three absconded accused persons did not belong to Razakar Bahini and were not affiliated with the alleged Razakar camp at Chingra bazaar. These accused persons could have been prosecuted and tried under the Collaborators Order, 1971 if really they had nexus with the commission of alleged crimes around the locality under Keshobpur Police Station, Jessore. But absence of any document in this regard impels to the inference that they were not involved with any of the alleged offences in any manner, the learned State defence counsel added.

49. The learned State defence counsel then placed his respective argument on each charge, drawing attention to the evidence tendered by the prosecution and the same may be well attended at the time of adjudicating the charges.

XIV. Rebuttal by the prosecution

50. Mr. Zead-Al-Malum, the learned prosecutor, on rebuttal, chiefly submitted that mere absence of showing the victim Ashura Khatun [charge no. 01] as a 'war affected woman' in her appointment letter dated 21.11.1972 [Exhibit 14/2, Prosecution Document Volume page -59] does not render the fact that she got the job, after independence, as a 'war affected' woman'. For obvious reason and to keep the probable social ostracism narrowed down it could not be explicitly shown in the letter appointing her as a Matron -cum- Nurse. The facts and circumstances and the time she got the job cumulatively prove that she got the job as a 'war affected woman'.

51. The learned prosecutor further submitted that (i) in absence of any specific *plea of alibi* and evidence whatsoever it cannot be argued that the accused Md. Sakhawat Hossain was away from the crime locality in 1971, and (ii) inconsistencies and discrepancies *per se* do not taint the truthfulness of witness's testimony and such inconsistencies and discrepancies may naturally occur as the witnesses came on dock long more than four decades

after the commission of atrocious activities. In this regard the learned prosecutor cited observations already rendered in many of cases disposed of the Tribunal [ICT].

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

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

53. It is true that from the testimonies of some prosecution witnesses it is revealed that some armed Razakars and co-perpetrators accompanied the accused persons at the crime sites in committing the crimes. Excepting the present accused persons, none of their accomplices have been brought to justice, but that by itself does not make the horrendous episode of atrocities directing attack on the civilian population constituting the offences of crimes against humanity untrue or give any immunity to the present accused persons. If the accused persons are found guilty and

criminally liable beyond reasonable doubt for their culpable acts, inaction in prosecuting their accomplices cannot be the reason for holding the former innocent or relieved from liability. In this regard we may recall the provision as contained in section 4(1) of the Act of 1973 which states that when any crime as specified in section 3(2) of the said Act is committed by several persons each of such person is liable for that crime in the same manner as if it were done by him alone. Further, we have no hesitation to hold that rule 36 of ROP, 2010 is not mandatory but directory. Non compliance of the said rule *ipso-facto* does not vitiate the trial.

54. It may be mentioned here that we did not find any provision within the four corners of the Act of 1973 that all the perpetrators of an offence must be tried in one trial, failing which one of the perpetrators against whom if any proceeding is brought that would be vitiated. There is a basic principle of criminal jurisprudence that a man cannot be vexed twice for the same cause of action. But one of the perpetrators of an offence cannot be absolved *ipso facto* for non bringing the other perpetrators in the same trial with him. So, the submission made by the learned defence counsels in respect of this issue has no leg to stand. In this regard we find support from the case of the **Prosecutor vs. Brdjanin [Case No. IT-99-36-T, September 1, 2004, para -728]** where the ICTY Trial Chamber observed –

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

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

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

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

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

57. The accused persons have been brought to justice more than four decades after the barbaric offences occurred. The case so far as it relates to the alleged facts of criminal acts constituting the alleged offences is predominantly founded on oral evidence presented by the prosecution. Together with the circumstances to

be divulged it would be expedient to have a look to the facts of common knowledge of which Tribunal has jurisdiction to take into its judicial notice [section 19(3) of the Act of 1973], for the purpose of unearthing the truth. Inevitably, determination of the related legal issues will be of assistance in arriving at decision on facts in issues.

58. Totality of its horrific profile of atrocities committed in 1971 naturally left little room for the people or civilians to witness the entire events of the criminal acts. Some times it also happens that due to the nature of international crimes, their chaotic circumstances, and post-conflict instability, these crimes usually may not be well-documented by post-conflict authorities.

59. We reiterate that section 23 of the Act of 1973 provides that the provisions of the Criminal Procedure Code, 1898 [V of 1898] and the Evidence Act, 1872 [I of 1872] shall not apply in any proceedings under this Act. Section 19(1) of the Act provides that the Tribunal shall not be bound by technical rules of evidence and it shall adopt and apply to the greatest possible extent non-technical procedure and may admit any evidence which it deems to have probative value.

60. In adjudicating the atrocious events alleged and complicity of the accused persons therewith we have to keep the 'context' in mind in the process of assessment of evidence adduced. The reason

is that the term ‘**context**’ refers to the events, organizational structure of the group of perpetrators, *para militia* forces, policies that furthered the alleged crimes perpetrated in 1971 during the war of liberation.

61. It is to be noted too that the testimony even of a single witness on a material fact does not, as a matter of law, require corroboration for a finding to be made. This jurisprudence as propounded by our own jurisdiction shall seem compatible to the principle enunciated by *ad hoc* tribunal [ICTR] wherein it has been observed as under -

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

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

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

finds support too from the principle enunciated in the case of *Muvunyi* which is as below:

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

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

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

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

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

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

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

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

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

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

prevailing in 1971 in the territory of Bangladesh. Credibility of evidence adduced is to be weighed in the context of its relevance and circumstances.

XVII. Razakar Bahini: It's Objective in 1971

69. We felt it indispensable to focus on this issue as the accused persons allegedly belonged to local Razakar force in 1971. In assessing the charges brought against them and their alleged culpability and also the motivation of their being associated with the Pakistani army and local Razakars we must have a clear portrayal about the Razakar Bahini and its activities carried out in 1971 in the territory of Bangladesh.

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

“The Jamaat-e-Islami and specially its student wing, Islami Jamaat-e-Talaba (IJT) joined the military's efforts in May 1971 to launch two para military counter insurgency units. The IJT provided a large number of recruits. The two special brigades of Islamist cadres were named Al-shams (the sun in Arabic) and Al-Badr (the moon). A separate Razakars Directorate was established. Two separate wings called Al-Badr and Al-shams were recognized. Well-educated and properly motivated students from the schools and Madrasas were put in Al-Badr wing, where they were trained to undertake specialized operations, where the remainders

were grouped together under Al-shams, which was responsible for the protection of bridges, vital points and other areas. Bangladeshi scholars accused the Al-Badr and Al-shams militias of being fanatical. They allegedly acted as the Pakistan army's death squads and "exterminated leading left wing professors, journalists, litterateurs and even doctors."

[Source:- "Pakistan between Mosque And Military" -written by Hossain Haqqani, page 79 published in 2005, Washington D.C. USA].

71. The Jamaat-e-Islami, a religion based political party and brain child of controversial Islamist thinker Maulana Maududi was significantly pro-active in its mission to destroy the Bangalee nation in the name of safeguarding Pakistan in collaboration with the Pakistani occupation army. We deem it indispensable to get a scenario on the role and stand of the Jamaat-e-Islami in 1971, particularly when it established various militia Bahinis, namely Peace Committee, Razakar, Al-Badar, Al-shams and Al-Mujaheed, etc. in association with Pakistani army.

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

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

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

73. It is pertinent to state that it is a fact of common knowledge by the people at large that the Pakistani invading force made attacks on Bangalee people on the very night of 25 March 1971 in the name of so called ‘**operation search light**’ and subsequent their further actions were assisted by anti-liberation people like accused-perpetrators. Anti-liberation forces started their atrocious activities from the very day when Pakistani military ruler secretly decided not to handover the power to the party which won majority seats in the general election held in 1970. Early atrocious activities of anti-liberation forces can be authenticated by the statements of some people which have been embodied in **Bangladesher Shadhinata Juddya Dalilpatra, Astom Khonda [volume-08] at page nos.301,126 and 90, and Dosom Khonda [volume-10] at page 435** respectively as under :

tgvt i wdKj øvn, Mõg-Kvw` i nvlbd, _vbw-mjavi vg, tRj v-tbvqvLvj x|

015B Gwç 15 Rb ivRvi Kvi Avgvt` i Mõtg Avtm, Awmg ZLb
Avgvt` i Mõtgi `wY Pivq avb KvwUtzWQ| ivRvKvi Awmqv Avgvt`K
etj th, tZvt` i Mõg nBtZ Avgvt` i PvDj Zwj qv w` tZ nBte|

-----|0

tgvt tMvj vg tgv` Í dv gUj , Mõg-Rqcj nvlU, tRj v-e_ ov|

0.....tg gvtmi gvSvwmS Ggwbfvte KwZcq tj vKtK Mvfovqvbi v
evsj vt` tki mxgvbvq ti tL Avmvi c`_ ivRvKvi iv H mg`Í 16/17

Rb MvovqvbtK tMdzvi Kti RqcjnvU kwišÍ KugwU Awdttm vbtq Avttm | ivtZ tmLvttb e`x Kti titL ciw`b UttK Kti kvxgx menvixi tbZttZ; Zvt`i Avt`j cj wgvj Uvix K`vt`c vbtq hvq | tmLvttb Zvt`i fvj K`v evtki tgvUv tMvov w`tq Kttctq Kttctq H mg`Í MvovqvbtK nZ`v Kti | -----|Ó

Ave`j gvtj K, `Mvej, ivRkvnx |

OkwišZ KugwU Ges ivRvKvit`i mieivnKZ Zt`i Dci wfvE Kti wgvj Uvixiv wewfbæ GjvKvq Gtm Acvtikb Kti tQ | Zviv jJcvU Kti tQ, AwMasthvM Kti tQ, bvix al`Kti tQ Ges gvb | nZ`v Kti tQ | Zvt`i Acvtikb wj i gta` vbt`st`w`j cãvb | Zviv tg gvtmi gvSvgnS thvMxtmb cvj kvq Acvtikb Kti 42 Rb wv`K nZ`v Kti | tmLvttb tqtqt`i Dci AZ`vPvi Kti tQ | Rb gvtm Zviv `Mvej Acvtikb Kti 8/9 RbtK nZ`v Kti | -----|Ó

mv`vrKvit kvgmj Avj g Avj K`vi

Ò.....Rb gvtmi cŭg mBvtn kiYtLvjj v`vbtZ ivRvKvi ewnbx `Zix nq cvK ivR`^gš`x gbm`ii tbZttZ | tg gvtmi gvSvgnS bvtqK mte`vi gay Zvi wvR`^`j vbtq tgvovj MÄ`_vbvq hvq | gay _vbvZ tcvQtj Awg Ges gay thš`fvte KivR`i iæ Kw | 40 Rb ivRvKvi BwZgta` tgvovj MÄ`_vbvZ Avttm | ----- --|Ó

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

" POGROM IN PAKISTAN

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

In the said report it was narrated to the effect:

".....A new element in the regime of terror is the Gestapostyle pick-up. Some of those wanted for questioning are arrested openly. Others are called to the army cantonment for interrogation. Most of them do not return. Those who do are often picked up again by secret agent known as RAZAKARS, a term used by the

volunteers of the Nizam of Hyderabad who resisted the Indian takeover of the State in 1948 Some University teachers reported for duty on 1st June at the instigation of General Tikka Khan, the Martial Law Administrator, but some of them have since fallen into the hands of the RAZAKARS. The activities of RAZAKARS are known, if not overtly approved, by the military administration. Occasionally, they are a source of concern. ----- Organisations caring for the refugees who came into East Pakistan at the time of Partition and the Razakar backed 'Peace Committee' are publishing press notices inviting applications for "allotment" of shops and houses left by Bengalis....."
[Source: Bangladesher Sawdhinata Juddha Dalilpattra: Volume 8, Page 527].

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

"RvgvqvtZ Bmj vgx gvrhixi ii " t_tK tkI chSZ mvgviiK RvšZvtK mg_θ Kti | Zvt`i mnvqZvi Rb` Ab`vb` agvθ` j vbtq cθgZ MVb Kti kvšZ KvgvU | cieZxmgvq mk`z ewnbx ivRvKvi I Avje`i MVb Kti Ges miKvix`KZx Av`vq Kti | hvtk aghv vntmte cθvi Yv Pwj tq DMθagvθ Dbv` bv mvo i tPov Kti | Avi Gi Avovtj`mb`i mnvqZvq Pvj vq vbiePvti bksm MYnZ`v, jψ, bvix vbhvZb, AcniY I Pwv Av`vq | metRl RwiZi veteK eyxRvext`i nZ`v Kiv nq |"
 [Source: *Muktijudhdhe Dhaka 1971*: edited by Mohit Ul Alam, Abu Md. Delowar Hossain, Bangladesh Asiatic Society , page 289]

76. Thus, the above materials have proved that the members of Razakar Bahini committed and conducted various atrocious acts like genocide, murder, abduction, torture and other inhumane acts as crimes against humanity all over the country to implement the

common plan and design of Pakistani occupation army, as its auxiliary force.

XVIII. Whether the accused persons belonged to locally formed Razakar Bahini, a *para militia* force.

77. In the case in hand, the accused persons have been indicted on allegation of committing offences enumerated in the Act of 1973 in exercise of their membership in local Razakar Bahini. Amongst them accused Md. Sakhawat Hossain was allegedly the commander of the Razakar camp at Chingra bazaar under Police Station Keshobpur, Jessore. All the five charges framed allege that the offences of confinement, rape, murder, torture and other inhumane acts as narrated therein were carried out by them detaining the pro-liberation civilians at the camp bringing them there on forcible capture.

78. It transpires that defence does not dispute formation of Razakar Bahini in Sagardari Union and setting up its camp at Chingra bazaar. Defence does not dispute too that the said Razakar camp consisted of three parts-Primary School, Tahshil Office and Union Council Office located at Chingra bazaar.

79. Defence however disputes that the accused persons did not belong to Razakar Bahini and were not affiliated with the camp at Chingra bazaar and activities carried out there in any manner. It is to be noted that it seems to be negative assertion which need not be

proved by adducing evidence. Burden thus lies upon the prosecution to prove the alleged status of the accused persons in 1971 during the war of liberation and only then we are to proceed examining how far the defence's claim is credibly probable.

80. The settled history says that object of forming Razakar Bahini was aimed to narrow down the significant local influence of pro-liberation Bengali civilians and freedom-fighters of the crime locality. In 1971 it used to act as an infamous armed wing of Pakistani occupation army intending to resist the war of liberation. Therefore, we deem it necessary to resolve the alleged status and affiliation of the accused persons with the locally formed Razakar Bahini and the camp set up at Chingra bazaar as averred by the prosecution although there has been no bar to prosecute and try even an 'individual' or 'group of individuals' under the Act of 1973.

81. We are persuaded to infer from the foregoing deliberation we have rendered that objective of creating the Razakar Bahini was not to guard lives and properties of civilians. Rather, it had acted in furtherance of policy and plan of Pakistani occupation army and in so doing it had committed atrocities in a systematic manner against the unarmed Bengali civilians throughout the territory of Bangladesh in 1971.

82. Thus, purpose of creating such an armed auxiliary force obviously made its members' atrocious activities anecdote around the locality and accordingly the residents of the locality around the crime sites seem to be quite competent to remain aware about the status and affiliation of the accused persons with the Razakar Bahini.

83. Therefore, mere absence of any old documentary evidence cannot readily force to the inference that the accused persons did not belong to locally formed Razakar Bahini. We are to see what the witnesses have testified in this regard. Now, let us eye on what has been testified by the witnesses who are the residents of the crime locality.

84. P.W.02 Fazlur Rahman Gazi, the son of the victim of charge no.02 stated that Chingra Razakar camp was comprised of Tahshil Office, Union Parishad Office and the Primary School situated at the bazaar. In cross-examination, P.W.02 stated that Chingra Razakar camp was situated about one kilometre far towards east from their [P.W.02] house.

85. P.W.03 Md. Nur Uddin Morol, a freedom-fighter and the victim of charge no.03, is a resident of village Chingra under Police Station Keshobpur, District Jessore. He was allegedly abducted and confined at the Chingra Razakar camp. The Chingra Razakar camp consisted of Primary School, Tahshil Office and Union Council

Office which were adjacent to each other. He [P.W.03] was kept detained at the Primary School segment of the said Razakar camp. The river Kapatakkha was 50 cubits far towards south from this camp.

86. P.W.04 Momin Gazi, a nephew of Chandtulla Gazi[victim of charge no.02] is a direct witness to the event of his uncle Chandtulla Gazi's capture and detention.P.W.04 in reply to question put to him by the defence stated that in 1971 there existed three Razakar camps including Chingra bazaar camp in the locality under Keshobpur Police Station.

87. P.W.05 Kazi Abdul Aziz, a shop keeper at Chingra bazaar stated that the accused Ibrahim, Abdul Aziz Sardar son of Ful Miah Sardar, Abdul Aziz Sardar son of Ahmmad Sardar, Abdul Khaleque Morol, Lutfor Morol [did during trial] were Razakars and he [P.W.05] knew them as they always used to come to Chingra bazaar.

88. P.W.07 Liakot Ali Sheikh in reply to question put to him by the defence stated that he knew the accused Ibrahim, Lutfor Morol, Billal, Aziz son of Ful Miah Sardar, Aziz son of Ahmmad Sardar and Abdul Khaleque Morol and they were Razakars. Similarly P.W.08 Hasan Ali Sheikh stated in cross-examination that accused Aziz son of Ful Miah Sardar, Aziz son of Ahmmad Sardar, Billal, Abdul Khaleque of no.04 Bidyanandakathi Union were Razakars.

89. P.W.09 Md. Kamal Sardar stated in cross-examination that the bank of the river Kapatakkha was adjacent to Chingra bazaar and the kheyra ghat was about 100 cubits far towards west from Chingra bazaar; that accused Md. Sakhawat Hossain was the Razakar commander of no.2 Sagardari Union and Amin Uddin Master was the commander of Keshobpur Thana Razakar Bahini.

90. P.W.10 Md. Rashidul Haque is a freedom-fighter and gets allowance. He stated that in 1971 there had been three Razakar camps in Police Station Keshobpur-at Trimohini, Keshobpur and Chingra bazaar.

91. P.W. 11 Md. Abdus Sobhan Sarder was a source of freedom-fighters in 1971. He is a resident of village Boga under Police Station Keshoppur. In 1971 a Razakar camp was set up at Chingra bazaar which was comprised of Council Office, Tahshil Office and Primary School situated there and accused Md. Sakhawat Hossain was its commander. In cross-examination P.W.11 stated that accused Md. Shakhawat Hossain was the inhabitant of no.4 Bidyanandakathi Union and he [Md. Shakhawat Hossain] was the commander of Chingra Razakar camp.

92. On cross-examination P.W.13 Md. Mozid Morol, the brother of the victim of charge no.03 stated that there had been three Razakar camps-- at Keshobpur, Trimohini and Chingra.

93. The above testimony of the witnesses indisputably proves that the accused persons were the members of Razakar Bahini and accused Md. Sakhawat Hossain had been in leading position of the Chingra Razakar camp. Defence could not refute it. Rather, all these have been re-affirmed in cross-examination as well, as found above. In no way the defence could taint the above version on this material aspect by cross-examining the witnesses. The above prosecution witnesses knew the accused persons beforehand and thus their testimony relating to status and membership of those accused persons in locally formed Razakar Bahini inspires credence.

94. Undeniably long more than four decades after the commission of alleged atrocious activities it was really a challenging job for the Investigation Agency to collect old documentary evidence. Despite this challenge, it transpires that the prosecution in order to prove the accused persons' membership in locally formed Razakar Bahini relied upon the lists and relevant papers provided by the office of the Deputy Commissioner, Jessore and Bangladesh Muktijodhdha Sangsad, Keshobpur Upazila Command and the same have been proved and marked as Exhibit-6 [Prosecution Documents Volume page nos. 4, 9 and 11], in addition to oral testimony. The lists prove the accused persons' membership

in the local Razakar Bahini. Names of the accused persons find place in those documents as Razakars.

95. Defence attacking the credibility of those documents submitted that the same have been created for the purpose of this case and are not authoritative. And no document could be collected to show that accused Md. Sakhawat Hossain was the commander of Chingra Razakar camp or Sagardari Union Razakar Bahini.

96. We are not convinced with the above submission advanced by the defence. In the absence of anything contrary to the evidence tendered, documentary and oral, the Exhibit showing membership of the accused persons cannot be excluded. The information contained in the documents as have been relied upon by the prosecution on this aspect seem to be compatible with the oral testimony of witnesses, the local people and there has been no reason of disbelieving them.

97. It is to be noted that the witnesses examined in the Tribunal are the locals of Sagardari Union and around it and thus naturally they were in a position of being aware about the stance and status of the accused persons in 1971. And thus it would not be inappropriate to determine this issue even solely on oral testimony presented by the prosecution.

98. It is to be noted that indisputably the task of collecting old documentary evidence to prove all the facts related to the events

alleged, particularly more than long four decades after the atrocities committed was challenging indeed. Necessary documents, by this time, might have been destroyed for various reasons. In this regard we recall the observation of the **Appellate Division of the Supreme Court of Bangladesh passed in the case of Allama Delwar Hossain Sayedee** which is as below:

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

[Criminal Appeal Nos. 39-40 of 2013, Judgment: 17 September 2014, Page-43]

99. The Appellate Division also observed in the case of **Muhammad Kamaruzzaman** that-

"Evidence collection and interpretation in atrocity cases is also complicated by the instability of post-atrocity environments, which results in much evidence being lost or inadequately preserved. The investigation officers and the prosecutors have to trawl through decades-old records, track and verify witnesses."

[Criminal Appeal No.62 of 2013, Judgment: 03 November 2014, Page -173]

100. Therefore, mere absence of any old documentary evidence cannot readily forces to the inference that the accused persons did not belong to locally formed Razakar Bahini and accused Md. Sakhawat Hossain was not the commander of Chingra Razakar

camp. We are to weigh rationally what the witnesses have testified in this regard.

101. Accused Md. Sakhawat Hossain joined the politics of Islami Chhatra Sangha [ICS], the student wing of Jamaat-e-Islami [JEI] since prior to the war of liberation ensued. It stands proved from information contained in the book titled **০েস্জ ব্ ত্ ক্ ি ব্বেবপ্ : 1970-2008** edited by ASM Shamsul Arefin, Exhibit-9 [**Prosecution Documents Volume, relevant page-30**]. ICS was the student wing of JEI and thus naturally its stand in 1971 was against the war of liberation and self-determination of Bengali nation.

102. Also a report titled **০-তাব্জ্বেত্ িব্ ক্ ০_x^` ৰ্ ত্ RvUB** published in the **Daily Prothom Alo** on 06.12.2008 [**Exhibit-3, Prosecution Documents Volume, relevant page 70**] narrates that—

"হ্ ক্ ি-6 (ত্ ক্ ক্ ক্ ক্ ক্ ক্) Avmt b gnv t Rv t Ui g t b v b q b t c t q t Q b Rv Z x q c w U P g l j v b m v L v l q v Z t n v t m b | w Z w b 1991 m v t j R v g v q v t Z i c ০_x^ w n t m t e G A v m b t _ t K R q x n b | t K k e c j g y ৩ t h v x v m s m t ` i m v t e K K v g v U v i K v R x i w d K j B m j v g c ০_g A v t j v t K e t j b, m v L v l q v Z t n v t m b G K R b K L ` v Z i v R v K v i | g y ৩ h t x i m g q t m t K k e c j i g v b t l i N i e w o R y w j t q w t q t Q, j j K t i t Q | m v L v l q v t Z i g t b v b q b e ` t j i ` w e t Z I t K k e c j i g y ৩ t h v x v i v c ০ Z e v ` m v g t e k K t i t Q b |"

103. Defence does not dispute the authoritative nature of the information depicted in the above two documents. Even it could not be shown by the defence that accused Md. Sakhawat Hossain formally opposed the information made in the report in the Daily Prothom Alo. Thus, information contained in those two documents unerringly proves that accused Md. Sakhawat Hossain belonged to

Razakar Bahini formed in Sagardari Union under Keshobpur Police Station, Jessore. Affiliation with the ICS, the student wing of JEI also lends assurance to the fact of his being engaged in the locally formed Razakar Bahini.

104. Next question is whether the accused Md. Sakhawat Hossain was the commander of Chingra Razakar camp. It is to be noted that position of dominance and authority of an individual over his cohorts reasonably makes an individual a *de facto* commander and in such case it is immaterial to prove it by adducing any documentary evidence. It may safely be concluded by determining his act and conduct, influence over his cohorts and omission on evaluation of evidence presented in support of charges to be adjudicated.

105. Accused Md. Sakhawat Hossain's *de facto* position in the local Razakar Bahini and over his cohort Razakars and the camp at Chingra bazaar can be well perceived from relevant facts and circumstances. And also it may be well determined on appraisal of evidence tendered by the witnesses in relation to his conduct and act in carrying out the crimes alleged. At this stage, it stands proved beyond reasonable doubt that accused Md. Sakhawat Hossain and other accused persons were the active members of locally formed Razakar Bahini and were culpably engaged in operating the Razakar camp set up at Chingra bazaar.

106. It is a fact of common knowledge now that Razakar Bahini was an armed *para militia* force which was created for ‘operational’ and ‘static’ purpose of the Pakistani occupation army. The accused persons did not keep them distanced from furthering the said object of forming this armed *para militia* force—Razakar Bahini, we may reasonably presume, although determination of their participation and complicity to the commission of the alleged crimes narrated in the charges framed rests on effective appraisal of evidence adduced.

107. Testimony of P.W.01 Gaziur Rahman, the son of martyr Chandtulla Gazi[victim of charge no.02] demonstrates that in the mid of Bangla month Sraban in 1971 at about 10:00 A.M. a meeting held at the shed of Muslim League leader Munshi Salimuddin at Chingra bazaar was attended by accused Md. Sakhawat Hossain and 30/40 Razakars where it was announced that the pro-Awami League people and the people who chanted ‘Joy Bangla’ slogan were ‘*Kafers*’, *Monafeks*’ and they would be liquidated on hunting. P.W.01 sitting inside a shop at Chingra bazaar overheard the speech delivered in the meeting when accused Md. Sakhawat Hossain asked his accomplice Razakars to keep eyes on the ferry ghats which freedom- fighters often used for their movement.

108. The above pertinent fact remained totally undenied in cross-examination. This piece of evidence on crucial relevant fact also makes the fact of the accused persons' membership in the locally formed Razakar Bahini proved. Because in 1971 only the persons of such notorious mindset who felt enthused to resist the war of liberation were engaged in Razakar Bahini intending to collaborate with the Pakistani occupation army to further policy and plan.

109. From the above, the matters stands proved are –

(i) In 1971 there existed a Razakar camp at Chingra bazaar under Police Station Keshobpur, Jessore;

(ii) In addition to this camp there existed two other camps at Trimohini and Keshobpur under Police Station Keshobpur, Jessore;

(iii) Chingra Razakar camp was on the bank of the river Kapatakkha;

(iv) The Chingra Razakar camp consisted of Primary School, Tahshil Office and Union Council Office which were adjacent to each other;

(vi) All the accused persons belonged to locally formed Razakar Bahini and were actively associated with the Razakar camp at Chingra bazaar; and

(v) Accused Md. Sakhawat Hossain was the Razakar commander of no.2 Sagardari Union and the commander of Chingra Razakar camp as well.

110. All the prosecution witnesses testified the alleged events constituting the offences implicating the accused persons terming

them the members of local Razakar Bahini and it can be well weighed only in adjudicating the charges framed on detail evaluation of evidence adduced. At this stage, their testimony as discussed above together with the information contained in the documents provided leads us to conclude that the accused persons belonged to Razakar Bahini formed at Sagardari Union under Police Station Keshobpur, District Jessore and were significantly associated with the Razakar camp set up at the Chingra bazaar of Sagardari Union.

XIX. Adjudication of charges

Adjudication of charge no. 01

[Abduction, confinement, torture and rape of Ashura Khatun [now dead] of village Boga, Police Station Keshobpur, District Jessore]

111. Summary charge: That on 27 Bangla month Ashwin [1378 BS] in 1971 at about 9.00/9.30 A.M., as per order of accused Md. Sakhawat Hossain, accused Md. Ibrahim Hossain alias Ghungur Ibrahim, Abdul Aziz Sardar son of late Ahmmad Sardar and Md. A. Aziz Sardar son of late Ful Miah Sardar along with other 10/12 Razakars having forcibly abducted Ashura Khatun [now dead] wife of Md. Rashidul Haque and daughter of late Abdul Latif Morol of Village Boga, Police Station Keshobpur, District Jessore, who was a 'source' of local freedom-fighters, from her house kept her confined in Chingra Razakar camp. During confinement she was physically tortured and raped by accused Md. Sakhawat Hossain.

Three days after her confinement in the Razakar camp, one Shariatulla [now dead] , maternal grandfather of victim Ashura Khatun, with the help of Jonab Ali [now dead] and Rafiuddin Sardar [now dead] of same locality managed to get her released from the Chingra Razakar camp having requested accused Md. Sakhawat Hossain.

112. Thereby accused (1) Md. Sakhawat Hossain (2) Md. Ibrahim Hossain alias Ghungur Ibrahim (3) Abdul Aziz Sardar son of late Ahmmad Sardar, and (4) Md. A. Aziz Sardar son of late Ful Miah Sardar are charged for participating, aiding, abetting, facilitating and for complicity in the commission of offences of abduction, confinement, torture and rape as crimes against humanity as part of systematic attack directed against unarmed civilians as specified 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 said accused persons have incurred liability under section 4(1) of the Act.

Evidence of Witnesses Presented

113. To prove charge no. 01, the prosecution has examined as many as 04[four] witnesses [P.Ws. 02, 10, 11 and 12]. Before we enter the task of evaluation of evidence adduced, let us first see what the witnesses examined have narrated in the Tribunal.

114. P.W.02 Fazlur Rahman Gazi [60], is the son of martyr Chandulla Gazi, the victim of the event narrated in charge no. 02.

In 1971 he was 15/16 years old. He stated that his father Chandulla Gazi was the president of no.2 Sagardari Union Awami League.

115. In respect of taking away his father on forcible capture P.W.02 stated that on 28th day of Bangla month Ashwin in 1971 a group of 15/20 Razakars accompanied by accused Sakhawat Hossain, the commander of Chingra Razakar camp and his accomplice Razakars Ibrahim alias Ghungur Ibrahim, Billal, Mujibur, Ohidul, Abdul Aziz son of late Ahmmad Sardar, Abdul Aziz son of late Ful Sardar, Lutfor [died during trial] and Khaleque besieged their house and started searching of his father when his father went into hid inside a bush at the northern side of their house. At that time he [P.W.02] had been at their house. The Razakars got his father apprehended and dragged him out of the bush and took away to Chingra Razakar camp which he saw standing beside the mud wall of their house. He knew the Razakars beforehand as they were the residents of their locality.

116. P.W.02 further stated that about two hours after his father was taken away to Chingra Razakar camp he went there taking meal for his father detained there. He found his father and another detainee Nur Uddin there in bleeding condition. Few minutes later he heard screaming of a girl from the Union Office, a part of the Razakar camp. The girl was crying holding grill of the window of the room where she was kept detained. He [P.W.02] then saw

accused Sakhawat Hossain, present in that room, removing his wearing Panjabi. He [P.W.02] also stated that Chingra Razakar camp was comprised of Tahshil Office, Union Parishad Office and the Primary School situated at the bazaar. His father and Nur Uddin were kept detained in the Primary School part of the camp.

117. P.W.02 also stated that the girl whom he saw at the Razakar camp was Ashura Khatun of village Boga. He heard from Sobhan of that village and many others that accused Sakhawat Hossain sexually ravished Ashura Khatun keeping her in captivity at that Razakar camp.

118. In cross-examination, P.W.02 expressed ignorance about the name of accused Sakhawat Hossain's father. He stated that he first saw accused Sakhawat Hossain in 1971. Chingra Razakar camp was situated about one kilometre far towards east from their [P.W.02] house. He [P.W.02] denied the suggestions that the accused persons were not the members of Razakar Bahini and that he testified falsely and being tutored.

119. P.W.10 Md. Rashidul Haque [68] is a freedom- fighter and a resident of village Rejakati under Police Station Keshobpur of District Jessore. He is the husband of Ashura Khatun, the victim of the event of sexual invasion as narrated in charge no.01.

120. P.W.10 stated that in the month of February in 1971 he got marital engagement to Ashura Khatun of village Boga and they

were supposed to get married at the end of March 1971. At that time Ashura Khatun was SSC examinee from Sagardari MM Institute. After the war of liberation ensued in 1971 he [P.W.10] at the end of March joined the 'Mukti Bahini' formed under the leadership of Mofazzal Hossain Master, the cousin brother of Ashura Khatun.

121. P.W.10 next stated that in the mid of Bangla month Ashwin in 1971[October] he was engaged in fighting Razakars at the localities around villages Nehalpur, Sagardari and Sheikhpura under Police Station Keshobpur and at a stage they got stationed at village Datpur under Police Station Tala. P.W.10 further stated that Ashura Khatun used to keep him and Mofazzal Hossain Master apprised about atrocities done by Razakars by communicating written information through people. After the fighting they fought against Razakars as stated he became aware from their source that on 27 Ashwin in 1971 at about 09:00/09:30 A.M. accused Md. Sakhawat Hossain, Razakar commander of Chingra Razakar camp, accused Billal Hossain, Ibrahim Hossain, Abdul Aziz Sardar son of late Ahmmad Sardar, Abdul Aziz Sardar son of late Ful Miah Sardar and their 10/12 cohort Razakars took away Ashura Khatun to Chingra Razakar camp on forcible capture. Later on, from their source he became aware too that accused Md. Shakhawat Hossain keeping his would be wife Ashura Khatun in captivity at that camp

raped and sexually abused her. Next, on intervention of relative of Ashura Khatun Sarup Sheikh [now dead], neighbour Rafiuddin Sardar [now dead], Jonab Ali[now dead] and the elders of the village she[Ashura Khatun] got released from the said Razakar camp and two days later he[P.W.10] secretly met her when he found Ashura Khatun, with poison in hand, telling that she had lost her chastity. Then he [P.W.10] promised to get her married after independence achieved and asked not to take poison. And then he came back therefrom to join the war of liberation.

122. P.W.10 further stated that after independence he returned back home and on 22 January 1972 he got married to Ashura Khatun. After their marriage, Ashura Khatun disclosed to him that Razakar accused Md. Shakhawat Hossain and his accomplices abused her in different ways on the way of her taking away to Razakar camp and keeping her in captivity at that camp Razakar accused Md. Shakhawat Hossain and his accomplices sexually abused her.

123. Finally, P.W.10 stated that his wife Ashura Khatun got the job of Matron-cum-Nurse at 'Onath Shishu Sadan O Dustho Mohila Punarbasan Kendro', Jessore as a woman tortured and abused during the war of liberation. In the month of September 2006 she [Ashura Khatun] died. He [P.W.10] knew the accused persons he

named since prior to the event as they were the inhabitants of his neighbouring villages.

124. On cross-examination done on behalf of accused Md. Shakhawat Hossain and Abdul Aziz Sardar son of late Ahmmad Sardar P.W.10 stated in reply to question put to him that accused Md. Shakhawat Hossian's father's name is Omor Ali, that he [P.W.10] is a listed freedom-fighter and gets allowance, that in 1971 there had been three Razakar camps in Police Station Keshobpur—at Trimohini, Keshobpur and Chingra bazaar, that Mofazzal Hossain Master was head master in 1971, that Ashura Khatun was his second wife. P.W.10 denied the suggestions put to him that the accused persons he named were not Razakars, that no such event as he stated happened and that Ashura Khatun got her job on her own eligibility and not as a war affected woman.

125. On cross-examination done on behalf of accused Md. Ibrahim Hossain alias Ghungur Ibrahim and Abdul Aziz Sardar son of late Ful Miah Sardar P.W.10 stated in reply to question put to him that accused Ibrahim Hossain was a Razakar in 1971 and his father's name was Akabbar Ali, that Chingra bazaar was about eight kilometres far from village Datpur, and that he did not sue for the abuse caused to Ashura Khatun. P.W.10 denied the suggestions put to him that these two accused persons were not Razakars and

were not involved with the event he testified and what he testified was untrue and tutored.

126. P.W. 11 Md. Abdus Sobhan Sarder [74] was a source of freedom-fighters in 1971. He is a resident of village Boga under Police Station Keshobpur of District Jessore. Before narrating the event, P.W.11 stated that in 1971 a Razakar camp was set up at Chingra bazaar which was comprised of Council Office, Tahshil Office and Primary School situated there and accused Md. Shakhawat Hossain was its commander.

127. P.W.11 next stated that he joined the 'Mukti Bahini' under the leadership of Mofazzal Master as its source. During the last part of Bangla month Ashwin in 1971 he participated freedom-fight under the leadership of Mofazzal Master around the localities of Sheikhpura, Sagardari and Nehalpur and at a stage they made their station at village Datpur wherefrom on 27 Ashwin at about 09:00 A.M. he went to village Boga and after his arrival there he saw some Razakars moving towards east from west and then he being feared went into hid inside a '*bet bagan*' and afterwards he saw, remaining in hiding, accused Abdul Aziz Sardar son of late Ahmmad Sardar, Abdul Aziz Sardar son of late Ful Miah Sardar, Ibrahim Hossain and their cohorts taking away Ashura Khatun on capture towards west. On seeing this he returned their camp at village Datpur and disclosed it to his

commander Mofazzal Master and freedom- fighter Rashid Master [P.W.10]. P.W. 11 also stated that Ashura Khatun was his next door neighbour and thus he knew her.

128. P.W.11 further stated that about one week after the said event he went to the house of Ashura Khatun at village Boga from their camp at village Datpur and when he met Ashura Khatun she on his [P.W.11] query disclosed that Shakhawat Hossain sexually abused her during her three days captivity at Chingra Razakar camp. She [Ashura Khatun] also disclosed that on intervention of Rafiuddin Sardar, Jonab Ali Sardar and Sarup Sheikh she got released from the camp.

129. P.W.11 finally stated that after independence Ashura Khatun [victim] got married to Md. Rashidul Haque [P.W.10]. He knew the accused persons he named since prior to the event as they were the inhabitants nearer to his [P.W.11] house.

130. In cross-examination P.W.11 stated that Ashura Khatun's house was at east side to his [P.W.11] house and in 1971 she was a student of Class X in Michael Madhusudan Institute. P.W.11 also stated in reply to question put to him that he [P.W.11] and accused Md. Shakhawat Hossain were the inhabitants of no.4 Bidyanandakathi Union and Md. Shakhawat Hossain was the commander of Chingra Razakar camp. P.W.11 denied the suggestions put to him that no such event he narrated at all

happened and Md. Rashidul Haque [P.W.10] concocted the story of sexually abusing Ashura Khatun just to get her married and that accused Md. Shakhawat Hossain and Abdul Aziz Sardar son of late Ahmmad Sardar did not belong Razakar Bahini and were not involved with any anti-liberation activity.

131. On cross-examination done on behalf of accused Md. Ibrahim Hossain alias Ghungur Ibrahim and Abdul Aziz Sardar son of late Ful Miah Sardar P.W.11 stated that in 1971 accused Md. Ibrahim Hossain was a Razakar and his father was Yakub Ali Biswas. P.W.11 denied the suggestion put to him that accused Md. Ibrahim Hossain and Abdul Aziz Sardar son of late Ful Miah Sardar were not Razakars and were not involved with the event he narrated.

132. P.W.12 S.M Robiul Haque Royal [36] is the son of Ashura Khatun [the victim of the event of sexual invasion as narrated in charge no.01]. He is a hearsay witness. He stated that in 1996 when he was a student of Class X in Mohadebpur RBS Secondary School under Keshobpur Police Station his class mates used to ask him whether he knew that his mother was taken away by the Razakars on capture in 1971. It made him mentally perplexed and pained and then in 1998 when he was a student of Keshobpur Degree College he inquired his father Rashidul Haque about it. His father did not prefer to say anything on it. However, on his repeated

asking his father disclosed that on 27 Ashwin 1971 his mother Ashura Khatun was taken away to Chingra Razakar camp on forcible capture from her parental home at village Boga by Razakars accused Md. Ibrahim Hossain, Abdul Aziz Sardar son of late Ahmmad Sardar, Abdul Aziz Sardar son of late Ful Miah Sardar and their cohorts and during her captivity at the camp for three days she was subjected to rape by accused Md. Shakhawat Hossain. His father also told that three days after by the intervention of Shariatulla, the uncle of his grand-mother [now dead], Rafiuddin Sadar [now dead] and Jonab Ali [now dead] his mother got released from the Razakar camp and was taken back to home. P.W.12 also stated that his father got married to Ashura Khatun [victim] on 22 January 1972. His [P.W.12] mother Ashura Khatun got the job of Metron-cum-Nurse in 1972 as a 'war affected woman' and she died on 09 September 2006. He [P.W.12] sought justice for the grave wrong done to his mother.

133. Defence suggested P.W.12 that he did not hear anything about what he stated in respect of the sexual invasion caused to his mother Ashura Khatun and his mother got the job of Metron-cum-Nurse not as a 'war affected victim' but as a regular candidate. P.W.12 denied it.

Finding with Reasoning on Evaluation of Evidence

134. In respect of charge no.01 it has been submitted by Ms. Rezia Sultana, the learned prosecutor that this charge relates to abduction, confinement, torture and rape of Ashura Khatun of Village Boga, Police Station Keshobpur, District Jessore. In all four [04] witnesses [P.Ws. 02.10.11 and 12] have been examined to prove this charge. Of the four witnesses P.W.11 Md. Abdus Sobhan Sarder is a direct witness to the event of abduction. P.W.02 Fazlur Rahman Gazi, the son of victim of charge no.02, saw the victim [Ashura Khatun] detained at the Chingra Razakar camp. P.W.10 Md. Rashidul Haque and P.W.12 S.M. Robiul Haque Royal are the husband and son respectively of the victim Ashura Khatun. They heard from the victim how beastly she was treated in confinement at the Chingra Razakar camp.

135. The learned prosecutor further submitted that the defence could not refute what has been testified by these witnesses on material particulars. After independence, Ashura Khatun got the job of Matron-cum-Nurse as a war affected woman. It lends assurance to the fact of sexual invasion committed upon her. The evidence tendered shall go to prove beyond reasonable doubt that accused Md. Sakhawat Hossain, the key man of the Chingra Razakar camp having dominance and control, was consciously concerned with the entire event and on his order the victim Ashura Khatun was taken away to the Chingra Razakar camp on forcible capture by his

cohort Razakars. Abduction and keeping in captivity at the Chingra Razakar camp are chained to the act of committing rape, the learned prosecutor added.

136. Mr. Abdus Sattar Palwan, the learned defence counsel for the accused Md. Sakhawat Hossain, Md. Billal Hossain Biswas and three others[absconded] submitted that the prosecution failed to prove the fact of abduction and confinement of victim Ashura Khatun and causing alleged rape upon her at Chingra Razakar camp and that she [victim], after independence, got the job of Matron-cum-Nurse as a war affected woman. Prosecution failed to substantiate it by any relevant document. Testimony of P.W.10 and P.W.11 so far as it relates to accompanying the alleged group of Razakars in launching attack shall appear to be inconsistent to each other. P.W.12 is not a credible witness and his hearsay testimony does not inspire credence as he being the son of a rape victim would never opt to visit the offender[accused Md. Sakhawat Hossain] if really he [P.W. 12] knew him [offender] to be the perpetrator of grave wrong committed upon his mother. But it appears from the testimony of P.W.12 that he met the accused Md. Sakhawat Hossain several occasions which is not compatible with the allegation brought. P.W.03 Md. Nur Uddin Morol, a detainee did not state that he saw the victim Ashura Khatun detained at the Razakar camp. Thus, the testimony of P.W.12 in this regard carries

no credence. However, the prosecution failed to prove the event as well as complicity of the accused persons therewith beyond reasonable doubt.

137. Mr. Abdus Sukur Khan, the learned State defence counsel for the three absconded accused namely, Md. Ibrahim Hossain alias Ghungur Ibrahim, Sheikh Mohammad Mujibur Rahman alias Mujibur Rahman and Md. A. Aziz Sardar son of late Ful Miah Sardar submitted that accused Md. Ibrahim Hossain and Md. A. Aziz Sardar son of late Ful Miah Sardar have been arraigned for the crimes alleged in this charge. But the charge framed itself does not speak of specific allegation of committing rape against them; that even no prosecution witnesses stated anything implicating them with the commission of alleged offence of rape upon the victim Ashura Khatun. P.W.10 and P.W.11 had no reason of being able to recognise the accused Md. Ibrahim Hossain and Md. A. Aziz Sardar son of late Ful Miah Sardar and thus their testimony involving their complicity with the attack is not believable; that the testimony of other witnesses examined in support of this charge shall appear to be inconsistent to each other, the learned State defence counsel added.

138. Victim Ashura Khatun of Village Boga, Police Station Keshobpur, District Jessore was subjected to sexual ravishment at the Chingra Razakar camp by the accused Md. Sakhawat Hossain

and his cohorts after she was taken away there, on forcible capture, the charge framed alleges. Naturally, none had occasion to see committing sexual abuse on her as it happened in captivity at the Razakar camp. In all four witnesses examined are relied upon by the prosecution to prove this charge.

139. Of those four witnesses P.W.02 Fazlur Rahman Gazi is the son of victim of the event narrated in charge no.02 and he going to the Chingra Razakar camp saw the victim Ashura Khatun detained there and he also experienced some facts relevant to the alleged offence. P.W.10 Md. Rashidul Haque is a freedom fighter and he got married to the victim Ashura Khatun after independence, and as such, he allegedly heard the grave wrong done to her at Razakar camp. He heard about the complicity of accused Md. Sakhawat Hossain and other Razakars with the alleged offence of rape in captivity from her. P.W.11 Md. Abdus Sobhan Sarder, a source of freedom-fighters and a resident of village Boga allegedly saw the event of forcible taking away the victim by the accused persons. P.W.12 S.M. Robiul Haque Royal is the son of victim Ashura Khatun who later on heard the event of sexual ravishment committed on her mother at Chingra Razakar camp in 1971 from his father [P.W.10] and he also claims that his mother got the job of Merton-cum-Nurse in 1972 as a 'war affected woman'.

140. In addition to the testimony of above four witnesses, prosecution also relied upon the statement of Md. Nesar Ali[60] made to the investigation officer as the same has been received in evidence under section 19(2) of the Act of 1973 due to his death during trial. Statement of this witness appears at page nos. 10-11 of the Volume of Statement of Witnesses which has been marked as Exhibit-15 vide the Tribunal's order no.29 dated 02.06.2016.

141. In resolving this charge prosecution requires to prove---

(i) Razakar camp set up at Chingra bazaar was operated under the leadership of accused Md. Sakhawat Hossain;

(ii) Victim Ashura Khatun was forcibly taken away to the said Razakar camp by the Razakars affiliated with it;

(iii) Reason of forcibly taking away the victim to the Razakar camp;

(iv) Who were engaged in abducting the victim ?

(v) Victim was kept detained for three days at the Razakar camp;

(vi) Victim was released on intervention of some local people;

(vii) In captivity the victim was sexually ravished by accused Md. Sakhawat Hossain and his cohorts.

142. It already stands proved that a Razakar camp was set up at Chingra bazaar and its activities were carried out under the guidance and within knowledge of accused Md. Sakhawat Hossain as he had culpable position of authority over this camp.

143. From the trend of cross examination as has been extracted in cross-examination of prosecution witnesses examined it appears that the defence could not controvert the fact of keeping the victim Ashura Khatun confined at the Chingra Razakar camp by taking her on forcible capture from her village Boga. The entire event consisted of phases—first forcible capture of the victim, next, keeping the victim in captivity for three days in the Chingra Razakar camp when she was subjected to physical invasion.

144. The first phase appears to have been narrated by the direct witness P.W.11. Keeping the victim confined at the Chingra Razakar camp has been testified by P.W.02. The testimony of P.W.11 and P.W.02 is thus significant in resolving the commission of the principal crime and participation and complicity of the accused persons therewith. P.W.10 and P.W.12, the husband and son respectively of the victim Ashura Khatun are hearsay witnesses. Their testimony may be considered to carry value if the same is found to have been corroborated by other evidence in respect of facts relevant to the principal offence. Therefore, now let us eye on what the P.W.11 and P.W.02 stated before the Tribunal.

145. P.W.10 Md. Rashidul Haque is a freedom-fighter and after the independence achieved he got married to her [victim Ashura Khatun]. It is undisputed that in 1971 Ashura Khatun was SSC examinee from Sagardari MM Institute. P.W.10 stated that Ashura

Khatun used to keep him [P.W.10] and Mofazzal Hossain Master, the leader of freedom- fighters and the cousin brother of victim Ashura Khatun apprised about atrocities committed by Razakars by communicating written information through people.

146. Defence could not refute this pertinent fact in any manner. Presumably the above was the reason why the Razakars of Chingra camp opted designing plan to abduct Ashura Khatun and in accomplishing the plan they had carried out criminal acts forming attack which was with the object of forming Razakar Bahini, an auxiliary force , to further policy and plan of the Pakistani occupation army.

147. Victim Ashura Khatun's cousin brother Mofazzal Hossain Master was a freedom-fighter. Defence does not dispute it. It is found from the evidence that when Mofazzal Hossain Master and his co-freedom-fighters got stationed around the village Boga with a plan to combat the counterpart and used to receive information from the victim Ashura Khatun about the activities of Razakars, came to know the event of attack resulted in Ashura Khatun's forcible capture happened. The group of attackers formed of Razakars. P.W.11 Md. Abdus Sobhan Sarder, a source of 'Mukti Bahini' led by Mofazzal Hossain Master and a resident of village Boga witnessed how victim Ashura Khatun was forcibly picked up by the Razakars. We are thus forced to infer that the attackers, the

group of Razakars of Chingra camp intended to reign horror and coercion amongst the nationalist Bengali civilians by taking Ashura Khatun to the Razakar camp on abduction.

148. P.W.11 also joined the 'Mukti Bahini' under the leadership of Mofazzal Hossain Master as its source. During the last part of Bangla month Ashwin in 1971 he had participated freedom-fight under the leadership of Mofazzal Hossain Master around the localities of Sheikhpura, Sagardari and Nehalpur and at a stage they got them stationed at village Datpur. This unimpeached version provides corroboration to the fact that Ashura Khatun used to keep the freedom-fighters and her cousin brother Mofazzal Hossain Master, the leader of 'Mukti Bahini' apprised about atrocities committed by Razakars by communicating written information through people.

149. P.W.11 claims to have witnessed the Razakars taking away the victim Ashura Khatun forcibly as at the relevant time he had been at village Boga. It is evinced that from the village Datpur where he and other freedom-fighters got stationed he went to village Boga on 27 Ashwin at about 09:00 A.M and after his arrival there he saw some Razakars moving towards east from west and then he being feared went into hid inside a '*bet bagan*' and afterwards he saw, remaining in hiding, accused Abdul Aziz Sardar son of late Ahmmad Sardar, Abdul Aziz Sardar son of late Ful

Miah Sardar, Ibrahim Hossain and their cohorts taking away Ashura Khatun on capture towards west. On seeing this he returned their camp at village Datpur and disclosed it to his commander Mofazzal Hossain Master and freedom- fighter Rashid Master [P.W.10]. P.W. 11 also stated that Ashura Khatun was his next door neighbour and thus he knew her.

150. The above version crucially pertinent to the commission of the principal crime remained unimpeached. P.W.11 being a neighbour of the victim naturally could recognise her and some of the Razakars forming the group of the attackers. He [P.W.11] knew the accused persons he saw taking away the victim since prior to the event as they were the inhabitants nearer to his [P.W.11] house. Therefore, evidence of P.W.11 inspires credence and he [P.W.11] appears to be the vital direct witness to the act of abducting the victim. Defence could not shake his testimony on material particulars in any manner.

151. It also depicts from the statement of Md. Nesar Ali [Exhibit-15] made to the investigation officer which has been received in evidence under section 19(2) of the Act of 1973 that he [Md. Nesar Ali] was an associate of freedom-fighters Rashidul Haque Master [P.W.10] and Mofazzal Hossain Master and at a stage of fighting against Razakars in the mid of Bangla month Ashwin they took shelter at village Datpur.

152. Statement of this witness as received in evidence under section 19(2) of the Act of 1973 also demonstrates that victim Ashura Khatun was engaged in providing information secretly about the activities of Razakars around the locality to Rashidul Haque Master [P.W.10] and Mofazzal Hossain Master [the cousin brother of victim Ashura Khatun] through source and for the reason of engaging in such activities Ashura Khatun was so taken away forcibly to Chingra Razakar camp by the three accused persons charged with and their cohorts on order of accused Md. Sakhawat Hossain and the victim was ravished keeping her in protracted captivity.

153. The above statement received in evidence under section 19(2) of the Act of 1973 inspires credence as it lends assurance particularly to the testimony of P.W.11, a source and associate of those Mofazzal Hossain Master and Rashidul Master [P.W.10]. Besides, being an associate of them this witness Md. Nesar Ali too had opportunity of being aware of the event of attack that resulted in Ashura Khatun's abduction and confinement at the Razakar camp that ended with beastly ravishment committed on her.

154. P.W.10 Md. Rashidul Haque, a freedom fighter who after independence got married to the victim Ashura Khatun became aware from their source that on 27 Ashwin in 1971 at about 09:00/09:30 A.M accused Md. Sakhawat Hossain, Razakar

commander of Chingra Razakar camp, accused Billal Hossain, Ibrahim Hossain, Abdul Aziz Sardar son of late Ahmmad Sardar, Abdul Aziz Sardar son of late Ful Miah Sardar and their 10/12 cohort Razakars took away Ashura Khatun to Chingra Razakar camp on forcible capture.

155. The above version gets corroboration from P.W.11 who was one of the sources of the 'Mukti Bahini' stationed around the crime locality and a resident of village Boga as he stated that on seeing the event of forcibly taking away the victim Ashura Khatun, his neighbour he returning their camp at village Datpur disclosed it to his commander Mofazzal Master [cousin brother of the victim] and freedom- fighter Rashid Master [P.W.10].

156. Where the victim was taken away and kept in protracted confinement? In this regard prosecution chiefly relied upon the testimony of P.W.02. P.W.02 Fazlur Rahman Gazi is the son of martyr Chantulla Gazi, the victim of the event narrated in charge no. 02. In 1971 he was 15/16 years old.

157. After taking away his[P.W.02] father on forcible capture on 28th day of Bangla month Ashwin in 1971 by a group of 15/20 Razakars accompanied by accused Md. Sakhawat Hossain, the commander of Chingra Razakar camp he[P.W.02] went there[camp] taking meal for his father detained there. He found his father and another detainee Nur Uddin [P.W.03] there in bleeding

condition when he also heard screaming of a girl from the Union Office, a part of the Razakar camp. The girl was crying holding grill of the window of the room where she was kept detained. He [P.W.02] then saw accused Md. Sakhawat Hossain, present in that room, removing his wearing Panjabi. The girl whom he saw at the Razakar camp was Ashura Khatun [victim] of village Boga.

158. It is found from evidence of Md. Nur Uddin Morol [P.W.03] that he [P.W.03] along with Chandtulla Gazi, the father of P.W.02 were kept detained at the Primary School segment of the Chingra Razakar camp. It gets corroboration from the evidence of P.W.03 that on the day they were taken to the Razakar camp, Fazlur Rahman [P.W.02], the younger son of Chandtulla Gazi came there to provide meal for his detained father but Razakar Mashiar turned him out therefrom.

159. In view of above, P.W.02 had fair opportunity of seeing some one crying inside the other segment adjacent to the Primary School segment of the Chingra Razakar camp. And it proves the act of keeping the victim Ashura Khatun there in unlawful confinement. Seeing the accused Md. Sakhawat Hossain removing his wearing apparel inside the room where the victim was kept detained as testified by P.W.02 speaks a lot and provides assurance about his culpability. Defence does not dispute the act of keeping the victim in captivity at the Chingra Razakar camp, and as such,

the proved fact of her forcible picking up as testified by P.W.11, a direct witness is chained to the act of her confinement there.

160. What happened to victim Ashura Khatun in captivity at the Chingra Razakar camp and how she got spared therefrom? In this regard the victim could be the best witness. But now she is dead. Besides, sexual ravishment in protracted confinement happened inside the Razakar camp, and as such, the persons affiliated with it and who used to operate its activities were supposed to know what happened to the detainee. In the matter under adjudication, the accused persons have been arraigned of grabbing the supreme honour of the victim under coercion and threat inside the Razakar camp. Relevant fact may sufficiently tend to prove the infliction of sexual harm to the victim.

161. P.W.11 is a direct witness to the attack that resulted in victim's abduction. He is a neighbour of the victim. Naturally, later on he got occasion of being aware what happened to the victim at the Chingra Razakar camp. But before going to resolve it let us see how and when the victim got released from the captivity at Chingra Razakar camp. On intervention of Rafiuddin Sardar, Jonab Ali Sardar and Sarup Sheikh she got released from the Razakar camp, P.W.11 testified it. How he [P.W.11] knew it? According to him he heard it from Ashura Khatun, the victim.

162. P.W.10 also heard the event of abduction of victim Ashura Khatun from their source. P.W.10 testified that on intervention of victim Ashura Khatun's relative Sarup Sheikh [now dead], neighbour Rafiuddin Sardar [now dead], Jonab Ali [now dead] and the elders of the village she[Ashura Khatun] got released from the said Razakar camp.

163. The above piece of unshaken version proves it that on intervention of locals [presumably the elder relatives and neighbours] the victim got released. Besides, getting release from the Razakar camp does not appear to have been disputed by the defence, and thus, the fact of being confined there stands proved. It is immaterial to show how many days the victim was kept there confined. Now, we are to see how the victim was treated in captivity.

164. It is found from the evidence of P.W.10 that two days after the victim's release he [P.W.10] secretly met the victim Ashura Khatun when he found her telling that she had lost her chastity, with poison in hand. Then he [P.W.10] promised to get her married after independence achieved and asked her not to take poison.

165. What made the P.W.10 feeling urged to meet the victim secretly and to make him promise bound to marry her [victim]? Thinking to cause self harm by taking poison as testified by P.W.10 reflects the extent of the victim's disappointment that she could not

carry. And she did it two days after her release from the Razakar camp. Obviously grave misdeeds done in captivity forced her to think of taking such attempt of causing self harm. This fact materially adds assurance to the fact of inflicting grave sexual invasion upon the detained victim.

166. P.W.10 stated that he was supposed to get married to victim Ashura Khatun at the end of March 1971. Presumably, it could not be materialized as the war of liberation ensued. However, P.W.10 after independence returned back home and on 22 January 1972 he got married to Ashura Khatun [victim]. Thus, meeting the victim secretly after her release from Razakar camp seems to be rationale as even prior to solemnization of their marriage there had been an engagement between them.

167. Not only the victim Ashura Khatun [now dead] spent her life as ‘vulnerable’—her family including her husband[P.W.10] and son [P.W.12] also had to face vulnerability and they felt stigmatized too. However, finally they came on dock and deposed the trauma their dear one the victim sustained intending to get ‘justice’ ignoring social ostracism.

168. Gabriela Mischkowski rightly pointed that-

“in practice, rape survivors are more or less routinely accepted as “vulnerable” rather than “threatened” for mainly two reasons: they are either perceived as too shameful to talk about “such things” in front of a public audience, or- based on a less prejudiced and more enlightened understanding

of rape and its social implications—they are to be protected from public stigmatising.”

[Gabriela Mischkowski, Medica Mondiale, Cologne, Germany: *The trouble with rape Trials: Bangladesh Genocide and the Issue of Justice*, a paper presented in the International conference held at Heidelberg University, Germany 4-5 July, 2013, publication of Liberation War Museum, Bangladesh, page 98; also cited in the judgement of Syed Md. Qaiser, Paragraph 685].

169. It is true that victim Ashura Khatun could be the best witness to the act of rape committed upon her. But now she is dead. So the testimony of her husband [P.W.10] and son [P.W. 12] who had natural occasion and reason of being aware of the said grave wrong done to victim Ashura Khatun cannot be excluded.

170. The charge framed alleges that on order of accused Md. Sakhawat Hossain a group of Razakars accompanied by accused Abdul Aziz Sardar son of late Ahmmad Sardar, Abdul Aziz Sardar son of late Ful Miah Sardar and Md. Ibrahim Hossain alias Ghungur Ibrahim forcibly picked up the victim Ashura Khatun. It has already been proved beyond reasonable doubt from the testimony of P.W.11, a direct witness to the phase of abduction, that those three accused persons and their cohorts forcibly took away the victim from village Boga. Evidence of P.W.02 also demonstrates that he saw the victim detained at the Chingra Razakar camp operated under command of accused Md. Sakhawat Hossain. He knew the Razakars accompanying the group engaged

in abducting the victim beforehand as they were the residents of their locality. It remained unshaken. Thus, his testimony so far as it relates to seeing the accused Abdul Aziz Sardar son of late Ahmmad Sardar, Abdul Aziz Sardar son of late Ful Miah Sardar and Md. Ibrahim Hossain alias Ghungur Ibrahim physically participating in victim's forcible capture inspires credence.

171. It is to be noted that 'ordering' even refers to the act of inducing or instigating another by a person in a position of authority using that position to commit an offence. It is now well settled that the existence of the order may be proven through circumstantial evidence and it can be explicit or implicit.

172. The act of 'ordering' another may not always be tangible. It may be inferred from the facts and circumstance of each case. In the case in hand, it stands proved that accused Md. Sakhawat Hossain was the commander of Chingra Razakar camp and the above mentioned three accused persons affiliated with that camp and their cohorts had forcibly picked up the victim. Thus and since the victim was taken away to the said camp and was kept detained there it may lawfully be inferred that the criminal acts starting from the act of abducting the victim and keeping her confined at the camp happened on 'order' of accused Md. Sakhawat Hossain.

173. Accused Md. Sakhawat Hossain being the commander of the Chingra Razakar camp was obviously under duty to suppress or

prevent unlawful behaviour and acts of his accomplices affiliated with the camp of which he had knowledge but he did nothing to suppress that act or behaviour and it thus allowed the conclusion that he, by culpable omissions, participated in the commission of crimes and also he may be deemed to have 'ordered' or 'induced' his accomplice Razakars to accomplish the act of victim's abduction, the first phase of the attack, by 'culpable omission.'

174. The act of abduction of the victim was chained to the commission of the principal criminal act constituting the offence of rape upon her. Therefore, accused Abdul Aziz Sardar son of late Ahmmad Sardar, Abdul Aziz Sardar son of late Ful Miah Sardar and Md. Ibrahim Hossain alias Ghungur Ibrahim, who are found to have had active and culpable engagement in forcibly picking up the victim to the Razakar camp, are liable for aiding, abetting, facilitating, contributing and for complicity in the commission of sexual violation upon the victim in captivity.

175. Testimony of P.W.10 demonstrates that after he[P.W.10] got married to victim Ashura Khatun he[P.W.10] heard from her that Razakar accused Md. Sakhawat Hossain and his accomplices abused her in different ways on the way of her taking away to Razakar camp and keeping her in captivity at that camp Razakar accused Md. Sakhawat Hossain and his accomplices sexually abused her. This piece of hearsay evidence carries probative value

as it appears compatible with the facts unveiled which are materially relevant to the commission of the act of sexual violation upon the victim. P.W.12 is the son of the victim. He[P.W.12] also heard the grave sexual misdeed committed upon her mother at the Razakar camp in 1971. With regard to hearsay evidence, it should be pointed out that this is not inadmissible *per se*. However, it needs to be cautiously considered, depending on the circumstances of each case.

176. In the case in hand, we find no earthly reason to exclude the hearsay testimony of P.W.10[husband of victim] and P.W.12[son of victim] as , we believe, they have not opted to imprint scar on their dear one[victim] by bringing false accusation of her being sexually violated during the war of liberation in 1971.

177. Their hearsay testimony together with the facts relevant to the commission of the principal crime obviously inspires credence. We believe that no husband [P.W.10] and son [P.W.12] of a woman would prefer to bring a false accusation that stamps stigma on her life, and makes their social and family life shattered.

178. Additionally, the evidence of P.W.02 divulges that he[P.W.02] saw the accused Md. Shakahwat Hossain removing his wearing Panjabi in the room where the victim was kept detained. P.W.02 saw it through the opened window when he went to the Chingra Razakar camp carrying meal for his father detained there.

179. It thus stands proved that Ashura Khatun, a helpless girl was systematically captured by the group of Razakars who took her away to the Chingra Razakar camp where she was kept detained and sexually violated, defying the Article 27 of Fourth Geneva Convention providing war time protection to women. And accused Md. Sakhawat Hossain being in commanding position of the Razakar camp incurred liability for the grave misdeed done to the detained victim Ashura Khatun.

180. Victim Ashura Khatun's cousin brother Mofazzal Hossain Master was a freedom fighter. Defence does not dispute it. It is found from the evidence that when Mofazzal Hossain Master and his co-freedom-fighters got stationed around the village Boga with a plan to combat the counterpart and used to receive information from the victim Ashura Khatun about the activities of Razakars, came to know the event of attack resulted in Ashura Khatun's forcible capture happened. The group of attackers formed of Razakars.

181. P.W.11, a source of 'Mukti Bahini' led by Mofazzal Hossain Master and a resident of village Boga witnessed how Ashura Khatun was forcibly picked up by the Razakars. We are thus forced to infer that the attackers, the group of Razakars of Chingra camp intended to reign horror and coercion amongst the nationalist

Bengali civilians by taking Ashura Khatun to the Razakar camp on abduction.

182. In addition to above, we have got it proved that Ashura Khatun, after independence, got the job of Matron-cum-Nurse as a 'war affected woman'. If the victim was not ravished sexually in captivity at the Razakar camp why she was considered as a 'war affected woman'? In absence of anything contrary it may be unerringly concluded that for the reason of trauma and injury she sustained due to physical invasion committed upon her at the Razakar camp she was considered as a 'war affected woman' and in honour of her supreme sacrifice she was provided with the said job.

183. War time rape is not simply an individual criminal action but involved a chain of command, particularly when it happened in a camp. This did not mean that a man in commanding position had ordered his cohorts affiliated with the camp to commit rape upon a woman kept in captivity, but rape occurred with his conscious knowledge and on his approval and he did not intervene to stop its commission. On this score as well he is liable for the crime of physical invasion upon the victim.

184. The Act of 1973 reflects that criminal responsibility for any crime enumerated in the Act is incurred not only by individuals who physically commit that crime, but also by individuals who

participate in and contribute to the commission of a crime in other ways, ranging from its initial planning to its execution. This view finds support from the observation of **ICTR** in the case of **Rutaganda** which is as below:

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

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

185. Accused Md. Sakhawat Hossain was the commander of the Chingra Razakar camp and it is enough to conclude that what happened to victim in captivity at the camp was well within the knowledge of the accused and despite being in a position of authority he did not intended to prevent the commission of the principal crime.

186. ‘Knowledge’ or ‘intent’ refers to ‘awareness’ and thus accused’s omission even constituted his participation to the commission at the camp as he being in commanding position over the camp intended the commission of the crime. Prosecution thus is not required to prove accused’s direct participation. In this regard the **ICTR Trial Chamber-1** observed in the case of **Rutaganda** that--

".....an accused may participate in the commission of a crime either through direct commission of an

unlawful act or by omission, where he has a duty to act."

[The Prosecutor V. Georges Anderson Nderubumwe Rutaganda, Case No. ICTR-96-3-T, Judgment: December 6, 1999, Para-41]

187. The act of forcible capture of the victim Ashura Khatun was accomplished by the cohort Razakars of the Chingra Razakar camp over which the accused Md. Sakhawat Hossain had substantial influence and command. Thus, the attack obviously resulted from the approval, instigation and endorsement stirred up by the accused Md. Sakhawat Hossain, we conclude it. Instigation may arise from a positive act or a culpable omission. And thus an accused may participate by act of providing instigation to the commission of a criminal act, by virtue of his conduct even being far from the crime site.

188. The prohibition of rape in armed conflicts has been long recognized in international treaty law as well as in customary international law. But this grave wrong was done to the victim Ashura Khatun keeping her in protracted confinement which was gross violation of customary international law.

189. The crime of physical invasion upon the victim confined at the Razakar camp would not have been perpetrated without the involvement of the accused Md. Sakhawat Hossain as he used to steer the criminal activities happened there. As an authority figure, accused Md. Sahawat Hossain's commanding position over the

camp itself together with his act of omission had a substantial effect in accomplishing the act of sexual abuse on the victim detained there. Accused Md. Sakhawat Hossain's inaction was for the purpose of assisting and facilitating his cohorts the actual offenders in committing the crime of sexual ravishment. Accused Md. Sakhawat Hossain had shown such deliberate inaction pursuant to the joint criminal enterprise [Systematic Form], it may indisputably be inferred.

190. Does the act of physical invasion on a woman in war time leaves impact only on the victim suffered? No, it rather stigmatizes the society and civility as well and its impact never erased from the shrine of her soul. In this regard we reiterate the observation propounded by the ICT-2 in the case of **Syed Md. Qaiser** which is as below:

"The research on war time rape shows that in war time, the soldiers assume the use of rape as an effective weapon of launching attack not simply against an individual, but against social and gender stigmas aiming for the advancement of societal break-down. When rape is used as a weapon instead of a bullet, the weapon continues to exert its effect beyond the primary victim and it eventually outrages the civility, we have already observed in our deliberation made on charge no.8 that involves another event of mass rape. Rape as a weapon in war time thus affects not only the rape victim, but her family, village and community."

[Syed Md. Qaiser, ICT-2, Judgment Paragraph 709].

191. Rape is a systematic attack to violently degrade people and rob them of their very humanity. The curse of rape as a weapon,

affects not only the life of an individual, but the entire family and community in which she lives. The victim Ashura Khatun is no more in this earth—she died in 2011. But the trauma and pain she sustained has been left for her dear and near ones—husband [P.W.10] and son [P.W.12]. The effects of rape as a weapon of war never ceases. The wounds of rape never heal, and they leave enduring scar on victim, her family, communities, nations and even the humanity too.

192. In view of above deliberation made on rational evaluation it has been found proved beyond reasonable doubt that victim Ashura Khatun, a cousin sister of a potential freedom fighter Mofazzal Hossain Master, was engaged in providing information to 'Mukti Bahini' about the activities of Razakars and thus she was forcibly captured by the accused Razakars affiliated with Chingra Razakar camp intending to create coercion and terror, that keeping the victim detained at the Razakar camp sexual invasion was done upon her and it was done as a weapon of war. It was the accused Md. Sakhawat Hossain who was the key orchestrator of criminal acts carried out by his cohort Razakars. Victim's supreme honour was robbed in protracted captivity. Accused Md. Ibrahim Hossain alias Ghungur Ibrahim, Abdul Aziz Sardar son of late Ahmmad Sardar and Md. A. Aziz Sardar son of late Ful Miah Sardar actively participated in abducting the victim Ashura Khatun from her house

and it happened in day time. Indisputably the attack in effecting the victim's capture was carried out within the knowledge and on explicit approval of accused Md. Sakhawat Hossain as he was in commanding position of those accused persons. Accordingly, accused Md. Sakhawat Hossain incurred liability for the entire 'collective criminality' that eventually resulted in horrific sexual invasion in captivity.

193. Therefore, accused (1) Md. Sakhawat Hossain (2) Md. Ibrahim Hossain alias Ghungur Ibrahim (3) Abdul Aziz Sardar son of late Ahmmad Sardar, and (4) Md. A. Aziz Sardar son of late Ful Miah Sardar are found criminally liable for participating, aiding, abetting, facilitating and for complicity in the commission of offences of abduction, confinement, torture and rape as crimes against humanity as part of systematic attack directed against unarmed civilians as specified 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 said accused persons have incurred liability under section 4(1) of the Act.

Adjudication of charge no. 02

[Abduction, confinement, torture, murder and other inhumane acts at village Chingra, Police Station Keshobpur, District Jessore]

194. Summary charge: That in 1971 one day in the mid of Bangla month Sraban [1378 BS] at about 10.00 A.M. in the Gadi Ghar [business office] of Muslim League leader Munshi Salimuddin of Chingra bazaar, accused Md. Sakhawat Hossain

along with other 25/30 Razakars convened a meeting where accused Md. Sakhawat Hossain delivered a inciting speech before the people present in that meeting uttering that the supporters and activists of Awami League and people of Joy Bangla and supporters of the liberation war were 'Kafer and Monafek' and they had to be killed after finding them out.

195. Thereafter, in the mid of Bangla month Bhadra [1378 BS] in 1971 accused Md. Shakhawat Hossain, Md. Ibrahim Hossain alias Ghungur Ibrahim, Md. Billal Hossain Biswas, Sheikh Mohammad Mujibur Rahman alias Mujibur Rahman, Md. A. Aziz Sardar son of late Ful Miah Sardar, Abdul Aziz Sardar son of late Ahmmad Sardar, Kazi Ohidul Islam alias Kazi Ohidus Salam, Md. Lutfor Morol[died during trial], Md. Abdul Khaleque Morol and other 8/9 unknown Razakars raided the house of freedom-fighter Chandtulla Gazi [martyr] to apprehend him, but at that time he was not present in his house. Then the above mentioned accused persons and their other accomplice Razakars having plundered set fire to two dwelling houses of said Chandtulla Gazi. At that moment the wife of Chandtulla Gazi having taken her one and a half year old son Atiar, who was crying in her lap, touched the legs of accused Md. Sakhawat Hossain and requested him not to plunder and set their houses on fire. But accused Md. Sakhawat Hossain kicked her down along with her baby son Atiar, and as a result they were

thrown down on a wooden cot and Atiar was seriously injured that resulted in his death after 17 days.

196. Subsequently, on 28 Bangla month Ashwin [1378 BS] in 1971 at about 11.00/11.30 A.M. the above mentioned nine accused persons and other 10/15 unknown Razakars again raided the house of said Chandtulla Gazi [martyr] and then he luckily escaped from the house and went into hid inside a bush to the northern side of his house. But the above mentioned accused persons along with their accomplice Razakars having brought Chandtulla Gazi out from the that bush confined him in Chingra Razakar camp for four days and in captivity he was mercilessly tortured physically and on 1 Bangla month Kartik in 1971 at about 6.00 A.M. he was killed by rifle shot of accused Md. Sakhawat Hossain on the bank of Kapatakkha river and his dead body was left there.

197. Thereby accused (1) Md. Sakhawat Hossain (2) Md. Ibrahim Hossain alias Ghungur Ibrahim (3) Md. Billal Hossain Biswas (4) Sheikh Mohammad Mujibur Rahman alias Mujibur Rahman (5) Md. A. Aziz Sardar son of late Ful Miah Sardar (6) Abdul Aziz Sardar son of late Ahmmad Sardar (7) Kazi Ohidul Islam alias Kazi Ohidus Salam, (8) Md. Lutfor Morol [died during trial], and (9) Md. Abdul Khaleque Morol are charged for participating, aiding, abetting, facilitating, incitement and for complicity in the commission of offences of abduction, confinement , torture, murder

and other inhumane acts [plundering, arson, etc.] as crimes against humanity as part of systematic attack directed against unarmed civilians as specified in section 3(2)(a)(f)(g)(h) of the Act of 1973 which are punishable under section 20(2) of the said Act for which the above mentioned nine accused persons have incurred liability under section 4(1) of the Act.

Evidence of Witnesses Presented

198. Prosecution adduced and examined 04[four] witnesses [P.Ws. 01, 02, 03 and 04] in support of this charge. Before we enter the task of evaluation of evidence let us first see what they have testified on oath before the Tribunal.

199. P.W.01 Gaziur Rahman [62] is the son of martyr Chandtulla Gazi of village Chingra under Police Station Keshobpur of District Jessore. In 1971 P.W.01 was 17 years old. He stated that his father Chandtulla Gazi was the president of Sagardari Union Awami League in 1971.

200. Before narrating the facts relevant to the event of killing his father P.W.01 stated that in the mid of Bangla month Sraban in 1971 at about 10:00 A.M. a meeting held at the shed of Muslim League leader Munshi Salimuddin at Chingra bazaar was attended by accused Md. Sakhawat Hossain and 30/40 Razakars where it was announced that the pro-Awami League people and the people who chanted 'Joy Bangla' slogan were '*Kafers*', *Monafeks*' and

they would be liquidated on hunting. At that time he [P.W.01] was sitting inside a shop in Chingra bazaar and overheard the speech delivered in the meeting. Accused Md. Sakhawat Hossain asked his accomplice Razakars to keep eyes on the ferry ghats which freedom- fighters often used for their movement.

201. P.W.01 next stated that on ending the meeting accused Md. Shakawat Hossain and his associates knew from him [P.W.01] the way to the '*Dhandia Kheya ghat*' and he [P.W.01] accompanied them to the '*kheya ghat*' and therefrom they moved to Krishnanagar *kheya ghat* and then on the way back therefrom accused Md. Sakhawat Hossain wanted to know from him who the president of the local Awami League was. He did not know, P.W.01 replied and then they leaving him at Chingra bazaar moved towards Chingra Razakar camp set up at that bazaar.

202. In respect of the fact relevant to the principal event of attack, P.W.01 stated that in the mid of Bangla month Bhadra in 1971 at about 10:00/10:30 A.M. Razakar Sakhawat Hossain accompanied by 20/22 cohort Razakars including accused Ibrahim, Khaleque, Lutfor[died during trial], Abdul Aziz son of late Ful Sardar, Abdul Aziz son of late Ahmmad Sardar, Mujibur Rahman, Billal and Ohidus Salam went to Chingra bazaar searching for his [P.W.01] father, and failing to find him out there, they came to their house and detained his [P.W.01] cousin Momin Gazi and accused Ibrahim

tortured him as he could not tell anything about his[P.W.01] father's whereabouts and then the Razakars looted their house and set it on fire on order of accused Md. Sakhawat Hossain. He [P.W.01] witnessed the incident from behind a bush at the northern side of their house. When his[P.W.01] mother requested accused Sakhawat Hossain not to torch their house, he kicked her and his[P.W.01] 18-month-old brother Atiar fell off his mother's lap and thus three ribs of his brother[Atiar] were broken and he eventually died after 17 days due to lack of treatment.

203. P.W.01 further stated that on the 28th of Ashwin at about 11.00 / 11.30 A.M., accused Sakhawat Hossain and his accomplices already he [P.W.01] named along with 15/ 20 Razakars, besieged their house and with this his father went into hid inside a bush northern side of their house and he[P.W.01] as well went into hid inside a bamboo bush at the west side of their house. The Razakars on search detained his father and dragged him out of the bush and took him away on forcible capture to Chingra Razakar camp tying him up with a '*gamsa*'. He [P.W.01] saw it from the bamboo bush, P.W.01 stated. His father was subjected to inhumane torture by the accused Razakars during his 3/4 days captivity at the Razakar camp.

204. P.W.01 finally stated that afterwards on the first day of Bangla month Kartik in 1971 at about 06:00 A.M. the accused

Razakars and their accomplices brought his father on the bank of river Kapatakkha where accused Sakhawat Hossain himself gunned him down to death. On the same day he [P.W.01] heard it from the locals when he went to Chingra bazaar. Then on request of Moulana Fazlur Rahman to accused Sakhawat Hossain his father's dead body was handed over to them and they buried it. P.W.01 also stated that they later on learned the act of causing torture to his [P.W.01] father [Chandtulla Gazi] at the Razakar camp and also killing him from Nur Uddin who was also kept detained there and subsequently got released.

205. In cross-examination P.W. 01 stated that they did not sue in relation to the event of killing his father and brother, after independence, that Chingra Razakar camp was under no.2 Sagardari Union and was about half kilometre far from their house. P.W 01 admitted that in 1971 five persons including two brothers of Ajihar Morol, one brother of Mujibur Rahman and father of Aziz Sardar were killed but denied that they were so killed by his[P.W.01] father with the aid of underground activists or the relatives of those five persons afterwards killed his [P.W.01] father to take revenge.

206. P.W.01 in reply to question put to him stated that his father's[Chandtulla Gazi] name has been enlisted as a martyr freedom- fighter and they as his family members get allowance,

that Chingra Razakar camp was about 100 cubits far from the river Kapatakkha, that Atiar's [victim] mother is still alive but she however cannot speak and has become physically challenged. P.W.01 denied the suggestions put to him that he testified falsely and being tutored against accused Sakhawat Hossain and other accused persons and that he did not hear the event of causing torture to his father and killing him from Nur Uddin.

207. P.W.01 on cross-examination done on behalf of accused Md. Lutfor Morol [died during trial] and three absconded accused persons stated that there had been 50/60 Razakars from Sagardari Union, in 1971, that Kazi Rafiqul Islam was the commander of Keshobpur freedom-fighters, that he did not go to Chingra Razakar camp to see his father detained there, but his brother Fazlur Rahman [P.W.02] had gone there. P.W.01 denied the suggestion put to him that hiding the real cause of his father's death he testified falsely and being tutored.

208. P.W.02 Fazlur Rahman Gazi [60] is another son of martyr Chandtulla Gazi, the victim of the event narrated in the charge framed. In 1971 he was 15/16 years old. He stated that his father Chandtulla Gazi was the president of no.2 Sagardari Union Awami League.

209. P.W.02 testified that in the mid of Bangla month Bhadra at about 10:00/10:30 A.M. a group of 15/20 Razakars accompanied by

accused Sakhawat Hossain, the commander of Chingra Razakar camp and his accomplice Razakars accused Ibrahim Hossain, Billal, Mujibur, Ohidul, Abdul Aziz son of late Ahmmad Sardar, Abdul Aziz son of late Ful Sardar, Lutfor[died during trial], Khaleque came to their house and started searching of his[P.W.02] father when he was lying on the veranda and then he being feared went to his step mother Ayesha Begum as accused Ibrahim kicked him. The Razakars looted their house and set it on fire as they failed getting his father available in the house. When his[P.W.02] step mother requested accused Sakhawat Hossain not to torch their house, he kicked her and with this his[P.W.02] step brother Atiar fell off his mother's lap and thus three left ribs of his brother[Atiar] were broken and eventually , for the reason of injury he sustained, died after 17 days due to lack of treatment.

210. In respect of taking away his father on forcible capture P.W.02 stated that on 28th day of Bangla month Ashwin in 1971 at about 11.00 / 11.30 A.M., a group of 15/20 Razakars accompanied by accused Sakhawat Hossain, the commander of Chingra Razakar camp and his accomplice Razakars accused Ibrahim, Billal, Mujibur, Ohidul, Abdul Aziz son of late Ahmmad Sardar, Abdul Aziz son of late Ful Sardar, Lutfor[died during trial] and Khaleque besieged their house and started searching of his father when his father went into hid inside a bush at the northern side of their

house. At that time he [P.W.02] had been at their house. The Razakars got his father apprehended and dragged him out of the bush and took away to Chingra Razakar camp which he saw standing beside the mud wall of their house. He knew the Razakars beforehand as they were the residents of their locality.

211. P.W.02 further stated that about two hours after his father was taken away to Chingra Razakar camp he went there taking meal for his father detained there. He found his father and another detainee Nur Uddin there in bleeding condition. He [P.W.02] also stated that Chingra Razakar camp was comprised of Tahshil Office, Union Parishad Office and the Primary School situated at the bazaar. His father and Nur Uddin were kept detained Primary School part of the Razakar camp.

212. P.W.02 then stated that on the following day he again at about 12:00 P.M. went to the Razakar camp taking meal with him for his father when he was resisted and assaulted by the Razakars and then he returned back home. His father was kept detained there for four days where he was subjected to inhumane torture and then in the early morning of the 1st day of Kartik in 1971 accused Sakhawat Hossain along with other accused persons he already named and their accomplice Razakars took his father on the bank of river Kapatakkha where accused Sakhawat Hossain shot his father to death.

213. P.W.02 also stated that later on they heard the event of killing his father from the locals at Chingra bazaar. They got his father's dead body on request of Moulana Fazlur Rahman made to the accused Sakhawat Hossain and they buried it at their house. They also heard the incident of causing torture to and death of his father from detainee Nur Uddin after his release from the Razakar camp.

214. In cross-examination, P.W.02 expressed ignorance about the name of accused Sakhawat Hossain's father. He stated that he first saw accused Sakhawat Hossain in 1971, that he could not recollect the fathers' names of accused Billal Hossain, Kazi Ohidul Islam, Abdul Khaleque Morol, Ibrahim Hossain and Sheikh Mohammad Mujibur Rahman. P.W.02 in reply to question put to him stated that in 1971 Aminuddin Master was the commander of Keshobpur Thana Razakar Bahini. He expressed his ignorance as to how many days after the meeting was held by accused Sakhawat Hossain in the Bangla month Sraban Chingra Razakar camp was set up. P.W.02 stated in response to question put to him that in 1971 Razakars had killed freedom-fighters including Khaleque, Doulat Biswas and his [P.W. 02] father Chandtulla Gazi. Razakars were in black dress when they came to their house. Chingra Razakar camp was about one kilometre far from their house. P.W.02 denied the suggestions put to him that his father was killed by the relatives of

five persons who were killed earlier at the instance of his [P.W.02] father and that his step brother Atiar's death was not caused by any injury he testified or he died of pneumonia or some other disease. P.W.02 also denied the suggestions that the accused persons were not the members of Razakar Bahini and were not involved in the killing of his father and that he testified falsely and being tutored,

215. P.W.03 Md. Nur Uddin Morol [73], a freedom-fighter is a resident of village Chingra under Police Station Keshobpur, District Jessore. In 1971 he was associated with Awami League's politics. He studied up to Class X.

216. P.W.03 stated that at the end of Bangla month Asarh[mid of July] in 1971 he along with Chandtulla Gazi, the then president of Sagardari Union Awami League, went to Bongaon, India to join the war of liberation where he received 18 days' training in youth camp. He after the training he received there joined the war of liberation in Hakimpur under Sector No. 8. Then on 25th day of Bangla month Ashwin in 1971 he came home to meet his parents, being accompanied by Chandtulla Gazi.

217. In respect of his being in captivity along with Chandtulla Gazi at the Razakar camp, P.W.03 testified that the Razakars of Chingra Razakar camp became aware of their coming home and thus on 28th day of Ashwin in 1971 at about 07:00 A.M. Razakars of the said camp accused Mujibur Rahman, Akram Hossain, Abdul

Khaleque, Lutfor[died during trial], Billal, Sakhawat Hossain and their 10/12 cohort Razakars besieging their house apprehended him[P.W.03] and forcibly picked him up and took him to Chingra Razakar camp where he was subjected to torture. The Chingra Razakar camp consisted of Primary School, Tahshil Office and Union Council Office which were adjacent to each other. He [P.W.03] was kept detained at the Primary School segment of the camp.

218. P.W.03 went on to state that on the day he was taken to the Razakar camp, at about 11:00 A.M. /12:00 P.M. Razakars apprehended Chandtulla Gazi too and brought him at the Razakar camp and had kept him detained at Primary School segment of the camp. The Razakars keeping them detained there tortured them to know about their arms and fellow freedom- fighters. At about 01:00 P.M. on the day they were taken to the Razakar camp Fazlur Rahman, the younger son of Chandtulla Gazi came there to provide meal for his father but Razakar Mashiar turned him out therefrom.

219. In respect of the event of killing detained Chandtulla Gazi P.W.03 stated that on 01 Kartik, 1971 at about 06:00 A.M. accused Sakhawat Hossain, co-accused persons and Razakars took Chandtulla Gazi on the bank of river Kapatakkha from the Razakar camp and then accused Sakhawat Hossain himself shot Chandtulla Gazi to death. He [P.W.03] saw this event through the window of

the camp [P.W.3 became emotion choked and started shedding tears at this stage of his testimony]. On the same day at about 10:00/11:00 A.M he was taken to Keshobpur Girls' High School from the Razakar camp and was kept detained there. Abdul Aziz[now dead], the then Union Parishad Chairman requested Aminuddin Master, the Razakar commander of Keshobpur Police Station, for his[P.W.03] release. And with this he was released from the camp after giving a bond that he would not work against Pakistan.

220. P.W.03 then stated that on release, he first came to the house of Ershad Gazi[now dead] at Keshobpur bazaar morh and on the following day he came to his own house with the help of Abdul Aziz and received medical treatment of local doctors. After he got a bit cured he disclosed the event he experienced including the killing of Chandtulla Gazi to Gaziur Rahman[P.W.01], Fazlur Rahman[P.W.02], the sons of Chandtulla Gazi and Momin Gazi[P.W.04] when they came to his [P.W.03] house.

221. In cross-examination on behalf of accused Md. Lutfor Morol[died during trial], Ibrahim Hossain [absconded], Sheikh Md. Mujibur Rahman [absconded] and Md. Aziz Sardar son of late Ful Miah Sardar P.W.03 stated that he received training at the camp in India commanded by Captain Shafiullah and Major Manjur was the commander of Sector No.8 and that he knew the freedom-fighters

commander Kazi Rafiqul Islam of village Gobindapur. P.W.03 stated that he could not recall the number of Razakar camps existed in Keshobpur Police Station, that he could not say the names of fathers of accused Sheikh Md. Mujibur Rahman and Lutfor Morol[died during trial]. P.W.03 denied the suggestions put to him that the accused Md. Mujibur Rahman and Lutfor Morol[died during trial] were not Razakars and that what he testified implicating these accused persons was untrue and tutored. Defence, as it appears, however does not dispute the act of detaining P.W.03 and Chandtulla Gazi at Chingra Razakar camp and the event of killing Chandtulla Gazi as has been testified by P.W.03.

222. On cross-examination by accused Md. Sakhawat Hossain, Md. Billal Hossain, absconded accused Abdul Aziz Sardar son of late Ahmmad Sardar, Kazi Ohidul Islam and Md. Abdul Khaleque Morol P.W.03 stated that he could not say the name of accused Md. Sakhawat Hossain's father, that he saw Md. Sakhawat Hossain around their locality even before the war of liberation. He [P.W.03] could not recall who the Razakar commander of Jessore District was. Accused Md. Sakhawat Hossain was the Razakar commander of No.2 Sagardari Union. In reply to question put to him P.W.03 stated that in 1971 Razakars had killed many other civilians besides Chandtulla Gazi and they were Hasan, Patu, one 15/16 years old boy who were killed at Chingra Razakar camp.

P.W.03 also stated that he could not recognise the other Razakars excepting those he named while they came to their house and apprehended him. One boy was also kept detained at Chingra Razakar camp when he [P.W.03] and Chandtulla Gazi were kept there in captivity. On 06 December 1971 the freedom-fighters had attacked the Chingra Razakar camp and the river Kapatakkha was 50 cubits far towards south from this camp. P.W.03 denied the suggestions put to him that Razakars did not kill Chandtulla Gazi and some other people out of revenge had killed him and that what he testified implicating these accused persons was untrue and tutored.

223. P.W.04 Momin Gazi [70], a nephew of Chandtulla Gazi is a direct witness to the event of his uncle Chandtulla Gazi's capture and detention. In respect of Chandtulla Gazi's killing P.W.04 is a hearsay witness. Earlier, Chandtulla Gazi's two sons Gaziur Rahman and Fazlur Rahman Gazi, and freedom- fighter Nur Uddin Morol gave testimonies implicating the accused in the killing.

224. P.W.04 stated that in the middle of the Bangla month of Bhadra in 1971 at about 10.00 / 10.30 A.M., accused Razakar Sakhawat Hossain, along with the Razakars accused Ibrahim, Billal Hossain, Aziz son of Ahmmad Sardar, Aziz son of Ful Sardar, Khaleque, Lutfor[died during trial], Mujibur and Ohidul and 14/15 other Razakars came to their house and took him to his

uncle's[Chandtulla Gazi] house to pick the latter up. Failing to find Chandtulla Gazi, accused Ibrahim banged him [P.W. 04] and wanted to know about his uncle's whereabouts and at one stage, he [P.W.04] escaped and hid in a bush near his uncle's house. At that time his cousin brother Fazlur Rahman [P.W.02] was lying at the terrace of his uncle's house, P.W.04 added.

225. P.W.04 further stated that he saw, remaining in hiding inside the bush, the Razakars looting and torching his uncle's house. When he came out from the bush, he saw his aunt Ayesha Begum crying carrying his cousin Atiar in her arms. His[P.W.04] aunt told him that when she requested accused Sakhawat Hossain to stop the torching, accused Sakhawat Hossain kicked her and thus three ribs of his cousin Atiar were broken as her aunt fell on the ground due to the attack and Atiar died after 17 days due to lack of treatment.

226. P.W.04 next testified that on the 28th of Ashwin in 1971 at about 11:00/11:30 A.M. he saw the accused Sakhawat Hossain and other accused persons along with 15/20 Razakars coming towards the house of Chandtulla Gazi and with this he [P.W.04] went into hid inside the bush west to the house and Chandtulla Gazi too went into hid inside a bush north to his house. He[P.W.04] remaining inside the bush saw the accused Sakhawat Hossain and his cohorts dragging his uncle Chandtulla Gazi out of the bush and tying him up took away to Chingra Razakar camp. P.W.04 stated that he

could recognise the Razakars he named as he [P.W.04] and they [Razakars] belonged to same locality and he thus knew them beforehand.

227. P.W.04 also stated that the Razakars tortured Chandtulla Gazi keeping him detained at the Chingra Razakar camp for four days and afterwards on 01 Kartik in 1971 at about 06:00 A.M. on instruction of accused Md. Sakhawat Hossain, Chandtulla Gazi was taken on the bank of river Kapatakkha where accused Sakhawat Hossain himself gunned him down to death. On the same day a shopkeeper of his locality told him about the killing of his uncle and he then disclosed it to his cousin Gaziur Rahman and Fazlur Rahman. Their neighbour Fazlur Rahman requested accused Sakhawat Hossain allowing them to get the dead body of Chandtulla Gazi and then they brought the dead body and buried it at their house.

228. P.W.04 also stated that few days later, they learnt the event also from one Nur Uddin Morol [P.W.03], a co-detainee of Chandtulla Gazi at the Chingra Razakar camp when he got released therefrom.

229. On cross-examination by accused Md. Sakhawat Hossain, Md. Billal Hossain, absconded accused Abdul Aziz Sardar son of late Ahmmad Sardar, Kazi Ohidul Islam and Md. Abdul Khaleque Morol P.W.03 stated that Aminuddin Master was the Keshobpur

Thana commander of Razakar Bahini, that he could not say the fathers' name of accused Md. Sakhawat Hossain, Billal Hossain, Abdul Khaleque and Kazi Ohidul Islam.

230. P.W.04 in reply to question put to him by the defence stated that in 1971 there existed three Razakar camps including Chingra bazaar camp in the locality under Keshobpur Police Station. P.W.04 admits that in 1971 five persons were killed in one day in their locality but he could not say who committed it. P.W.04 denied the suggestion put to him by the defence that the relatives of those five persons who were killed in one day had killed Chandtulla Gazi out of revenge. P.W.04 stated that in 1971 on 28 Ashwin his uncle Chandtulla Gazi returned back home from India and on that day at about 11.00/11:30 A.M. he[P.W.04] had occasion to meet him and that accused Sakhawat Hossain was the Razakar commander of their Union. P.W.04 denied the suggestion that the accused persons were not Razakars and what he testified was untrue and tutored.

231. In cross-examination on behalf of accused Md. Lutfor Moral[died during trial], Ibrahim Hossain [absconded], Sheikh Md. Mujibur Rahman [absconded] and Md. Aziz Sarder son of late Ful Miah Sardar P.W.03 stated that his uncle Chandtulla Gazi was a freedom- fighter and that there had been no other's house to the east and north to the house of Chandtulla Gazi. P.W.04 expressed ignorance about the names of accused persons' fathers. P.W.04

denied the defence suggestion that these accused persons did not belong to Razakar Bahini and were not involved with the killing of Chandtulla Gazi and that what he testified was untrue and tutored.

Finding with Reasoning on Evaluation of Evidence

232. Ms. Rezia Sultana, the learned prosecutor submitted that prosecution relied upon P.W.01, P.W.02, P.W.03 and P.W.04. P.W.01 and P.W.02 are the sons of the victim and P.W.04 is the nephew of the victim. They observed how the victim Chandtulla Gazi was taken away to the Razakar camp at Chingra bazaar on forcible capture. P.W.03, a co-freedom-fighter of the victim testified the facts relevant to detention, causing torture and killing Chandtulla Gazi as he [P.W.03] had been also in confinement at the same Razakar camp. Defence could not impeach the testimony of those witnesses made on material particular in any manner. Rather some pertinent relevant facts have been re-affirmed in their cross-examination.

233. The learned prosecutor next submitted that inciting speech full of hatred delivered by the accused Md. Sakhawat Hossain in public few days before the event of attack took place was closely linked to the criminal acts carried out in accomplishing the crimes. The victim and P.W.03 were freedom-fighters and this was the reason of causing their capture.

234. On contrary, Mr. Abdus Sattar Palwan, the learned defence counsel for the accused Md. Sakhawat Hossain, Md. Billal Hossain Biswas and three others [absconded], submitted that Chandtulla Gazi, the father of P.W.01 and P.W.02 was not killed at all; that the prosecution failed to prove this charge; that Chandtulla Gazi was not the President of Sagardari Awami League in 1971 nor he was a freedom-fighter; that P.W.01 made exaggerated statement which inspires no credence. Testimony of prosecution witnesses tendered on the event alleged in charge no.02 suffers from glaring inconsistencies which create reasonable doubt as to the manner of commission of alleged event and complicity of the accused persons therewith. Benefit of such doubt goes in favour of the defence.

235. The learned defence counsel went on to submit that no attack[first] was allegedly launched directing Chandtulla Gazi's house when the victim was allegedly found not available. Testimony of P.W.01, P.W.02 and P.W.04 tendered in this regard creates reasonable doubt. The prosecution witnesses had no reason of knowing the accused persons and they have testified being tutored. Testimony of P.W.02 is inconsistent to that of P.W.03 as P.W.03 did not state that P.W.02 went to the Chingra Razakar camp for twice to meet his father Chandtulla Gazi, a detainee.

236. Mr. Abdus Sukur Khan, defending the three absconded accused Md. Ibrahim Hossain alias Ghungur Ibrahim, Sheikh

Mohammad Mujibur Rahman alias Mujibur Rahman and M.A. Aziz son of late Ful Miah Sardar as State defence counsel attacking credibility of the witnesses examined for the purpose of proving this charge in 1971, P.W.02 was minor in 1971, and thus his going to Chingra Razakar camp carrying meal for his detained father, as stated by him is not believable. P.W.01 and P.W.02 are the sons of Chandtulla Gazi. But they have not made it clear as to when their father came back home from India and thus the testimony of P.W.03 in this regard stands uncorroborated. Prosecution failed to prove complicity and participation of these three absconding accused persons with the commission of alleged crimes by evidence of reliable and competent witnesses. However, the learned defence counsel did not dispute the event narrated in this charge.

237. This charge chiefly narrates the attack that resulted in Chandtulla Gazi's abduction, confinement, torture and death by gun shot on the bank of the river of Kapatakkha. In order to materialize the victim Chandtulla Gazi's forcible capture the group of Razakars accompanied by the accused persons arraigned had launched attack twice at his house, the charge allegedly narrates. One month before they had launched attack directing Chandtulla Gazi's house accused Md. Sakhawat Hossain delivered a inciting speech in a meeting convened by local Razakars, terming the supporters of Awami

League and people of Joy Bangla of the war of liberation as 'Kafer and Monafek' and provoked to kill them after finding them out, the charge framed also arraigns it presumably to portray culpable conduct and mindset the accused Md. Sakhawat Hossain, a man of position of authority had shown even prior to the attack launched which relates to forcible capture of Chandtulla Gazi, a freedom-fighter.

238. First attack was carried out during the mid of Bhadra in 1971 when Chandtulla Gazi could not be found available and thus the attackers allegedly set his houses on fire and in conjunction with this attack accused Md. Sakhawat Hossain allegedly kicked down the wife of Chandtulla Gazi when she requested not to set their house ablaze and with this she fell down with her baby son Atiar that resulted severe injury and eventually Atiar died 17 days after this event.

239. Second attack allegedly happened on 28th Ashwin in 1971 directing the house of Chandtulla Gazi wherefrom he was captured and taken away to Chingra Razakar camp. He was kept detained there for four days. Then in one early morning he was taken on the bank of river Kapatakkha when the accused Md. Sakhawat Hossain shot him to death, the charge framed arraigns.

240. Both the attacks as narrated in the charge framed happened on two distinct dates. But those are linked to each other as the

intention of the these attacks was to forcible picking up Chandtulla Gazi who was a freedom- fighter and in accomplishing the plan the group of Razakars in conjunction with the attack that happened in the mid of Bhadra the baby son Atiar of Chandtulla Gazi sustained severe injury as he was on his mother's lap when she fell down being kicked down by accused Md. Sakhawat Hossain. Atiar eventually died later on due to injuries sustained.

241. Thus, this charge involves killing of Chandtulla Gazi, a freedom-fighter. Razakars under the leadership of accused Md. Sakhawat Hossain had carried out criminal activities that eventually resulted in brutal killing of Chandtulla Gazi who was kept in four days' captivity at Chingra Razakar camp, the charge framed alleges. The event narrated in this charge once again reflects notoriety of Razakar Bahini, an auxiliary force formed to collaborate with the Pakistani occupation army in 1971. However, we need to determine the commission of crimes alleged and participation and complicity of the accused persons therewith, on appraisal of evidence tendered. It is to be noted that out of nine[09] accused persons indicted in this charge one Md. Lutfor Morol died in prison , during trial and as such, proceedings against him stood abated.

242. Prosecution, in view of arraignment brought in the charge framed, requires proving that –

- (i) Accused Md. Sakhawat Hossain delivering inciting speech terming the supporters of the war of liberation as 'Kafer and Monafek' provoked the Razakars, the audience to liquidate them after finding them out ;
- (ii) Launching attack directing Chandtulla Gazi's house during mid of Bhadra and criminal activities carried out by accused Md. Sakhawat Hossain and their accomplices;
- (iii) Chandtulla Gazi was taken away forcibly to Chingra Razakar camp by launching attack on 28th Ashwin in 1971 directing his house by the group of Razakars accompanied by accused Md. Sakhawat Hossain and other accused persons;
- (iv) Captured Chandtulla Gazi was kept confined for four days at the Chingra Razakar camp;
- (v) Chandtulla Gazi was subjected to cruel torture in captivity;
- (vi) The reason of forcible capture and keeping Chandtulla Gazi detained at Razakar camp; and
- (vii) How and where Chandtulla Gazi's death was caused.

243. Prosecution, intending to prove this charge, adduced 04[four] witnesses who have been examined as P.W. 01, P.W.02, P.W.03 and P.W. 04. Of these four witnesses P.W.01 and P.W.02 are the sons of martyr Chandtulla Gazi and they allegedly witnessed the act and conduct of the accused persons in abducting their father. Naturally, they had no occasion to observe the causing torture and death to their father. P.W.03 was a co-detainee of the victim at the same Razakar camp. He] P.W.03] allegedly was kept

detained with the victim Chandtulla Gazi and as such he is a vital witness, prosecution claims. P.W.04 a nephew of Chandtulla Gazi, is a direct witness to the event of his uncle Chandtulla Gazi's capture and detention.

244. In war time situation it may not always be practicable to observe all the criminal activities carried out in systematic manner directing civilian population by the group of attackers. The event alleged ended with the killing the detainee Chandulla Gazi. He was kept detained at Chingra Razakar camp. The first phase of the attack involved the act of his forcible capture and it happened in day time by besieging his house. Naturally, despite being panicked the sons and others could observe the act and conduct of the attackers in accomplishing abduction of the victim. Thus their testimony so far as it relates to abduction of the victim carries value.

245. The prosecution's burden in every case involving the offences of crimes against humanity under the Act of 1973 includes the requirement to prove that the offence was committed and also that its commission was facilitated, contributed and abetted by the accused persons by their act or conduct forming part of attack or physical participation. The defence does not deny the commission of the offence alleged, but asserts that the prosecution has not been able to prove that the accused persons were the persons who

facilitated and participated to the commission of the offence or was involved with its perpetration in any manner.

246. Therefore, the primary and core issue pertains to the involvement of the accused persons, who are said to be the perpetrators forming the group of attackers and who by which act or conduct participated and facilitated or substantially assisted the materialization of the entire collective criminal mission and purpose thereof.

247. P.W.01 and P.W.02 are the sons of the victim. They have testified how their father was forcibly taken away from their house. Their consistent evidence demonstrates that the victim Chandtulla Gazi was taken away to Chingra Razakar camp.

248. It is also evinced from the evidence of P.W. 01 Gaziur Rahman, the son of the victim that on the mid of Bangla month Bhadra [1971] prior to abduction of the victim, accused Ibrahim, Khaleque, Lutfor[died during trial], Abdul Aziz son of late Ful Sardar, Abdul Aziz son of late Ahmmad Sardar, Mujibur Rahman, Billal and Ohidus Salam accompanied by 20/22 Razakars made attempt to capture Chandtulla Gazi coming to their house and detained his[P.W.01] cousin Momin Gazi and accused Ibrahim tortured him as he could not tell anything about his[P.W.01] father's whereabouts and then the Razakars looted their house and set it on fire on order of accused Md. Sakhawat Hossain.

249. The above version remained unimpeached. It thus depicts that accused Md. Sakhawat Hossain too was also with the group and on failure to find Chandtulla Gazi available the Razakars on tacit approval of accused Md Sakhawat Hossain destructed the victim's house by looting and setting it on fire. It gets corroboration from the evidence of P.W.02 Fazlur Rahman Gazi, another son of the victim as he [P.W.02] had been at the house at the relevant time and thus could see the activities carried out by the attackers, the Razakars.

250. It also transpires from the evidence of P.W.01 and P.W.02, the sons of the victim Chandtulla Gazi that when their step mother requested accused Md. Sakhawat Hossain not to torch their house, he kicked their mother and with this their step brother Atiar fell off his mother's lap and thus three left ribs of their brother [Atiar] were broken and eventually, for the reason of injury he sustained, died after 17 days due to lack of treatment. Accused Md. Shakawat Hossain's act and conduct formed part of attack directing the unarmed civilian population. The act of accompanying the group by the accused Md. Sakhawat Hossain itself consisted of practical assistance, encouragement or moral support to the principal offenders of the crime.

251. The above version remained unshaken. Defence could not bring anything by cross-examining P.W.01 and P.W.02 which may

reasonably cast doubt as to the truthfulness of this piece of evidence tendered by them. The narration of P.W.01 and P.W.02 as above demonstrates ruthless aggressive attitude of the accused Md. Sakhawat Hossain and his accomplice Razakars towards the pro-liberation civilians. It is quite clear that their target was Chandtulla Gazi, a freedom-fighter. But during their first attempt of attack they did not get him available and such failure made them culpably maddened to carry out destructive activities that resulted in looting, arson and causing cruel treatment to inmates of the victim.

252. Additionally testimony of P.W.01 and P.W.02 indisputably proves too that accused Md. Sakhawat Hossain was actively with the group formed of Razakars and he himself physically participated in carrying out criminal acts including vehement assault on their step mother, looting and arson. Besides, his presence at the crime site with the group of Razakars itself had substantial effect to the commission of those crimes as he was in commanding position of his accomplice Razakars. On this score as well, we may safely conclude that on his [accused Md. Sakhawat Hossain] guidance, approval and instruction the entire criminal activities were carried out and thus he too incurred liability as participant. In this regard we recall the observation of the **ICTY** in the case of **Limaj** that--

"In a particular case encouragement may be established by an evident sympathetic

or approving attitude to the commission of the relevant act. For example, the presence of a superior may operate as an encouragement or support, in the relevant sense."

[Limaj et al., (Trial Chamber), November 30, 2005, para. 517]

253. Few days before the event of such attack [mid of Bangla month Sraban in 1971] was carried out intending to get Chandtulla Gazi captured accused Md. Sakhawat Hossain by delivering inciting speech at Chingra bazaar culpably propelled his hostile attitude to the supporters of Awami League and the war of liberation with an announcement to liquidate them terming them 'Kafers', 'Monafeks' as testified by P.W.01. He [P.W.01] was sitting inside a shop in Chingra bazaar and overheard the speech delivered in the meeting. Defence could not impeach it in any manner. It provides a portrayal of accused Md. Sakhawat Hossain's notoriety he had shown in 1971 during the war of liberation, by siding with the Pakistani occupation army.

254. Such provocative and inciting announcement was to further policy and plan of the Pakistani occupation army. It also indeed offers sufficient indication as to his significant position of authority on the Razakars at Sagardari Union under Police Station Keshobpur. As the members of an auxiliary force of the Pakistani occupation army the accused persons under the leadership of the accused Md. Sakhawat Hossain made their stance clear by such inciting speech made in public by accused Md. Sakhawat Hossain.

It significantly imbued his accomplice Razakars in committing criminal acts in systematic manner directing the pro-liberation civilians. Inciting speech of accused Md. Sakhawat Hossain in presence of 30/40 Razakars with an announcement to liquidate the pro-liberation civilians had thus substantial effect on launching first attack to get Chandtulla Gazi abducted, we may conclude it unerringly.

255. Undeniably, effective control requirement is a key factor in determining one's position in an organization. The notion of 'effective control' to prove one's position on a particular group is to be perceived from circumstances of each case. It is to be noted that of course a significant level of authority in position made accused Md. Sakhawat Hossain a person able to insist his accomplice Razakars to commit the crimes he intended. And that it made him able to feel enthused in delivering such inciting speech.

256. The act of delivering infuriating and hate speech in public also proves his leadership and control on the local Razakars. It is also to be noted that an individual is termed as a 'leader' when his activity involves establishing a goal and common purpose by sharing the vision with others so that they will follow or obey him willingly. Leadership is a process whereby an individual influences a group of individuals to achieve a common goal. Leadership is a

process by which a person influences others to accomplish an organizational objective.

257. Naturally his[accused Md. Sakhawat Hossain] speech, in other words, urging to annihilate the pro-liberation civilians terming them 'Kafers and Monafeks' was inciting and provoking and it had substantial effect on launching the attack directing a pro-liberation civilians of the locality. We are thus convinced to conclude that the accused Md. Sakhawat Hossain by his act of making such inciting speech intended to share the intent of the Pakistani occupation army to further their policy and plan.

258. The act of 'incitement' is a step towards the commission of another crime. By making inciting speech an individual, particularly if he is in position, may incur criminal liability even though the crime he intended to bring about does not materialize. It is now settled. The inciting speech the accused Md. Shakhawat Hossain made in public prompted and stimulated his cohort Razakars who attended the meeting.

259. Accused Md. Shakhawat Hossain, in his public speech, termed the supporters of Awami League and the war of liberation as 'Kafers' and 'Monafeks'. It was simply 'hate propaganda'. The essence of the provoking speech delivered by the accused Md. Shakahwat Hossain as testified by P.W.01 was explicitly aimed at

singling out the pro-liberation civilians by launching attack directing them.

260. Accused Md. Sakhawat Hossain who was in leading and commanding position of Sagardari Union Razakar Bahini and the Chingra Razakar camp as well deliberately created an atmosphere conducive to the commission of criminal acts by making such public incitement and thus inspired his cohorts present in the meeting to be engaged in committing crimes directing pro-liberation civilian population. The essence of his above criminal conduct , therefore, was a crucial fact indeed that through it , he rather knowingly contributed to the creation of an atmosphere which encouraged and induced the Razakars to participate in the attack intending to annihilate pro-liberation civilians.

261. Both the P.W.01 and P.W.02, the sons of Chandtulla Gazi testified that their father was the President of Sagardari Union Awami League in 1971. Defence does not dispute it. Name of Chandtulla Gazi has been enlisted as a martyr freedom- fighter and they as his family members get allowance, P.W.01 stated in reply to question put to him by the defence. Potential pro-liberation profile of victim Chandtulla Gazi was the reason of ensuing repeated attack to secure his capture and finally to cause his death by gun shot after keeping detained at Razakar camp for couple of days. It forces us to infer too that the announcement of liquidating pro-

liberation civilians terming them 'Kafers' and 'Monafeks' by delivering inciting speech accused Md. Sakhawat Hossain meant to get watchful and ready to annihilate them by finding them out.

262. We have already got it proved that by launching attack in the mid of Bangla month Bhadra [1971] the accused persons and their accomplices could not find Chandtulla Gazi. But failure of this mission did not make them halted from launching further attack, in continuation of the prior one.

263. P.W.01 Gaziur Rahman stated that on the 28th of Ashwin at about 11.00 / 11.30 A.M., accused Sakhawat Hossain and his accomplices accused persons being accompanied by 15/ 20 Razakars besieged their house and with this his father went into hid inside a bush northern side of their house and he[P.W.01] as well went into hid inside a bamboo bush. P.W.01 is a direct witness to the act of forcible capture of his father victim Chandtulla Gazi and he could see, remaining inside the bush, the Razakars dragging his father out of the bush and took him away on forcible capture to Chingra Razakar camp tying him up with a '*gamsa*'. His father was subjected to inhumane torture by the accused Razakars during his 3/4 days captivity at the Razakar camp---he [P.W.01] heard it later on from Nur Uddin Morol [P.W.03], a co-detainee.

264. P.W.02 Fazlur Rahman Gazi, another son of victim Chandtulla Gazi is a direct witness to the attack that resulted in his

father's abduction. He[P.W.02] too corroborating P.W.01 consistently testified that a group of 15/20 Razakars accompanied by accused Md. Sakhawat Hossain, the commander of Chingra Razakar camp and his accomplice Razakars accused Ibrahim, Billal, Mujibur, Ohidul, Abdul Aziz son of late Ahmmad Sardar, Abdul Aziz son of late Ful Sardar, Lutfor[died during trial] and Khaleque besieged their house, got his father apprehended by dragging him out of the bush and took away to Chingra Razakar camp which he[P.W.02] saw standing beside the mud wall of their house. He knew the Razakars beforehand as they were the residents of their locality.

265. On the same day, in the afternoon P.W.02 went to the Chingra Razakar camp carrying something to eat with him for his detained father when he found Md. Nur Uddin Morol [P.W.03] too detained there. P.W.02 returned back home therefrom as he was resisted and assaulted by the Razakars. However, the fact of going to Chingra Razakar camp as stated by P.W.02 stands affirmed as his brother P.W.01 in reply to defence question stated that he[P.W.01] did not go to Chingra Razakar camp to see his father detained there, but his brother Fazlur Rahman Gazi [P.W.02] had gone there. This piece of testimony of P.W.02 proves it well that captured Chandtulla Gazi was taken to Chingra Razakar camp and

he was kept confined there where Md. Nur Uddin Morol [P.W.03] was his co-detainee.

266. P.W.04 Momin Gazi, a nephew of the victim Chandtulla Gazi is a direct witness to the event of his uncle's forcible capture. His testimony too demonstrates that in conjunction with the first attack, target of the group of Razakars accompanied by the accused persons was his [P.W.04] uncle Chandtulla Gazi. And on failure to find their target available he [P.W.04] was beaten up and at a stage he went into hid wherefrom he could see the criminal activities of assaulting his aunt Ayesha Begum by accused Md. Sakhawat Hossain when she requested to stop torching their house.

267. The above version remained unimpeached and it depicts patently how brutal the accused persons were as they did not remain paused even when they failed to get their target captured. They started destructing the victim's house by torching and assaulting a woman with a baby on her lap. Testimony of P.W.04 so far as it relates to the first day attack intending to cause the victim's capture provides consistent corroboration to that of P.W.01 and P.W.02, the two other direct witnesses.

268. It appears that on the day the second attack was launched by the group of Razakars accompanied by the accused persons P.W.04 had been at his uncle's [victim] house and on sensing their coming he[P.W.04] and Chandtulla Gazi went into hid. He [P.W.04],

remaining inside the bush saw the accused Md. Sakhawat Hossain and his cohorts dragging his uncle Chandtulla Gazi out of the bush and tying him up took away to Chingra Razakar camp. P.W.04 could recognize the accused persons belonging to Razakar Bahini as they belonged to the same locality and he thus knew them beforehand.

269. The above version goes consistently with the testimony of P.W.01 and P.W.02, the two other direct witnesses to the act of abduction of Chandtulla Gazi. The event happened in day time and the P.W.04 knew the accused persons beforehand. Thus, even remaining inside bush it was practicable to observe the acts carried out by the group accompanied by the accused persons. Besides, defence failed to bring anything by cross-examining this P.W.04 that may facilitate creating reasonable doubts as to what he testified on material fact.

270. On cross-examination of P.W.04, it has been re-affirmed that Chandtulla Gazi went to India to join the war of liberation as a freedom-fighter and at a stage he returned back home and accused Md. Sakhawat Hossain was the Razakar commander of their Union. Chandtulla Gazi's co-freedom-fighter P.W.03 Md. Nur Uddin Morol too corroborates it. Indisputably the civilians sided with the war of liberation were the targets of Razakars, the armed members of auxiliary force of the Pakistani occupation army and on getting

information about their arrival they started launching attack to cause their forcible capture and finally they[Razakars and accused persons] got them[Chandtulla Gazi and P.W.03] available and took them away to Chingra Razakar camp on forcible capture where they were kept detained for couple of days.

271. In respect of the act of killing P.W.04 is a hearsay witness. On the day Chandtulla Gazi was killed he heard from a shopkeeper of his locality about the killing of his uncle. Few days later he [P.W.04] also heard the event of killing Chandtulla Gazi from P.W.03 Md. Nur Uddin Morol, a co-detainee when he [P.W.03] got released from the Chingra Razakar camp. His [P.W.04] hearsay testimony gets corroboration from P.W.03. Besides, it transpires that defence does not dispute the fact of keeping the victim detained at the Razakar camp and causing his death by gun shot on the bank of river Kapatakkha. Thus, hearsay evidence of P.W.04 tendered in respect of killing Chandtulla Gazi carries probative value.

272. P.W.03 Md. Nur Uddin Morol, a freedom-fighter, is a resident of village Chingra under Police Station Keshobpur, District Jessore. In 1971 he was associated with Awami League's politics. Presumably, the Razakars apprehending him kept confined at the Razakar camp and detention condition at the camp made him [P.W.03] able to see and observe how Chandtulla Gazi was treated in captivity.

273. At the end of Bangla month Asarh[mid of July] in 1971 he[P.W.03] along with Chandtulla Gazi, the then president of Sagardari Union Awami League, went to Bongaon, India to join the war of liberation where he received 18 days' training in youth camp, P.W.03 testified. Both P.W.03 and Chandtulla Gazi then joined the war of liberation in Hakimpur under Sector No. 8 and on 25th day of Bangla month Ashwin in 1971 he [P.W.03] came home to meet his parents, being accompanied by Chandtulla Gazi.

274. Receiving training at the camp in India commanded by Captain Shafiullah and joining the war of liberation in Hakimpur under Sector No. 8 as testified by P.W.03 has been re-affirmed in cross-examination. Thus, P.W.03 and Chandtulla Gazi were the freedom-fighters and on 25th day of Bangla month Ashwin in 1971 they came to their home in Bangladesh. What happened to them after their returning back home? Both of them were captured and taken away to Chingra Razakar camp.

275. Evidence of P.W.03 demonstrates that the Razakars of Chingra Razakar camp became aware of their coming home and thus on 28th day of Ashwin in 1971 at about 07:00 A.M. Razakars of the Chingra Razakar camp accused Mujibur Rahman, Akram Hossain, Abdul Khaleque, Lutfor [died during trial], Billal, Sakhawat Hossain and their 10/12 cohort Razakars besieging their house apprehended him [P.W.03] and forcibly picked him up and

took him away to Chingra Razakar camp where he was subjected to torture. He [P.W.03] was kept detained at the Primary School segment of the camp.

276. In respect of detaining his [P.W.03] co-freedom fighter it stands proved too from the unimpeached evidence that on the same day and few hours after his [P.W.03] capture Chandtulla Gazi too was brought there and was kept detained with him at the Primary School segment of the Razakar camp. Both of them were subjected to torture by the Razakars when they grilled them to extract information about their fellow freedom-fighters and their arms.

277. The above indisputably proves that Chandtulla Gazi and his fellow freedom- fighter P.W.03 were forcibly captured by launching attack at their respective houses, three days after they returned home and their forcible capture happened on the same day. It also stands proved that at the time of their forcible capture they [P.W.03 and Chandtulla Gazi] were non-combatant, and as such, at the time of launching attack Chandtulla Gazi and P.W.03 were part of civilian population and obviously were entitled to protection as enshrined in the Geneva Convention, 1949. Intention of causing torture to the detainees keeping in detention was to extract information about their fellow freedom-fighters and their arms-it also stands proved.

278. Capturing two unarmed freedom-fighters and keeping them detained at the Razakar camp itself once again proves the level of hostile attitude and arrogance of the members of Razakar Bahini, an auxiliary force, towards the pro-liberation Bengali civilians. Presumably, the Razakars of Chingra camp somehow got information about their return to home and then they, under the leadership of accused Md. Sakhawat Hossain orchestrated plan of attack intending to annihilate them as announced earlier in public meeting by the accused Md. Sakhawat Hossain terming the civilians sided with the war of liberation as 'Kafers and Monafeks.

279. What happened to detained Chandtulla Gazi? Naturally none had occasion to observe and experience it excepting the inmates of the camp and co-detainees as such a detention camp does not allow stranger's access therein. We have already got it proved that Chandtulla Gazi and P.W.03 Md. Nur Uddin Morol were kept confined at the Primary School segment of the Razakar camp. Defence could not shake what has been testified by P.W.03, a co-detainee of the victim, who had fair opportunity of observing even the dying fate of Chandulla Gazi.

280. On totality of evidence tendered we safely conclude that unlawful acts of causing torture in captivity were carried out by the accused Razakars affiliated with the Chingra Razakar camp which was principally operated by accused Md. Sakhawat Hossain to

further the object of terrorizing the innocent civilians, which eventually ended with the brutal killing of Chandtulla Gazi.

281. Evidence of P.W.03 impels to the conclusion that accused Md. Sakhawat Hossain was the principal perpetrator in causing death of detained Chandtulla Gazi by gun shot by taking him on the bank of river Kapatakkha which was closer to the Chingra Razakar camp. P.W.03 could see it through the window of the Razakar camp where he was kept detained at the relevant time. It is also found that at the time of gunning the victim down to death the other accused persons and other Razakars were with the accused Md. Sakhawat Hossain. Remaining present at the execution cite reflects the culpable intent and refers to assistance which made the other accused persons equally liable. The execution phase of the event happened on 01 Kartik, 1971 at about 06:00 A.M, P.W.03 stated. That is the victim was eventually shot to death after keeping him detained at the Chingra Razakar camp for three days—it stands proved too from the evidence of his co-detainee P.W.03.

282. Defence could not controvert the above version. We do not find any earthly reason to disbelieve P.W.03. His testimony which remained unimpeached gets strength also from his demeanour we observed while he was on dock. P.W.03 in narrating the fact of his seeing the brutal killing of his fellow freedom-fighter Chandtulla Gazi became emotion choked and started shedding tears at a stage

of providing testimony before the Tribunal. It adds further credibility of his testimony. Additionally, defence, as it appears, however does not dispute the act of detaining P.W.03 and Chandtulla Gazi at the Chingra Razakar camp and the event of killing Chandtulla Gazi as has been testified by P.W.03.

283. It appears that in reply to question put to him by the defence P.W.03 expressed ignorance about the father's name of accused Md. Sakhawat Hossain. It is to be noted that one is not required to know someone's father's name to prove or justify his claim of knowing that person beforehand. Mere ignorance about accused Md. Sakhawat Hossain's father's name thus does not diminish truthfulness of his [P.W.03] testimony tendered in respect of knowing the accused Md. Sakhawat Hossain. We do not find any rational logic to exclude his testimony merely taking such ignorance into account. P.W.03 however also stated in reply to defence question that he saw Md. Sakhawat Hossain around their locality even before the war of liberation. It has been re-affirmed too in his cross-examination that accused Md. Sakhawat Hossain was the Razakar commander of No.2 Sagardari Union.

284. Chingra Razakar camp transformed into a detention and torture cell—it divulges from the testimony of P.W.03. In reply to defence question put to him P.W.03 stated that in 1971 Razakars had killed many other civilians besides Chandtulla Gazi and they

were Hasan, Patu, one 15/16 years old boy who were killed at Chingra Razakar camp. It rather reaffirms the nature and pattern of recurrent criminal activities carried out at the said Chingra Razakar camp which was under effective control, guidance and command of accused Md. Sakhawat Hossain.

285. It has been suggested to P.W.01 as defence case that in 1971 five persons including two brothers of Ajihar Morol, one brother of Mujibur Rahman [accused] and father of Aziz Sardar [accused] were killed by his [P.W.01] father [Chandtulla Gazi] with the aid of underground activists and the relatives of those five persons afterwards killed his [P.W.01] father [Chandtulla Gazi] intending to take revenge.

286. P.W.01 admitted the killing of those five persons in 1971 but he denied that they were so killed by his [P.W.01] father [Chandtulla Gazi] with the aid of underground activists or the relatives of those five persons afterwards killed his [P.W.01] father [Chandtulla Gazi] to take revenge.

287. First, later part of the defence case lacks specificity. Second, defence could not adduce any evidence, oral or documentary, to substantiate this part of defence case. Third, it has already been found that Chandtulla Gazi and his fellow P.W.03 had been in India for couple of months to undergo training for joining the war of liberation. Thus, absence of any proof whatsoever renders the later

part of the above defence case quite unbelievable, particularly when already it stands proved beyond reasonable doubt that Chandtulla Gazi was taken away to Chingra Razakar camp on forcible capture three days after his return from India and he was kept detained and was subjected to torture at the Chingra Razakar camp and afterwards he was gunned down to death on the bank of the river Kapatakkha which happened on participation of all the accused persons arraigned.

288. In view of above, we conclude it irresistibly that all the accused persons had done the criminal acts not pursuant to their own policy and plan. They were the members of ‘auxiliary force’ which was under command of the Pakistani occupation army, and as such, they had consciously and actively participated to the commission of crimes in systematic manner knowing well about such policy. Thus, their criminal acts constituting the offences were aimed to further the policy and plan of annihilating the pro-liberation Bengali civilians. And it happened to detained Chandtulla Gazi who was a freedom-fighter and a leader of Awami League of local prominence.

289. ‘Participation’ includes both direct participation and indirect participation. It has been observed **by the ICTY Appeals Chamber** in the case of **Kvočka et al.** that-

“.....it is, in general, not necessary to prove the substantial or significant nature

of the contribution of an accused to the joint criminal enterprise to establish his responsibility as a co-perpetrator: it is sufficient for the accused to have committed an act or an omission which contributes to the common criminal purpose."

[Case No. IT-98-30/1-A, Judgment: 28 February 2005, Para-421]

290. All the accused, the members of local Razakar Bahini and affiliated with the camp, were part of collective criminality and they all incurred liability of committing the crime, the murder of Chandtulla Gazi. 'Committing' connotes an act of 'participation', physically or otherwise, directly or indirectly, in the material elements of the crime charged through positive acts, whether individually or jointly with others. It has been observed by the **ICTY Trial Chamber in the case of *Stakic*** that-

".....a crime can be committed individually or jointly with others, that is, there can be several perpetrators in relation to the same crime where the conduct of each one of them fulfils the requisite elements of the definition of the substantive offence."

[Case No. IT-97-24-T, Judgment : 31 July 2003, Para-528]

291. In the light of above principle, act and conduct of all the accused persons as demonstrated particularly from the evidence of co-detainee, a fellow freedom-fighter of Chandtulla Gazi prompt to the conclusion that they had consciously played active and culpable

role in getting Chandtulla Gazi captured, keeping him detained at Chingra Razakar camp and gunning him down to death after his three days' captivity and thereby all the accused persons including the accused Md. Lutfor Morol who died at the fag end of trial [proceeding so far relates to him stood abated by Tribunal's explicit order] participated all the phases of the event of systematic attack that eventually led to Chandtulla Gazi's brutal killing, we are forced to conclude it on appraisal of facts and circumstances unveiled.

292. We reiterate that the crimes committed during the period of war of liberation in 1971 in the territory of Bangladesh were the upshot of part of a 'systematic' attack directed against the unarmed Bengali civilian population. This 'context' itself prompts even a person of common prudence that the offences of 'crimes against humanity' as mentioned in section 3(2)(a) of the Act of 1973 were inevitably the effect of part of widespread or systematic attack.

293. The role all the accused persons had played as the members of local infamous Razakar Bahini in accomplishing the actual crime impels to the conclusion that they made them deliberately associated with the horrific attack knowing the consequence of their acts of extreme notoriety. And it happened under the leadership and command of accused Md. Sakhawat Hossain. The other accused persons consciously made them part of common plan of collective

criminality under control and command of accused Md. Sakhawat Hossain that eventually resulted in killing of Chandtulla Gazi a pro-liberation civilian as already found.

294. The criminal acts we find proved on evaluation of evidence tendered are—**(i)** making inciting and provoking speech in public by accused Md. Sakhawat Hossain **(ii)** following such inciting speech the attackers comprising of members of Chingra Razakar camp had launched attack the victim's house when finding the victim not available they had carried out destructive activities and cruel treatment to inmates of Chandtulla Gazi which was detrimental to fundamental human rights **(iii)** By launching next attack the same group of Razakars had captured the victim and took him away to Chingra Razakar camp **(iv)** on the same day the P.W.03, a co-freedom-fighter of Chandtulla Gazi was also captured and brought to the said Razakar camp where he too was kept confined **(v)** victim Chandtulla Gazi was kept there detained for four days along with P.W.03, and **(vi)** finally the detained victim Chandtulla Gazi was shot to death by taking him on the bank of the river Kapatakkha, adjacent to the said Razakar camp.

295. The criminal acts done as above constituted the offences of abduction, confinement, torture and murder as crimes against humanity as enumerated in section 3(2)(a) of the Act of 1973 for which all the nine accused persons have been arraigned. We have

already noted that due to death in prison, during trial, proceedings against accused Md. Lutfor Morol stood abated, and as such, the other eight accused persons incurred liability for the crimes proved.

296. Active participation and providing substantial contribution on the part of all the eight accused persons in accomplishing the act of abduction, confinement , torture and killing of Chandtulla Gazi have been proved beyond reasonable doubt. All the accused persons had tangible and culpable affiliation with the Chingra Razakar camp and accused Md. Sakhawat Hossain had been in its commanding position.

297. In view of deliberation made above on rational evaluation of the evidence tendered we conclude that it has been proved beyond reasonable doubt that the accused (1) Md. Sakhawat Hossain (2) Md. Billal Hossain Biswas (3) Md. Ibrahim Hossain alias Ghungur Ibrahim (4) Sheikh Mohammad Mujibur Rahman alias Mujibur Rahman (5) Md. A. Aziz Sardar son of late Ful Miah Sardar (6) Abdul Aziz Sardar son of late Ahmmad Sardar (7) Kazi Ohidul Islam alias Kazi Ohidus Salam, and (8) Md. Abdul Khaleque Morol were thus consciously ‘concerned with the entire collective criminality’ the object of which ended with the brutal killing of detainee Chandtulla Gazi which was perpetrated four days after his forcible capture.

298. Therefore, the accused (1) Md. Sakhawat Hossain (2) Md. Billal Hossain Biswas (3) Md. Ibrahim Hossain alias Ghungur Ibrahim (4) Sheikh Mohammad Mujibur Rahman alias Mujibur Rahman (5) Md. A. Aziz Sardar son of late Ful Miah Sardar (6) Abdul Aziz Sardar son of late Ahmmad Sardar (7) Kazi Ohidul Islam alias Kazi Ohidus Salam, and (8) Md. Abdul Khaleque Morol participated, abetted, and substantially contributed and had complicity by their deliberate and culpable act and conduct forming part of systematic attack to the commission of the offences of ‘abduction’, ‘confinement’, ‘torture’ and ‘murder’ as crimes against humanity as enumerated in section 3(2)(a)(g)(h) of the Act of 1973 which are punishable under section 20(2) of the Act for which the accused persons have incurred liability under section 4(1) of the Act.

Adjudication of charge no. 03

[Abduction, confinement and torture of Md. Nur Uddin Morol of Village Chingra under Police Station Keshobpur, District Jessore]

299. Summary Charge: That on 25 Bangla month Ashwin in 1971 [1378 BS] at night being unarmed freedom-fighter Md. Nur Uddin Morol came to see his parents in their house situated at village Chingra under Police Station Keshobpur, District Jessore, and being secretly informed by source about his coming home, accused Md. Sakhawat Hossain directed his companion Razakars to apprehend Md. Nur Uddin Morol, and being so directed accused Sheikh Mohammad Mujibur Rahman alias Mujibur Rahman, Md.

Ibrahim Hossain alias Ghungur Ibrahim, Md. Abdul Khaleque Morol and other 10/12 Razakars of Chingra Razakar camp and also accused Md. Sakhawat Hossain having abducted said Md. Nur Uddin Morol confined him in Chingra Razakar camp where he was mercilessly tortured for four days. Thereafter, from Chingra Razakar camp Md. Nur Uddin Morol was sent to Keshobpur Sadar Razakar camp Headquarter on 1 Bangla month Kartik in 1971 and subsequently by giving bond he was released therefrom.

300. Thereby accused (1) Md. Sakhawat Hossain (2) Sheikh Mohammad Mujibur Rahman alias Mujibur Rahman (3) Md. Ibrahim Hossain alias Ghungur Ibrahim, and (4) Md. Abdul Khaleque Morol are charged for participating, aiding, abetting, facilitating and for complicity in the commission of offences of abduction, confinement and torture as crimes against humanity as part of systematic attack directed against unarmed civilians as specified in section 3(2) (a)(g)(h) of the Act of 1973 which are punishable under section 20(2) of the Act of 1973 for which the said accused persons have incurred liability under section 4(1) of the Act.

Evidence of Witnesses Presented

301. To prove charge no. 03, the prosecution has examined 03[three] witnesses [P.Ws. 02, 03 and 13]. Before we evaluate the

evidence adduced, let us see what the witnesses examined have deposed before the Tribunal.

302. P.W.02 Fazlur Rahman Gazi [60] is the son of martyr Chandtulla Gazi, the victim of the event narrated in charge no. 02. In 1971 he was 15/16 years old. He stated that his father Chandtulla Gazi was the president of no.2 Sagardari Union Awami League.

303. In respect of taking away his father on forcible capture P.W.02 stated that on 28th day of Bangla month Ashwin in 1971 a group of 15/20 Razakars accompanied by accused Sakhawat Hossain, the commander of Chingra Razakar camp and his accomplice Razakars accused Ibrahim, Billal, Mujibur, Ohidul, Abdul Aziz son of late Ahmmad Sardar, Abdul Aziz son of late Ful Sardar, Lutfor[died during trial] and Khaleque besieged their house and started searching of his father when his father went into hid inside a bush at the northern side of their house. At that time he [P.W.02] had been at their house. The Razakars got his father apprehended and dragged him out of the bush and took away to Chingra Razakar camp which he saw standing beside the mud wall of their house. He knew the Razakars beforehand as they were the residents of their locality.

304. P.W.02 further stated that about two hours after his father was taken away to Chingra Razakar camp he went there taking meal for his father detained there. He found his father and another

detainee Nur Uddin [victim of charge no. 03] there in bleeding condition. Chingra Razakar camp was comprised of Tahshil Office, Union Parishad Office and the Primary School situated at the bazaar. His father and Nur Uddin were kept detained in the Primary School part of the Razakar camp.

305. P.W.02 also stated that later on they heard the event of killing his father from the locals at Chingra bazaar. They also heard the incident of causing torture to and death of his father from the detainee Nur Uddin [victim of charge no. 03] after his release from the Razakar camp.

306. In cross-examination, P.W.02 expressed ignorance about the name of accused Md. Sakhawat Hossian's father. He stated that he first saw accused Md. Sakhawat Hossain in 1971, that he could not recollect the fathers' names of accused Billal Hossain, Kazi Ohidus Salam, accused Abdul Khaleque Morol, accused Ibrahim Hossain and accused Mujibur Rahman. P.W.02 in reply to question put to him stated that in 1971 Aminuddin Master was the commander of Keshobpur Thana Razakar Bahini. Chingra Razakar camp was about one kilometre away from their house. P.W.02 denied the suggestions that the accused persons were not the members of Razakar Bahini and that he testified falsely and being tutored,

307. P.W.03 Md. Nur Uddin Morol [73], a freedom-fighter, is a resident of village Chingra under Police Station Keshobpur, District

Jessore. In 1971 he was associated with Awami League's politics. He studied up to Class X. He is the victim of the event narrated in charge no. 03.

308. P.W.03 stated that at the end of Bangla month Asarh[mid of July] in 1971 he along with Chandtulla Gazi, the then president of Sagardari Union Awami League, went to Bongaon, India to join the war of liberation where he received 18 days' training in youth camp. He after the training he received there joined the war of liberation in Hakimpur under Sector No. 8. Then on 25th day of Bangla month Ashwin in 1971 he came home to meet his parents, being accompanied by Chandtulla Gazi.

309. In respect of his being in captivity along with Chandtulla Gazi at the Razakar camp, P.W.03 testified that the Razakars of Chingra Razakar camp became aware of their coming home and thus on 28th day of Ashwin in 1971 at about 07:00 A.M. Razakars of the said camp accused Mujibur Rahman, Akram Hossain, Abdul Khaleque, Lutfor[died during trial], Billal, Sakhawat Hossain and their 10/12 cohort Razakars besieging their house apprehended him[P.W.03] and forcibly picked him up and took him to Chingra Razakar camp where he was subjected to torture. The Chingra Razakar camp consisted of Primary School, Tahshil Office and Union Council Office which were adjacent to each other. He

[P.W.03] was kept detained at the Primary School segment of the camp.

310. P.W.03 went on to state that on the day he was taken to the Razakar camp, at about 11:00 A.M. / 12:00 P.M. Razakars apprehended Chandtulla Gazi too and brought him at the Razakar camp and had kept him detained at Primary School segment of the camp. The Razakars keeping them detained there tortured them to know about their arms and fellow freedom-fighters. At about 01:00 P.M. on the day they were taken to the Razakar camp Fazlur Rahman, the younger son of Chandtulla Gazi came there to provide meal for his father but Razakar Mashiar turned him out therefrom.

311. He[P.W.03] further stated that on 01 Kartik, 1971 at about 10:00/11:00 A.M. he was taken to Keshobpur Girls' High School from the Razakar camp and was kept detained there. Abdul Aziz[now dead], the then Union Parishad Chairman requested Aminuddin Master, the Razakar commander of Keshobpur Police Station for his[P.W.03] release. And with this he was released from the camp after giving a bond that he would not work against Pakistan.

312. P.W.03 then stated that on release, he first came to the house of Ershad Gazi [now dead] at Keshobpur bazaar morh and on the following day he came to his own house with the help of Abdul Aziz and received medical treatment of local doctors. After he got a

bit cured he disclosed the event he experienced including the killing of Chandtulla Gazi to Gaziur Rahman [P.W.01], Fazlur Rahman [P.W.02], the sons of Chandtulla Gazi and Momin Gazi [P.W.04] when they came to his [P.W.03] house.

313. In cross-examination on behalf of accused Md. Lutfor Morol[died during trial], Ibrahim Hossain, Sheikh Md. Mujibur Rahman and Md. Aziz Sardar son of late Ful Miah Sardar P.W.03 stated that he received training at the camp in India commanded by Captain Shafiullah and Major Manjur was the commander of Sector No.8 and that he knew the freedom- fighters commander Kazi Rafiqul Islam of village Gobindapur. P.W.03 stated that he could not recall the number of Razakar camps existed in Keshobpur Police Station, that he could not say the names of fathers of accused Sheikh Md. Mujibur Rahman and Lutfor Morol[died during trial]. P.W.03 denied the suggestions put to him that the accused Md. Mujibur Rahman and Lutfor Morol[died during trial] were not Razakars and that what he testified implicating these accused persons was untrue and tutored. Defence, as it appears, however does not dispute the act of detaining P.W.03 Md. Nur Uddin Morol and Chandtulla Gazi at Chingra Razakar camp and the event of killing Chandtulla Gazi as has been testified by P.W.03.

314. On cross-examination by accused Md. Sakhawat Hossain, Md. Billal Hossain, absconded accused Abdul Aziz Sardar son of

late Ahmmad Sardar, Kazi Ohidul Islam and Md. Abdul Khaleque Morol P.W.03 stated that he could not say the name of accused Md. Sakhawat Hossain's father, that he saw Md. Sakhawat Hossain around their locality even before the war of liberation. He [P.W.03] could not recall who the Razakar commander of Jessore District was. Accused Md. Sakhawat Hossain was the Razakar commander of No.2 Sagardari Union. In reply to question put to him P.W.03 stated that in 1971 Razakars had killed many other civilians besides Chandtulla Gazi and they were Hasan, Patu, one 15/16 years old boy who were killed at Chingra Razakar camp. P.W.03 also stated that he could not recognise the other Razakars excepting those he named while they came to their house and apprehended him. One boy was also kept detained at Chingra Razakar camp when he [P.W.03] and Chandtulla Gazi were kept there in captivity. On 06 December 1971 the freedom-fighters had attacked the Chingra Razakar camp and the river Kopotakkho was 50 cubits far towards south from this camp. P.W.03 denied the suggestion put to him that what he testified implicating these accused persons was untrue and tutored.

315. P.W.13 Md. Mozid Morol[72] is the brother of Md. Nur Uddin Morol, the victim of the event narrated in the instant charge i.e. charge no. 03. He testified that his brother Md. Nur Uddin Morol went to India to receive training as freedom-fighter. Later on

his brother returned home on 25 Ashwin 1971 to meet his parents. P.W.13 further stated that on 28 Ashwin, 1971 at about 07:00 A.M. Razakars accused Md. Mujibur Rahman, Md. Billal Hossain and Akram Hossain accompanied by some other Razakars entered their houses as sent by accused Md. Shakhawat Hossain and remaining in hiding he [P.W. 13] saw that those Razakars on having apprehended his brother Md. Nur Uddin Morol took him away to Chingra Razakar camp.

316. P.W.13 next stated that on the same day after his brother was forcibly taken away he went to Chingra Razakar camp where through the window of Primary School [part of the Razakar camp set up there] he saw his brother Md. Nur Uddin Morol lying in a room in bleeding condition and then the Razakars forced him [P.W.13] to go back home by hurting him with rifle as he started crying seeing his brother. Returning home he disclosed to his parents what he saw at the Razakar camp. Then his parents and some other relatives approached the Union Parishad Chairman Aziz who then requested Keshobpur Thana Razakar commander Amin Uddin Master for release of detained Md. Nur Uddin Morol. With this his brother got released on 1st Kartik [in 1971] on furnishing bond to Razakar commander Amin Uddin Master. On release his brother was taken back home when he told that during his captivity at the Chingra Razakar camp he was subjected to torture by accused

Md. Billal Hossain and Sheikh Mujibur Rahman on order of accused Shakhawat Hossain.

317. P.W.13 also stated, in respect of reason of knowing the accused persons he named, that he knew them since prior to the event as they were inhabitants of neighbouring villages and they used to come at the same '*haat*' [bazaar] very often.

318. On cross-examination P.W.13 expressed ignorance as to in which year accused Md. Shakhawat Hossain contested the general election. In reply to question put to him P.W.13 stated that he first saw accused Md. Shakhawat Hossain in his boyhood but could not say in which year. P.W.13 also stated in reply to question put to him that there had been three Razakar camps-- at Keshobpur, Trimohini and Chingra. He denied the suggestion that he testified falsely and being tutored. P.W.13 also denied that the accused persons he named did not belong to Razakar Bahini and were not involved with the event he narrated.

Finding with Reasoning on Evaluation of Evidence

319. In the case in hand, in all nine accused persons have been brought to justice. Of nine accused one Md. Lutfor Morol died in prison during trial, and as such, proceeding against him stood abated. This charge no.03 indicts four accused persons out of those eight accused persons.

320. This charge involves the attack directing a non-combatant freedom-fighter [Md. Nur Uddin Morol] of village Chingra under Police Station Keshobpur, District Jessore that resulted in his abduction, confinement and causing torture to him in captivity. Four accused, namely (1) Md. Sakhawat Hossain (2) Sheikh Mohammad Mujibur Rahman alias Mujibur Rahman[absconded] (3) Md. Ibrahim Hossain alias Ghungur Ibrahim[absconded], and (4) Md. Abdul Khaleque Morol[absconded] have been indicted in this charge for participating, aiding, abetting, facilitating and complicity in the commission of offences alleged. The accused persons allegedly accompanied the group of 10/12 Razakars of Chingra Razakar camp in accomplishing the alleged act of forcible capture of victim Md. Nur Uddin Morol [P.W.03] on 28th day of Bangla month Ashwin in 1971.

321. After four days' coercive captivity at Chingra Razakar camp victim Md. Nur Uddin Morol was sent to Keshobpur Sadar Razakar camp Headquarter on 01 of Bangla month Kartik in 1971 and subsequently by giving undertaking [pledge] he got release therefrom, the charge framed also alleges it.

322. For the purpose of proving the arraignment prosecution has been able to adduce and examine three witnesses including the victim Md. Nur Uddin Morol. Of them P.W.03 Md. Nur Uddin Morol is the victim who is the star witness in respect of the event

alleged in this charge. P.W.02 Fazlur Rahman Gazi is a witness to the fact relevant to the victim's alleged confinement at the Chingra Razakar camp, and P.W.13 Md. Mozid Morol is the brother of the victim who claimed to have had occasion to observe the act of forcibly taking away his brother victim Md. Nur Uddin Morol.

323. Ms. Rezia Sultana, the learned prosecutor in pressing argument on this charge involving the criminal act of abduction, confinement and torture of Md. Nur Uddin Morol, a freedom-fighter submitted that the victim himself testified before the Tribunal how he was forcibly captured and subjected to torture in confinement at Chingra Razakar camp. In addition to him his brother P.W.13 is a direct witness to the event of abduction, confinement and torture as he saw the victim lying at the camp in blood wrapped condition. P.W.02, the son of the victim Chandtulla Gazi of the event narrated in charge no.02 also saw the victim [P.W.03] detained at the Primary School part of the Chingra Razakar camp. Defence could not dislodge what has been testified by these key witnesses including the victim.

324. The learned prosecutor also submitted that the victim Md. Nur Uddin Morol [P.W.03] was a co-freedom fighter of Chandtulla Gazi who was also taken away to the same Razakar camp and kept detained in the same room. The reason of launching attack on them was that they sided with the war of liberation and on returning back

home the Razakars led and guided by accused Md. Sakhawat Hossain designed to get them captured and eventually it happened. The fact of getting release from the captivity on givign bond of not doing activities against Pakistan, as found proved, lends assurance to it. Keeping someone in unlawful detention itself causes mental harm which qualifies the offence of torture, the learned prosecutor added.

325. Adopting the argument as advanced in respect of charge no.02 Mr. Abdus Sattar Palwan, the learned defence counsel for the accused Md. Sakhawat Hossain, Md. Billal Hossain Biswas and three others[absconded] chiefly added that the testimony of the witnesses relied upon by the prosecution in support of this charge suffers from fatal inconsistencies and the witnesses are not credible. They have testified falsely implicating the accused persons. P.W.03 Md. Nur Uddin Morol was not kept detained at the Razakar camp. His testimony is inconsistent to that of P.W.02 who claimed to have had visited the Razakar camp when he allegedly saw him [P.W.03] detained there. The prosecution witnesses have testified falsely.

326. Echoing submission already advanced in respect of charge no.02 Mr. Abdus Sukur Khan, the learned State defence counsel defending the three absconded accused Md. Ibrahim Hossain alias Ghungur Ibrahim, Sheikh Mohammad Mujibur Rahman alias Mujibur Rahman and Md. A. Aziz Sardar son of late Ful Miah

Sardar chiefly attacked credibility of the witnesses examined in support of this charge. It has been submitted that evidence of P.W.03, the alleged victim remained uncorroborated by other evidence; that P.W.02 was not a credible witness as he was a minor at the relevant time and naturally he was not supposed to move to the Razakar camp as claimed by him and that those witnesses including the P.W. 13 were not familiar with the identity of these accused persons, and thus, they had no reason of recognizing them accompanying the group at any of the phases of the event of attack and that they have testified falsely.

327. It is to be noted that the entire event thus consisted of phases – abduction, keeping the captured victim detained for four days at the Chingra Razakar camp where he was subjected to torture and taking the victim to another camp wherefrom he got release by executing bond. Victim Md. Nur Uddin Morol who has been examined as P.W.03 is the best witness to prove the criminal acts allegedly done to him in all the phases of attack and the complicity and participation of the accused persons therewith. Before we assess the credibility and probative value of the testimony of P.W.02 and P.W.13 let us see first what the victim P.W.03 himself narrated on dock.

328. The event of abduction happened on 28th day of Bangla month Ashwin in 1971 i.e mid of October 1971. The reason of

targeting the victim pertinently needs to be resolved and in doing so we are to eye on what has been testified by the victim P.W.03. We have already found it proved in adjudicating charge no.02 involving the act of abduction, confinement of Chandtulla Gazi happened on the same day and he and P.W.03 who happened to be his co-freedom-fighter were kept detained at the Primary School part of the Chingra Razakar camp where both of them were subjected to torture and the object of inflicting torture was to obtain information about freedom- fighters and the arms they had.

329. In adjudicating charge no.02 we have recorded our reasoned finding based on evidence tendered that P.W.03 and Chandtulla Gazi[the victim of charge no.02] were freedom-fighters and he[P.W.03] came back home on 25th day of Bangla month Ashwin in 1971 to meet his parents, being accompanied by Chandtulla Gazi. What happened next?

330. P.W.03 Md. Nur Uddin Morol, the victim in testifying the criminal acts he experienced stated that the Razakars of Chingra Razakar camp became aware of their [his and his co-freedom-fighter Chandtulla Gazi] coming back home and three days later i.e. on 28th day of Ashwin in 1971 at about 07:00 A.M. Razakars of the said camp accused Mujibur Rahman, Akram Hossain, Abdul Khaleque, Lutfor[died during trial], Billal, Sakhawat Hossain and their 10/12 cohort Razakars besieging their house apprehended

him[P.W.03] and forcibly picked him up and took him away to Chingra Razakar camp where he was subjected to torture. The Chingra Razakar camp consisted of Primary School, Tahshil Office and Union Council Office which were adjacent to each other. He [P.W.03] was kept detained at the Primary School segment of the camp.

331. Detention at the Chingra Razakar camp and causing torture in captivity was the upshot of the victim's abduction. Defence, as it appears, however could not controvert the act of detaining P.W.03 Md. Nur Uddin Morol and Chandtulla Gazi, his co-freedom-fighter at the Chingra Razakar camp as has been testified by P.W.03. Defence simply denied it. It is to be noted that mere denial is not sufficient to cast any degree of doubt on what is testified in examination-in-chief unless it is shaken in cross-examination.

332. It is now settled that cross-examination is the optimal tool in the assessment of credibility. But in the case in hand we see that the defence even did not care to cross-examine the narration made by the witnesses on material particular related to the principal event.

333. The purpose of cross-examination is to challenge the evidence of the witness. If you do not cross-examine a witness then what the witness has said can be taken as unchallenged and true. Failure to cross-examine a witness or to cross-examine him on a

vital part of his evidence may be treated as acceptance of that part or even the whole of his evidence.

334. In respect of the act of taking away the victim to the Chingra Razakar camp on forcible capture the victim [P.W.03] is the best witness as he had ample opportunity of seeing the perpetrators forming the group of attackers. According to him [P.W.03] accused Mujibur Rahman, Abdul Khaleque, and Md. Sakhawat Hossain were with the group in abducting him. P.W.03 does not allege the presence of accused Ibrahim Hossain with the group.

335. In cross-examination, P.W.03 stated that he saw the accused Md. Sakhawat Hossain around their locality even before the war of liberation. Thus P.W.03 had reason of recognizing the accused Md. Sakhawat Hossain with the group in accomplishing his forcible capture. On behalf of accused Mujibur Rahman, Abdul Khaleque nothing could be brought by cross-examining the P.W.03 that he had no reason of identifying these two accused persons, and as such, the testimony of P.W.03 made in this regard carries credence.

336. On cross-examination, P.W.03 also stated that he could not recognise the other Razakars accompanying the group excepting those he named while they came to their house and apprehended him. It makes his testimony of recognizing the three accused Md. Sakhawat Hossain, Mujibur Rahman and Md. Abdul Khaleque Morol natural and believable.

337. It also transpires from the above testimony of P.W.03 that Akram Hossain, Lutfor Morol [died during trial] and Billal Hossain were also with the group of Razakars accompanied by the accused persons at the time of causing his abduction. But the charge framed does not allege it. Thus, this part of testimony of P.W.03 implicating three other persons who have not been indicted in this charge as the cohorts of the perpetrators by accompanying them in launching attack seems to be ‘exaggeration’.

338. It appears that P.W.13 Md. Mozid Morol, the brother of the victim also testified that accused Md. Mujibur Rahman, Md. Billal Hossain and Akram Hossain were with the group of attackers formed of Razakars. Md. Billal Hossain and Akram Hossain have not been indicted in this charge and he [P.W.13] did not state that he saw accused Md. Sakhawat Hossain accompanying the group. According to him the group was sent by accused Md. Sakhawat Hossain to cause his brother’s [victim] forcible capture. He [P.W. 13] saw that those Razakars taking away his brother [P.W.03] on having apprehended.

339. It is to be noted that the accused (1) Md. Sakhawat Hossain (2) Sheikh Mohammad Mujibur Rahman alias Mujibur Rahman (3) Md. Ibrahim Hossain alias Ghungur Ibrahim, and (4) Md. Abdul Khaleque Morol accompanied the group of Razakars, the charge framed speaks and no other accused persons who are being

prosecuted and tried jointly for other charges were with the group in launching the attack.

340. However, the testimony of P.W.03 implicating even the other Razakars who have not been charged with for the event constituting the offences as narrated in this charge [charge no.03] is not the indicator to diminish his credibility, particularly if he is found to have not made any dexterous exaggeration, in narrating the material facts. Such mere exaggeration so far as it relates to presence of other Razakars at the crime site which is apparently beyond the charge framed does not *ipso facto* diminish the value of the testimony of P.W.03, the victim made in relation to the event of criminal acts under adjudication and complicity of the accused Md. Sakhawat Hossain, Mujibur Rahman, Md. Abdul Khaleque, and others therewith.

341. Accused Md. Ibrahim Hossain was a member of local Razakar Bahini and had culpable affiliation with the Razakar camp set up at Chingra bazaar---it already stands proved. But merely on the basis of this fact he cannot be connected with the act of the victim's abduction as the victim P.W.03 himself in testifying before the Tribunal did not claim his presence with the group.

342. We have found it from the evidence of P.W.13 Md. Mozid Morol, the brother of the victim that at the time of launching attack he remaining in hiding saw the act of taking away his brother by the

group of Razakars accompanied by accused Mujibur Rahman, Md. Billal Hossain and Akram Hossain and some other Razakars as sent by accused Md. Shakhawat Hossain. In respect of participating in launching attack the testimony of P.W.13 seems to be consistent in part to that of P.W.03, the victim. The version of P.W.13 demonstrates presence of accused Mujibur Rahman with the group and he also implicated Md. Billal Hossain and Akram Hossain with the act of abduction. But these two persons have not been indicted in the instant charge [charge no. 03].

343. It has been argued on part of the defence that the testimony of P.W.03 and P.W.13 so far as it relates to presence of the accused persons with the group at the crime site seems to be inconsistent and the same cannot be relied upon and such inconsistency indicates that they have testified falsely.

344. But we are not convinced with the argument that the victim's testimony being inconsistent with that made by P.W.13, another alleged direct witness to the act of abduction and thus their evidence is not credible. There must exist reasonable ground to exclude witness's testimony particularly if the same is provided by victim or victim's near relative who had natural occasion of witnessing or knowing the event and facts related to it.

345. It is to be noted that it would be appropriate and jurisprudentially logical if, in the process of appraisal of evidence,

we separate the grains of acceptable truth from the chaff of exaggerations and improbabilities which cannot be safely or prudently accepted and acted upon. It is sound common sense to refuse to apply mechanically, in assessing the worth of necessarily imperfect human testimony, the maxim: "*falsus in uno falsus in omnibus*."

346. It is to be noted that P.W.13 did not claim that he observed all the activities of the group of Razakars started from abduction to keeping the victim detained at Chingra Razakar camp. In a horrific situation of attack one's observation may naturally vary from that of others. P.W.13 might not have opportunity of seeing the accused Md. Sakhawat Hossain with the group and thus he has not named him as one of the members of the group of Razakars which had launched the attack. Be that as it may, naturally it may not be practicable for him[P.W.13], remaining in hiding, to see or observe all the accused persons or Razakars participating in accomplishing the act of his brother's abduction, although his unimpeached testimony consistently corroborates the core fact of his brother's abduction by the group of Razakars of Chingra Razakar camp.

347. In view of above, since the three other Razakars Akram Hossain, Lutfor Morol [died during trial] and Billal Hossain have not been indicted for the offence narrated in this charge[charge no.03] statement made by the P.W.03, the victim so far as it relates

to their participation and complicity simply deserves exclusion from consideration and merely for this reason his[P.W.03] testimony cannot be termed unreliable in its entirety. The court has to form its opinion about the credibility of the witness and record a finding as to whether his deposition inspires confidence. Exaggerations *per se* do not render the evidence brittle.

348. Besides, discrepancies in testimony of witnesses could be due to the fallibility of perception and memory and the operation of the passage of time. It has been observed by the **ICTR Trial Chamber in the case of Akayesu** that:

“The majority of the witnesses who appeared before the Chamber were eye-witnesses, whose testimonies were based on events they had seen or heard in relation to the acts alleged in the Indictment. The Chamber noted that during the trial, for a number of these witnesses, there appeared to be contradictions or inaccuracies between, on the one hand, the content of their testimonies under solemn declaration to the Chamber, and on the other, their earlier statements to the Prosecutor and the Defence. This alone is not a ground for believing that the witnesses gave false testimony.”

[Case No. ICTR-96-4-T, Judgment: 2 September 1998, Para -140].

349. It is the victim P.W.03 who had experienced and observed the event of attack in its entirety carried out by the group of Razakars that resulted in his abduction and detaining him at the Chingra Razakar camp. Defence could not impeach what he testified in respect of the criminal acts of accused Md. Sakhawat Hossain, Mujibur Rahman and Md. Abdul Khaleque constituting

their participation and complicity in accomplishing the victim's abduction.

350. We, in dealing with the cases involving crimes punishable under the Act of 1973, are to keep the context prevailing in 1971 in mind. The 'context' existing in 1971 allowed their local collaborators of the Pakistani occupation army and the perpetrators in accomplishing the criminal acts without facing any social correctives or any kind of counter incentive either on part of the victims under attack or their relatives who had occasion to see such organised criminal attack upon their near and dear ones. The above context loaded of horrific climate of course did not allow the persons to resist or to make any counter effort to rescue the civilian under attack despite the opportunity of seeing the accomplishing the criminal act by the perpetrators who truly had carried out such atrocious activities to further the policy an plan of the Pakistani occupation army, we emphatically conclude.

351. Despite the above reality three direct witnesses to the event of abduction, confinement and torture have been examined and of them one is the victim, the star witness to prove this charge. The event of attack that resulted in abduction of victim Md. Nur Uddin Moral [P.W.03] happened in day time and thus naturally at least the family inmates had opportunity to observe the activities of the perpetrators even remaining in hiding. Naturally, the persons who

had opportunity of seeing the criminal act could not come forward and resist the perpetrators as it happened in horrific and insecure war time situation. Besides, the persons who also had opportunity to see the attack may not be available now due to lapse of long passage of time.

352. It is to be noted that the testimony even of a single witness on a material fact does not, as a matter of law, require corroboration. The established jurisprudence is clear that corroboration is not a legal requirement for a finding to be made. In this regard **ICTR Trial Chamber observed 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."

[Case No. ICTR-01-63-T, Judgment: 12 November 2008, Para-14].

353. This view finds support also from the decision of the **ICTY Appeals Chamber in the case of Kordic and Cerkez**, wherein it has been observed that-

"The Appeals Chamber has consistently held that the corroboration of evidence is not a legal requirement, but rather concerns the weight to be attached to evidence".

[Case No. ICT-95-14/2-A, Judgment: 17 December 2004, Para-274]

354. The instant charge is chiefly rested on the testimony of P.W.03, the victim. Defence does not claim categorically that examining this witness by the prosecution is the outcome of a systematic attempt intending to falsely implicate the accused with the crimes alleged. There must exist reasonable ground to exclude witness's testimony particularly if the same is provided by the victim who had natural occasion of experiencing the criminal acts and wrongs done to him. Thus, in the absence of anything contrary we cannot keep the testimony of the victim and near relative of the victim aside merely on the ground of conflict or rivalry between the accused and P.W.03 as suggested by the defence.

355. What happened next to taking away the victim, on forcible capture? In this respect the victim [P.W.03] himself is the best witness. Naturally, no one had occasion of easy access inside the Razakar camp where the victim was kept in coercive detention. It already stands proved that Chingra Razakar camp consisted of three parts-Primary School, Tahshil office and Union Council Office. In adjudicating charge no.02 we have found it proved that the victim Md. Nur Uddin Morol [P.W.03] and Chandtulla Gazi [victim of charge no.02] were kept detained together in the Primary School part of the Chingra Razakar camp.

356. Evidence of the victim P.W.03 demonstrates that the Razakars keeping them [he and Chandtulla Gazi] detained there

tortured them to extract information about their arms and fellow freedom-fighters. Defence merely denied it in cross-examination but could not be refuted in any manner. Rather it has been re-affirmed in cross-examination that P.W.03 and his co-freedom-fighter were in captivity at the Razakar camp, accused Md. Sakhawat Hossain was its commander, four civilians Hasan, Patu, Chandtulla Gazi and a boy of 15/16 years old were killed there and he did not sue for the torture caused to him in detention by Razakars.

357. It is to be noted that it is now jurisprudentially settled that in a criminal trial mere denial is not sufficient to exclude one's testimony if it inspires credence. Even trustworthiness of witnesses particularly the direct witnesses to material facts could not be diminished by cross-examining them. Mere putting suggestion which has been denied by the P.W.03 that what he testified implicating accused persons does not go with the object of cross-examination. Thus, and in absence of any earthly reason mere denial of what has been testified by the P.W.03 does not diminish its value and credence. In respect of object of cross-examination the **Appellate Division of the Supreme Court of Bangladesh** in its judgment in the case of **Allama Delwar Hossain Sayedee** observed as below:

"It is to be remembered that the object of cross-examination is to bring out desirable facts of the case modifying the examination-in-chief and to

impeach the credit of the witness. The other object of cross-examination is to bring out facts which go to diminish or impeach the trustworthiness of the witness."

[Criminal Appeal Nos. 39-40 of 2013, Judgment: 17 September 2014, Pages 138-139]

358. In addition to P.W.03, the victim, P.W.02, the son of Chandtulla Gazi [victim of charge no.02] saw P.W.03 Md. Nur Uddin Morol detained at the Chingra Razakar camp when he rushed there carrying meal for his [P.W.02] detained father. According to P.W.02, two hours after his father was taken away to Razakar camp he went there carrying meal with him for his father when he saw Md. Nur Uddin Morol [P.W.03] in blood wrapped condition detained together with his father [Chandtulla Gazi]. It gets corroboration from the evidence of the victim P.W.03 as he testified that Fazlur Rahman Gazi [P.W. 02], the younger son of Chandtulla Gazi at about 01:00 PM on the day they were taken at the camp came there with meal for his father. We find nothing in cross-examination that P.W.02 did not know Md. Nur Uddin Morol or it was not practicable to see any person detained at the camp.

359. P.W.13 Md. Mozid Morol, the brother of the victim [P.W.03] also testified what he experienced when he went to Chingra Razakar camp after his brother was taken away there and kept confined. His testimony demonstrates that when he came at the camp to meet his detained brother he could see through the open

window his brother lying in blood wrapped condition and on seeing it he started crying when Razakars turned him out and forced to leave. Coming back home he [P.W.13] disclosed to his parents what he saw at the Razakar camp.

360. We reiterate that the victim P.W.03 is the best witness in respect of this charge and he testified how he was treated in coercive detention and reason of causing torture to him and his co-detainee Chandtulla Gazi. And his [P.W.03] testimony is sufficient in arriving at unerring conclusion that the victim was cruelly tortured in detention. In addition to the victim's testimony seeing the detained victim in blood wrapped condition inside the Razakar camp as stated by the P.W.02 and P.W.13 is a pertinent fact which is materially relevant indeed to the victim's detention and causing brutal torture in coercive captivity. Defence could not impeach it in any manner. It simply denied it.

361. Defence argued that P.W.02 was a minor in 1971 and thus it is not believable that he after his father was forcibly taken away to the Chingra Razakar camp moved there carrying meal with him and thus his testimony is not credible.

362. We are not convinced with the above argument. It appears that in 1971 P.W.02 Fazlur Rahman Gazi was 15/16 years old and merely for this reason his testimony cannot be brushed aside, particularly if it inspires credence and carries probative value. In

this regard relying on the observation made by the **ICTR Appeals Chamber in the case of *Gacumbitsi*** it has been observed by the **Appellate Division of the Supreme Court of Bangladesh in the case of *Ali Ahsan Muhammad Mujahid*** that –

"In Gacumbitsi v. Prosecutor, Case No. ICTR-2001-64-A Appeal Chamber found, "it was reasonable for the Trial Chamber to accept witness TAX's testimony despite her young age at the time of the events (11 years old). The young age of the witness at the time of the events is not itself a sufficient reason to discount his testimony." There is no rule requiring the Court to reject per se the testimony of a witness who was child at the events in question. The probative value to be attached to testimony is determined to its credibility and reliability."

[Criminal Appeal No. 103 of 2013, Judgment: 16.6.2015, Pages -166-167]

363. The proven fact of accompanying the group towards the crime site in perpetrating the victim's abduction provides rational indication that the accused Md. Sakhawat Hossain, Mujibur Rahman and Md. Abdul Khaleque Morol, instead of withdrawing them from the group, participated, facilitated and contributed even to the accomplishment of criminal acts constituting the offence of torture in captivity in furtherance of an evil and common design.

364. It is to be noted that there could be no confinement if there was no act of abduction and there could be no torture if an individual was not in confinement. In the case in hand, the accused persons have been indicted for participating, aiding, abetting and facilitating the commission of offences forming a 'series of system

criminal acts' constituting the offences of abduction, confinement and torture.

365. The act of all the three accused Md. Sakhawat Hossain, Mujibur Rahman and Md. Abdul Khaleque as proved in taking away the victim Md. Nur Uddin Morol [P.W.03] on capture obviously had a substantial effect even on the victim's coercive confinement and causing physical torture on him in captivity as well. These three accused persons' act of presence while launching attack to abduct the victim by accompanying the group of Razakars forming part of attack was rather an act of 'participation', 'abetment' and 'facilitation' to the accomplishment of the victim's confinement and torture caused to him as there had been a 'causal connection' between such acts and the act of causing torture keeping the victim detained at the Razakar camp.

366. 'Torture' not only refers to physical or mental harm-it denies the inherent dignity and fundamental rights of the human being. Keeping a protected person in unlawful detention itself constitutes the act of torture. At the relevant time the victim was non-combatant and thus obviously he was a protected person. But the accused persons and their cohorts committed the vilest acts of torture directing the victim [P.W.03] in coercive detention which was extremely derogatory.

367. It is not required to show that how the accused persons physically participated at all the three phases of such chained cruelties. In order to determine the accused persons' liability it is to be kept in mind that participation or aiding and abetting may occur before, during or after the commission of the crime. The Razakar camp set up at the Chingra bazaar turned into a 'criminal enterprise' to which the accused persons were active part.

368. We reiterate that to qualify the act of 'participation' in causing torture to the detained victim Md. Nur Uddin Morol[P.W.03], the accused persons need not be shown present at the Razakar camp, the prime crime site. Even remaining far from the crime site an individual may have capacity to 'participate' to the commission of actual crime by his act or conduct and by virtue of his culpable affiliation or position of domination over the principals. It already stands proved that the accused persons were actively affiliated with the Chingra Razakar camp and accused Md. Sakhawat Hossain was in position of authority over it and its activities.

369. Therefore, and since the accused persons physically participated in accomplishing the act of forcible capture of the victim they all are criminally liable even for the act of causing torture to the victim in unlawful captivity, the upshot of the victim's abduction. Besides, it has been proved from the testimony

of P.W.03 that the three accused Md. Sakhawat Hossain, Mujibur Rahman and Md. Abdul Khaleque and their cohort Razakars were engaged in causing torture to him.

370. It already stands proved too that accused Md. Sakhawat Hossain was in dominant and steering position of the Chingra Razakar camp and thus presumably activities carried out there by the Razakars affiliated with it were well within his knowledge. All the system criminal acts directing the civilians detaining them at the Chingra Razakar camp were thus carried out on explicit approval and instruction of accused Md. Sakhawat Hossain, it may safely be inferred from fact and circumstances unveiled.

371. Act and conduct of the accused Md. Sakhawat Hossain, Mujibur Rahman and Md. Abdul Khaleque and their cohort Razakars, as unveiled, were intended to facilitate and assist to the perpetration of the act of forcible capture of the victim Md. Nur Uddin Morol and this criminal acts indisputably had a substantial effect even upon the perpetration of the offences of confinement and torture, evidence presented suggests to infer it conclusively. It is to be noted that providing ‘assistance’ or ‘facilitation’ to the commission of a crime may not always be tangible. It may be perceived or inferred from circumstances and material facts. It has been observed by the **ICTY Trial Chamber in the case of Simic, Tadic and Zaric** that -

“The acts of aiding and abetting need not be tangible, but may consist of moral support or encouragement of the principals in the commission of the crime.”

[Case No. IT-95-9-T, Judgment: 17 October 2003, Para- 162]

372. The evidence provided demonstrates that presence of accused Md. Sakhawat Hossain, Mujibur Rahman and Md. Abdul Khaleque were with the group in launching attack in accomplishing the victim’s abduction was indeed culpable one and they all actively participated to such criminal act that resulted in forcible capture of the victim. Besides, as a commander of Chingra Razakar camp accused Md. Sakhawat Hossain obviously by his presence with the group culpably encouraged and induced to carry out the ‘collective criminality’, we validly infer. And thus all these three accused are equally liable for the crimes committed. In this regard we recall the observation of the **Appellate Division in the case of Muhammad Kamaruzzaman that--**

"The provision of section 4(1) requires that when several persons unite to do any criminal act, all those who assist the accomplishment of the object would be equally guilty as if it were done by him alone. It deals with the doing of separate act similar or diverse by several persons, if all are done, each person is liable for the result of them all, as if he had done them himself, for that act. It is only necessary to prove that the criminal act or crime complained against was done by one of the accused persons."

[Criminal Appeal No. 62 of 2013, Judgment: 3 November 2014, Pages-170-171]

373. In our deliberation made in respect of charge no.02, we have already recorded our finding too that accused Md. Sakhawat Hossain was in dominant position of Chingra Razakar camp and he and his cohort Razakars affiliated with the said camp were extremely hostile to the persons who sided with the war of liberation and accused Md. Sakhawat Hossain made inciting speech publicly provoking annihilation of pro-liberation civilians and freedom-fighters terming them 'Kafers' and 'Monafeks'. Such hostile attitude which compatibly was with the policy and plan of the Pakistani occupation army imbued the accused persons targeting a non-combatant freedom-fighter [P.W.03], it may be inferred unerringly.

374. The above proved pertinently the fact materially related to accused Md. Sakhawat Hossian's extreme hostile attitude lends assurance to the fact that within his knowledge and on his approval the victim, P.W.03 and his co-freedom-fighter Chandtulla Gazi were forcibly captured on the same day and were kept in protracted and coercive captivity at the Chingra Razakar camp when they were subjected to torture for extracting information about their arms and co-freedom-fighters. We have already found it proved that Chandtulla Gazi [victim of charge no.02] was eventually brutally killed. How the victim Md. Nur Uddin Morol [P.W.03] escaped and what happened to him finally?

375. It is evinced from the testimony of the victim P.W.03 that on 01st day of Kartik he was shifted to another camp wherefrom later on he got release on intervention of Aminuddin Master, the Razakar commander of Keshobpur as requested by UP Chairman Abdul Aziz[now dead] on executing bond of not engaging in activities against Pakistan. Defence simply denied it. It however remained totally unshaken.

376. Already it has been proved that P.W.03 was subjected to torture in captivity. He would not have been alive if he was not set at liberty as stated. In absence of anything contrary it may thus be unerringly inferred that P.W.03 got release from captivity in the manner he testified. At the same time, presumably he would have to embrace the fate of his fellow freedom-fighter, a co-detainee Chandtulla Gazi [victim of charge no.02] if he [P.W.03] did not opt to secure his release by executing such undertaking of being refrained from siding against Pakistan. It gets corroboration from the evidence of P.W.13, the brother of the victim. Thus, this piece of unimpeached evidence in relation to release of the victim P.W.03 adds assurance to the fact of torture caused to him in coercive detention.

377. It is now jurisprudentially settled that the guilt of the accused persons through Joint Criminal Enterprise [JCE], however, has to fulfil three requirements: (i) the existence of an organised system of

ill-treatment of the detainees and the committing of the crime alleged; (ii) the accused's awareness of this system; and (iii) the active participation of the accused in the enforcement of such system, or in any case, in the realization of the 'common criminal design'

378. JCE is an important and effective prosecutorial tool for capturing the criminal conduct of leaders' relation to system group crimes. The crimes committed directing the victim, a protected civilian constitute manifestations of collective criminality as the same were carried out by the group of Razakars, an auxiliary force of Pakistani occupation army in pursuance of a common criminal plan. The Chingra Razakar camp which was turned into a detention camp in true sense under the guidance of accused Md. Sakhawat Hossain used to run its activities pursuant to a 'concerted plan' to which the accused persons were part.

379. In respect of criminal acts constituting the offences of abduction, confinement and torture, accused Md. Sakhawat Hossain and three other accused persons have been indicted to have had incurred 'individual criminal liability' under section 4(1) of the Act of 1973. Of these four accused persons charged with the crimes narrated in this charge three accused persons including accused Md. Sakhawat Hossain are found to have had participation in causing forcible capture of the victim which resulted in facilitating torture

upon him in captivity. At the same time it stands proved too that accused Md. Sakhawat Hossain was in commanding position of Chingra Razakar camp and the Razakars associated therewith. In this circumstance, under the same set of facts constituting the offences proved a question comes forward as to under which mode of liability accused Md. Sakhawat Hossain is to be found guilty and his conviction should be entered.

380. For the propose of resolving this crucial legal aspect let us make a deliberation based on jurisprudence settled in our Apex Court and *ad hoc* tribunal [ICTY].

381. At the out set, it is to be noted that **JCE** refers to section 4(1) of the Act of 1973 and section 4(2) refers to 'civilian superior responsibility'. In the case in hand, accused Md. Sakhawat Hossain has been indicted to have participated to the commission of crimes narrated in charge no.03. It has been divulged too that he was the commander of Chingra Razakar camp. Thus, naturally the Razakars affiliated with the said camp had acted under guidance and command of accused Md. Sakhawat Hossain. But merely for this reason accused Md. Sakhawat Hossain can not be held liable under the theory of civilian superior responsibility, instead of individual direct responsibility under section 4(1) of the Act of 1973, particularly when his 'participation' in collective criminality stands proved.

382. Evidence of the victim P.W.03 demonstrates that accused Md. Sakhawat Hossain accompanied the group in taking him away on forcible capture. This act was chained to the act of his detention and causing torture to him. P.W.03, the victim testified that he was subjected to torture in detention at the Razakar camp. However, since the act of causing torture in coercive detention was the upshot of his abduction and since the three accused persons including accused Md. Sakhawat Hossain participated in accomplishing the said act they are indisputably held criminally liable under section 4(1) of the Act of 1973 even for the offence of causing torture in detention.

383. Act of the victim's abduction was chained with the subsequent wrongs done to the victim in detention. Accused Md. Sakhawat Hossain was in commanding and dominating position of the Razakar camp, and as such, it may be taken as an aggravating factor especially in determining the level of his culpability and awarding sentence. Although accused Md. Sakhawat Hossain is found criminally liable for the criminal acts, the upshot of the act of the victim's abduction happened at the Razakar camp, operated under his command. This view finds support from the observation made by the **Appellate Division of the Supreme Court of Bangladesh in the case of Mir Quasem Ali** which is as below:

"If an offender in the capacity of superior commander directly participates in the commission of crimes against humanity, his culpability is higher

than other offenders. It is because the superior must prevent the crimes committed by his subordinates and if there is failure either one or both of this obligations, could render his superior liability and his offence is taken as an aggravated one."

[Criminal Appeal No. 144 of 2014, Judgment: 8 March 2016, Page-190]

384. The Appellate Division also observed in the said case that--

"The commander is held responsible in proportion to the gravity of the offences committed. This view has been taken in case No.IT-01-44T, ICTR and affirmed by Zlatko Aleksovski, in case No.IT-95-14/1-T, ICTY; Milorad Kvojelec, case No.IT-97-25-A, ICTY; Enver Hadzihasanovic and Amir Kubura, case No.IT-01-47-A, ICTY. It was emphasised that 'direct and superior responsibility and it is not appropriate to convict under both grounds for the same count. In such a case, the accused should be convicted for direct responsibility and his superior position should be considered as an aggravating factor for sentencing."

[Criminal Appeal No. 144 of 2014, Judgment : 8 March 2016, Pages-192-193]

385. From the proposition as propounded above by the **Apex Court** it is thus understood that an accused should be convicted for direct responsibility under section 4(1) of the Act of 1973 he incurred in committing the crimes and if his superior position over the other perpetrators forming group in accomplishing the said crimes is found to have had should be taken into account as an aggravating factor. This proposition goes compatibly with the observation of the **ICTY Appeals Chamber in the case of Miroslav Kvočka** which is as below:

"The Appeals Chamber notes that participation in a joint criminal enterprise pursuant to Article 7(1) of the Statute and superior responsibility pursuant to Article 7(3) of the Statute are distinct categories of

individual criminal responsibility, each with specific legal requirements. Joint criminal enterprise responsibility does not require any showing of superior responsibility, nor the proof of a substantial or significant contribution. Moreover, it is not appropriate to convict under both Article 7(1) and Article 7(3) of the Statute for the same crime. Where the legal requirements of both forms of responsibility are met, a conviction should be entered on the basis of Article 7(1) only, and the superior position should be taken into account as an aggravating factor in sentencing."

[Case No. IT-98-30/1-A, Judgment: 28 February 2005, Para -104]

386. In adjudicating two preceding charges [charge nos.01 and 02], we have found it proved, on evaluation of evidence offered that the accused Md. Sakhawat Hossain himself along with his cohort Razakars participated to the commission of crimes narrated in those charges intending to further object of collective criminality despite the fact that he was in commanding position of the Chingra Razakar camp. And thus he has been held criminally liable under section 4(1) of the Act of 1973 although it has been found proved too that he was in position of authority and had effective control over the Razakar camp and the Razakars affiliated with it.

387. This charge [charge no.03] under adjudication does not allege that accused Md. Sakhawat Hossain was neglected to his duty and failed to prevent his cohort Razakars in committing the crimes. Rather it is evinced that accused Md. Sakhawat Hossain directly participated, by remaining present at the crime site with the group, in abducting the victim and thereby he knowing the consequence of his act and conduct culpably and consciously

facilitated the torture upon the victim in detention at the Razakar camp.

388. However, in view of deliberation made above there has been no bar in holding the accused Md. Sakhawat Hossain liable simultaneously under section 4(1) and also under the theory of 'civilian superior responsibility' as reflected in section 4(2) of the Act of 1973, under the same set of facts constituting the offences of abduction, confinement and torture as crimes against humanity. But cumulative convictions under both mode of responsibilities are not permissible, under the same set of criminal acts for which the accused has been charged with and in such case conviction should be entered on the basis of section 4(1) only, and the 'superior responsibility' can be taken into account as an aggravating factor for determination of level of culpability of the accused Md. Sakhawat Hossain.

389. We are to keep it in mind that culpability implies personal conduct which finds expression in individual contributions to the enterprise. Command responsibility is an omission mode of individual criminal liability as the superior is responsible for crimes committed by his subordinates and for failure to prevent them in committing crimes.

390. Superior responsibility is thus a form of 'indirect liability' as the superior is not held criminally liable for the 'physical

participation'. But here in the case in hand, the accused Md. Sakhawat Hossain himself participated in accomplishing the crimes planned, by his culpable act and conduct.

391. At the same time it is to be significantly noted that it is now settled that superior is responsible not 'for the crimes committed by his subordinates' but 'merely' for 'his neglect of duty' with regard to the crimes committed. To this extent, the neglect of duty seems to be considered as a separate crime of omission. And the superior is not liable as mode of liability for the commission of the offences committed by the subordinates but it is the liability for the 'dereliction of his duty'. This proposition together with the proved fact of accused Md. Sakhawat Hossain's participation to the commission of the crimes lawfully suggests holding the accused Md. Sakhawat Hossain liable under section 4(1) of the Act of 1973 and not under section 4(2) of the Act.

392. In view of above, we are of the view that the prosecution has been able to prove beyond reasonable doubt that the accused (1) Md. Sakhawat Hossain, (2) Sheikh Mohammad Mujibur Rahman alias Mujibur Rahman [absconded], and (3) Md. Abdul Khaleque Morol [absconded] knowingly and deliberately participated and facilitated the group of armed Razakars in abducting the victim Md. Nur Uddin Morol [P.W.03] and had kept him in unlawful and protracted detention at Chingra Razakar camp where he was

subjected to torture. Therefore, accused Md. Sakhawat Hossain, Sheikh Mohammad Mujibur Rahman alias Mujibur Rahman and Md. Abdul Khaleque Morol are found criminally liable under section 4(1) of the Act of 1973 for 'participating', 'abetting', 'facilitating' and substantially 'contributing', and also for complicity, by their culpable act and conduct forming part of attack, in carrying out criminal acts directing unarmed civilian constituting the offences of '**abduction**', '**confinement**' and '**torture**' as crimes against humanity as enumerated in section 3(2) (a) (g)(h) of the Act of 1973 which are punishable under section 20(2) of the Act.

393. Prosecution could not prove the arraignment brought against the accused Md. Ibrahim Hossain alias Ghungur Ibrahim in this charge no. 03, and as such, accused Md. Ibrahim Hossain alias Ghungur Ibrahim be acquitted thereof.

Adjudication of charge no. 04

[Abduction, confinement, torture and murder of A. Malek Sardar of village Hajoldanga under Police Station Keshobpur, District Jessore]

394. Summary charge: That at the end of Bangla month Ashwin, 1971 [1378 BS] the Razakars of Chingra Razakar camp having abducted A. Malek Sardar, a source of freedom-fighters, of village Chingra under Police Station Keshobpur, District-Jessore confined him in Chingra Razakar camp and tortured him mercilessly there. Thereafter, on 28 Bangla month Ashwin, 1971 at about 8.00/ 8.30

A.M. accused Md. Sakhawat Hossain, Md. Ibrahim Hossain alias Ghungur Ibrahim, Md. A. Aziz Sardar son of late Ful Miah Sardar, Abdul Aziz Sardar son of late Ahmmad Sardar and Md. Abdul Khaleque Morol along with other 6/7 Razakars brought said A. Malek Sardar from Chingra Razakar camp to Chingra bazaar ferry [Kheya ghat] and then accused Md. Sakhawat Hossain himself killed him by gun-shot there and the dead body of A. Malek Sardar was thrown down on the bank of Kapatakkha river.

395. Thereby accused (1) Md. Sakhawat Hossain (2) Md. Ibrahim Hossain alias Ghungur Ibrahim (3) Md. A. Aziz Sardar son of late Ful Miah Sardar (4) Abdul Aziz Sardar son of late Ahmmad Sardar, and (5) Md. Abdul Khaleque Morol are charged for participating, aiding, abetting, facilitating and for complicity in the commission of offences of abduction, confinement, torture and murder as crimes against humanity as part of systematic attack directed against unarmed civilians as specified in section 3(2)(a)(g)(h) of the Act of 1973 which are punishable under section 20(2) of the Act of 1973 for which the said accused persons have incurred liability under section 4(1) of the Act.

Evidence of Witnesses Presented

396. To prove the instant charge i.e. charge no. 04, 02[two] witnesses [P.Ws. 05 and 09] have been examined by the prosecution. Before we enter the task of evaluation of evidence

adduced, let us see what the witnesses examined have narrated in the Tribunal.

397. P.W.05 Kazi Abdul Aziz [66] is a resident of village Chingra under Police Station Keshobpur of District Jessore. He used to work in the business godown of his uncle Kazi Abdul Rashid at Chingra bazaar. P.W.05 stated that in 1971 he was 21/22 years old. He studied upto Class X. A Razakar camp was set up at Chingra bazaar which consisted of Tahshil Office, Union Parishad Office and Primary School and accused Sakhawat Hossain was its commander. The Razakar camp was about 1000 cubits far from his [P.W.05] uncle's godown.

398. In respect of the event as narrated in charge no.04 involving the act of abduction, confinement, torture and murder of A. Malek P.W.05 stated that on 28th day of Bangla month Ashwin in 1971 at about 08:00/08:30 A.M. while he had been at his uncle's godown at Chingra bazaar he saw Razakars accused Ibrahim, Abdul Aziz Sardar son of Ful Miah Sardar, Abdul Aziz Sardar son of Ahmmad Sardar, Abdul Khaleque Morol, Lutfor Morol[died during trial] accompanied by 4/5 armed Razakars moving towards west of Alauddin Munshi's tailoring shop taking a boy with them tying him up. Few minutes later he [P.W.05] closing the godown started going home along with adjacent shop keeper Khondokar Abdur Razzak and those Razakars resisted them when they arrived in front

of Alauddin Munshi's tailoring shop and then they heard Razakar Ibrahim asking the detained boy to get 'ready'. With this the boy told the Razakars –'sir, please allow me to say two *rakaats* prayer by taking *oju*'. In response, Razakar Ibrahim told- '*you will say your prayer finally*'. Then Razakar Ibrahim asked them [P.W.05 and his companion Khondokar Abdul Razzak] to take the detained boy towards kheyra ghat, west to Chingra bazaar. But they did not agree and with this Razakars accused Ibrahim and Aziz son of Ful Miah started beating them with rifle and threatened to shot them. Then they being feared took the detained boy to kheyra ghat and the Razakars followed them. After arrival at the kheyra ghat, Razakar accused Sakhawat Hossain told why the detained boy had not been killed yet and saying this accused Sakhawat Hossain taking the rifle from accused Ibrahim gunned the boy down to death and thus the bullet hit boy fell down. Then the accused Ibrahim and Abdul Aziz Sardar son of Ful Miah Sardar started beating them again and they with this being feared threw the dead body of the boy to the muddy bank of the river and the Razakars had left the place. They also came back home. P.W.05 stated that he did not go to Chingra bazaar for many days after the event as he became feared.

399. P.W.05 stated that later on he heard from people that the boy who was gunned down to death by accused Sakhawat Hossain was Abdul Malek of village Hijoldanga. Abdul Malek was engaged in

providing information about the activities of Razakars with the freedom- fighters and this was the reason of detaining and killing him.

400. In cross-examination, P.W.05 stated that the river Kapatakkha was about 150/200 cubits far from his uncle's godown at Chingra bazaar and that the boy who was detained and killed taking him to kheyra ghat from the Razakar camp was about 12/14 years old. P.W.05 expressed his ignorance as to on which date the boy was taken to Razakar camp.

401. The above statement made by P.W.05 in reply to defence questions affirms the fact of detaining the boy Abdul Malek and killing him taking to kheyra ghat.

402. P.W.05 denied the defence suggestions that the accused persons were not Razakars , that the victim was an adult person, that the accused persons were not concerned with the event of alleged killing and that what he testified implicating the accused persons was untrue and tutored.

403. P.W.09 Md. Kamal Sarder [63] is a resident of village Chingra under Police Station Keshobpur of District Jessore. He stated that Razakar camp was set up at Chingra bazaar on 15th day of Bangla month Jaistha in 1971. He stated facts relevant to the commission of the principal crime as narrated in charge no. 04.

404. P.W.09 stated that on 28th day of Bangla month Ashwin in 1971 when he was coming back home from Chingra bazaar, buying wheat, he heard a gun firing and when he arrived on the west of bazaar he saw Razakars accused Md. Sakhawat Hossain, Abdul Aziz son of Ful Sardar, Abdul Aziz son of Ahmmad Sardar, Lutfor Morol[died during trial] and their accomplices moving towards east from the end of kheya ghat. Later on, he [P.W.09] going to kheya ghat found a boy lying dead there.

405. P.W.09 further stated that three days later he went to Chingra bazaar when his uncle Aziz [P.W.05] told him that Razakars thrashed him [P.W.09] as he declined to keep the detained boy clutched as asked by Razakar accused Sakhawat Hossain. On being beaten he [P.W.09] eventually kept the detained boy hold when Razakar accused Sakhawat Hossain shot him [the detained boy] to death and asked to toss his dead body to the river of Kopotakkho. Then his uncle leaving the dead body of the murdered boy at kheya ghat came back home. His uncle also told that the boy killed was Malek of village Hijoldanga. P.W.09 also stated that he knew the Razakars whom he saw on his way to home from Chingra bazaar as he used to see them in bazaar.

406. In cross-examination, P.W.09 stated that he knew accused Md. Sakhawat Hossain by name and saw him even prior to independence. In reply to defence question P.W.09 stated that the

bank of the river Kapatakkha was adjacent to Chingra bazaar and the kheyra ghat was about 100 cubits far towards west from Chingra bazaar, that it was about 09:00 A.M when he found the bullet hit body of the boy lying and the boy was about 7/8 years old. P.W.09 also stated in reply to defence question that accused Md. Sakhawat Hossain was the Razakar commander of no.2 Sagardari Union and Amin Uddin Master was the commander of Keshobpur Thana Razakar Bahini. P.W.09 also stated that apart from the boy he testified about, Chandtulla Gazi was also kept detained at Chingra bazaar Razakar camp and three days later he was killed and accused Md. Sakhawat Hossain was the commander of Chingra Razakar camp. P.W.09 denied the defence suggestions that the accused persons were not Razakars and were not involved with the event of killing alleged and that what he testified implicating the accused persons with the commission of the offence alleged was untrue and tutored.

Finding with Reasoning on Evaluation of Evidence

407. This charge involves brutal killing of a pro-liberation boy of tender age and it happened in day time by dragging him at the Kheyra ghat of the river Kapatakkha adjacent to Chingra bazaar within the range of people's sight.

408. Five accused, namely (1) Md. Sakhawat Hossain (2) Md. Ibrahim Hossain alias Ghungur Ibrahim (3) Md. A. Aziz Sardar son

of late Ful Miah Sardar (4) Abdul Aziz Sardar son of late Ahmmad Sardar, and (5) Md. Abdul Khaleque Morol have been arraigned for participating, aiding, abetting, facilitating and for complicity in the commission of offences of abduction, confinement, torture and murder of a tender aged boy A. Malek Sardar as he used to act as a source of freedom fighters.

409. For the purpose of proving the arraignment brought in charge no.04 prosecution relied upon P.W.05 and P.W.09. Ms. Rezia Sultana, the learned prosecutor drawing attention to the evidence tendered submitted that P.W.05 is a direct witness to the act of gunning down A. Malek Sardar, the detained tender aged victim to death at the Kheya ghat adjacent to Chingra bazaar. P.W.09 at the relevant time heard a firing of gun shot and few minutes later he saw the accused persons moving towards east from the Kheya ghat and later on he found the dead body of the victim boy lying at the Kheya ghat. All these cumulatively prove the commission of killing at the place and at the relevant time on participation and facilitation of the accused persons affiliated with the Chingra Razakar camp.

410. The learned prosecutor went on to submit that the group of Razakars accompanied by the accused persons forced P.W.05 and another witness Khondokar Abdur Razzak[died during trial] to accompany them in taking the tender aged detained victim to the execution site where they saw the accused Md. Sakhawat Hossain

gunning the victim down to death. The event happened in day time and at the relevant time these two witnesses were about to return back home from Chingra bazaar, as found proved. Defence could not bring anything by cross-examining them to shake credibility of their testimony. Later on these two witnesses knew that the boy so killed was one Abdul Malek of village Hijoldanga.

411. The learned prosecutor also relied upon the statement of Khondokar Abdur Razzak [Exhibit-16] made to the investigation officer as the same has been received in evidence under section 19(2) of the Act of 1973 due to his death during trial. Khondokar Abdur Razzak was also a direct witness to the event and his statement received in evidence under section 19(2) of the Act of 1973 gets corroboration from the sworn testimony of P.W.05.

412. On contrary, Mr. Abdus Sattar Palwan, the learned defence counsel for the accused Md. Sakhawat Hossain, Md. Billal Hossain Biswas and three others [absconded] chiefly attacking the credibility of the witnesses depended upon by the prosecution submitted that the prosecution could not show why the victim was allegedly captured and killed; that the alleged victim A. Malek Sardar was not a source of freedom-fighters and there has been no proof in this regard. Testimony of P.W.05 so far as it relates to forcing him to assist the Razakars in taking the detained victim to Kheya ghat is not at all credible. His testimony is fatally

inconsistent to that of P.W.09. The learned defence counsel further submitted that the alleged fact of killing A. Malek Sardar is an untrue story. Prosecution failed to prove this charge by adducing reliable evidence.

413. Mr. Abdus Sukur Khan, the learned State defence counsel defending the absconded accused Md. Ibrahim Hossain alias Ghungur Ibrahim and Md. A. Aziz Sardar son of late Ful Miah Sardar submitted that these two accused persons were not involved with the alleged event of attack that resulted in killing of a tender aged boy. Prosecution failed to prove it beyond reasonable doubt by adducing reliable and trustworthy evidence. P.W.05 did not know the accused persons beforehand, and thus, it was not practicable to recognize these two accused accompanying the group of Razakars, as alleged. Inconsistent statement of P.W.s examined creates reasonable doubt as to complicity of these two accused persons with the alleged crimes.

414. This charge thus depends upon the testimony of P.W.05, P.W.09 and the statement of Khondokar Abdur Razzak [Exhibit-16] made to the investigation officer which has been taken in evidence under section 19(2) of the Act of 1973 as he died during trial. The event as narrated in the charge framed is that a tender aged boy named A. Malek Sardar of village Chingra was dragged out of Chingra Razakar camp and was taken to the Kheya ghat

adjacent to Chingra bazaar where he was gunned down to death. The boy allegedly used to act of providing information about the activities of Razakars around the locality. P.W.05 allegedly saw the event of killing and cited witness Khondokar Abdur Razzak [died during trial] was with him. P.W.09 allegedly heard the gun firing and then saw the accused persons returning back from the end of Kheya ghat, as at the relevant time he allegedly had been at the Chingra bazaar. Accused Md. Sakhawat Hossain allegedly shot the victim boy to death. The event happened in day time at 08:30AM.

415. Prosecution thus requires proving that-

- (i) The victim boy was dragged away by the accused persons and their cohorts to the Kheya ghat;
- (ii) P.W.05 and Khondokar Abdur Razzak were forced by the Razakars to drag the detained victim to the execution site on gun point;
- (iii) The victim was kept detained at the Razakar camp at Chingra bazaar;
- (iv) The victim was annihilated as he used to act as a source of freedom-fighters;
- (v) The accused persons participated in accomplishing the act of killing;
- (vi) Accused Md. Sakhawat Hossain gunned down the victim A. Malek Sardar to death; and
- (vi) How the P.W.s could know and recognise the accused persons?

416. Evidence of P.W.05 Kazi Abdul Aziz, a direct witness to the act of killing the detained boy A. Malek Sardar demonstrates that he [P.W.05] used to work at the shop at Chingra bazaar. On the day

of event after opening the shop in the morning at about 08:30 A.M. he saw the accused Razakars Ibrahim, Abdul Aziz Sardar son of Ful Miah Sardar, Abdul Aziz Sardar son of Ahmmad Sardar, Abdul Khaleque Morol, Lutfor Morol [died during trial] being accompanied by 4/5 armed Razakars moving towards west of Alauddin Munshi's tailoring shop taking a boy with them tying him up. Few minutes later, shutting down the shop he [P.W.05] started going back home along with adjacent shop keeper Khondokar Abdur Razzak and on their way when they arrived in front of Alauddin Munshi's tailoring shop they heard Razakar accused Ibrahim asking the detained boy to get 'ready'.

417. It also depicts from the evidence of P.W.05 that accused Razakars Ibrahim and Aziz son of Ful Miah Sardar asked them to assist in dragging the detained boy towards Kheya ghat. But on refusal to comply with it they started beating them with rifle and then forced them to drag the detained boy to kheya ghat on gun point where the accused Md. Sakhawat Hossain appeared and asked his cohorts – ' why the detained boy had not been killed yet' and on saying it he[accused Md. Sakhawat Hossain] taking the rifle from accused Ibrahim shot the boy to death. Razakars compelled them to drag the dead body to the bank of the river and left the site.

418. The above violent saying of accused Md. Sakhawat Hossain, as experienced by P.W.05 unambiguously implies that object of

detaining the victim boy on abduction was to annihilate him and accused Md. Sakhawat Hossain was aware about the entire event of attack that first resulted in detention on abduction and he was conscious part to it, rational prudence must conclude it.

419. Presumably, the victim boy A. Malek Sardar was kept detained at the Razakar camp and on the day of causing his death as above he was taken out of it. We have got it from the testimony of P.W.03 Md. Nur Uddin Morol, the victim of charge no.03 that during his captivity at the said camp a boy was also kept there detained. It remained unshaken. Thus, it lends assurance to the fact of victim A. Malek's protracted detention at the Razakar camp at Chingra bazaar. It also stands proved that kheyra ghat and the river Kapatakha were adjacent to the camp and Chandtulla Gazi, the victim of charge no.02 was killed by the Razakars of Chingra camp taking him on the bank of the river. We may thus unerringly infer that the act of killing the detainee A. Malek Sardar happened in similar way by taking him to the kheyra ghat from the Razakar camp.

420. It transpires that P.W.05 has stood hard and remained unshaken in the cross-examination and nothing has been elicited to dislodge his testimony he made in examination-in-chief about his accompanying the group as forced and seeing the act of killing.

421. It appears that the investigation officer reduced the statement of Khondokar Abdur Razzak in writing and he was accordingly cited as a key witness in relation to the event narrated in this charge. At a stage of trial the prosecution by initiating an application together with necessary paper brought it to the notice of the Tribunal that this witness died during trial, and thus, it prayed for taking his statement made to the investigation officer as evidence under section 19(2) of the Act of 1973. Accordingly, his statement which appears at page nos. 29-30 of the Volume of Statement of Witnesses has been marked as Exhibit-16 vide Tribunal's order no.29 dated 02.06.2016.

422. Taking away the victim boy by accused persons and their cohort Razakars to Kheya ghat as testified by P.W.05 Kazi Abdul Aziz is found to have been corroborated by Khondokar Abdur Razzak as he narrated in his statement made to the investigation officer [taken in evidence under section 19(2) of the Act of 1973 as he died during trial] that on being resisted while he and Kazi Abdul Aziz [P.W.05] were on the way to their home at a place in front of Alauddin Munshi's tailoring shop at the Chingra bazaar they were forced on gun point to assist them in dragging the detained boy holding his hands towards Kheya ghat when accused Md. Sakhawat Hossain appeared there and taking a gun from his cohort accused

Ibrahim gunned the detained boy down to death and then they had left the place abandoning the dead body there.

423. Upon arrival at the Kheya ghat, the execution site, as forced by the Razakars P.W.05 and Khondokar Abdur Razzak [witness died during trial] saw the brutal killing of the detained defenceless boy Malek and naturally such horrific experience made them too mentally tormented and traumatized.

424. It transpires from the testimony of P.W.09 Md. Kamal Sarder, the brother's son of P.W.05 Kazi Abdul Aziz that at the relevant time he had been at Chingra bazaar when he heard a gun firing and afterwards saw the accused persons accompanied by accused Md. Sakhawat Hossain moving towards east from the end of Kheya ghat. Later on, P.W.09 moved to Kheya ghat where he found the dead body of a boy lying there.

425. It appears that P.W.05 stated that accused Md. Lutfor Morol [died during trial] was also with the group of Razakars when they [P.W.05 and Khondokar Abdur Razzak] were forced to go with them at Kheya ghat holding the detained boy. The charge does not indict said Md. Lutfor Morol. Besides, he died during trial, and as such, proceeding against him stood abated. It is to be noted that merely for the reason of naming another one who has not been charged for the offences the testimony so far as it relates to participation and involvement of the accused persons indicted does

not go on air. It is now settled that mere exegeration does not diminish witness's testimony in its entirety.

426. Who was the boy so killed brutally by Razakars? Why he was targeted? Wherefrom he was taken towards the Kheya ghat? None of the above three witnesses knew the detained boy killed. P.W.05 later on heard from people that the boy who was gunned down to death by accused Md. Sakhawat Hossain was Abdul Malek and the reason of detaining and killing him was that he [Abdul Malek] was engaged in providing information about the activities of Razakars with the freedom- fighters. Three days later, P.W.09 heard from his uncle P.W.05 that the boy killed was Malek. Presumably P.W.05 might not have occasion of knowing the identity of the victim boy and reason of detaining and killing him. Thus, knowing the victim and reason of killing him later on as testified by P.W.05 inspires credence.

427. Defence as understood does not dispute the killing the victim A.Malek Sardar. It however even did not suggest that the event happened in some other manner, in some other place and by some other persons. In a criminal trial, prosecution witnesses are expected to be confronted or attacked on cross-examination by the defence. But the defence could not do it. Defence rather, as it appears, failed to undermine or destroy the direct testimony of P.W.05 and P.W.09.

428. It is significant to note that the victims of foregoing three charges, namely charge nos.01,02 and 03 actively sided with the war of liberation. Of them the victim of charge no.01 used to act as a source of freedom-fighters and the victims of charge nos. 02 and 03 were freedom-fighters who were detained at Chingra Razakar camp on forcible capture and of them victim Chandtulla Gazi [victim of charge no.02] was eventually brutally killed taking him on the bank of the river Kapatakkha. All these have been proved beyond reasonable doubt.

429. A. Malek Sardar, a tender aged boy who was detained and killed [as listed in charge no.04] was also a source of freedom-fighters as found proved and this was the reason of targeting him. It stands unambiguously proved that objective of collective criminal activities of the accused persons having constant and close affiliation with Chingra Razakar camp under the leadership of accused Md. Sakhawat Hossain was to capture, detain and annihilation of freedom-fighters and the civilians sided with them.

430. The above objective of the accused persons gets assurance from the speech of accused Md. Sakhawat Hossain made in a public meeting held in mid of Bangla month Sraban in 1971 at about 10:00 A.M at Chingra bazaar attended by 25/30 Razakars when he [accused Md. Sakhawat Hossain] announced that the pro-Awami League people and the people who chanted 'Joy Bangla'

slogan were '*Kafers*', *Monafeks*' and they would be liquidated on hunting. Accused Md. Sakhawat Hossain asked his accomplice Razakars present at the meeting to keep eyes on the ferry ghats through which freedom-fighters often used to move. P.W.01 Gaziur Rahman sitting inside a shop at Chingra bazaar overheard the speech delivered by the accused Md. Sakhawat Hossain. Defence does not deny it in cross-examination of P.W.01. The essence of this piece of totally unshaken and undenied evidence as to a pertinently relevant fact forces us to conclude that victim A. Malek Sardar was also detained on capture and later on killed as he was engaged in providing information about the Razakars and their activities to the freedom-fighters.

431. Five accused (1) Md. Sakhawat Hossain (2) Md. Ibrahim Hossain alias Ghungur Ibrahim (3) Md. A. Aziz Sardar son of late Ful Miah Sardar (4) Abdul Aziz Sardar son of late Ahmmad Sardar, and (5) Md. Abdul Khaleque Morol have been indicted in this charge for participating, aiding, abetting, facilitating and for complicity in the commission of offences of abduction, confinement, torture and murder of the victim A. Malek Sardar.

432. Prosecution could not bring evidence showing the act of victim's abduction. But it does not materially diminish the fact of detaining the victim at the Chingra Razakar camp. Owing to the context prevailing in 1971 and nature and pattern of activities of

Razakar Bahini, an auxiliary force particularly if the same are carried out at a camp or detention camp the people had no occasion to witness it. However, it is also evinced from what the P.W.03 Md. Nur Uddin Morol, another detainee and a star witness in respect of charge no.03 stated in reply to question put to him by the defence that one boy was also kept detained at Chingra Razakar camp when he [P.W.03] and Chandtulla Gazi were kept there in captivity.

433. The above proves A. Malek Sardar's detention at Chingra Razakar camp which was the upshot of his abduction. Since victim A. Malek Sardar was kept in captivity at Chingra Razakar camp, indisputably the Razakars who happened to be the cohorts of accused Md. Sakhawat Hossain, the leading person of the camp had brought the victim there on forcible capture and it happened on approval and instruction of accused Md. Sakhawat Hossain, we safely and unerringly conclude. Murder of the victim was the upshot of his abduction and detention. Thus, the accused persons' participating, facilitating and abetting the act of his killing as proved had nexus even to the phase of attack that started with the victim's forcible capture that ended with his brutal killing.

434. The above piece of unshaken testimony of P.W.03, a detainee [victim of charge no.03] which is materially relevant speaks a lot about the commission of the killing and complicity of the accused persons therewith. P.W.09 later on went to Kheya ghat

where he discovered the dead body of a boy[victim] lying there. It too strengthens what has been testified by P.W.05 and Khondokar Abdur Razzak, the two direct witnesses to the commission of the act of killing the detained boy dragging him at the Kheya ghat. Defence could not dislodge it in any manner by cross-examining the P.W.05. It merely suggested that what has been testified by P.W.05 was untrue and false. But there has been no earthy reason of accepting this suggestion. In absence of anything contrary suggesting untruthfulness of testimony of P.W.05 and the statement made by Khondokar Abdur Razzak to the investigation officer [taken in evidence as permissible under section 19(2) of the Act of 1973] they cannot be termed to be untrustworthy witnesses.

435. It is now settled that direct participation of an individual in accomplishing a crime increases his criminal responsibility and level of his culpability. It has already been proved that accused Md. Sakhawat Hossain physically participated in causing death of the detained victim by gunning him down. And the other accused persons were with him at the execution site. Thus, such mode of participation of accused Md. Sakhawat Hossain in respect of killing a detained civilian as proved is graver offence than his complicity and involvement therewith as a 'superior' or 'leader' or 'commander' of the Razakar camp because he himself perpetrated

the act of killing, the principal crime in a cold blooded and brutal manner.

436. It is now settled jurisprudence that an 'omission' or 'failure to prevent' subordinates in committing crime can constitute the offence of murder and a crime can be attributed to one person even where another did the causative action, through forms such as ordering and exercising superior responsibility.

437. We see in the case in hand that accused Md. Sakhawat Hossain himself physically participated to the commission of the crime, the killing of the detained defenceless civilian as he is found to have had gunned down the detained boy. However, his 'superior' position over the Razakars of the camp at Chingra bazaar increases the level of his culpability, as we have already rendered our reasoned view in this regard in the foregoing deliberation made in respect of charge no.03.

438. The Razakar Bahini, an auxiliary force formed by the Pakistani occupation armed forces, used to act as the 'aggressors' and their criminal acts directing the civilians gravely violated the Laws of War and the Geneva Convention as well. The Fourth Geneva Convention protects civilian persons who have fallen into enemy hands from arbitrary treatment and violence. The Pakistani occupation armed force and their armed organs including the auxiliary forces indisputably had committed forbidden act of

aggression against Bangladesh in 1971. The accused persons, in the case in hand, by committing the murder of a defenceless civilian of tender age after keeping him protracted detention at their camp was simply an aggression not only against a single civilian but against the Bengali nation as well.

439. It is now well settled jurisprudence that even a single act if had link or nexus with the armed conflict may constitute a violation of the law and customs of war. The accused being members of auxiliary force of Pakistani occupation army are found to have had complicity by their alleged act and conduct which had nexus with the policy and plan of the Pakistani occupation armed force in the territory of Bangladesh. It is to be noted that the **ICTY Trial Chamber** has observed in the case of *Halilovic* that—

".....there is no reason why a single, isolated act, could not constitute a violation of the law and customs of war, when the required nexus has been established."

[Case No. IT-01-48-T, Judgment: 16 November 2005, Para-724]

440. As regards the notion of ‘participation’ we prefer to pen our view that a person may be said to have participated in a Joint Criminal Enterprise [**JCE**] in various ways—by personally committing the crime or by assisting or substantially contributing to its commission or by act of omission that encouraged, approved and endorsed the actual offenders in committing the crime.

441. It has already been proved that accused Md. Sakhawat Hossain appearing at the Kheya ghat, the execution site, adjacent to the Razakar camp, arrogantly taking the gun from his cohort accused Md. Ibrahim Hossain alias Ghungur Ibrahim present at the site shot the detained boy A. Malek Sardar to death. The other accused persons present there substantially facilitated and contributed to the commission of principal crime as they dragged the detained boy there.

442. In respect of ‘participation’ in a **JCE** the **ICTY Trial Chamber** has observed in the case of *Stakic* that—

"A person may participate in a joint criminal enterprise in various ways: (i) by personally committing the agreed crime as a principal offender; (ii) by assisting or encouraging the principal offender in committing the agreed crime as a co-perpetrator who shares the intent of the joint criminal enterprise; (iii) by acting in furtherance of a particular system in which the crime is committed by reason of the accused's position of authority or function and with knowledge of the nature of that system and intent to further it."

[Case No. IT-97-24-T, Judgment: 31 July 2003, Para-435]

443. Thus, we conclude that the other four accused Md. Ibrahim Hossain alias Ghungur Ibrahim, Md. A. Aziz Sardar son of late Ful Miah Sardar, Abdul Aziz Sardar son of late Ahmmad Sardar and Md. Abdul Khaleque Morol also took consenting part in the commission of the crime and were connected with the enterprise. Their culpable role and presence at the Razakar camp and

execution site made them equally liable as ‘co-perpetrators’ in committing the murder, the upshot of the attack, under the doctrine of Joint Criminal Enterprise [JCE] which corresponds to section 4(1) of the Act of 1973 which reads as below:

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

444. Thus, mere non-participation physically in committing the crime does not absolve the other four accused Md. Ibrahim Hossain alias Ghungur Ibrahim, Md. A. Aziz Sardar son of late Ful Miah Sardar, Abdul Aziz Sardar son of late Ahmmad Sardar and Md. Abdul Khaleque Morol of liability if it is proved that they were ‘concerned’ with the commission of such crime, by their act or conduct and presence at the crime site with the group of attackers, knowing the consequence.

445. The accused persons, who were closely and constantly associated with the Razakar camp at the Chingra bazaar, used to carry out recurrent criminal acts as organised system crimes by detaining civilians there and killing them later on either taking on the bank of adjacent river or at Kheya ghat. It stands proved beyond reasonable doubt. Thus, in the case in hand the **Systematic Mode of JCE** is attracted in holding the accused persons liable. The **ICTR Appeals Chambers** in the cases of **Ntakirutimana and**

Ntakirutimana has interpreted the **Systematic Mode of JCE** as below:

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

[Case Nos. ICTR-96-10-A and ICTR-96-17-A, Judgment : 13 December 2004, Para -464]

446. 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' Case, Case No. IT-97-24-A, ICTY Appeals Chamber, Judgment: 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 [**Krnjelacs' case, Case No. IT-97-25-A, ICTY Appeals Chamber, Judgment: 17 September 2003, Para 81**].

447. In the case in hand, it has been found proved that all the accused persons charged with actively participated in taking the victim boy from captivity at the detention camp to the execution site and remained present there and thereby they facilitated and substantially contributed to the commission of the principal crime. In this way they all were the part of **JCE-Form-II**.

448. In view if above, despite the proved fact that accused Md. Sakhawat Hossain had been in leading position of Chingra Razakar camp having dominance over his cohort Razakars associated with the camp he is liable to have incurred liability under section 4(1) of the Act of 1973 and not under the theory of civilian superior responsibility reflected in section 4(2) of the Act of 1973. However, his dominant position of authority may be taken into account in determining the level of his culpability and awarding sentence. In this respect we have made reasoned deliberation in the foregoing charge [charge no.03].

449. On rational evaluation of evidence presented we arrive at a decision that the prosecution has been able to prove that victim A. Malek Sardar, a tender aged boy of village Hijoldanga under Police Station Keshobpur, Jessore was engaged in providing information about the Razakars and their activities to the freedom fighters and in this way he sided with the war of liberation in 1971. What a great and heroic boy A. Malek Sardar was! This was the reason of keeping him in protracted detention at Chingra Razakar camp, on forcible capture. Later on, in one morning [on the day of event of killing] he was taken out by the accused persons, the Razakars of the said Razakar camp and was dragged at the Kheya ghat, the execution site where accused Md. Sakhawat Hossain appeared and taking the gun from his cohort accused Md. Ibrahim Hossain alias

Ghungur Ibrahim gunned down the detained boy A. Malek Sardar to death, with grave anger. In this way the accused persons belonging to infamous Razakar Bahini did not spare even a tender aged boy. It is found too from the evidence of P.W.05, a direct witness that at the last moment before he was shot to death victim A. Malek Sardar desired to say ‘prayer’—but he was not allowed even. What a brutality! The sacrifice the victim laid for the cause of independence was great indeed. The nation should feel proud of this valiant boy A. Malek Sardar. All the five accused persons were active and conscious part of collective criminality that eventually halted the dream of a boy of seeing his mother land liberated, by causing his death by gun shot.

450. Therefore, (1) Md. Sakhawat Hossain (2) Md. Ibrahim Hossain alias Ghungur Ibrahim (3) Md. A. Aziz Sardar son of late Ful Miah Sardar (4) Abdul Aziz Sardar son of late Ahmmad Sardar, and (5) Md. Abdul Khaleque Morol are found criminally liable under section 4(1) of the Act of 1973 for participating, aiding, abetting, facilitating and for complicity, by their culpable act and conduct forming part of attack, directing a defenceless civilian constituting the offences of **‘abduction’**, **‘confinement’** and **‘murder’** as crimes against humanity as enumerated in section 3(2) (a) (g)(h) of the Act of 1973 which are punishable under section 20(2) of the Act.

Adjudication of charge No. 05

[Abduction, confinement, torture, arson and plundering) committed at village Mohadebpur under Police Station Keshobpur, District Jessore]

451. Summary charge: That one day in first part of Bangla month Ashwin in 1971 [1378 BS] at about 6.00 A.M. freedom-fighter Miron Sheikh of village Mohadebpur under Police Station Keshobpur, District Jessore being unarmed came to his house to meet his parents . Accused Md. Sakhawat Hossain having got that message from secret source ordered his companion Razakars of Chingra Razakar camp to abduct him, and accordingly 30/40 Razakars of that camp entered into Mohadebpur village from western side of the village and started plundering and setting fire to the houses of freedom-fighters, supporters of liberation war and voters of boat symbol one after another and they burnt about 20/22 houses . At one stage at about 10.00/11.00 A.M. 10/12 Razakars raided the house of said Miron Sheikh and tried to apprehend him, but he ran away from back side of the house through open field, and when Razakars ran after him he stood up raising his two hands. At that stage accused Md. Abdul Khaleque Morol shot him with his rifle in hand, and as such, he sustained serious injuries on his fingers of his left hand, and then the Razakars having abducted injured Miron Sheikh brought him to Chingra Razakar camp. Thereafter, in presence and direction of accused Md. Sakhawat

Hossain, accused Md. Ibrahim Hossain alias Ghungur Ibrahim, Md. A . Aziz Sardar son of late Ful Miah Sardar, Abdul Aziz Sardar son of late Ahmmad Sardar, Md. Lutfor Morol[died during trial] and Md. Abdul Khaleque Morol tortured Miron Sheikh mercilessly, and in the evening he [Miron Sheikh] was thrown in the Kapatakkha river thinking that he died.

452. Thereby accused (1) Md. Sakhawat Hossain (2) Md. Ibrahim Hossain alias Ghungur Ibrahim (3)Md. A. Aziz Sardar son of late Ful Miah Sardar (4) Abdul Aziz Sardar son of late Ahmmad Sardar (5) Md. Lutfor Morol[died during trial], and (6) Md. Abdul Khaleque Morol are charged for participating, aiding, abetting, facilitating and for complicity in the commission of offences of abduction, confinement , torture and other inhumane acts [arson and plundering] as crimes against humanity as part of systematic attack directed against unarmed civilians as specified in section 3(2)(a)(g)(h) of the Act of 1973 which are punishable under section 20(2) of the said Act of 1973 for which the said accused persons have incurred liability under section 4(1) of the Act.

Evidence of Witnesses Presented

453. To prove charge no. 05, the prosecution has examined 03[three] witnesses [P.Ws. 06, 07 and 08]. Before you evaluate the evidence of the witnesses adduced, let us see what they have testified before the Tribunal.

454. P.W.06 Miron Sheikh [66] is a resident of village Mohadebpur under Police Station Keshobpur of District Jessore. He came on dock to testify the event narrated in charge no.05 involving the criminal acts of abduction, confinement, torture and other inhumane acts allegedly carried out at their village. In 1971 P.W.06 was 22/23 years old. He was a farmer. He stated that in 1971 during the war of liberation he joined the Mukti Bahini formed of freedom-fighters under the leadership of Mofazzal Hossain Master of their village. He [P.W.06] was engaged in providing information about Razakars with the freedom-fighters and he had been staying at the locality of his neighbouring village, P.W.06 stated.

455. P.W.06, in respect of the event, testified that on a day of first part of Bangla month Ashwin in 1971 at about 06:00 A.M he went to his native home to meet his wife, brothers and sisters. On getting information about his coming home 30/40 Razakars of Chingra Razakar camp besieged their village Mohadebpur and set the houses of freedom-fighters, pro-liberation civilans and supporters of Awami League on fire. At that time he[P.W.06] had been at his home and then he came out and saw the houses on fire and he started running to escape as 10/12 Razakars besieged their house. At that time Razakar accused Abdul Aziz Sardar son of Ful Miah Sardar, Abdul Aziz Sardar son of Ahmmad Sardar, Abdul

Khaleque, Md. Ibrahim, Md. Lutfor Rahman[died during trial] and their accomplice Razakars started chasing him and at a stage he[P.W.06] got halted raising hands in the field about 200 yards far from his house. The accused Abdul Khaleque shot gun fire targeting him which hit on his left hand and two fingers. P.W.06 further stated that the Razakars then detaining him took away to Chingra Razakar camp.

456. P.W.06, in respect of cruelty inflicted on him at the Razakar camp keeping him in captivity, stated that accused Abdul Aziz son of Ful Miah Sardar, Abdul Aziz son of Ahmmad Sardar, Ibrahim and Lutfor Rahman[died during trial] on instruction of accused Razakar Md. Sakhawat Hossain started pounding him severely and he thus became unconscious. At night on the same day at about 10:00/10:30 P.M when he [P.W. 06] regained sense accused Md. Sakhawat Hossain grilled him to obtain information about the camps of freedom-fighters and he got unconscious again due to torture caused to him as he declined to provide any such information.

457. P.W.06 further stated that on the following day he regained sense and discovered him lying on the bank of river Kopotakkho. The people on hearing his cry took him to the house of Altaf Master of village Varsa and therefrom he was taken to India and got him admitted in Taki hospital where the doctors by surgical intervention

removed his two fingers[at this stage of deposition, the P.W.06 exhibited his left hand having three fingers only]. His [P.W.06] brother's son Liakat Ali went to hospital to see him and he [P.W.06] described the event to him. After the independence achieved, he [P.W.06] came back home land and found his houses destructed. The accused persons were the residents of his neighbouring locality and thus he knew them beforehand.

458. On cross-examination, P.W.06 stated that Chingra bazaar was about 3/4 kilometres away from their village Mohadebpur and that Mofazzal Hossain Master was a freedom-fighter and Altaf Master of village Varsa was a commander of freedom fighters. P.W.06 next stated that his name has not yet been enlisted as a freedom-fighter, that currently he has been maintaining his livelihood by 'begging'.

459. In reply to defence question, P.W.06 also stated that he received training as a freedom-fighter secretly at Patkelghata Kumuria inside the territory of Bangladesh and Mofazzal Master and Altaf Master were engaged in providing them training. In 1971 during the war of liberation he used to stay in the locality of Shyampur, Avoytola, Kumuria and Laripara villages; accused Ibrahim Hossain's father's name was Yakub Ali, P.W.06 added in reply to defence question. During the war of liberation he visited the village Varsa which was about five kilometres away from his

village. P.W.06 denied defence suggestions that the accused persons did not belong to Razakar Bahini, that they were not engaged in any criminal activities and that what he testified implicating the accused persons was untrue and tutored.

460. P.W.07 Liakot Ali Sheikh [59] is a resident of village Mohadebpur. He is the son of Miron Sheikh's [P.W.06] brother. He is a freedom-fighter. He testified what he learnt from his uncle Miron Sheikh [P.W.06], the victim of the event narrated in charge no.05. He testified that in 1971 he was a student of class IX. After the war of liberation ensued in 1971 he along with Nurul Islam Khokon, Fajor Ali, Abdul Motleb, Md. Tohiduzzaman of their village and 10/12 others went to Bashirhat, India on 23 April 1971 to undergo freedom-fighters' training. Therefrom they went to Chakunia in Bihar to receive training and on ending of training they a group of ten freedom-fighters got stationed at village Khordo under Police Station Kolaroa by entering Bangladesh through Hakimpur border.

461. P.W.07 further testified that during their staying at Khordo camp, in the first part of Bangla month Ashwin he came to know through source that receiving bullet hit injury and brutal torture caused by Razakars his uncle Miron Sheikh had been in Taki hospital[in India] under treatment. Then he [P.W.07] along with 2/3 co-freedom fighters went to Taki hospital where he found the

left hand and left leg bandaged and mark of injuries on his uncle's body.

462. P.W.07 also added that on his [P.W.07] query his uncle Miron Sheikh described that he was engaged with activities being affiliated with Mofazzal Master, an organiser of the war of liberation of their locality, and in the first part of Bangla month Ashwin Miron Sheikh went to his own home and this information reached to Chingra Razakar camp and then the Razakars besieged their village Mohadebpur, set many houses on fire and a group of 10/12 Razakars including accused Ibrahim, Lutfor Morol[died during trial], Billal Biswas, Abdul Aziz son of Ful Miah Sardar, Abdul Aziz son of Ahmmad Ali, Abdul Khaleque besieged their house and with this he[Miron Sheikh] started running away towards the field at north . But the Razakars started chasing him and at a point he [Miron Sheikh] got halted in the field raising hands and then accused Abdul Khaleque fired a gun shot to him which hit his left hand causing lopping off two fingers. The Razakars then took Miron Sheikh away to Razakar camp at Chingra bazaar, P.W.07 testified as learnt from Miron Sheikh.

463. P.W.07 next stated that Miron Sheikh [victim] also told that he was subjected to inhumane cruelties by accused Ibrahim, Lutfor[died during trial] and their accomplices after taking him away to Razakar camp and thus he lost his sense. When he [Miron

Sheikh] regained sense, Razakar accused Md. Sakhawat Hossain grilled him for obtaining information about the freedom- fighters including him [P.W.07]. Accused Md. Sakhawat Hossain had smashed his left leg by contorting as he refused to provide information. With this Miron Sheikh lost his sense again. On the following morning, on regaining sense he [Miron Sheikh] discovered him lying on the south bank of the river Kapatakkha and then he was taken to the house of Altaf Master of village Varsa by the people who came there on hearing his scream. Afterwards, Altaf Master took Miron Sheikh to Taki hospital, India and therefrom he was shifted to Vangur hospital, Kolkata for his better treatment, Miron Sheikh [P.W.06] told him [P.W.07].

464. P.W.07 also stated that he then returned back to Khordo camp in Bangladesh and they the freedom- fighters got the Chingra Razakar camp freed on 06 December 1971 and on that day coming home he learnt from his parents and the villagers that accused Abdul Aziz Sardar son of Ful Miah Sardar, Abdul Aziz Sardar son of Ahmmad Sardar, Ibrahim, Abdul Khaleque, Lutfor Morol[died during trial] and their accomplice Razakars had destructed their village by looting and setting on fire and in the end of Bengali month Ashwin they took his[P.W.07] father Johor Ali Sheikh away to Chingra Razakar camp on capture wherefrom he was shifted to Keshobpur Razakar camp where during his seven days' captivity

Razakar commander Amin Uddin forced him[father of P.W.07] to disclose his[P.W.07] and Miron Sheikh's [P.W.06] whereabouts and eventually his father was set at liberty.

465. On cross-examination, in reply to defence question P.W.07 stated that accused Md. Sakhawat Hossain was the commander of Chingra Razakar camp and that accused Abdul Khaleque was a resident of village Altapole and accused Md. Sakhawat Hossain was from village Hijoldanga. P.W.07 also stated that there existed three Razakar camps in the locality of Keshobpur Police Station. He [P.W.07] returned from India on having training possibly in the first part of Bangla month Bhadra and afterwards he went to India to see his uncle Miron Sheikh [P.W.06] and he went to India once again to collect arms and ammunition. He fought the war of liberation under command of freedom fighter Subhash.

466. P.W.07, in reply to defence question, also stated that he received training at Chakunia, Bihar, India for one month and three days and he was a freedom- fighter of Sector No.8 which was under command of Major Manjur. P.W.07 also stated that Mofazzal Master and Altaf Master are not alive now. Razakars had fled away when they launched attack at Chingra Razakar camp on 06 December 1971, he added. P.W.07 denied defence suggestions that the accused persons had no affiliation with Razakar Bahini and were not involved with the commission of the offence alleged and

that what he testified implicating the accused persons was untrue and tutored.

467. P.W.08 Hasan Ali Sheikh [91] is a co-villager of victim Miron Sheikh. In 1971 he was a farmer. He stated that Miron Sheikh [P.W.06] of their village got enrolled as a freedom- fighter and was engaged in communicating information about the local Razakars to the freedom- fighters. Miron Sheikh's nephew Liakot Ali [P.W.07] was a freedom- fighter and thus in the Bangla month Ashwin in 1971 at about 10:00/10:30 A.M. a group of 30/40 Razakars of Chingra Razakar camp had attacked their village Mohadebpur and besieging the village they burnt down the houses of followers of the war of liberation and Awami League. At that time he [P.W.08] had been at his house and on observing the attack he went into hid inside a bush north to his house wherefrom he saw Miron Sheikh [P.W.06] running away towards the field on being chased by Razakars and at a stage Miron Sheikh got halted in the field raising hands when Razakar accused Khaleque fired a gun shot targeting him [Miron Sheikh] and then the Razakars detaining him took away to their camp. He [P.W.08] could recognize some of the Razakars who were accused Ibrahim, Abdul Aziz son of Ahmmad Sarder, Abdul Aziz son of Ful Sarder. P.W.08 further stated that later on he knew from Liakot Ali [P.W.07], the son of

Miron Sheikh's brother that Miron Sheikh survived and got admitted in hospital.

468. On cross-examination, P.W.08 stated that the accused he could recognize were Razakars and they were from their no.4 Bidyanandakathi Union. Chingra Razakar camp was about 3/4 kilometres far from their village Mohadebpur. Miron Sheikh's [victim] house was adjacent north to their [P.W. 08] house and Razakars burnt down the house of Miron Sheikh as well, he added in reply to question put to him by the defence. P.W.08 denied defence suggestion that Miron Sheikh did not receive bullet hit injury or he got injured in some other manner. P.W.08 also denied that the accused persons were not the members of Razakar Bahini and were not associated with the offence alleged and that what he testified implicating the accused persons was untrue and tutored.

Finding with Reasoning on Evaluation of Evidence

469. This charge refers to the event of attack that resulted in abduction of victim Miron Sheikh [P.W.06] and causing severe torture to him in detention at Razakar camp at Chingra bazaar. Six [06] accused persons have been indicted for the offences narrated in this charge. Out of 06 accused, accused Md. Lutfor Morol died in prison during trial and thus proceedings against him stood abated. In conjunction with the attack by the group of Razakars accompanied by the accused persons had set the houses of the

victim and others on fire before securing his capture, the charge framed alleges.

470. On capture the victim was taken to Chingra Razakar camp where he was subjected to merciless torture in detention. The event of abduction happened in one morning in the first part of Bangla month Ashwin [1971] and in the evening he was thrown in the river Kapatakkha supposing him to be dead, the charge framed narrates.

471. In advancing argument on this charge no.05 Ms. Rezia Sultana, the learned prosecutor submitted that the victim Miron Sheikh himself testified as P.W.06 the entire event of attack that resulted in his abduction, torture and confinement at the Chingra Razakar camp by the accused persons. P.W.08, a resident of the victim's village also observed how the attack was launched and the victim was taken away forcibly by the accused persons and their cohorts. It remained unshaken that the victim P.W.06 was associated with the group of freedom-fighters led by Mofazzal Hossain Master and was engaged in providing information with them about Razakars and this was the reason of targeting him.

472. The learned prosecutor continued to submit that in addition to those two direct witnesses, one Liakot Ali Sheikh [P.W.07] who is brother's son of the victim heard the event from the victim after tracing him [victim] from a place on the bank of the river

Kapatakkha, on the following day. His hearsay evidence carries probative value as it appears to have been corroborated by the victim himself. The victim was treated in India as he was subjected to brutal physical torture in captivity by the accused persons which has been corroborated by the P.W.07, the learned prosecutor added. Defence could not controvert the testimony of these witnesses in any manner by cross-examining them.

473. Mr. Abdus Sattar Palwan, the learned defence counsel for the accused Md. Sakhawat Hossain, Md. Billal Hossain Biswas and three others [absconded] submitted drawing attention to the testimony of the witnesses relied upon by the prosecution that the prosecution witnesses were not at all familiar with the identity of accused Md. Sakhawat Hossain and other accused persons; that they testified falsely intending to implicate the accused persons with the alleged crime. The learned defence counsel went on to submit that victim P.W.06 was not a source of freedom-fighters, and as such, there had been no reason of targeting him allegedly. Victim's testimony in relation to his alleged abduction, confinement and torture is not at all believable. He might have sustained injury in some other manner caused by some other persons.

474. Mr. Abdus Sukur Khan, the learned State defence counsel defending the two absconded accused Md. Ibrahim Hossain and Md. A. Aziz Sardar son of late Ful Miah Sardar submitted that

these two accused persons were not involved with the event alleged; that the prosecution could not prove that the victim [P.W.06] of the alleged event was a freedom-fighter and thus there had been no reason of making him target of the alleged attack. P.W.08 did not know the name of accused Ibrahim's father and it indicates that he was not aware of accused Ibrahim's identity. Thus, the testimony of P.W.08 implicating accused Md. Ibrahim Hossain does not inspire credence. Prosecution failed to connect these two accused persons with the accomplishment of alleged crimes.

475. Prosecution in order to prove this charge relied upon the oral testimony of three witnesses who have been examined as P.W.06, P.W.07 and P.W.08. Of them P.W.06 is the victim Miron Sheikh, P.W.08 Hasan Ali Sheikh, a neighbour of the victim, is a direct witness to the event of attack and taking the victim away on forcible capture. P.W.07 Liakot Ali Sheikh, the nephew of the victim is a hearsay witness and he claimed to have learnt the event from the victim. Thus, the P.W.06, the victim himself is a star witness in respect of this charge.

476. Prosecution requires proving that-

- (i) The accused persons accompanied the group of attackers for causing capture of victim Miron Sheikh [P.W.06].
- (ii) The reason of targeting the victim.

- (iii) Had the accused persons participated in carrying out destructive activities, in conjunction with the attack?
- (iv) The act of causing brutal torture to the victim detaining him at Chingra Razakar camp.
- (v) How the accused persons participated, aided and facilitated the commission of crimes? and
- (vi) How the detained victim could get survived and in what condition ?

477. Testimony of the victim P.W.06 demonstrates that in 1971 during the war of liberation he joined the Mukti Bahini formed of freedom-fighters under the leadership of Mofazzal Hossain Master of their village and was engaged in providing information with them about Razakars and thus he had been staying at the locality of his neighbouring village. Defence simply denied it and it could not be controverted in any manner.

478. The above version is found to have been corroborated by P.W.08, a neighbour of the victim. P.W.08 Hasan Ali Sheikh stated that Miron Sheikh [victim P.W.06] used to furnish information about Razakars to the freedom-fighters and he joined the war of liberation. P.W.07 Liakot Ali Sheikh, the nephew of the victim corroborates too that his uncle Miron Sheikh [P.W.06] used to work being associated with Mofazzal Hossain Master, an organiser of freedom-fight around their locality. It has been re-affirmed too in cross-examination of P.W.06. Besides, we have already got it

proved in adjudicating charge no.01 that Mofazzal Hossain Master was a potential freedom-fighter as testified by P.W.11 and P.W.10.

479. It may be unerringly inferred that the members of infamous Razakar Bahini had not targeted victim Miron Sheikh for no casual reason. The victim was actively associated with a group of freedom- fighters and used to facilitate their activities by providing information with them about Razakars. Indisputably this was the reason that prompted the accused persons and their cohort Razakars affiliated with the Chingra Razakar camp to secure Miron Sheikh's capture, we conclude. When it happened?

480. Testimony of P.W.06 Miron Sheikh depicts that he had been staying with the group of freedom-fighters at the locality of his neighbouring village and on the day of the event he came to his native home [at village Mohadebpur] to meet his wife, brothers and sisters and on getting this information a group of 30/40 Razakars of Chingra Razakar camp besieged their village Mohadebpur and set the houses of freedom-fighters, pro-liberation civilians and supporters of Awami League on fire. At that time he[P.W.06] had been at his home and then he came out and saw the houses on ablaze and he started running to escape as 10/12 Razakars besieged their house.

481. The above version remained unimpeached in cross-examination and thus carrying out destructive activities by setting

the houses of civilians on fire stands proved and such criminal act was detrimental to normal livelihood of protected civilians and obviously it caused grave mental harm to the sufferers which constituted the offence of 'other inhumane act'.

482. Victim P.W.06 also stated that after besieging their house Razakar accused Abdul Aziz Sardar son of Ful Miah Sardar, Abdul Aziz Sardar son of Ahmmad Sardar, Abdul Khaleque, Md. Ibrahim, Md. Lutfor Rahman [died during trial] and their accomplice Razakars started chasing him and at a stage he [P.W.06] got halted raising hands up in the field about 200 yards far from his house. The accused Abdul Khaleque then shot gun fire targeting him which hit on his left hand and two fingers. P.W.06 further stated that the Razakars then detaining him took away to the Chingra Razakar camp.

483. The above piece of evidence thus proves that accused Abdul Aziz Sardar son of Ful Miah Sardar, Abdul Aziz Sardar son of Ahmmad Sardar, Abdul Khaleque and Md. Ibrahim along with their cohorts actively participated to secure the victim's forcible capture and in accomplishing it accused Abdul Khaleque fired a gun shot that resulted in injury on victim's left hand and two fingers. It has also been divulged that the group of attackers accompanied by these four accused persons was an 'armed gang'.

484. Learned defence counsels defending the accused persons indicted in this charge submitted that the victim P.W.06 had no reason of recognizing the accused persons as he could not say the name of fathers of these accused persons. Therefore, his testimony implicating the accused persons with the act of alleged abduction was untrue.

485. We are not convinced with the above argument. Mere ignorance about the name of fathers of the accused persons does not render the P.W.06 ineligible to know the identity of the accused persons. It transpires that P.W.06 stated that he knew the accused persons beforehand as they were the inhabitants of his neighbouring locality. It remained unshaken. Thus, and since the event happened in day time and the victim was captured from a field on chase it was practicable for him recognizing the accused persons.

486. P.W.08 Hasan Ali Sheikh, a neighbour of the victim Miron Sheikh [P.W.06] is a direct witness to the act of taking away the victim forcibly by launching attack. He consistently corroborates this phase of the attack. Remaining in hiding P.W.08 could see Miron Sheikh [P.W.06] fleeing towards the field on being chased by the accused persons and at a stage Miron Sheikh [victim P.W.06] got halted raising hands up when accused Md. Abdul Khaleque Morol shot a gun fire directing the victim Miron Sheikh and then accused Ibrahim, Abdul Aziz son of Ful Miah Sardar and

Abdul Aziz son of Ahmmad Sardar accompanied by other Razakars took him away towards Chingra Razakar camp on forcible capture, P.W.08 testified. The act of setting the houses of pro-liberation civilians of their village Mohadebpur, in conjunction with the attack is found to have been corroborated even by this P.W.08 as well.

487. Defence simply denied what P.W.08 testified in relation to launching attack, setting the houses of civilians on fire, violently chasing the victim, securing victim's capture by shooting gun fire. But it could not taint his testimony in any manner in cross-examination. Defence suggested P.W.08 that Miron Sheikh sustained injury in some other manner and not in the manner he testified. P.W.08 denied it. Defence could not bring anything to make this specific suggestion believable, by cross-examining the P.W.08.

488. What was the purpose of getting he victim detained at the Chingra Razakar camp? It could be well perceived from the testimony of the detained victim how he was treated in captivity. In view of situation and context prevailing in 1971 naturally no civilian had access to the camp which in true sense turned into a 'crimes den'. Thus, the victim P.W.06 alone is the best witness who is capable to narrate what happened to him in captivity.

489. It is depicted from the testimony of the victim P.W.06 that taking him at the Chingra Razakar camp the accused Abdul Aziz son of late Ful Miah Sardar, Abdul Aziz son of late Ahammad Sardar, Ibrahim and Lutfor[died during trial] started him beating mercilessly by the rifles and thus at a stage he became fainted. At 10:00/10:30 PM when the victim felt ease, in captivity, accused Md. Sakhawat Hossain started grilling him to extract information about the freedom- fighters but he did not provide it. With this the accused Md. Sakhawat Hossain fatally twisted his left leg that resulted in its fracture and thus he became fainted again.

490. The above version remained unimpeached in cross-examination. This piece of evidence lawfully suggests the conclusion that the victim was actively associated with the freedom- fighters and purpose of detaining him was to extract information about the freedom -fighters which he denied to provide and the victim's firm stance made the accused persons especially the accused Md. Sakhawat Hossain extremely aggressive.

491. As a result of gun shot injury the victim received at the initial phase of the attack and the severe brutal torture inflicted on him in detention by accused Md. Sakhawat Hossain and his cohorts in the name of grilling him to extract information about freedom- fighters the victim eventually lost sense that led the accused persons to get confirmed about his death. On the following day the severely

injured victim discovered him lying abandoned on the bank of the river Kapatakkha as he regained sense, testimony of the victim P.W.06 demonstrates.

492. Above suggests to an unerring inference that the accused persons with the victim's sensory loss due to grave physical abuse caused to him became in no doubt about his death and thus the senseless victim was thrown in the river, it may be validly inferred from the facts and circumstance unveiled. But the victim somehow survived as he regained sense later on. Since the victim was captured by launching organised attack and was ruthlessly tortured in captivity to further a particular purpose the accused persons would not have allowed setting him at liberty shortly after taking him in captivity at the camp.

493. Presumably, the consequence resulted from brutal torture done to the victim made the perpetrators the accused persons sure about death of the detained victim. It offers indisputable inference about the magnitude and pattern of torture inflicted upon the detained victim. The evidence of the victim P.W.06 demonstrates that accused Md. Sakhawat Hossain himself physically participated in causing aggressive torture that eventually resulted in downing his sense.

494. Physical participation in causing severe torture to the detained victim as found proved from the evidence of the victim

P.W.06 Miron Sheikh offers lawful indication that the victim's forcible capture was carried out pursuant to accused Md. Sakhawat Hossain's instruction, approval and it was well within his knowledge as causing torture in detention at Chingra Razakar camp was inevitably connected with the act of the victim's abduction. Obviously the accused persons having constant and culpable affiliation with the Chingra Razakar camp would not have launched such an attack securing a particular civilian beyond knowledge of accused Md. Sakhawat Hossain who had been in leading and dominant position of the said camp.

495. The victim P.W.06 could not say what happened in between he got fainted at the camp and he discovered him lying on the south bank of the river Kapatakkha, on the following day when he regained sense. It leads to the conclusion that the accused persons sensed the victim to be dead as a result of torture they caused to him at the Razakar camp and thus in absence of anything contrary it may be inferred too that none but the accused persons had left the victim abandoned in the river supposing him to be dead.

496. What happened next? On hearing his scream the people came on the south bank of the river and took him to Altaf Master's house at village Varsa wherefrom he was taken to India and got admitted in Taki Hospital to undergo treatment which was followed by removing his two fingers by surgical intervention – P.W.06

testified. At this stage of his deposition P.W.06 drew attention of the Tribunal demonstrating his three fingers of left hand in support of the physical harm he sustained.

497. P.W.07 Liakot Ali Sheikh, the nephew of the victim is a hearsay witness. His testimony demonstrated too that on being informed he visited his victim uncle at Taki Hospital in India when he learnt the event from his uncle[victim]. Defence could not shake what has been testified by the P.W.07. His hearsay testimony carries probative value as it appears to be consistent to what has been narrated by the victim. There has been no reason to disbelieve him.

498. The above piece of unshaken version rings the truth as to firing gun shot directing the victim Miron Sheikh [P.W.06] to secure his capture and merciless torture caused to him in coercive detention at the Chingra Razakar camp. All the phases of the attack that resulted in the victim's abduction, causing torture to him in detention and later on leaving him abandoned supposing him to be dead formed 'collective criminality' to which all the accused persons knowingly, actively and consciously took part and facilitated and aided the commission of criminal acts. The entire event was a case of a gross violation of human rights of a civilian resulting from barbaric acts of torture perpetrated on him by the accused persons.

499. The criminal acts done to the detained victim, an active fellow of a group of freedom-fighters constituted the offence of ‘torture’ as he was subjected to merciless torture in unlawful detention which was aimed to obtain information from him under coercion. These elements to characterize criminal act as the offence of ‘torture’ seem to be compatible with the observation of the **ICTY Appeals Chamber in the case of Kunarac, Kovac and Vukovic** regarding the definition of torture which is as below:

" With reference to the Torture Convention and the case -law of the Tribunal and the ICTR, the Trial Chamber adopted a definition based on the following constitutive elements: "(i) The infliction, by act or omission, of severe pain or suffering, whether physical or mental. (ii) The act or omission must be intentional. (iii) The act or omission must aim at obtaining information or a confession, or at punishing, intimidating or coercing the victim or a third person, or at discriminating, on any ground, against the victim or a third person."

[Case No. IT-96-23 and IT-96-23/1-A, Judgment: 12 June 2002, Para- 142]

500. Undergoing treatment in a hospital in India immediately after the event also proves that the victim Miron Sheikh [P.W.06] sustained severe pain and physical suffering resulted from the brutal acts of substantial gravity he had to face in coercive detention and it happened aiming to extract information from him about the freedom-fighters with whom he was actively associated.

Therefore, the acts of the accused persons indubitably constituted the offence of 'torture.'

501. In view of act and conduct of the accused persons as divulged above in all the phases lead us to conclude beyond reasonable doubt that they all were 'participants' in the Joint Criminal Enterprise [JCE] and thus are equally liable for the crimes regardless of the part played by each of them in its commission.

502. In all six accused persons have been indicted in this charge. Of them one Md. Lutfor Morol died in prison during trial, and as such, proceedings against him stood abated. Four accused persons along with their cohorts forming an armed group participated in launching attack to secure the victims' capture, it stands proved. In captivity at the Chingra Razakar camp the detained victim was brutally subjected to torture by accused Ibrahim, Abdul Aziz son of Ful Miah Sardar, Abdul Aziz son of Ahmmad Sarder, Md. Ibrahim Hossain and accused Md. Sakhawat Hossain.

503. Victim Miron Sheikh [P.W.06] did not implicate accused Md. Abdul Khaleque Morol with the act of causing him torture in detention. But since he actively and culpably participated in materialize the act of the victim's abduction which substantially facilitated the act of causing severe torture to the victim in coercive detention he may also lawfully be said to have incurred liability

even for the act of torture in detention, the upshot of abduction, sharing common intent and purpose. In this regard the following observation of the **ICTY Trial Chamber in the case of Furundzija** seems to be relevant which is as below:

"(i) to be guilty of torture as a perpetrator (or co-perpetrator), the accused must participate in an integral part of the torture and partake of the purpose behind the torture, that is the intent to obtain information or a confession, to punish or intimidate, humiliate, coerce or discriminate against the victim or a third person. (ii) to be guilty of torture as an aider or abettor, the accused must assist in some way which has a substantial effect on the perpetration of the crime and with knowledge that torture is taking place."

[Case No. IT-95-17/1-T, Judgment: 10 December 1998, Para-257]

504. In view of above it has been found proved beyond reasonable doubt that all the five [05] accused persons participated, facilitated and aided the accomplishment of the act of taking away the victim Miron Sheikh on capture and keeping him unlawful detention at the Chingra Razakar camp had mercilessly tortured him. The act of abduction obviously had a substantial effect even on the victim's confinement and causing torture on him in captivity. There had been a 'causal connection' between such act of 'abetment' and the act of causing torture keeping the victim detained at the Razakar camp. It stands also proved that in conjunction with the attack the accused persons had carried out destructive activities by setting

houses of civilians on fire which was gravely detrimental to fundamental rights of civilians' livelihood and it had obviously caused mental harm constituting the offence of 'other inhumane act'. Accused Md. Sakhawat Hossain was not present with the group while it had launched attack at village Mohadebpur. But the attack was carried out on his order or instruction. It is to be noted that 'order' or 'instruction' may not always be tangible. It may be inferred from the facts and circumstances unveiled. His dominant position and influence over the accused persons and Razakars and conduct subsequent to capture of the victim suggest to infer it unerringly that the attack was launched on his approval or instruction and he was the man who orchestrated the collective criminality.

505. On totality of the evidence produced it has been proved beyond reasonable doubt that accused (1) Md. Sakhawat Hossain (2) Md. Ibrahim Hossain alias Ghungur Ibrahim (3) Md. A. Aziz Sardar son of late Ful Miah Sardar (4) Abdul Aziz Sardar son of late Ahmmad Sardar, and (5) Md. Abdul Khaleque Morol by their conduct and act as proved, participated, aided, abetted, facilitated and had complicity in the commission of the offences of **'abduction', 'confinement', 'torture' and 'other inhumane acts'** [arson and plundering] as crimes against humanity as part of systematic attack directed against unarmed civilian 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 and thus they incurred liability under section 4(1) of the Act, for the above offences.

XX. Conclusion

506. All the eight [08] accused persons have been found guilty for committing offences as enumerated in the Act of 1973. The offences proved were not isolated crimes. Those were ‘group’ or ‘system’ crimes committed in the context of the war of liberation in 1971 directing civilian population violating the international humanitarian law. It is to be noted that accused Md. Lutfor Morol was also indicted but due to his death in prison during trial the proceedings against him stood abated.

507. Section 3(1) of the Act of 1973 provides jurisdiction of trying and punishing even any ‘individual’ or ‘group of individuals’ including any ‘member of auxiliary force’ who commits or has committed, in the territory of Bangladesh any of crimes mentioned in section 3(2) of the Act, apart from member of armed or defence forces. We have already resolved in our foregoing deliberations that ‘Razakar Bahini’ was an ‘auxiliary force’ and the accused persons belonged to locally formed Razakar Bahini and accused Md. Sakhawat Hossain was its potential leader and its camp at Chingra bazaar.

508. It has been found proved that the victims of the criminal acts constituting the offences as narrated in all the five charges actively sided with the war of liberation. Three of them were freedom - fighters. It has been found proved that accused Md. Sakhawat Hossain by delivering speech in public in a meeting attended by Razakars announced to annihilate the freedom-fighters terming them 'Kafers and Monafeks'. Such inciting speech obviously had a causal relation to the criminal acts carried out by him and his cohort Razakars affiliated with the Razakar camp at Chingra bazaar.

509. The instant case involving five specific events of attacks chiefly rested on oral evidence. All the event of attacks and crucial criminal acts constituting the offences happened in day time and within the sight of people, it has been unveiled. Victims of two events [**as listed in charge nos. 03 and 05**] testified what they experienced and how and why they were subjected to torture in captivity. Apart from them direct witnesses came on dock to testify what they saw and experienced in respect of the events involving abduction of Ashura Khatun, killing A. Malek Sardar and abduction and detention of Miron Sheikh [**as listed in charge nos. 01, 04 and 05**].

510. It transpires from the testimony of Miron Sheikh [P.W.06], the victim of charge no.05 that he has been maintaining his livelihood by begging. We are shocked and surprised. It is not

understood why the society and concerned government machinery have shown inaction to recognize his contribution and sacrifice in achieving independence of our mother land.

511. We feel really sorry to note that a man who contributed to the war of liberation in 1971 by acting as a source of a group of freedom-fighters and thus became target of the attack of infamous Razakar Bahini which resulted in his severe physical injury by gun shot has been maintaining his livelihood by begging. We believe that the nation shall not endorse the disgrace that is being carried by Miron Sheikh [P.W.06]. He deserves recognition for his contribution and sacrifice he made in 1971 during the war of liberation. Prosecution is expected to bring this matter to the notice of the concerned Ministry and authority so that the victim Miron Sheikh can have proper recognition and grace to make the rest of his livelihood honoured.

512. All the crimes proved [as listed in the five charges] are found to have had a causal relation to the inciting and provoking speech delivered by accused Md. Sakhawat Hossain encouraging the Razakars to annihilate the freedom-fighters and pro-liberation people terming them 'Kafers and Monafeks'. It also aggravates the level of culpability of accused Md. Sakhawat Hossain.

513. The atrocious activities carried out by the accused persons directing pro-liberation civilians of a particular rural area portray a

fragmented picture of horrific atrocities carried out in the territory of Bangladesh in 1971. All the crimes proved in the case in hand happened at the Chingra Razakar camp and on the bank of river adjacent to it by keeping the victims in captivity there on forcible capture. The Razakar camp was not only a 'detention centre' but it turned into a 'crimes den' indeed over which accused Md. Sakhawat Hossain had a significant dominance which indisputably influenced, encouraged and endorsed his cohort Razakars attached to that Razakar camp in participating, aiding and facilitating the attacks that resulted in abduction, detention, torture and murder.

514. We reiterate that crimes against the gravest crimes never get old and that the perpetrators who are treated as the enemies of mankind must face justice. We should not forget it that the millions of victims who deserve that their tormentors are held accountable as the passage of time does not lessen their culpability.

515. Now, long more than four decades after those crimes committed in violation of international humanitarian law bringing the accused persons, the perpetrators of 'group crimes' has made the space of coming out from the culture of immunity and also it provides a message too that even national system is quite lawfully capable to bring those persons responsible for such crimes to justice. **Ambassador Rapp** has observed that -

".....these trials are of great importance to the victims of the 1971 war of independence from Pakistan. What happens in Bangladesh today will send a strong message that it is possible for a national system to bring those responsible for grave human rights abuses to justice."

['Old Evidence and Core International Crimes': FICHL Publication Series No. 16(2012), Page -169]

516. The offences of 'Crimes against Humanity' proved were committed during the war of liberation in 1971 and the same have been tried under the Act of 1973 and it is obvious that they were committed in the '**context**' of the 1971 war of liberation. This context itself is sufficient to prove the existence of a '*systematic attack*' on Bangladeshi self-determined population in 1971. It is the '*context*' that transforms an individual's act into a crime against humanity and the accused must be aware of this context in order to be culpable of crime alleged.

517. The pattern and nature of the crimes happened unerringly suggest that the act and conduct of the accused persons in accomplishing those crimes formed a part of 'attack' which was 'systematic' indeed as the accused persons felt culpably enthused to engage them in carrying out such atrocious activities intending to further policy and plan of the Pakistani occupation army and the organization, the Razakar Bahini they belonged was an auxiliary force formed to collaborate with the Pakistani occupation army.

518. The accused Md. Sakhawat Hossain by his culpable act and conduct had played ‘a key coordinating role’ in accomplishing the crimes and thus his ‘**participation**’ was of an exceedingly significant nature. According to section 4(1) of the Act of 1973 all the accused persons, being equally responsible, have incurred individual criminal liability for the commission of crimes proved. However, accused Md. Ibrahim Hossain alias Ghungur Ibrahim could not be found guilty in respect of charge no.03.

519. It also stands proved that the accused Md. Sakhawat Hossain had been in leading and dominating position over the Chingra Razakar camp and the Razakars associated with it and thus he may be said to have incurred liability also under the theory of civilian superior responsibility as reflected in section 4(2) of the Act of 1973 for the same set of facts described in the charges. But we refrain from convicting him cumulatively for both mode of liability, excepting taking it into account as an aggravating factor. Accordingly, the accused Md. Sakhawat Hossain and other seven accused persons are held criminally responsible under section 4(1) of the Act of 1973 for the commission of crimes proved.

XXI. Verdict on conviction

520. For the reasons set out in this judgement and having considered all evidence, both oral and and documentary, and arguments advanced by the parties, we find-

Accused (1) Md. Sakhawat Hossain (2) Md. Ibrahim Hossain alias Ghungur Ibrahim (3) Abdul Aziz Sardar son of late Ahmmad Sardar, and (4) Md. A. Aziz Sardar son of late Ful Miah Sardar in,

Charge No.01: GUILTY of the offences of participating, aiding, abetting, facilitating and for complicity in the commission of offences of '**abduction**', '**confinement**', '**torture**' and '**rape**' as crimes against humanity as specified in section 3(2)(a)(g)(h) of the Act of 1973 and they be convicted and sentenced under section 20(2) of the said Act.

Accused (1) Md. Sakhawat Hossain (2) Md. Billal Hossain Biswas (3) Md. Ibrahim Hossain alias Ghungur Ibrahim (4) Sheikh Mohammad Mujibur Rahman alias Mujibur Rahman (5) Md. A. Aziz Sardar son of late Ful Miah Sardar (6) Abdul Aziz Sardar son of late Ahmmad Sardar (7) Kazi Ohidul Islam alias Kazi Ohidus Salam, and (8) Md. Abdul Khaleque Morol in,

Charge No.02: GUILTY of the offences of participating, abetting, contributing and for complicity in the commission of the offences of '**abduction**', '**confinement**', '**torture**' and '**murder**' as crimes against humanity as specified in section 3(2)(a)(g)(h) of the Act of 1973 and they be convicted and sentenced under section 20(2) of the said Act.

Accused (1) Md. Sakhawat Hossain (2) Sheikh Mohammad Mujibur Rahman alias Mujibur Rahman, and (3) Abdul Khaleque Morol in,

Charge No. 03: GUILTY of the offences of participating, abetting, facilitating, contributing and for complicity in the commission of offences of **'abduction', 'confinement' and 'torture'** as crimes against humanity as specified in section 3(2)(a)(g)(h) of the Act of 1973 and they be convicted and sentenced under section 20(2) of the said Act; **AND**

Accused Md. Ibrahim Hossain alias Ghungur Ibrahim in,

Charge No. 03: NOT GUILTY of the offences of participating, aiding, abetting, facilitating and for complicity in the commission of offences of **'abduction', 'confinement' and 'torture'** as crimes against humanity as specified in section 3(2)(a)(g)(h) of the Act of 1973 and he be acquitted thereof accordingly.

Accused (1) Md. Sakhawat Hossain (2) Md. Ibrahim Hossain alias Ghungur Ibrahim (3) Md. A. Aziz Sardar son of late Ful Miah Sardar (4) Abdul Aziz Sardar son of late Ahmmad Sardar, and (5) Md. Abdul Khaleque Morol in,

Charge No. 04: GUILTY of the offences of participating, aiding, abetting, facilitating and for complicity in the commission

of offences of ‘**abduction**’ ‘**confinement**’ and ‘**murder**’ as crimes against humanity as specified in section 3(2)(a)(g)(h) of the Act of 1973 and they be convicted and sentenced under section 20(2) of the said Act.

Accused (1) Md. Sakhawat Hossain (2) Md. Ibrahim Hossain alias Ghungur Ibrahim (3)Md. A. Aziz Sardar son of late Ful Miah Sardar (4) Abdul Aziz Sardar son of late Ahmmad Sardar, and (5) Md. Abdul Khaleque Morol in,

Charge No. 05: GUILTY of the offences of participating, aiding, abetting, facilitating and for complicity in the commission of offences of ‘**abduction**’, ‘**confinement**’, ‘**torture**’ and ‘**other inhumane acts**’ [arson and plundering] as crimes against humanity as specified in section 3(2)(a)(g)(h) of the Act of 1973 and they be convicted and sentenced under section 20(2) of the said Act.

XXII. Verdict on sentence

521. Mr. Zead-Al-Malum, the leaned prosecutor ended his summing up by submitting that the offences committed by the accused persons were grave in nature and happened in systematic manner directing the pro-liberation civilians and non-combatant freedom-fighters in the context of war of liberation in 1971. The accused Md. Sakhawat Hossain and other accused persons belonged to locally formed Razakar Bahini and by setting up camp

at Chingra bazaar under Keshobpur Police Station, Jessore they deliberately incited and designed to annihilate the pro-liberation civilians. Accused Md. Sakhawat Hossain was in leading position of the said camp. He and his cohort Razakars committed the crimes as they deliberately and knowing the consequence of their act and conduct consciously participated in launching attacks that resulted in abduction, confinement, torture, other inhumane acts and murder of civilians.

522. The learned prosecutor submitted too that by virtue of leading position over the Razakar camp at Chingra bazaar, the accused Md. Sakhawat Hossain used to exercise his authority and influence over the Razakars affiliated with this camp. It together with the pattern and severity of crimes proved inevitably aggravates his culpability. The other accused persons, the cohorts of accused Md. Sakhawat Hossain too consciously participated and facilitated and aided the commission of the crimes .Therefore, the accused persons deserve only the highest punishment.

523. On contrary, Mr. Abdus Sattar Palwan defending the accused Md. Sakhawat Hossain, Md. Billal Hossain Biswas, Abdul Aziz Sardar son of late Ahmmad Sardar, Kazi Ohidul Islam alias Kazi Ohidus Salam and Md. Abdul Khaleque Morol submitted that the prosecution failed to prove the involvement and complicity of these accused persons with the offences for which they have been

charged; that there has been no credible evidence to show their physical or any mode of participation with any of the offences alleged. The accused persons did not belong to Razakar Bahini and had no nexus with the Chingra Razakar camp. Thus they deserve acquittal.

524. Mr. Abdus Sukur Khan, the learned State defence counsel appointed to defend the absconded accused Md. Ibrahim Hossain alias Ghungur Ibrahim, Sheikh Mohammad Mujibur Rahman alias Mujibur Rahman and Md. A. Aziz Sardar son of late Ful Miah Sardar submitted that there has been no evidence to prove direct participation of the accused persons he defended; that the evidence offered by the prosecution does not connect these accused persons with the alleged offences and they did not belong to the local Razakar Bahini and had no connection with the Razakar camp at Chingra bazaar. Thus, they deserve acquittal.

525. Sentencing is a crucial component of the criminal justice system as it provides justice to the victims and sufferers and the society as well. Thus, a court of law should keep in mind that sentencing leads to punishment which should be seen by them and the society to be just. The court of law should not forget pains and sufferings the dear ones of victims still have been hauling since more than last four decades. In this regard the Appellate Division of

the Supreme Court of Bangladesh observed in the case of **Ali Ahsan Muhammad Mujahid** that-

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

[Criminal Review Petition No. 62 of 2015, Judgment : 18 November 2015, Page-28]

526. The nature and pattern of criminal acts and the context in which the same were committed, the gravity of harm or damage done to the victims, the intensity of criminal intent of the convict perpetrators and their status and capacity need to be taken into consideration in awarding sentence. The degree of punishment to be awarded should be proportionate to the severity of criminal conduct of the convicted accused person[s] constituting the offences of crimes against humanity proved.

527. It is to be noted that the offences of crimes against humanity by nature are monstrous and diabolical and committed directing defenceless civilian population protected under the Geneva Convention 1949. In the case of **Abdul Quader Molla** the Appellate Division in respect of awarding sentence observed as below:

"In awarding the appropriate sentence, the tribunal must respond to the society's cry for justice against perpetrators of Crimes against

Humanity. The perpetrator like the appellant has committed most worst and barbarous types of Crimes against Humanity. He participated in the killing and rape of innocent persons without just cause. His acts are comparable with none..... Justice demands that it should impose a sentence befitting the crime so that it reflects public abhorrence of crime. In Cases of murders in a cold and calculated manner without provocation cannot but shock the conscience of the society which must abhor such heinous crime committed on helpless innocent persons."

[Criminal Appeal Nos. 24 and 25 of 2013, Judgment: 17 September 2013, Pages- 247-248]

528. In the instant case all the five[05] charges have been proved beyond reasonable doubt. In view of above settled principle now, in assessing the aggravating factors, we must eye on the pattern and extent of the offences committed and the role the convict accused persons had played in accomplishing the crimes and their organizational position and status which enthused them culpably to remain engaged in committing such horrific atrocious activities.

529. It appears that all the 08 [eight] accused persons have been found guilty for the offences of abduction, confinement, torture and murder of Chandtulla Gazi, a non-combatant freedom-fighter [**as listed in charge no. 02**]. Before causing his death by gun shot he was kept in detention at the Chingra Razakar camp for couple of days and then in an early morning he was taken on the bank of river Kapatakkha, adjacent to the Razakar camp where he was shot to

death and the convict accused Md. Sakhawat Hossain was the principal perpetrator and convicted 07[seven] other accused persons facilitated, substantially contributed and aided the commission of the crimes.

530. Charge no.04 refers to detaining a tender aged boy at the Chingra Razakar camp who was afterwards killed. Five accused persons have been indicted for the offences and all of them have been found guilty. It has been found proved that the convict accused Md. Sakhawat Hossain was the principal perpetrator as he himself gunned down the detained boy A. Malek Sardar to death taking at the Kheya ghat adjacent to the Razakar camp at the Chingra bazaar.

531. The events of killing as proved [as listed in charge nos. **02 and 04**] are graver and extremely brutal and accused Md. Sakhawat Hossain has been found to have had directly participated to the commission of those crimes. It together with his dominant and leading position over the Razakar camp as proved increases the level of his culpability which deserves to be taken into consideration as an aggravating factor in awarding sentence. At the same time we consider it appropriate to award sentence proportionate to the gravity of culpable act and conduct of the other accused persons found guilty in committing the offences in respect of **charge nos. 02 and 04.**

532. Ashura Khatun, a youth girl was kept detained on capture and in protracted captivity she was sexually ravished [**as listed in charge no.01**] and the entire event is found to have been committed on participation and facilitation of all the four accused persons indicted including the principal accused Md. Sakhawat Hossain, the key man of the Razakar camp at Chingra bazaar. Thus, the accused persons did not remain distanced even from capturing a youth girl who was engaged in providing information about the Razakars and their activities to the freedom-fighters stationed around her locality. In the name of resisting the victim girl the accused persons seized her supreme honour as well presumably intending to spread terror and message to the civilians siding with the war of liberation. In this way the accused persons by committing rape upon a girl in captivity intended to use it as a tool to spread terror around the locality.

533. Charge no.03 involves the offences of abduction and causing torture in detention at the Chingra Razakar camp. Out of four [04] accused persons indicted three have been found guilty in respect of this charge. Victim Md. Nur Uddin Morol [P.W.03] was a co-freedom- fighter of Chandtulla Gazi [victim of charge no.02] and both of them were captured on the same day by the Razakars on the basis of information about their return from India. Accused Md. Sakhawat Hossain is found to remain present with the group in

securing capture of the victim and facilitated causing torture upon him in detention.

534. Miron Sheikh[P.W.06], the victim of the event as listed in **charge no.05** was associated with the group of freedom-fighters led by Mofazzal Hossain Master and used to provide them information about the Razakars and their activities. In this way he actively joined the war of liberation. This was the reason of his being captured by the accused persons and he sustained gun shot injury while he was on chase by them. On capture he was kept detained at the Chingra Razakar camp and he was subjected to torture [as listed in charge no.05].The five accused persons indicted in this charge have been found guilty for the offences. In conjunction with the attack to secure the victim's capture the group of attackers accompanied by the accused persons set their house and the houses of pro-liberation people on fire.

535. It is significant to note that the victims of the crimes as listed in all the five charges were non-combatant freedom-fighters and sources of freedom-fighters. The convict accused persons and their cohorts belonging to locally formed Razakar Bahini made the civilians of this class their target with extreme severity and accused Md. Sakhawat Hossain had played intense culpable role in accomplishing the crimes proved. Inciting speech of accused Md. Sakhawat Hossain, as proved, had an encouraging effect in carrying

out the attacks directing this class of civilians as they were announced by him to be annihilated terming them 'Kafers and Monafeks'.

536. In view of discussion and reasons rendered herein above and considering the nature and proportion to the gravity of the offences in respect of **charge nos. 02 and 04** together with the aggravating factors as conversed above we are of the view that justice would be met if convict accused Md. Sakhawat Hossain who has been found guilty beyond reasonable doubt for the offences of which he has been charged with in respect of **charge nos. 02 and 04** are **condemned and sentenced** to the highest punishment. Sentence of imprisonment is considered appropriate and just to be awarded to the other convict accused persons as mentioned herein above in respect of **charge no.s 02 and 04**.

537. At the same time in view of reasons recorded herein above, it would be appropriate if the convict accused persons found guilty for the **charge nos.01, 03 and 05** are condemned to the sentence of imprisonment to be awarded as below.

Accordingly, we do hereby render the following **ORDER ON SENTENCE**.

Hence it is
ORDERED

That accused (1) Md. Sakhawat Hossain son of late Omar Ali and late Anowara Begum of Village Hijildanga, Police Station Keshobpur, District Jessore (2) Md. Ibrahim Hossain alias Ghungur Ibrahim [absconded] son of late Yakub Ali Biswas alias Akabbar alias Akbor and late Rupban Bibi of Village Nehalpur, at present Boga, Police Station Keshobpur, District Jessore (3) Abdul Aziz Sardar [absconded]son of late Ahmmad Sardar and late Sakina of Village Boga, Police Station Keshobpur, District Jessore, and (4) Md. A. Aziz Sardar [absconded] son of late Ful Miah Sardar and late Nurjahan Begum of Village Mominpur, Police Station Keshobpur, District Jessore are found guilty of the offences of crimes against humanity as specified in section 3(2)(a)(g)(h) of the International Crimes (Tribunals) Act, 1973 as listed in **charge no. 01** and all of them be convicted accordingly and sentenced there under to rigorous imprisonment for 20 [twenty] years under section 20(2) of the said Act.

Accused (1) Md. Sakhawat Hossain is found guilty of the offences of crimes against humanity as specified in section 3(2)(a)(g)(h) of the International Crimes (Tribunals) Act, 1973 as listed in **charge no. 02** and he be convicted accordingly and sentenced thereunder to death under section 20(2) of the said Act;
AND

Accused (2) Md. Billal Hossain Biswas son of late Yakub Ali Biswas alias Akabbar alias Akbor and late Rupban Bibi of Village Nehalpur, Police Station Keshobpur, District Jessore (3) Md. Ibrahim Hossain alias Ghungur Ibrahim [absconded] (4) Sheikh Mohammad Mujibur Rahman alias Mujibur Rahman [absconded] son of Sheikh Mohammad Afazullah alias Effaztulla and late Pachibibi of Village Sheikhpara, Police Station Keshobpur, District Jessore (5) Md. A. Aziz Sardar [absconded] son of late Ful Miah Sardar (6) Abdul Aziz Sardar [absconded] son of late Ahmmad Sardar (7) Kazi Ohidul Islam alias Kazi Ohidus Salam [absconded] son of late Kazi Motiassalam alias Motiar Salam and late Hosneara Begum of Village Sheikhpara, Police Station Keshobpur, District Jessore, and (8) Md. Abdul Khaleque Morol [absconded] son of late Hachan Ali Morol and late Rebeya Begum of Village Altapoul [72 No. Altapoul], Police Station Keshobpur, District Jessore are found guilty of the offences of crimes against humanity as specified in section 3(2)(a)(g)(h) of the International Crimes (Tribunals) Act, 1973 as listed in **charge no. 02** and all of them be convicted accordingly and sentenced thereunder to imprisonment for life i.e. rest of their natural life under section 20(2) of the said Act.

Accused (1) Md. Sakhawat Hossain (2) Sheikh Mohammad Mujibur Rahman alias Mujibur Rahman [absconded], and (3)

Abdul Khaleque Morol [absconded] are found guilty of the offences of crimes against humanity as specified in section 3(2)(a)(g)(h) of the International Crimes (Tribunals) Act, 1973 as listed in **charge no. 03** and all of them be convicted accordingly and sentenced thereunder to rigorous imprisonment for 10 [ten] years under section 20(2) of the said Act; **AND**

Accused Md. Ibrahim Hossain alias Ghungur Ibrahim [absconded] is found not guilty of the offences of crimes against humanity as specified in section 3(2)(a)(g)(h) of the International Crimes (Tribunals) Act, 1973 as listed in **charge no. 03** and he be acquitted of the said charge.

Accused (1) Md. Sakhawat Hossain is found guilty of the offences of crimes against humanity as specified in section 3(2)(a)(g)(h) of the International Crimes (Tribunals) Act, 1973 as listed in **charge no. 04** and he be convicted accordingly and sentenced thereunder to death under section 20(2) of the said Act; **AND**

Accused (2) Md. Ibrahim Hossain alias Ghungur Ibrahim [absconded] (3) Md. A. Aziz Sardar [absconded] son of late Ful Miah Sardar (4) Abdul Aziz Sardar [absconded] son of late Ahmmad Sardar, and (5) Md. Abdul Khaleque Morol [absconded] are found guilty of the offences of crimes against humanity as specified in section 3(2)(a)(g)(h) of the International Crimes

(Tribunals) Act, 1973 as listed in **charge no. 04** and all of them be convicted accordingly and sentenced thereunder to imprisonment for life i.e. rest of their natural life under section 20(2) of the said Act.

Accused (1) Md. Sakhawat Hossain (2) Md. Ibrahim Hossain alias Ghungur Ibrahim [absconded] (3) Md. A. Aziz Sardar [absconded] son of late Ful Miah Sardar (4) Abdul Aziz Sardar[absconded] son of late Ahmmad Sardar, and (5) Md. Abdul Khaleque Morol [absconded] are found guilty of the offences of crimes against humanity as specified in section 3(2)(a)(g)(h) of the International Crimes (Tribunals) Act, 1973 as listed in **charge no. 05** and all of them be convicted accordingly and sentenced thereunder to rigorous imprisonment for fifteen [15] years under section 20(2) of the said Act.

The sentence of death awarded as above in respect of charge nos. 02 and 04 be executed by hanging the convict accused Md. Sakhawat Hossain by the neck or by shooting him till he is dead, as decided by the government.

The sentence of imprisonment awarded to the convicted accused persons as above shall run concurrently.

However, as and when any sentence of death awarded to convict accused Md. Sakhawat Hossain as above will be executed, the other sentence of death and sentence of imprisonment awarded

to him as above would naturally get merged into the sentence of death executed.

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

Since the convicted accused persons, namely (1) Md. Ibrahim Hossain alias Ghungur Ibrahim (2) Sheikh Mohammad Mujibur Rahman alias Mujibur Rahman (3) Md. A. Aziz Sardar son of late Ful Miah Sardar (4) Abdul Aziz Sardar son of late Ahmmad Sardar (5) Kazi Ohidul Islam alias Kazi Ohidus Salam, and (6) Md. Abdul Khaleque Morol have been absconding, the sentence of imprisonment awarded to them as above shall be executed after causing their arrest or when they surrender before the Tribunal, whichever is earlier.

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

The convicts accused Md. Sakhawat Hossain and Md. Billal Hossain Biswas be sent to the prison with conviction warrants accordingly.

Issue conviction warrants against the six absconding accused, namely (1) Md. Ibrahim Hossain alias Ghungur Ibrahim (2) Sheikh Mohammad Mujibur Rahman alias Mujibur Rahman (3) Md. A. Aziz Sardar son of late Ful Miah Sardar (4) Abdul Aziz Sardar son of late Ahmmad Sardar (5) Kazi Ohidul Islam alias Kazi Ohidus Salam, and (6) Md. Abdul Khaleque Morol.

The Secretary, Ministry of Home Affairs and the Inspector General of Police [IGP] are hereby directed to ensure the apprehension of the above mentioned six fugitive convict accused persons, if necessary with the help of the Inter-Pol.

Let certified copy of this judgment be provided to the prosecution and the convicts accused Md. Sakhawat Hossain and Billal Hossain Biswas free of cost, at once.

If the above mentioned absconding convicts 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 above mentioned six fugitive convict accused

persons be sent to the District Magistrate, Dhaka for information and necessary action.

Let a copy of this order be sent together with the conviction warrants of the above mentioned six fugitive convict accused persons to the (1) Secretary, Ministry of Home Affairs, Bangladesh Secretariat, Dhaka, and (2) Inspector General of Police [IGP], Police Head Quarters, Dhaka for information and compliance.

Justice Md. Shohrwardi, Member

538. The International Crimes (Tribunals) Act, 1973 is the first domestic legislation in the global history of the trial of International Crimes and Sub-section 1 of section 20 of the said Act empowers each member of this Tribunal to deliver a judgment of his own. In view of the provision provided in the proviso to Sub-section 1 of section 20 of the International Crimes [Tribunals] Act, 1973, I am inclined to deliver a judgment of my own in the following terms.

539. Accused (1)Md. Sakhawat Hossain[61], son of late Omar Ali and late Anowara Begum of village Hijoldanga, Police Station-Keshobpur, District-Jessore, (2) Accused Md. Billal Hossain Biswas [75], son of late Yakub Ali Biswas alias Akabbar alias Akbor and late Rupban Bibi of village Nehalpur, Police Station-Keshobpur, District-Jessore, (3) Accused Md. Lutfor Morol [69] [now dead], son of late Joynal Morol and late Mekarjan of village Porchokra, Police Station-Keshobpur, District-Jessore, (4) Accused

Md. Ibrahim Hossain alias Ghungur Ibrahim [absconded] [60], son of late Yakub Ali Biswas alias Akabbar alias Akbor and late Rupban Bibi of village Nehalpur, at present Boga, Police Station-Keshobpur, District-Jessore, (5) Accused Sheikh Mohammad Mujibur Rahman alias Mujibur Rahman [61] (absconded), son of late Sheikh Mohammad Afazulla alias Effaztulla and late Pachibibi of village Sheikhpara, Police Station-Keshobpur, District-Jessore, (6) Accused Md. A. Aziz Sardar [absconded] [65], son of late Ful Miah Sardar and late Nurjahan Begum of village Mominpur, Police Station- Keshobpur, District-Jessore, (7) Accused Abdul Aziz Sardar [absconded] [66], son of late Ahmmad Sardar and late Sakina of village Boga, Police Station -Keshobpur, District-Jessore, (8) Accused Kazi Ohidul Islam alias Kazi Ohidus Salam [absconded] [61], son of late Kazi Motiassalam alias Motiar Salam and late Hosneara Begum of village Sheikhpara, Police Station-Keshobpur, District-Jessore, (9) Accused Md. Abdul Khaleque Morol [absconded][68], son of late Hachan Ali Morol and late Rebeya Begum of village Altapoul ,Police Station-Keshobpur, District-Jessore have been put on trial before this Tribunal at the instance of the Chief Prosecutor to answer the charges framed against them under section 3(2)(a)(g)(h) read with section 3(1) of International Crimes (Tribunals) Act, 1973 for which they incurred

the liability under section 4(1) of the Act of 1973 which is punishable under section 20(2) of the said Act.

540. This International Crimes Tribunal-1 [herein after referred to as ‘the Tribunal’] was created under Section 3 of the International Crimes (Tribunals) Act, 1973[hereinafter referred to as the ‘Act of 1973’] which is an ex-post-facto legislation for detention, prosecution and punishment of any individual or group of individuals, organization or any members of any armed, defence or auxiliary forces, irrespective of his nationality who commits or has committed in the territory of Bangladesh, whether before or after the commencement of this Act for commission of the crimes against humanity, crimes against peace, genocide, war crime and other class crimes committed in the territory of Bangladesh in violation of customary International law particularly during the War of Liberation in 1971. However, no Tribunal has been set up under section 3 of the Act of 1973 for which no one could be brought to justice under the Act of 1973 until created this Tribunal on 25th March 2010.

541. Jurisdiction of the Tribunal under the Act of 1973.

In section 3 of the International Crimes (Tribunals) Act, 1973, the Legislature have given this Tribunal the jurisdiction for trial of the International Crimes as specified in sub-Section 2 of section 3 of the Act of 1973 which is quoted below;

Section 3.

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

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

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

(b) Crimes against Peace: namely, planning, preparation, initiation or waging of a war of aggression or a war in violation of international treaties, agreements or assurances;

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

(i) killing members of the group;

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

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

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

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

(d) War Crimes: namely, violation of laws or customs of war which include but are not limited to murder, ill-treatment or deportation to slave labour or for any other purpose of civilian population in the territory of Bangladesh; murder or ill-treatment of prisoners of war or persons on the seas, killing of hostages and detainees, plunder of public or private property, wanton destruction of cities, towns or villages, or devastation not justified by military necessity;

- (e) violation of any humanitarian rules applicable in armed conflicts laid down in the Geneva Conventions of 1949;
- (f) any other crimes under international law;
- (g) attempt, abetment or conspiracy to commit any such crimes;
- (h) complicity in or failure to prevent the commission of any such crimes;”

542. At the very outset it is to be remembered that this domestic Tribunal was created under the authority of the Act of 1973 and in the meantime our Apex Court already settled our own jurisprudence and in view of the provision of Article 111 of the Constitution of the People’s Republic of Bangladesh all Courts including this Tribunal is legally bound to follow the law declared by our Apex Court. Therefore, at the time of adjudication of the charges framed against the accused persons, this Tribunal may look at the jurisprudence evolved by the ICTY, ICTR, and ICC, but not legally permitted to go beyond the Act of 1973, and in interpreting any provision of the Act of 1973, this domestic Tribunal cannot arrogate the jurisdiction of those Tribunals, as if, this Tribunal delivers its judgment relying on the provisions as contained in the Statutes of ICTY, ICTR, and ICC and the Rules made thereunder.

543. In the case of the Chief Prosecutor vs Abdul Quader Molla, reported in 22 BLT (AD) 8, at page 83, Para 150 Mr. J Surendra Kumar Sinha made an observation as regards applicability of the Customary International Law in the proceedings of this Tribunal in the following language [Majority view]:

“In the backdrop of above legal position, the words “International law” is a misnomer unless the said international obligations/responsibility /norms/practices/undertakings are incorporated within the framework of the domestic law. In the absence of such legislative action, the said International laws are mere state international obligations/ responsibilities. Further, even states cannot be compelled to honour such international obligations/responsibilities, because at international level there is no mechanism to enforce such international obligations/responsibilities. Therefore, when states cannot be compelled to honour such international obligations/ responsibilities, a citizen of the State can not, in any event, be subjected to the said international obligations/ responsibilities of the State. But the world community having experienced two great wars felt the necessity to keep harmony amongst the international communities, which led the international community’s to harmonize their interactions and practices in various fields. This tendency of the international community’s by elapse of time formulated various practices and norms, which are often termed as “Customary International Law.” and in paragraph No. 151 further observed that; “So there is no doubt that the Act of 1973 has primacy over CIL and CIL will be applicable, so far as it is not inconsistent with the Act.”

544. In the case of the Chief Prosecutor –vs Abdul Quader Mollah reported in 22 BLT(AD) at page 308 para- 285 Mr. J. A.H.M. Shamsuddin Chowdhury similarly observed that;

“It is true that the Act borrowed words from the UN created tribunals, but because of that, it cannot be said that the Tribunals created by the Act stand on the same footing with those UN tribunals, or are bound to follow the laws those tribunals did or do.

Some of our post-1947 statutes contain phrases similar to Indian statutes, but that does not mean they are Indian Laws. They are, nevertheless, very much our laws passed by our legislators. Similarly, many of our pre-1947 statutes are a replica of English Common Law, but that does not mean they are British Laws. We do, however, not too infrequently, take in aid, Indian, Pakistan, and UK decisions as well as decisions emanating from other Common Law following countries as persuasive authority, because of similarity of provisions. In the same way, we can take in aid decisions of the UN created tribunal as persuasive authority, as I have done in determining this appeal. The Tribunal below also followed them but reckoning them to be binding, rather than persuasive.”

545. It may be noted that the Act of 1973 is the first domestic legislation enacted by the Bangladesh Parliament for the trial of the international crimes and the Statutes of the ICTY, ICTR and ICC are the subsequent Statutes made at the instance of the United Nation. Although the Act of 1973, Statutes of ICTY and ICTR are

ex-post-facto legislation, but the Rome Statute of ICC is the only prospective Statute.

546. All the charges framed in the instant case relates to the offences of crimes against humanity alleged to have been committed at the time of War of Liberation in 1971 and it is very pertinent to look at the background and history of the trial of international crimes and the development of the law connected therewith.

Background of the trial of International Crimes

547. The term “international crime” is a collective term for extremely serious violation of international law: genocide, war crimes, and crimes against humanity, torture, and enforced disappearance. The trial of Peter Von Hagenbach or Pierre de Hagenbach by an ad hoc Tribunal of the Roman Empire in 1474 was the first “international crimes trial” and also “command responsibility.” He was put on trial for atrocities committed during the occupation of Breisach, found guilty of war crimes and beheaded at Breisach am Rhein. He was convicted of crimes “he as a knight was deemed to have a duty to prevent,” but he defended himself on the ground that “he was only following orders from the Duke of Burgundy, Charles the Bold, to whom the Holy Roman Empire had given Breisach.” Although there was no explicit use of the doctrine of “command responsibility,” it is seen that Peter von

Hagenbach was found guilty on the principle of “command responsibility.” [https:// en. wikipedia org/wiki/War-Crimes.](https://en.wikipedia.org/wiki/War-Crimes)

548. Another trial of international crimes was held after the American Civil War in 1865, Henry Wirz, a Confederate Officer, was held accountable and hanged for the appalling condition of Andersonville Prison where many Union soldiers died during the American Civil War. He was charged with “combining, confederating, and conspiring along with others to injure the health and destroy the lives of soldiers in the military service of the United States” and for “Murder” in violation of the “laws and customs of War.” The 13 murders committed by Wirz have personally been by a revolver, by physically storming and kicking the victims and by confining prisoners in stocks, by beating a prisoner with a revolver and by chaining prisoners together. All murder occurred in 1864. He was also charged with ordering guards to fire on the prisoners with muskets and to have dogs attack escaped prisoners. The Military Tribunal took place between August 23 and October 18, 1865. In early November, the Tribunal found Henry Wirz guilty. He was sentenced to death.

Henry Wirz was one of two men tried, convicted and executed for war crimes during the American Civil War the other being confederate guerrilla Champ Ferguson. Confederate soldiers Robert Cobb Kennedy and John Yates Beall were executed for

spying and Marcellus Jerome Clarke and Henry C. Magruder was executed for being a guerrilla. Sourced: <https://en.Wikipedia.Org/wiki/Henry>.

549. After World War I, in the European history, for the first time the regulations specified by the Geneva and Hague Conventions were enforced, and adopted the concept that once victory was achieved, defeated enemy leaders should face criminal charges for international law violations made during the World War I. On 25 January 1919, during the Paris Peace Conference, the Allied governments established the Commission of Responsibilities to make recommendations to that effect. As a result, Articles 227-230 of the Treaty of Versailles stipulated the arrest and trial of German officials defined as war criminals by the Allied governments. Article 227 made provision for the establishment of a special tribunal presided over by a judge from each one of the major Allied powers – Britain, France, Italy, United States and Japan. It identified the former Kaiser Wilhelm II as a war criminal, but his trial was dropped, as the Dutch government refused to extradite him, and he remained in the Netherlands until his death on 4 June 1941.

550. “The Allies intended to create special combined military tribunals to prosecute individuals whose violations had affected persons from multiple countries. They demanded post-war trials for

many reasons. Legal representatives to the Paris Peace Conference believed that “might make right” should not supplant international law; therefore, the rules governing the treatment of civilians and prisoners of war must be enforced. They declared the war had created a modern sensibility that demanded legal innovations, such as prosecuting heads of state and holding officers responsible for the actions of subordinates. British and French leaders wanted to mollify domestic feelings of injury as well as propel an interpretation that the war had been a fight for “justice over barbarism,” rather than a colossal bloodletting. They also sought to use trials to exert pressure on post-war governments to pursue territorial and financial objectives. The German, Ottoman, and Bulgarian governments resisted extradition demands and foreign trials, yet staged their own prosecutions. Each fulfilled a variety of goals by doing so. The Weimar government in Germany was initially forced to sign the Versailles Treaty with its extradition demands, then negotiated to hold its own trials before its Supreme Court in Leipzig because the German military, plus right-wing political parties, refused the extradition of German officers. The Weimar government, led by the Social Democratic party, needed the military’s support to suppress communist revolutions. The Leipzig trials, held 1921-27, only covered a small number of cases, serving to deflect responsibility for the most serious German

violations, such as the massacre of approximately 6,500 civilians in Belgium and deportation of civilians to work in Germany. The limited scope of the trials did not purge the German military as the Allies had hoped.” Sourced: [http:// en-Wikipedia org/Leipzig War-Crimes-T](http://en-Wikipedia.org/Leipzig-War-Crimes-T).

551. Although largely regarded as a failure of the relevant time, the Leipzig trials were the first attempt to develop the judicial system in Europe for the prosecution of violations of international law. This trend was renewed during the World War II, as Allied governments decided to try, after the war, defeated Axis leaders for war crimes committed during the War, notably the Nuremberg Trials and International Military Tribunal for the Far East.

552. The first international body to make preparation for the punishment of the war criminal was the *United Nation War Crimes Commission (UNWCC)*. It was constituted on October 20, 1943, to investigate the allegations of war crimes committed by Nazi Germany and its allies in World War II. The Commission began its work at the behest of the British government and the other Allied Nations in 1943, prior to the formal establishment of the United Nations itself. The announcement of the establishment of the commission was made by the Lord Chancellor John Simon in the House of Lords on October 7, 1942.

“The proposal is to set up with the least possible delay a United Nations Commission for the Investigation of War Crimes. The Commission will be composed of nationals of the United Nations, selected by their Governments. The Commission will investigate war crimes committed against nationals of the United Nations recording the testimony available, and the Commission will report from time to time to the Government of those nations cases in which such crimes appear to have been committed, naming and identifying wherever possible the persons responsible. The Commission should direct its attention in particular to organize atrocities. The atrocities perpetrated by or on the orders of Germany in Occupied France should be included. The investigation should cover war crimes of offenders irrespective of rank, and the aim will be to collect material, supported wherever possible by depositions or by other documents, to establish such crimes, especially where they are systematically perpetrated, and to name and identify those responsible for their perpetration. A similar statement was issued by the US government.”Sourced [https://en.Wikipedia.Org/wiki/United Nations](https://en.Wikipedia.Org/wiki/United_Nations).

553. The Commission had no power to prosecute war criminals by itself, it merely reported back to the government members of the UN. These governments then could convene the tribunals, such as the Nuremberg International Military Tribunal and the International Military Tribunal for the Far East. The Commission, which was headed by British Peer Robert Alderson Wright, was dissolved in

1949. One of its tasks was to carefully collect evidence of War Crimes for the arrest and fair trial of alleged Axis criminals.

554. The United Nations War Crimes Commission prepared 80 lists of war criminals, which together comprised 36,529 names (including Japanese). The Commission published a number of partial statistics on the period until March 1, 1948. The authorities of the United States, Great Britain, France, Greece, Netherlands, Norway, Poland, and Yugoslavia conducted 969 trials, in which 3,470 German defendants were tried. Death sentences were passed for 952; 1,905 were sentenced to varying prison terms, and 613 were acquitted.

555. Before the trials concluded, the political climate changed. The Cold War had begun and both the Americans and the Soviet Union were vying for the esteem of the German people. For some Americans, the Korean War made putting the Nazi period in the past ever more urgent. John J. McCloy, a former Assistant Secretary of War who became U.S. High Commissioner for Germany in 1949, promulgated the Clemency Act in January 1951, commuting many of the convicted war criminals' sentences. By 1958, nearly all prisoners had been freed.

556. "The IMT trial, the first of the Nuremberg trials, was conducted from November 1945 to October 1946. The defendants included Hermann Goering, the most prominent Nazi, the Allies

had captured, who officially held the title of Commander of the Luftwaffe and several departments of the SS; Hans Frank, governor-general of occupied Poland; Ernst Kaltenbrunner, head of the RSHA; Joachim von Ribbentrop, Reich minister for foreign affairs; Julius Streicher, gauleiter of Franconia and editor of *Der Stuermer*, the infamous anti-Semitic publication; Martin Bormann, chief of the chancellery of the Nazi Party and Hitler's private secretary, who was tried in absentia. Some of the most prominent Nazi criminals and German government leaders managed to evade justice and were not brought to trial at Nuremberg, including Hitler, Himmler, Goebbels, and Robert Lye, who committed suicide [the latter hanged himself in his cell while awaiting trial at Nuremberg]; Reinhard Hedrick, charged by Goering with the implementation of the Final Solution, was assassinated in 1942; Heinrich Mueller, one of the heads of the Gestapo, disappeared without a trace. Martin Bormann tried in absentia, was never found. Having fled from the Chancellery bunker on May 1, 1945, as the Red Army was closing in, he was said to have been killed by the Russians; his death in Berlin was supposedly confirmed by evidence found in 1972, but he was also rumored to have escaped to South America.)” Sourced/judica/ejud 00200

The IMT proceedings began on November 20, 1945, and were ended on October 1, 1946. Twelve accused were sentenced

to death, three to life imprisonment, four to prison terms, and three acquitted. The death sentences were executed by hanging on October 16-17, 1946, except Goering who took poison before his execution.

557. “After IMT trial, Nuremberg Proceedings or Zonal trials are known as “Nuremberg Trials” were conducted by the military tribunals of the four Allied powers under Control Council Law No. 10. The twelve cases were brought against groups of important Nazis who bore the chief responsibility for some of the most serious and significant of Nazi crimes. One hundred seventy-seven Nazis were tried and convicted in these twelve trials. Of these, twelve were sentenced to death, 25 to life imprisonment, and the remainder to long prison terms. Proximity to the crime was taken as a measure of guilt. Those who were directly involved in the killing-doctors, concentration camp heads, Einsatzgruppen officers-received the most severe sentences. Thus, those who profited by the crime and developed the infrastructure that enabled the killings to proceed were treated more leniently. In the US Military tribunal trials conducted at Dachau, 1,517 of the 1,941 defendants who were tried by 1949 were found guilty. Of these, 324 were sentenced to death, and 278 of these sentences were actually carried out.

558. In the British Occupation Zone, in Luneburg, Hamburg, and Wuppertal, 1,085 defendants were tried before British military

tribunals and 240 were sentenced to death. Among the more important trials in the British Zone, that of the SS guards at the Bergen- Belsen concentration camp(the Bergen Trial, September 17-November 17, 1945) should be mentioned, Josef Kramer, the camp commandant, and his accomplices were convicted. Kramer was put to death.

559. In the Franch Zone, 2,107 defendants were tried and 104 sentenced to death. The total number of Nazi criminals convicted in the three Western occupation zones between 1945 and 1949 was 5,025, of whom 806 were sentenced to death. Four hundred eighty-six death sentences were carried out; the remainders were commuted to prison terms of varying lengths.

560. The Soviet Union played a major role in the prosecution of Nazi war criminals and collaborators in Eastern Europe. During the initial decade of the war, thousands of accused perpetrators were put on trial in the Soviet Republics that had been under German occupation- although not always for their role in the murder of the Jews. Unfortunately, no exact figures exist on the number of such trials and their results, but from the information available in the post- Communist era, it is clear that the number of those punished is relatively high when compared to Western countries. It is assumed, however, that tens of thousands of Germans were tried there and that most of them were convicted and

in large measure deported to Soviet territories to serve their sentences. In 1955, in the wake of a Soviet- West German agreement, 8,877 criminals were freed. Another 749 were handed over to West Germany for further investigation.

561. The Courts in postwar Germany began to function at the end of 1945 when some of the Allies reinvested the Germans with the right to hold trials. According to a summary prepared by the Federal Department of Justice in Bonn, indictments were issued by the West German authorities against 9,401 Nazi criminals between 1945 and Jan. 1,1969. Of these, twelve were condemned to death (through 1949), 98 to life imprisonment, 6,002 to various prison terms, and the remainder acquitted or never brought to trial. All in all, during the above period, investigations were carried out against 79,401 accused Nazi criminals. 13,000 were tried and 6,487 were convicted; 6,197 were sentenced to prison (thirteen to life terms) and 23 to death. Among the most important trials were those of the Treblinka guards (1959-65); the Auschwitz SS personnel (1963-79 and 1963-64); Franz Stangl, commandant of Sobibor and Treblinka(1974-75); the Majdanek case (1975-81); and Josef Schwammberger, commandant of the Mieliec, Rozvadow, and Przemysl forced labor camps in Poland, who also destroyed the Przemysl ghetto (1991-92).

562. After 1958, and especially after the capture and trial of Adolf Eichmann, a change became noticeable in the pursuit of Nazi criminals. In Germany and in other countries, investigations were renewed against a number of Nazis who had long ceased to be of official interest; the search for Nazi criminals who had thus far succeeded in avoiding imprisonment was intensified; the possibilities for Nazis to exploit the rights of asylum in other countries were diminished; there was an increased awareness that the crimes of the Nazis must not be forgotten and that the criminals must be punished in order to prevent a recurrence of the crimes.” All Sourced: <http://www.virtuallibrary.org/jsource/judica/ejud.00200> and History of the United Nations War Crimes Commission (1948).

563. Besides being the first international tribunal in the history of the trial of international criminal offences, the IMT at Nuremberg also established two other precedents of procedural nature: “Crimes against Humanity are committed by men, not by abstract entities..., “thereby resoundingly affirming the charges against the leaders of the Nazi regime, who argued that since, under international law, only states had legal personality, it was the state of Germany that should have been tried. In the process, too, it was made abundantly clear that heads of state, heads of government and other national leaders could not hide behind claims of immunity in an

international tribunal. Sourced: [http // www.virtual library.org / jsource / judica / ejud. 00200](http://www.virtuallibrary.org/jsource/judica/ejud.00200)

564. In addition, in dealing with Nazi crimes, investigation authorities had to take into consideration further difficulties. Many witnesses who were victims of National Socialism were no longer alive or were unwilling to give testimony about their terrible experiences, especially in the oppressive atmosphere of a courtroom. The Proof becomes more difficult to establish over time. Some survivors refused to return to Germany even for a trial. Others were angry at what they considered the disrespectful tone of cross-examination. Ordinary victims had usually been in contact only with low-level perpetrators and not with those in charge, the leaders. In cases of culprits who were not known to their victims either by name or by appearance, verification could arrive at only through documentary evidence. Documents often arrived in the form of photocopies from the archives of Eastern European states and were therefore distrusted, or flatly rejected, by certain circles in the Federal Republic. In some trials in which such documentary evidence was introduced, counsel for the defense asked the courts not to accept it. When, however, incontestable originals were placed at the courts' disposal, no further attempts were made to dispute the authenticity of these documents. Unfortunately, in several cases, such documentary proof was entirely missing, as the

documents had been destroyed shortly before the end of the war or never existed. These proceedings have been almost always dependent on the testimony of witnesses. But it is only natural that decades after the events, the value of such testimony becomes more and more questionable. In addition, the exterminations of the National Socialist era were not carried out openly, but in specially chosen localities, behind walls and fences and under the strictest secrecy.

565. The problem of locating witnesses was even greater with respect to German nationals, who were unwilling to give incriminating testimonies against their accomplices. The reservoir of witnesses was therefore usually limited to the circles of the perpetrators or the victims. Many of those who witnessed such acts or were in contact with those who committed them were afraid to expose themselves to the investigation; they remained silent, because of misguided solidarity with the perpetrators, or because they had suppressed the terrible events from their memory. The victims were often able to recall the essentials but had forgotten the details which seemed to them at the time unimportant and which might have been crucial for the proceedings. They often instinctively substituted for their imperfect knowledge hearsay evidence and conclusions reached later, often after discussion with other survivors. Perpetrators, times, and places became confused,

especially as many of the victims had passed through a dozen or more camps. Still, even in these cases remarkably, precise testimonies were often given which could be sometimes through documentation-unequivocally verified. It has also been repeatedly established that witnesses for the accused contacted each other, sometimes in an organized fashion, to coordinate their exonerating statements.

Crimes against humanity.

566. The phrase ‘crimes against humanity’ was first employed internationally in a 1915 declaration by the governments of Great Britain, France and Russia, which condemned the Turkish government for the alleged massacres of Armenians as “ crimes against humanity and civilization for which all the members of the Turkish Government will be held responsible together with its agents implicated in the massacres.” Basically, crimes against humanity are heinous crimes which would constitute crimes in most of the world’s national criminal law systems committed against any civilian population.

567. Crimes against humanity were first tried under the Nuremberg Tribunal Charter. The concept of crimes against humanity has evolved since WWII through the jurisprudence of ICTY, ICTR, and ICC. Crimes against humanity are mass crimes committed against the fundamental human rights of a civilian population on

a large scale which can be distinguished from genocide in that the accused persons had not targeted a specific group, but a civilian population at large. In the case of genocide, it is required for the perpetrators to intend to destroy a particular group as such, in whole or in part. In the context of Public International Law, the “civilian” character of the attacked population and persons applies both in war and peacetime. In the context of crimes against humanity, the notion “civilian population” aims to protect the fundamental rights of every human being against any form of systematic or widespread attack. Status is not the criteria to determine the civilian, but the actual role of a person at the time of the commission of the crimes. This includes membership of military forces or other armed groups who have laid down their arms or has otherwise been rendered hors de combat. The widespread nature of the attack can be inferred from the numbers of victims and systematic attack refers to the organized nature of the crimes committed and excluded isolated acts from the notion of crimes against humanity. Perpetrators of crimes against humanity, need not be members of the State or organization involved in the crimes, but include any person who acts to implement or support the policy of the state or the organization. In the context of Public International law, any widespread or systematic attacks against

civilians, which infringe the basic human values, is classified as crimes against humanity.

568. In the present case in hands, all the charges relate to the commission of crimes against humanity as defined in section 3(2)(a)(g)(h) of the International Crimes (Tribunals) Act, 1973. The crimes against humanity are international crimes and like the Act of 1973, many other International Statutes defined the notion “crime against humanity.” At this point in time, the definition as has been given in section 3(2)(a) of the Act of 1973 may be considered as the most authoritative definition of crimes against humanity.

The provision of Section 3 of the Act of 1973 is already quoted above which speaks about the jurisdiction and the definition of the International Crimes. To see the development of the law on crimes against humanity emerged from WW 11 to till date the definitions provided in other Statutes is required to be quoted below;

569. In Article 6 of the Constitution of the International Military Tribunal (IMT), the “crime against humanity” has been defined as under:

Article 6 of the IMT

“CRIMES AGAINST HUMANITY: namely, murder, extermination, enslavement, deportation, and other inhumane acts

committed against any civilian population, before or during the war, or persecutions on political, racial or religious grounds in execution of or in connection with any crime within the jurisdiction of the Tribunal, whether or not in violation of the domestic law of the country where perpetrated.

Leaders, organizers, instigators and accomplices participating in the formulation or execution of a common plan or conspiracy to commit any of the foregoing crimes are responsible for all acts performed by any persons in execution of such plan.”

570. In article II of the Control Council Law No. 10 “crime against humanity” has been defined as under:-

Article II(c) of the CCL No. 10.

“Crimes against Humanity: Atrocities and offenses, including but not limited to murder, extermination, enslavement, deportation, imprisonment, torture, rape, or other inhumane acts committed against any civilian population, or persecutions on political, racial, or religious grounds whether or not in violation of the domestic laws of the country where perpetrated.”

571. The Statute of the International Criminal Tribunal for the Former Yugoslavia (ICTY Statute)

Article 5

“Crimes against humanity

The International Tribunal shall have the power to prosecute persons responsible for the following crimes when committed in armed conflict, whether international or internal in character, and directed against any civilian population:

- (a) murder;
- (b) extermination;
- (c) enslavement;
- (d) deportation;
- (e) imprisonment;
- (f) torture;
- (g) rape;
- (h) persecutions on political, racial and religious grounds;
- (i) other inhumane acts.”

572. The Statute of the International Tribunal for Rwanda**Article 3: Crimes against humanity**

“The International Tribunal for Rwanda shall have the power to prosecute persons responsible for the following crimes when committed as part of a widespread or systematic attack against any

civilian population on national, political, ethnic, racial or religious grounds:

- Murder;
- Extermination;
- Enslavement;
- Deportation;
- Imprisonment;
- Torture;
- Rape;
- Persecutions on political, racial and religious grounds;
- Other inhumane acts.”

573. The Statute of the Special Court for Sierra Leone.

Article 2

Crimes against humanity

“The Special Court shall have the power to prosecute persons who committed the following crimes as part of a widespread or systematic attack against any civilian population:

- Murder;

- Extermination;
- Enslavement;
- Deportation;
- Imprisonment;
- Torture;
- Rape, sexual slavery, enforced prostitution, forced pregnancy and any other form of sexual violence;
- Persecution on political, racial, ethnic or religious grounds;
- Other inhumane acts.”

574. In the International Military Tribunal for the Far East Charter, a provision has been made for trial of individual who committed any international crimes as defined in Article 5 which is quoted below;

Article 5.

“The following acts, or any of them, are crimes coming within the jurisdiction of the Tribunal for which there shall be individual responsibility:

“(C)Crimes against Humanity: Namely, murder, extermination, enslavement, deportation, and other inhumane

acts committed against any civilian population, before or during the war, or persecutions on political or racial grounds in execution of or in connection with any crime within the jurisdiction of the Tribunal, whether or not in violation of the domestic law of the country where perpetrated.

Leaders, organizers, instigators and accomplices participating in the formulation or execution of a common plan or conspiracy to commit any of the foregoing crimes are responsible for all acts performed by any person in execution of such plan.”

575. The Crimes against Humanity and War Crimes Act [Canada]

[S.C. 2000, C. 24]

Assented to 2000-6-29.

“Section 4(3).The definitions in this subsection apply in this section.

“crime against humanity”

“crime contre l’humanite”

“crime against humanity” means murder, extermination, enslavement, deportation, imprisonment, torture, sexual violence, persecution or any other inhumane act or omission that is committed against any civilian population or any

identifiable group and that, at the time and in the place of its commission, constitutes a crime against humanity according to customary international law or conventional international law or by virtue of its being criminal according to the general principles of law recognized by the community of nations, whether or not it constitutes a contravention of the law in force at the time and in the place of its commission.”

576. In the Rome Statute of the International Criminal Court, the “crime against humanity” has been defined as under;

Article 7: Crimes against humanity

“1. For the purpose of this Statute, “crime against humanity” means any of the following acts when committed as part of a widespread or systematic attack directed against any civilian population, with knowledge of the attack:

- (a) Murder;
- (b) Extermination;
- (c) Enslavement;
- (d) Deportation or forcible transfer of population;
- (e) Imprisonment or other severe deprivation of physical liberty in violation of fundamental rules of international law;
- (f) Torture;

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

2. For the purpose of paragraph 1:

- “Attack directed against any civilian population” means a course of conduct involving the multiple commission of acts referred to in paragraph I against any civilian population, pursuant to or in furtherance of a State or organizational policy to commit such attack;

- “Extermination” includes the international infliction of conditions of life, inter alia the deprivation of access to food and medicine, calculated to bring about the destruction of part of a population;
- “Enslavement” means the exercise of any or all of the powers attaching to the right of ownership over a person and includes the exercise of such power in the course of trafficking in persons, in particular, women and children;
- “Deportation or forcible transfer of population” means forced displacement of the persons concerned by expulsion or other coercive acts from the area in which they are lawfully present, without grounds permitted under international law;
- “Torture” means the international infliction of severe pain or suffering, whether physical or mental, upon a person in the custody or under the control of the accused: except that torture shall not include pain or suffering arising only from, inherent in or incidental to, lawful sanctions;
- “Forced pregnancy” means the unlawful confinement of a woman forcibly made pregnant, with the intent of affecting the ethnic composition of any population or

carrying out other grave violations of international law. This definition shall not in any way be interpreted as affecting national laws relating to pregnancy;

- “Persecution” means the intentional and severe deprivation of fundamental rights country to international law by reason of the identity of the group or collectivity;
- “The crime of apartheid” means inhumane acts of a character similar to those referred to in paragraph I, committed in the context of an institutionalized regime of systematic oppression and domination by one racial group over any other racial group or groups and committed with the intention of maintaining that regime;
- “Enforced disappearance of persons” means the arrest, detention or abduction of persons by, or with the authorization, support or acquiescence of, a State or a political organization, followed by a refusal to acknowledge that deprivation of freedom or to give information on the fate or whereabouts of those persons, with the intention of removing them from the protection of the law for a prolonged period to time.”

577. Practically, the Rome Statute employs the same definition of crimes against humanity that the ICTR does, minus the requirement

that the attack was carried out 'on national, political, ethnic, racial or religious grounds.' In addition, the Rome Statute definition offers the most expansive list of specific criminal acts that may constitute crimes against humanity to date. Widespread or systematic attack directed against any civilian population are the essence of the crimes against humanity under the Statute of ICTR, SCSL and ICC, and crimes committed in armed conflict, whether international or internal in character, and directed against any civilian population are the essence of the crimes against humanity under the Statute of ICTY. Like other international crimes such as genocide, crimes against humanity have not been codified in an international treaty, and as the above provisions describe, the different tribunals charged with the prosecution of crimes against humanity have tended to employ slightly different definitions of the crime. Though Article 10 of the Rome Statute states that the Statute is not to be considered a definitive codification of international criminal law, the definition offered in the Statute does, at least, reflect the latest consensus of the international community. The Rome Statute establishing and governing the International Criminal Court (ICC) was adopted in 1998 and entered into force in 2002. It was signed by 139 countries and 116 are parties to the treaty. Bangladesh signed the Rome Statute in 1999 and became a state party in March 2010. While seven countries namely Iraq, Israel,

Libya, China, Qatar, the United States, and Yemen voted against the Rome Statute. Additionally, internationally sanctioned tribunals created specifically to handle similar offenses and developed in the ever-growing body of IHL case law. They include the Criminal Tribunal for the Former Yugoslavia (1993), the International Criminal Tribunal for Rwanda (1994), the Special Court for Sierra Leone (2002), and the Extraordinary Chambers in the Courts of Cambodia (2003).

Murder as “crimes against humanity”

578. In Section 3(2)(a) of the Act of 1973, the Legislature included the word “murder” as “crimes against humanity” although no definition of “murder” has been provided in the said Act. Incorporating section 23 in the Act of 1973, the Legislature excluded the application of the Code of Criminal Procedure, 1898 and the Evidence Act, 1872 in the proceedings of this Tribunal, but the provision of any other law has not been expressly excluded. Furthermore, in view of the provisions provided in Section 26 of the Act of 1973, the provisions of the Act of 1973 shall have effect notwithstanding anything inconsistent therewith contained in any other law for the time being in force, which means that the provisions contained in any other law is applicable in the proceedings of this tribunal so far not inconsistent with any provision contained in the Act of 1973. In the absence of any

express provision, this Tribunal is not legally authorised to exclude the application of the Penal Code in the proceedings of this Tribunal inasmuch as the Legislature at the time of enactment of the Act of 1973 was well aware of the legal provisions as contained in the Penal Code and no provision has been made in the said Act excluding the application of the Penal Code. In view of the above position of law, it is to be noted that the provisions of Penal Code so far is not inconsistent with the Act of 1973 is applicable in the proceedings of this Tribunal.

579. On a bare reading of the provisions of section 23 and 26 of the Act of 1973 it reveals that only the Criminal Procedure Code, 1898 and the Evidence Act, 1872 shall not apply in the proceedings of the Tribunal and if any provisions contained in any other law for the time being in force in Bangladesh do not contradict or is found to be not inconsistent with any provision as contained in the Act of 1973, the said provisions shall not be excluded and may be relied on by this tribunal.

580. In the case of Abdul Quader Molla, reported in 22 BLT (AD) 8, Para 143, Mr. Justice Surendra Kumar Sinha, who delivered the unique majority view as regards applicability of the Penal Code observed in the following language;

“True, in the Act, 1973, the offences of ‘Crimes against Humanity’ ‘genocide’ and ‘war crimes’ have not been

defined. In offence of Crimes against Humanity, some offences like, rape, murder, abduction, confinement, extermination, enslavement etc. have been included, of them, the appellant was in fact tried and convicted for murder and rape. Similarly in respect of 'genocide' and 'war crimes,' some offences have been included as constituents of those crimes but the appellant has not been tried in respect of those offences. In the absence of a definition of those crimes, we are unable to follow the definition given in the Rome Statute as submitted by the learned Counsel for the appellant. The offences of murder and rape mentioned in the Act have been defined in our Penal Code and the definition of those offences given in the Penal Code may be taken in aid since this Code has not been excluded by the Act. Besides, almost all laws prevailing in our country are codified laws, these laws have been promulgated following the concepts, principles, rules and traditions of English Common Law, or in the alternative, it may be said that the concepts, principles, rules and traditions of English Common Law, have penetrated into our jurisprudence and the fabric of our judicial system. The definitions given in respect of these offences in those laws are identical. Therefore, there is no bar to taking the definitions of those laws mentioned in Act, 1973."

581. In the Case of Salauddin Quader Chowdhury, reported in 67 DLR (AD) Page 334 para 102 Mr. Justice Surendra Kumar Sinha, the Hon'ble C.J, as regards applicability of other law in the proceedings of this Tribunal observed in the following language;

“More so, under the Act of 1973, though there is a provision that the Code of Criminal Procedure and the Evidence Act may not be applicable to the trial of offences punishable under section 3 of the Act, the Act or the Rules are totally silent as regards the applicability of the affidavits sworn abroad and also the mode of proving the same. In the absence of any procedure, the general laws and procedures for admissibility of an affidavit sworn abroad may be taken as guidance in the interest of justice.”

582. The notion “murder” used in section 3(2)(a) of the Act of 1973 “committed against any civilian population” may be interpreted keeping those terms in juxtaposition. If any attack is launched directing against any civilian population and in the course of the attack a civilian may be killed. The Legislature incorporated the notion “murder” as crimes against humanity and “murder” includes both “single” and “multiple” murder as per definition provided in section 300 of the Penal Code.

583. On this point I would like to refer the provision of section 299 and 300 of the Penal Code which is quoted below;

“Section 299. Culpable homicide- Whoever causes death by doing an act with the intention of causing death, or with the intention of causing such bodily injury as is likely to cause death, or with the knowledge that he is likely by such act to cause death, commits the offence of culpable homicide.

Explanation 1-A person who causes bodily injury to another who is labouring under a disorder, disease or bodily infirmity, and thereby accelerates the death of that other, shall be deemed to have caused his death.

Explanation 2.- Where death is caused by bodily injury, the person who causes such bodily injury shall be deemed to have caused the death, although by resorting to proper remedies and skilful treatment the death might have been prevented.

Explanation 3.-The causing the death of a child in the mother's womb is not homicide. But it may amount to culpable homicide to cause the death of a living child if any part of that child has been brought forth, though the child may not have breathed or been completely born."

Section 300. Murder- Except in the cases hereinafter excepted, culpable homicide is murder if the act by which the death is caused is done with the intention of causing death, or-

Secondly- If it is done with the intention of causing such bodily injury as the offender knows to be likely to cause the death of the person to whom the harm is caused, or-

3rdly.- If it is done with the intention of causing bodily injury to any person and the bodily injury intended to be inflicted is sufficient in the ordinary course of nature to cause death, or-

4thly.-If the person committing the act knows that it is so imminently dangerous that it must, in all probability, cause death or such bodily injury as it likely to cause death, and commits such act without any excuse for incurring the risk of causing death or such injury as aforesaid.

Exception 1-Culpable homicide is not murder if the offender, whilst deprived of the power of self-control by grave and sudden provocation, causes the death of the person who gave the provocation or causes the death of any other person by mistake or accident.

The above exception is subject to the following provision:-

First-That the provocation is not sought or voluntarily provoked by the offender as an excuse for killing or doing harm to any person.

Secondly- That the provocation is not given by anything done in obedience to the law, or by a public servant in the lawful exercise of the powers of such public servant.

Thirdly- That the provocation is not given by anything done in the lawful exercise of the right of private defence.

Explanation- Whether the provocation was grave and sudden enough to prevent the offence from amounting to murder is a question of fact.

Exception 2-Culpable homicide is not murder if the offender, in the exercise in good faith of the right of private defence of person or property, exceeds the powers given to him by law and causes the death of the person against whom he is exercising such right of defence without premeditation, and without any intention of doing more harm than is necessary for the purpose of such defence.

Exception 3-Culpable homicide is not murder if the offender, being a public servant or aiding a public servant acting for the advancement of public justice, exceeds the powers given to him by law, and causes death by doing an act which he, in good faith, believes to be lawful and necessary for the due discharge of his duty as such public servant and without ill-will towards the person whose death is caused.

Exception 4- Culpable homicide is not murder if it is committed without premeditation in a sudden fight in the heat of passion upon a sudden quarrel and without the offenders having taken undue advantage or acted in a cruel or unusual manner.

Explanation-It is immaterial in such cases which party offers the provocation or commits the first assault.

Exception 5- Culpable homicide is not murder when the person whose death is caused, being above the age of eighteen years, suffers death or takes the risk of death with his own consent.”

584. The word “intention” and the words “common intention” has been mentioned in Section 300 and 34 respectively of the Penal Code, 1860. The paramount consideration of Section 34 of the Penal Code is the commission of an offence “in furtherance of common intention of all” and always it cannot be proved by direct evidence. Common intention of the accused may be inferred from the facts and circumstances of a particular case. On a bare reading of sections 33 and 34 of the Penal Code, it appears that in interpreting section 34 of the Penal Code, both the provisions of sections 33 and 34 of the Code is required to be considered in a juxtaposition inasmuch as the word “act” mentioned in section 34 of the Penal Code has been interpreted by the Legislature in section 33 of the said Code wherein it has been mentioned that “act denotes as well as series of acts as a single act.” On a cumulative consideration of sections 33 and 34 of the Penal Code, it appears that the accused person is not required to be present at the place of occurrence at the time of the commission of the offence. Any act done with the common intention of all to commit the crime without being present at the place of occurrence at the time of the

commission of the offence may be considered as participation in the “criminal act” as mentioned in section 34 of the Penal Code. For easy understanding of the provision of section 34, the provision of sections 33 and 34 of the Penal Code is quoted below;

“Sections 33- “Act,” “Omission”- The word “act” denotes as well as series of acts as a single act: the word “omission” denotes as well as series of omissions as a single omission.”

“**Section 34-** Acts done by several persons in furtherance of common intention- When a criminal act is done by several persons, in furtherance of the common intention of all, each of such person is liable for that act in the same manner as if it were done by him alone.”

585. Now the question has arisen as to whether under Section 4(1) of the Act of 1973 the prosecution is required to prove the “common intention of all” the accused persons to prove the charge of aiding, abetting or participating in the commission of offence of crimes against humanity as required under Section 34 of the Penal Code, 1860.

To resolve the issue provision of Section 4 of the Act of 1973 is quoted below;

“Section 4(1) When any crime as specified in section 3 is committed by several persons, each of such persons is liable for that crime in the same manner as if it were done by him alone.

(2) Any commander or superior officer who orders, permits, acquiesces or participates in the commission of any of the crimes specified in section 3 or is connected with any plans and activities involving the commission of such crimes or who fails or omits to discharge his duty to maintain discipline, or to control or supervise the actions of the persons under his command or his subordinates, whereby such persons or subordinates or any of them commit any such crimes, or who fails to take necessary measures to prevent the commission of such crimes, is guilty of such crimes.”

586. On a cursory reading of the provision of Section 4(1) of the Act of 1973 and Section 34 of the Penal Code, 1860 it appears that Section 4(1) of the Act of 1973 is the replica of Section 34 of the Penal Code except the words “in furtherance of common intention of all.” Under Section 34 of the Penal Code to constitute an offence “criminal act done by several persons, in furtherance of common intention of all” is the pre-condition. The Legislature by deleting the words-“in furtherance of common intention of all” made a copy of the provision of Section 34 of the Penal Code and inserted the same provision in the Act of 1973. The Legislature carefully deleted the words “ in furtherance of common intention of all” to

effectively bring the perpetrators into the criminal net, therefore under Section 4(1) of the Act of 1973, the prosecution is not required to prove the “common intention of all the accused – persons” to prove the charge of “murder” as “crimes against humanity.”

587. The above view finds support from the case of Mohammad Kamruzzaman vs the Chief Prosecutor, ICT, Bangladesh, Criminal Appeal No. 62 of 2013 judgment dated 3.11.2014 PDF page 168 wherein the Hon’ble Appellate Division made an interpretation of section 4 of the Act of 1973 in the following language;

“The Tribunal fell into an error in holding that as the superior perpetrator, the accused may be held responsible under section 4(1) of the Act. This sub-section has no nexus with the superior responsibility. This sub-section (1) contains a provision resembling that of section 34 of the Penal Code. This sub-section enumerated the general doctrine of joint liability in crime. The only difference is that in sub-section (1) of section 4, the expression ‘in furtherance of the common intention of all’ has not been used. The legislature has consciously omitted these words because those words are redundant for holding an offender responsible who has committed offences punishment under section 3(2), (a), (b), (c), (d), (e), (f), (g), (h) of Act of 1973. The object for which these forces were raised is obvious. The Pak army raised Al-Badar force to act as ‘death squad’ for exterminating the pro-liberation forces and their supporters and to maintain the

sovereignty of Pakistan and also to thwart the independence of Bangladesh.”

588. In Barendra Kumar Ghosh’s case reported in AIR 1925 PC 1 (known as the Postmaster’s case) the Privy Council interpreted the provision of section 34 of the Penal Code and held as follows;

“By S. 33, a Criminal act in S. 34 includes a series of acts and, further “act includes omission to act, for example, an omission to interfere in order to prevent a murder being done before one’s very eyes. By S. 37, when any offence is committed by means of several acts whoever intentionally co-operates in the commission of that offence by doing any one of those act, either singly or jointly with any other person, commits that offence. Even if the appellant did nothing as he stood outside the door, it is to be remembered that in crimes as in other things “they also serve who only stand and wait.” By S. 38 when several persons are engaged or concerned in the commission of a criminal act, they may be guilty of different offences by means of that act. Read together, these sections are reasonably plain. S. 34 deals with the doing of separate acts, similar or diverse by several persons; if all are done in furtherance of a common intention, each person is liable for the result of them all, as if he had done them himself for “that act” and “the act” in the latter part of the section must include the whole action covered by “a criminal act” in the first part, because they refer to it.”

589. The Supreme Court of India, in the case of Shoekantiah Ramayya Munipalli and other Vs. The State of Bombay reported in

AIR 1955 SC 287 interpreted the provision of section 34 of the Penal Code and observed as follows;

“The essence of S. 34 that the person must be physically present at the scene of occurrence couple with actual participation which, of course can be of a passive character such as standing by a door, provided that is done with the intention of consisting in furtherance of common intention of them all and there is a readiness to play his part in the prearranged plan when the time comes for him to act.”

590. The most important feature of Section 34 is the element of participation in the criminal act which needs not be in all cases be by physical presence. In the case of Jaikrishnadas Monohardas Desai and another Vs State of Bombay, reported in AIR 1960 (SC) 889, the Supreme Court of India has distinguished the circumstances in which the physical presence of accused person at the place of occurrence is required and in which cases the physical presence of accused is not required his participation by doing any separate act or omission in furtherance of common intention of all would bring him within the boundary of Section 34 of the Penal Code. In Jaikrishnadas Monohardas Desai the Supreme Court of India has reiterated the view made in Barendra Kumar Ghose and held as under;

“But the essence of liability under S. 34 is to be found in the existence of a common intention animating the offenders leading to the doing of a criminal act in furtherance of the

common intention and presence of the offender sought to be rendered liable under S. 34 is not, in the words of the statute, one of the conditions of its applicability. As explained by Lord Sumer in *Barendra Kumar Ghose vs. Emperor*, 52 In App 40 at p. 52: (AIR 1925 PC 1 at p. 7), the leading feature of S. 34 of the Indian Penal Code is participation in action. ‘To establish joint responsibility for an offence, it must, of course, be established that a criminal act was done by several persons; the participation must be in doing the act, not merely in its planning. A common intention- a meeting of minds – to commit an offence and participation in the commission of the offence in furtherance of that common intention invite the application of S. 34. But this participation need not in all cases be by physical presence. In offences involving physical violence, normally presence at the scene of the offence of the offenders sought to be rendered liable on the principle of joint liability may be necessary, but such is not the case in respect of other offences where the offence consists of divers’ acts which may be done at different times and places.

591. In the Case of Noor Mohammad Mohd. Yusuf Momin (appellant) Vs. The State of Maharashtra, reported in AIR 1971 SC 885, the Supreme Court of India made the following observations:

“From the evidence, it seems highly probable that at the time of the actual murder of Mohd. Yahiya, the appellant was either present with other three co-accused or was somewhere nearby. But this evidence does not seem to be enough to prove beyond reasonable doubt his presence at the spot in the company of the other accused when the murder was

actually committed we are, therefore, inclined to give to the appellant the benefit of doubt in regard to the charge under Section 302 read with Section 34 IPC.”

592. In *Tukaram Ganpat's* case reported in AIR 1974 SC 514, the Supreme Court of India maintained the conviction of the appellant relying on the principle of common intention and again relied on the principle as enumerated in section 34 of the Penal Code and extended the view in the following language;

“Mere distance from the scene of a crime cannot exclude culpability under Section 34 which lays down the rule of joint responsibility for a criminal act performed by a plurality of persons. In *Barandra Kumar Ghosh v. The King Emperor* (1924) 52 IA 40-(AIR 1925 PC 1) the Judicial Committee drew into the criminal net those who only stand and wait. This does not mean that some form of presence, near or remote, is not necessary, or that mere presence without more, at the spot of crime, spells culpability. Criminal sharing, overt or covert by the active presence or by distant direction, making out a certain measure of jointness in the commission of the act is the essence of Section 34. Even assuming that presence at the scene is a pre-requisite to attract Section 34 and that such propinquity is absent. S. 107 which is different in one sense, still comes into play to rope in the accused. The act here is not the picking the godown lock but house-breaking and criminal house trespass. This crime is participated in by those operating by remote control as by those doing the physical removal. Together operating in concert, the criminal project is executed. Those who supply the duplicate key, wait at the weight bridge for the break-in

and bringing of the booty and later secrete the keys are participles criminal. And this is the role of accused No.2 according to the Courts below. Could this legal inference be called altogether untenable?"

593. Subsequently in Ramaswami Ayyangar's case (AIR 1976 SC 2027) the above views have been further concurred and observed as under;

"Section 34 is to be read along with the preceding Section 33 which makes it clear that the "act" spoken of in Section 34 includes a series of acts as a single act. It follows that the words "when a criminal act is done by several persons" in Section 34, may be construed to mean "when criminal acts are done by several persons. " The acts committed by different confederates in the criminal action may be different but all must in one way or the other participate and engage in the criminal enterprise, for instance, one may only stand guard to prevent any person coming to the relief of the victim or to otherwise facilitate the execution of the common design. Such a person also commits an "act" as much as his co-participants actually committing the planned crime. In the case of an offence involving physical violence, however, it is essential for the application of Sec. 34 that the person who instigates or aids the commission of the crime must be physically present at the actual commission of the crime for the purpose of facilitating or promoting the offence, the commission of which is the aim of the joint criminal venture. Such presence of those who in one way or the other facilitate the execution of the common design is itself tantamount to actual participation in the

‘criminal act.’ The essence of Section 34 is the simultaneous consensus of the minds of persons participating in the criminal action to bring about a particular result. Such consensus can be developed on the spot and thereby intended by all of them.”

594. In our jurisdiction in the case of Rasool Bux Vs. The State reported in 22 DLR (SC) 297, our Apex Court considered the view taken in Barendra Kumar Ghosh and as explained by Justice H. Rahman, C.J., it has been observed as follows;

“There is no doubt that to bring a case within the ambit of section 34 PPC it is necessary that some overt act or acts must be established to lead to the inference that the participators in the crime acted in pre-concert or under some pre-arranged plan but this does not mean that every participant in the crime must be shown to have committed the same kind of act. It is sufficient to show that they joined together in the commission of a particular act, for then they must all be deemed to have intended the natural and inevitable consequences of that act even if some of them did nothing but merely helped by their presence the commission of the act.”

595. Our Apex Court subsequently in the case of Abdur Rahman Mondal reported in 29 DLR (SC)247 considered the necessity of the presence of accused at the place of occurrence and observed that;

“The common intention to bring about a particular result may develop on the spot as between a number of persons. All that

is necessary is either to have direct proof of prior concert or proof of circumstances which necessarily lead to that inference or the incriminating acts must be incompatible with the innocence of the accused and incapable of explanation on any other reasonable hypothesis. Further, it is the essence of S. 34 that the person must be physically present at the actual commission of the crime.”

596. In the case of Tajul Islam, (popularly known as Birajabala murder case) reported in 48 DLR (HC) 305 the High Court Division observed as follows:

“In an offence involving physical violence, normally presence at the scene of the occurrence of the offender sought to be rendered liable on the principle of joint liability is necessary, such is not the case in respect of other offences where offence consists of diverse acts which may be done at different time and place.”

597. Lastly, considering all the decisions of this sub-continent, Our Apex Court in Bangabandhu Sheikh Mujibur Rahman Murder Case, reported in VI (A) ADC 2010, relied on the observations made in Barendra Kumar Ghosh’s case reported in AIR 1925 PC 1 (known as Postmaster’s case) wherein it has been observed as follows;

“Thus, the consistent views right from the Privy Council to the Apex Courts of India, Pakistan and Bangladesh are that in order to bring an offence within the ambit of section 34, in respect of physical violence, the offender must be physically

present at the actual commission of the crime for the purpose of facilitating the offence. Even if the offender did nothing but merely helped by his presence for facilitating the offence, he will be liable for joint liability. In order to bring the offence within the ambit of the section, there must be the simultaneous consensus of minds of persons participating in the criminal action to bring about a particular result such consensus can be developed on the spot.”

598. Crimes against humanity is an organized or group crime and many persons participate in different phases of the crimes. If any person aided or abetted or facilitated, contributed in any manner in the commission of any phase of crimes against humanity, he is liable under Section 4(1) of the Act of 1973 as if it was done by him alone. “Criminal act is done by several persons, in further of the common intention of all” is not the essence of Section 4(1) of the Act of 1973 and the provision of section 34 of the Penal Code is inconsistent with the provision of section 4(1) of the Act of 1973 and as such, the provision of section 34 of the Code is not applicable in the proceedings of this Tribunal in view of the provision as contained in section 26 of the Act of 1973. The provision of Section 4 of the Act of 1973 is wider than the provision as contained in Section 34 of the Penal Code, and more effectively brings the perpetrator within the criminal net.

599. In view of the definition of murder as provided in section 300 of the Penal Code intention of the accused or accused persons to

cause the death of “any person” or “persons” is the paramount consideration and if death of “a person” is caused at the time of attack directing “against any civilian population” the said “murder” will attract the notion “any civilian population.”

600. In my view, under section 3(2)(a) of the Act of 1973, the following are the elements of “crimes against humanity.”

- There must be an attack,
- The attack must be directed against any civilian population.
- The notion “any civilian population” includes “any civilian”
- The “civilian” character of the attacked population applies both in war and peacetime.
- Status is not the criteria to determine the “civilian”, but the actual role of a person at the time of the commission of the crimes.
- The perpetrators of crimes against humanity need not be members of the State or organization involved in the crimes, but includes any person who acts to implement or support the policy of the state or the organization.

- In the course of the attack, the perpetrators committed any of the offence as specified in section 3(2) (a) of the Act of 1973.

601. The recovery of dead body of the victim is not the essence of the Act of 1973 inasmuch as the provisions of the Code of Criminal Procedure, 1898 (Act V of 1898), and the Evidence Act, 1872 shall not be applicable in any proceedings of this tribunal in view of the provision of Section 23 of the Act of 1973. Furthermore, as per provision contained in Section 19 of the Act of 1973, this Tribunal shall not be bound by technical rules of evidence; and it shall adopt and apply to the greatest possible extent expeditious and non-technical procedure, and may admit any evidence to be of probative value. In view of the above statutory provision, recovery of the dead body of victim of crimes against humanity, genocide, war crimes and other international crime as specified in section 3(2)(a)(c)(d)(e)(g) and (h) of the Act of 1973 is not required to prove the charge against accused persons.

602. It is to be noted that the events as narrated in charges happened at wartime situation, but in view of the definition provided in section 3(2)(a) of the Act of 1973, crimes against humanity may occur at any time, and war or an armed conflict is not the essence of the crimes against humanity and furthermore “

widespread or systematic attack” is not the essence of the crimes against humanity; although the events narrated in the charges alleged to have been committed launching a systematic attack and the crimes committed is an organized or group crime.

603. It is to be further noted that the Pakistani occupation army launching ‘operation search light’ on 25th March 1971 killed students, teachers, all professionals, and unarmed pro-liberation people and all of them are civilian population and the cruel and barbaric Pakistani army to annihilate the pro-liberation Bengali population formed Razakar, Al-Badr, and Al-Shams Bahini as auxiliary force under the Razakar Ordinance and during nine months War of Liberation in 1971, the said auxiliary force actively assisted the Pakistani army and participated in launching attack to annihilating the pro-liberation people and freedom fighters and jointly killed about three million unarmed civilian population which impulse to draw the irresistible conclusion that the unarmed civilian population and pro-liberation people of Bangladesh were the main target of the Pakistani army, Razakars, Al-Badr and Al- Shams. In the above premises, it reveals that the crimes committed during nine- months War of Liberation in 1971 were an organized or group crimes committed against the civilian population of Bangladesh.

604. The events narrated in charge No. 2 and 4 relates to “murder” as “crimes against humanity” as specified in section 3(2)(a) of the Act of 1973 which is punishable under Section 20(2) of the said Act. Article 3(1) (a) of the Geneva Convention Relative to the Protection of Civilian Persons in time of War of August 1947 prohibits violence to life and persons, particularly murder of all kinds, which provides that:

“In the case of armed conflict not of an international character occurring in the territory of one of the High Contracting Parties, each Party to the conflict shall be bound to apply, as a minimum, the following provisions.

1. Persons taking no active part in the hostilities, including members of armed forces who have laid down their arms and those placed ‘ hors de combat’ by sickness, wounds, detention, or any other cause, shall in all circumstances be treated humanely, without any adverse distinction founded on race, colour, religion or faith, sex, birth or wealth or any other similar criteria.

To this end, the following acts are and shall remain prohibited at any time and in any place whatsoever with respect to the above- mentioned persons:

(a) violence to life and person, in particular, the murder of all kinds, mutilation, cruel treatment, and torture;

(b) the taking of hostages;

(c) outrages upon personal dignity, in particular, humiliating and degrading treatment;

(d) the passing of sentences and the carrying out of executions without previous judgment pronounced by a regularly constituted Court, affording all the judicial guarantees which are recognized as indispensable by civilized peoples.

2) The wounded and sick shall be collected and cared for.

An impartial humanitarian body, such as the International Committee of the Red Cross, may offer its services to the Parties to the conflict.

The Parties to the conflict should further endeavour to bring into force, by means of special agreements, all or part of the other provisions of the present Convention.

The application of the preceding provisions shall not affect the legal status of the Parties to the conflict.”

605. In Article 3(1)(a) of the Geneva Convention 1949 the phrase “armed conflict not of an international character” has been

employed, although definition of International armed conflict has not been provided in the said Convention but the ICTY and ICTR interpreted the notion “armed conflict” in the case of Tadic and Lubanga. In the case of *The Prosecutor v. Thomas Lubanga Dyilo* (the “Lubanga decision”) the Pre-Trial Chamber I of ICTY [Case No. ICC-01/04-01/06-803-tEN, relying on common Article 2 of the Geneva Convention 1949 and the relevant ICTY jurisprudence observed that-

“The Chamber considers an armed conflict to be international in character if it takes place between two or more States; this extends to the partial or total occupation of the territory of another State, whether or not the said occupation meets with armed resistance. In addition, an internal armed conflict that breaks out on the territory of a State may become international- or, depending upon the circumstances, be international in character alongside an internal armed conflict- if (i) another State intervenes in that conflict through its troops (direct intervention), or (ii) some of the participants in the internal armed conflict act on behalf of that other State (indirect intervention).”

606. In the case of Prosecutor V. Tadic, Case No. IT-94-1, “Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction”, 2 October 1995, para. 70 it has been observed that –

‘ (...) an armed conflict exists whenever there is a resort to armed force between States or protracted armed violence between governmental authorities and organized armed

groups or between such groups within a State. International humanitarian law applies from the initiation of such armed conflicts and extends beyond the cessation of hostilities until a general conclusion of peace is reached; or, in the case of internal conflicts, a peaceful settlement is achieved. Until that moment, international humanitarian law continues to apply in the whole territory of the warring States or, in the case of internal conflicts, the whole territory under the control of a party, whether or not actual combat takes place there.’’

607. In the case of *The Prosecutor V Akayesu*, Case No. ICTR-96-4-T, “Judgment, 2 September 1998, para. 620 the ICTR considered the notion armed conflict and observed in the following language;

“The terms, ‘armed conflict’ in itself suggests the existence of hostilities between armed forces organized to a greater or lesser extent. This consequently rules out situations of internal disturbances and tensions.”

608. The International Committee of the Red Cross (ICRC) in ICRC Commentary on Convention (IV) Relative to the Protection of Civilian Persons in Time of War, 12 August 1949, (ICRC, 1958), p. 20 added that

“Any difference arising between two States and leading to the intervention of members of the armed forces is an armed conflict within the meaning of Article 2, even if one of the Parties denies the existence of a state of war. It makes no difference how long the conflict lasts, or how much slaughter

takes place. The respect due to the human person as such is not measured by the number of victims.”

609. What is meant by ‘armed conflict’? The question was settled in 2010 by an ICTY Appeal Chamber in *Boskoski and Tarculovski*. The Chamber confirmed the finding of the Trial Chamber that “an armed conflict existed at the relevant time in the Former Yugoslav Republic of Macedonia (FYROM) between the FYROM security forces and the ethnic Albanian National Liberation Army (NLA). It held that the Trial Chamber had correctly set out the relevant legal test that ‘an armed conflict exists whenever there is a resort to armed force between States or protracted armed violence between government authorities and organised armed groups or between such groups within a State.’ Furthermore, the Appeal Chamber upheld that Trial Chamber’s view that “in order to distinguish an armed conflict from ‘banditry’ unorganized and short-lived insurrections or terrorist activities,’ two closely related criteria, namely (i) the intensity of the conflict; and (ii) the level of organization of the parties to the conflict must be applied on a case-by-case basis in light of the particular evidence. The Appeal Chamber found no error in the Trial Chamber’s analysis of factors relevant to the assessment of the intensity of the conflict and the level of organization of the NLA. The Appeal Chamber also upheld the Trial Chamber’s conclusion based on these factors, whereby, despite the relatively limited number of casualties and damaged

houses, the intensity of the conflict in the FYROM at the relevant time and the characteristics of the NLA as an organized armed group met the criteria for armed conflict.”

610. The “act” or actus reus of murder as mentioned in section 300 of the Penal Code is an act or omission resulting in the death of an individual or civilian population. It is not necessary that proof of a dead body be produced if the victim’s death can be inferred circumstantially from other evidence which has been presented to the Tribunal. With regard to the nexus between the crimes and the perpetrators, the requirement is that the death must have occurred as a result of “act or omission,” the perpetrator does not require being the sole cause of the death of the victim. It is sufficient that the conduct of the perpetrator substantially contributed to the death of a person or civilian population.

611. The intention or mens rea of murder includes both direct intent which is a state of mind in which the perpetrator desired the death of a civilian or civilian populations to the result of his act or omission, and indirect intent which is knowledge on the part of the perpetrator that the death of a victim was a probable consequence of his act or omission.

612. In charges Nos. 2 and 5 the accused persons have been charged with the criminal responsibility of the commission of offences of “other inhumane acts as crimes against humanity as part

of systematic attack” which is punishable under Section 20(2) of the Act of 1973. While Section 3(2)(a) does not explicitly prohibit “attack” on civilians as such, but the attack on the civilian population or individual civilian meet the threshold requirements for the crimes against humanity, therefore, covered by Section 3(2)(a) of the Act of 1973. Thus, the targeting of a civilian or civilians has been deemed by this Tribunal to be absolutely prohibited at all times and, as such, cannot be justified by an action of the accused persons.

613. In section 3(2)(a) of the Act of 1973, the Legislature included the notion “murder” as “crimes against humanity “committed “against any civilian population”, but in the four-corner of the said Act “any civilian population” has not been defined. In the case of Prosecutor –Vs- Radovan Karadzic, Case No. IT-95-5118-T dated 24.3.2016, the Trial Chamber of ICC made following observations as regards civilian population;

“The meaning of civilian for the purposes of unlawful attacks on civilians stems from Article 50(1) of Additional Protocol I which provides that a “civilian is any person who does not belong to one of the categories of persons referred to in Article 4(A)(1), (2), (3) and (6) of the Third [Geneva] Convention and in Article 43 of [Additional] Protocol [I]. This is a negative definition of “civilian” as it includes anyone who is not a member of the armed forces or an organised military group belonging to a party to the conflict.

Article 50(1) of Additional Protocol I also provides that in the case of doubt whether a person is a civilian, that person shall be considered to be a civilian. The protection from attack afforded to individual civilians by Article 51 of Additional Protocol I continues until such time as they take direct part in hostilities, that is until they engage in acts of war which, by their very nature and purpose, are likely to cause actual harm to the personnel or material of the enemy forces. Thus, in order to establish that unlawful attacks against civilians have been committed, the Chamber has to find that the victims of these attacks were civilians and that they were not participating in the hostilities.”

614. In the case of Radovan Karadzic, as regards civilians or civilian population, the ICC Trial Chamber further observed that-

“To constitute an unlawful attack on civilians, the Prosecution has to show that it was directed against individual civilians or the civilian population. Whether this is the case can be determined by a number of factors, including the means and methods used in the course of the attack, the status and the number of victims, the distance between the victims and the source of fire, the ongoing combat activity at the time and location of the incident, the presence of military activities or facilities in the incident, the nature of the acts of violence committed, the indiscriminate nature of the weapons used, and the extent to which the attacking force has complied or attempted to comply with the precautionary requirements of the law of war. In this respect, the jurisprudence is also clear that both indiscriminate attacks and disproportionate attacks may qualify as attacks directed against civilians or give rise to an inference that an attack

was directed against civilians. This is to be determined on a case by case basis, in light of the available evidence.”

615. The Trial Chamber of ICC in the Case of the Prosecutor – Vs- Radovan Karadzic, Case No. IT-95-5118-T, judgment dated 24.3.2016, has identified the following five general requirements of crimes against humanity under Article 7 of the Statute of ICC.

“(i) There must be an attack;

(ii) The attack must be directed against any civilian population;

(iii) The attack must be widespread or systematic;

(iv) The acts of the perpetrator must be part of the attack, and

(v) the perpetrator must know that there is a widespread or systematic attack directed against a civilian population and know that his acts constitute part of this attack.”

616. A population is considered to be a civilian population under Section 3(2)(a) of the Act of 1973 if it is predominantly civilian in nature. The presence within a population of a person or persons who do not come within the definition of civilians does not necessarily deprive the population of its civilian character. The civilian status of the victims, the number of civilians, and the proportion of civilians within a civilian population are factors relevant to the determination as to whether an attack is directed

against any “civilian population”, there is no requirement that individual victims of crimes against humanity be civilians. It is, therefore, possible for a person hors de combat to be a victim of an act amounting to a crime against humanity.

617. Hors de combat, literally meaning “outside” the fight,” is a French term used in diplomacy and international law to refer to the persons who are incapable of performing their ability to wage war. Examples include fighter pilots or aircrews parachuting from their disabled aircraft, as well as sick, wounded, detained, or otherwise disabled. Person hors de combat are normally granted special protections according to the law of war, sometimes including prisoners of war status, and therefore officially become non-combatants. Under the Geneva conventions, unlawful combatants or hors de combat are granted the same privilege and to be treated with humanity while in captivity but until lawful combatants, they are subjected to trial and punishment, which includes capital punishment. en.m.wikipedia, org.

618. Article 41 of the Additional Protocol I to the Geneva Conventions defines the notion “hors de combat” which reads as follows;

“Article 41: Safeguard of an enemy hors de combat.

- A person who is recognized or who, in the circumstances, should be recognized to be hors de combat shall not be made the object of attack.
- “A person is hors de combat’ if:
- he is in the power of an adverse Party;
- he clearly expresses an intention to surrender, or
- he has been rendered unconscious or is otherwise incapacitated by wounds or sickness, and therefore is incapable of defending himself; “

Provided that in any of these cases he abstains from any hostile act and does not attempt to escape.

3. When persons entitled to protection as prisoners of war have fallen into the power of an adverse party under unusual condition of combat which prevents their evacuations as provided for in Part II, section I, of third Convention, they shall be released and all feasible precaution shall be taken to ensure their safety.”

619. In the Case of Radovan Karadzic as referred herein above as regards attack directed against civilian population, the Trial Chamber of ICC observed in the following language;

“For the purpose of Article 5 of the Statute, an attack can be considered to have been directed against a civilian population if the civilian population was the “primary rather than an incidental target of the attack”. In order to determine whether the attack was so directed, the Appeals Chamber has identified a non- exhaustive list of relevant factors, such as the means and method used during the course of the

attack, the status of the victims, their number, the discriminatory nature of the attack, the nature of the crimes committed in the course of the attack, the resistance to the assailants at the time of the attack, and the extent to which the attacking force may be said to have complied or attempted to comply with the precautionary requirements of the laws of war. The term “population” does not mean that the entire population of the geographical entity in which the attack is occurring was subjected to the attack. However, the attack must have targeted more than “a limited and randomly selected number of individuals” within the population”

620. International humanitarian law protects those who do not take part in the fighting, such as civilians and medical and religious military personnel. It also protects those who have ceased to take parts, such as wounded, shipwrecked and sick combatants and prisoners of war. These categories of person are entitled to respect for their lives and for their physical and mental integrity. They also enjoy legal guarantees. They must be protected and treated humanely in all circumstances, with no adverse distinction. It is forbidden to kill or wound an enemy who surrenders or is unable to fight; the sick and wounded must be collected and cared for by the party in whose power they find themselves. Medical personnel, supplies, hospitals and ambulances must all be protected.

621. There are also detailed rules governing the conditions of detention for prisoners of war and the way in which civilians are to be treated when under the authority of an enemy power. This

includes the provision of food, shelter and medical care, and the right to exchange messages with their families. The law sets out a number of clearly recognizable symbols which can be used to identify protected persons, places, and objects. The main emblems are the Red Cross, the Red Crescent and the symbols identifying the cultural property and civil defence facilities.

622. In the Fourth Geneva Convention, 1949, the High Contracting Parties for the purpose of establishing a Convention for the protection of the civilian person in time of war made provision for the protection of civilian population. In Article 4 of the said convention it is mentioned as follows:

“Persons protected by the Convention are those who, at a given moment and in any manner whatsoever, find themselves in the case of conflict or occupation, in the hands of a Party to the conflict or Occupying Power of which they are not nationals.

Nationals of a State which is not bound by the Convention are not protected by it. Nationals of a neutral State who find themselves in the territory of a belligerent State, and nationals of a co-belligerent State, shall not be regarded as protected persons while the State of which they are nationals has normal diplomatic representation in the State in whose hands they are.

The provisions of Part II are, however, wider in the application, as defined in Article 13.

Persons protected by the Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field of 12 August 1949, or by the Geneva Convention for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea of 12 August 1949, or by the Geneva Convention relative to the Treatment of Prisoners of War of 12 August 1949, shall not be considered as protected persons within the meaning of the present Convention.”

623. In Article 50 of the Additional Protocol I to the Geneva Convention 1949, the term “civilian and civilian population” has been defined as under;

“Article 50- Definition of civilians and the civilian population.

- A civilian is any person who does not belong to one of the categories of persons referred to in Article 4 A 1), 2), 3) and 6) of the Third Convention and in Article 43 of this Protocol. In the case of doubt, whether a person is a civilian, that person shall be considered to be a civilian.
- The civilian population comprises all persons who are civilians.
- The presence within the civilian population of individuals who do not come within the definition of

civilians does not deprive the population of its civilian character.“

624. As per provision of Article 51 of the said Protocol I, the civilian population or any individual civilian is a protected person which runs as follows;

“Article 51- Protection of the civilian population

- The civilian population and individual civilians shall enjoy general protection against dangers arising from military operations. To give effect to this protection, the following rules, which are additional to other applicable rules of international law, shall be observed in all circumstances.
- The civilian population as such, as well as individual civilians, shall not be the object of attack. Acts or threats of violence the primary purpose of which is to spread terror among the civilian population are prohibited.

3. Civilians shall enjoy the protection afforded by this Section, unless and

for such time as they take a direct part in hostilities.

4. Indiscriminate attacks are prohibited. Indiscriminate

attacks are:

- those which are not directed at a specific military objective;
- those which employ a method or means of combat which cannot be directed at a specific military objective; or
- those which employ a method or means of combat the effects of which cannot be limited as required by this Protocol;

and consequently, in each such case, are of a nature to strike military objectives and civilians or civilian objects without distinction.

5. Among others, the following types of attacks are to be considered as indiscriminate:

- a) an attack by bombardment by any methods or means which treats as a single military objective a number of clearly separated and distinct military objectives located in a city, town, village or other area containing a similar concentration of civilians or civilian objects; and
- b) an attack which may be expected to cause incidental loss of civilian life, injury to civilians, damage to civilian objects, or a combination thereof,

which would be excessive in relation to the concrete and direct military advantage anticipated.

6. Attacks against the civilian population or civilians by way of reprisals are prohibited.

7. The presence or movements of the civilian population or individual civilians shall not be used to render certain points or areas immune from military operations, in particular in attempts to shield military objectives from attacks or to shield, favour or impede military operations. The Parties to the conflict shall not direct the movement of the civilian population or individual civilians in order to attempt to shield military objectives from attacks or to shield military operations.

8) Any violation of these prohibitions shall not release the Parties to the conflict from their legal obligations which respect to the civilian population and civilians, including the obligation to take the precautionary measures provided for in Article 57.

625. In the instant case in hands, rape victim Ashura Khatun and other victims namely Nuruddin Morol [P.W.3], Atiar, Chandtullah Gazi, Miron Sheikh [P.W.6] and A. Malek Sardar are civilians and protected persons under the Geneva Convention of 1949. It is

alleged that the accused persons having abducted the victim Ashura Khatun from her house confined her in the Chingra Razakar Camp and committed rape on her. It is further alleged that freedom fighters Chandtullah Gazi, Nuruddin Morol [P.W. 3] and Miron Sheikh [P.W.6] were abducted from their house and at the time of the abduction, they were not engaged in any hostility. The accused persons having abducted the victims confined them in Chingra Razakar Camp and inhumanely tortured and subsequently killed Chandtullah Gazi and A. Maleque Sardar on the bank of Kapotakha River. The alleged act of abduction, rape, torture, confinement and killing are also prohibited under the Geneva Convention as the victims are civilians and protected persons.

626. In the case of Abdul Quader Mollah vs The Chief Prosecutor reported in 22 BLT (AD) 8 at page 119, para 210 Mr. J. Surendra Kumar Sinha interpreted the notion “crimes against humanity” in the following language;

“The term of Crimes against Humanity has come to mean anything atrocious committed on a large scale. These crimes are committed against the civilian population during the war, or persecution on political or racial or religious grounds in execution of any crime. These offences by nature are heinous. In the instant case, the appellant along with his cohorts attacked the house of Hazrat Ali Laskar, killed his wife, raped two minor daughters and then killed them with a minor son only because he supported the Awami League and was an

admirer of Sheikh Mujibur Rahman. These nefarious acts were perpetrated in a preplanned manner and in doing so, the appellant, who led the team exceeded all norms of humanity. He was involved in Islami Chhatra Sangh and Jamat-e-Islami politics from before the 1970 general election at Mirpur and accordingly, he had harbored a grudge against Hazrat Ali Lasker. The aim of the perpetrators was to wipe out the family of Hazrat Ali Lasker, but incidentally, P.W.3 survived. The horrible picture of the carnage that had been unleashed was so brutal that the sentence of death is to be taken as the proper sentence. If no such sentence is passed on the facts of the case, it will be difficult to inflict a death sentence in other cases.”

627. In the case of *Salauddin Quader Chowdhury vs The Chief Prosecution* reported in 67 DLR(AD) 295 at Page- 351 Para167 Mr. Surendra Kumar Sinha C.J. again interpreted the notion “crimes against humanity” in the following language;

“Crimes against humanity and genocides are a heinous form of crime that could possibly exist in the human civilization. Throughout the ages in every civilization, these crimes are considered as the most atrocious, appalling and terrible acts and extremely hated by each and every one. Accused Salauddin Quader Chowdhury has committed crimes with the highest ruthlessness and extreme atrocity. He persecuted civilian and unarmed people, tortured them to death, caused the disappearance of innocent people and helped in disappearing people in collaboration with the occupier Pakistani Army. He rampantly looted and assisted to plunder people’s property. The offences were not the one envisaged in the penal laws of any country, the accused in committing

those crimes in the synchronized plan and design that were developed and put into execution with cool blood. Salauddin Quader Chowdhury persecuted, killed and caused the disappearance of civilian people solely on religious and political grounds. He had direct involvement in the killing of innocent people. The prosecution has been able to establish clearly that he had thoroughly designed plan and a common objective to commit those crimes, especially he had done all these brutal offences with specific intention to exterminate the Hindu religious community and his political opponents from that locality. And he eventually accomplished his killing mission of mass people, a very rarest of atrocities so far committed to the collaboration of occupying army forces and local allies. Accordingly, it is one of the fittest cases to award such sentences. We find no cogent ground to interfere with the sentences of death.”

628. In the case of the Chief Prosecutor vs Abdul Quader Mollah reported in 22BLT (AD) 8, at Page-81 Para 146 it has been held further that

“The phrase “crimes against humanity” has acquired enormous resonance in the legal and moral imaginations of the post-World War II world. It suggests, in at least two distinct ways, the enormity of those offenses. First, the phrase “crimes against humanity” suggests offenses that aggrieve not only the victims and their own communities, but all human beings, regardless of their community. Second, the phrase suggests that these offences cut deep, violating the core humanity that we all share and that distinguishes us from other natural beings.”

629. It is now well settled that only in the context of Public International Law, the widespread and systematic attack is the element of crimes against Humanity. In the case of Chief Prosecutor Vs. Abdul Kader Molla reported in 22 BLT(AD) 8 our Apex Court held that provision of Public International Law is not applicable to the International Crimes Tribunal, Bangladesh, which is a domestic tribunal. Subsequently, in the review case of Muhammad Kamruzzaman Vs. The Chief Prosecutor reported in 35 BLD (AD) 158 our Apex Court reiterated the same view. In section 3 of the International Crimes(Tribunals) Act, 1973, the Legislature stated nothing as regards widespread and systematic attack which are the elements of crimes against humanity in the context of Public International Law. As per provision of Section 3(2)(a) of the Act of 1973 crimes committed against any civilian population is the pre-condition to constitute an offence of crimes against humanity. By nature, it is an organized and group crimes committed against any civilian population.

630. In view of the above position of law the definition of “ crimes against humanity” provided in section 3(2)(a) of the Act of 1973 will prevail and this Tribunal will only follow the Act of 1973 in adjudicating the charges framed in the instant case and if require, this Tribunal may only look at the jurisprudence developed by ICTY,ICTR,SCSL, and ICC. The constitution of the newly

created country of Bangladesh was amended in 1973 to authorize criminal prosecution of any person accused of “ genocide or crimes against humanity or crimes against peace or war crimes and any other crimes under international law. The Legislature also enacted the International Crimes (Tribunals) Act, 1973 to establish a process for such prosecution. War crimes prosecutions have become common over the last decade or so, but in 1973, the Legislature has taken pioneer steps to prevent impunity for grave atrocities, steps that drew praise from the international community at that time.

Historical Background.

631. After Sepoy Revolt of 1857, the Parliament of the United Kingdom enacted the Government of India Act, 1858 for the liquidation of the British East India Company and transferred all powers from the East India Company to Crown. The Crown was empowered to appoint a Governor-General and the Governors of the Presidencies. British Empire believed that Britain’s superpower status for most of the nineteenth century and some of the twentieth depended on their control over India. Viceroy Lord Curzon had expressed it clearly in 1901, “As long as we rule India, we are the greatest power in the world. If we lose it we shall drop straight way to a third-rate power.” The British rulers established their Empire in India by playing off one part against

the others and effectively implemented the “Divide and Rule” policy in India. Viceroy Lord Curzon partitioned Bengal in 1905 in the name of “administrative improvement,” but practically made a division in between Muslims and Hindus, which resulted in a huge political crisis both in East Bengal and West Bengal. In 1906, Rabindranath Tagore wrote “Amar Shonar Bangla” as a rallying cry for proponents of annulment of Partition, which, much later, after War of Liberation of Bangladesh, became the “National Anthem of Bangladesh.” Due to protest of the people of both East and West Bengal, the two parts of Bengal were reunited and partition of Bengal was rescinded in 1911. “United Bengal Movement” was started for a separate united State for all Bengalis on the eve of 1947 partition.

632. After rescind of Partition of Bengal in 1911, Mohammad Ali Jinnah made a demand to divide India on the basis of “two-nation theory” or “Dijati Totto” which was practically originated from the “Divide and Rule” theory of British and founding principle of the Pakistan movement (i.e. the ideology of Pakistan as a Muslim nation-state in South Asia) and the partition of India in 1947, although the “Lahore Resolution” or Lahore Prostab,” presented by Sher-e-Bangla A.K.Fazlul Huq was adopted by the All-India Muslim League in its general session in Lahore on March 22-24, 1940 for the creation of “independent states” for

Muslims in “ north –western” and “eastern zones” within British India.

633. Eminent Muslim personalities within Congress like Maulana Abdul Kalam Azad, a real Muslim cleric, who was elected President of All Indian Congress in 1939 firmly opposed the idea of “divide India on a sectarian basis.”

He said, “I have considered from every possible point of view the scheme of Pakistan as formulated by Muslim League. As an Indian, I have examined its implication for the future of India as a whole. As a Muslim, I have examined its likely effects upon the fortunes of Muslims of India.

Considering the scheme in all its aspects I have come to the conclusion that it is harmful not only for India as a whole but for Muslims in particular. And in fact, it creates more problems than it solves. I must confess that the very term Pakistan goes against my grain. It suggests that some portion of the world is pure while others are impure. Such a division of territories into pure and impure is un-Islamic and is more in keeping with orthodox Brahmanism which divides men and countries into holy and unholy- a division which is a repudiation of the very spirit of Islam. Islam recognizes no such division and the prophet says, ‘God has made the whole world a mosque for me.’

Further, it seems that the scheme of Pakistan is a symbol of defeatism and has been built upon the analogy of the Jewish demand for a national home. As a Muslim, I for one am not prepared for a moment to give up my right to treat the whole of India as my domain and to share in the shaping of its political and economic life. To me, it seems a sure sign of cowardice to give up what is my patrimony and content myself with a mere fragment of it. Mr. Jinnah replied that this is no way affected their separate nationality. Two nations according to Mr. Jinnah confront one another in every hamlet, village, and town and he, therefore, desires that they should be separated in two states.” (India Wins Freedom by Maulana Abul Kalam Azad. The Complete Version, Page 150).

634. Pandit Jawaharlal Nehru expressed, “Mr. Jinnah’s demand was based on a new theory he had recently propounded that Indian considered of two nations, Hindu, and Muslim. Why only two, I do not know, if nationality is based on religion, and then there were many nations in India. Of two brothers one may be a Hindu and another may be a Muslim—they would belong to two different nations. These two nations existed in varying proportions in most of the villages of India. They were a nation which had no boundaries; they overlapped. A Bengalee Muslim and a Bengalee Hindu living together speaking the same language and having much the same tradition and customs belong to different nations. All these were

difficult to grasp; it seemed a reversion to some medieval theory.”
(Nehru, *Discovery of India*-2004 edition, page 431/42).

635. “From Mr. Jinnah’s two-nation theory developed the conception of Pakistan, or splitting up of India. That, of course, did not solve the problem of the ‘two nations’ for they were all over the place. But that gave birth to a metaphysical conception. (*Discovery of India*, Page 432).”

636. “Mr. Orest Martyshin, a Senior Registrar at the Institute of State and Law, USSR Academy of Sciences, wrote way back to 1940 that Muslim League had for the first time advanced a slogan of a “Muslim nation” in India. Thanks to the skilful propaganda of the League, which took advantage of the fact that the INC had almost completely stayed away from politics during the war, of connivance and direct incitement by the colonial authorities, the “two-nation theory” had, by the end of the war, gained currency among the Muslim and official British circles so that they began to regard the problem of creating Pakistan just as important as the granting of national independence to India.” (JAWAHARLAL NEHRU, AND HIS POLITICAL VIEWS. Page-39).

637. “Surprisingly enough, as Maulana Azad reveals, Sardar Bollob Bhai Patel, who in Maulana’s view was one of the staunch supporters of partition of India, was convinced that the new state of Pakistan was not viable and could not last, and that he thought that

the acceptance of Pakistan would teach the Muslim League a bitter lesson, Pakistan would collapse in a short time and the provinces which had seceded from India would have to face untold difficulty and hardship.” (India Wins Freedom Page-225). LT General Kamal Motin Uddin, who was a Pakistani soldier, writes, “Pakistan has been described by many western and Indian writers as a geographical non-density and country disfigured of birth.”

638. Maulana Abul Kalam Azad, the well-known Muslim nationalist leader and President of All India Congress, predicted that Pakistan in its present shape would not last more than a quarter of a century. His prediction came true.” (Tragedy of Error-East Pakistan Crisis 1968-71). Para-267, pages-239-240

639. “While the Muslim League leaders in Bengal went ahead hand in gloves with Mohammed Ali Jinnah to an extent and for a while, it is conceivable from their vision and action that they were not thinking of one united Pakistan but of more than one independent homeland for the Muslims in India. This is quite obvious from the fact that Sher-E-Bangla A.K.Fazlul Haque scripted the word “states” (in plural) rather than “state” (in singular) in Lahore Resolution in 1940. But this theory of having more than one independent homeland for the Muslims in India was torpedoed by the Muslim League Leaders in the west and northern part of India headed by Mr. Mohammad Ali Jinnah. It is also clear

from the actions of the Muslim League Leaders in Bengal that it was not beyond their contemplation that the Muslims of Bengal were not only geographically separated from the Muslim in north-west India, but they constituted an entirely different ethnic group, divided not only by language but also by culture, tradition, heritage and history. They are the totally distinct anthropological blend. Yet as Maulana Azad, who grew up in Bengal, opined that “Mr. Jinnah did not seem to have realized that geography was against him.” (India Wins Freedom, Bombay Edition-1959 Page 227)

640. “The percipient arch leaders of Bengali Muslims of that time namely Husain Shahid Suhrawardy, AK Fazlul Hoque, Abul Hashem had no difficulty in visualizing that Muslims in Bengal would not be treated with respect, dignity and equality. Sign of ignominious treatment became obvious even before the partition when Shere-E-Bangla A.K. Fazlul Haque who moved the Lahore resolution, was expelled from Muslim League and Shahid Suhrawardy, who singularly contributed to making possible Muslim League’s victory in Bengal in 1946 election, was pushed to a corner in preference to Urdu-speaking man of Kashmiri descent, Khawaja Nazimuddin, even to the extent of being declared a persona non-grata in Pakistan.

Shuhrawardy along with another Muslim League leader Abul Hashem in alliance with Sharat Chandra Bose, a younger

brother of Netaji Subash Chandra Bose, a perennial fighter against communism, put an alternative proposal for the creation of a united Independent Bengal.

Bangabandhu Sheikh Mujibur Rahman, who was a promising student leader at that time and was closely accomplices with H.S. Suhrawardy, has elaborated this fact as follows. "At this time, Mr. Hashim and Mr. Suharawardy on behalf of the Muslim League and Sharatbose and Kiron Shankar Roy on behalf of the Congress party met to discuss the situation.

The subject of their discussion was whether an alternative could be found to the splitting up of Bengal. Mr. Suhrawardy went to Delhi to meet Mr. Jinnah and with his permission began a negotiation to find a way out.

The Bengal Congress and Muslim league Leaders came up with a Formula. The Bengal Muslim League Working Committee accepted the formula unanimously. As far as I remember, it stated clearly that Bengal would be an independent and sovereign nation. The people would elect a Constituent Assembly. That Assembly would decide whether Bengal would join either Hindustan or Pakistan or stay independent. If the majority of the assembly decides in favour of joining Pakistan, then Bengal would become part of that nation.

However, if most people wanted to be part of India, then Bengal would be allowed to join India, and if the people wanted independence they could have that option too. Mr. Suharawardy and Mr. Sharat Bose took this formula to Delhi where they intended to meet Jinnah and Gandhi. Mr. Bose has left a written testimony to the effect that Jinnah had told him the Muslim League would have no objections if the Congress Party was willing to accept this formula. As for the British, they had let it be known that they would accept no new formula if that had not been agreed upon by both the Congress and the League. Mr. Bose felt insulted when the leaders of the Congress refused him an audience and returned home. Apparently, Sardar Vallabhai Patel had told him, “Mr. Bose, stop acting crazy; we want Calcutta.” Gandhi and Nehru for their part had said nothing but had referred Mr. Bose to Patel.” (The Unfinished Memories: by Sheikh Mujibur Rahman, 1st edition 2012 Page-77).

641. “Desh Bandhu Chitto Ranjan Das, as one time President of Indian National Congress, a top to toe Bengali, who, like Netaji Shubash Chandra Bose attained metaphysical immortality for secular, non-communal outlooks, proclaimed as early as 1917, that a Bengali, be he a Muslim, or a Hindu or a Christian, he is nevertheless a Bengali.” (Bangladesh Mukti Judho, Prasangik Dalil

Patro, Edited and Compiled by Rabindranath Trivedi: Foreword).

Pages 240-241, para- 267

642. Unfortunately, Mohammad Ali Jinnah, a frustrated leader of the then India, subsequently reverted from the “Lahore Resolution of 1940” and advocating to create” “independent state” for Muslims instead of “ independent states” and ultimately an artificial new Muslim state, ‘Pakistan’ was formed from Punjab, Afghania (North –West Frontier Province), Kashmir, Sindh and Baluchistan excluding the “ Bengal” and finally in August, 1947 the “ British India” was partitioned on the basis of “Divide and Rule” or “ two-nation theory” and created two new states, secular “India” and the “Islamic Republic of Pakistan.” The predominantly Muslim eastern part of Bengal (East Bengal) became the “East Pakistan” now “Bangladesh” and “north-western’ India became the “West Pakistan” now “Pakistan.”

643. After the partition of India and creation of Pakistan in 1947, frictions developed between East and West Pakistan, which were separated by more than 1200 miles of Indian Territory. East Pakistanis were exploited by the West Pakistani- dominated central government. In 1948, the Government of Pakistan declared the “Urdu” as the “sole national language,” sparking extensive protests among the Bengali –speaking majority people of “East Pakistan”. The movement reached its climax when police killed

student demonstrators on 21 February 1952. Great differences developed in between the two wings of so-called Pakistan. While the West Pakistan had a minority share of the total population of Pakistan, it had the largest share of revenue allocations, industrial development, agricultural reforms and development projects. Military and civil service were dominated by the West Pakistanis. In the above backdrop, in 1966 Sheikh Mujibur Rahman, the most popular leader of East Pakistan had proclaimed his six-point plan which is known as historical “Six point movement.” In the General Election of 1970, Awami League became the majority party in the Pakistan National Assembly, but unfortunately, on March 1, 1971, Yahya Khan, the President of the then Pakistan postponed the session of the National Assembly which resulted in civil disobedience in East Pakistan. On March 7, 1971, Bangabandhu Sheikh Mujibur Rahman delivered his historical speech in “Suhrawardy Uddyan” in the following language “Ebarer Shongram Amader Muktir Shongram, Ebarer Shongram Shadhinotar Songram.” “Our struggle, this time, is a struggle for our freedom. Our struggle, this time, is a struggle for our independence”.

644. On the evening of March 25, 1971, Yahya Khan flew back to Pakistan after giving the order to eliminate the Bengalis and launched operation “search-light.” “On March 25, the Pakistan

Army launched a campaign calculated to intimidate the Bengalis into submission. Within hours, a wholesale attack had commenced in Dhaka, with the heaviest casualties concentrated on the University of Dhaka and the Hindu area of the old town. The Pakistan Army came with hit lists and systematically killed several hundred Bengalis. Mujib was captured and flown to West Pakistan for incarceration.” ([http:// country studies. us/bangladesh 71.htm](http://countrystudies.us/bangladesh71.htm))

In the above backdrop, Bangabandhu Sheikh Mujibur Raman declared Bangladesh as “Independent state” on 26 March 1971 before his arrest by Pakistani Army and the said declaration of Independence of Bangladesh was widely circulated in the international press.

Context-prevailing in 1971 in the territory of Independent Bangladesh

645. During the liberation war of 1971, Pakistani occupation army led by General Yahya Khan and his colleagues in collaboration with the anti-liberation forces (Jamat, Muslim League, and other religious political parties) of Bangladesh killed total 3 million unarmed Bangalees, molested and raped about 450,000 Bangalee women and on the eve of the independence, murdered hundreds of leading intellectuals to spiritually cripple the nation. A crime far exceeds, in its atrocity and inhumanity, the crimes of Hitler,

Melosovitch, the Nazis and the fascists. <http.org/collaborators-and-war-criminal>.

646. AN EYE-WITNESS ACCOUNTS “HOW DACCA PAID FOR A “UNITED PAKISTAN”

Report by Simon Dring.

“Sheikh Mujibur Rahman, East Pakistan’s popular political leader was seen being taken away by the army, and nearly all the top members of his Awami League Party have also been arrested.

Leading political activities have been arrested, others are dead, and the offices of two papers which supported Mujibur’s movement have been destroyed. But the first target as the tanks rolled into Dacca on the night of Thursday, March 25, seems to have been the students.

An estimated three battalions of troops were used in the attack on Dacca-one of armored, one of artillery and one of infantry. They started leaving their barracks shortly before 10 p.m. By 11, firing had broken out and the people who had started to erect makeshift barricades-overtured cars, three stumps, furniture, concrete piping-became early casualties.

Sheikh Mujibur was warned by telephone that something was happening, but he refused to leave his house. “If I go into hiding

they will burn the whole of Dacca to find me,” he told an aide who escaped arrest.

The students were also warned, but those who were still around later said that most of them thought they would only be arrested. Led by American supplied M-24 World War II tanks, one column of troops sped to Dacca University shortly after midnight. Troops took over the British Council Library and used it as a fire base from which to shell early dormitory areas.

Caught completely by surprise, some 200 students were killed in Iqbal Hall, headquarters of the militantly anti-government student's union, I was told. Two days later, bodies were still smoldering in burnt-out rooms, others were scattered outside, more floated in a nearby lake, and an art student lay sprawled across his easel.

The military removed many of the bodies, but the 30 bodies till there could never have accounted for all the blood in the corridors of Iqbal Hall.

At another hall, reportedly, soldiers buried the dead in a hastily dug mass grave which was then bulldozed over by tanks. People living near the university were caught in the fire too, and 200 yards of shanty houses running alongside a railway line were destroyed.

Army patrols also razed nearby marked area. Two days later, when it was possible to get out and see all this, some of the market's stall-owners were still lying as though asleep, their blandest pulled up over their shoulders. In the same district, the Dacca Medical College received direct bazooka fire and a mosque was badly damaged.

As the university came under attack other columns of troops moved in the Rajarbag headquarters of the East Pakistan Police, on the other side of the city. Tanks opened fire first, the witness said: then the troops moved in and leveled the men's sleeping quarters, firing incendiary rounds into the buildings. People living opposite did not know how many died there, but out of the 1,100 police based there, not many are believed to have escaped.

Mujib's arrest

As this was going on, other units had surrounded the Sheikh's house. When contacted shortly before I am he said that he was expected an attack any minute and had sent everyone except his servants and bodyguard away to safety.

A neighbour said that at 1-10 am one tank, an armored car, and trucks loaded with troops drove down the street firing over the house. "Sheikh you should come down", an officer called out in English as they stopped outside. Mujibur stepped out onto his

balcony and said, “Yes, I am ready, but there is no need to fire. All you need to have done is call me on the telephone and I would have come.”

The officer then walked into the yard and told Mujibur: “You are arrested”.

He was taken away along with three servants, an aide and his bodyguard, who was badly beaten up when he started to insult the officer. One man was killed a night watchman hiding behind the fence of the house next door.

As the Sheikh was driven off presumably to army headquarter-the soldiers moved into the house, took away all documents, smashed everything in sight locked the garden gate, shot down the green, red and yellow “Bangladesh” flag and drove away.

By 2 O'clock Friday.

Fires were burning all over the city, troops occupied the university and surrounding areas. There was still heavy shelling in some areas, but the fighting was beginning to slacken noticeably. Opposite the International Hotel Platoon of troops stormed the empty office of “The People” newspaper, burning it down along with most houses in the area and killing the night watchman.

City lies silent

Shortly before dawn, most firings had stopped, and as the sun came up an eerie silence settled over the city, deserted and completely dead except for the noise of the crows and the occasional convoy of troops or two or three tanks rumbling by mopping up.

At noon, again without warning, columns of troops poured into the old section of the city where more than I million people lived in a sprawling maze of narrow winding streets.

For the next 11 hours, they devastated large areas of the “old town”, as it is called, where Sheikh Mujibur had some of his strongest support in Dacca. English Road, French Road, Naya Bazar, City Bazar were burned to the ground.

“They suddenly appeared at the end of the street”, said one old man living in Naya Bazar area. “Then they drove down it, firing into the entire house.”

The lead unit was followed by soldiers carrying cans of gasoline. Those who tried to escape were shot. Those who stayed were burnt alive. About 700 men, women, and children died there that day between noon and 2 p.m. I was told.

The pattern was repeated in at least three other areas of up to a half square mile or more. Police stations in the old town were also attacked. Constable killed.

“I am looking for any constables”, a police inspector said on Saturday morning as he wandered through the ruins of one of the bazaars. “I have 240 in my district, and so far I have only found 30 of them all dead.

In the Hindu area of the old town, the soldiers reportedly made the people come out of their houses and shot them in – groups. This area too was eventually razed.

The troops stayed on in force in the old city until about 11 p.m. on the night of Friday, March 26, driving around with local Bengali informers. The soldiers would fire a flare and the informer would point out the houses of Awami League supporters. The house would then be destroyed- either by direct fire from tanks or recoilless rifles or with a can of gasoline, the witness said.

Meanwhile, troops of the East Bengal Regiment in the suburbs started moving out towards the industrial areas about 10 miles from the Sheikh’s centers of support. Firing continued in these areas until early Sunday morning, but the main part of the operation in the city was completed by Friday night- almost exactly 24 hours after it began.

One of the last targets was the daily Bengali language paper “Ittefaq.” More than 400 people reportedly had taken shelter in its offices when the fighting started. At 4 O’ clock Friday afternoon,

four tanks appeared on the road outside. By 4-30, the building was an inferno, witnesses said. By Saturday morning, only the charred remains of a lot of corpses huddled in back rooms were left.

Curfew lifted.

As quickly as they had appeared, the troops disappeared from the streets. On Saturday morning, the radio announced that the curfew would be lifted from 7 am until 4 p.m. It then repeated the Martial Law Regulations banning all political activity, announced press censorship and ordering all government employees to report back to work. All privately owned weapons were ordered to be turned into the authorities.

Magically, the city returned to live, and panic set in by 10 am with palls of black smoke still hanging over large areas of the old town and out in the distance toward the industrial areas, the streets were packed with people leaving town. By car and in rickshaws, but mostly on foot, carrying their possessions, with them, the people of Dacca were fleeing. By noon, the refugees numbered in the tens of thousands.

“Please give me a lift, I am old man” – In the name of Allah, help me”- “Take my children with you”. Silent and unsmiling they passed and saw what the army has done. They looked the other way and kept on walking. Down near one of the markets a shot was

heard. Within seconds, 2,000 people were running, but it had only been someone going to join the lines already forming to turn in weapons.

Government offices remained almost empty. Most employees were leaving for their villages ignoring the call to go back to work. Those who were not fleeing wandered aimlessly around, the smoking debris, lifting blackened and twisted sheets of corrugated iron(used in most shanty areas for roofing) to salvage from the ashes what they could.

Nearly every other car was either taking people out into the countryside or flying a red cross and conveying dead and wounded to the hospitals. In the middle of it, all occasional convoys of troops would appear, the soldiers peering- equally unsmiling-down the muzzles of their guns at the silent crowds. On Friday night as they pulled back to their barracks they shouted “Narai Takbir,” an old Persian war cry meaning “We have won the war.” On Saturday when they spoke it was to shout “Pakistan Zindabad-Long live Pakistan.”

Fast-selling Flags.

Most people took the hint. Before the curfew was re-imposed the two hottest-selling items on the market were gasoline and the national flag of Pakistan. As if to protect their property in their

absence, the last thing a family would do before they locked up their house would be to raise the flag.

At 4 O' clock Saturday afternoon, the streets emptied again. The troops reappeared and silence fell once more over Dacca. But firing broke out again almost immediately. "Anybody out after four will be shot," the radio had announced earlier in the day.

A small boy running across the street outside the International Hotel two minutes after the curfew fell was stopped slapped four times in the face by an officer and taken away in a jeep.

The night watchman at the Dacca Club, a bar left over from the colonial days, was shot when he went to shut the gate of the club. A group of Hindu Pakistanis living around a temple in the middle of the race course was all killed apparently because they were out in the open.

Refugees who came back into the city, after finding that roads leading out of it were blocked by army, told how many had been killed as they tried to walk across the country to avoid the troops.

Beyond these roadblocks was more or less no man's land, where the clearing operations were still going on. What is happening out there now is anybody's guess, except the army's.

Many people took to the river to escape the crowds on the roads, but they ran the risk of being stranded waiting for a boat when curfew fell. Where one such group was sitting on Sunday afternoon there were only bloodstains the next morning.

Hardly anywhere was their evidence of organized resistance. Even the West Pakistani officer scoffed at the idea of anybody putting a fight.

“These bigger men,” said one Punjabi lieutenant “could not kill us if they tried.”

“Things are much better now,” said another officer. “nobody can speak out or come out. If they do we will kill them they have spoken enough-they are traitors, and we are not. We are fighting in the name of God and a united Pakistan.” (Despatch by Simon Dring of Daily Telegraph, London, in Washington post, March 30th, 1971).

Killing in Dhaka University.

647. Iqbal Hall, student dormitory centre of the Student Council, was attacked on the morning of March 26, 1971, by tanks and soldiers with sub-machine guns and grenades. Inspection of the Hall two days later revealed a building demolished by tank blasts and gutted by fire. Bodies were visible, many of them having been taken to the roof to prevent body count. One man and two children

corpses were charred leaning against a window. The degree of armed resistance offered by the students was not clear. According to one American physician, who inspected the hall saw “a pile of burned rifles? All of these rifles had false wooden barrels, and many have reflected the degree of armed resistance which these students offered.” Para-22, page-35. Bangladesh Document P - 353-354.

648. Jagannath Hall was the dormitory of the Hindu students at Dhaka University. According to one student survivor who was treated at Dacca Medical College, “all 103 students were killed. Soldiers attacked the dormitory on the morning of March 26, 1971, without warning. Approximately students were spared and forced at gunpoint to dig a mass grave (in a field adjacent to the dormitory). They were then shot. This student was left for dead and was able to crawl away to the hospital under the cover of darkness.” Para-23, page-25. Bangladesh Document P- 353-354.

649. Although the exact circumstances of death were not known, one of the eyewitness accounts from family members described the exact circumstances of death as follows:

“On March 28, 1971, Building contained pools of blood on the first and second-floor foyers. According to wives of faculty members, troops attacked the building on the morning of March 26th. Apartment A was entered forcibly and the faculty member

marched to the courtyard where he was shot. Fortunately, he was only injured with a neck wound and was known to be in critical condition at Dacca Medical College. The soldiers then went to Flat D, where Professor Muniruzzaman lived. He, his son, his brother who was an advocate of the East Pakistan High Court and the only son of his sister-in-law were marched to the first-floor foyer, lined up against the wall and machine-gunned. The wife of professor Zaman dragged her wounded husband back to their apartment hiding him in the bedroom. Three hours later when the soldiers returned to remove the bodies they re-entered his apartment, again dragged him down the stairs and killed him.” Para-24, pages-35-36. Bangladesh Document Page-354.

650. One American missionary described the army tactics in old Dhaka in these words: “soldiers during the day carried whistles, which were blown when they wanted to search a civilian. At the blowing of a whistle, any moving person was immediately shot. An official of USAID, while driving through Gulshan, witnessed a jeep load of soldier’s fire submachine guns at three children who were playing in the rice paddies.” Ibid Para-25, page-36.

Peter Hazlehurst of The Times of London reported that Mr. Bhutto thanked God as “the tanks and guns rolled into Bengal” (The Times 29th March 1971).

651. HINDUS IN EAST PAKISTAN WERE SPECIAL TARGET OF PAK ARMY

Senator Edward Kennedy in the summary of his report dated November 1, 1971, submitted to the U.S. Government, mentioned that the countless eye-witnesses, journalistic accounts, reports of international agencies such as the World Bank and additional information available to the subcommittee document the reign of terror which grips East Bengal (East Pakistan). Hardest hit has been done to the members of the Hindu community who have been robbed of their lands and shops, systematically slaughtered, and in some places, painted with yellow patches marked "H." All of this has been officially sanctioned, ordered and implemented under martial law from Islamabad."

652. Sydney Schonberg, Pulitzer prize-winning journalist (of 'killing Fields') was a New York Times correspondent in Dhaka in 1971 at the time of army repression and during the War of Liberation of Bangladesh in 1971. In his syndicated column in the name of 'The Pakistani Slaughter That Nixon Ignored,' he had written that: "I covered the war and witnessed first the population's joyous welcome of the Indian soldiers as liberators. Later I toured the country by road to see the Pakistani legacy first hand. In town after town, there was an execution area where people had been killed by bayonet, bullet, and bludgeon. In some towns, executions

were held on a daily basis.” He further reported that “this was a month after the war’s end (i.e. January 1972)... human bones were still scattered along many roadsides. Blood stained clothing and tufts of human hair clung to the brush at these killing grounds. Children too young to understand were playing grotesque games with skulls.” <http://bd71.blogspot.com/2008/05/1971-hindu-genocidein-east.pak>.

653. US government cables noted that the minorities of Bangladesh, especially the Hindus, were specific targets of the Pakistani army. There was the widespread killing of Hindu males, and rapes of women. Documented incidents in which Hindus were massacred in large numbers include the Chuknagar massacre, the Jathibhanga massacre, and the Shankharipara massacre. More than 60% of the Bengali refugees who fled to India were Hindus. It has been alleged that this widespread violence against Hindus was motivated by a policy to purge East Pakistan of what was seen as Hindu and India influences. Buddhist temples and Buddhist monks were also attacked through the course of the year. https://en.wikipedia.org/wiki/1971_Bangladesh_genocide.

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

happened in Bangladesh was no less a case of cultural and political genocide on a scale unknown to history. The whole of Bangladesh became truly a Jallianwala Bagh, hallowed and sanctified by the blood of patriotic martyrs and innocent defenseless people; whose only fault was that they were somewhat different than those who came to rule them from Pakistan. If Bangladesh has survived the onslaught and has been able to confine more than three divisions of Pakistan's Army to cantonments and towns, it is because the people of Bangladesh, who laid down their lives at the altar of freedom to pay the price of liberty in the coin of blood and sufferings and did not permit the Pakistani troops to clamp colonial rule on the 75 million people of Bangladesh. War Crimes and Genocide. B.N. Mehrish P. 173 para- 33 page 40.

655. According to R. J. Rommel, professor of Political Science at the University of Hawaii, in his book "Death by Government," p.335 had written as follow; "The genocide and genocidal atrocities were also perpetrated by lower-ranking officers and ordinary soldiers. These "willing executioners" were fueled by an abiding anti-Bengali racism, especially against the Hindu minority. "Bengalis" were often compared with monkeys and chickens. Said General Niazi, 'It was a low lying land of low lying people.' The Hindus among the Bengali were as Jews to the Nazis: scum and vermin that should best be exterminated. As to the Moslem

Bengalis, they were to live only on the sufferance of the soldiers: any infraction, any suspicion cast on them, any need for reprisal, could mean their death. And the soldiers were free to kill at will. The journalist Dan Coggin quoted one Pakistani captain as telling him, “We can kill anyone for anything. We are accountable to no one.” This is the arrogance of power.

656. The Newsweek, in its reports dated 28.06.1971 published a statement of an eyewitness who narrated the barbarian act of Pakistani Army in the following language;

“I am certain that troops have thrown babies into the air and caught them on their bayonets--- I am certain that troops have raped girls repeatedly, and then killed them by pushing their bayonets up between their legs.” As regards atrocities committed by Pakistani Army in the name of Islam, “**The Jakarta Times**” in its report dated 5.4.1971 had written, “Does Islam permit killing unarmed Muslims by armed Muslims? Can Islamic Principles justify the suppression by a minority of a majority demand for social and economic justice? The Muslim States should act quickly and see that good Muslims are not massacred by fellow Muslims.”

657. A. Hossain of the “Pakistan Observer” expressed his experience to Mr. Petar Hazelhuzst of Times, London, as published on May 24, 1971, and reported that:

“I saw many bodies floating down the Buriganga between May 6 and 10. Their hands were tied together and in some cases, six to seven victims had been roped together. There were no signs of violence on the bodies. Some people nearby told me that the victims were workers belonging to the Sattar Match Factory on the outskirts of Dhaka and that non-Bengalis were responsible for the killings.”

Mr. Hassan Ullah Chowdhury, the manager of the Bengali edition of PURAB Desh, was hacked to death two weeks ago by non-Bengalis in his house in Mirpur, nine miles out of Dhaka. This is a non-Bengali residential area and most of the Bengalis were either attacked or killed there after the army took over. If they saw any able-bodied Bengalis, they pick them up in a truck and take them away. I don't know what happened to them. Page 28, Para 11

One of my colleagues was sent to Jessore and told to write a story about the normal conditions there. Every member of his family had been butchered, but they still wanted him to write a story claiming that the situation was normal. 2Bangladesh Documents P-387-388.

658. Mr. Anthony Mascarenhas was Assistant Editor of Morning News, Karachi in the year 1971 who published an article in the Sunday Times, London of June 13, 1971, wrote:

“The pogrom’s victims are not only the Hindus of East Bengal who constitute about 10% of the 75 million population but also many thousands of Bengali Muslims. These include university and college students, teachers, Awami League and left-wing political cadres and everyone the army could catch of the 1,76,000 Bengali Military men and police who mutinied on March 26 in a spectacular to create the independent Republic of Bangladesh.”

“The bone-crushing military operation has two distinctive features. One is what the authorities like to call the ‘cleansing process, ‘a euphemism for the massacre. The other is the ‘rehabilitation effort.’ This is a way of describing the moves to turn East Bengal into a docile colony of West Pakistan. These commonly used expressions and the repeated official references to ‘miscreants’ and infiltrators’ are part of the charade which is being enacted for the benefit of the world. Strip away the propaganda and the reality is colonization and killing.” Para-12 Bangladesh Document P- 358-361.

659. In an editorial published on April 3, 1971, the Times, London, wrote in the following terms;

“The more the news from East Pakistan accumulates, the more harrowing it becomes. Senseless murder, hysterical cruelty and what must be a creeping fear run like a current throughout this

packed mass of human beings. All this the distant observer may assume despite the protests of Pakistan Government at some of the stories that have been given circulation. By now the picture is a little clearer and a great deal more gruesome. Enough first-hand reports from Dacca itself and from some of the major towns have come in to confirm that what is happening is far worse than what might have been expected in a war of East Pakistan resisting the forces of the Central Government in their demand for independence. The accounts piling up make conditions in East Bengal sound only too much like the massacres that broke out between Muslims and Hindus in the months leading up to the partition of India.”Bangladesh Document P- 391-392.

660. The Dagens Nyheter, Stockholm, in an article published on June 27, 1971, had written about the atrocities committed by Pakistani Army in the following language:

“The reign of terror in East Bengal is now in its fourth month. The fleeing and hunted people are still streaming across the border into India. There is no limit to the brutality of the Pakistani military dictatorship- very few of the terror victims belong to the Bengali group of leaders whom the aggressors are trying to eradicate. Also, the common man falls victim to the ‘fiscal solution’ which the Pakistani Army, obsessed by power, is trying to force through as the terrible climax to decades of

systematic misgovernment. Scenes which are a daily occurrence along the border between East Bengal and India expose the miserable lies about the ‘return to normalcy’ with which the dictatorship is trying to camouflage its crime against its fellowmen.”

“The longer this was, this persecution and devastation go on, the stronger will be our condemnation of the governments which have not yet managed to pull themselves together in a determined effort to stop the bloodbath. The suffering we see in the Bengali women’s eyes is a compromising picture of our era’s statesmanship. Behind the official inability to bring pressure on Yahya Khan from outside Morol, political and above all economic pressure-lie cynicism and totally unfounded speculations that the Pakistani military dictatorship in future could stand for a kind of stability at all in this part of the world.” Para-17, page-30 Bangladesh Document P-406-407.

661. The Palaver Weekly of Ghana on July 8 published a news story as regards genocide and other mass killing committed by Pakistani Army:

“On March 25, 1971, under cover of darkness, one of the most gruesome crimes in the history of mankind was perpetrated by a blood-thirsty military junta against a whole population seventy-five million, constructing the majority of the people of Pakistan.

“Many newspapers, reported for the objectivity, have come out with documentary evidence in the form of photographs and eyewitness reports of one of the greatest genocide exercise in the annals of man.

“According to all available evidence and report the awful genocide which was deliberately planned and executed ruthlessly by the West Pakistan army and has been marked, among other unspeakable atrocities, by the systematic decimation of East Bengal’s intellectuals, and professions, including eminent professors, lawyers, journalists, doctors, students etc. is still continuing.

“The only crime of Sheikh Mujib and his party was that they sought through the normal process of democracy, to end the erstwhile colonial status of their part of the country and restore it to a position of respectability within a united Pakistani federation.

“For humanitarian reasons, India which has always been regarded by Pakistan as its enemy number one has despite its own population explosion and sacrifices did whatever it could do to the house, shelter and feed the vast number of refugees from East Pakistan.

“The number of refugees fleeing East Pakistan into India is still increasing at a rate of fifty thousand a day. If a government can

force millions of its people to seek protection in another country, one wonders what earthly or heavenly right that Government has to remain in power any longer.

“As the situation is reported to be there seems little hope of East Pakistan refugees in India being able to return to their own homes.”

Para-18, Pages-30-31 Bangladesh Document P- 411-412.

662. Mr. Chand Joshi, an Indian Press Correspondent of the Hindustan Times, New Delhi on 24 December 1971 narrated the barbaric atrocities committed by the Pakistani Army's in the following language:

“The ears are not yet dry. The stench of death still fills the nostrils as one walks through many of Dacca's streets. Perhaps all this is imagination? One could only pinch oneself to find out whether it was just a cruel nightmare or whether all this was a reality.

On the Nawabpur Road, a pregnant girl ran around, her hair disheveled, her saree on and shouting “Na, na, na,(no, no, no). She no longer has any name. This is made but a few months ago, she had a face, a figure and a name. She was a Dacca college student. She was, that is, till the Pakistani Army took her away to the cantonment. Nobody could ask her what happened, for she cannot talk anymore. Only at the first sight of people approaching her, she

shrinks back and shouts 'Na, na, na' An Indian Army officer said that she was perhaps luckier than some others. She might even be cured. Most of them never had a chance.

“At the Dacca Cantonment, young girls were rounded up and then made to fall in naked. They tried to hide their breasts with their hair. The mocking soldiers would brush their hair aside with a “Dekhna do” (Let us see)”. The soldiers would fall into company formations and choose the girls. Innumerable times, innumerable soldiers chose the girls till they collapsed. They would then mockingly cut off their breasts, or bayonet them through the vagina. Those who were liked particularly would be kept for a repeat performance every hour of the day. Most of them who were recovered were pregnant. A majority had been killed. At Brahmanbaria, the Indian Army recovered nude women, dead or almost senseless with continued rape, from trenches.

“Apart from Dacca, in Jessore, Fariddpur, Tangail and almost everywhere the same thing happened. In a village near Dacca, a father was asked at bayonet point to rape his daughter. When he refused the soldiers raped the girl in her father's presence. The soldiers then bayoneted his daughter to death. Mercifully they hanged her father also for the crime of refusing to obey the orders. The story was repeated in exactly the same manner by at least half a dozen persons from the village. It could perhaps be true.

“The living proof of atrocities committed by the occupation forces was the recovery of the bodies of intellectuals who were killed on Dec. 15, a day before the surrender. They included prominent doctors, intellectuals, and journalists, including the BBC’s representative in Dacca.

“People may exaggerate, but the evidence of one’s eyes cannot lie. Burnout, broken localities, bullet holes on the walls of houses, the stains of blood all speak of the enemy’s barbarity. In one such locality, Sakhari Pati in Dacca, there is not a single house standing, Massive old buildings were razed to the ground after being looted. Some of them were shelled. And what about their inmates?” Those who were lucky stayed in their houses to be buried alive.”

663. “It was not only rape and murder. Every single house was visited one time or the other. Most of them were looted. Everything of value was taken away. We safe almirah kholoy.” the Razakars would say pointing out the fridge. And they would take away even the eatables. In one instance, they looted a house and took away brass utensils thinking that they were made of gold. They then went to a goldsmith and asked for cash in exchange. When the goldsmith told them that they had brought brass and not gold they beat him up mercilessly. Para-19, pages-31-32 The Hindus times Time, New Delhi, December, 24 971, p-6.

664. Mr. Father John Hastings from Norwich, U.K., who served in the then East Pakistan(Bangladesh) in volunteer Service Corps had written about the atrocities committed by Pakistani Army and its local collaborators in the following language.

“In May, there were occasions when I visited Husnabad, Taki, Basirhat called sometimes at the hospitals around camps. In Bashirhat Hospital, there was one woman who had a foot amputated from a bullet wound. She had three children with her, and all of them were injured, either by a bayonet or a bullet. They had bandages on, the baby had a bullet wound across the thighs, and she said her husband had been shot. She was a part of, I think, a very big group that were coming from Khulna and crossed at Hakimpur and into West Bengal. And they had surrounded on the way, a place called Jaldanga. This was apparently done with the collaboration of some villagers along the way stopped the thousand who were moving in this direction and passed information to the Army, who came along and then machine-gunned them. And they say some 400 of them died while they were on their way to what they thought was safety in India. The Army followed them and other groups to the border of India and were, in fact, shooting at them as they were trying to cross on more than one occasion. One day the Army came to the river crossing and seized girls who were about to cross into India by boat and carried

them off. Other women and girls jumped into the river and tried to swim across and two were drowned. I spoke to one woman who had crossed at that time. I actually have her photograph here, and this woman told of her husband being killed just as he was reaching the border of India.

Then in the Bongaon Hospital, I saw young men and girls also. Some had been bayoneted in the vagina, and one of them was so demented that she was carrying all the time. They will kill us all, they will kill us all. It was an incessant refrain that she couldn't cease uttering –at that time, “They will kill us all they will kill us all.” It was when I saw the mass graves of 200 people and another grave where they said there were 65 bodies. This was actually at Shikarpur near the reception centre.

“I was away for some time, but again on renewed visits to the border found again many cases of people arriving without clothes, or anything at all. The numbers coming then were perhaps a little less but still seemed to be about 50,000 a week. More recently, there were three girls who had been raped on their way through Bangladesh and they met a Major of the Mukti Fouj and said to him: this is our condition, we cannot live any longer. Please spare three bullets for us. And the major felt the only kindness he could do was to shoot them, so he did. Other women who had become pregnant by rape hanged themselves from trees in

Husnabad and others sought and got an abortion, others who tried abortion and failed, killed themselves. And we understand there is something like 400 of such pregnant women round about the Bongaon areas, at least, 50 in Calcutta and possibly another 500 in other West Bengal camps and many of them are now approaching full term. So we have arranged a very quiet place in Kalyani and we are sending the word to all camps if any girl wants private attention this can be given to her.”

“Some of them have put sindoor on their foreheads and pretended to be married and some of them will keep the children. We would like them to be helped to love the children and make homes for them and give them the assistance to do that, rather than spurn the child, having been so impregnated with hate and horror. This is extremely difficult, but worth trying, we feel. It, at least, gives these girls a chance for a future where probably they are thinking they have no future whatsoever. More so than other refugees they deserved special attention. But how successful this will be, we have no idea.” Para-21, pages-33- War Crime and Genocide, B.N.Mehrish P-127-128

665. In the Indian Parliament, Prime Minister herself moved a resolution on March 31, 1971, and condemned the atrocities and brutalities perpetrated by Pakistan Army against the unarmed civilian of East Pakistan.

The text of the resolution reads as follows:

“This House expresses its deep anguish and grave concern at the recent developments in East Bengal. A massive attack by armed forces, dispatched from West Pakistan has been unleashed against the entire people of East Bengal with a view to suppressing their urges and aspirations. Instead of respecting the will of the people of unmistakably expressed through the election in Pakistan in December 1970, the Government of Pakistan has chosen to flout the mandate of the people.

“The Government of Pakistan has not only refused to transfer power to legally elected representatives but has arbitrarily prevented the National Assembly from assuming its rightful and sovereign role. The people of East Bengal are being sought to be suppressed by the naked use of force, by bayonets, machine guns, tanks, artillery, and aircraft.

“The Government and people of India have always desired and worked for peaceful, normal and fraternal relations with Pakistan. However, situated as India is and bound as the people of the subcontinent are by centuries old ties of history culture and tradition, this House cannot remain indifferent to the macabre tragedy being enacted so close to our border. Throughout the length and breadth of our land, our people have condemned, in

unmistakable terms, the atrocities now being perpetrated on an unprecedented scale upon an unarmed and innocent people.

“This House expresses its profound sympathy for and solidarity with the people of East Bengal in their struggle for a democratic way of life. Bearing in mind the permanent interest which India has in peace and committed as we are to uphold and defend human rights, this House demands the immediate cessation of the use of force and the massacre of defenseless people. This House calls upon all peoples and Governments of the world to take urgent and constructive steps to prevail upon the Government of Pakistan to put an end immediately to the systematic decimation of people which amount to genocide.

“This House records its profound conviction that the historic upsurge to the 75 million people of East Bengal will triumph. The House wishes to assure them that their struggle and sacrifices will receive the wholehearted sympathy and support of the people of India.” Bangladesh Documents. Ministry of External Affairs, Government of India, New Delhi P-672. Page 37, Para 27

666. As regards trial of POW, Prime Minister Indira Gandhi in an interview to the Hungarian journal, *Nopszadadsag* made her demand for trial of POW. She added as follows;

“There is no doubt that the POWs surrendered to the joint command of Indian and Bangladesh forces. This fact is as real as Bangladesh. Bangladesh is recognised by more than 60 sovereign states. It is not a fiction. So far as the trial of some POWs is concerned... the Geneva Conventions provide for such trials. POWs were not exempted from the processes of law if they have committed a crime.” Para 27, Page 38

667. The policy of Pakistani Army in 1971.

Genocide, crimes against humanity, war crimes and other international crimes committed by Pakistani Army in 1971 in Bangladesh was cold-blooded and cruel in nature which was carried out throughout the territories of Bangladesh to swap out the Bengali Nationalism from the then East Pakistani. Dr. Kabir Chowdhury expressed the same in the followings language.

“The Pakistani Army and their agents killed the intellectuals including the students, teacher, and doctors on the eve of the liberation of Bangladesh. The following were the policy of Pakistani Army in 1971 in the then East Pakistan.

“(1) The Bengalis must be ruled by West Pakistanis;

(2) The Bengalis will have to be re-educated along proper Islamic lines. The Islamisation of the masses” -this was the official jargon, which was intended to eliminate secessionist tendencies and provide a strong religious bond with West Pakistan:

“(3) When the Hindus had been eliminated by death and flight, their property would be used as a golden carrot to win over the underprivileged Muslim middle class. This would provide the base for erecting administrative and political structures in the future.” Para 29, Page 38 Bangladesh Documents P-371.

668. From the evidence available one may conclude that the aim of Pakistan’s regime was to wipe out the Awami League leadership so that it could no longer provide an effective leadership for any resistance movement. Sheikh Mujibur Rahman was arrested and taken to Pakistan, where he was charged with ‘treason.’ The slaughter of students in Dhaka, as likely organizers of guerrilla operations, seems well attested. Eyewitness reports from foreign residents evacuated from Dhaka paint a more horrible picture of the carnage that had been unleashed by Yahya’s troops than had been suspected. 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. Army trucks rolled through the deserted streets of Dhaka, carrying arrested persons to work-sites for hard labour. Their heads were shaved and they had no shoes and no clothes except for shorts all making escape difficult. The Pakistanis were “discouraging the use of the Bengali language and trying to replace it with their own, Urdu.

Soldiers told the Bangalees disdainfully, that theirs was not really a civilized tongue and that they should start teaching their children Urdu if they wanted to get along, merchants, out of fear, had replaced their signs with signs in English because they did not know Urdu.” Bangladesh Documents, P- 414. Para 31, Page 38-39.

669. Pakistani Poet, Faiz Ahmed Faiz in his poem narrated the atrocities committed during the War of Liberation in 1971 in the following terms;

“How can I embellish this carnival of slaughter?

How decorate this massacre?”

“ the bitterness now so clear that

I had to listen when my friends

told me to wash my eyes with blood.”

670. After independence of Bangladesh in 1971, the then President of Pakistan Mr. Julfikar Ali Bhutto appointed Mr. Mamoodur Rahman, the then Chief Justice of Pakistan as head of the War Inquiry Commission to inquire into the circumstances in which the Commander, Eastern Command surrendered and the members of the armed forces of Pakistani occupation army laid down their arms and cease-fire was ordered along the borders of West

Pakistan and India and along the cease-fire line in the State of Jammu and Kashmir. The Commission examined about 300 witnesses and hundreds of classified army signals communicated between East and West Pakistan. The Commission in its report opined as follows;

“ The excesses committed by the Pakistani Army fall into the following categories: -a) Excessive use of force and firepower in Dacca during the night of the 25th and 26th of March 1971 when the military operation was launched. b) Senseless and wanton arson and killings in the countryside during the course of the “sweeping operations” following the military action. c) Killing of intellectuals and professionals like doctors, engineers, etc. and burying them in mass graves not only during early phases of the military action but also during the critical days of the War in December 1971. d) Killing of Bengali Officers and men of the units of the East Bengal Regiment, East Pakistan Rifles and the East Pakistan Police Force in the process of disarming them, or on the pretense of quelling their rebellion. e) Killing of East Pakistani civilian officers, businessmen, and industrialists, or their mysterious disappearance from their homes by or at the instance of Army Officers performing Martial Law duties. f) Raping of a large number of East Pakistani women by the officers and men of the Pakistan army as a deliberate act of revenge, retaliation and torture. g) Deliberate killing of members of the Hindu minority.”

671. Although there is no similarity in between the people of East Pakistan (Bangladesh) and West Pakistan as regards culture,

language, tradition and customs except religion, even than the leaders of West Pakistan violating the Lahore Regulation of 1940 presented by A.K. Fazlul Hagu for establishment of “independent states” for Muslims in the northwestern and eastern zone within British India, included the territory of East Pakistan (Bangladesh) within the territory of Pakistan in the name of Islam. Lt. General A. A. K. Niazi in his book “The Betrayal of East Pakistan,” said, “Except for religion, there was hardly anything in common between the Muslims of East and West Pakistan. The distance was an impediment, hindering rapport between the two provinces. The language was different, customs and traditions failed to merge. The diet was different. The dress was not the same. The culture of East Pakistan clashed with the culture of West Pakistan. Each believed in its own values, traditions, customs, and social set-up.” Page-33.

672. To break the Pakistan, initiatives were taken by General Tikka Khan at the instance of Bhutto by launching “operation searchlight” on 25th March 1971 and the Pakistani Army and its local collaborator's committed cruel genocide in the World History which is also admitted by LT. General A.A.K. Niazi who was the Chief of the Eastern Command of Pakistani Army during the War of Liberation in 1971. In his book ‘The Betrayal of East Pakistan’ stated, ‘on the night on 25/26 March 1971, General Tikka struck. Peaceful night was turned into a time of wailing, crying, and

burning. General Tikka let loose everything at his disposal as if raiding an enemy, not dealing with his own misguided and misled people. The military action was a display of stark cruelty, more merciless than the massacres at Bukhara and Baghdad by Changez Khan and Halaku Khan, or at Jallianwala Bagh by the British General Dyer. “Page-(45-46).” General Tikka, instead of carrying out the tasks given to him, i.e., to disarm armed Bengali units and persons and to take into custody the Bengali leaders, resorted to the killing of civilians and a scorched-earth policy. His orders to his troops were: ‘I want the land and not the people.’ These orders were carried out in letter and spirit by Major-General Farman and Brigadier (Later Lt.-Gen.) Jahanzeb Arbab in Dhaka. Major-General Rao Farman had written in his table diary, ‘Green land of East Pakistan will be painted red.’ It was painted red with Bengali blood.” Page-46. “On the night of 25/26 March 1971, Yahya sneaked out of Dhaka before the start of military action. He told Tikka before leaving Dhaka, ‘Sort them out.’ Bhutto had remained behind to see what Tikka did. Bhutto saw Dhaka burning and heard the cries of the people, the crackle of the burning material, the roar of tanks, the boom of guns and rockets, and the rattle of machine guns.” Page-46.

673. Major Siddiq Salik who was working with Lt General Tikka Khan during the War of Liberation in 1971 and Public Relation

Officer of Lt General Niazi witnessed the atrocities committed by the Pakistani army and its collaborators. In his book “Witness to Surrender” narrated the horrific” Operation Searchlight I” and said, “Junior Officers like me started collecting at Headquarters, Martial law Administrator, Zone B (Second Capital) at about 10 p.m. They laid out sofas and easy chairs on the lawn and made arrangements for tea and coffee to last the night. I had no specific job to perform except ‘to be available’. A jeep fitted with a wireless set was parked next to this ‘outdoor operations room’. The city wrapped in starlight was in deep slumber. The night was as pleasant as a spring night in Dacca could be. The setting was perfect for anything but a bloody holocaust.” Page -72. He further added, “While Mujib rested in the Adamje School, the city of Dacca was in the throes of a civil war. I watched the harrowing sight from the veranda for four hours. The prominent feature of this gory night was the flames shooting into the sky. At times, mournful clouds of smoke accompanied the blaze, but soon they were overwhelmed by the flaming fire trying to lick at the stars. The light of the moon and the glow of the stars paled before this man-made furnace. The tallest columns of smoke and fire emerged from the university campus, although some other parts of the city, such as the premises of the day people, had no small share in these macabre fireworks. At about 2 am the wireless set in the jeep again drew our attention. I was ordered to receive the

call. The Captain on the other end of the line said that he was facing a lot of resistance from Iqbal Hall and Jagannath Hall. Meanwhile, a senior staff officer snatched the handset from me and shouted into the mouthpiece: ‘How long will you take to neutralize the target?..... Four hours!Nonsense.....What weapons have you got?.... Rocket launcher, recoilless rifles, and mortars and.... O.K., use all of them and ensure complete capture of the area in two hours.”Page 76

674. After completing “Operation Searchlight I’, Major Siddiq Salik visited Dacca city and he narrated the bloodshed committed by Pakistani Army in the following language;

“When Bhutto was making this optimistic remark, I was surveying mass graves in the university area where I found three pits- of five to fifteen metres diameter each. They were filled with fresh earth. But no officer was prepared to disclose the exact number of casualties. I started going around the buildings, particularly Iqbal Hall and Jagan Nath Hall, which I had thought from a distance, had been razed to the ground during the action. Iqbal Hall had apparently been hit by only two and Jagan Nath Hall by four rockets. The rooms were mostly charred, but intact. A few dozen half-burnt rifles and stray papers were still smouldering. The damage was very grave but not enough to match the horrible picture I had conjured up on the verandah of General Tikka’s headquarters.”page-77, Witness to surrender.

History of Razakars, Al-Badr, and Al- Shams:

675. In the above context, the Governor of East Pakistan, Lieutenant General Tikka Khan promulgated the East Pakistan Razakar Ordinance, 1971. The Ordinance stipulated the creation of a voluntary force to be trained and equipped by the Provincial Governor. Razakars, Al-Badr, and Al-Shams were recruited by the Shanti Committee, which was formed by several pro-Pakistani leaders of the then East Pakistan and Urdu-speaking migrants who lived in East Pakistan (now Bangladesh). The Razakars, Al-Badr, and Al-Shams were under Pakistani Army command and also trained by them to prevent the independence of Bangladesh. The Razakar force was organized into several brigades armed with Light Infantry weapons provided by Pakistani Army and acted as an auxiliary force to the Pakistani Army. The Razakar, Al-Badr, and Al-Shams were placed under the command of Pakistani Army, and they along with Pakistani Army jointly committed crimes against humanity, war crimes, genocide and other inhuman acts during the War of Liberation of Bangladesh in 1971. At the relevant time, many reports have been published in the International news media. New York Times, on July 30, 1971, published a report on the formation of the Razakar where the following was reported: “ The Razakars..... should be especially helpful for members of rural communities, who can identify guerrillas [freedom fighters], an army officer said... The

government says it has already recruited more than 22, 000 Razakaars of a planned force of 35000”.

676. The Razakar, Al-Badr, and Al- Shams were recruited by the Pakistani Army to protect Pakistan and to fight against Bangladesh as a counterblast of Mukti Bahini. After the formation of Razakar Directorate, the Pakistani Army established Razakar Training Camp and after completing specialized training, the Razakars, Al-Badr and Al-Shams had undertaken specialized operations against the Mukti Bahini. Lt General A.A.K Niazi who led the Pakistani forces as the Chief of the Eastern Commander of Pakistani Army in 1971, in his book “The Betrayal of East Pakistan, said, “The proposal for raising an organized Razakar Force remained under consideration with HQ CMLA and GHQ for a long time. Although their recruitment had started earlier, the sanction for the raising of this force was given at the end of August 1971. A separate Razakars Directorate was established, and the whole setup started taking proper shape. Two separate wings called Al-Badr and Al-Shams were organized. Well-educated and properly motivated students from the schools and madrasas were put in Al-Badr wing, where they were trained to undertake ‘Specialized Operations’ while the remainder were grouped together under Al-Shams, which was responsible for the protection of bridges, vital points, and other areas.” Page-78.

677. After the establishment of the Razakar force, the Pakistani Army engaged the Razakars, Al-Badr and Al- Shams all over the East Pakistan (Bangladesh) to kill the freedom fighters and pro-liberation people. He further narrated, “The Razakars were mostly employed in areas where army elements were around to control and utilize them. Being an army of rookies, not fully trained, they were prone to subversion through local influences. Their defection rate was four percent in October 1971 and six percent in November 1971 and it increased tremendously when the war started. Despite these handicaps, this force was useful where available, particularly in the areas where the rightist parties were in strength and had a sufficient local influence. “The Betrayal of East Pakistan, Page 78.”

678. Under the Razakar Ordinance, 1971 the Pakistani Army recruited the Razakars, Al-Badr, and Al-Shams and established training school and trained the said force as a paramilitary force and the young officers of Pakistani Army were appointed as Razakar Group Commander. Lt General A.A.K Niazi added, “Seventy percent of the target ceiling of 50,000 Razakars, spread over all the districts of the province, was achieved. Battle schools were established to train Razakar platoon and company commanders. To provide an effective command structure to this organization, about sixty young officers were selected to be appointed as Razakar Group Commanders. Page-79. He further

added, “Since the East Pakistan Civil Armed Forces had disintegrated, local Razakars, mainly consisting of ex-Biharis and loyal East Pakistanis have trained initially to man the border outposts and fall back on to the strong points and fortresses manned by the regular Army. The officers were from the regular Army. They did an admirable job. They gave a tough fight to the Mukti Bahini and fought minor patrolling and tactical actions.” “The Betrayal of East Pakistan Page-87.”

679. After completing training, the Razakars, Al-Badr and Al-Shams started operations against the Mukti Bahini and directly participated against the War of Liberation of Bangladesh. The Razakars, Al-Badar, and Al-Shams were none, but the betrayer, traitor and killing squad and enemy of Bangladesh. Lt General Niazi stated, “Our troops were now being concentrated in their battle locations, and the local Razakars were trying to eliminate the Mukti Bahini and, at places beefed up by regular troops, were taking on the Indian Army as well. The Indian Army had launched attacks in the salients of Bhuranga Mari, Kamalpur BOP, Attgram, Chandpura, Belonia salient, Benapole, and Hilli.” The Betrayal of East Pakistan Page-112.

680. During the War of Liberation in 1971, the Pakistani Army was substituted by the local collaborators as and when required for operational purposes. He added, “Most of the troops deployed for

counterinsurgency operations were withdrawn and replaced by Razakars and Mujahids. The reserves at all levels had been committed in anti-rebel operations in the interior as per GHQ orders. Their promised replacements never arrived. Hence, we recreated reserves.” The Betrayal of East Pakistan Page-112.

681. At the last stage of the War of Liberation in 1971, the Pakistani Army, Razakars, Al-Badar and Al-Shams jointly launched operations against the Mukti Bahini and the joint force, and the local collaborators directly participated in the War of liberation against Bangladesh and killed unarmed pro-liberation people and freedom fighters. Lt. General A.A.k Niazi who dedicated his book, “The Betrayal of East Pakistan” to the local collaborators stated, “our troops already involved in active operations since last nine months and now committed to very intense battle. Obviously, they had no rest or relief. Due to pitched battles fought since last 17 days own casualty rate both in men and material fairly increased. The absence of own tanks, artillery, and air support has further aggravated the situation. The defection of Razakars with arms also increased. Nonetheless....Own troops inflicted heavy casualty on the enemy and caused maximum possible attrition on them. Enemy thus paid a heavy cost for each success in terms of ground.” Page-134. The operational environment at present is not conducive to us to fight a full-fledged

war. The guerrilla activities are directed against us and destruction of bridges, culverts, roads and railway lines and the majority of the local population is hostile. The civil administration is symbolic only. However, law and order are under control where Razakars and Mujahids are operating beefed up by regulars. The industrial workers, who have succeeded in restoring production to 80%, are threatened with dire consequences. The major cities are carrying on normal business but strong attacks by guerrillas do cause fear and panic among the population. abide page 103-104

682. Pakistani Army Officers who surrendered on 16th December 1971 and detained as a prisoner of war in 1971 admitted that Pakistan Army and its local collaborators committed crimes against humanity and other international crimes during the War of Liberation in 1971. Major Siddiq Salik in his book “Witness to Surrender” added that “During these operations, some troops, to the shame of all, indulged in looting, killing and rape. The stories of these atrocities naturally alienated the Bengali population. They were not very fond of us before, but now they hated us bitterly. No serious effort was made to arrest this trend or diminish the hatred. Hence, there was no question of mass co-operation by the Bengalis. Only those people joined hands with us who, in the name of Islam and Pakistan, were prepared to risk everything. These patriotic elements were organized into two groups. The elderly and

prominent among them formed peace committees while the young and able-bodied were recruited as Razakars (volunteers). The committees were formed in Dacca as well as in the rural areas and they served as a useful link between the Army and the local people. At the same time, they earned the wrath of the rebels and 250 of them were killed, wounded or kidnapped. The Razakars were raised to augment the strength of the West Pakistani troops and to give a sense of participation to the local population. Their manpower rose to nearly 50,000 as against a target of 100,000. In September, a political delegation from West Pakistan complained to General Niazi that he had raised an army of Jamaat-i-Islami nominees. The general called me to his office and said, 'From now on, you will call the Razakars Al-Badr and Al-Shams to give the impression that they do not belong to one single party.' I complied. The Al-Badr and Al-Shams groups were a dedicated lot, keen to help the army."

page- 105

683. Husain Haqqani in his book titled '**Pakistan: between Mosque and Military**' had given a description about the deployment of the Razakars in the following language;

"The army decided to raise a Razakar (volunteer) force of one hundred thousand from the civilian non-Bengalis settled in East Pakistan and the pro-Pakistan Islamist group. The Razakars were mostly employed in areas where army elements were around to control

and utilize them .This force was useful where available, particularly in the areas where the rightist parties were in strength and had sufficient local influence" [Pakistan: between Mosque and Military, written by Hussain Haqqani, Page 79]

684. It is a common knowledge that Razakars, Al-Badr, and Al-shams were the notorious killing squad who executed the blueprint of Pakistani Army for the elimination of the pro-liberation Bangalee people and freedom fighters. They were the local collaborators who used to participate in different killing operation in 1971 along with Pakistani Army and killed freedom fighters and pro-liberation Bangalee people, committed rape upon Bangalee girls and women. They used to abduct the girls and woman, freedom fighters and the pro-liberation people and after inhuman torture in the Razakar camp raped and killed them to execute the further policy, plan and ill design of the Pakistani Army. The Pakistani Army with the help of Razakar, Al-Badr and Al-Shams killed 3(three) million people, committed rape upon about 45, 0000 girls and women, and over 10 million people were forced to deport to India to escape the brutal killing, torture, persecution at home, during the nine month War of Liberation in Bangladesh. In the above backdrop of the case, it is alleged that the accused persons committed the alleged offences of crimes against humanity for which this tribunal framed the charges against them for trial. The

prosecution alleged that the accused persons committed the offences as a member of Razakar Bahini. The dreadful systematic events constituting the crimes against humanity as narrated in the charges allegedly occurred in and around the Chingra Bazaar Razakar Camp under Keshobpur Police Station of District Jessore were part of horrific atrocious activities carried out during the War of liberation in 1971 directing the unarmed pro-liberation civilians in furtherance of common plan and design of Pakistani occupation army. The undisputed history says that atrocious and dreadful crimes were committed during the nine-month-long War of Liberation in 1971, which resulted in the birth of Bangladesh, an independent State.

The delay of trial.

685. After independence of Bangladesh, the Pakistan Government set up Hamoodur Rahman Commission in 1971 to enquire into the circumstances in which the Commander, Eastern Command surrendered and the members of armed forces of Pakistani occupation army laid down their arms and a cease-fire was ordered along the borders of West Pakistan and India and along the cease-fire line in the State of Jammu and Kashmir and try those responsible for the defeat of Pakistan Army, and the Commission after conducting inquiry submitted its report to the President of Pakistan and in the inquiry report the Hamoodur

Rahman Commission candidly made an observation in the following terms:-

“The government of Pakistan should set a high-powered Court of Inquiry to investigate these allegations and to hold trials of those who indulged in these atrocities, brought a bad name to the Pakistan Army and alienated the sympathies of the local population by their acts of wanton cruelty and immorality against our own people.” As regards evidence of atrocities committed by the Pakistani Army in the territory of Bangladesh, the Commission observed that “the Commission feels that sufficient evidence is now available in Pakistan for a fruitful inquiry to be undertaken in this regard (atrocities). As the Government of Bangladesh has been recognized by Pakistan it may be feasible to request the Dacca authorities to forward to this Court of Inquiry whatever evidence may be available to them.”

686. About the Pakistan army’s atrocities in 1971, the Commission further observed that “no amount of provocation by the militants of the Awami League or other miscreants could justify retaliation by a disciplined army against its own people. The Pakistan army was called upon to operate in Pakistan territory, and could not, therefore, be permitted to behave as if it was dealing with external aggression or operating on enemy soil. Irrespective, therefore, of the magnitude of the atrocities, we are of the considered opinion that it’s necessary for the Government of Pakistan to take effective action to punish those who were

responsible for the commission of these alleged excesses and atrocities.” The Commission felt that firm and proper action would not only satisfy the nation’s demand for punishment where it is deserved but would also ensure any future recurrence of the kind of “shameful conduct displayed during the 1971 war.”

687. After submitting the report, the Generals did not have to worry because Bhutto swept the report under the carpet and Pakistan’s own commitment to try its generals for atrocities remained a false public statement forever. When Pakistan found its back against the wall on the issue of trying its war criminals, it swiftly moved to the International Court of Justice in The Hague and argued on the line of defence of notorious Nazi killer Adolf Eichmann, the Gestapo Chief who was responsible for the implementation of Adolf Hitler’s infamous Final Solution involving the deportation, robbery and murder of approximately six million Jews during the World War II and tried to deny Bangladesh’s right to try the 195 Pakistani army officers held prisoners of war in India. Before going to The Hague, Pakistan had also promised to set up a judicial tribunal to try the perpetrators. It was a statement made solely to deceive the Hague court. Pakistan argued that if India transferred the prisoners of war to Bangladesh for trial, it would be an illegal act on the part of India and tried to

convince the International Court of Justice to pass an order staying the immediate transfer of the prisoners to Bangladesh for trial.

688. Pakistan going to The Hague Court in May, 1973 followed the Bangladesh-India joint declaration of April 17, 1973 which state that “the two governments are ready to seek a solution to all humanitarian problems through simultaneous repatriation of the Pakistani prisoners of war and civilian internees, except those required by the government of Bangladesh(meaning the 195 Provision of War), repatriation of the Bangalees forcibly detained in Pakistan and repatriation of Pakistanis in Bangladesh, that is, all non-Bangalees who owe allegiance and have opted for repatriation to Pakistan.”

689. In that application filed in the International Court of Justice in The Hague, the Government of Pakistan has made prayer in the following language;

“(1) That Pakistan has an exclusive right to exercise jurisdiction over the one hundred and ninety-five Pakistani nationals or any other number, now in Indian custody, and accused of committing acts of genocide in Pakistani territory, by virtue of the application of the Convention on the Prevention and Punishment of the Crime of Genocide of 9 December 1948, and that no other Government or authority is competent to exercise such jurisdiction.

(3) That there can be no ground whatever in international law, justifying the transfer of custody of these one hundred and ninety-five or any other number of prisoners of war to “Bangla Desh” for trial in the face of Pakistan’s exclusive right to exercise jurisdiction over its nationals accused of committing offences in Pakistan territory, and that India would act illegally in transferring such persons to “ Bangla Desh” for trial. “

790. After independence of Bangladesh, initiatives were taken for trying of 195 prisoners of war against whom there were specific evidence and proof of crimes against humanity, genocide, war crimes and crimes against peace, but due to international pressure of Western allies and on the assurance of Pakistan given to both Bangladesh and India that Pakistan would ensure the trial of 195 prisoners of war, they were returned to Pakistan.

791. The trial of offences committed during World War II have been continued for many decades after Nuremberg, even presently the perpetrators are being tried for those offences. Since the Einsatergruppen trials in 1958 and the beginning of the Auschwitzprozesse in Frankfurt in the early 1960s, the German courts had also faced difficulties since those trials were held after long passage of time. Israeli Supreme Court overturned the conviction of Demjanjuk, who was tried for the offence committed during WWII and after his acquittal, deported to Munich in 2009 and again he stood trial before a German Court, where he was

charged as an accessory to the murder of 29000 persons at Sobibor. He was convicted in May 2011.

792. In the case of Chief Prosecutor-vs.- Abdul Quader Molla reported in 22 BLT (AD) 8 at page 51 Para 67, legality of holding trial of crimes against humanity; war crimes and genocide after about 40 years was raised before the Appellate Division, and our Apex Court after proper adjudication of the objection raised by the convicted appellant Abdul Quader Molla observed as follows;

“The demand for trial of war crimes and genocide committed by the collaborators of Pakistani Army in Bangladesh was mounting and if their crimes, during the war, go unpunished, it would only embolden the perpetrators to recur similar offense in future. Crimes during the war must be brought to an end in the interest of law, humanity, and justice. One way to do so is to try war criminals, not with a vengeance but with justice and impartiality. The object of punishment, to quote Hugo Grotius, “may be the good of the criminal, the good of the victim or the good of the community.”

793. In adjudicating the issue regarding the cause of delay of holding trial of the crimes against humanity, war crimes or genocide, our Apex Court in the referred decision at page 53, Para 74 further observed as follows;

“The International Crimes (Tribunals) Act, 1973 is the first written statute on core crimes which are recognized as

international crimes. The trial of the perpetrators could not be held due to the killing of Sheikh Mujibur Rahman. This killing was followed by the killing of four national leaders in prison on 3rd November 1975. There is no doubt that the trial is held in accordance with international legal and human rights standards. In holding trials, the prosecution obviously needs to deal with old evidence and to critically evaluate historical records, and the victim and their relations' recollections as well as to deal with collective memories. Additionally, it helps contextualize both when the events took place and the span of time that has elapsed since the events occurred. The German writer Jorgen Fuchs once said to Adam Michnik a leader of the polish opposition to communist rule about crimes committed during the communist regime in East Germany that ' if we do not solve this problem in a definite way, it will haunt us.' The persons suffered and their family has a powerful sense that what they experienced must not be forgotten, but must be cultivated both as a monument to those who did not survive and as a warning to future generations, so that a nation can be free from these crimes and atrocities; however much a government tries to bury these crimes by defiant, the crimes continue to haunt the nation from the debris of the history in countless ways.”

794. In the referred case reported in 22 BLT (AD) 8 at page 55 para 78 Mr. Surendra Kumar Sinha, J further observed as follows;

“Although Act, 1973 is the first written statute on Crimes against Humanity, the trial could not be held due to the seizure of state power by killing Sheikh Mujibur Rahman, and his family. It was followed by the killing of the four

national leaders. In the absence of the President Sheikh Mujibur Rahman, Syed Nazrul Islam was the Acting President of the Government in exile in 1971. Tajuddin Ahmed was the Prime Minister, M. Mansur Ali was the Minister of Commerce and Trade, A.H.M. Kamruzzaman was a cabinet Minister leading the liberation movement as a lawful and constitutional government. They were killed in prison on 3 November 1975 in another orgy operated by the same military group at the Dhaka Central Jail. These are historical facts.”

No bar of trial

795. The Act of 1973 is ex-post-facto legislation and on a careful reading of the said Act, it reveals that the Legislature did not make any provision of limitation barring the trial of offences as specified in section 3(2)(a) of the Act of 1973. In criminal jurisprudence, there is no time limit for the trial of offence. In the Constitution of the International Military Tribunal also, no provision of limitation has been provided barring the trial of International Crimes.

796. The Control Council Law No. 10 is a retrospective statute and there is no legal bar of the trial of international crimes and the accused shall not be entitled to the benefits of any statute of limitation with respect to the period from 30 January 1933 to 1 July 1945. Article II (5) runs as below;

Article II (5). “In any trial or prosecution for a crime herein referred to, the accused shall not be entitled to the benefits of any

statute of limitation with respect to the period from 30 January 1933 to 1 July 1945, nor shall any immunity, pardon or amnesty granted under the Nazi regime be admitted as a bar to trial or punishment.”

797. Convention on the Non-Applicability of Statutory Limitations to War Crimes and crimes against Humanity.

Adopted by General Assembly Resolution No. 2391 of November 1968.

Entry into force: II November 1970, in accordance with Article III.

Article-I

“No statutory limitation shall apply to the following crimes, irrespective of the date their commission:

(a) War crimes as they are defined in the Charter of the International Military Tribunal, Nurnberg, of 8 August 1945 and confirmed by resolutions 3(1) of 13 February 1946 and 95(1) of 11 December 1946 of the General Assembly of the United Nations, particularly the “grave breaches” enumerated in the Geneva Convention August 1946 for the protection of war victims;

(b) Crimes against humanity whether committed in time of war or in the time of peace as they are defined in Charter of the

International Military Tribunal, Nuremberg, of 8 August 1945 and confirmed by resolutions 3 13 February 1946 and 95(I) of 11 December 1946 of the General Assembly of the United Nations, eviction by armed attack or occupation and inhuman acts resulting from the policy of apartheid, and the crime of genocide as defined in the 1948 Convention on the Prevention and Punishment of the Crime of Genocide, even if do not constitute a violation of the domestic law of the country in which they were committed.”

798. Rome Statute of the ICC

Article 29: Non-applicability of statute of limitations.

“The crimes within the jurisdiction of the Court shall not be subject to any statute of limitations.”

In the case of Abdul Quader Mollah vs The Chief Prosecutor (Review) reported in 22 BLT(AD) 541, at Page- 560 Para 51 Mr. Surendra Kumar Sinha J observed in the following language;

“Criminal Law generally, whether municipal or international do not recognize the doctrine of limitation for the trial of persons of War Crimes, Genocide, and Crimes against Humanity. For this reason, some serious violations that occurred in World War II in 1940 and in Indonesia in 1960 are being investigated and prosecuted now after the lapse of time.”

799. In view of the above, it reveals that there is no legal bar of trial of any offence at a belated stage, particularly the crimes against humanity, war crimes, genocide and crimes against peace, rather it is the legal obligation of the state to initiate proceedings and conclude the trials against the perpetrators who committed heinous crimes against the mankind at the time of War of Liberation of Bangladesh in 1971.

Rules of Evidence

700. This domestic Tribunal was created under the Act of 1973 for the trial of International Crimes as specified in section 3(2) of the Act of 1973 and other International Crimes Tribunals created for the trial of International Crimes under their respective Statutes also excluded the application of National Rules of Evidence and Procedure. In Section 23 of the Act of 1973 provision has been made excluding the application of the Evidence Act and the Code of Criminal Procedure which runs as follows;

Section 23: The provisions of the Criminal Procedure Code, 1898(v of 1898), and the Evidence Act, 1872(I of 1872), shall not apply in any proceedings under this Act.”

701. In pursuance of the provision contained in section 22 of the Act of 1973 this Tribunal regulated “International Crimes (Tribunal

–I) Rules of Procedure, 2010 and in Rule 2(9) of the Rules, “evidence” has been defined as under;

“(9) **“Evidence”** means all statements which the Tribunal permits or requires to be made before it by witnesses, and it includes all other materials, collected during investigation, placed before the Tribunal in relation to matters of fact;”

702. The offences as specified in section 3(2) of the Act of 1973 are International Crimes and the Legislature at the time of enactment of the said Act, made similar provisions as made in other Statutes for the trial of International Crimes excluding the application of National Rules of Evidence. In holding trials of the offences this Tribunal followed the provisions as provided in section 19 of the Act of 1973 which runs as follows;

Section 19 of the ACT of 1973.

19(1) A Tribunal shall not be bound by technical rules of evidence; and it shall adopt and apply to the greatest possible extent expeditious and non-technical procedure, and may admit any evidence, including reports and photographs published in newspapers, periodicals and magazines, films and tape recordings and other materials as may be tendered before it, which it deems to have probative value.

(2) A Tribunal may receive in evidence any statement recorded by a Magistrate or an Investigation Officer being a statement made by any person who, at the time of the trial, is dead or whose attendance cannot be procured without an amount of delay or expense which the Tribunal considers unreasonable.

(3) A Tribunal shall not require proof of facts of common knowledge but shall take judicial notice thereof.

(4) A Tribunal shall take judicial notice of official governmental documents and reports of the United Nations and its subsidiary agencies or other international bodies including non-governmental organizations.

703. Furthermore, Rule 44 of the International Crimes (Tribunal-1) Rules of Procedure, 2010 authorized this Tribunal to admit any evidence oral or documentary and further authorized this Tribunal to exclude any evidence which does not inspire any confidence in it and admission or non-admission of evidence is the absolute discretion of the Tribunal.

Rule 44 of International Crimes [Tribunal 1] Rules of Procedure, 2010 is quoted below;

Rule 44. The Tribunal shall be at liberty to admit any evidence oral or documentary, print or electronic including books, reports and photographs published in newspapers, periodicals, and magazines,

films and tape recording and other materials as may be tendered before it and it may exclude any evidence which does not inspire any confidence in it, and admission or non-admission of evidence by the Tribunal is final and cannot be challenged.

The rules of evidence provided in the Act of 1973 is consonant with the rules of evidence provided in other Statutes made at the instance of the United Nations for trial of international crimes and the relevant provisions of those Statutes are quoted below;

704. Rules of Evidence under the Constitution of the IMT.

Article 19.

The Tribunal shall not be bound by technical rules of evidence. It shall adopt and apply to the greatest possible extent expeditious and nontechnical procedure, and shall admit any evidence which it deems to be of probative value.

705. Rules of Evidence of IMT Charter for the Far East.

In the International Military Tribunal for the Far East, the similar provision as regards Rules of Evidence is made to be followed by the Tribunal for the trial of International Crimes, and the Tribunal shall follow the expeditious and non-technical procedure and it is not bound by technical Rules of Evidence.

Article 13 of IMT Charter for the Far East (IMTFE) runs as follows;

Article 13.

Evidence.

- Admissibility. The Tribunal shall not be bound by technical rules of evidence. It shall adopt and apply to the greatest possible extent expeditious and non-technical procedure, and shall admit any evidence which it deems to have probative value. All purported admissions or statements of the accused are admissible.
- Relevance. The Tribunal may require to be informed of the nature of any evidence before it is offered in order to rule upon the relevance.
- Specific Evidence Admissible. In particular, and without limiting in any way the scope of the foregoing general rules, the following evidence may be admitted:
 - A document, regardless of its security classification and without proof of its issuance or signature, which appears to the Tribunal to have been signed or issued by any officer, department, agency or member of the armed forces of any government.

- A report which appears to the Tribunal to have been signed or issued by the International Red Cross or a member thereof, or by a doctor of medicine or any medical service personnel, or by an investigator or intelligence officer, or by any other person who appears to the Tribunal to have personal knowledge of the matters contained in the report.
- An affidavit, deposition or other signed statement.
- A diary, letter or other document, including sworn or unsworn statements which appear to the Tribunal to contain information relating to the charge.
- A copy of a document or other secondary evidence of its contents, if the original is not immediately available.

706. International Criminal Tribunal for Rwanda, Rules of Procedure and Evidence.

Entered into force on 29 June 1995.

Section 3. Rules of Evidence

Rule 89

General Provisions

- The rules of evidence set forth in this Section shall govern the proceedings before the Chambers. The Chambers shall not be bound by national rules of evidence.

(B) In cases not otherwise provided for in this Section, a Chamber shall apply rules of evidence which will best favour a fair determination of the matter before it and are consonant with the spirit of the Statute and the general principles of law.

(C) A Chamber may admit any relevant evidence which it deems to have probative value.

(D) A Chamber may request verification of the authenticity of evidence obtained out of court.

707. ICTY Rules of Procedure and Evidence

Section 3. Rules of Evidence

Rule 89

General Provisions

- A Chamber shall apply the rules of evidence set forth in this Section, and shall not be bound by national rules of evidence.
- In cases not otherwise provided for in this Section, a Chamber shall apply rules of evidence which will best

favour a fair determination of the matter before it and are consonant with the spirit of the Statute and the general principles of law.

- A Chamber may admit any relevant evidence which it deems to have probative value.
- A Chamber may exclude evidence if its probative value is substantially outweighed by the need to ensure a fair trial.
- A Chamber may request verification of the authenticity of evidence obtained out of court.
- A Chamber may receive the evidence of a witness orally or, where the interests of justice allow, in written form.

708. Section 3: Rules of Evidence

ICC Rules of Evidence

ICC Rule 63 Para 5 states that “the Chambers shall not apply national laws governing evidence, other than in accordance with Article 21.”

709. As per provision of Article 19 of the Constitution of IMT, admission of evidence is the discretion of the Tribunal and it shall follow the expeditious and nontechnical procedure to ensure speedy trial of the offence and shall only admit the evidence which it

deems to be of probative value. In all other Statutes made for the trial of International Crimes similar provisions have been made and the Act of 1973 is consonant with the provisions made in those Statutes.

710. Considering the provision contained in the Act of 1973 and the Rules of Procedure of the Tribunal our Apex Court in the Case of Abdul Quader Mollah vs The Chief Prosecutor [review] reported in 22 BLT(AD)541 at page 560 para 50 observed as follows;

“The tribunal, as per law, is not bound to follow the rules of evidence which are normally applicable in proof of a fact. It may admit a photograph or a news- paper reporting or an article in a magazine in proof of a fact, if such fact is relevant to connect the accused with the incident for which he is being tried. The technical rules for admitting digital evidence are also not applicable and it takes films and tape recording statements, even a statement recorded by the investigation officer of any witness, who is dead or whose presence cannot be procured without delay and if the Tribunal feels that his statement is relevant to corroborate a fact in issue or which it deems to have probative value. This is because the trials are being held at a belated stage; most of the material evidence are lost in many cases; most of the members of the family were killed and the neighboring witnesses escaped to avoid similar eventuality; the surviving witnesses are not interested in disclosing the real incident because of the harrowing incidents of brutalities perpetrated against unarmed innocent people of the country by an organized armed force with the

help of Razakars, Al-Badar, Al-Shams and Peace Committee members for causes mentioned above.”

711. Subsequently in the case of Salahuddin Quader Choudhury reported in 67 **DLR (AD) 334, at page 334 Para 101** our Apex Court considered the provisions as contained in section 19 of the Act of 1973 and Rule 44 and 51(2) and observed as follows;

“The tribunal has given discretionary power under rule 44 of the Rules to admit any evidence, oral or documentary, print or electronic including books, reports and photographs published in newspapers, periodical and magazines, films and tape recording and other materials as may be tendered before it and it may exclude any evidence which does not inspire any confidence in it. In exercise of this discretionary power, the tribunal has discarded these affidavits as having no reliability. Rule 51(2) provides that the defence shall prove the documents and materials to be produced by it in accordance with law, that is to say, under the Act of 1973. In order to prove any documentary evidence by the defence, it is required to prove the same in accordance with section 9(5) of the Act which provides that a list of witnesses for the defence, if any along with documents or copies thereof, which the defence intends to rely upon, shall be furnished to the tribunal at the time of the commencement of the trial. The defence did not at all produce these affidavits as documentary evidence before the commencement of the trial or at the stage of framing a formal charge. It has produced these affidavits only on 18th July 2013, after examination of DW 2 and in the midst of cross-examination of DW 3 by the prosecution. Till that date, the defence did not file those

affidavits or even stated anything regarding the existence of these affidavits. The tribunal, in the premises, has rightly ignored these affidavits as not admissible in evidence."

712. In the referred case reported in **67 DLR (AD) at page 339 para 122** the Hon'ble Appellate Division further observed in the following language;

“Over and above, rule 44 of the Rules authorizes the tribunal to exercise its discretionary power to admit oral or documentary evidence that may be tendered before it, and the tribunal’s decision is final regarding the admissibility or non-admissibility of evidence and cannot be challenged. So, under this rule, once documentary evidence is admitted into evidence, it cannot be challenged subsequently. Adding to this provision, Rule 55 says that once the document is marked as an exhibit, the content of such document may be admissible. Section 19(1) provides that the tribunal shall not be bound by “technical rules of evidence; and it shall adopt and apply to the greatest possible extent expeditious and non-technical procedure, and may admit any evidence, including reports and photographs .”

713. The crimes narrated in the charges alleged to have been committed at the time of War of Liberation in 1971 and the trial against accused persons has been initiated after 44 years. It reveals that the accused persons are old, victims [P.Ws. 3 and 6]and their family members(witnesses) are also old, although their wounds have not been healed up and the youth generation has limited knowledge of the atrocities committed during the War of

Liberations in 1971 .In the meantime, this Tribunal relying on the old evidence had adjudicated many cases against other accused persons and our Apex Court also relying on the old evidence upheld the conviction of other perpetrators and settled the jurisdiction on this point. In the case of Abdul Quader Mollah vs the Chief Prosecutor, ICT reported in 22 BLT 541[Review Case] para 51 at page 561 Hon’ble Appellate Division relied on the observation of Alphos M.M. Orio, a Judge of the ICTY, who expressed his view in the following language.

“Thus, the focus is on the use of old evidence in respect of these crimes. Alphos M Orie. a Judge of the International Criminal Tribunal for the former Yugoslavia wrote in an article titled “Adjudicating Core International Crimes Cases in which Old Evidence is introduced.” that if someone gives testimony in court it is quite hard to say whether it is old or fresh evidence. The legal approach does not produce a fully satisfactory answer to the challenges encountered when dealing with old evidence about events that have long since passed.”

714. The Hon’ble Appellate Division in the case of Salahuddin Quader Chowdhury vs The Chief Prosecutor, reported in 67 DLR(AD) 295 at page 350 Para- 162 relied on the observation of Andrew Cayley, an International Co-prosecutor of the Khmer Rouge Tribunal in Cambodia made in an article ‘Prosecuting and

Defending in Core International Crimes Cases using Old Evidence’

wherein it has been stated in the following language;

“Indeed, one victim who filed a complaint with the Khmer Rouge Tribunal accidentally learned the fate of her disappeared father when, after the regime fell, she brought some food from a street vendor, only to discover that the food was wrapped in a page from her father’s forced confession. This led to the discovery that he had been executed at S-21 as an ‘enemy of the people’. This incident highlights the fact that for many societies in which the oral tradition is still strong, and appreciation for the written word is not widespread, documents may be seen as significant in and of themselves, and instead may be much more valued as, for example, something in which to wrap fish, or to roll tobacco for a cigarette.’

715. All the events narrated in the charges alleged to have been committed at the time of War of Liberation in 1971, and during long passage of time many witnesses and the perpetrators of the crimes had expired. Since the offence relates to the charges alleged to have been committed long 45 years ago, there is no scope to adjudicate the charges relying on the new evidence and in the above facts and circumstances this tribunal has to adjudicate the charges relying on the old evidence only.

Judicial Notice

716. Like other International Tribunals created for trial of International Crimes, this domestic Tribunal is also empowered under sub-section (3) and (4) of Section 19 to take judicial notice of official governmental documents and reports of the United Nations and its subsidiary agencies or other international bodies including non-governmental organizations and shall not require proof of common knowledge but shall take judicial notice thereof and the provisions contained in Section 19 of the Act of 1973 is consonant with the provisions made in the other Statutes for trial of International Crimes. In other Statutes made for trial of International Crimes, similar provision has been provided for trial of those offences and the relevant provisions is quoted herein below;

717. Rules of Evidence of IMT Charter.

Judicial notice.

Article 21.

“The Tribunal shall not require proof of facts of common knowledge but shall take judicial notice thereof. It shall also take judicial notice of official government documents and reports of the United Nations, including the facts and documents of the committees set up in the various allied countries for the

investigation of war crimes, and of records and findings of military or other Tribunals of any of the United Nations.

718. International Military Tribunal for the Far East Charter
(IMTFE Charter)

Date enacted: 1946-1-19.”

Article 13 d.

“Judicial Notice. The Tribunal shall neither require proof of facts of common knowledge, nor of the authenticity of official government documents and reports of any nation nor of the proceedings, records, and findings of military or other agencies of any of the United Nations.”

719. Rule 94 of ICTR

Judicial Notice

“A Trial Chamber shall not require proof of facts of common knowledge but shall take judicial notice thereof.”

720. Rule 94 of the ICTY

Judicial Notice

- “A Trial Chamber shall not require proof of facts of common knowledge but shall take judicial notice thereof.

- At the request of a party or Proprio Motu, a Trial Chamber, after hearing the parties, may decide to take judicial notice of adjudicated facts or documentary evidence from other proceedings of the Tribunal relating to matters at issue in the current proceedings.”

721. Under Article 21 of the Constitution of IMT, the Tribunal is legally empowered to take judicial notice of the fact of common knowledge with proof of facts and documents and reports of the United Nations including the facts and documents and reports of the committees set up in the various allied countries for the investigation of war crimes, and of records and findings of military or other Tribunals of any of the United Nations. In the Statutes of IMT, IMTFE, ICTY and ICTR and the Act of 1973 similar provisions have been provided for the trial of International Crimes considering the context of the offences.

722. In the case of Ali Ahsan Muhammad Mujahid vs The Chief Prosecutor reported in XII ADC 673 at page 676 para -2 Mr. Justice Hesan Foez Siddique observed that; “

”It is relevant here to mention that ICT Act provides that the Tribunal should not require proof of facts of common knowledge but shall take judicial notice thereof. The term “common knowledge” denotes facts those are commonly accepted or universally known, such as general facts of history. In International Criminal Tribunal for Rwanda,

Prosecutor v. Semenza, ICTR-97-20-A Appeal Judgment 20 May 2005 it has been held that taking judicial notice of the facts of common knowledge is a matter of an obligation and not discretionary. In determining what constitutes common knowledge the ICTR held that these are facts that are so notorious or clearly established or susceptible to determination by reference to readily obtainable and authoritative sources that evidence of their existence is unnecessary. It further elaborated that common knowledge concerns fact that are generally known in the tribunal's jurisdiction and are reasonably indisputable."

723. In the instant case in hand it is alleged that the accused persons participated, aided, abated, facilitated and complicity in the commission of offences of abduction, confinement, torture, rape, murder and other inhumane acts [arson and plundering] as crimes against humanity as part of systematic attack directed against unarmed civilian as specified in section 3(2)(a)(g)(h) of the Act of 1973 which are punishable under section 20(2) read with section 3(1) of the Act for which it is required to look at the jurisprudence developed on individual responsibility adopted in section 4 of the Act of 1973 which is already quoted herein above.

Section 4 of the Act of 1973 and Joint Criminal Enterprise

724. In section 4(1) of the Act of 1973 the legislature made provision for individual criminal responsibility for crimes committed by several persons which does not include an explicit

reference to the notion “joint criminal enterprise.” There are three distinct categories of “joint criminal enterprise” which are set out in the jurisprudence and which are said to be representative of customary international law on the basis of the content of relevant case law relating to crimes against humanity, genocide and war crimes tried after World War II.

725. President Roosevelt on October 7, 1942, declared, “It is our intention that just and sure punishment shall be meted out to the ringleaders responsible for the organized murder of thousands of innocent persons in the commission of atrocities which have violated every tenet of the Christian faith.” In the case of *Ali Ahsan Muhammad Mujahid vs The Chief Prosecutor* reported in 12 ADC(2015) 673 at page 731 paragraph No. 254 our Apex Court held that “With regards to crimes against humanity, there is no doubt whatever, those mass people, political opponents and leading intellectuals of the country were killed during the War of Liberation and that many of them kept confined in circumstances of great horror and cruelty. The pattern of the killings and of the circumstances under which those took place brings to mind the bitter memory of the Hitlerite hordes onslaughts on culture. It was the cruelest blow to all the Bangalees.”

726. In the case of *Ali Ahsan Mujahid* reported in 12ADC (2015) 673, para 345 as regards individual responsibility of the accused

person under section 4 of the Act of 1973 Mr. Justice Hasan Foez Siddique observed that;

“Leaders and organizers of Badr Bahini, instigators, and accomplices participating in the formulation or execution of a common plan or conspiracy to commit any of the crimes defined in the ICT Act are responsible for the act performed by any one of them in the execution of such plan.”

727. In the case of Ali Ahsan Mujahid reported in 12ADC (2015) 673, at page 749 para 346 as regards elements of individual liability as provided in section 4 of the Act of 1973 Mr. Justice Hasan Foez Siddique further observed that;

“The appellant prepared Badr Bahini and led, facilitated, encouraged, instigated and supported their brutal activities. This Division in the appeal of Kamaruzzaman v. The Public prosecutor (Criminal Appeal No. 62 of 2013) case has observed that in the Tribunal’s jurisprudence, aid and abetting refer to all acts of assistance that lend encouragement or support to the commission of a crime. This encouragement or support may consist of physical acts, verbal statements, or, in some cases, mere presence as an “approving spectator”. Except in the case of the “approving spectator,” the assistance may be provided before or during the commission of the Crime, and an accused need not necessarily be present at the time of the criminal act.”

728. Prime Minister Winston Churchill who after the World War II declared the Policy as regards Joint Criminal responsibility of the Nazi War Criminal and said, “It is quite clear that all concerned

who may fall into our hands, including the people, who only obeyed orders by carrying out the butcheries should be put to death after their association with the murders has been proved.” In the case of *Ali Ahsan Muhammad Mujahid vs. Chief Prosecutor* reported in 12 ADC (2015) 673 para 252 our Apex Court held as follows; “Justice demands that none who participated in those acts of savagery shall go unpunished. All who share in the guilt shall share the punishment.”

729. The East Pakistan Razakars Ordinance, 1971 was promulgated by the Governor of East Pakistan on 2, August 1971 and created the Razakar Bahini as a “paramilitary force” for “operational and static” purposes and also established a separate Razakar Directorate for administration and control of the affairs of the Razakars. The Razakar, Al-Badar, and Al-Shams was created with intent to kill the freedom fighters and pro-liberation people and during nine months War of Liberation in 1971 the Pakistani occupation army and the Razakars, Al-Badar, and Al-Shams to implement the further policy and plan of the Pakistani army jointly launched operations and killed about three million unarmed pro-liberation civilians and raped about 45,0000 girls and women and forced to deport about 10 million people to India. In the above backdrop, the legislature enacted the Act of 1973 for which it was not

required to insert the words “ in furtherance of the common intention of all” in the said Act.

730. “Joint Criminal Enterprise” doctrine considers that each member of an organized group is individually responsible for crimes committed by a group within the common plan or purpose. The origin of Joint Criminal Enterprise may be influenced by the Common Law of England, which introduced the principle into criminal Law in the UK and other commonwealth nations. It is a notion of collective liability and shared punishment for the actions of others as if all perpetrated the same, although an individual may not present at the time of the actual commission of offences.

Forms of Joint Criminal Enterprise

731. According to the Tadic Judgment, JCE is a relatively new concept of criminal responsibility, although a similar concept of common criminal purpose or common criminal plan had existed since WW II. This notion is found in three main fundamental documents from the post- World War II period i.e. the Charter of the Nuremberg IMT, CCL No. 10 and the Charter of the Tokyo IMT. According to these provisions, a person who participated in a common plan or conspiracy to commit any crime would be liable for all acts performed in execution of that common plan or conspiracy. In fact, thousands of post- WW II’s trials made JCE a part of the customary international law and considering the

judgments of Post World War II trials, in the Tadic judgment, the ICTY had given the JCE doctrine a new shape in the jurisprudence of customary international law. The notion “Joint Criminal Enterprise” recently expanded in the Tadic Judgment by the ICTY, but the said notion first developed in the post-WWII trials of International Crimes. Although the International Tribunals created at the instance of the United Nations used the notions “Joint Crimes Enterprise” at large, but the Supreme Court of India long before the ICTY, in the case of Kamaswami Ayyangar’s case [AIR 1976 S.C. 2027] Untwalia J, used the notion “the criminal enterprise” which corresponds the provisions of Section 34 of the India Penal Code.

732. The Joint Criminal Enterprise “notion was spelled out in the report of Secretary General wherein it was instructed as follows;

“The Secretary-General believes that all persons who participated in the planning, preparation or execution of serious violations of international humanitarian law in the former Yugoslavia are individually responsible for such violation.”

733. Accordingly to the ICTY jurisprudence in the Tadic Case, the Appeals Chamber distinguished, relying on post- World War II case law, collective criminality into three categories: I Basic, II Systemic and III Extended forms. The Appeals Chamber concluded

that international responsibility embraces actions perpetrated by the collectivity of persons in furtherance of a common criminal design.

The Basic Form

734. JCE I is the liability for a common criminal purpose; the basic form where the participants act on the basis of a ‘common design’ or ‘common enterprise’ and with a common ‘intention.’ Cases where all co-perpetrators, acting pursuant to a common design possess the same criminal intention such as the formulation of a plan among the co-perpetrators to kill, where, in effecting this common design, and even if each co-perpetrator carries out a different role within it, they nevertheless all purpose the intent to kill. The accused must ‘voluntary participate’ in one aspect of the common design, for instance, by inflicting non-fatal violence upon the victim, or providing material assistance to, or facilitating the activities of his co-perpetrators.

735. “The first such category is represented by cases where all co-defendants, acting pursuant to a common design, possess the same criminal intention; for instance, the formulation of a plan among the co-perpetrators to kill, where, in effecting this common design(and even if each co-perpetrator carries out a different role within it), they nevertheless all possess the intent to kill. The objective and subjective prerequisites for imputing criminal responsibility to a participant who did not, or cannot be proven to

have, affected the killing are as follows: (i) the accused must voluntarily participate in one aspect of the common design (for instance, by inflicting non-fatal violence upon the victim, or by providing material assistance to or facilitating the activities of his co-perpetrators); and (ii) the accused, even if not personally affecting the killing, must nevertheless intend this result.”
 Prosecutor vs. Dusko Tadic, 15th July 1999, ICTY, Case No. IT-94-1-A, Appeal Judgment, para- 196

736. Some of the important cases referred by the Chamber as an example of JCE I was the trial of Georg Otto Sandrock et al. case and three others known as “Almeno Trial”, where three Germans had killed a British prisoner of war and they were found guilty by the British Military Court under the doctrine of ‘common enterprise.’ Similarly, in the Holzer et al. case brought before a Canadian Military Court, where the Judge Advocate spoke of a ‘common enterprise’ with regard to the murder of a Canadian prisoner of war by the three Germans and emphasized that the three all knew that the purpose of taking the Canadian to a particular area was to kill him.

JCE II: The Systemic Form

737. “JCE II is the liability for participation in an institutionalized common criminal plan. The systemic form, that is, the so-called concentration camp cases where crimes were alleged to have been

committed by members of military or administrative units acting pursuant to a ‘concerted plan,’ such as those running concentration or detention camps on the basis of a “common plan.”

738. The Appeals Chamber in the Tadic Case, in paragraph No. 202 interpreted the systematic form of JCE in the following terms:

“The second distinct category of cases is in many respects similar to that set forth above and embraces the so-called “concentration camp” cases. The notion of common purpose was applied to instances where the offences charged were alleged to have been committed by members of military or administrative units such as those running concentration camps; i.e.,-by groups of persons acting pursuant to a concerted plan. Cases illustrative of this category are Dachau Concentration Camp, decided by a United States court sitting in Germany and Belsen, the case of Josef Kramer decided by a British military court sitting in Germany. In these cases, the accused held some position of authority within the hierarchy of the concentration camps. Generally speaking, the charges against them were that they had acted in pursuance of a common design to kill or mistreat prisoners and hence to commit war crimes. In his summing up in the Belsen case, the Judge Advocate adopted the three requirements identified by the Prosecution as necessary to establish guilt in each case: (i) the existence of an organized system to ill-treat the detainees and commit the various crimes alleged; (ii) the accused’s awareness of the nature of the system; and (iii) the fact that the accused in

some way actively participated in enforcing the system, i.e. encouraged, aided and abetted or, in any case, participated in the realization of the common criminal design. The convictions of several of the accused appear to have been explicitly based on these criteria.”

JCE III The Extended Form

739. JCE III is an incidental criminal liability based on foresight and voluntary assumption of risk. The extended form where one of the co-perpetrators actually engages in acts going beyond the common plan, but his or her acts constitute a “ natural and foreseeable consequence” of the realization of the plan, and the accused willingly took the risk that natural and the foreseeable consequence would occur.

740. The two important examples of JCE III are the Case of Essen Lynching Heyer and six others which are known as the “Essen Lynching Case or Essen West Case”. The accused were ‘concerned in the killing’ of the prisoners and the Kurt Goebel et al. Case (called the “Borkum Island Case”) before a United States military Court and all the accused found guilty were held responsible for pursuing a common criminal design, the intent being to assault the prisoners of war.

741. In the Tadic Case the Appeal Chamber in paragraph No. 202 interpreted the Extended form of JCE in the following language;

“The case-law in this category has concerned first of all cases of mob violence, that is, situations of disorder where multiple offenders act out of a common purpose, where each of them commit offences against the victim, but where it is unknown or impossible to ascertain exactly which acts were carried out by which perpetrator, or when the causal link between each act and the eventual harm caused to the victims is similarly indeterminate. Cases illustrative of this category are Essen Lynching and Borkum Island.”

Elements of JCE

742. The Appeals Chamber in the Tadic Case not only unified and identified the three separate categories of JCE, but also classified the subjective and objective elements of each category in its Judgment.

Subjective Elements (actus reus)

743. The Aftermath of Tadic, both ICTY and ICTR have followed the Tadic jurisprudence lead in articulating three broad physical elements (actus reus) common to all categories of JCE liability, that is:

- a plurality of persons;
- the existence of a common plan, design or purpose which amount to or involves the commission of a crime provided for in the Statute and;

- Participation of the accused in the common design involving the perpetration of one of the crimes provided for in the Statute.

Objective Elements (mens rea)

744. While the actus reus element of all three categories is exactly the same, the mens rea elements of each category of JCE is distinguished separately. JCE I requires the shared intent of the co-perpetrators, JCE II requires the perpetrator's personal knowledge of the system of ill- treatment and JCE III required the perpetrator's intention to participate in the criminal purpose, to further this purpose and to contribute to the commission of the crimes by the group. Tadic Appeal Judgment para- 227.

Mens rea element of JCE I

745. The mens rea element of the JCE I is that the accused must have the intent to perpetrate a certain crime. However, the jurisprudence of ad hoc tribunals identifies physical or objective elements of JCE I into two elements, that is, voluntary participatory and shared intent. Regarding the first element, the jurisprudence requires the voluntary participation in the enterprise and intended the criminal result.

Mens rea element of JCE II

746. The mens rea elements of the second category, which relates to ‘ system of ill-treatment ‘ such as concentration or detention camp, the accused must have personal knowledge of the system of ill-treatment as well as the intent to further this common concerted such system.

Mens rea element of JCE III

747. The mens rea element of JCE III covers crimes that fall outside the common plan. The accused must intend to participate in and further the criminal activity or the criminal purpose of a group and to contribute to the JCE. Liability for the crime other than the one agreed upon in the common plan arises only if, under circumstances of the case (i) it was foreseeable that such a crime might be perpetrated by one or other members of the group and (ii) the accused willingly took that risk.

748. The Appeals Chamber of the ICTY in the case of The Prosecutor –Vs-Milutinovic et al case No. IT- of 99-37-AR 72, judgment dated 21 May 2003 interpreted the notion “Joint Criminal Enterprise “ in the following language;

“The Tribunal’s jurisdiction rationale personae: In order to fall within the Tribunal’s jurisdiction rationale personae, any form of liability must satisfy four pre-conditions: (i) it must be provided for in the Statute, explicitly or implicitly; (ii) it must have existed

under customary international law at the relevant time; (iii) the law providing for that form of liability must have been sufficiently foreseeable at the relevant time to anyone who acted in such a way; and (iv) such person must have been able to foresee that he could be held criminally liable for his actions if apprehended.

Joint criminal enterprise and the Tribunal's Statute: the reference to that crime or to that form of liability does not need to be explicit to come within the purview of the Tribunal's jurisdiction. The Statute of the ICTY is not and does not purport to be a meticulously detailed code providing for every possible scenario and every solution thereto. It sets out in somewhat general terms the jurisdictional framework within which the Tribunal has been mandated to operate. This list in Article 7 (1) appears to be non-exhaustive in nature as the use of the phrase 'or otherwise aided and abetted' suggests.

The nature of joint criminal enterprise: insofar as a participant shares the purpose of the joint criminal enterprise (as he or she must do) as opposed to merely knowing about it, he or she cannot be regarded as a mere aider and abettor to the crime which is contemplated. A joint criminal enterprise is a form of 'commission' pursuant to Article 7 (1) of the Statute.

Joint criminal enterprise and conspiracy: joint criminal enterprise and 'conspiracy' are two different forms of liability.

While the mere agreement is sufficient in the case of conspiracy, the liability of a member of a joint criminal enterprise will depend on the commission of criminal acts in furtherance of that enterprise.

Joint criminal enterprise and membership in a criminal organization: criminal liability pursuant to the joint criminal enterprise is not a liability for mere membership or for conspiring to commit crimes but a form of liability concerned with the participation in the commission of a crime as part of a joint criminal enterprise, a different matter.”

749. Possibly, the most well-known post-World War II cases in the notion of Joint Criminal Enterprise are the Dachau Concentration Camp case, decided by a United States Court, and the Belsen case, decided by a British Military Court, both sitting in Germany. In these cases, the accused held position of authority within the hierarchy of the Nazi concentration camps and based on that were found guilty of the charges that they had acted in pursuance of a common plan to kill or mistreat prisoners. (<http://www.okobih.ba/files/docs/Jasmina-Pjanic-ENG-i-BHS.pdf>).

750. The mens rea depends on the category of joint criminal enterprise. For “basic” joint criminal enterprise liability, it must be shown that the accused and the other participants intended that the crime is committed. For the systemic category, it must be shown that an organised criminal system exists, as is the case with

concentration or detention camps. The accused must be shown to have personal knowledge of the system and intent to further the criminal purpose of the system. The personal knowledge may be proven by direct evidence or by reasonable inference from the accused's position of authority. The "extended" category allows the conviction of a participant for certain crimes committed by other participants in the joint criminal enterprise even though those crimes were outside the common purpose of the enterprise. The accused can be found to be liable if he intended to further the common purpose of the joint criminal enterprise and the crime was a natural and foreseeable consequence of that common purpose. Thus, liability attaches if, under the circumstances of the case, (i) it was foreseeable that such a crime might be perpetrated by one or other members of the group and (ii) the accused willingly took that risk. Finally, the crime must be shown to have been foreseeable to the accused in particular. *Prosecutor vs Stakic*, IT-97-24-A. A-Ch., 22 March 2006, Para -65.

751. For the third form of joint criminal enterprise, it is not sufficient that an accused created the conditions making the commission of a crime falling outside the common purpose possible; it is actually necessary that the occurrence of such crime was foreseeable to the accused and that he willingly took the risk that this crime might be committed.

752. The ICTY prosecutor indicted Slobodan Milosevic on three separate indictments which on appeal they successfully pleaded to the ICTY Appeals Chamber considered as one indictment. As the prosecution had not used the same language in all three indictments it was left to the Court of Appeal to decide if the alleged criminal enterprises in the three indictments were one of the same and what was common among the allegations. The Appeals court decided that:

“A joint criminal enterprise to remove forcibly the majority of the non-Serb population from areas which the Serb authorities wished to establish or to maintain as Serbian-controlled areas by the commission of the crimes charged remains the same transaction notwithstanding the fact that it is put into effect from time to time and over a long period of time as required. Despite the misleading allegation in the Kosovo indictment, therefore, the Appeals Chamber is satisfied that the events alleged in all three indictments do form part of the same transaction.” The Case of Slobodan Milosevic, ICTY Appeal Chamber, IT-99-37 AR 73. Milosevic died during the trial, but he was still found to have been a part of a joint criminal enterprise in the verdicts against Milan Martić and Milan Babić, who publicly admitted his own (and Milosevic’s) guilt. The Prosecutor vs. Milan Babić-Sentencing judgment ICTY, (PDF).

753. In the case of Prosecutor vs Radovan Karadžić, the Trial Chamber of ICC, Case No. 1T-95-5. 18-T, Judgment dated

24.3.2016 considered the notion“ JCE” and in paragraph No. 560 observed that-

“When two or more persons act together to further a common criminal purpose, the jurisprudence of the Tribunal recognizes three forms of criminal responsibility which may accrue to all members of the group. The first, “basic” category of JCE encompasses situations where all participants, acting pursuant to a common purpose, possess the same criminal intention to effectuate that purpose. The second, “systemic” form of JCE pertains to organised systems of ill-treatment. The third, “extended” type of JCE involves the liability of a JCE participant for a crime which falls outside the common purpose or design, but which is nevertheless a natural and foreseeable consequence of effectuating that common purpose.”

754. In section 4(1) of the Act of 1973, the legislature included the words “committed by several persons” which includes both direct participation and indirect participation in the commission of crimes. An accused’s involvement in the criminal act must form a link in the chain of circumstances. This means that the prosecution must, at least, established that the accused took part in the crimes committed in any manner. However, it is not necessary that the participation is a condition sine qua non, or that the offence would not have occurred but for the accused’s participation. Under section 4[1] it is not required to prove that the accused persons committed the crimes in furtherance of common intention of all accused-

persons. Prosecution is required to prove that the accused persons committed, aided, abetted, facilitated or contributed to the commission of crimes in any manner but under the Statutes of the ICTY, ICTR, ICC the prosecution is required to prove that the accused persons committed the offence to implement the common criminal plan or policy of the accused persons and the intent of the accused persons are the main essences of the notion “joint criminal enterprise” in the context of Public International Law.

Command or superior responsibility.

755. The Legislature adopted the principle “command or superior responsibility” in Sub-section (2) of section 4 of the Act of 1973 wherein it has been provided that if any commander or superior officer who orders, permits, acquiesces or participates in the commission of any of the crimes specified in section 3 or is connected with any plans and activities involving the commission of such crimes or who fails or omits to discharge his duty to maintain discipline, or to control or supervise the actions of the persons under his command or his subordinates, whereby such persons or subordinates or any of them commit any such crimes, or who fails to take necessary measures to prevent the commission of such crimes, is guilty of such crimes committed.

756. Nowadays, the superior responsibility of both civil and military commander is an established principle of our jurisdiction.

Although the customary international law *ifso facto* does not apply to our jurisdiction in view of the existence of the Act of 1973, but in interpreting the provision of section 4(2) of the Act of 1973, this tribunal may look at the jurisprudence evolved on the notion “command responsibility” by ICTY, ICTR, SCSL and ICC and our Apex Court in the case of *Motiur Rahman Nizami* considered the views adopted by the ICTY, ICTR and SCSL wherein it has been observed as follows;

“The above referred decisions of ICTR, ICTY and SCSL have settled that (i) the doctrine of command responsibility is also applicable to political leaders and other civilian superiors in position of authority, (ii) a civilian superior need not be official superior of the perpetrators, rather a *de-facto* command over the perpetrators is enough to hold someone responsible, (iii) a civilian superior may be liable for the crimes of his subordinates as long as he exercises effective control, and (iv) more than one superiors may be liable for the same crime committed by the subordinates. [**Motiur Rahman Nizami vs. the Government of Bangladesh, Criminal Appeal No.143 of 2014, Judgment on 06.1.2016, PDF page-140:**”]

757. A civilian commander without participating in the atrocities may incurred liability of the offence committed by perpetrator by acquiescence and our Appellate Division in the case of *Motiur Rahman Nizami* made an observation in the following language;

“The appellant Motiur Rahman Nizami being a very active political leader at that time had full knowledge of those atrocities. But in spite of that he, instead of prohibiting or discouraging the members of his Al-Badr Bahini had continued giving speeches praising and encouraging them and also urging them to cooperate with the Pakistani army. In those speeches, he addressed the pro-liberation people and freedom fighters as “betrayers” “miscreants”, “enemy of the country,” “agent of India” etc, and urged the Al-Badr and Rajakers to take revenge and to exterminate the enemies of the country. These speeches of the appellant and the facts and circumstances prove sufficiently that this accused-appellant Motiur Rahman Nizami acquiesced or tacitly accepted all the atrocious activities including the killing of intellectuals by the members of his Al-Badr Bahini during the period of liberation war.” **[Motiur Rahman Nizami vs. the Government of Bangladesh, Criminal Appeal No.143 of 2014, Judgment on 06.1.2016, PDF page-143]**

758. Naturally in war crime situation more than one person may hold the command position and if any offence is committed by any members of his force in the situation narrated in section 4(2) of the Act of 1973, all accused persons who were in command position incurred the liability for the offence committed by his subordinate perpetrator. In this regard, our Apex Court in the case of Motiur Rahman Nizami further held that

“More than one person can be superiors and can hold effective control on the same subordinates and more than one superior may be liable for the crime committed by the subordinates.” **[Motiur Rahman Nizami vs. the Government of Bangladesh, Criminal Appeal No.143 of 2014, Judgment on 06.1.2016, PDF page-148]**

759. The Command responsibility, popularly known as superior responsibility, often referred to as the Yamashita standard or the Medina standard, or the inaction of the commander is the doctrine of hierarchical accountability in cases of crimes against humanity, war crimes, genocide or any other international crimes. In The Art of War, written during the 6th century BC, Sun Tzu argued that “it was a commander’s duty to ensure that his subordinates conducted themselves in a civilised manner during an armed conflict.” The trial of Peter von Hagenbach by an ad hoc tribunal of the Holy Roman Empire in 1474 was the first “international” recognition of commanders’ obligations to act lawfully.” Hagenbach was put on trial for atrocities committed during the occupation of Breisach, found guilty of war crimes and beheaded. Since he was convicted for crimes “he as a knight was deemed to have a duty to prevent” Hagenbach defended himself by arguing that he was only following order from the Duke of Burgundy, Charles the Bold, to whom the Holy Roman Empire had given Breisach.” Despite the fact, there was no explicit use of a doctrine

of “command responsibility” it is seen as the first trial based on this principle.

760. During the American Civil War, the concept developed further, as is seen in “The Lieber Code of April 24, 1863.” This regulated accountability by imposing criminal responsibility on commanders for ordering or encouraging soldiers to wound or kill already disabled enemies.

Article 71 of the Lieber Code provided that:

“Whoever intentionally inflicts additional wounds on an enemy already wholly disabled, or kills such an enemy, or who orders or encourages soldiers to do so, shall suffer death, if duly convicted, whether he belongs to the Army of the United States, or is an enemy captured after having committed his misdeed.”

761. The doctrine of “command responsibility” was established by The Hague Conventions of 1899 and 1907 which upheld the notion that “a superior must account for actions of his subordinates.” It also suggests that military superiors have a duty to ensure that their troops act in accordance with international law and if they fail to command them lawfully, their respective states may be held criminally liable. In turn, those states may choose to punish their commanders. The Hague Conventions of 1899 and 1907 is considered as a foundational root of the modern doctrine of “command responsibility. After World War I, the Allied Powers

Commission on the Responsibility of the Authors of the War and on the Enforcement of Penalties recommended the establishment of an international tribunal, which would try individuals for “order[ing], or, with knowledge thereof and with power to intervene, abstain[ing] from preventing to taking measures to prevent, putting an end to or repressing, violations of the laws or customs of war.” Command responsibility (<http://www.globalpolicy.org/intljustice/general/2005/command/htm>) The Mens Rea Requirement, By Eugenia Levine, Global Policy Forum, February 2005.

762. The doctrine of command responsibility was applied by the German Supreme Court at the Leipzig War Crimes Trials after World War I, in the 1921 trial of Emil Muller wherein it has been observed as follows;

“His acts originated, not in any pleasure in persecution, or even in any want of feeling for the sufferings of the prisoners; but in a conscious disregard of the general laws of humanity. Had this not been so, he would not have generally troubled so much about the well-being of the prisoners, and his acts of ill-treatment would have caused more serious injury to those concerned than has been proved to have occurred. Not a single case has had really serious consequences.

His conduct has sometimes been unworthy of a human being: these factors the court considers decisive. When he mixed

with the prisoners there was seldom anything but angry words, attempts to ride them down, blows and efforts to push them out of his way: he never listened patiently to their grievances and complaints: he had no eyes for their obvious sufferings: he cared little for the individual, if only he could secure order among the prisoners collectively. It is impossible to consider his conduct as a number of separate instances of rash actions which he regretted: it appears rather as a deliberate practice of domineering disregard for other men's feelings. It is no justification that his methods were intended to secure discipline. It is also no excuse that the conditions had been brutalized by war. The only possible excuse for him was that he was over-excited: that he feared disorder, and that he did not know how to handle men. But even so, it must be recalled that he had under him prisoners who were peculiarly unfortunate, sick and suffering men who deserved protection. When these prisoners offended against the regulations, the cause, for the most part, lay in their miserable condition. Such men in such conditions were not likely to be really refractory. The accused should have avoided being unduly severe; and above all, he ought not to have indulged in such reprehensible means of punishment as blows, kicks, tying-up and such like. Such conduct dishonors our army, and is singularly unfitting in a man of his education and military as well as civilian position." He was convicted and sentenced to suffer the total sentence of 6 months.

763. The Post-WWII tribunals were the first international courts to apply superior responsibility to prosecute senior leaders for serious crimes. The constitutive laws of the Nuremberg and Tokyo

Tribunal the London Agreement and the International Military Tribunal for the Far East (IMTFE) Charter respectively did not contain explicit superior responsibility provisions. Instead, they included the following language: "Leaders, organizers, instigators and accomplices participating in the formulation or execution of a common plan or conspiracy to commit any of the foregoing crimes are responsible for all acts performed by any persons in the execution of such plan."

764. The jurisprudence of the post-WWII tribunals follows this trend of imposing liability on superiors for their omissions instead of restricting liability only to those superiors that were directly involved in serious crimes. The trial of General Tomoyuki Yamashita was the first international law case in which a superior was found guilty without affirmative evidence to link him to the crimes of his subordinates. The Tokyo Tribunal, which delivered guilty verdicts against several senior Japanese leaders, indicted them "by virtue of their respective offices" for having "deliberately and recklessly disregarded their legal duty to take adequate steps to secure the observance and prevent breaches thereof, and thereby violated the laws of war." The "Yamashita standard" is based upon the precedent set by the United States Supreme Court in the case of Japanese General Tomoyuki Yamashita. He was prosecuted in 1945, for atrocities committed by troops under his command in the

Philippines during the Pacific Theater of World War II. Yamashita was charged with “unlawfully disregarding and failing to discharge his duty as a commander to control the acts of members of his command by permitting them to commit war crimes.” The Yamashita standard Sugamo and the River Kwai (<http://robinrowland.com/sugamokwai.pdf>) By Robin Rowland, Paper presented to Encounters at Sugamo Prison, Tokyo 1945-52, The American Occupation of Japan and Memories of the Asia-Pacific War, Princeton University, May 9, 2003. The Commission found Yamashita guilty and adopted a new standard holding that where “vengeful actions are widespread offences and there is no effective attempt by a commander to discover and control the criminal acts, such a commander may be held responsible, even criminally liable.” The matter was appealed and was affirmed by the United States Supreme Court in 1946. After sentencing, Yamashita was executed.

765. Control Council Law No. 10 did not contain an explicit superior responsibility provision. In *the United States v. Brandt (Medical Case)*, a military tribunal, established under Control Council Law No. 10, articulated a standard of superior responsibility much like that in *Yamashita*, declaring: that law of war imposes on a military officer in a position of command an affirmative duty to take such steps as are within his power and

appropriate to the circumstances to control those under his command for the prevention of acts which are violations of the law of war. The tribunal made similar statements about superior responsibility in *United States v. Von Leeb (High Command Case)* and emphasized a commander's duty to prevent crimes from occurring and observed as follows;

“Any commanding officer of normal intelligence must see and understand their criminal nature. Any participation in implementing such orders, tacit or otherwise, a silent acquiescence in their enforcement by his subordinates, constitutes a criminal act on his part.” In the High Command Case (1947-8), the U.S. military tribunal held that in order for a commander to be criminally liable for the actions of his subordinates “there must be a personal dereliction” which “can only occur where the act is directly traceable to him or where his failure to properly supervise his subordinates constitutes criminal negligence on his part” based upon “a wanton, immoral disregard of the action of his subordinates amounting to acquiescence”..Command responsibility ([http:// www. globalpolicy. org/ intljustice/ general/ 2005/ command/ htm](http://www.globalpolicy.org/intljustice/general/2005/command/htm)) The Mens Rea Requirement, By Eugenia Levine, Global Policy Forum, February 2005.

766. The Tokyo Tribunal trial held under Control Council Law No.10 and in its judgment of Admiral Toyoda declared as follows:

“In the simplest language it may be said that this Tribunal believes that the principle of command responsibility to be that, if this accused knew, or should by the exercise of

ordinary diligence have learned, of the commission by his subordinates, immediate or otherwise, of the atrocities proved beyond a shadow of a doubt before this Tribunal or of the existence of a routine which would countenance such, and, by his failure to take any action to punish the perpetrators, permitted the atrocities to continue, he has failed in his performance of his duty as a commander and must be punished.”

767. In the German context, six civilian industrialists were accused of war crimes and crimes against humanity in *United States v. Flick* (Flick Cases.) for their participation in a slave labor camp. While three of the accused were acquitted, three men, Flick, Steinbrink, and Weiss, were found guilty. Flick was the controlling supervisor of the slave labor camp and was Weiss' superior. Though the final judgment mentioned only that Flick had "knowledge and approval" of Weiss' acts, the tribunal's holding was based on Flick's failure as a superior to prevent Weiss' actions.

768. In *Government Commissioner v. Roechling*, five German industrialists were found guilty under a fact pattern similar to the *Flick* case. The five accused, all held senior positions in the Roechling iron and steel firm were accused of mistreating their laborers, including prisoners of war and deported persons. The court noted that "Hermann Roechling and the other accused members of the Directorate of the Voelklingen works are not accused of having ordered this horrible treatment, but of having

permitted it; and indeed supported it, and in addition, of not having done their utmost to put an end to these abuses." The accused were found guilty for failing to take measures to improve the treatment of the prisoners and deportees working under their control.

769. In the aforementioned German cases, the Tribunal without referring the notion "superior responsibility" in their judgments found civilian business leaders guilty for their failures to prevent employees from abusing laborers. The Tokyo Tribunal Judgment treated civilian leaders much like their military counterparts, finding them guilty under a theory of superior responsibility for not taking appropriate actions to prevent crimes of which they should have known. Superior responsibility today is clearly defined because Additional Protocol I, followed by the ICTY and ICTR, and the ICC, have established and elucidated its three constituent elements. Additional Protocol I also made clear that international law requires a higher standard of proof than some of the post-WWII cases to hold superiors responsible for the crimes of their subordinates.

770. The "Medina standard" is based upon the 1971 prosecution of U.S. Army Captain Ernest Medina in connection with the My Lai Massacre during the Vietnam War. It held that a commanding officer, being aware of a human rights violation or a war crime, will

be held criminally liable when he does not take action. Excerpt of the Prosecution Brief on the Law of principals in United States v. Captain Ernest L. Medina (<http://www.law.umkc.edu/faculty/projects/ftrials/mylai/MYL-LAW3.HTM>)

771. The first international treaty to comprehensively codify the doctrine of command responsibility was the Additional Protocol I (“API”) of 1977 to the Geneva Conventions of 1949.

“Article 86(2) of Additional Protocol I sets out the law of superior responsibility for all superiors (including civilians) It states, as follows:

“The fact that a breach of the Conventions or of this Protocol was committed by a subordinate does not absolve his superiors from penal or disciplinary responsibility, as the case may be, if they knew, or had information which should have enabled them to conclude in the circumstances at the time, that he was committing or was going to commit such a breach and if they did not take all feasible measures within their power to prevent or repress the breach.”

772. Superior responsibility is a mode of liability that holds superiors responsible for the criminal acts of his subordinates. In Additional Protocol, I to the Geneva Conventions of 1949 (1977), more clearly defines superior responsibility and reflects a broad consensus on the state of international law. Article 87 of the Additional Protocol I to

the Geneva Convention 1949 speaks about the duty of a commander which runs as follows;

Article 87- Duty of commanders

“1. The high Contracting Parties and the Parties to the conflict shall require military commanders, with respect to members of the armed forces under their command and other persons under their control, to prevent and, where necessary, to suppress and report to competent authorities breaches of the Conventions and of this Protocol.

2. In order to prevent and suppress breaches, High Contracting Parties and Parties to the conflict shall require that, commensurate with their level of responsibility, commanders ensure that members of the armed forces under their command are aware of their obligations under the Conventions and this Protocol.

3. The High Contracting Parties and Parties to the conflict shall require any commander who is aware that subordinates or other persons under his control are going to commit or have committed a breach of the Conventions or of this Protocol, to initiate such steps as are necessary to prevent such violations of the Conventions or this Protocol, and, where appropriate, to initiate disciplinary or penal action against violators thereof.”

773. Article 1 of the Annex to the Hague Convention IV (Annex) states: "The laws, rights, and duties of war apply not only to armies, but also to militia and volunteer corps, fulfilling the following conditions: To be commanded by a person responsible

for his subordinates" Article 43 of the Annex further requires that those in positions of authority "take all steps in his power to re-establish and ensure, as far as possible, public order and safety."Hague Convention IV, therefore, stipulates that a military superior has certain responsibilities, but does not establish superior responsibility as a mode of individual criminal liability. It was not until the end of WWII that superior responsibility was used to hold high-level commanders responsible for the crimes of their subordinates.

774. In Article 86(2) for the first time, a provision would “explicitly address the knowledge factor of command responsibility. Article 87 obliges a commander to “prevent and, where necessary, to suppress and report to competent authorities” any violation of the Conventions and of API.

“In the discussion regarding “command responsibility,” the term “command” can be defined as

- De jure (legal) Command, which can be both military and civilian. The determining factor here is not rank but subordination and there are several structures which are as under;
- Policy command: heads of state, high-ranking government officials, monarchs

- Strategic command: War Cabinet, Joint Chiefs of Staff
- Operational command: military leadership. In Yamashita it was established that operational command responsibility cannot be ceded for the purpose of the doctrine of command responsibility; operational commanders must exercise the full potential of their authority to prevent war crimes- failure to supervise subordinates or non-assertive orders does not exonerate the commander.
- Tactical command: direct command over troops on the ground.

International case law has developed two special types of “de jure commanders.”

- Prisoners-of-war (POW) camp commanders: the ICTY established in *Aleksovski* that POW camp commanders are entrusted with the welfare of all prisoners, and subordination, in this case, is irrelevant.
- Executive commanders: supreme governing authority in the occupied territory. Subordination is again irrelevant- their responsibility is the welfare of the population in the territory under their control, as

established in the High Command and Hostages cases after World War II.

- De facto (factual) command, which specifies effective control, as opposed to formal rank. This needs a superior-subordinate relationship. Indicia are:
 - Capacity to issue orders.
 - The power of influence: influence is recognized as a source of authority in the Ministries case before the US military Tribunal after World War II.
 - Evidence stemming from distribution of tasks: the ICTY has established the Nikolic test- superior status is deduced from analyzing the distribution of tasks within the unit, and the test applies both to operational and POW camp commanders.”Common Responsibility and Superior Orders in the Twentieth Century. A century of Evolution (<http://www.murdock.edu.au/elaw/issue/Vlon1/hendin101tex.html>) by, Stuart E. Hendin, Murdock University Electronic Journal of Law.

775. After the WWII, the Act of 1973 is the first modern domestic law adopted the principle of command responsibility and

subsequently at the instance of the UN, the Statute of ICTY was made for trial of International Crimes which also adopted the concept of command responsibility for the crimes committed by subordinate. In the statutes of ICTR, SCSSL, ICC the doctrine of command responsibility has been adopted as a mode of criminal responsibility. The relevant provisions of the above-mentioned statutes and the decisions made thereunder are quoted below;

776. Statute of ICTY

Article 7: Individual criminal responsibility

- A person who planned, instigated, ordered, committed or otherwise aided and abetted in the planning, preparation or execution of a crime referred to in articles 2 to 5 of the present Statute, shall be individually responsible for the crime.
- The official position of any accused person, whether as Head of State or Government or as a responsible Government official, shall not relieve such person of criminal responsibility nor mitigate punishment.
- The fact that any of the acts referred to in articles 2 to 5 of the present Statute was committed by a subordinate does not relieve his superior of criminal responsibility if he knew or had reason to know that the subordinate was

about to commit such acts or had done so and the superior failed to take the necessary and reasonable measures to prevent such acts or to punish the perpetrators thereof.

- The fact that an accused person acted pursuant to an order of a Government or of a superior shall not relieve him of criminal responsibility, but may be considered in mitigation of punishment if the International Tribunal determines that justice so requires.

Article 6 of the Statute of the ICTR is the copy of the Article 7 of the Statute of the ICTY and to avoid repetition it is not required to quote the same.

Article 7(3) of the ICTY Statute established that crimes were committed by a subordinate does not relieve his superior of criminal responsibility if he knew or had reason to know that the subordinate was about to commit such acts or had done so and the superior failed to take the necessary and reasonable measures to prevent such acts or to punish the perpetrators.

777. In *The Prosecutor v. Delalic et al.* (“the Celevici case”) the ICTY considered the scope of command responsibility by concluding that “had reason to know” (article 7(3)) means that a commander must have “had in his possession information of a

nature, which at the least, would put him on notice of the risk of ...offences by indicating the need for additional investigation in order to ascertain whether ... crimes were committed or were about to be committed by his subordinates.” “In the Celebici judgment, the ICTY Trial Chamber held that the principle of individual criminal responsibility of superiors for failure to prevent or repress the crimes committed by subordinates forms part of customary international law and as regards essential elements of command responsibility observed in the following language;

- the existence of a superior –subordinate relationship;
- the superior knew or had reason to know that the criminal act was about to be or had been committed, and
- the superior failed to take the necessary and reasonable measures to prevent the criminal act or punish the perpetrator thereof.”

778. The ICTY and ICTR have applied superior responsibility to leaders with de facto control over their subordinates. The ICTY and ICTR require the same level of control to hold civilian and military superiors liable under superior responsibility. In *Prosecutor vs Deliaie (Celebici)* Case No.IT-96-21-A, Appeal

Judgment, I193-92(ICTY, February 20, 2001) it has been observed as follows;

“A commander or superior is the one who possesses the power or authority in either a de jure or a de facto form to prevent a subordinate’s crime or to punish the perpetrators of the crime after the crime is committed.”

779. In the Prosecutor v. Blaskic, Case No. IT-95-14-A, Appeals Judgment, ICTY, July 29, 2004) the Appeals Chamber considers that the *Celebici* Appeal Judgment has settled the issue of the interpretation of the standard of 'had reason to know.' In that judgment, the Appeals Chamber stated that 'a superior will be criminally responsible through the principles of superior responsibility *only if the information was available to him* which would have put him on notice of offences committed by subordinates.’”

780. In the case of Prosecutor vs. Brdjanin, Case No. IT-99-36-T, Judgment, 281 (Sept. 1, 2004), www.icty.org/x/cases/brdanin/tjud/en/brd-tj040901e.pdf (“[T] it was held that –

“The concept of effective control for civilian superiors is different in that a civilian superior's sanctioning power must be interpreted broadly. It cannot be expected that civilian superiors will have disciplinary power over their subordinate’s equivalent to that of military superiors in an analogous command position. For a finding that civilian

superiors have effective control over their subordinates, it suffices that civilian superiors, through their position in the hierarchy, have the duty to report whenever crimes are committed, and that, in light of their position, the likelihood that those reports will trigger an investigation or initiate disciplinary or criminal measures is extant.”

781. In *Prosecutor vs Kordic & Cerkoz*, Case No. IT-95-14/2-A, Judgment dated December 17, 2004, the ICTY Trial Chamber held that;

“Superior responsibility is a well-established mode of liability in modern international criminal jurisprudence and applies to both military and civilian leaders. The current formulation includes three elements that the prosecution must prove in order to obtain a conviction: (1) the existence of a "superior-subordinate relationship" characterized by "effective control" in which (2) the superior "knew or had reason to know" that his subordinates were committing or had committed crimes, and for which (3) the superior failed to take "necessary and reasonable measures" to prevent the commission of those crimes or to punish the perpetrators thereof.”

782. The ICTY and ICTR have made clear that a superior's duties to "prevent" and "punish" crimes are two distinct obligations: a superior must both take measures, if possible, to prevent the commission of crimes *and* punish the perpetrators thereof. In *prosecutor vs Limaj*, Case No.IT-03-66-T.Judgment, ICTY

November 30, 2008, it has been observed in the following language;

“It is sufficient that the superior is in possession of sufficient information, even general in nature, to be on notice of the likelihood of illegal acts by his subordinates, *i.e.*, so as to justify further inquiry in order to ascertain whether such acts were indeed being or about to be committed”

783. The judgment against Jean-Paul Akayesu established rape as a war crime. Rape was placed in line with “other acts of serious bodily and mental harm” rather than the historical view of rape as “a trophy of war.” Akayesu was held responsible for his actions and non-actions as mayor and police commander of a commune in which many Tutsis were killed, raped, tortured, and otherwise persecuted.

784. Statute of SCSL

Article 6: Individual criminal responsibility

- A person, who planned, instigated, ordered, committed or otherwise aided and abetted in the planning, preparation or execution of a crime referred to in articles 2 to 4 of the present Statute shall be individually responsible for the crime.
- The official position of any accused persons, whether as Head of State or Government or as a responsible

government official, shall not relieve such person of criminal responsibility nor mitigate punishment.

- The fact that any of the acts referred to in articles 2 to 4 of the present Statute was committed by a subordinate does not relieve his or her superior of criminal responsibility if he or she knew or had reason to know that the subordinate was about to commit such acts or had done so and the superior had failed to take the necessary and reasonable measures to prevent such acts or to punish the perpetrators thereof.
- The fact that an accused person acted pursuant to an order of a Government or of a superior shall not relieve him or her of criminal responsibility, but may be considered in mitigation of punishment if the Special Court determines that justice so requires.
- Individual criminal responsibility for the crimes referred to in article 5 shall be determined in accordance with the respective laws of Sierra Leone.

785. In prosecution –v-Brima, the Appeal Chamber of SCSL held that the superior is one who possesses the power or authority to either prevent subordinates' crimes or punish the subordinates after

the crime has been committed. The power or authority may arise from a de-jure or de facto command relationship. Whether it is de-jure or de facto, the superior-subordinate relationship must be one of effective control, however, short or temporary in nature, and “effective control refers to material abilities to prevent or punish criminal conduct.”

786. Rome Statute of the ICC

Article 28: Responsibility of commanders and other superiors

In addition to other grounds of criminal responsibility under this Statute for crimes within the jurisdiction of the Court:

- A military commander or person effectively acting as a military commander shall be criminally responsible for crimes within the jurisdiction of the Court committed by forces under his or her effective command and control, or effective authority and control as the case may be, as a result of his or her failure to exercise control properly over such forces, where:
 - That military commander or person either knew or, owing to the circumstances at the time, should have known that the forces were committing or about to commit such crimes; and

- That military commander or person failed to take all necessary and reasonable measures within his or her power to prevent or repress their commission or to submit the matter to the competent authorities for investigation and prosecution.
- With respect to superior and subordinate relationships not described in paragraph(a), a superior shall be criminally responsible for crimes within the jurisdiction of the Court committed by subordinates under his or her effective authority and control, as a result of his or her failure to exercise control properly over such subordinates, where:
 - The superior either knew or consciously disregarded information which clearly indicated, that the subordinates were committing or about to commit such crimes;
 - The crimes concerned activities that were within the effective responsibility and control of the superior; and
 - The superior failed to take all necessary and reasonable measures within his or her power to

prevent or repress their commission or to submit the matter to the competent authorities for investigation and prosecution.

787. The ICC Rome Statute appears to modify the control requirement for civilian leaders. While in the military context the Rome Statute merely states that a commander is responsible for the crimes committed by "forces under his or her effective command and control," in the civilian context it adds that the crimes must have "concerned *activities* that were within the effective responsibility and control of the superior." The Rome Statute explicitly recognizes what ICTY jurisprudence has implied: those civilian leaders cannot be held responsible for every crime perpetrated by individuals under their command, as they tend to have a broader range of responsibilities than their military counterparts.

788. Article 28 of the Rome Statute of the International Criminal Court codified the doctrine of command responsibility. Under Article 28(a) military commanders are imposed with individual responsibility for crimes committed by forces under their effective command and control if they: "either knew or, owing to the circumstances at the time, should have known that the forces were committing or about to commit such crimes." It uses the stricter

“should have known” standard of mens rea, instead of “had reason to know”, as defined by the ICTY Statute.

789. The ICTY and ICTR impose on all superiors, whether civilian or military, a *mens rea* standard that falls between ordinary negligence and recklessness, the *Bemba Gombo* Decision essentially adopts an ordinary negligence standard for military superiors that "should have known" of the crimes but the ICC requires a higher standard of fault for civilian superiors. The "consciously disregarded" language in Article 28(b)(i) of the Rome Statute suggests a standard closer to recklessness. The ICTY and ICTR Statute, state that the "failure to take the necessary and reasonable measures to prevent such acts or to punish the perpetrators." The Rome Statute also requires superiors, both civilian and military, to use "necessary and reasonable measures." Moreover, the Rome Statute elaborates that superiors must take measures "to prevent or repress [the crimes] or to submit the matter to the competent authorities for investigation and prosecution."

790. In the case of the Prosecutor vs. Jean-Pierre Bemba Gombo [Case No. ICC-01/ 05-01/08 Para 501, judgment dated 15th June 2009] the ICC Pre-Trial Chamber II considered the notion command responsibility and having explained the situations fixed up the responsibility of the commander in the following language;

“In light of the foregoing and having thoroughly assessed the evidence, the Chamber reiterates its finding that Mr. Jean Pierre-Bemba neither took the necessary nor the reasonable measures within his material ability to prevent or to repress the crimes committed by his MLC subordinates throughout the five-month period of the intervention in the CAR. The evidence shows that a genuine will to take the necessary and reasonable measures to protect the civilian population by preventing crimes or even repressing their commission was lacking. Mr. Jena-Pierre Bemba’s failure to fulfill his duties to prevent crimes increased the risk of their commission by the MLC troops in the CAR at all times relevant to the Case in reaching this finding the Chamber has given particular weight to Mr. Jean-Pierre Bemba’s material ability to prevent and repress crimes; the availability of a functional military judicial system within the MLC through which he could have punished crimes committed and prevented their future repetition during the period of intervention; the absence of any measures with respect to the crimes committed by MLC troops between November 2002 and January 2003 which increased the risk of their future occurrence; and the length of time taken to announce the troop withdrawal and to issue an order to this effect, which led to the continuing commission of the crimes at least between mid January to mid February 2003.”

791. The Article 28(a) of the ICC Statute is more detailed than the provisions on command responsibility contained in the Statutes of the two ad hoc tribunals. In line with the Pre-Trial Chamber’s (PTC) Decision on the Confirmation of charges in Bemba, the TC

III in its judgment dated 21.3.2016 fixed up the following elements of command responsibility;

“1 crimes within the jurisdiction of the Court must have been committed by forces;

2.the accused must have been either a military commander or a person effectively acting as a military commander:

3. the accused must have had effective command and control, or effective authority and control, over the forces that committed the crimes;

4.the accused either knew or, owing to the circumstances at the time, should have known that the forces were committing or about to commit such crimes;

5.the accused must have failed to take all necessary and reasonable measures within his power to prevent or repress the commission of such crimes or to submit the matter to the competent authorities for investigation and prosecution; and

6.the crimes committed by the forces must have been a result of the failure of the accused to exercise control properly over them.

Considering the nature of command responsibility, the ICC TC III highlighted that under the Rome Statute a commander “shall be criminally responsible for crimes within the jurisdiction of the Court committed by forces under his or her effective command and control”. The responsibility of a commander is distinct from the responsibility of those who

commit the crimes. Adopting the language of the ICTY in Halilovic, the TC III maintained that the command responsibility is a sui generis form of responsibility.”

792. The ICC Trial Chamber in Radovan Karadzic relied on the notion “command responsibly” (Case No. IT-95-5/18-T judgment dated 24.03.2016) to make the commander criminally responsible for the offences perpetrated by his subordinates and in paragraph 579 relied on the decision made in Oric Appeal judgment para 21 which considered Article 7(3) of the ICTY Statute provided provision to make the superior responsible for offence committed by his subordinate and it has been observed that;

“Under Article 7(3) of the Statute, a superior may incur criminal responsibility with respect to a crime for which his subordinate is criminally responsible if the following three elements are established : (i) there was a superior-subordinate relationship between the accused and the perpetrator of the underlying crime; (ii) the superior knew or had reason to know that the criminal act was about to be or had been committed; and (iii) the superior failed to take the necessary and reasonable measures to prevent the criminal act or punish the perpetrator thereof. A superior can bear responsibility under Article 7(3) with respect to the criminal conduct of his subordinates under “all other modes of participation under Article 7(1)”, namely the “planning, instigating ordering, committing or otherwise aiding and abetting a crime” by his subordinates.”

793. The essence of the superior or command responsibility is the “effect control” over the subordinate” which is a matter of fact, may be either proved or inferred from the fact proved. Under Article 28 of the Rome Statute of the ICC, both de jure or de facto superior are responsible for the offences committed by his subordinate and in this regard the ICC Trial Chamber in Karadzic para 580 further observed that;

“In order to establish that a superior-subordinate relationship exists between the accused and the perpetrator of an underlying crime, it must be proven that he exercised “effective control” over the perpetrator. A superior is someone who possesses “the power or authority in either a de jure or a de facto form to prevent a subordinate’s crime or to punish the perpetrators of the crime”. In assessing whether there is a superior-subordinate relationship it does not matter whether the accused was a civilian or military superior. An evaluation of effective control is more a question of fact than of law and requires consideration of factors that show “that the accused had the power to prevent, punish, or initiate measures leading to proceedings against the alleged perpetrators where appropriate.”

The evidentiary value of a statement of a witness who died during trial.

794. The International Crimes [Tribunals] Act, 1973 is a domestic legislation enacted for the trial of International Crimes as specified in Section 3(2) of the said Act which ensured a fair trial. Right of

cross-examination of the prosecution witnesses by the defence is indispensable and pre-condition of fair trial and globally followed in the trials of International Crimes since WWII and the Legislature at the time of enactment of the Act of 1973 incorporated this principle in section 17 of the Act of 1973 which is quoted below;

Section 17.(1) During the trial of an accused person he shall have the right to give any explanation relevant to the charge made against him.

(2) An accused person shall have the right to conduct his own defence before the Tribunal or to have the assistant of counsel.

(3) An accused person shall have the right to present evidence at the trial in support of his defence, and to cross-examine any witness called by the prosecution.

795. As per provision of Section 17 of the Act of 1973 right of cross-examination of prosecution witness by the defence is indispensable and pre-condition of fair trial, but at the same time the Legislature also made provision in section 19 of the Act of 1973 to receive in evidence any statement made by any person recorded by an investigation officer during investigation of the case who at the time of trial is dead. Provision of Section 19 of the Act of 1973 has already been quoted above for which to avoid repetition it is not required to quote the same again.

796. On a careful reading of both the provisions contained in Section 17 and 19 of the Act of 1973, it reveals that cross-examination of the prosecution witnesses is the basic right of the accused person and pre-condition of a fair trial. If any witness died during trial whose statement has been recorded by the Investigation Officer during the investigation of the case, this Tribunal considering the probative value of the statement of that witness may receive his statement in evidence. In that case, the defence has no scope to cross-examine the dead witness, but at the same time, the prosecution also cannot be deprived of receiving the statement of dead witnesses in evidence in support of the charge framed. On reading of the provision as contained in Section 17 and 19 of the Act of 1973, I am of the view that the statement of any witnesses recorded by an Investigating Officer during investigation of the case who died during trial may be relied on by the prosecution to confirm or corroborate the evidence of another witness, but statement of a witness recorded by an investigation Officer who died during trial cannot be the sole basis of conviction.

797. A brief account of the accused persons

(i) Accused Md. Sakhawat Hossain [61], son of late Omar Ali and late Anowara Begum of village Hijoldanga, Police Station-Keshobpur, District-Jessore was born on 01.03.1954. He passed Alim Examination in 1967 and Fazil Examination in 1969. He got

his Kamil degree from Alia Madrasha, Khulna in 1971, but that examination was cancelled. Thereafter, he obtained his Kamil degree in 1972. He also obtained M.A. degree in 1976 from the department of Islamic Studies of the University of Dhaka. In 1966, he joined Islami Chhatra Sangha [ICS], the student wing of Jamaat-e-Islami [JEI], the prosecution alleged. After the independence of Bangladesh, he joined the Motijheel Ideal School as an Assistant Teacher. Subsequently, he resigned from that school and joined in the office of Accountant General [A.G] in 1981. He became the 'Rukan' of Jamaat-e-Islami in 1986, the prosecution alleged. He was elected as a Member of Parliament in 1991. Thereafter, he joined the Bangladesh Nationalist Party [BNP]. He was also elected as a Member of Parliament in 1996. In 2008, he joined the Jatio Party [JP] and since then, he has been holding the post as ' Presidium Member' of the JP.

(ii) Accused Md. Billal Hossain Biswas [75], son of late Yakub Ali Biswas alias Akabbar alias Akbor and late Rupban Bibi of village Nehalpur, Police Station-Keshobpur, District-Jessore was born on 10.05.1940. He joined the Razakar Bahini during the war of liberation in 1971, the prosecution alleged.

(iii) Accused Md. Lutfor Morol [69] (now dead), son of late Joynal Morol and late Mekarjan of village Porchokra, Police Station Keshobpur, District-Jessore was a Member of local Razakar Bahini

and an accomplice of accused Md.Sakhawat Hossain, at the time of War of Liberation in 1971, the prosecution alleged.

(iv) Accused Md. Ibrahim Hossain alias Ghungur Ibrahim [60] [absconded], son of late Yakub Ali Biswas alias Akabbar alias Akbor and late Rupban Bibi of village Nehalpur, at present Boga, Police Station-Keshobpur, District-Jessore was a member of local Razakar Bahini and an accomplice of accused Md. Sakhawat Hossain at the time of War of Liberation in 1971, the prosecution alleged.

(v) Accused Sheikh Mohammad Mujibur Rahman alias Mujibur Rahman [absconded] [61], son of Sheikh Mohammad Afazulla alias Effaztulla and late Pachibibi of village Sheikhpara , Police Station Keshobpur, District-Jessore was a member of local Razakar Bahini and an accomplice of accused Md. Sakhawat Hossain at the time of War of Liberation in 1971, the prosecution alleged.

(vi) Accused Md. A. Aziz Sardar [absconded] [65], son of late Ful Miah Sardar and late Nurjahan Begum of village Mominpur, Police Station- Keshobpur, District-Jessore was a member of local Razakar Bahini and an accomplice of accused Md. Sakhawat Hossain at the time of War of Liberation in 1971, the prosecution alleged.

(vii) Accused Abdul Aziz Sardar [absconded] [66], son of late Ahmmad Sardar and late Sakina of village Boga, Police Station-

Keshobpur, District-Jessore was a member of local Razakar Bahini and an accomplice of accused Md. Sakhawat Hossain at the time of War of Liberation in 1971, the prosecution alleged.

(viii) Accused Kazi Ohidul Islam alias Kazi Ohidus Salam [absconded] [61], son of late Kazi Motiassalam alias Motiar Salam and late Hosneara Begum of village Sheikhpara, Police Station-Keshobpur, District-Jessore was a member of local Razakar Bahini and an accomplice of accused Md. Sakhawat Hossain at the time of War of Liberation in 1971, the prosecution alleged.

(ix) Accused Md. Abdul Khaleque Morol [absconded] [68], son of late Hachan Ali Morol and late Rebeya Begum of village Altapoul, Police Station-Keshobpur, District-Jessore was a member of local Razakar Bahini and an accomplice of accused Md. Sakhawat Hossain at the time of War of Liberation in 1971, the prosecution alleged.

Brief Procedural History.

Submission of “Formal Charge” and taking cognizance of offences.

798. The record shows that after holding investigation on some atrocious events allegedly committed during the War of Liberation in 1971 in a systematic manner directing unarmed civilians in different villages under Keshobpur Police-Station, District-Jessore by the armed killing squad of local Razakars, the Investigating Agency submitted its investigation report before the Chief

Prosecutor against 12(twelve) accused persons including the accused persons mentioned hereinabove finding them prima facie responsible for the atrocities. The Chief Prosecutor considering the investigation report and documents submitted therewith by the Investigating Agency, the nature, pattern of the alleged atrocious events and culpable participation and involvement of the 12(twelve) accused persons, submitted a single “formal charge” with a view to prosecuting them jointly for participation or contribution or facilitation or abetment to the commission of the alleged offences in the course of the same transaction and they appear to have allegedly acted in furtherance of common plan and design to the accomplishment of such offences. Out of twelve accused persons, this Tribunal by order dated 08.09.2015 discharged three accused- persons namely (1)Md. Akram Hossain,(2) Ojihar Morol alias Ojiwar Morol and (3) Moshiar Rahman, and took cognizance of offences against 9(nine) accused persons as mentioned hereinabove.

Framing of Charge

799. Out of nine accused persons (1) accused Md. Sakhawat Hossain,(2) accused Md. Billal Hossain Biswas and (3) accused Md. Lutfor Morol has been in detention. After framing charges accused Md. Lutfor Morol died on 06.05. 2016 while he was in custody and the proceedings of the instant case against him stand

abated. The other six accused persons neither could have been arrested nor did they surrender and remained absconding. After taking cognizance of offences against accused persons, this Tribunal on 30.09.2015 passed order for publication of notice in two daily newspapers as required under Rule 31 of the International Crimes (Tribunal-1) Rules of Procedure, 2010 against the six absconding accused, namely (1) accused Md. Ibrahim Hossain alias Ghungur Ibrahim, (2) accused Sheikh Mohammad Mujibur Rahman alias Mujibur Rahman, (3) accused Md. A. Aziz Sardar, (4) accused Abdul Aziz Sardar, (5) accused Kazi Ohidul Islam alias Kazi Ohidus Salam and (6) accused Md. Abdul Khaleque Morol as the execution of a warrant of arrest issued against them earlier was returned unserved. Despite the publication of the notice in two daily newspapers namely 'Daily Janakantha' and the 'Daily Sun' dated 05.10.2015, the six absconding accused persons did not surrender for which this Tribunal ordered for holding the trial in absentia against them and appointed Mr. Abdus Sukur Khan, Advocate to defend (1) accused Md. Ibrahim Hossain alias Ghungur Ibrahim, (2) Sheikh Mohammad Mujibur Rahman alias Mujibur Rahman and (3) Md. A. Aziz Sardar, son of late Ful Miah Sardar, and (4) accused Md. Lutfor Morol [now dead] who was in jail custody and Mr. Qutub Uddin Ahmed, Advocate to defend accused (1) Abdul Aziz Sardar, son of late Ahmmad Sardar, (2)

Kazi Ohidus Islam alias Kazi Ohidus Salam and (3) Md. Abdul Khaleque Morol, as State defence counsels. This Tribunal also ordered the prosecution for furnishing documents it relies upon to the State defence counsels and fixed on 17.11.2015 for hearing the charge framing matter. Accused Md. Sakhawat Hossain and accused Md. Billal Hossain Biswas engaged Mr. Abdus Satter Palwan, Advocate to defend them. On 17.11.2015 and 22.11.2015, this Tribunal heard the charge framing matter and by order dated 23.10.2015 framed charge against 9 (nine) accused- persons as mentioned above.

Witnesses adduced by the parties.

800. The prosecution submitted a list of 32 witnesses along with formal charge and documents. But during trial prosecution has examined 17(seventeen) witnesses including the investigation officer to prove the charges framed against the accused –persons. During the investigation of the case, the Investigation Officer having examined witnesses Md. Nesar Ali [60] and Khandaker Abdur Razzaque [65] recorded their statement, but during the trial of the case both of them died on 24.10.15 and 27.12.15 respectively and accordingly the learned Prosecutor filed an application under section 19(2) of the Act of 1973 praying to receive their statement in evidence. After hearing, both the prosecution and the defence, this Tribunal by order dated 2.6.2016 allowed the application filed

by the prosecution under section 19(2) of the Act of 1973 and the statement of those witnesses recorded by the Investigation Officer has been received in evidence. None was examined by the defence, but the defence counsels engaged on behalf of all the accused persons have cross-examined all the prosecution witnesses.

Defence case:

801. From the trend of cross-examination, the defence case as appears is that the accused persons were not Razakar or accused Md. Sakhawat Hossain was not Razakar Commander at the time of War of Liberation in 1971 and the prosecution failed to exhibit any documentary evidence to prove that the accused persons were Razakar in 1971 and after long 45 years of the alleged offences, mere oral testimony is not sufficient to prove that the accused – persons committed alleged offences as Razakar. It is the further case of the defence that accused persons were not involved with the alleged offences and they also not aided, abetted, facilitated or participated in the commission of any crimes as alleged by the prosecution and with an ulterior motive, the prosecution examined only local rival political persons who are inimical to the defence. All the allegations brought against the accused persons involving the offence of crimes against humanity are false, frivolous, politically motivated and the offences as narrated in the charges,

might have been committed by the Pakistani army and the offences did not take place in the manner as alleged by the prosecution.

Burden of proof and the right of the accused persons:

802. The fundamental principle of criminal jurisprudence is that the prosecution is bound to prove the charge to the hilt beyond reasonable doubt against the accused persons. The Evidence Act, 1872 and the Code of Criminal Procedure, 1898 shall not apply in any proceedings of this Tribunal and the legislature made provision in Section 19 of the Act of 1973 regarding the rules of evidence which provided that “the tribunal shall not be bound by technical rules of evidence and it shall adopt and apply to the greatest possible extent expeditious and non-technical procedure.” Jurisprudentially, the accused persons are presumed to be innocent until prosecution proved the guilt of the accused persons beyond all reasonable doubt. Under the Act of 1973, the accused persons are not bound to prove anything and the burden of proof always lies upon the prosecution. As per provision provided in Section 17 of the Act of 1973, during trial the accused- persons shall have the right to give any explanation relevant to the charges made against them and shall have the right to present evidence at the trial in support of his defence, and to cross-examine any evidence called by the prosecution.

Recognition of the accused persons.

803. The learned Prosecutor Mr. Zead-Al-Malum appearing with Ms. Rezia Sultana on behalf of the prosecution submitted that the accused persons were the inhabitant of the locality of Chingra Bazaar Razakar Camp and the witnesses examined by the prosecution were also the locals and the accused –persons were previously known to them, for which the prosecution witnesses Nos. 1 to 13 and witnesses Nesar Ali and Khondakar Abdur Razzaque [both died during trial] rightly recognized the accused persons as locals of the crime site.

804. Conversely, the learned Advocate Mr. Abdus Sattar Palwan appearing on behalf of the accused Md. Sakhawat Hossain, Md. Billal Hossain Biswas, Abdul Aziz Sardar, son of late Ahmed Sardar, Md. Abdul Khaleque Morol and Kazi Ohidul Islam alias Kazi Ohidus Salam submitted that the alleged occurrence took place long before 45 years and the witnesses examined by the prosecution were minor at the time of War of Liberation in 1971 for which it was not possible on their part to recognize the perpetrators, who actually had committed the alleged offences.

805. Mr. Abdus Sukur Khan, the learned State defence counsel appearing on behalf of accused Md. Ibrahim Hossain alias Ghungur Ibrahim, Sheikh Mojibur Rahman alias Mujibur Rahman and Md. A. Aziz Sardar, son of late Ful Mia Sardar adopted the submissions advanced by the learned Advocate Mr. Abdus Sattar

Palwan and further submitted that the accused –persons are not the locals of the crime site for which there was no reason for the witnesses to recognize the accused persons.

806. To resolve the dispute as regards recognition of the accused person, let us see the evidence of the prosecution witnesses, what they have testified before this Tribunal regarding the recognition of the accused persons;

P.W 1 Gaziur Rahman was aged about 17 years in 1971. He stated that in the middle of Bangla month, Sraban in 1971 one day at about 10 am accused Md. Sakhawat Hossain along with other 30/40 Razakars convened a meeting in the Ghadi Ghar[business office] of Muslim League leader Munshi Solimuddin situated at Chingra Bazaar and delivered an inciting speech stating that the members of Awami League and the people who say “Joy Bangla” are ‘Kafer, Monafek’ and decided to prepare their list to be killed after finding them out. He further stated that the accused persons were locals of the crimes site for which they were previously known to him. During cross-examination, the defence did not deny the above evidence of P.W.1.

P.W. 2 Fazlur Rahman Gazi was aged about 15/16 years at the time of War of Liberation in 1971. He stated that accused persons were

the inhabitant of the same locality for which they were previously known to him.

P.W. 3 Nuruddin Morol is a victim and freedom fighter. He stated that accused persons were previously known to him. In cross-examination in reply to a quarry, he stated that accused Md. Sakhawat Hossain contested in the general election from his locality and he saw accused Md. Sakhawat Hossain before and after War of Liberation in 1971.

P.W. 4 Momin Gazi was a young boy aged about 18/ 19 years at the time of War of Liberation in 1971. He stated that the accused persons were locals for which they were previously known to him. During cross-examination in reply to a question put to him by the defence, he stated that in 1979 accused Md. Sakhawat Hossain as the candidate of Jamaat-e-Islam took part in the general election, but he could not say, from which party, accused Md. Sakhawat Hossain participated in the general election in 1986 and 1996.

P.W. 5 Kazi Abdul Aziz was aged about 21/22 years old at the time of War of Liberation in 1971. In the examination-in-chief, he stated that the aforesaid Razakars and accused persons (accused Md. Sakhawat Hossain, accused Ibrahim, accused Abdul Aziz Sardar, accused Md. A Aziz Sardar, accused Abdul Khaleque Morol, accused Lutfor Morol used to come to Chingra Bazar for which

they were previously known to him. In cross-examination P.W. 5 stated that the house of accused Abdul Khaleque was situated at village Altapul of Keshobpur Thana.

P.W. 6 Miron Sheikh is an injured victim and a freedom fighter. He stated that the accused persons were inhabitants of the same locality for which they were previously known to him.

P.W. 7 Md. Liakot Ali Sheikh, a freedom fighter, in examination-in-chief, stated that the Razakar accused persons were inhabitants of his neighbouring villages and they were previously known to him.

P.W. 8 Hasan Ali Sheikh is an old man of 91 years. In cross-examination in reply to a question put to him by the defence, he stated that accused Abdul Aziz, accused Billal and accused Abdul Khaleque were the Razakars of his Union, and Chingra Razakar Camp was situated 3 / 4 kilometers away from his village Mohadebpur.

P.W. 9 Md. Kamal Sardar stated that accused Md. Sakhawat Hossain was the Razakar Commander of Chingra Bazaar Razakar Camp which was set up on 15th Jytha in 1971. He stated that on 28th Bangla month, Ashwin in 1971 in the morning the Razakars who were going to the east side of the boathouse was known to him by face and he used to see them in the Bazaar for which he could

recognize them. In cross-examination, he stated that Chingra Bazaar was situated to the one-kilometer east side from his house. He denied the suggestion that accused Abdul Aziz, son of Ful Sardar, accused Lutfor Morol were not known to him.

P.W. 10 Rashidul Haque Master is a freedom fighter. He stated that the accused persons were inhabitants of the adjacent villages for which they were previously known to him. In cross-examination, he further stated that in 1996 accused Md. Sakhawat Hossain was elected Member of Parliament from Jamaat-e-Islam, and that name of the father of accused Ibrahim Hossain is Ekabbar Ali, and that before 1971 accused Ibrahim was a student, but in 1971, he was a Razakar.

P.W. 11 Md. Abdus Subhan Sardar is a freedom fighter. He stated that after going to Datpur, on 27th Bangla month, Ashwin in 1971 at about 9-30 am he came back to his own village Boga to collect information about Razakars. He further testified that the accused persons were previously known to him since they were inhabitants of the same locality before 1971. He stated that Yeakub Ali Biswas is the father of accused Ibrahim.

P.W. 13 Md. Mozid Morol stated that Razakars having detained abducted his brother Nuruddin Morol [P.W. 3) and confined him in Chingra Razakar Camp. On the same day in the afternoon, he went

to Chingra Razakar Camp to see his brother Nuruddin Morol, and that the accused persons were inhabitants of the adjacent villages for which they were previously known to him, and that at the very early age, he saw accused Md. Sakhawat Hossain.

Witnesses Nesar Ali and Khondakar Abdur Razzaque [both of them died during the trial of the case] stated to the Investigating Officer that they were locals of the crime site. Nesar Ali was a freedom fighter, and Knandoker Abdur Razzaque was a resident of village-Chingra and a business man of Chingra Bazaar who stated that Md. Sakhawat Hossain was the Commander of Chingra Bazaar Razakar Camp and other Razakars of the said Camp used to come to his shop to purchase goods. Nesar Ali also stated that Md. Sakhawat Hossain was Razakar Commander of Chingra Bazaar Razakar Camp.

807. The above-mentioned evidence of the prosecution witnesses as regards recognition of the accused persons was not disputed by the defence by giving a suggestion to them that the accused persons were not known to them, although during cross-examination of the P.W. 9 a suggestion was given to him that accused Abdul Aziz son of Ful Sardar and Lutfor Morol were not known to him, but P.W. 9 denied the suggestion.

808. It is alleged that the accused persons having abducted all the detainees from their house confined them in Chingra Bazaar Razakar Camp and after inhuman torture killed Chandtullah Gazi and A. Maleque Sardar on the bank of River Kapotakha situated beside Chingra Bazaar Razakar Camp and committed rape on Ashura Khatun. The P.Ws. 1 and 2 are sons of Martyr Chandtullah Gazi and P.W.4 is the nephew, and P.W. 3 is a freedom fighter. P.Ws. 1 to 5, 9 and 13 were the inhabitant of the village Chingra and the crime site i.e. Chingra Razakar Camp was also situated in the same village. P.Ws. 6 to 8 were the inhabitant of village Mohadebpur, adjacent village of Chingra Razakar Camp. P.W. 6 was a source of freedom fighters and P.Ws. 3, 7, 10 and 11 are freedom fighters and P.Ws. 3 and 6 are the victims of abduction, confinement, and torture. P.W. 10 is the inhabitant of village Razakathi, adjacent to Chingra Razakar Camp.

809. It is further alleged that accused Md. Sakhawat Hossain was an influential local leader who subsequently contested in the General Election in 1979 and other accused persons were also the locals of the crime site. It is also alleged that accused Md. Sakhawat Hossain set up Razakar Camp at Chingra Bazaar in the Bangla month Jystha in 1971, and other accused persons joined the locally formed Razakar Bahini and the alleged offences were perpetrated in Bangla months Ashwin[October] in 1971 in and

around the Chingra Razakar Camp and during this four/five months all the accused persons were closely associated with the Chingra Bazaar Razakar Camp and actively collaborated with the Pakistani occupation army.

810. It is very natural that at the time of War of Liberation in 1971, the freedom fighters and pro-liberation people of the locality were very much aware of the members of the locally formed Razakar Bahini. From the direct evidence of the prosecution presented to the Tribunal it stands proved that the accused persons were known to the prosecution witnesses before the commission of the offences alleged to have been committed at the time of the War of Liberation in 1971 and the prosecution witnesses correctly identified them at the time of the commission of the alleged offences.

811. On scrutiny of the evidence of prosecution witnesses, it transpires that the prosecution witnesses and the accused persons are locals of the crime site and they were known to each other before the alleged offences took place. P.Ws. 1 to 13 and witnesses Nesar Ali and Khondakar Abdur Razzak (both of them died during trial) are locals of the crime site and they rightly recognized all the accused persons who were also the locals of the crime site at the time of War of Liberation in 1971.

Whether the accused persons belonged to Razakar Bahini.

812. Mr. Zead-Al-Malum the learned prosecutor appearing on behalf of the prosecution submitted that the accused Md. Sakhawat Hossain as Razakar Commander and all other accused as Razakar actively took part in the War in 1971 against Bangladesh and collaborated with the Pakistani occupation army and joined in local Razakar Bahini and perpetrated the crimes against humanity in their locality and by adducing both oral and documentary evidence, the prosecution proved that the accused persons were Razakar and accused Md. Sakhawat Hossain was the Razakar Commander in 1971.

813. Conversely, Mr. Abdus Sattar Palwan learned defence counsel appearing on behalf of the accused Md. Sakhawat Hossain, Md. Billal Hossain Biswas, Abdul Aziz Sardar, son of late Ahmed Sardar, Md. Abdul Khaleque Morol and Kazi Ohidul Islam alias Kazi Ohidus Salam submitted that the prosecution totally failed to prove any documentary evidence to show that the accused persons were the Razakar at the time of War of Liberation in 1971. He further submitted that the Razakars were appointed by the Pakistani army and they used to draw the monthly salary and in the absence of any documentary evidence it is not legally permissible to arriving any decision as to whether the accused persons were the Razakar or Razakar Commander.

814. Mr. Abdus Sukur Khan, the learned State defence counsel appearing on behalf of accused Md. Ibrahim Hossain alias Ghungur Ibrahim, Sheikh Mujibur Rahman alias Mujibur Rahman and Md. A. Aziz Sardar, son of late Ful Mia Sardar adopted the submission advanced by the learned Advocate Mr. Abdus Sattar Palwan and further submitted that the accused –persons are not the locals of the crime site for which there was no reason for the accused persons to join the locally formed Razakar Bahini of Chingra Razakar Camp.

815. The prosecution adduced documentary evidence i.e. exhibits 3 and 6 to prove that at the time of War of Liberation in 1971, the accused persons were Razakar. To adjudicate the dispute it is required to see both oral and documentary evidence adduced by the prosecution.

P.W 1 Gaziur Rahman is the son of Martyr Chandtulla Gazi who was a freedom fighter. He was aged about 17 years at the time of War of Liberation in 1971 and claimed to be an eyewitness to the event of the abduction of his father. He stated that in the middle of Bangla month, Sraban in 1971 one day at about 10 am accused Md. Sakhawat Hossain along with other 30/40 Razakars convened a meeting in the shop of Muslim League leader Munshi Solimuddin situated at Chingra Bazaar and delivered an inciting speech stating that the members of Awami League and the people who say “Joy

Bangla” are ‘Kafer, Monafek’ and decided to prepare their list to be killed after finding them out. In cross-examination, in reply to a question put to P.W. 1, he firmly asserted that accused Md. Sakhawat Hossain was Razakar Commander of the No.2 Sagardari Union and No. 4 Bidhanandakathi Union.

P.W.2 Fazlur Rahman Gazi is another son of Martyr Chandtullah Gazi and claimed to be an eyewitness to the event of the abduction of his father. He was a student of Class V and aged about 15/16 years at the time of War of Liberation in 1971 .He stated that in the middle of Bangla month, Bhadra of 1971 at about 10/10:30 am Razakar Commander of Chingra Razakar Camp accused Md. Sakhawat Hossain along with other accused persons namely Ibrahim Hossain alias Ghungar Ibrahim, accused Billal, accused Mujibur, accused Ohidul, accused Abdul Aziz, son of late Ahamed Sardar, accused Md. A. Aziz, son of late Ful Miah Sardar, accused Lutfor, accused Khaleque along with other 15/20 Razakars attacked their house to apprehend his father Chandtullah Gazi and in cross-examination he also stated that accused Md. Sakhawat Hossain was the Razakar Commander of Chingra Razakar Camp. The above evidence of P.W. 2 is corroborated by evidence of P.W.1.

P.W. 4 Momin Gazi [70] was aged about 18/19 years at the time of War of Liberation in 1971 and used to help the freedom fighters. He stated that in the middle of Bangla month, Bhadra of 1971, one

day at about 10:30 am Razakar accused Md. Sakhawat Hossain and his accomplices Razakar accused Ibrahim, accused Billal Hossain, accused Abdul Aziz Sardar, son of Ahmed Sardar, accused Md. A. Aziz Sardar, son of Ful Miah Sardar, Khaleque, Lutfor, Mujibur and Ohidul along with other 14/15 Razakars attacked his house and having detained from his house took him to the house of his uncle freedom fighter Chandtulla Gazi to detain him but at that time Chandtullah Gazi was not present in his house. He further stated that on 28th Bangla month, Ashwin in 1971, at about 11/11:30 am Razakar accused Md. Sakhawat Hossain along with above mentioned accused and other 15/20 Razakars attacked the house of Chandtulla Gazi and having abducted from his house confined him in Chingra Razakar Camp and subsequently killed him.

P.W.3 Nuruddin Morol [73] and P.W. 4 Momin Gazi [70] during cross-examination in reply to a question put to them, they firmly asserted that accused Sakhawat Hossain was the Razakar Commander of No.2 Sagardari Union.

P.W.5 Kazi Abdul Aziz [66] was aged about 21/22 years at the time of War of Liberation in 1971. He stated that in the last part of Bangla month, Jystha in 1971, the Razakars set up Chingra Razakar Camp and Razakar accused Md. Sakhawat Hossain was the Commander of the said Camp.

P.W. 6 Miron Sheikh [66] is a freedom fighter. He was aged about 22/23 years at the time of War of Liberation in 1971. He stated that in the first part of Bangla month, Ashwin in 1971, one day at about 6:00 am Razakar accused persons having abducted him from his house confined him in Chingra Razakar Camp and at the order of Razakar accused Md. Sakhawat Hossain, accused Abdul Aziz Sardar, accused Md. A. Aziz Sardar, accused Ibrahim, accused Lutfor Morol inhumanely tortured him, consequently, he lost his sense. When he regained his sense at about 10/10:30 pm Razakar accused Md. Sakhawat Hossain wanted to know information about the camp of freedom fighters. When he refused to give any information about freedom fighters, accused Md. Sakhawat Hossain by twisting had broken his left leg.

During cross-examination of P.W7 Md. Liakat Ali Sheikh [59], in reply to a question put to him, he stated that Razakar accused Md. Sakhawat Hossain was the Commander of Chingra Bazaar Razakar Camp.

P.W.9 Md. Kamal Sardar [63] stated that on 15th Bangla month, Jystha in 1971, the Razakars set up Razakar Camp at Chingra Bazaar and accused Md. Sakhawat Hossain was the Commander of Chingra Razakar Camp. In cross-examination in reply to a question put to him, P.W.9 stated that accused Md. Sakhawat Hossain was the Razakar Commander of No. 2 Sagardari Union.

P.W.10 Md. Rashidul Haque [68] is a freedom fighter and husband of rape victim Ashura Khatun. He is a retired Headmaster and was an Assistant Teacher of Tegoria Palli Mangal High School in 1971. He stated that he came to know through the source of freedom fighters that Razakar Commander accused Md. Sakhawat Hossain of Chingra Bazar Razakar Camp along with accused Billal Hossain, accused Ibrahim Hossain alias Ghungar Ibrahim, accused Abdul Aziz Sardar, son of late Ahmed Sardar, accused Abdul Aziz, son of late Ful Mia Sardar along with other 10/12 Razakars on the 27th Bangla month, Ashwin of 1971 at about 9/9:30 AM having forcibly abducted Ashura Khatun from her house confined her in Chingra Razakar Camp.

P.W. 11, Md. Abdus Subhan Sardar [74] is a freedom fighter. He stated that in the last part of Bengala month Jystha in 1971 accused Md Sakhawat Hossain set up Razakar Camp at Chingra Bazar.

P.W. 12, Robiul Haque Royal is the son of rape victim Ashura Khatun and freedom fighter Rashidul Huq (P.W.10). He stated that his father informed that Razakar accused Md. Ibrahim Hossain alias Gungar Ibrahim, accused Abdul Aziz Sardar, accused Md. A. Aziz Sardar having abducted Ashura Khatun on 27th Bangla month Ashwin in 1971 from the house of her father confined her in Chingra Razakar Camp.

P.W.13 Md. Mozid Morol [72] stated that Razakar accused Md. Sakhawat Hossain on 28th Bangla month Ashwin in 1971, at about 7:00 am sent other Razakars to their house to abduct his brother Nuruddin Morol (P.W.3) and after abduction, on the same day in the afternoon he went to Chingra Razakar Camp to see his brother Nuruddin Morol and through the window of the Primary School (Razakar Camp), he witnessed that his brother Nuruddin Morol was lying in a bleeding condition for which he started crying and consequently, Razakars dragged him out from the Razakar Camp. After returning to his house, Nuruddin Morol informed him and others that at the order of accused Md. Sakhawat Hossain, accused Billal and accused Sheikh Mohammad Mujibur Rahman inhumanely tortured him in the Chingra Razakar Camp.

816. The defence argued that the Pakistani occupation army set up camp at Chingra Bazaar of Keshobpur Thana and it was the Pakistani army who had committed the criminal acts around the locality. The defence totally failed to adduce any evidence to prove this assertion. It is not the prosecution case that Pakistani army men were engaged in committing the alleged crimes. The defence merely suggested that the accused persons were not the Razakars.

817. Out of 17 P.Ws. P.Ws.3, 6,7,10 and 11 are freedom fighters and P.Ws. 1 and 2 are sons of freedom fighter Chandtallah Gazi and both of them claimed to be eye witnesses of the event of the

abduction of their father. On scrutiny of the evidence of the prosecution witness, it reveals that P.Ws. 1 to 5, 7,9,10 and 12 stated that accused Md.Sakhawat Hossain was the Razakar Commander of Chingra Razakar Camp. Although P.W. 6 Miron Sheikh did not mention accused Md. Sakhawat Hossain as Razakar Commander, but he stated that at the order of Razakar accused Md. Sakhawat Hossain, other Razakars having abducted him from his house confined in Chingra Razakar Camp and Razakar accused Md. Sakhawat Hossain inhumanely tortured him. P.Ws. 5, 9 and 11 stated that accused Md. Sakhawat Hossain set up Chingra Razakar Camp in the Bangla month Jystha in 1971.

818. It transpires from the evidence adduced by the prosecution that the Razakars set up Chingra Bazaar Razakar Camp under the leadership of accused Md. Sakhawat Hossain and accused **(2) Md. Billal Hossain Biswas, (3) Md. Lutfor Morol(now dead), (4) Md. Ibrahim Hossain alias Ghungur Ibrahim [absconded], (5) Sheikh Mohammad Mujibur Rahman alias Mujibur Rahman[absconded], (6) Md. A. Aziz Sardar [absconded], (7) Abdul Aziz Sardar[absconded], (8) Kazi Ohidul Islam alias Kazi Ohidus Salam[absconded] and (9) Md. Abdul Khaleque Morol [absconded]** also joined the locally formed Razakar Bahini. The Razakar Bahini was formed under the Razakar Ordinance, 1971 to collaborate with the Pakistani occupation army and for

killing the freedom fighters and pro-liberation people. The Razakars of Chingra Bazaar Razakar Camp allegedly carried out atrocities directing the civilian population of the locality of Keshobpur Thana violating the laws of war and international humanitarian law to implement the further policy and plan of the Pakistani army to annihilating the freedom fighters and pro-liberation Bangali civilian population.

819. It reveals that accused Md. Sakhawat Hossain as Razakar Commander along with his cohorts Razakar accused-persons set up Razakar Camp at Chingra Bazaar in the Bangla month Jytha in 1971 and thereafter one day at about 10:00 am in the middle of Bangla month Sraban in 1971 he convened a meeting in the Gadi Ghar [business office] of Muslim League leader Md. Solimuddin situated at Chingra Bazaar and holding command of Razakars delivered an inciting speech stating that the members of Awami League and the people who say “Joy Bangla” are “Kafer and Monafek” and ordered his cohorts Razakars to prepare their list to be killed after finding them out and subsequently launched operations in the Bangla month Ashwin[October] in 1971 in the locality of Keshobpur Thana. P.Ws.1 to 13 and witnesses Nesar Ali and Khondakar Abdur Razakar firmly stated that accused persons were members of the locally formed Razakar Bahini and all of them committed the alleged atrocities as members of locally formed

Razakar Bahini and was involved with the Chingra Bazaar Razakar Camp and they acted as per order of Razakar Commander accused Md. Sakhawat Hossain. From exhibit 3 and 6, it reveals that all the accused persons were Razakar at the time of War of Liberation in 1971.

820. It is to be noted that in the instant case in hand, accused Md. Sakhawat Hossain and all other accused persons set up Razakar Camp in the Bangla month Jystha in 1971 and after setting up Razakar Camp, Razakar Commander Md. Sakhawat Hossain along with other Razakar accused persons in the Bangla month Ashwin[October] in 1971 allegedly carried out atrocious activities and abducted Ashura Khatun, freedom fighters Chandtullah Gazi, Nuruddin Morol [P.W.3] and Miron Sheikh[P.W.6], and A. Maleque Sardar, a source of freedom fighters and committed rape on Ashura Khatun and subsequently after inhuman torture killed, Chandtullah Gazi, A Maleque Sardar and also killed Atiar.

821. Morethan long four decades after the atrocities committed it is really difficult to collect documentary evidence to prove all the facts alleged inasmuch as, by this time, the relevant documents might have been destroyed. At this point, the observation of the **Appellate Division of the Supreme Court of Bangladesh made in the case of Allama *Delwar Hossain Sayedee* is very relevant** which is as below;

"In most cases, the perpetrators destroy and/or disappear the legal evidence of their atrocious acts. Normally the investigation, the prosecution and the adjudication of those crimes often take place years or even decades after their actual commission. In Bangladesh, this has caused because of the fragile political environment and the apathy of the succeeding government. In the case of Bangladesh, the process has started after 40 years." [**Criminal Appeal Nos. 39-40 of 2013, Judgment dated 17th September 2014, page 43**]

822. In the instant case in hand, accused Md Sakhawat Hossain was a very influential person of his locality and he was also elected Member of Parliament as the candidate of Jamaat-e-Islami from the locality of alleged crime site. In this regard, the observation of the Appellate Division of the Supreme Court of Bangladesh made in the case of Allama Delwar Hossain Sayedee in Criminal Appeal Nos. 39-40 of 2013, Judgment dated 17th September 2014, at PDF page- 141 is relevant wherein it has been further observed that-

“The trial of the offences of Crimes against Humanity is held after 40 years and in the intervening period there was political change in the country- two Martial Laws were in force the system of Government was changed twice. New

political parties were formed and the right-wing minded people like Sayedee were allowed to activate politics on religion by restoring Jamat-e-Islami and ultimately, this political party came to power by forming an alliance with another political party. This political polarization has adversely affected in the process of collecting evidence against the accused who became Member of Parliament twice. The history of our national liberation struggle was distorted; the basic pillars enshrined in the Constitution were also changed. Under such scenario, it will be a difficult task to collect a true and correct history of the liberation struggle of a particular district or the names of the Razakars of that district. Some persons wrote books touching to the liberation struggle by distorting facts. It cannot be exaggerated if it can be said that the accused has been able to make his name excluded from the list of Razakars by using his political influence.”

823. From the above conspectus, it is proved beyond reasonable doubt that under the guidance of Pakistani occupation army, accused Md. Sakhawat Hossain as Commander of Razakars along with accused persons and other Razakars set up a Razakar Camp in the Bangla month Jystha in 1971 at Chingra Bazaar of Keshobpur Thana and accused- persons were the active and potential members

of the locally formed Razakar Bahini. The Razakar Bahini of Chingra Bazaar Razakar Camp was formed of pro-Pakistani people of the locality and all the accused persons joined the locally formed Razakar Bahini and they were Razakars in 1971 and accused Md. Sakhawat Hossain was the Razakar Commander of Chingra Bazaar Razakar Camp.

Adjudication of charges

Charge No. 01

[Abduction, confinement, torture and rape of Ashura Khatun (now dead) of village Boga, Police Station-Keshobpur, District Jessore].

824. Summary of charge; In this charge, it is alleged that on 27 Bangla month Ashwin [1378 BS] in 1971 at about 9.00/9.30AM as per order of accused Md. Sakhawat Hossain accused Md. Ibrahim Hossain alias Ghungur Ibrahim, accused Abdul Aziz Sardar, son of late Ahmmad Sardar and accused Md. A. Aziz Sardar, son of late Ful Miah Sardar along with other 10/12 Razakars having forcibly abducted Ashura Khatun [now dead] wife of Md. Rashidul Haq and daughter of late Abdul Latif Morol of village Boga, Police Station-Keshobpur, District -Jessore, who was a 'source' of local freedom-fighters, from her house, kept her confined in Chingra Razakar Camp. During confinement period, she was physically tortured and raped by accused Md. Sakhawat Hossain. Three days after her confinement in the said Razakar Camp, one Shariatulla [now dead],

maternal grandfather of said victim Ashura Khatun, with the help of Janab Ali [now dead] and Rafiuddin Sardar [now dead] of same locality managed to get her released from the Chingra Razakar Camp having requested accused Md. Sakhawat Hossain.

825. Thereby, accused (1) Md. Sakhawat Hossain, (2) accused Md. Ibrahim Hossain alias Ghungur Ibrahim, (3) accused Abdul Aziz Sardar, son of late Ahmmad Sardar, and (4) accused Md. A. Aziz Sardar, son of late Ful Miah Sardar has been charged with participating, aiding, abetting, facilitating and complicity in the commission of offences of abduction, confinement, torture and rape as crimes against humanity as specified in section 3(2)(a)(g)(h) of the Act of 1973 which are punishable under section 20(2) of the Act of 1973 read with section 3(1) of the Act for which accused persons have incurred liability under section 4(1) of the said Act.

Witnesses examined by the prosecution

826. To prove the event narrated in charge No 1, the prosecution has examined P.Ws, 2, 10,11and 12, out of which P.W 2 is the son of freedom fighter Chandtallah Gazi, who after alleged abduction of his father went to Chingra Bazaar Razakar Camp to see him and at that time victim Ashura Khatun had been in detention in Chingra Bazaar Razakar Camp. P.W 10 is a freedom fighter and husband of victim Ashura Khatun, P.W 11 is another freedom fighter and claimed to be the eye- witness of the abduction of Ashura Khatun,

and the P.W. 12 S.M. Robiul Haque Royal is the son of victim Ashura Khatun and a hearsay witness. The prosecution also relied on the evidence of witness Nesar Ali who died during the trial of the case.

827. P.W.2 Fazlur Rahman Gazi[60] is the son of freedom fighter Chandtullah Gazi and claimed to be an eyewitness to the event of the abduction of his father. He was a student of Class V and aged about 15/16 years at the time of War of Liberation in 1971. After about 2 hours of the alleged abduction of his father, he went to Chingra Bazaar Razakar Camp with food for his father. At that time, he heard the scream and weeping of a young girl who was confined in the Union Office (Chingra Bazaar Razakar Camp) and standing to grasp the iron rod of the window. P.W.2 claimed that he saw the girl through the window of Union Office (Razakar Camp) wherein his father was confined. He further narrated that at that time, he saw that Razakar accused Md. Sakhawat Hossain was putting off his panjabi (loose shirt).He further stated that Ashura Khatun of village Boga was confined in the Chingra Razakar Camp. He heard from Shuban of village Boga and many others that accused Md. Sakhawat Hossain committed rape on Ashura Khatun while she was confined in Chingra Bazaar Razakar Camp.

828. P.W.10 Md. Rashidul Haque [68] is an old man of 68 years and a freedom fighter. He is the husband of rape victim Ashura

Khatun and a retired Headmaster. He was an Assistant Teacher of Tegoria Palli Mangal High School in 1971. He retired from service in the year 2008. He stated that in the month of February 1971 Ashura Khatun, an inhabitant of his adjacent village Boga was SSC candidate and betrothed to him. She was a “source” of freedom fighters and used to inform him and freedom fighter Mofazzal Master [now dead], cousin of Ashura Khatun (now dead), different information about Razakars.

829. He further stated that in the last part of March 1971, he took part in the War of Liberation under the leadership of Mofazzal Master [cousin of Ashura Khatun] at Tala and Keshobpur Thana. In the middle of Bangla month, Ashwin (October) in 1971, he took part in the war at village Nehalpur, Sagardari, Sheikhpara of Keshobpur Thana against the Razakars. At that time, the freedom fighters took shelter in the adjacent village Dadpur of Tala Thana. He came to know through the “source” of freedom fighters that Razakar Commander accused Md. Sakhawat Hossain of Chingra Bazaar Razakar Camp along with accused Billal Hossain, accused Ibrahim Hossain alias Ghungar Ibrahim, accused Abdul Aziz Sardar, son of late Ahmed Sardar, accused Md. A. Aziz Sardar, son of late Ful Mia Sardar along with other 10/12 Razakars on 27th Bangla month Ashwin in 1971 at about 9/9:30 am having forcibly abducted Ashura Khatun from her house confined her in Chingra

Bazaar Razakar Camp and accused Md. Sakhawat Hossain after inhuman torture committed rape on his (P.W.10) betrothed Ashura Khatun [now dead] while she was confined for three days in the Chingra Bazaar Razakar Camp. Subsequently, Sharup Sheikh (now dead), Rafiuddin Sardar (now dead), Jonab Ali Sardar (now dead) and other elderly persons of her village went to Chingra Bazaar Razakar Camp and having requested accused Md. Sakhawat Hossain managed to take back Ashura Khatun to her house.

830. He also stated that after two days of the release of Ashura Khatun from the captivity of Chingra Razakar Camp at night he secretly met with her. At that time, she (Ashura Khatun) had a bottle of insecticide in her hand and she informed that she had no chastity for which she will commit suicide, but he promised to his betrothed that after the independence of Bangladesh, he will marry her and requested not to commit suicide. Thereafter he came back to join in the War of Liberation. After independence, on 22nd January 1972 he married Ashura Khatun. After marriage, Ashura Khatun informed him that accused Md. Sakhawat Hossain along with other Razakars abducted her from her house and on the way to Chingra Bazaar Razakar Camp, the Razakars outraged her modesty in different manner and while she was confined in Chingra Bazar Razakar Camp, accused Md. Sakhawat Hossain and his accomplices Razakars tortured her and forcibly committed rape.

After the independence of Bangladesh, on 01.11.1972 Ashura Khatun joined in her service as Metron-cum-Nurse in the Office of Jessore Orphan and Distressed Women Rehabilitation Centre as a war affected woman. He further stated that Ashura Khatun died in the month of September 2006.

831. In cross-examination P.W. 10 stated that the name of the village of accused Abdul Aziz Sardar, son of late Ahamed Ali is Boga and Hijaldanga is situated to the 5 kilometers east side from his village. The name of the father of accused Md. Sakhawat Hossain is Omer Ali Morol, and that his name [P.W.10] has been included in the list of freedom fighters and he is receiving allowances as a freedom fighter. In 1971 three Razakar Camp were set up at Trimahoni, Keshobpur and Chingra Bazar of Keshobpur Thana. In reply to a question put to P.W.10 by the defence, he stated that in 1996 accused Md. Sakhawat Hossain was elected Member of Parliament from Jamaat-e-Islam. He could not remember the exact date and year when for the first time he saw accused Md. Sakhawat Hossain. He admitted that Ashura Khatun was his second wife. He denied the suggestions that the Razakars did not torture or commit rape on Ashura Khatun. He also denied the suggestions that accused persons were not Razakars or as tutored by others to be financially benefited falsely deposed against the accused persons or no occurrence took place in the manner as

stated by him. He further denied the suggestions that his wife Ashura Khatun obtained the job on merit, but not as a war affected woman. He stated that he took training as freedom fighter at Taki in India. Nehealpur is situated about a half kilometer west of his village Razakathi. He stated that in 1971 accused Md. Ibrahim Hossain alias Ghungur Ibrahim was a Razakar and his father's name is Ekabbar.

832. P.W. 11, Md. Abdus Subhan Sardar [74] is an old man of about 74 years and a freedom fighter. He claimed to be an eyewitness of the event of the alleged abduction of his neighbour Ashura Khatun. He stated that in the last part of Bangla month Jytha in 1971 Razakars set up a Razakar Camp at Chingra Bazaar and accused Md. Sakhawat Hossain was the Commander of that Camp. After setting up Razakar Camp at Chingra Bazaar, he took part in the War of Liberation in 1971 and he was a "source" of freedom fighters. He along with Rashid Master (P.W.10) and many others under the command of Mofazzal Master took part in the war in his locality at Shiekhpara, Sagardari, and Nehalpur and one point of time the freedom fighters took shelter at village Datpur, adjacent village of Tala Thana.

833. P.W 11 further stated that after going to Datpur, he came back to his own village Boga on 27th Bangla month Ashwin in 1971 at about 9.00 am to collect information about Razakars and after

going to village Boga, he saw that some Razakars were going to the east from west of village Boga and sensing the enormity of attack he went into hiding in the cane garden. After sometimes he saw that Razakar accused Md. A. Aziz Sardar, Abdul Aziz Sardar, accused Md. Ibrahim Hossain alias Ghungur Ibrahim and some other Razakars were coming back after forcibly abducting his neighbour Ashura Khatun. Thereafter he came back to the camp of freedom fighters at village Dhatpur and informed about the matter of abduction of Ashura Khatun to his commander Mofazzal Master (now dead) and freedom fighter Rashid Master (P.W.10).

834. P.W.11 also stated that after one week of the abduction, he went to the house of Ashura Khatun and requested her to disclose what happened while she was confined in the Razakar camp and at that time Ashura Khatun informed him that accused Md. Sakhawat Hossain destroyed her chastity while she was confined for three days in Chingra Razakar Camp. She further informed that (1) Rafiuddin,(now dead) (2) Janab Ali Sardar (now dead)(3) Sharup Sheikh (now dead) having requested accused Md. Sakhawat Hossain managed to get her released from the captivity of Chingra Razakar camp. P.W.11 further stated that after independent, P.W.10 married victim Ashura Khatun.

835. In cross-examination, P.W.11 stated that house of Ashura Khatun was situated to the east side of his house. In 1971, Ashura

Khatun was a student of Class X of Sagardari Mychal Modushudan Institute, and he was also a student of that Institution. The house of Razakar accused Md. Sakhawat Hossain was situated within the No.4 Biddanandakathi Union and firmly asserted that he was Commander of Chingra Razakar Camp. In reply to a question put to P.W.11 by the defence, he stated that on 27th Bangla month Ashwin when he went to village Boga from village Dadpur, Md. Rashidul Haque Master (P.W.10) was present at village Dadpur. He could not say when Rashidul Haque Master went to his village Boga. After returning from village Boga, he went to the Camp of freedom fighters, and that house of Rashidul Haque Master (P.W.10) was situated to the quarter mile west side from his house. He empathetically denied the suggestions that no occurrence took place in the manner as stated by him or since the family members of Ashura Khatun refused to give in marriage her with Rashidul Haque Master, he got up a story of rape to marry Ashura Khatun and the guardians of Ashura Khatun under compelling circumstances agreed to give in marriage Ashura Khatun. He denied the suggestions that accused Md. Sakhawat Hossain and Abdul Aziz Sardar were not Razakar or they were also not involved in any activities against the War of Liberation. He denied the suggestion that P.W.10 forcibly married Ashura Khatun. In reply to a question put to P.W.11 by the defence, he further stated that

locally he took training of the War of Liberation and freedom fighter Kazi Rafiqul was his Commander. He stated that Dadpur freedom fighter's Camp was situated within Tala Thana and village Dadpur is situated to the 6(six) kilometers west side from village Chingra. He denied the suggestion that accused Ibrahim was not a Razakar.

836. P.W. 12, S.M. Robiul Haque Royal [36] is the son of rape victim Ashura Khatun and freedom fighter Rashidul Huq (P.W.10). He stated that he passed M.A in 2002 from Jagannath University College and now serving as Postmaster of Keshobpur Post Office. He stated that in 1996, while he was a student of Class X of Mohadebpur R.B.S. Secondary School of Keshobpur Thana, his classmates used to ask as to whether he knows the fact that in 1971, the Razakars abducted his mother which pained him a lot. In the deposition sheet, in Bangla, it has been recorded as “HC pju Bjil pqfjwEli thci æ pju Bj jK hma k, aij j jL iSjLjll i 1971 pjm dtl tetu Nu;Rm, aC pVj S;tep tLej? HC Lbj öte Bj Lø faj z”

837. He further stated that subsequently, in 1998 while he was a candidate of B.A Examination of Keshobpur Degree College, he asked his father about the occurrence as disclosed by his classmates regarding his mother. Initially, his father did not agree to disclose anything, but due to his insistence, his father informed that Razakar accused Md. Ibrahim Hossain alias Gungar Ibrahim, accused Abdul

Aziz Sardar, son of late Ahmed Sardar, accused Md. A. Aziz Sardar, son of Ful Mia Sardar along with other Razakars having abducted his mother Ashura Khatun on 27th Bangla month, Ashwin in 1971 from the house of her father confined her in Chingra Razakar Camp and firmly stated that his father informed him that while his mother was confined in Chingra Razakar Camp, accused Md. Sakhawat Hossain committed rape on her. His father further informed him that after committing rape, while his mother was in captivity in Razakar Camp, Shariatullah Sheikh (now dead), Rafiuddin Sardar (now dead), Jonab Ali Sardar(now dead) went to Chingra Razakar Camp and having requested accused Md. Sakhawat Hossain managed to get released Ashura Khatun from the captivity. He also stated that the Deputy Commissioner of Jessore appointed his mother as a war affected woman in the Office of Jessore Orphan and Distressed Women Rehabilitation Centre as Metron-Cum- Nurse and his mother died in 2006.

838. In cross-examination, P.W.12 stated that he was born on 01.02.1981. He denied the suggestion that his father did not say anything about the torture of his mother. He firmly asserted that since the matter was embarrassing for him, he did not ask anything to his mother about her abduction, confinement, and torture. He admitted that since accused Md. Sakhawat Hossain was the Member of Parliament of his locality, sometimes he went to his

house along with his friends, but he did not take any food. He stated that the first wife of his father Mahmuda Khatun is alive and he joined in his service as the son of a freedom fighter and he was aged about 14/15 years old when he was a student of Class X. He further stated that for the first time, he came to know about the abduction of his mother from his classmates. Subsequently, he also heard about the abduction of his mother from his maternal grandmother. He further stated that he and his another sister are two children of his mother Ashura Khatun. He denied the suggestion that accused Ibrahim Hossain alias Ghungar Ibrahim and accused Md. A. Aziz Sardar, son of Ful Mia Sardar were never Razakar or his father did not disclose their name to him or he falsely deposed against the accused as tutored by others. During cross-examination, by giving suggestions, the defence denied his evidence given in examination-in-chief.

839. Witness Nesar Ali [60], son of late Yusuf Ali Morol and late Alekzan Bibi, village Rezakathi, Thana- Keshobpur, District Jessore during investigation made statement to the Investigation Officer stating that in the first part of April in 1971, he along with a group of 50 people including Rashidul Haque Master, Motaleb Morol, Mufazzal Hossain Master joined in the War of Liberation. Zillur Rahman, a Sepoy of East Bangle Regiment trained them and they took part in the war under the leadership of Mufazzal

Master in the middle of Bangla month, Ashwin in 1971 at village Nehalpur, Sheikpara and Sagardari against the Razakars, and at that time, they took shelter at village Dadpur. At the time of those wars, accused Md. Sakhawat Hossain was the Commander of Chingra Bazaar Razakar Camp. He stated that Ashura Khatun, a maternal cousin of Mufazzal Master, used to inform different information of Razakars regarding their torture, looting and movement to Rashidul Haque Master [P.W.10] and Mofazzal Master [now dead]. While he was staying at Datpur, he came to know from the “source” of freedom fighters that since Ashura Khatun used to give information about Razakars regarding torture, looting and movement to Mofazzal Hossain Master[now dead] and Rashidul Haque Master, at the order of Razakar Commander Md. Sakhawat Hossain, his cohorts Razakar accused (1) Md. Ibrahim Hossain alias Ghungur Ibrahim, (2) accused Abdul Aziz Sardar, (3) accused Md. A. Aziz Sardar, along with 10/12 Razakars on 14th October 1971 at about 9/9.30 am having forcibly abducted Ashura Khatun from her house confined her in Chingra Bazaar Razakar Camp and Md. Sakhawat Hossain himself committed rape on her. After three days, on the request of Sariatullah [now dead], Jonab Ali Sardar [now dead] and Rafiuddin Sardar [now dead], Razakar Commander Md. Sakhawat Hossain released Ashura Khatun from the captivity. He also stated that in

the month of February in 1972 Ashura Khatun was betrothed to Rashidul Haque Master [P.W.10] and in 1972 he married Ashura Khatun and in the month of November 1972, the Government appointed Ashura Khatun in the Office of Orphan and Distressed Women Rehabilitation Centre, Jessore and she died in 2006.

Evaluation of evidence presented to the Tribunal

840. The learned Prosecutor Mr. Zead-Al-Malum appearing with another Prosecutor Ms. Rezia Sultana on behalf of the prosecution submitted that the prosecution by adducing P.Ws. 2,10,11 and 12 and witness Nesar Ali whose statement has been marked as Exhibit-15 proved the event of abduction, confinement, torture and rape of Ashura Khatun. Out of 4 witnesses examined by the prosecution, P.Ws. 11 is the eye witness of abduction and P.W. 2 is the witness of confinement and torture of Ashura Khatun. P.Ws. 10 and 12 although are hearsay witnesses but the P.W.10 is the husband of victim Ashura Khatun and P.Ws. 10 and 11 heard about the occurrence from the victim. The learned Prosecutor further submitted that although P.W.12 did not hear anything from the victim but he heard about the occurrence as a local anecdote. Furthermore, witness Nesar Ali also stated that he heard about the occurrence. Finally, the learned Prosecutor submitted that since Ashura Khatun is the victim of war, the government rehabilitated her as a war affected woman appointing in the office of Orphan

and Distressed Woman Rehabilitation Centre, Jessore as Metron-cum-Nurse. The learned Prosecutor taking to the evidence of P.W.11 submitted that accused Md. A. Aziz Sardar, Abdul Aziz Sardar, accused Md. Ibrahim Hossain alias Ghungur Ibrahim and some other Razakars at the order of Razakar Commander Md. Sakhawat Hossain abducted victim Ashura Khatun from her house and confined her in the Chingra Razakar Camp and handed over the victim to the custody of the Razakar Commander Md. Sakhawat Hossain who committed rape on Ashura Khatun while she was confined in Chingra Razakar Camp, and these accused persons by abducting Ashura Khatun aided, abetted and facilitated in the commission of the offence of rape and they are equally liable under section 4(1) of the Act of 1973 along with Razakar Commander Md. Sakhawat Hossain who actually committed rape on Ashura Khatun.

841. The learned defence counsel Mr. Abdus Sattar Palwan appearing on behalf of the accused Md. Sakhawat Hossain and Abdul Aziz Sardar submitted that admittedly accused Md. Sakhawat Hossain was not present at the time of the abduction and there is no eye witness of the offence of rape committed on Ashura Khatun. He further submitted that there is no allegation of committing rape against accused Abdul Aziz Sardar and admittedly Aminuddin Master was the Razakar Commander of Kashobpur

Thana and he is responsible for all the offences committed within Kashobpur Thana, but the prosecution with an ill motive falsely implicated accused Md. Sakhawat Hossain in the instant case due to political reasons. Since Md. Sakhawat Hossain is a local political leader and was elected Member of Parliament twice in 1991 and 1996, due to political reasons prosecution falsely implicated him in the instant case and allegation of rape cannot be legally proved by hearsay witnesses. Since the victim Ashura Khatun died in 2006, the prosecution got up a story of rape after her death to harras the accused persons.

842. The learned prosecutor Mr. Abdus Sukur Khan appearing on behalf of Md. A Aziz Sardar and Md. Ibrahim Hossain alias Ghungur Ibrahim submitted that admittedly there is no allegation of rape against them and the prosecution only to harras got up a story of rape in the name of a dead woman against the accused persons and the prosecution failed to prove the charge against the accused- persons.

843. On rebuttal, the learned Prosecutor Mr. Zead-Al-Malum appearing with Ms. Rezia Sultana submitted that although there is no documentary evidence of rape, but the offence took place in a wartime situation for which it was not possible on the part of the prosecution to prove the charge relying on the documentary evidence. Even then, to prove the charge of rape, the prosecution

proved material exhibit-14 series. Since Ashura Khatun was a war affected woman, the government immediate after the War of Liberation rehabilitated victim Ashura Khatun appointing as Metron-Cum-Nurse in the office of the Orphans and Distressed Woman Rehabilitation Centre, Jessore.

844. Admittedly there is no eyewitness of the alleged offence of rape committed on Ashura Khatun because she died in the month of September 2006 and the alleged offence was committed while she was confined in the Chingra Razakar Camp at the wartime situation and the entrance of the relations of the victim and pro-liberation people in the said Camp was prohibited for which it was not possible for the relations of the victim and pro-liberation people to witness the occurrence as narrated in Charge No.1. P.W.11 Md. Abdus Subhan Sardar claimed to be the only eyewitness of the event of the abduction of victim Ashura Khatun. P.W.2 Fazlur Rahman Gazi stated that he saw both the victim Ashura Khatun and accused Md. Sakhawat Hossain in the Chingra Razakar Camp while she was confined in the said Camp. At the time of the commission of the alleged offence, the rape victim Ashura Khatun of village Boga was an unmarried young girl and a student of Class X of Sagardari Mychal Modhusudon Institute, and P.W.11 was also a student of that Institute and both of them were an inhabitant of the same village Boga. The crime site, i.e. the

Chingra Razakar Camp was situated within the No.2 Sagardari Union and 7 kilometers away from village Boga.

845. P.W. 11 Abdus Sobhan Sardar [74], a freedom fighter, as regards setting up Razakar Camp he stated that in the last part of Bangla month Jystha in 1971, the Razakars set up Chingra Razakar Camp at Chingra Bazaar and accused Md. Sakhawat Hossain was the Commander of that Razakar Camp. After setting up Razakar Camp, what had happened? In this regards, the P.W. 1 stated that in the middle of Bangla month, Sraban in 1971 one day at about 10 am accused Md. Sakhawat Hossain along with other 30/40 Razakars convened a meeting in the shop (business office) of Muslim League leader Munshi Solimuddin situated at Chingra Bazaar and he delivered an inciting speech stating that the members of Awami League and the people who say “Joy Bangla” are ‘Kafer, Monafek’ and decided to prepare their list to be killed after finding them out.

846. As regards the cause of abduction, confinement, torture and rape committed on victim Ashura Khatun, P.W. 10 Md. Rashidul Haque, husband of victim Ashura Khatun stated that she used to inform him and freedom fighter Mofazzal Master (now dead) in writing different information regarding torture committed by Razakars.

847. P.W.11 Md. Abdus Subhan, a source of freedom fighters and an eye-witness of the event of abduction of Ashura Khatun as narrated in Charge No.1 stated that after going to Datpur, he came back to his own village Boga on 27th Bangla month, Ashwin in 1971 at about 9.30 am to collect information about Razakars and after going to village Boga, he saw that some Razakars were going to the east from west of village Boga and sensing the enormity of attack, he went into hiding in the cane garden. After sometimes he saw that Razakar accused Md. A. Aziz Sardar, son of late Ful Mia Sardar, accused Abdul Aziz Sardar, son of late Ahmed Sardar, accused Ibrahim Hossain alias Ghungur Ibrahim and some other Razakars came back after forcibly abducting his neighbour Ashura Khatun. Thereafter he went to the camp of freedom fighters at village Dhatpur and informed about the matter of abduction of Ashura Khatun to his commander Mofazzal Master (now dead) and freedom fighter Rashid Master (P.W.10).

848. P.W.10 Md. Rashidul Haque, husband of victim Ashura Khatun as regards abduction and rape stated that he came to know through the source of freedom fighters that Razakar Commander accused Md. Sakhawat Hossain of Chingra Bazar Razakar Camp along with accused Billal Hossain, accused Ibrahim Hossain alias Ghungar Ibrahim, accused Abdul Aziz Sardar, son of late Ahmed Sardar, accused Md. A. Aziz Sardar, son of late Ful Mia Sardar

along with other 10/12 Razakars on 27th Bangla month, Ashwin of 1971 at 9/9:30 am having forcibly abducted Ashura Khatun confined her in Chingra Razakar Camp and accused Md. Sakhawat Hossain after inhuman torture committed rape on his (P.W.10) betrothed Ashura Khatun while she was confined for three days in the Chingra Razakar Camp.

849. P.W. 12 S.M. Robiul Haque Royal, son of P.W.10 Md. Rashidul Haque as regards abduction stated that in 1996, while he was a student of Class X of Mohadebpur R.B.S. Secondary School of Keshobpur Thana, his classmates used to ask as to whether he knows the fact that in 1971, the Razakars abducted his mother which pained him a lot. Subsequently, in 1998 while he was a candidate of B.A Examination of Keshobpur Degree College, he asked his father about the occurrence as disclosed by his classmates regarding his mother. Initially, his father did not agree to disclose anything, but due to his insistence, his father informed that Razakar accused Md. Ibrahim Hossain alias Ghungur Ibrahim, accused Abdul Aziz Sardar and accused Md. A. Aziz Sardar abducted Ashura Khatun on 27th Bangla month Ashwin in 1971 from the house of her father and confined her in Chingra Razakar Camp.

850. Although there is no eye witness to the event of rape, but while victim Ashura Khatun had been in captivity in Chingra Razakar Camp, P.W.2 Fazlur Rahman Gazi went to see his father

Chandtullah Gazi, another freedom fighter detainee, who was also confined in the Chingra Razakar Camp. He stated that he also heard the scream and weeping of a young girl who was confined in the Union Office [Chingra Bazaar Razakar Camp] and at that time she was standing to grasp the iron rod of the window. He witnessed the girl through the window of Union Office (Razakar Camp) wherein his father was confined. At that time, he saw that Razakar accused Md. Sakhawat Hossain was putting off his panjabi (loose shirt). He further stated that the name of the girl who was confined is Ashura Khatun and he heard from Subhan of village Boga that accused Md. Sakhawat Hossain committed rape on her while she was confined in the said Camp.

851. On perusal of the evidence of P.W. 11, it appears that the defence did not cross-examine him as regards recognition of accused Abdul Aziz Sardar, accused Md. A. Aziz Sardar and accused Md. Ibrahim Hossain alias Ghungur Ibrahim while after abducting the victim Ashura Khatun from her house taken her to Chingra Razakar Camp. While Ashura Khatun was abducted at the time of War of Liberation in 1971, naturally it was not possible on the part of P.W.12 to see the occurrence inasmuch as in 1971, his mother was only betrothed to P.W.10. After the independence of Bangladesh, it became the local anecdote that in 1971, the Razakars having abducted victim Ashura Khatun

confined her in Chingra Razkar Camp for which his classmates were also aware of the fact of the abduction of Ashura Khatun for which they used to make comments about the abduction of the mother of P.W.12. It is very natural that after hearing about the abduction and rape of one's mother, he will know about the incident from the family members. In this respect, P.W.12 stated that subsequently, in 1998 while he was a candidate of B.A Examination of Keshobpur Degree College, he asked his father about the occurrence as disclosed by his classmates regarding his mother. Initially, his father did not agree to disclose anything, but due to his (P.W. 11) insistence, his father informed that Razakar accused Md. Ibrahim Hossain alias Gungar Ibrahim, accused Abdul Aziz Sardar, accused Md. A. Aziz Sardar and other Razakars having abducted his mother on 27th Bangla month, Ashwin in 1971 from the house of her father confined her in Chingra Razakar Camp and he firmly stated that his father informed him that while his mother was confined in Chingra Razakar Camp, accused Md. Sakhawat Hossain committed rape on her.

852. His [P.W.12] father further informed him that after committing rape, while his mother was in captivity in Chingra Razakar Camp, Shariatullah Sheikh (now dead), Rafiuddin Sardar (now dead), and Jonab Ali Sardar (now dead) went to Chingra

Razakar Camp and having requested accused Md. Sakhawat Hossain managed to get her released from the captivity. He stated that the Deputy Commissioner of Jessore appointed his mother as war affected woman in the Office of Jessore Distressed Woman Rehabilitation Centre as Metron-Cum- Nurse and his mother died in 2006 and this statement of P.W.12 also corroborates the evidence of P.W.10, 11 and witness Nesar Ali as regards abduction, confinement, torture and rape narrated in Charge No.1.

853. As regards rape committed on Ashura Khatun, P.W.10 stated that after hearing the information about the abduction and rape of victim Ashura Khatun, after two days of her release from the captivity at night he secretly met with Ashura Khatun. At that time, she (Ashura Khatun) had a bottle of insecticide in her hand and she informed P.W.10 that she had no chastity for which she will commit suicide, but he (P.W. 10) promised to his betrothed that after independence of Bangladesh, he will marry her and requested not to commit suicide. P.W.10 further stated that after marriage, Ashura Khatun stated to him that accused Md. Sakhawat Hossain along with other Razakars having abducted her from her house confined her in Chingra Razakar Camp and on the way to Camp, the Razakars outraged her modesty in different manner and while she was confined in Chingra Bazaar Razakar Camp, accused Md. Sakhawat Hossain and his accomplices Razakars tortured her

and forcibly committed rape on Ashura Khatun. After independent of Bangladesh, on 01.11.1972 Ashura Khatun joined in her service as Metron-cum-Nurse in the Office of Jessore Orphan and Distressed Woman Rehabilitation Centre as war affected women.

854. As regards rape committed on victim Ashura Khatun, P.W.11, an eye witness to the event of abduction and a “source” of freedom fighters, stated that after one week of the abduction, he went to the house of Ashura Khatun of village Boga and requested her to disclose what happened while she was confined in the Razakar camp. P.W.11 claimed that Ashura Khatun informed him that accused Sakhawat Hossain destroyed her chastity while she was confined for three days in Chingra Razakar Camp.

855. On scrutiny of the evidence of P.W.2, it transpires that during his cross-examination, the defence only denied his evidence but no cross-examination has been made as regards incriminating evidence. It is settled jurisprudence that mere denial of the prosecution evidence is not enough to negate the incriminating evidence, unless by cross-examining the particular witnesses, the defence brought out any material contradiction or discrepancy. Thus the evidence of P.W.2 relating to the event narrated in Charge No.1 remains unchallenged and the defence failed to shake the credibility of the evidence of P.W.2.

856. As regards abduction, P.W. 10 Rashidul Haque Master stated that he heard about the abduction of Ashura Khatun from the “source” of freedom fighters that Razakar Commander accused Md. Sakhawat Hossain, accused Billal Hossain, Md. Ibrahim Hossain alias Ghungur Ibrahim, Abdul Aziz Sardar, Md. A. Aziz Sardar along with 10/12 Razakars abducted Ashura Khatun on 27th Bangla month, Ashwin in 1971 at about 9/9.30 am and subsequently he met with Ashura Khatun after two days of her coming back to her house who informed that accused Md. Sakhawat Hossain and his accomplices Razakars having forcibly abducted her confined in Razakar Camp and tortured and raped her. The above-mentioned evidence of P.W.10 as regards event narrated in Charge No. 1 has been merely denied by the defence. As regards abduction, torture, confinement and rape committed on Ashura Khatun, the defence did not specifically cross-examine him.

857. P.W.11 Md. Abdus Sobhan Sardar stated that at the time of War of Liberation in 1971 he was a “source” of freedom fighters which has not been denied by the defence and in his examination - in-chief as regards recognition of accused he specifically stated that at the time of abduction of Ashura Khatun, he recognised the accused Abdul Aziz Sardar, Md. A. Aziz Sardar, Md. Ibrahim Hossain alias Ghungur Ibrahim which has not been disputed by the defence. He further stated that after released of Ashura Khatun he

went to village Boga and secretly met with her in her house and at the time Ashura Khatun informed him that Razakar Commander Md. Sakhawat Hossain destroyed her chastity while she was confined in Chingra Bazaar Razakar Camp. The above evidence as regards disclosure of rape by the victim Ashura Khatun to P.W.11 has not been challenged by the defence. On perusal of the evidence of P.W.11, it appears that the defence without cross-examining as regards incriminating evidence merely denied by giving suggestion that the statement made by P.W.11 in the examination -in-chief are not true or the accused persons were not involved with the occurrence as stated by him or he deposed falsely against the accused persons.

858. P.W. 12 S.M. Robiul Haque Royal stated that he heard about abduction from his classmates while he was a student of Class X and subsequently while he was a candidate of B.A examination, on a quarry, his father informed him that at the time of War of Liberation in 1971 accused Md. Ibrahim Hossain alias Ghungur Ibrahim, accused Abdul. Aziz Sardar, accused Md. A. Aziz Sardar along with other Razakars having abducted her mother from her house confined in Chingra Bazaar Razakar Camp and his father informed him that Razakar Commander accused Md. Sakhawat Hossain committed rape on her mother. Although the defence denied that father of P.W.12 did not say anything as regards

abduction, torture and rape to him, but during cross-examination, the defence did not deny the fact that he heard about the abduction of his mother from his classmates. Rather during cross-examination on behalf of the accused Md. Ibrahim Hossain alias Ghungur Ibrahim, Abdul Aziz Sardar, son of Ful Mia Sardar in reply to a question put to him, he stated that he did not hear anything about abduction of his mother before hearing the same from this classmates, but subsequently he also heard about the occurrence from her maternal grandmother and by cross-examining P.W.12, the defence admitted that he heard about abduction of her mother from his classmates and grandmother. Witness Nesar Ali, a hearsay witness, also corroborated the evidence of P.Ws.11 and 12 as regards abduction, torture, and rape committed on Ashura Khatun.

859. On scrutiny of the evidence of the P.Ws.2 and 10 to 12, it appears that the testimony of those witnesses could not be shaken in any manner by the defence during cross-examination. P.W.2 is the solitary eye witnesses of confinement and torture of Ashura Khatun and hearsay as regards rape, and P.W.11 is also the solitary eyewitness of abduction. I do not find any inconsistency or improbability in their evidence and the defence totally failed to impeach the credibility of the evidence of those witnesses.

860. On appraisal of the evidence of the prosecution witnesses, presented regarding the event as narrated in the Charge No. 1 it transpires that P.W.11 Abdus Subhan Sardar, a source of freedom fighters, after witnessing the event of the abduction of victim Ashura Khatun, came back to village Datpur, wherein the freedom fighters took shelter and informed to P.W.10, and freedom fighter Mofazzal Master (now dead) about the abduction of Ashura Khatun. P.W.10 also stated that he heard from the source of freedom fighters that accused Md. Sakhawat Hossain having confined Ashura Khatun for three days in Chingra Razakar Camp committed rape on her. Thereafter P.W.10 secretly met with Ashura Khatun, who had a bottle of insecticide in her hand. At that time, she informed him that she had no chastity for which she will commit suicide. After one week of the abduction, P.W.11 also went to the house of Ashura Khatun and at that time Ashura Khatun stated to P.W.11 that accused Md. Sakhawat Hossain destroyed her chastity while she was confined in Chingra Razakar Camp for three days.

861. It is evidenced from the testimony of P.Ws. 10,11, 12 and statement of Nesar Ali that local elderly persons Rafiuddin (now dead), Sharup Sheikh(now dead) and Jonab Ali Sardar (now dead) and other local people having requested accused Md. Sakhawat Hossain managed to get released the victim Ashura Khatun. In

this regard, the defence submitted that although in the meantime the three local persons died, but other local persons who also requested Md. Sakhawat Hossain to get Ashura Khatun released, was not examined by the prosecution and only due to political reason, the prosecution examined only the interested persons who are inimical to the accused –persons and they falsely implicated the accused persons in the case and the prosecution failed to prove the charge to the hilt against the accused persons beyond all reasonable doubt.

862. It is true that three persons as mentioned above having requested accused Md. Sakhawat Hossain managed to get Ashura Khatun released and other local people were also present there, but none of the witnesses in examination-in-chief mentioned their names and during cross-examination of the prosecution witnesses, the defence also did not cross-examine as regards the names of “other local people” who were present with those persons to request accused Md. Sakhawat Hossain to release Ashura Khatun. After forty-five years of the occurrence happened in a wartime situation, it is difficult for the prosecution to examine all the witnesses present at the crime site. Now it is a settled principle. At this point, it is required to recall the observation of our Apex Court made in the case of Abdul Quader Mollah vs. The

Chief Prosecutor reported in 22 BLT (AD) 541 Para 47,[Review case], wherein Mr. J. Surendra Kumar Sinha observed that;

“If there is any matter against a witness, no adverse inference can be drawn against him unless he has been given an opportunity to explain it. But in respect of crimes committed under the Act of 1973, because of the influx of time, most of the eyewitnesses are not available and in some cases, the witnesses are not willing to depose for fear or reprisal or for any other cause or the witness has lost interest by efflux of time.’”

863. In the case of Salauddin Quader Chowdhury vs Chief Prosecutor reported in 67DLR (AD) 295 at Page - 350 Para- 161, the Hon’ble Appellate Division considered the objection of the defence as regards non-examination of witnesses and made following observation;

“The trial has taken place after 42 years. Most of the material evidence is lost due to death of the witnesses and some of them left the country to avoid similar brutal eventuality. Many surviving witnesses are not intended to disclose the actual incident because of the harrowing incidents of brutalities perpetrated against unarmed innocent people of the locality. More so, the accused is a

powerful political leader of the locality and therefore, the living witnesses are not dared to depose against him.”

864. In a criminal case, a fact may be proved even by adducing a single competent, reliable and trustworthy witness and quality of the witnesses is the main consideration of the Tribunal, but not the quantity. In the referred case reported in 22 BLT (AD), 541 at page 560 para 48 [Review Case]Mr. J. Surendra Kumar Sinha made an observation as regards the credibility of the witnesses and held that-

“A witness can be held unreliable or his testimony can be deemed not credible if; (a) his statement is inherently improbable or contrary to the course of nature, that is to say, he says that he has identified the accused by face in darkness, or that he has recognized his voice from a mile away, or that he has seen the accused killing the deceased with a dao whereas the medical evidence proved that the deceased succumbed to bullet injury;(b) his deposition is contradictory or inconsistent i.e.at one place he says that “X” was the murderer but in another breath, he says it was “Y”; (C) if he is found to be biased or partial in relation to the parties in the cause; (d) his demeanour whilst under examination, is found abnormal or unsatisfactory. None of the above conditions is present in this case. “

865. P.W.10 Rashidul Haque Master is a freedom fighter and retired Headmaster of a High School and highly respected person of the locality. P.W.12 is the son of victim Ashura Khatun and a government servant now serving as Postmaster of Keshobpur Post Office. Both of them are educated and respected persons of the locality. Naturally, a close relation of the victim is the last person to shield the real culprit falsely implicating the innocent persons. Especially in a rape case in our society, socially respected persons never tell lie about the chastity of their beloved one. Moreover, the evidence of P.Ws. 10 and 12 as regards abduction, confinement, torture, and rape are corroborated by P.W. 2, P.W.11 and witness Nesar Ali. At the time of cross-examination of the prosecution witnesses, the defence totally failed to impeach the credibility and truthfulness of the evidence of those witnesses and even did not give any cogent suggestion to those witnesses as regards false implication of the accused persons. In view of the above, I am constrained to hold that the P.Ws. 2, 10, 11, 12 and witness Nesar Ali are trustworthy, credible, and reliable witnesses and they narrated the true picture of the event as narrated in charge No.1.

866. It is to be noted that most of the incriminating evidence of the prosecution witnesses have not been challenged by the defence during cross-examination. The defence case as appears from the trend of the cross-examination is a mere denial of the evidence of

the prosecution witnesses. Although some discrepancy in the evidence of the prosecution witnesses has been pointed out by the defence, but the same are insignificant, minor and not material at all. Victim Ashura Khatun was a source of freedom fighters and P.W 11, as freedom fighter used to collect information about Razakars. So it is very natural that P.W.11 became anxious about Ashura Khatun after her abduction for which he met at her house and at that time she informed P.W.11 that accused Md. Sakhawat Hossain destroyed her chastity while she was confined in Chingra Bazaar Razakar Camp for three days.

867. From the evidence of the prosecution witnesses presented to the Tribunal it is proved beyond all reasonable doubt that the victim Ashura Khatun was a “source” of freedom fighters and both Ashura Khatun and accused Abdul Aziz Sardar were inhabitant of village Boga and he was very much aware of Ashura Khatun and it is legally presumed that to take revenge and implement the further policy and plan of the Pakistani army, the Razakar Commander accused Md. Sakhawat Hossain being informed about Ashura Khatun decided to abduct and commit rape on her. The purpose of the abduction of Ashura Khatun was to commit rape on her and reason was that she was a source of freedom fighters.

868. From the unimpeachable testimony of P.W.11 Abdus Subhan Sardar it is proved that on 27th Bangla month Ashwin in 1971 at about 9:30 am while he came back to his village Boga to collect information about Razakars he saw that Razakar, accused Abdul Aziz Sardar, accused Md. A. Aziz Sardar and accused Md. Ibrahim Hossain alias Ghungur Ibrahim and other Razakars forcibly abducted his neighbour Ashura Khatun and thereafter he informed the matter of abduction to P.W.10 Md. Rashidul Haque Master and freedom fighter Mofazzal Master (now dead). P.W.2, 10 and 12 also corroborated the evidence of P.W.11 as regards abduction of Ashura Khatun. After the independence of Bangladesh it became the local anecdote that in 1971, Razakars having abducted victim Ashura Khatun confined her in Chingra Razakar Camp for which classmates of P.W.12 were also aware of the fact of the abduction of Ashura Khatun and his classmates used to make a comment about the abduction of his mother. The defence raised objection submitting that the alleged occurrence took place at the time of War of Liberation in 1971 and at that time victim Ashura Khatun was unmarried and P.W. 12 was born only in the year 1981 for which it is not at all believable that the son of Ashura Khatun heard the event happened in 1971 and further, argued that the evidence of hearsay of close relation of the victim is not at all safe to rely against the accused persons.

869. It is to be noted that rape is a weapon even more powerful than a bomb or a bullet. At least with a bullet, a man may be killed. But if a girl or a woman is raped, she appears to the community like someone who is cursed. After the rape, no one talks to her and no man will see her. It's a living death. A rape victim and her relations suffer mental agony till their death. In our conservative society not only the rape victim, but his relations also have to carry the ill reputation of rape till their death for which it became the local anecdote that at the time of the War of Liberation in 1971, the Razakars having abducted Ashura Khatun, confined her in Chingra Razakar Camp for which after long time P.W.12 as local anecdote heard about abduction of his mother from his classmates. It is further noted that the defence did not deny the statement of P.W.12 that he heard about the abduction of his mother from his classmates. Moreover, by cross-examining the P.W. 12, the defence confirmed that P.W.12 heard about the abduction of his mother from his classmates and maternal grandmother.

870. As regards hearsay evidence I recall the observation of our Apex Court made in the case of Abdul Quader Mollah reported in 22 BLT(AD) 8 at para 289 page 389 wherein it has been observed that:-

“So far as the complaint against hearsay is concerned, the same falls through instantaneously once it is reckoned that the Act, which has engendered a special law, has made hearsay evidence admissible.

Parliament in its wisdom had done so reckoning that procuring direct eye witnesses to prove atrocities that pervaded during our Glorious War of Liberation would be difficult, if not impossible. In this regard, as in other regards too, our Parliament followed Nuremberg Charter, which also made hearsay evidence admissible, followed by Rome Statute and the statutes of other Tribunals set up at the instance of the United Nations to try people accused of Crimes against Humanity.”

871. In the case of the Prosecutor vs. Jean-Pierre Bemba Gombo [Case No. ICC-01/ 05-01/08 Para 47, judgment dated 15th June 2009] the ICC Pre-Trial Chamber II considered the hearsay evidence although in the Statute of ICC or ICC Rules of Procedure nothing has been expressly provided as regards hearsay evidence. The ICC Pre-Trial Chamber II observed that;

“The Chamber identifies the Disclosed Evidence either as direct or indirect, the latter encompassing hearsay evidence, reports of the United Nations (the “UN”), Non-Governmental Organizations (the “NGO” or “NGOs”) and media reports.

Pursuant to rule 76 of the Rules, evidence may also be oral, in particular when it is rendered by witnesses called to testify, or written, such as copies of witness statements, material covered by rule 77 of the Rules, such as books, documents emanating from various sources, photographs, and other tangible objects, including but not limited to video and /or audio recorded evidence. In this regard, the Chamber notes that neither party relied on live witnesses during the Hearing” and in paragraph No. 51 in the referred case the Pre-Trial Chamber further held that “As a general rule, a lower probative value will be attached to indirect evidence than to direct evidence. The Chamber does not disregard it but is cautious in using it to support its findings. The Chamber highlights that, although indirect evidence is commonly accepted in jurisprudence, the decision of the Chamber on the confirmation of charges cannot be solely based on one such piece of evidence.”

872. As regards objection of the defence against the hearsay evidence, it is to be noted that in the Act of 1973 no provision is provided against the acceptance of hearsay evidence. Globally, in the trials of international crimes, hearsay evidence is admissible. Moreso, the legislature in section 19 of the Act of 1973 made provision to admit any evidence, including reports and

photographs published in newspapers, periodicals and magazines, films and tape- recordings and other materials as may be tendered by it, which it deems to have probative value and Rule 44 is consonant with the provision of section 19 of the Act of 1973 wherein it has been provided that admission and non-admission of the evidence is the absolute discretion of the Tribunal. In Rule 56(2) of the International Crimes [Tribunal-1] Rules of Procedure, 2010 provision is made to consider both hearsay and non-hearsay evidence, but in my view solitary hearsay evidence cannot be the sole basis of conviction, it can be used to corroborate other direct evidence.

873. In the case of Muvunyi, the Trial Chamber of ICTY considered the hearsay evidence and accepted the same in support of other credible witnesses and observed in the following language;

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

874. The defence raised an objection regarding material exhibit-14 series and submitted that in the said exhibit nothing has been mentioned that Ashura Khatun obtained her job as war affected woman for which the same cannot be used against the accused-persons as corroborative evidence of rape. The learned prosecutor submitted that after the War of Liberation, the government without disclosing the detailed identity of the victims appointed them in their service to protect the war victims from social and mental harassment. Considering the social condition of the relevant time I find substance in the argument of the learned Prosecutor. Since the event narrated in charge No.1 happened in a wartime situation, it is not always possible to prove the fact by documentary evidence.

875. From the evidence of the prosecution witnesses presented to the Tribunal, it transpires that after hearing the information about the event of abduction, confinement, torture and rape committed on Ashura Khatun, P.W.10 secretly met with her. At that time, she (Ashura Khatun) had a bottle of insecticide in her hand and she informed P.W.10 that she had no chastity for which she will commit suicide, but he promised to his betrothed that after the independence of Bangladesh, he will marry her and requested not to commit suicide. Thereafter P. W.10 came back to join in the War of Liberation for independent of his motherland. Naturally as a freedom fighter, he saw the atrocities committed by Pakistani

Army and their collaborators for which after independence he married his betrothed Ashura Khatun. It is in the evidence of P.Ws. 10 and 12 that after independent government rehabilitated victim Ashura Khatun as a war affected woman appointing her as Metro-cum- Nurse in the office of Jessore Orphan and Distressed Women Rehabilitation Centre and material exhibit-14 series i.e. documents relating to her appointment also corroborated the event of abduction, confinement, torture, and rape committed on Ashura Khatun.

876. Unimpeachable evidence of the prosecution witnesses presented to the Tribunal impulse to draw the irresistible conclusion that since the victim Ashura Khatun was a source of freedom fighter, it is legally inferred that being informed about Ashura Khatun, accused Md. Sakhawat Hossain as Razakar Commander of Chingra Razakar Camp ordered his cohort Razakar accused persons to abduct Ashura Khatun to commit rape on her to implement the further policy and plan of the Pakistani occupation army and as per order of Razakar Commander accused Md. Sakhawat Hossain on 27th Bangla month Ashwin in 1971 at about 9/3.30 am his cohorts Razakar accused Md. Ibrahim Hossain alias Ghungur Ibrahim, accused Abdul Aziz Sardar, and accused Md. A. Aziz Sardar along with other 10/12 Razakars consciously forming part of a criminal enterprise and sharing common criminal intention of all to commit

the crimes having forcibly abducted Ashura Khatun [now dead], a 'source' of local freedom-fighters, from her house, confined her in Chingra Razakar Camp for three days and during confinement period Razakar Commander accused Md. Sakhawat Hossain, after inhuman torture committed rape on Ashura Khatun.

877. It is to be noted that P.W.12 firmly stated that his father informed him that Razakar Commander Md. Sakhawat Hossain committed rape on her mother while she was confined in Chingra Razakar Camp and on scrutiny of the evidence of P.W.11 it also transpires that while Ashura Khatun came back to his house from the captivity of Chingra Bazaar Razakar Camp, P.W.11 secretly met Ashura Khatun who informed him that Razakar Commander Md. Sakhawat Hossain destroyed her chastity which proved that Razakar Commander Md. Sakhawat Hossain only committed rape on Ashura Khatun and he is the mastermind and the principal perpetrator of the event narrated in charge No. 1 and this finding of fact is also corroborated by witness Nesar Ali who also stated that he heard that Razakar Commander Md. Sakhawat Hossain committed rape on Ashura Khatun.

878. It further transpires that although Ashura Khatun died in 2006, but immediate after her released from the captivity she informed to P.Ws. 10 and 11 that the Razakar Commander Md. Sakhawat Hossain destroyed her chastity while accused Md.

Sakhawat Hossain and other Razakars confined her for 3/4 days in Chingra Razakar Camp and on perusal of the material exhibit-14 series it reveals that the victim Ashura Khatun was appointed as Metron-cum- Nurse in the office of Jessore Orphan and Distressed Women Rehabilitation Center as war affected woman which corroborated the fact of torture and rape committed on Ashura Khatun.

879. From the evidence discussed above it is proved beyond all reasonable doubt that the P.W.2 Fazlur Rahman Gazi saw the victim Ashura Khatun and the accused Md. Sakhawat Hossain in the Chingra Razakar Camp and he also heard scream and weeping of Ashura Khatun who was standing at that time to grasp the iron rod of the window. Being informed about the event of abduction and rape, P.W.10 secretly met with Ashura Khatun and she informed him that she had no chastity. After one week of the event of abduction, P.W.11 Abdus Subhan Sardar went to the house of victim Ashura Khatun and at that time, she also disclosed to P.W.11 that accused Md. Sakhawat Hossain had destroyed her chastity while she was confined for three days in Chingra Razakar Camp. P.W.12 Robiul Haque Royal heard about the event of abduction from his classmates as local anecdote while he was a student of Class X in 1996 and thereafter he heard from his father [P.W.10] about the event of the abduction, confinement, and rape

that in 1971 while his mother was confined in Chingra Razakar Camp, accused Md. Sakhawat Hossain committed rape on her mother Ashura Khatun. The above-mentioned evidence proved *beyond* all reasonable doubt that on 27th Bangla months Ashwin (October) in 1971 at about 9.00/9:30 am at the order of Razakar Commander Md. Sakhawat Hossain his cohorts Razakar accused Md. Ibrahim Hossain alias Ghungur Ibrahim, accused Abdul Aziz Sardar, accused Md. A Aziz Sardar along with other 10/12 Razakars having abducted Ashura Khatun from her house situated at village –Boga of Keshobpur Thana confined her in the said Camp for three days and after inhuman torture Razakar Commander accused Md. Sakhawat Hossain committed rape on Ashura Khatun while she was confined in Chingra Bazaar Razakar Camp.

880. The event narrated in charge No.1 happened in a wartime situation in Chingra Bazaar Razakar Camp and before committing rape the Razakars forcibly abducted Ashura Khatun from her house. There was no holy purpose of forcible abduction and confinement of Ashura Khatun. Evidence presented to the Tribunal proved beyond reasonable doubt that at the order of Razakar Commander accused Md. Sakhawat Hossain, his cohorts Razakar accused Md. Ibrahim Hossain alias Ghungur Ibrahim, accused Abdul Aziz Sardar, accused Md. A. Aziz Sardar along

with other 10/12 Razakars to implement the further policy and plan of the Pakistani occupation army sharing the common criminal intention of committing the crimes having abducted victim Ashura Khatun confined her in the Chingra Razakar Camp and Razakar Commander Md. Sakhawat Hossain inhumanely tortured and committed rape on Ashura Khatun while she was confined in Chingra Bazaar Razakar Camp. Rape is the outcome of abduction. Thus accused Md. Ibrahim Hossain alias Ghungur Ibrahim, accused Abdur Aziz Sardar, accused Md. A. Aziz Sardar along with other 10/12 Razakars by abducting Ashura Khatun from her house confined her in Chingra Razakar Camp and thereby these three accused persons aided, abetted, facilitated and contributed in the commission of offences of abduction, confinement, torture and rape as crimes against humanity as specified in section 3(2)(a)(g)(h) of the Act of 1973 which is punishable under section 20(2) of the Act of 1973.

881. In order to hold an accused criminally responsible under section 4(1) of the Act of 1973, there must be a nexus between the accused and the crimes committed. To prove the events narrated in the charges framed against the accused persons for the alleged crimes committed by accused persons, the prosecution is required to prove that the accused–persons aided, abetted, facilitated or contributed to the commission of the offences in any phase of the

crimes by his act or omission and he or they are concern with the offence committed. Crimes against humanity is an organised or group crimes and normally it happens in different phases. If the prosecution by legal evidence established a nexus in between the crime and the accused, the accused is responsible for the offence committed and this nexus or link may be proved either by direct evidence or may be inferred from the fact proved by the prosecution. The presence of the accused at the crime site is not the essence of the crimes against humanity. In the instant case, it is proved beyond reasonable doubt that at the order of accused Razakar Commander Md. Sakhawat Hossain, his cohorts Razakar accused Md. Ibrahim Hossain alias Gungar Ibrahim, Abdul Aziz Sardar, accused Md. A.Aziz Sardar and other Razakars having forcibly abducted Ashura Khatun from her house confined her in Chingra Razakar Camp for 3 days and Razakar Commander Md. Sakhawat Hossain committed rape on Ashura Khatun and thereby the prosecution successfully established a link between the accused Md. Ibrahim Hossain alias Ghungur Ibrahim, Abdul Aziz Sardar, Md. A. Aziz Sardar and the offence of rape committed by Razakar Commander Md. Sakhawat Hossain inasmuch as those accused persons having abducted the victim Ashura Khatun from her house confined her in Chingra Bazaar Razakar Camp and it is legally presumed that the said accused persons handed over her in the

custody of accused Md. Sakhawat Hossain and thus aided, abetted, facilitated and contributed to the commission of the offence of rape on civilian Ashura Khatun committed by accused Razakar Commander Md. Sakhawat Hossain, and thereby accused Md. Ibrahim Hossain alias Ghungur Ibrahim, Abdul Aziz Sardar, Md. A. Aziz Sardar incurred the liability under section 4(1) of the Act of 1973.

882. In the instant case in hand, the charge has been framed against all accused persons under section 3(2)(a)(g)(h) read with section 4(1) of the Act of 1973 which is punishable under section 20(2) of the said Act. The prosecution witnesses sufficiently proved that the accused Md. Sakhawat Hossain was the Razakar Commander of Chingra Razakar Camp and he had the superior command and control over the members of the local Razakar Bahini of Chingra Razakar Camp. The prosecution witnesses presented to the Tribunal proved beyond reasonable doubt that as per order of Razakar Commander Md. Sakhawat Hossain his cohorts Razakar accused Md. Ibrahim Hossain alias Ghungur Ibrahim, accused Md. A. Aziz Sardar, accused Abdul Aziz Sardar and other Razakars consciously forming part of a criminal enterprise and sharing the common criminal intent of all the accused persons to commit the crime having abducted Ashura Khatun, a “source” of freedom fighters, from her house confined

her in Chingra Razakar Camp and Razakar Commander Md. Sakhawat Hossain after inhuman torture committed rape on civilian Ashura Khatun while she was confined in Chingra Razakar Camp and he is the principal perpetrator of the offence of abduction, confinement, torture and rape, and as Razakar Commander he committed the most heinous and cruel crimes against humanity as specified in section 3(2)(a)(g)(h) of the Act of 1973 and incurred the liability under section 4(2) of the Act of 1973 which is punishable under section 20(2) of the said Act.

Charge No. 02

[Abduction, confinement, torture and murder and other inhumane acts at village Chingra, Police Station-Keshobpur, District-Jessore].

883. Summary of charge; It is alleged that in 1971 one day in the middle of Bangla month Sraban [1378 BS] at about 10.00 A.M, in the Gadi Ghar [business office] of Muslim League leader Munshi Salimuddin of Chingra Bazar, accused Md. Sakhawat Hossain along with other 25/30 Razakars convened a meeting where accused Md. Sakhawat Hossain delivered an inciting speech before the people present in that meeting uttering that the supporters and activists of Awami League and people of Joy Bangla and supporters of the liberation war were ' "Kafer and Monafek" and they had to be killed after finding them out. Thereafter, in the middle of Bangla month Bhadra [1378 BS] in 1971 accused Md.

Sakhawat Hossain accused Md. Ibrahim Hossain alias Ghungur Ibrahim, accused Md. Billal Hossain Biswas, accused Sheikh Mohammad Mujibur Rahman alias Mujibur Rahman, accused Md. A. Aziz Sardar, son of late Ful Miah Sardar, accused Abdul Aziz Sardar, son of late Ahmmad Sardar, accused Kazi Ohidul Islam alias Kazi Ohidus Salam, accused Md. Lutfor Morol accused Md. Abdul Khaleque Morol and other 8/9 unknown Razakars raided the house of freedom-fighter Chandtulla Gazi [martyr] to apprehend him, but at that time, he was not present in his house. Thereafter above mentioned accused persons and their accomplice Razakars having plundered set fire to two dwelling houses of Chandtulla Gazi. At that moment, the wife of Chandtulla Gazi having taken her one and a half-year-old son Atiar, who was crying in her lap, touched the legs of accused Md. Sakhawat Hossain and requested him not to plunder and set their houses on fire. But accused Md. Sakhawat Hossain kicked her along with her baby son Atiar, and as a result, they were thrown down on a wooden cot and Atiar was seriously injured that resulted in his death after 17 days.

884. Subsequently, on 28 Bangla month Ashwin [1378 BS] in 1971 at about 11.00/11.30 am the above mentioned nine accused persons and other 10/15 unknown Razakars again raided the house of said Chandtulla Gazi [martyr] and then he luckily escaped from the house and went into hiding inside a bush to the northern side of his

house. But the above mentioned accused persons along with their accomplice Razakars having brought Chandtulla Gazi out from that bush confined him in Chingra Razakar Camp for four days and in captivity, he was mercilessly tortured physically and on 1 Bangla month Kartik in 1971 at about 6.00 am he was killed by rifle shot of accused Md. Sakhawat Hossain on the bank of Kapotakkho River and his dead body was left there.

885. Thereby, accused (1) Md. Sakhawat Hossain, (2) accused Md. Ibrahim Hossain alias Ghungur Ibrahim, (3) accused Md. Billal Hossain Biswas, (4) accused Sheikh Mohammad Mujibur Rahman alias Mujibur Rahman, (5) accused Md. A. Aziz Sardar, son of late Ful Miah Sardar, (6) accused Abdul Aziz Sardar, son of late Ahmmad Sardar, (7) accused Kazi Ohidul Islam alias Kazi Ohidus Salam, (8) accused Md. Lutfor Morol, and (9) accused Md. Abdul Khaleque Morol have been charged for participating, aiding, abetting, facilitating, incitement and complicity in the commission of offences of abduction, confinement, torture, murder and other inhumane acts [plundering, arson, etc.] as crimes against humanity as part of systematic attack directed against unarmed civilians as specified in section 3(2)(a)(g)(h)(f) of the Act of 1973 which is punishable under section 20(2) read with section 3(1) of the Act and thereby accused persons incurred liability under section 4(1) of the Act of 1973.

Witnesses presented to the Tribunal

886. In support of the event narrated in the charge No.2, the prosecution examined P.Ws 1 to 4 and 9, out of which P.W. 1 and 2 are the sons of freedom fighter Chandttullah Gazi. P.W. 3 is another victim of abduction, confinement, and torture. It is alleged that P.W.3 was also confined in Chingra Razakar Camp while freedom fighter Chandtullah Gazi had been in detention in the said camp. P.W.4 is the nephew of freedom fighter Chandtullah Gazi and P.W.9 is a hearsay witness.

887. P.W 1 Gaziur Rahman [62] is the son of freedom fighter Chandtulla Gazi who was also the President of Sagardari Union Awami League in 1971. He was aged about 17 years at the time of War of Liberation in 1971 and claimed to be an eyewitness to the alleged event of the abduction of his father. He stated that in the middle of Bangla month, Sraban in 1971 one day at about 10 am accused Md. Sakhawat Hossain along with other 30/40 Razakars convened a meeting in the Gadi Ghar (business office) of local Muslim League leader Munshi Solimuddin situated at Chingra Bazaar and he delivered an inciting speech stating that the members of Awami League and the people who say “Joy Bangla” are ‘Kafer, Monafek’ and decided to prepare their list to be killed after finding them out. At that time, P.W.1 sitting in a shop at Chingra Bazaar witnessed the inciting speech of the Razakars. In that meeting

Razakar accused Md. Sakhawat Hossain told his accomplices Razakars to identify the boathouses (ferry ghat) of the locality through which the freedom fighters used to cross the river. After completing the meeting, while the Razakars were leaving the bazaar, they saw P.W.1 beside the road and wanted to know where the Dhandia boathouse was located. In reply, he stated that he know that boathouse (ferry ghat). Thereafter the Razakars along with P.W.1 went to identify the Dhandia and Krishnanagar boathouses and when they came back, accused Md. Sakhawat Hossain wanted to know the name of the President of Awami League of the locality. Thereafter all the Razakars went to Chingra Bazaar Razakar Camp leaving him at Chingra Bazaar.

888. P.W.1 further stated that in the middle of Bangla month Bhadra in 1971, one day at about 10/10:30 am Razakar accused Md. Sakhawat Hossain along with other 20/22 Razakars including accused Ibrahim, accused Khaleque, accused Lutfor, accused Md. A. Aziz, son of Ful Sardar, accused Abdul Aziz, son of Ahammad Sardar, accused Mujibur, accused Billal, accused Ohidus Salam attacked Chingra Bazaar to apprehend Chandtulla Gazi, but at that time, he was not present in the bazaar. Thereafter the above mentioned Razakars attacked the house of Chandtullah Gazi and detained Momin Gazi, cousin of P.W.1. At the time, accused Ibrahim having tied inhumanely tortured Momin Gazi wanted to

know whereabouts of Chandtulla Gazi. In reply, he stated that he does not know his whereabouts. At that time, accused Md. Sakhawat Hossain ordered other Razakars to plunder and set fire to the dwelling houses of Chandtulla Gazi. Thereafter all Razakars having plundered set fire to the dwelling houses of Chandtulla Gazi. P.W.1 claimed that he witnessed the occurrence hiding in a bush situated on the north side of their house. At that time, mother of P.W.1 having taken her one and a half-year-old son Atiar, who was crying in her lap, touched the legs of accused Md. Sakhawat Hossain and requested him not to plunder and set their dwelling houses on fire. But accused Md. Sakhawat Hossain kicked her along with her son and consequently she along with Atiar were thrown down on a wooden cot and Atiar was seriously injured by breaking his bones which resulted in his death after 17 days without treatment.

889. He also narrated that on 28th Bangla month Ashwin in 1971, at about 11/11:30 am accused Md. Sakhawat Hossain along with above-mentioned accused persons and other 15/20 unknown Razakars again attacked the house of freedom fighter Chandtullah Gazi. Sensing the enormity of the attack father of P.W.1 went into hiding inside a bush to the north side of their house and he went into hiding in the bamboo bush situated to the west side of their house. The above-mentioned accused persons and the Razakars

searching the house brought Chandtulla Gazi out from that bush and having abducted from his house confined Chandtulla Gazi in Chingra Bazaar Razakar Camp. P.W.1 claimed that he witnessed the occurrence of the abduction of his father hiding in the bamboo bush. He further stated that accused persons and the Razakars inhumanely tortured Chandtulla Gazi while he was confined in Chingra Bazaar Razakar Camp for 3 /4 days.

890. P.W.1 also stated that on 1st Bangla month Kartik in 1971 at about 6 am above mentioned accused persons and Razakars forcibly took Chandtulla Gazi from Chingra Bazaar Razakar Camp to the bank of Kapotakkha River and the accused Md. Sakhawat Hossain gunned down Chandullah Gazi to death by a rifle shot on the bank of Kapotakkha River. On the same day in the morning, he heard about the killing of his father from the people who were present at Chingra Bazaar. After killing his father, he along with his relations went to Moulana Fazlur Rahman who requested accused Md. Sakhawat Hossain to handover the dead body of Chadtulla Gazi to his relations. Thereafter accused Md. Sakhawat Hossain allowed them to take the dead body of Chandullah Gazi. He further stated that after release, while Nuruddin Morol (P.W.3) came back to his house, he heard about torture and killing of his father from P.W.3.

891. In cross-examination, P.W.1 stated that there were 4/5 Razakar Camps at Keshobpur Thana except Chingra Razakar Camp which was situated within No. 2 Sagardari Union and half a mile away from his house. The River Kapotakha is situated to the south side of Sagardari Union, and Tala Thana (presently Patkelghata Thana) is situated to the south side of Kapotakha river. He denied the suggestion that in 1971, the followers of Sarbahara (me©nviv) and Nokshal (bKkvj) (both are a terrorist group) were active in their locality. He admitted that two brothers of Ozihar Morol, one brother of Md. Mujibur Rahman, father of Abdul Aziz Sardar were killed in 1971. He denied the suggestions that with the help of Sarbahara (a terrorist group) his (P.W. 1) father killed the aforesaid five persons or to take revenge the family members of those deceased killed his father. He further stated that name of his father has been included in the list of martyr and his family members are enjoying allowances as members of martyr family since last 18/20 years. He firmly asserted that accused Md. Sakhawat Hossain was Razakar Commander of the No.2 Sagardari Union and No. 4 Bidhanandakathi Union. He admitted that his stepmother Ayesha Khatun is alive, but unable to move and speak. He also denied the suggestion that he heard nothing about the torture and killing of his father from Nuruddin. He stated that after

the abduction of his father, he did not go to Chingra Bazaar Razakar Camp, but his brother Fazlur Rahman (P.W.2) went there.

892. P.W.2 Fazlur Rahman Gazi [60] was a student of Class V and aged about 15/16 years at the time of War of Liberation in 1971. He stated that one day, in the middle of Bangla month, Bhadra of 1971 at about 10/10:30 am Razakar Commander accused Md. Sakhawat Hossain, accused Md. Ibrahim Hossain alias Ghungar Ibrahim, accused Billal, accused Mujibur, accused Ohidul, accused Abdul Aziz, son of late Ahamed Sardar, accused Md. A. Aziz, son of late Ful Miah Sardar, accused Lutfor, accused Khaleque along with other 15/20 Razakars attacked their house to apprehend his father Chandtullah Gazi. At that time, he was taking rest in verandah (balcony) of their house and Razakar accused Ibrahim kicked him on his head for which due to fear of his life, he went to his stepmother and embraced her. At that time, his father was not present in their house for which the accused Md. Sakhawat Hossain ordered other Razakars to plunder and set fire to the dwelling houses of Chandtulla Gazi. Thereafter all accused persons and Razakars having plundered set fire to the dwelling houses of Chandtulla Gazi. At that time, mother of P.W.2 having taken her one and a half-year-old son Atiar, who was crying in her lap, touched the legs of accused Md. Sakhawat Hossain and requested him not to plunder and set their dwelling houses on fire. But

accused Md. Sakhawat Hossain kicked her for which she along with Atiar were thrown down on a wooden cot and Atiar was seriously injured which resulted in his death after 17 days without treatment.

893. He further stated that on 28th Bangla month Ashwin in 1971 at about 11/11:30 am accused Md. Sakhawat Hossain along with above mentioned accused and other 15/20 Razakars again attacked the house of Chandtullah Gazi to apprehend him. Sensing the enormity of the attack, father of P.W.2 went into hiding inside a bush to the north side of their house. He claimed that at that time he was present in their house. The above-mentioned accused persons and the Razakars searching the house brought Chandtullah Gazi out from that bush and having detained Chandtullah Gazi abducted him from his house and confined him in Chingra Bazaar Razakar Camp. P.W.2 claimed that he witnessed the occurrence of the abduction of his father hiding beside the wall of their dwelling house. He stated that the Chingra Razakar Camp was situated within the campus of Primary School, Land Office, and Union Parishad Office, and his father was confined in the Primary School. After two hours of the abduction of his father, he went to Chingra Razakar Camp with food to see his father and after sometimes he came back to his house. On the next day, again he went to Chingra Razakar Camp, but at that time, he was not allowed to feed his father and he was

beaten for which he came back to his house. The Razakars confined his father for four days in Chingra Razakar Camp. The accused and the Razakars inhumanely tortured his father while he was confined in Chingra Razakar Camp.

894. P.W.2 also stated that after inhuman torture on 1st Bangla month Kartik in 1971 at about 6 am above-mentioned accused persons and Razakars took his father from Chingra Bazaar Razakar Camp to the bank of Kapotakha River and accused Md. Sakhawat Hossain gunned down Chandtullah Gazi to death by a rifle shot on the bank of Kapotakkha River. On the same day in the morning, he heard about the killing of his father from the people who were present at Chingra Bazaar. Thereafter, he along with his relations went to Moulana Fazlur Rahman who requested accused Md. Sakhawat Hossain to handover the dead body of Chadtulla Gazi. Thereafter accused Md. Sakhawat Hossain allowed them to take the dead body of Martyr Chandgullah Gazi.

895. P.W. 2 further narrated that while his father was confined in Chingra Bazaar Razakar Camp, the Razakars having inhumanely tortured killed his father which he heard from Nuruddin [P.W.3] who after releasing from the captivity of Chingra Razakar Camp informed P.W.2.

896. In cross-examination P W 2 stated that in the year 1971, for the first time, he saw the accused Md. Sakhawat Hossain. He could not say the exact date when the Razakar Bahini was formed in his locality. He firmly stated that accused Md. Sakhawat Hossain was the Razakar Commander of Chingra Razakar Camp, but he could not say the exact date of setting up Razakar Camp. He also stated that his father actively took part in the War of Liberation in 1971 and that the Razakar Bahini killed freedom fighters Khaleque, Dowlat Biswas and his father Chandtullah Gazi. In reply to a question put to P.W.2 by the defence, he stated that when the Razakars attacked his house, they were in black dresses. The Chingra Razakar Camp was situated one kilometer away from their house. He could not say as to whether five persons including two brothers of Azihar Morol, one brother of Sheikh Mujibur Rahman and Ahmed Sardar, father of Abdul Aziz were killed or not. He denied the suggestion that to take revenge for the killing of above mentioned five persons; their family members killed Chandtullah Gazi. He further stated that Atiar has been killed before killing his father. He denied the suggestion that due to Pneumonia or any other disease his brother Atiar died. He stated that three freedom fighters of his village are now alive. He denied the suggestions that accused were not members of Razakar Bahini or they were also not

involved in the killing of his father. He also denied the suggestion that as tutored by others, he falsely deposed in the case.

897. P.W.3 Nuruddin Morol is a freedom fighter and an old man of aged about 73 years. He claimed to be an eyewitness of the killing of Chandtulla Gazi. When accused Md. Sakhawat Hossain and other accused persons and Razakars forcibly took Chandtulla Gazi from Chingra Bazaar Razakar Camp to the bank of Kapotakha River to kill him, he (P.W.3) claimed that at the time he was also confined in Chingra Razakar Camp.

898. He stated that at the time of War of Liberation in 1971, he was a cultivator and involved with politics of Bangladesh Awami League. At the last part of Bangla month Ashar in 1971, he along with Chandtulla Gazi who was the President of Sagardari Union Awami League went to India for training to take part in the War of Liberation. After training of 18 (eighteen) days in the Youth Camp, he took part in the War of Liberation under Sector No. 8. On 25th Bangla month, Ashwin in 1971, he along with Chandtulla Gazi came back to his house from India to see his mother. Being informed about P.W.3 and Chandtulla Gazi, on 28th Bangla month, Ashwin of 1971 at about 7:00 am Razakar accused Mujibur Rahman, Akram Hossain, accused Abdul Khaleque, accused Lutfor, accused Billal, accused Md. Shakhawat Hossain along with 10/12 Razakars of Chingra Razakar Camp attacked his house and

having detained Chandtullah Gazi abducted and confined him in Chingra Razakar Camp and inhumanely tortured him. The Razakars confined him in the Primary School [Razakar Camp] and on that day at about 11/12 am the Razakar accused persons also confined Chandtulla Gazi in the Primary School. The Razakar accused persons and other Razakars inhumanely tutored him, Chandtulla Gazi and other detainees to know the information about the freedom fighters and their arms. After confinement of Chandtulla Gazi in the Chingra Razakar Camp, his son Fazlur Rahman (P.W.2) went to the Chingra Razakar Camp with food for his father, but the Razakar Moshier snatched away the food and forcibly dragged him out from the Razakar Camp.

899. He further stated that on Ist Bangla month Kartik in 1971 at about 6(six) am Razakar accused Sakhawat Hossain, other accused persons and Razakars forcibly took Chandtulla Gazi from Chingra Razakar Camp to the bank of Kapotakha river and accused Md. Sakhawat Hossain gunned down Chandtulla Gazi to death by a rifle shot on the bank of Kapotakha river. P.W.3 claimed that he witnessed the killing of Chandtulla Gazi through the open window while he was confined in the Chingra Razakar Camp [at that time P.W.3 started crying failing to control his emotion]

900. He also stated that while he came back to his house from the captivity of Chingra Razakar Camp, Gaziur Rahman (P.W.1) and

Fazlur Rahman (P.W.2), sons of Chandtulla Gazi and nephew of Chandtulla Gazi namely Momin Gazi (PW4) came to his house and wanted to know about the killing of Chandtulla Gazi. At that time he had given them detail information about the killing of Chandtulla Gazi.

901. In cross-examination, P.W. 3 stated that Captain Shafiullah was his Commander of training Camp in India and Major Monjur was the Commander of Sector No. 8. His house was situated ½ mile away from Chingra Bazaar. The house of Martyr Chandtulla Gazi was situated to the ½ mile south-west side from his house. He denied the suggestions that accused Mujibur Rahman and Lutfor Rahman Morol were not Razakars or they were also not involved in the alleged occurrence. He admitted that accused Sakhawat Hossain contested in the general election from his locality and that he saw accused Sakhawat Hossain before and after War of Liberation in 1971. The freedom fighters of his locality namely Kazi Rafiqul Islam, Kazi Shahidul Islam, Latif, Khalil, Ratan, and Sattar are alive. He firmly asserted that accused Sakhawat Hossain was the Razakar Commander of No.2 Sagardari Union. In 1971, the Razakars killed Chandtulla Gazi and many other people of his Union. The Razakars killed Hasan, Patu, another young boy aged about 15/16 years and Chandtulla Gazi in the Chingra Razakar Camp. While the Razakars attacked his house, they were wearing

lungi, trousers, panjabi and different kind of local dress. He could not recognize other Razakars except the accused persons who abducted him. In both the list of freedom fighters prepared in 1971 and present list, his name has been included as a freedom fighter and now he is receiving allowances as a freedom fighter. The Chingra Razakar Camp was situated in the 25 yards south from the bank of Kapotakha River. He denied the suggestions that the Razakars did not kill Chandtulla Gazi or other persons to take revenge of killing their family members killed Chandtulla Gazi.

902. P.W. 4 Momin Gazi is an old man of 70 years and at the time of War of Liberation in 1971 he was aged about 18/19 years. He used to help the freedom fighters at the time of War of Liberation in 1971. He stated that in the middle of Bangla month Bhadra of 1971, one day at about 10:30 am Razakar accused Md. Sakhawat Hossain and his accomplices Razakar accused Ibrahim, accused Billal Hossain, accused Abdul Aziz Sardar, son of Ahmed Sardar, accused Md. M. Aziz Sardar, son of Ful Miah Sardar, Khaleque, Lutfor, Mujibur and Ohidul along with other 14/15 Razakars attacked his house and having detained him took him to the house of his uncle Chandtulla Gazi to detain him. Chandtulla Gazi was the President of Sagardari Union Awami League in 1971. Since at that time Chandtulla Gazi was not present in his house, accused Razakar Ibrahim having beaten him (P.W.4) wanted to know

whereabouts of Chandtulla Gazi, but one point of time, he fled away and went into hiding in the jungle situated to the west side of the house of Chandtulla Gazi. At that time, his cousin Fazlur Rahman was lying in their veranda (balcony). Hiding in the jungle, he witnessed that all the accused persons having plundered set fire in the dwelling houses of Chandtulla Gazi.

903. He further stated that after setting fire to the dwelling houses of Chandtullah Gazi, the Razakars left the house. Thereafter P.W.4 came back to the house of Chandtulla Gazi and saw that Ayesha Khatun, wife of Chandtulla Gazi, was crying keeping Atiar in her lap. Ayesha Khatun informed him that while the Razakars set fire in the house of Chandtulla Gazi, she requested Razakar accused Md. Sakhawat Hossain and other Razakars not to plunder and set fire to their dwelling houses, but at that time accused Md. Sakhawat Hossain kicked her along with her son Atiar, consequently, she and her one and a half year old son Atiar were thrown down on a wooden cot and Atiar was seriously injured by breaking his bones which resulted in his death after 17 days without any treatment.

904. He also stated that on 28th Bangla month Ashwin in 1971 at about 11/11:30 am again Razakar accused Md. Sakhawat Hossain along with his accomplices Razakar accused Ibrahim, accused Billal, accused Md. A. Aziz Sardar, son of Late Ful Miah Sardar,

accused Abdul Aziz Sardar, son of late Ahmad Sardar, accused Khaleque, accused Lutfor, accused Mujibur and accused Ohidul and other 15/20 Razakars attacked the house of Chandtulla Gazi. At that time, he went into hiding in the jungle situated to the west side and Chandtulla Gazi went into hiding in the jungle situated to the north side of his house. He witnessed that searching the house of Chandtullah Gazi, Razakar accused Md. Sakhawat Hossain and his accomplices Razakars brought Chandtulla Gazi out from the jungle and having tied abducted him and confined in Chingra Bazaar Razakar Camp. He further stated that Razakars and accused persons as mentioned above were inhabitant of the same locality for which they were previously known to him. The Razakars confined Chandtulla Gazi 4 days in the Chingra Razakar Camp and inhumanely tortured him.

905. He further narrated that on first Bangla month Kartik in 1971 at about 6:00 am at the order of Razakar accused Md. Sakhawat Hossain, his accomplices Razakar accused Ibrahim, accused Billal, accused Abdul Aziz Sardar, accused Md. A. Aziz Sarder, accused Khaleque, accused Lutfor, accused Mujibur, accused Ohidul forcibly dragged Chandtulla Gazi out from Chingra Razakar Camp and took him to the bank of Kapotakha river and accused Md. Sakhawat Hossain gunned down Chandtulla Gazi to death by a rifle shot.

906. P.W.4 lastly stated that on first Bangla month Kartik in 1971 after fajr prayer (Morning Prayer) he was standing on the road near to their house. At that time, one shopkeeper informed him that accused Razakar Md. Sakhawat Hossain killed Chandtulla Gazi and requested him to flee away. Thereafter he went to their house and informed about the killing of Chandtulla Gazi to his sons Gaziur Rahman (P.W.2) and Fazlur Rahman (P.W.2). Thereafter he went to their neighbour Fazlur Rahman to bring the dead body of Chandtulla Gazi who requested accused Md. Sakhawat Hossain to hand over the dead body of Martyr Chandtulla Gazi. Thereafter P.W.4 along with his relations brought the dead body of Martyr Chandtulla Gazi. He claimed that he also heard about the killing of Chandtullah Gazi from Nuruddin [P.W.3] who was confined in Chingra Razakar Camp. P.W.3 informed him about killing of Chandtullah Gazi while he came back to his house from the captivity.

907. In cross-examination P.W.4 stated that his house was situated to the about ½ mile west side from the Chingra Razakar Camp and quarter mile east from Kapotakha River. His house was situated beside the house of Martyr Chandtulla Gazi. There were total three Razakar Camps within the Keshobpur Thana; the other two Razakars Camps were situated at Mangalpur and Keshobpur. Gaziur Rahman (P.W.1), Fazlur Rahman (P.W.2) and Bazlur

Rahman are sons of Martyr Chandtulla Gazi and they are now alive. In reply to a question put to him by the defence, he stated that there was no second Chandtulla Gazi in his village. In 1979, accused Md. Sakhawat Hossain as the candidate of Jamaat-e-Islam took part in the general election, but he could not say, from which party, accused Md. Sakhawat Hossain participated in the general election in 1985 and 1996. He heard that in 1971 five people of his locality were killed, but he could not say the name who killed them. He denied the suggestions that Chandtulla Gazi was responsible for killing of those five people or the family members of those five persons to take revenge killed Chandtulla Gazi or in 1971 his cousin Atiar was suffering from various diseases. He admitted that in the middle of Bangla month, Bhadra in 1971, while accused Md. Sakhawat Hossain and his accomplices Razakars attacked the house of Chandtulla Gazi, he was not present in his house, and stated that at that time he was in India, and that on 28th Bangla month Ashwin of 1971, his uncle Chandtulla Gazi after completing training came back from India and on that day at about 11/11:30 am he met with his uncle Chandtulla Gazi. He denied the suggestion that Chandtulla Gazi was not a freedom fighter, but he asserted that he (Chandtulla Gazi) went India in 1971 and accused Md. Sakhawat Hossain was the Razakar Commander of Sagardari Union. He denied the suggestions that the accused persons were

not Razakars in 1971 or he is a tutored witness or to take revenge falsely deposed against the accused persons. In cross-examination P.W.4 further stated that amongst his family members, his uncle Chandtulla Gazi was a freedom fighter. He denied the suggestions that accused persons were not Razakars or they were also not involved in the act of killing of Chandtulla Gazi or as tutored by others he deposed falsely against the accused persons.

908. P.W.9 Md. Kamal Sardar is an old man aged about 63 years. He stated that on 15th Bangla month Jystha in 1971, the Razakars set up Razakar Camp at Chingra Bazar and accused Md. Sakhawat Hossain was the Commander of Chingra Razakar Camp. He did not say anything in examination in chief as regards the event narrated in charge No.2, but in reply to a question put to him during cross-examination, P.W.9 stated that except the boy who was killed at the boat house, in the Bangla month, Bhadra in 1971, the Razakars having abducted Chandtulla Gazi confined him in Chingra Razakar Camp and after 3 days killed him. In cross-examination, he stated that in 1971, Chingra Bazaar used to sit on Friday and Tuesday. He denied the suggestions that accused Md. A. Aziz Sardar, son of Ful Miah Sardar, accused Lutfor Morol were not known to him or they were not involved in the occurrence in the manner as stated by him.

Evaluation of evidence presented to the Tribunal

909.The learned Prosecutor Mr. Zead Al Mamun appearing with another learned Prosecutor Ms. Razia Sultana submitted that the Prosecution examined P.Ws. 1,2,3, 4 and 9 to prove the events of abduction, confinement, torture and killing of Chandtullah Gazi and his minor child Atiar as narrated in charge No.2. Out of 5 witnesses examined by the prosecution, P.Ws.1,2 and 4 are direct witness of the event of abduction and other inhumane acts [plundering and arson]. P.W.3 is the direct witness of killing Chandtullah Gazi and P.W.2 and 3 are the direct witnesses of confinement and torture of Chandtullah Gazi. P.Ws.1 and 2 are the direct witnesses of the killing of Atiar and P.W.4 is a hearsay witness of killing Atiar. The P.Ws. 1,2 and 4 as the direct witnesses proved the abduction and P.Ws. 2 and 3 proved the confinement and torture of Chandtullah Gazi and P.Ws. 1,2,4 and 9 are the hearsay witnesses regarding the killing of Chandtullah Gazi and all witnesses corroborated each other in respect of the event narrated in charge No.2.

910.The learned defence counsel Mr. Abdus Sattar Palwan appearing on behalf of accused Md. Sakhawat Hossain, Md. Billal Hossain Biswas, Abdul Aziz Sardar, Md. Abdul Khaleque Morol and Kazi Ohidul Islam alias Kazi Ohidus Salam submitted that there is no documentary evidence that Md. Sakhawat Hossain was the Razakar Commander and admittedly Aminuddin Master was

the Razakar Commander of Kashobpur Thana and the Prosecution with an ill motive exonerated Aminuddin Master and falsely implicated accused Md. Sakhawat Hossain in the instance case. He further submitted that there is no allegation of killing against any other accused persons and the prosecution falsely implicated them as an accomplice of Md. Sakhawat Hossain. The learned defence counsel further submitted that admittedly at the time of War of Liberation five persons of Sagardari Union were killed by the freedom fighters and the relations of those deceased to take revenge killed Chandtullah Gazi. He also submitted that admittedly the accused Md. Sakhawat Hossain is not the inhabitant of the No.2 Sagardari Union for which it is not believable that he was the Commander of No. 2 Sagardari Union.

911.The learned prosecutor Mr. Abdus Sukur Khan appearing on behalf of accused Md. Ibrahim Hossain alias Ghungur Ibrahim, Sheikh Mujibur Rahman alias Mujibur Rahman and Md. A. Aziz Sardar submitted that there is no allegation of killing against the accused persons and the prosecution falsely implicated them as accomplices of co-accused Md. Sakhawat Hossain and the prosecution failed to prove the charge by adducing any reliable witnesses.

912.On rebuttal, the learned Prosecutor Mr. Zead- Al- Malum appearing on behalf of the Prosecution submitted that all the

accused persons were present at the time of abduction and killing. Although the accused Md. Sakhawat Hossain only gunned down Chandtullah Gazi to death but all other accused persons along with Razakar Commander Md. Sakhawat Hossain by abducting Chandtullah Gazi from his house confined him in Chingra Razakar Camp and after inhuman torture forcibly dragged him out from the Chingra Razkar Camp and took him at the bank of Kapotakha River and all other accused persons aided, abetted, facilitated and thereby jointly committed the offence as narrated in charge No.2. The learned Prosecutor further submitted that all the accused persons participated in each of the phases of the events narrated in charge No.2 and the mere presence of the accused persons at the place of occurrence are enough to make them criminally liable for the offence committed.

913. The event narrated in Charge No. 2, relates to the killing of Atiar, one and a half-year-old son of freedom fighter Chandtullah Gazi and abduction, confinement, torture and killing of freedom fighter Chandtullah Gazi who was the President of Sagardi Union Awami League at the time of War of Liberation in 1971 and other inhumane acts[plundering and arson]. Atiar, one and a half-year-old son of freedom fighter Chandtullah Gazi alleged to have been killed one day at 10/10-30 am in the middle of Bangla month Bhadra in 1971 while accused Md. Sakhawat Hossain, accused Md.

Ibrahim Hossain alias Gungar Ibrahim, accused Md. Billal Hossain Biswas, accused Sheikh Mohammad Mojibur Rahman alias Mujibur Rahman, accused Md. A. Aziz Sardar, son of Ful Mia Sardar, accused Abdul Aziz Sardar, son of late Ahmed Sardar, accused Kazi Ohidul Islam alias Kazi Ohidus Salam, accused Md. Lutfor Morol accused Md. Abdul Khaleque Morol and other 8/9 unknown Razakars attacked the house of freedom fighter Chandtullah Gazi to apprehend him, but at that time he was not present in his house, consequently the above mentioned accused – persons and their accomplices Razakars at the order of accused Md. Sakhawat Hossain having plundered set fire in the dwelling houses of Chandtullah Gazi and at that moment his one and a half-year-old son Atiar was crying in the lap of his mother and she having touched the legs of accused Md. Sakhawat Hossain requested not to plunder and set their dwelling houses on fire but accused Md. Sakhawat Hossain kicked her along with her baby son Atiar, consequently, they were thrown down on a wooden cot and Atiar was seriously injured which resulted in his death after 17 days.

914. It is alleged that the event narrated in charge No.2 happened in three phases. Since Chandtullah Gazi was the president of Sagardari Union Awami League in 1971 and a freedom fighter, the Razakars decided to kill him and made attempts to apprehend

Chandtullah Gazi before abduction happened on 28th Bangla month Ashwin in 1971 and subsequently killed him on 1st Bangla month Kartik in 1971 at the bank of Kapotakha River.

Decision of killing

915. It is a common knowledge that at the time of War of Liberation in 1971, the freedom fighters and the pro-liberation people of Bangladesh were the main target of the Pakistani occupation army, Razakars and other collaborates and to implement the further policy and plan of the Pakistani occupation army, the Razakar Bahini was formed to annihilate the pro-liberation people and freedom fighters. In this respect P.W, 1 Gaziur Rahman stated that in the middle of Bangla month Sraban in 1971 one day at about 10 am accused Md. Sakhawat Hossain along with other 30/40 Razakars convened a meeting in the Ghadi ghar[business office] of Muslim League leader Munshi Solimuddin situated at Chingra Bazaar wherein accused Razakar Commander Sakhawat Hossain delivered an inciting speech stating that the members of Awami league and the people who say “Joy Bangla” are ‘Kafer, Monafek’ and decided to prepare their list to be killed after finding them out. In that meeting Razakar accused Md. Sakhawat Hossain told his accomplices Razakars to identify the boathouses (ferry ghat) of the locality through which the local freedom fighters used to cross the river.

The attempt of the abduction of Chandtullah Gazi and other inhuman acts.

916. As regards the first attempt of the abduction of civilian Chandtullah Gazi P.W 1 Gaziur Rahman who is the son of Martyr Chandtulla Gazi stated that in the middle of Bangla month, Bhadra in 1971, one day at about 10/10:30 am Razakar accused Md. Sakhawat Hossain along with other 20/22 Razakars including accused Ibrahim, accused Khaleque, accused Lutfor, accused Md. A. Aziz Sardar, son of Ful Miah Sardar, accused Abdul Aziz Sardar, son of Ahammad Sardar, accused Mujibur, accused Billal, accused Ohidus Salam attacked Chingra Bazaar to apprehend Chandtulla Gazi, but at that time, he was not present in the bazaar. Thereafter the above mentioned Razakars again attacked the house of Chandtullah Gazi and detained Momin Gazi, cousin of P.W.1. Accused Ibrahim having tied inhumanely tortured Momin Gazi wanted to know whereabouts of Chandtulla Gazi, since at that time he was not present in his house, at the order of Razakar accused Md. Sakhawat Hossain, other accused persons , and Razakars having plunder set fire to the dwelling huts of Chandtullah Gazi.

917. P.W 2 Fazlur Rahman Gazi, another son of civilian Chandtullah Gazi also stated regarding the first attempt of the abduction of Chandtullah Gazi. He stated that one day, in the middle of Bangla month, Bhadra of 1971 at about 10/10:30 am

Razakar Commander accused Md. Shakhawat Hossain, accused Ibrahim Hossain alias Ghungur Ibrahim, accused Billal, accused Mujibur, accused Ohidul, accused Abdul Aziz, son of late Ahamed Sardar, accused Md. A. Aziz Sardar, son of late Ful Miah Sardar, accused Lutfor, accused Khaleque along with other 15/20 Razakars attacked the house of Chandtullah Gazi to apprehend him. At that time, he [p.w 2] was taking rest in verandah (balcony) of their house and accused Ibrahim kicked him on his head for which due to fear of his life, he went to his stepmother and embraced her. At that time, his father was not present in their house for which the accused Md. Sakhawat Hossain ordered other Razakars to plunder and set fire to the dwelling houses. Thereafter all Razakars having plundered set fire in the dwelling houses of Chandtulla Gazi.

918. P.W. 4 Momin Gazi regarding the attempt of abduction stated that in the middle of Bangla month Bhadra of 1971, one day at about 10:30 am Razakar accused Md. Sakhawat Hossain and his accomplices Razakar accused Ibrahim, accused Billal Hossain, accused Abdul Aziz Sardar, son of Ahmed Sardar, accused Md. A. Aziz, son of Ful Miah Sardar, Khaleque, Lutfor , Mujibur and Ohidul along with other 14/15 Razakars attacked his house and having detained P.W.4 taken him to the house of his uncle Chandtulla Gazi to detain him. Chandtulla Gazi was the President of Sagardari Union Awami League in 1971. Since at that time

Chandtulla Gazi was not present in his house, accused Razakar Ibrahim having beaten him (P.W.4) wanted to know whereabouts of Chandtulla Gazi, but one point of time, he fled away and went into hiding in the jungle situated to the west side of the house of Chandtulla Gazi. At that time, he saw that all the accused persons having plundered set fire in the dwelling house of Chandtullah Gazi and thereafter left the house.

The abduction of Chandtullah Gazi.

919. To prove the event of the abduction of civilian Chandtullah Gazi, the prosecution examined P.Ws 1 to 4 and all of them are direct witnesses and prosecution also relied on the evidence of P.W.9.

920. P.W 1 Gaziur Rahman as regards abduction of his father stated that on 28th Bangla month Ashwin in 1971, at about 11/11:30 am accused Md. Sakhawat Hossain along with above mentioned accused[nine accused-persons] and other 15/20 unknown Razakars again attacked their house. Sensing the enormity of the commission of the offence, Chandtullah Gazi went into hiding inside a bush to the north side of their house and he went into hiding in the bamboo bush situated to the west side of their house. The above mentioned accused and the Razakars searching the house brought Chandtulla Gazi out from that bush and having detained Chandtullah Gazi abducted him from his house and confined him in Chingra Bazaar

Razakar Camp. He claimed that he witnessed the occurrence of the abduction of his father hiding in the bamboo bush. The accused and the Razakars inhumanely tortured Chandtulla Gazi while he was confined in Chingra Razakar Camp for 3 /4 days.

921. P.W.2 Fazlur Rahman Gazi, another son of Chandtullah Gazi regarding the abduction of his father stated that on 28th Bangla month Ashwin in 1971 at about 11/11:30 am accused Md. Sakhawat Hossain along with above mentioned accused (nine accused persons) and other 15/20 Razakars again attacked the house of Chandtullah Gazi to apprehend him. Sensing the enormity of the commission of the offence, his father went into hiding in a bush to the north side of their house. The above-mentioned accused persons and the Razakars searching the house brought Chandtullah Gazi out from that bush and having detained him abducted from his house and confined him in Chingra Bazaar Razakar Camp. P.W.2 claimed that he witnessed the abduction of his father hiding beside the wall of their dwelling house.

922. PW.3 freedom fighter Nuruddin Morol stated that at the last part of Bangla month Ashar in 1971, he along with Chandtulla Gazi who was the President of Sagardari Union Awami League went to India for training to take part in the War of Liberation. After training of 18 (eighteen) days in the Youth Camp, he took part in the War of Liberation under Sector No. 8. On 25th Bangla month

Ashwin in 1971, he along with Chandtulla Gazi came back to his house from India to see his mother. Being informed about P.W.3 and Chandtulla Gazi, on 28th Bangla month Ashwin in 1971 at about 7:00 am Razakar accused Mujibur Rahman, Akram Hossain, accused Abdul Khaleque, accused Lutfor, accused Billal, accused Md. Sakhawat Hossain along with 10/12 Razakars of Chingra Bazaar Razakar Camp attacked his house and having detained him abducted and confined in Chingra Razakar Camp and inhumanely tortured him while he was confined in Chingra Razakar Camp. The Razakars confined him in the Primary School and on that day at about 11/12 am the Razakars also confined Chandtulla Gazi in the Primary School. The Razakars inhumanely tutored him and Chadtulla Gazi and other detainees to know the information about the freedom fighters and their arms. After confinement of Chandtulla Gazi in the Chingra Razakar Camp, his son Fazlur Rahman (P.W.2) went to the Chingra Razakar Camp with food for his father, but the Razakar Moshier snatched away the food and forcibly dragged him out from the Razakar Camp.

923. P.W. 4 Momin Gazi as regards abduction of Chandtullah Gazi stated that on 28th Bangla month Ashwin in 1971 at about 11/11:30 am Razakar accused Md. Sakhawat Hossain along with his accomplices Razakar accused Ibrahim, accused Billal, accused Md. A. Aziz Sardar, son of Ful Miah Sardar, accused Abdul Aziz

Sardar, son of late Ahmad Sardar, accused Khaleque, accused Lutfor, accused Mujibur and accused Ohidul and other 15/20 Razakars attacked the house of Chandtulla Gazi. At that time, P.W. 4 went into hiding in the jungle situated to the west side and Chandtulla Gazi went into hiding in the jungle situated to the north side of his house. P.W. 4 witnessed that Razakar accused Md. Sakhawat Hossain and his accomplices Razakars brought Chandtulla Gazi out from the jungle and having tied abducted and confined him in Chingra Bazaar Razakar Camp.

Killing of Chandtullah Gazi.

924. P.W 1 Gaziur Rahman as regards killing of his father stated that on 1st Bangla month Kartik in 1971 at about 6 am above mentioned accused [nine accused –persons] and Razakars forcibly dragged Chandtulla Gazi out from Chingra Bazaar Razakar Camp to the bank of Kapotakkha River and the accused Md. Sakhawat Hossain gunned down Chandullah Gazi to death by a rifle shot on the bank of Kapotakkha River. On the same day in the morning, he heard about the killing of his father from the people who were present at Chingra Bazaar. Thereafter, he along with his relations went to Moulana Fazlur Rahman who requested accused Md. Sakhawat Hossain to handover the dead body of Chadtulla Gazi to his relations. Thereafter accused Md. Sakhawat Hossain allowed them to take the dead body of Chandullah Gazi. He further stated

that he heard about the torture and killing of his father from Nuruddin who was also confined in Chingra Bazaar Razakar Camp along with his father. P.W.1 further stated that after releasing from the captivity, Nuruddin Morol (P.W.3) informed the above-mentioned incident to him.

925. P.W.2 Fazlur Rahman Gazi as regards the killing of his father stated that on 1st Bangla month Kartik in 1971 at about 6 am above mentioned accused[nine accused-persons] and Razakars forcibly dragged Chandtulla Gazi out from Chingra Bazaar Razakar Camp and took him to the bank of Kapotakha River and accused Md. Sakhawat Hossain gunned down Chandtullah Gazi to death by a rifle shot on the bank of Kapotakkha River. On the same day in the morning, he heard about the killing of his father from the people who were present at Chingra Bazaar. Thereafter, he along with his relations went to Moulana Fazlur Rahman who requested accused Md. Sakhawat Hossain to handover the dead body of Chadtulla Gazi. Thereafter accused Md. Sakhawat Hossain allowed them to take the dead body of his father. He further stated that while his father was confined in Chingra Bazar Camp, the Razakars inhumanely tortured and killed his father which he also heard from Nuruddin who after released from the captivity informed him about the killing of his father.

926. It is alleged that while accused Md. Sakhawat Hossain and other accused persons and Razakars forcibly took Chandtulla Gazi from Chingra Bazaar Razakar Camp to the bank of Kapotakha river to kill him, P.W.3 Nuruddin Morol was also confined in Chingra Razakar Camp and P.W.3 claimed that he witnessed the killing of Chandtulla Gazi. He stated that on Ist Bangla month Kartik of 1971 at about 6(six) am Razakar accused Sakhawat Hossain, and his accomplices Razakar accused persons[nine accused-persons] and other Razakars forcibly took Chandtulla Gazi from Chingra Razakar Camp to the bank of Kapotakha river and accused Md. Sakhawat Hossain gunned down Chandtulla Gazi to death by a rifle shot on the bank of Kapotakha river. He witnessed the killing of Chandtulla Gazi through an open window while he was confined in the Chingra Razakar Camp (at that time P.W.3 started crying failing to control his emotion). He further stated that on Ist Bangla month Kartik in 1971 at 10/11:00 am the about mentioned accused persons and Razakars took him to Keshobpur Girls High School[another Razakar Camp] and confined him there. Abdul Aziz, the Chairman of Sagardari Union, went to Keshobpur Razakar Commander Aminuddin Master (now dead) to release him. Thereafter, by giving an undertaking to the Razakars to the effect that he will not do anything against Pakistan, P.W. 3 was released from the captivity of Razakars. After release from the captivity,

P.W.3 went to the house of Ershad Gazi (now dead) situated at Keshobpur Bazaar. On the next day, Chairman Abdul Aziz taken him from the house of Ershad Gazi to the house of Nuruddin Morol and while he came back to his house, Gaziur Rahman (P.W.1) and Fazlur Rahman (P.W.2), sons of Chandtulla Gazi and nephew of Chandtulla Gazi namely Momin Gazi (PW.4) came to his house and wanted to know about the killing of Chandtulla Gazi. At that time he had given them detail information about the killing of Chandtulla Gazi.

927. P.W. 4 Momen Gazi stated that on first Bangla month Kartik in 1971, at about 6:00 am at the order of Razakar accused Md. Sakhawat Hossain, his accomplices Razakar accused Ibrahim, accused Billal, accused Abdul Aziz Sardar, Md. A. Aziz Sardar, accused Khaleque, accused Lutfor, accused Mujibur, accused Ohidul forcibly dragged Chandtulla Gazi out from Chingra Razakar Camp and took him to the bank of Kapotakha river and accused Md. Sakhawat Hossain gunned down Chandtulla Gazi to death by a rifle shot. On that day, after performing fajr prayer (Morning Prayer) he was standing on the road near to their house. At that time, one shopkeeper informed him that accused Razakar Md. Sakhawat Hossain killed Chandtulla Gazi and requested him to flee away. Thereafter he went to their house and informed about the killing of Chandtulla Gazi to his sons Gaziur Rahman (P.W.2) and

Fazlur Rahman (P.W.2). Thereafter he went to their neighbour Fazlur Rahman to bring the dead body of Martyr Chandtulla Gazi who requested accused Md. Sakhawat Hossain to hand over the dead body of Martyr Chandtulla Gazi. Thereafter he along with his relations brought the dead body of Martyr Chandtulla Gazi. P.W.4 claimed that he and his relations also heard about the torture and killing of Martyr Chandtulla Gazi from Nuruddin Morol (P.W.3) who was also confined in the Chingra Razakar Camp along with Chandtulla Gazi. P.W.3 informed them when he came back to his house from the captivity of Chingra Razakar Camp.

928. P.W.9 Md. Kamal Sardar during cross-examination in reply to a question put to him by the defence stated that except the boy who was killed at the boat house in the Bangla month, Bhadra in 1971, the Razakars having abducted Chandtulla Gazi confined him in Chingra Razakar Camp and after 3 days killed him.

929. P.W.1 stated that in the middle of Bangla month Srabon in 1971 one day at about 10 am accused Md. Sakhawat Hossain along with other 30/40 Razakars convened a meeting in the Godi Ghar [business office] of Muslim League leader Solimuddin situated at Chingra Bazaar and delivered an inciting speech stating that the members of Awami League and the people who say “Joy Bangla” are “kafer and Monafek” and decided to prepare their list to be killed after finding them out. During cross-examination, above

evidence of P.W. 1 was not denied by the defence. In cross-examination, in reply to a question put to P.W.1, he stated that he heard that at the time of War of Liberation in 1971, five persons including two brothers of Azihar Morol, one brother of Md. Mujibur Rahman and father of Abdul Aziz Sardar were killed in the first part of War of Liberation, but he denied the suggestion that his father with the help of Sarbohara [a terrorist group] killed those five persons. He also denied the suggestion that family members of those five deceased to take revenge killed his father in 1971. In respect of killing of Atiar, one and a half-year-old son of Chandtullah Gazi, a suggestion was given to P.W. 1 to the effect that his brother had been suffering from pneumonia or he died due to his illness, which he denied.

930. P.W.2 Fazlur Rahman Gazi in examination-chief stated that in the middle of Bangla month Bhadra in 1971 at about 10/10. 30 am Razakar Commander accused Md. Sakhawat Hossain accused Md. Ibrahim Hossain alias Ghungur Ibrahim, accused Billal Hossain, accused Mujibur, accused Ohidur Rahman, accused Abdul Aziz Sardar, accused Md. A. Aziz Sardar, accused Lutfor Morol (now dead), accused Abdul Khaleque along with 15/ 20 Razakars attacked the house of Chandtullah Gazi to apprehend him. But during cross-examination of P.W.2, the defence did not cross-examine him in respect of above incriminating evidence, although

by giving suggestion to him, the defence merely denied his evidence. In respect of killing of Atiar, the P.W. 2 stated that at the time of attacking the house of Chandtullah Gazi, Razakar Commander Md. Sakhawat Hossain kicked wife of Chandtullah Gazi along with her son Atiar and consequently she along with Atiar were thrown down on a wooden cot and was seriously injured by breaking his bones which resulted in his death without treatment. During cross-examination of P.W. 2, the defence only suggested that Atiar died due to his illness which has been denied by P.W.2. Mere denial of the evidence of a witness is not sufficient to negate incriminating evidence. As regards abduction and killing of Chandtullah Gazi, P.W.2 stated that on 28th Bangla month, Ashwin at about 11/11.30 am the above mentioned nine accused persons again attacked the house of freedom fighter Chandtullah Gazi and having detained him abducted from his house and confined him in Chingra Bazaar Razakar Camp and after inhumane torture in the first Bangla month Kartik in 1971, the above mentioned nine accused- persons forcibly dragged Chandtullah Gazi out from the Camp and took him on the bank of Kapotakha river and accused Md. Sakhawat Hossain gunned down him to death. In cross-examination as regards killing of Chandtullah Gazi in reply to a question put to P.W.2, he stated that he does not know as to whether two brothers of Ozihar Morol, one brother of

Sheikh Mujibur Rahman and Ahmed Sardar, father of Abdul Aziz Sardar had been killed or not, and denied the suggestion that his father killed the aforesaid 5 persons and the family members of those five deceased to take revenge killed Chandtullah Gazi. The defence failed to prove the defence case by adducing legal evidence.

931. One scrutiny of the evidence of P.Ws. 1 to 4 it transpires that admittedly Chandtullah Gazi is a freedom fighter and his killing in 1971 has not been disputed by the defence. The defence case is that in 1971 freedom fighter Chandtullah Gazi killed 5 (five) persons of his locality including two brothers of Ozihar Morol, one brother of accused Sheikh Mujibur Rahman and Ahmed Sardar, father of accused Abdul Aziz Sardar and the family members of those deceased to take revenge killed Chandtullah Gazi. It is surprising that by giving suggestion to P.Ws. 1, 2,3 and 4 the defence admitted the killing of Chandtullah Gazi, inasmuch as accused Ozihar Morol, Sheikh Mujibur Rahman and Abdul Aziz Sardar are close relatives of those deceased claimed to have been killed by Chandtullah Gazi and cross-examination of accused Md. Sakhawat Hossain and others were adopted on behalf of accused Sheikh Md. Mujibur Rahman alias Mujibur Rahman, Md. Ibrahim Hossain alias Ghungur Ibrahim and Md. A. Aziz Sardar.

932. As regards event narrated in Charge No.2, P.W.3 stated that after the abduction, the Razakars confined him in the Primary School (Chingra Bazaar Razakar Camp) and on the same day of his confinement in Chingra Bazaar Razakar Camp at about 11/12 am the Razakars also confined Chandtullah Gazi in the Primary School. He further stated that Razakars inhumanely tortured Chandtullah Gazi and another detainee to know the information about freedom fighters and their arms. He also stated that during confinement of Chandtullah Gazi in Chingra Bazaar Razakar Camp, his son Fazlur Rahman (P.W.2) went there with food for his father, but the Razakar Moshiur snatched away the food and forcibly dragged him out from the Razakar Camp, and that after his released from captivity of Chingra Bazaar Razakar Camp while he came back to his house, P.W.1,2 and 4 came to his house and he informed them in detail about killing of Chandtullah Gazi. On scrutiny of the evidence of P.W.3, it appears that during cross-examination of P.W.3 as regards confinement, torture, and killing of Chandtullah Gazi, on behalf of the accused Md. Sakhawat Hossain, accused Billal Hossain, accused Abdul Aziz Sardar, son of Ahmed Sardar, accused Kazi Ohidul Islam and accused Abdul Khaleque Morol, he stated that accused Md. Sakhawat Hossain was the Razakar Commander of No. 2 Sagardari Union and except Chandtullah Gazi, the Razakars also killed many others of his

union in 1971, and that in Chingra Bazaar Razakars Camp, 4 persons were killed who are Hasan, Potu, a young boy aged about 15/16 years and Chandtullah Gazi. It appears that although by giving suggestion to P.W.3, the defence denied that the Razakars did not kill Chandtullah Gazi, but practically by cross-examining P.W. 3 admitted that the Razakars killed Chandtullah Gazi while he was confined in Chingra Bazaar Razakar Camp. As regards cause of the killing of Chandtullah Gazi, a suggestion was given to P.W.3 that other persons due to the killing of their family members to take the revenge killed Chandtullah Gazi. On perusal of the evidence of P.W.3 it reveals that before killing Chandtullah Gazi, the Razakars having abducted him confined in Chingra Bazaar Razakar Camp and after inhuman torture, the Razakar accused Md. Sakhawat Hossain along with other accused persons killed him on first Kartik at 6.00 am at the bank of Kapotakha river.

933. As regards event narrated in Charge No.2, P.W.4 Momin Gazi stated that in the middle of Bangla month, Bhadra in 1971, one day at about 10.30 am nine accused persons indicted in charge No.2, attacked the house of Chandtullah Gazi and at the time of attack Rakazar Commander Md. Sakhawat Hossain killed Atiar, one and a half-year-old son of Chandtullah Gazi. During cross-examination, suggestions were given to P.W.4 to the effect that in 1971 Atiar was suffering from various diseases, and that the accused persons

were not involved in the killing of Atiar which he denied. But as regards incriminating evidence of P.W.4 relating to attack and killing of Atiar one day in the middle of Bangla month Ashwin in 1971, the defence did not cross-examine P.W.4. The evidence of P.W. 4 regarding the abduction of Chandtullah Gazi on 28th Bangla month, Ashwin at 11/11.30 am from his house and his killing on the first Bangla month, Kartick at 6.00 am has been denied by the defence, but no cross-examination has been done by the defence as regards abduction and killing of Chandtullah Gazi.

934. It appears that by giving suggestions to P.W. 1 to 4, the defence tried to make out a defence case that in 1971 freedom fighter Chandtullah Gazi killed five persons of his union and the family members of those deceased killed Chanddtullah Gazi which is denied by them. As regards killing of Atiar, the defence suggested that he died due to his illness which is also denied. On careful scrutiny of the evidence of P.W.1, 2 and 4 it transpires that they specifically stated that the nine accused persons indicted in charge No. 2 along with other Razakars attacked the house of freedom fighter Chandtullah Gazi in the middle of Bangla month Bhadra and on 28th Ashwin in 1971, and on 28th Bangla month Ashwin in 1971 having abducted Chandtullah Gazi from his house confined him in Chingra Razakar Camp, and they heard from Nuruddin [P.W.3] and the other people present at the Bazaar that

after inhuman torture on 1st Kartik in 1971 at 6 am nine accused persons indicted in the charge No.2 forcibly dragged Chandtullah Gazi out from the Razakar Camp and took him on the bank of Kapotakha river near Chingra Razakar Camp and Razakar Commander Md. Sakhawat Hossain gunned down him to death but the defence did not cross-examine them as regards above mentioned incriminating evidence. From the trend of cross-examination, it further transpires that during cross-examination of P.Ws.1, 2 and 4 the defence merely denied the above incriminating evidence of those witnesses. The defence case suggested to them have been denied. In the instant case, the defence failed to prove its case suggested to P.W. 1, 2 and 4. It is the settled principle of criminal jurisdiction that if the defence case is not admitted by any prosecution witness at the time of cross-examination, the defence has to prove its own case, but due to failure of the defence to prove its case, the duty of the prosecution to prove its case will not shift to the defence. As regards recognition of the accused persons, the defence did not cross-examine them. The above evidence of P.W.1,2 and 4 regarding the killing of Atiar and abduction, confinement, torture and killing of freedom fighters Chandtullah Gazi remained unshaken during cross-examination which impules this Tribunal to rely on their evidence.

935. The main purpose of cross-examination is to elicit favourable facts from the witness to impeach the credibility of the testifying witnesses to lessen the weight of unfavourable testimony and to bring out any material contradiction or discrepancy to the statement made in their examination in chief but on a careful reading of the evidence of P.Ws. 1 to 4 and 9 it reveals that the defence totally failed to impeach the credibility of those witnesses and also could not bring out any material contradiction and discrepancy to their statement made as regards plundering, arson, killing of Atiar, one and a half year old son of Chandtullah Gazi, and abduction, confinement, torture and killing of freedom fighter Chandtullah Gazi. I do not find any legal infirmity in their evidence.

936. It is to be noted that to thwart the independence of Bangladesh, the Pakistani occupation army decided to annihilate the pro-liberation people and freedom fighters and to execute their plan and policy established Razakar Bahini under the Razakar Ordinance, 1971. The Razakar Ordinance was enacted in the month of August 1971, although the collaborators of the Pakistani army long before enactment of the said Ordinance formed the Peace Committee, Razakar, Al-Badr, Al-Shams, and Mujahid Bahini. The Jamaat-e- Islam, Nizami Islami, Muslim League and other pro-Pakistani political parties took a stand against the War of Liberation

in 1971. After operation search light I of 25th March of 1971 the Pakistani occupation army, Razakars, Al-Badr and Al-Shams started identifying the pro-liberation people and the freedom fighters to implement their further policy and plan.

937. Event narrated in charge no.2 happened in different phases. In the first phase, the Razakar Commander Md. Sakhawat Hossain one day in the middle of Bangla month Sraban in 1971 at about 10:00 am in the Gadi Ghar (business office) of Muslim League leader Munshi Solimuddin of Chingra Bazaar along with other 25/30 Razakars convened a meeting wherein the Razakar Commander accused Md. Sakhawat Hossain delivered an inciting speech before the local people present there uttering that the supporter and the activists of Awami League and the people of “Joy Bangla” and supporters of the War of Liberation are “Kafer and Monefak” and decided to kill them after finding them out which is evident from the evidence of P.W.1 Gaziur Rahman which has not been denied by the defence.

938. It transpires that after setting up Razakar camp in the Bangla month Jystha in 1971, the Razakar Commander Md. Sakhawat Hossain and his cohorts Razakars decided to kill the freedom fighters of the locality to implement the further policy and plan of the Pakistani occupation army. In this respect, P.W.1 stated that one day at 10 am in the middle of Bangla month Srabon in 1971,

after completing the meeting of Chingra Bazaar, to identify the local boathouses [ferry ghat] under the leadership of Razakar Commander Md. Sakhawat Hossain, the local Razakars along with P.W. 1 went to the Dhandia and Krishnanagar boathouses through which the local freedom fighters used to cross the river and when they came back, accused Md. Sakhawat Hossain wanted to know the name of the President of Awami League of the locality. From the evidence presented to the tribunal, it reveals that Chandtullah Gazi was the President of No.2 Sagardari Union Awami League in 1971.

939. From the evidence of P.W.1, it transpires that in the middle of Bangla month Bhadra in 1971, one day at about 10/10:30 am Razakar accused Md. Sakhawat Hossain along with other 20/22 Razakars including accused Ibrahim, accused Khaleque, accused Lutfor, accused Abdul Aziz Sardar, accused Md. A. Aziz Sardar, accused Mujibur, accused Billal, accused Ohidus Salam consciously forming part of a criminal enterprise sharing the common intent of all accused persons to commit the crime attacked Chingra Bazaar to apprehend Chandtulla Gazi, but at that time, he was not present in the bazaar. Thereafter the above mentioned Razakars in the same manner again attacked the house of Chandtullah Gazi and detained his nephew Momin Gazi. At that time, accused Ibrahim having tied Momin Gazi inhumanely

tortured and wanted to know whereabouts of Chandtulla Gazi. The above evidence of P.W. 1 in respect of the first attack of the house of civilian Chandtullah Gazi who was the President of Sagardari Union Awami League in 1971 is corroborated by evidence of P.Ws. 2 and 4. Since in the middle of Bangla month Badhra in 1971 at the time of a launching attack, the civilian Chandtullah Gazi was not present in his house, the Razakar accused persons could not execute their plan.

940. While the Razakar Commander Md. Sakhawat Hossain along with other accused persons attacked the house of civilian Chandtullah Gazi in the middle of Bangla month Bhadra in 1971 and plundered his dwelling houses, his wife requested Razakar Commander Md. Sakhawat Hossain and his cohorts Razakars not to plunder and set fire to their dwelling houses. From the evidence of P.W.1, it transpires that one day in the middle of Bangla month Badhra in 1971 at about 10/10.30 am at the time of launching attacked in the house of Chandtullah Gazi, Md. Sakhawat Hossain ordered other Razakars to plunder and set fire to the dwelling houses of Chandtulla Gazi. Thereafter all accused persons having plundered set fire to the dwelling houses of Chandtulla Gazi. At that time, mother of P.W.1 having taken her one and half-year-old son Atiar, who was crying in her lap, touched the legs of accused Md. Sakhawat Hossain and requested him not to plunder and set

their dwelling houses on fire. But accused Md. Sakhawat Hossain kicked her along with her son and consequently she along with Atiar were thrown down on a wooden cot and Atiar was seriously injured by breaking the bones which resulted in his death after 17 days without treatment. The above-mentioned evidence of P.W.1 as regards killing of Atiar is corroborated by evidence of P.Ws. 2 and 4.

941. It is evinced from the statement of P.W 1 that in the middle of Bangla month Sraban in 1971 Razakar Commander Md. Sakhawat Hossain delivered an inciting speech at the Ghadi Ghar[business office] of Muslim League leader Solimuddin at Chingra Bazar and decided to prepare the list of freedom fighters to be killed after finding them out, but in the middle of Bangla month Sraban in 1971, the Razakars could not execute their plan due to absence of Chandtullah Gazi in his house, but subsequently on 28th Bangla month Ashwin in 1971, Razakar Commander Md. Sakhawat Hossain along with other accused persons indicted in charge No.2 and other Razakars again attacked the house of Chandtullah Gazi. As regards the second attack to apprehend the civilian Chandtullah Gazi, P.W.1 in examination-in-chief stated that on 28th Bangla month, Ashwin in 1971, at about 11/11:30 am accused Md. Sakhawat Hossain along with all other accused persons[nine accused-persons] and other 15/20 unknown Razakars again

attacked the house of Chandtullah Gazi. Sensing the enormity of the attack Chandtullah Gazi went into hiding inside a bush to the north side of their house. All accused person and the Razakars searching the house brought Chandtulla Gazi out from that bush and having detained him abducted from his house and confined Chandtulla Gazi in Chingra Bazaar Razakar Camp. The accused and the Razakars inhumanely tortured Chandtulla Gazi while he was confined in Chingra Razakar Camp for 3 /4 days. The above-mentioned evidence of P.W.1 regarding abduction, confinement and torture are corroborated by evidence of P.Ws. 2, 3, 4 and 9.

942. At the time of recording evidence of P.W.3 regarding the killing of Chandtullah Gazi, Tribunal noted that P.W.3 started crying failing to control his emotion. During cross-examination of P.W.3 in reply to a question put to him, he stated that the bank of Kapotakha river was situated within 25 yards from the Chingra Razakar Camp and he and Chandtullah Gazi were confined in the primary school and it is quite natural that at the time of taking a detainee from the captivity another detainee of the same camp will see that and since Chandtullah Gazi was killed at 6 am it was possible to see the killing from 25 yards distance. It is to be noted that killing of Chandtullah Gazi at the time of war of liberation in 1971 is not disputed by defence .P.W.3 made positive statement as regards killing of Chandtullah Gazi implicating the accused

persons, but defence did not cross-examine P.W.3 as regards killing for which evidence of P.W.3 remained uncontroverted so far killing of civilian Chandtullah Gazi. P.W. 3 witnessed the killing of Chandtulla Gazi through the open window while he was confined in the Chingra Razakar Camp.

943. P.W.3 Nuruddin Morol stated that after confinement of Chandtullh Gazi in Chingra Bazaar Razakar Camp, P.W. 2 went there with food for his father which is also corroborated by P.W. 2. The event of confinement, torture and killing narrated in charge No.2 happened during the wartime situation in the month of Ashwin (October) while the entire nation took part in the war against Pakistani army and its collaborators for which it was not possible on the part of the relations of the victim and the pro-liberation people to witness the occurrence that happened in and around the Razakar Camp.

944. It is to be further noted that P.W.3 Nuruddin Morol was detained in the Chingra Bazaar Razakar Camp for which it was only possible for him to witness the killing of Chandtullah Gazi who was killed on the bank of river Kaputakha situated within 25 yards from the Chingra Bazaar Razakar Camp. At the time of recording the evidence of P.W.3, this Tribunal noted the demeanour of P.W.3 who was a close associate of freedom fighter Chandtullah Gazi. He (P.W.3) went India with Chandtullah Gazi for training

and on 25th Bangla month Ashwin in 1971 both of them came back from India to their houses and on the same day both of them were abducted from their house and they were also confined for three/four days in Chingra Bazaar Razakar Camp and due to intimate relation of P.W.3, at the time of recording his evidence regarding the killing of Chandtullah Gazi, he started crying failing to control his emotion.

945. Since P.W.3 witnessed the killing of freedom fighter Chandtullah Gazi, the Razakar accused –persons on the same date having transferred him from Chingra Bazaar Razakar Camp again confined him in Kashobpur Girls High School [another Razakar Camp] and subsequently by executing a bond in favour of Pakistan and on the request of Abdul Aziz, a local Chairman of Sagardari Union, P.W.3 was released from the captivity and the above evidence of P.W.3 is also corroborated by P Ws.1,2,4 and 13.

946. It is very natural that since Chandtullah Gazi and P.W.3 were confined in the same Razakar Camp on the same day, after releasing from the captivity of Chingra Bazaar Razakar Camp, the relations of Chandtullah Gazi went to P.W.3 who was a close associate of Chandtullah Gazi to know about his killing. In this regard, P.W. 3 in the examination- in-Chief stated that while he came back to his house two sons of Chandtullah Gazi namely Gaziur Rahman [P.W.1] and Fazlur Rahman [P.W.2] and his

nephew Momin Gazi [P.W.4] went to his house and wanted to know about the killing of Chandtullah Gazi. At that time, P.W. 3 had given them detail information about the killing of Chandtullah Gazi. The evidence of P.W.3 as regards disclosure about killing of Chandtullh Gazi immediate after release from the captivity is also corroborated by evidence of P.Ws. 1,2 and 4. As regards the information of killing of Chandtullah Gazi, P.W. 4 stated that when he (P.W. 3) came back to his house from the captivity of the Razakar Camp, he [P.W. 4] and his relations heard about the torture and killing of Chandtullah Gazi from Nuruddin Morol[P.W.3] who was also confined in Chingra Bazaar Razakar Camp along with Chandtullah Gazi, In this respect, P.W.1 stated that he heard about the torture and killing of his father from Nuruddin Morol(P.W.3) who was also confined in Chingra Bazaar Razakar Camp along with his father. P.W.1 stated that after releasing from the captivity, P.W.3 Nuruddin Morol informed about the killing of his father to them. P.W. 2 Fazlur Rahman stated that while his father was confined in Chingra Bazaar Razakar Camp, the Razakars inhumanly tortured and killed his father which he heard from Nuruddin Morol who after releasing from the captivity stated to them.

947. It is already held that the accused Md. Sakhawat Hossain was a Razakar Commander of Chingra Bazaar Razakar Camp. P.W.1

stated that after killing his father, he along with his relations went to Moulana Fazlur Rahman to request accused Md. Sakhawat Hossain to hand over the dead body of Chandtullah Gazi to his relations and on the request of Moulana Fazlur Rahman, accused Razakar Commander Md. Sakhawat Hossain allowed the relations of Chandtullah Gazi to take his dead body. The evidence of P.W. 1 as regards handing over the dead body to the relations of Chandtullah Gazi is also corroborated by the evidence of P.Ws. 2 and 4.

948. Although the P.W.9 did not say anything in examining-in-chief as regards killing of Chandtullah Gazi, but during cross-examination in reply to a question put to him, he stated that except the boy who was killed at the boathouse, Razakars having abducted Chandtullah Gazi confined him in Chingra Bazaar Razakar Camp and after three days killed him. The above-mentioned evidence of P.W.9 regarding the killing of Chandtullah Gazi was not denied by the defence; in fact, there is no scope of denial, since P.W.9 stated the same during cross-examination.

949. As regards the evidence of P.Ws. 1, 2 and 4 the learned counsels appearing on behalf of the accused persons submitted that at the time of War of Liberation in 1971, P.Ws. 1,2 and 4 were minor and it was not possible for them to witness the occurrence as stated by them and the prosecution by giving a go by

to the real witnesses who actually witnessed the killing of Chandtullah Gazi, examined only the family members of the victim who are inimical with the accused and they have falsely implicated the accused persons. On perusal of the evidence of P.Ws. 1, 2 and 4 it transpires that at the time of War of Liberation in 1971, P.W. 1 Gaziur Rahman was aged about 17 years, P.W. 2 Fazlur Rahman was aged about 15/16 years and P.W. 4 Momin Gazi was aged about 18/19 years. The mere youth age of the P.Ws. 1,2 and 4 is not a cogent reason to discard their testimony. The main consideration is to be given to the credibility of the evidence of the minor and youth witnesses. In this regard I recall the observation made by ICTR Appeal Chamber in the case of Gacumbisti wherein it has been observed in the following language;

“It was reasonable for the Trial Chamber to accept witness TAX’s testimony despite her young age at the time of the events (11 years old). The young age of the witness at the time of the events is not itself a sufficient reason to discount his testimony.” There is no rule requiring the Court to reject per se the testimony of a witness who was child at the [time of] events in question. The probative value to be attached to testimony is determined to its credibility and

reliability." Gacumbitsi v. Prosecutor, Case No. ICTR-2001-64-A Appeal Chamber found.

950. The learned Counsels appearing on behalf of the defence further argued that the witnesses who were minor at the time of War of Liberation in 1971 it was not practically and humanely possible to give a true picture after long 45 years of the occurrence. In this respect, the observation of the ICTR in the case of the Prosecutor vs. *Pauline Nyiramasuhuko et al.*, **ICTR-98-42-T, Judgment, 24 June 2011, Para- 179** is relevant which is quoted below;

“Many witnesses lived through particularly traumatic events and the Chamber recognises that the emotional and psychological reactions that may be provoked by reliving those events may have impaired the ability of some witnesses to clearly and coherently articulate their stories. Moreover, where a significant period of time has elapsed between the acts charged in the indictments and the trial, it is not always reasonable to expect the witness to recall every detail with precision.” [ICTR, the Prosecutor v. Pauline Nyiramasuhuko et al., ICTR-98-42-T, Judgement, 24 June 2011, Para- 179]

951.The learned Prosecutor Mr. Zead-Al-Malum submitted that P.Ws. 1,2 and 4 are the direct witnesses of abduction of Chandtullah Gazi and P.W.3 is the eye witness of the killing of civilian Chandtullah Gazi and P.Ws. 1, 2, 3, 4 and 9 in their evidence had given the true picture of the event of abduction, confinement, torture and killing of civilian Chandtullah Gazi and his son Atiar as narrated in charge No.2 and the prosecution proved the charge against all the accused persons beyond all reasonable doubt. On scrutiny of the evidence of P.Ws 1,2,3, 4 and 9 it transpires that P.Ws. 1 and 2 are sons of Chandtullah Gazi , P.W.4 is the nephew of Chandtullah Gazi and it is quite natural that since the Chandtullah Gazi was abducted from his house, the family members and his close relations who were present at that time in his house witnessed the occurrence of abduction. It is very pertinent that the defence did not dispute the killing of Chandtullah Gazi and his minor son Atiar. The defence case is that the accused persons are innocent and they were not Razakar at the time of War of Liberation in 1971.During cross-examination of P.W 1 in reply to a question put to him on behalf of accused Md. Sakhawat Hossain, Md. Billal Hossain Biswas, Abdul Aziz Sardar, Kazi Wahidul Islam, and Md. Abdul Khaleque Morol, he stated that five persons including two brothers of Azihar Morol, one brother of Shiekh Mujibur Rahman and Ahmed Sardar, father of accused Abdul Aziz

Sardar were killed and the defence had given a suggestion to P.W. 1 that the family members of those five deceased killed the Chandtullah Gazi, which he denied. It is surprising that the accused –persons by cross –examining P.W.1 admitted that the close relations of those deceased killed Chandtullah Gazi, but fact remains that the accused persons are the close relations of those deceased as claimed by the defence to have been killed by the freedom fighter Chandtullah Gazi and practically by cross-examining P.W. 1,2,3 and 4 in the same manner, the defence indirectly admitted that the accused –persons killed Chandtullah Gazi.

952. During cross-examination of P.Ws. 1 to 4, the defence could not bring out any discrepancy as regards abduction, confinement, torture and killing of Chandtullah Gazi. In this regards, the observation of the Appellate Division made in the case of **Motiur Rahman Nizami vs. The Government of Bangladesh**, (Appellate judgment) is relevant which is quoted below;

"It should be pointed out here that these 3 witnesses- the P. W. 9, P. W. 11 and P. W. 18 saw the occurrence of 14.05.1971 in 3 villages from different places and not from the same place and as such it was not unnatural at all that all these 3 witnesses might not see all the perpetrators of those atrocities. So, we find no

reason to disbelieve these two witnesses."[**Motiur Rahman Nizami vs. the Government of Bangladesh, Criminal Appeal No.143 of 2014, Judgment on 06.1.2016, Page 531**]

953. On perusal of the evidence of the prosecution witnesses, it transpires that all the accused persons consciously forming part of a criminal enterprise sharing the common criminal intent to commit the crime participated in all phases of the event and killed Chandtullah Gazi as members of the same criminal enterprise. Section 4(1) of the Act of 1973 is wider and effectively brings the perpetrators within the criminal net than the notion “joint criminal enterprise” as evolved in the trials held after World War II. The offence narrated in charge No. 2 happened in a wartime situation on different phases and all the accused persons participated in all the phases of occurrence.

954. As regards objection of the defence regarding hearsay evidence of P.Ws. 1, 2 and 4 regarding killing of victim Chandtullah Gazi, the provision of Rule 56 of the International Crimes [Tribunal 1]Rules of Procedure, 2010 is relevant, which is as under;

Rule“56.(1) The Tribunal shall give due weight to the primary and secondary evidence and direct and circumstantial

evidence of any fact as the peculiar facts and circumstances of the case demand having regard to the time and place of the occurrence.

(2) The Tribunal shall also accord in its discretion due consideration to both hearsay and non-hearsay evidence, and the reliability and probative value in respect of hearsay evidence shall be assessed and weighed separately at the end of the trial.

(3) Any statement made to the investigation officer or to the prosecutor in course of investigation by the accused is not admissible in evidence except that part of the statement which leads to discovery of any incriminating material.”

955. At the time of enactment of the Act of 1973, the legislature made provision in section 19(1) of the Act of 1973 to record any evidence which this Tribunal deems to have probative value and similarly in the International Crimes [Tribunal-1] Rules of Procedure, 2010 provision has been provided to give due consideration to both hearsay and non-hearsay evidence and as per Rule 56(2) of the ROP, 2010 the Tribunal shall assess and weight the reliability and the probative value of the hearsay evidence. Under provision of section 19(1) and Rule 56(2) of the ROP 2010 the hearsay evidence is admissible. In other Statutes also made at the instance of the United Nations provided provision for due consideration of hearsay evidence.

956. It is the consistent view of the ICTY, ICTR, and ICC that at the confirmation, hearsay is admissible, even if the source of the evidence is anonymous. In *Katanga & Ngudjeli*, whilst relying on ECHR Jurisprudence (ECHR, *Kostovski V. The Netherlands*, Judgment of 20 November 1989, Application No. 11454/85, para. 44), the Pre-Trial Chamber reiterated the previous finding of the Pre-Trial Chamber in *Lubanga* that “There is nothing in the statute or the Rules which expressly provides that the evidence which can be considered hearsay from anonymous sources is inadmissible **per se**. In addition, the Appeals Chamber has accepted that for the purpose of the confirmation hearing it is possible to use items of evidence which may contain anonymous hearsay, such as redacted versions of witness statements” (*Prosecutor V Lubanga*) Ref: Archbold, page-753).

957. In the ICTY jurisprudence the hearsay evidence is admissible under Rule 89(c) and in the *Tadic*, the ICTY made observation in the following language;

“It is well settled in the practice of the Tribunal that hearsay evidence is admissible. Thus, relevant out of court statements which a Trial Chamber considers probative is admissible under Rule 89 (C). This was established in 1996 by the Decision of Trial Chamber II in *Prosecutor v. Tadic* and followed by Trial Chamber I in *Prosecutor V. Blaskic*.”

958. In the case of Prosecutor-vs Zlatko Aleksovski, Appeal Chamber, ICTY,(IT 95-14/1-AR 73), the Appeal Chamber made following observation as regards hearsay evidence;

“Accordingly, Trial Chambers have a broad discretion under Rule 89 (C) to admit the relevant hearsay evidence. Since such evidence is admitted to prove the truth of its contents, a Trial Chamber must be satisfied that it is reliable for that purpose, in the sense of being voluntary, truthful and trustworthy, as appropriate; and for this purpose may consider both the content of the hearsay statement and the circumstances under which the evidence arose; or, as Judge Stephen described it, the probative value of a hearsay statement will depend on upon the context and character of the evidence in question. The absence of the opportunity to cross-examine the person who made the statements, and whether the hearsay is “first-hand” or more removed, are also relevant to the probative value of the evidence. The fact that the evidence is hearsay does not necessarily deprive it of probative value, but it is acknowledged that the weight or probative value to be afforded to the evidence will usually be less than that given to the testimony of a witness who has given it under a form of oath and who has been cross-examined, although even this will depend on upon the

infinitely variable circumstances which surround hearsay evidence.”

959. On scrutiny of the evidence of the prosecution witnesses, it reveals that the defence did not dispute the killing of freedom fighter Chandtullah Gazi and the fact of abduction, confinement and torture of Nuruddin Morol [P.W.3]. Rather by cross-examining P.W.3, the defence admitted that the Chandtullah Gazi was killed while he was confined in Chingra Bazaar Razakar Camp inasmuch as in reply to a question put to P.W.3 by the defence, he stated that the Razakars killed Hasan, Patu, another young boy aged about 15/16 years and Chandtullah Gazi in Chingra Bazaar Razakar Camp. In cross-examination, he further stated that while Razakars attacked his house, they were wearing lungi, trousers, panjabi and different kind of local dress and thereby the defence admitted that the Razakars attacked his house and having detained P.W.3 abducted him from his house and confined him in Razakar Camp. By cross-examining P.W.3, the defence confirmed that he is a freedom fighter. Be that as it may, it is quite natural for the P.W.3 to see the occurrence happened in the Chingra Bazaar Razakar Camp. In reply to a question put to P.W.3 by the defence, he stated that Chingra Bazaar Razakar Camp was situated within 25 yards from the Kapotakha River. P.W.3 stated that Razakar Commander Md. Sakhawat Hossain gunned down Chandtullah Gazi to death on

the bank of Kapotakha River at 6.00 am and he witnessed the killing through the open window. Since the freedom fighter Chandtullah Gazi was killed at 6.00 am it was possible to witness the killing from 25 yards distance through open window. I do not find any earthly reasons to disbelieve the evidence of P.W.3 as regards the confinement, torture, and killing of Chandtullah Gazi. His evidence so far relates to killing of Chandtullah Gazi is natural and self-explanatory and the defence failed to refute and shake the credibility of the evidence of P.W.3 and he is a trustworthy witness and narrated the true picture regarding abduction, confinement, torture and killing of civilian Chandtullah Gazi.

960. It reveals that before abducting Chandtullah Gazi, the Razakar Commander Md. Sakhawat Hossain along with other accused persons and Razakars on 28th Bangla month Ashwin in 1971 at about 7: 00 am having abducted Nuruddin Morol from his house confined him in Chingra Bazaar Razakar Camp and before confinement of Chandtullah Gazi, Nuruddin Morol was confined in Chingra Bazaar Razakar Camp. On scrutiny of the evidence of the prosecution witnesses presented to the tribunal, it reveals that the Razakar Commander Md. Sakhawat Hossain along with all other accused persons having abducted unarmed civilian Chandtullah Gazi from his house confined him in Chingra Bazaar Razakar Camp for three days and after inhuman torture the Razakar

Commander Md. Sakhawat Hossain and his cohorts Razakar accused persons on Ist Kartik in 1971 at about 6.00 am forcibly dragged him out from the captivity of Chingra Razakar Camp and took him to the bank of Kapotakha River and Razakar Commander accused Md. Sakhawat Hossain killed him by gunshot. It stands proved beyond all reasonable doubt.

961. It is to be noted that the killing of Chandtullah Gazi, on the date, time, and place of occurrence was not disputed by the defence. From the evidence presented to the Tribunal, it is crystal clear that the killing of Chandtullah Gazi was cold-blooded, calculated, pre-planned, inhumane and brutal. It is already held that the close relations of the victims are the last person to shield the real culprit falsely implicating the innocent persons. P.Ws.1 and 2 are sons and P.W.4 is the nephew of the Martyr Chandtullah Gazi, and P.W.3 was a close associate of Chandtullah Gazi who went to India along with Chandtullah Gazi. On the same day they took training for independent of the motherland, and after taking training both of them came back on 25th Ashwin in 1971 in Bangladesh and were abducted on the same day from their houses. The defence failed to give any reasonable suggestion for their false implication. I do not find any earthly reason to disbelieve the evidence of P.Ws 1 to 4 and 9.

962. Although P.W.3 Nuruddin Morol is the solitary eyewitness of confinement, torture and killing of Chandtullah Gazi, but fact remains that he is also the victim of abduction, confinement and torture. Moreover, P.Ws.1 and 2 are direct witness of killing Atiar. P.Ws.1,2 and 4 are also the direct witnesses of the abduction of Chandtullah Gazi. From the evidence presented to the Tribunal, it is proved that all the accused persons were the Razakars and members of the same “killing squad” and all of them were present at the crime site while Md. Sakhawat Hossain killed Atiar and all of them consciously forming a “killing squad” sharing the common criminal intent of all accused persons to commit the crime on 28th Bangla month Ashwin in 1971 at about 11.00/11.30 am launched attack in the house of Chandtullah Gazi and having forcibly abducted him from his house confined in Chingra Bazaar Razakar Camp and the killing of Chandtullah Gazi is the outcome of abduction and thus all the accused persons are responsible for the offence committed as listed in charge No.2 which has been proved beyond all reasonable doubt against all accused persons.

963. On scrutiny of the evidence it transpires that Razakar Commander Md. Sakhawat Hossain one day in the middle of Bangla month Sraban in 1971, at about 10 am along with other Razakars convened a meeting in Chingra Bazar and decided to prepare the list of the freedom fighters to kill them after finding

them out, and from the testimony of P.Ws1,2,3 and 4 it reveals that to execute the plan under the leadership of Razakar Commander Md. Sakhawat Hossain, all other accused persons along with other unknown Razakars consciously forming part of a criminal enterprise sharing the common criminal intent to commit the crimes attacked the house of civilian Chandtullah Gazi one day at about 10/10:30 am in the middle of Bangla months Bhadra in 1971. Since Chandtullah Gazi was not present in his house on that date, the Razakars could not execute their plan but at that time all accused persons having plundered set fire to the dwelling houses of Chandtullah Gazi and killed his one and a half-year-old child Atiar. Subsequently at about 11/11.30 am on 28th Bangla month Ashwin in 1971 again the same group of Razakar accused persons and other unknown Razakars of Chingra Razakar Camp, in the same manner consciously forming part of a criminal enterprise sharing the common criminal intent of all attacked the dwelling houses of civilian Chandtullah Gazi and finding him out from the bush having abducted him from his house confined in Chingra Bazaar Razakar Camp. The purpose of abducting civilian Chandtullah Gazi was to kill him and all accused persons participated in the abduction and after inhumane torture on first Bangla month Kartik in 1971 at about 6 am all the accused persons and unknown Razakars forcibly dragged the civilian Chandtullah Gazi out from the Razakar Camp

and took him at the bank of Kapotakha River situated near the Chingra Bazaar Razakar Camp and Razakar Commander Md. Sakhawat Hossain gunned down Chandtullah Gazi to death. It stands proved beyond all reasonable doubt. Thus all the accused persons indicted in charge No. 2 committed the offence of abduction, confinement, torture, murder and other inhumane acts[plundering and arson] as crimes against humanity as specified in section 3(2)(a)(g)(h) of the Act of 1973 which is punishable under section 20(2) of the said Act and all accused persons participated in all the phases of the event as narrated in charge No. 2 and aided, abated, facilitated and participated in the offence and except accused Md. Sakhawat Hossain all other accused-persons incurred the liability under section 4(1) of the Act of 1973.

964. The accused Razakar Commander Md. Sakhawat Hossain is thus found to have had committed the offence of confinement, torture and killing of unarmed civilian Chanduallah Gazi by forcibly abducting him from his house. The reason of forcible abduction, confinement, torture and killing was that he was the President of No.2 Sagardari Union Awami League and a freedom fighter, and to implement the further policy and common criminal plan of the Pakistani occupation army of annihilating the pro-liberation people and freedom fighters, Razakar Commander accused Md. Sakhawat Hossain consciously along with his cohorts

Razakar accused- persons forming a “killing squad” jointly launched attack in the house of civilian Chantuallah Gazi and having forcibly abducted him from his house on 28th Bangla month Ashwin in 1971 at about 11/11.30 am confined him in Chingra Bazaar Razakar Camp and after inhuman torture, killed him on Ist Kartik in 1971 at about 6:00 am at the bank of Kapotakha River. He was the principal perpetrator and a de facto Razakar Commander. As a result, he incurred the criminal liability under section 4(2) of the Act of 1973 for committing the offence of abduction, confinement, torture and murder of unarmed civilian Chantuallah Gazi and murder of his one and a half year old son Atiar and other inhumane acts [plundering and arson] constituting the offence of crimes against humanity as specified in section 3(2)(a)(g)(h) of the Act of 1973 which is punishable under section 20(2) of the said Act.

Charge No. 3.

[Abduction, confinement, and torture of Md. Nuruddin Morol of village Chingra under Police Station-Keshobpur, District Jessore]

965. Summary of charge; It is alleged that on 25 Bangla month Ashwin in 1971 [1378 BS] at night being an unarmed freedom fighter Md. Nuruddin Morol came to see his parents in their house situated at village Chingra under Police Station- Keshobpur,

District Jessore, and being secretly informed about his coming home by source, accused Md. Sakhawat Hossain directed his accomplices Razakars to apprehend Md. Nuruddin Morol, and being so directed (1) accused Sheikh Mohammad Mujibur Rahman alias Mujibur Rahman, (2) accused Md. Ibrahim Hossain alias Ghungur Ibrahim, (3) accused Md. Abdul Khaleque Morol and other 10/12 Razakars of Chingra Razakar Camp having abducted said Md. Nuruddin Morol confined him in Chingra Razakar Camp where he was mercilessly tortured for four days. Thereafter, from Chingra Razakar Camp Md. Nuruddin Morol was sent to Keshobpur Sadar Razakar Camp Headquarter on 1 Bangla month Kartik in 1971 and subsequently, by giving bond he was released therefrom.

966. Thereby accused (1) Md. Sakhawat Hossain, (2) Sheikh Mohammad Mujibur Rahman alias Mujibur Rahman, (3) Md. Ibrahim Hossain alias Ghungur Ibrahim, and (4) Md. Abdul Khaleque Morol have been charged for participating, aiding, abetting, facilitating and complicity in the commission of offences of abduction, confinement and torture as crimes against humanity as part of systematic attack directed against unarmed civilians as specified in section 3(2) (a)(g)(h) of the Act of 1973 which is punishable under section 20(2) read with section 3(1) of the Act, of 1973 and thereby accused persons incurred liability under section 4(1) of the Act of 1973.

967. As regards event narrated in charge No.3, the prosecution examined P.Ws 1 to 4 and 13. P.W.1 and 2 are sons of Martyr Chandtullah Gazi, P.W.3 Nuruddin Morol is the victim. P.W.1 and 4 are the hearsay witness of the abduction, confinement, and torture. P.W.13 claimed to be an eye-witness of the abduction, confinement, and torture of his brother Nuruddin Morol (P.W.3). P.W.2 claimed to be the eyewitness of the confinement and torture.

968. P.W 1 Gaziur Rahman is the son of Martyr Chandtulla Gazi who was a freedom fighter and the President of Sagardari Union Awami League in 1971. He was aged about 17 years at the time of War of Liberation in 1971 and an eye witness to the event of the abduction of his father. As regards captivity of victim Nuruddin Morol, P.W.1 stated that he heard about the torture and killing of his father from Nuruddin who was also confined in Chingra Bazaar Razakar Camp along with his father. He further stated that after releasing from the captivity, Nuruddin Morol (P.W.3) informed him about the killing of his father.

969. P.W.2 Fazlur Rahman Gazi, another son of Martyr Chandtullah Gazi and an eyewitness to the event of the abduction of his father and confinement of Nuruddin Morol. He was a student of Class V and aged about 15/16 years at the time of War of Liberation in 1971.As regards captivity of Nuraddin Morol (P.W.3)

in the Chingra Razakar Camp, P.W.2 stated that after about 2 hours of the abduction of his father, he went to Chingra Razakar Camp with food for his father and saw his father and Nuruddin in captivity in the Chingra Razakar Camp. The accused persons and the Razakars inhumanely tortured Nuruddin (P.W. 3) while he was confined in the said Camp.

970. P.W.3 Nuruddin Morol is a freedom fighter and an old man of aged about 73 years. He is the victim of abduction, confinement, and torture as regards the event narrated in charge No.3. At the time of War of Liberation in 1971, he was aged about 29 years.

971. He stated that at the time of War of Liberation in 1971, he was involved with politics of Bangladesh Awami League and at the last part of Bangla month Ashar in 1971, he along with Chandtulla Gazi who was the President of Sagardari Union Awami League went to India for training to take part in the War of Liberation. After training of 18 (eighteen) days in the Youth Camp, he took part in the War of Liberation under Sector No. 8. On 25th Bangla month, Ashwin in 1971, he along with Chandtulla Gazi came back to his house from India to see his mother. Being informed about P.W.3 and Chandtulla Gazi, on 28th Bangla month, Ashwin in 1971 at about 7:00 am Razakar accused Mujibur Rahman, Akram Hossain, accused Abdul Khaleque, accused Lutfor, accused Billal, accused Md. Sakhawat Hossain along with other 10/12 Razakars of Chingra

Razakar Camp attacked the house of Nuruddin Morol and having detained him confined in Chingra Razakar Camp and the Razakars inhumanely tortured him while he was confined in the said Camp. The Razakars confined him in the Primary School [Razakar Camp]. While he was confined in the Razakars camp, the Razakars inhumanely tortured him and other detainees to know the whereabouts of freedom fighters and their arms.

972. He further stated that after killing Chandtullah Gazi on Ist Bangla month Kartik in 1971, on the same day at about 10/11:00 am the above mentioned accused and Razakars took him to Keshobpur Girls High School [another Razakar Camp]. Thereafter Abdul Aziz, the Chairman of Sagardari Union went to Keshobpur Razakar Commander Aminuddin Master (now dead) to release him and by giving an undertaking to the Razakars to the effect that he will not do anything against Pakistan, he was released from the captivity. After released, he went to the house of Ershad Gazi (now dead) situated at Keshobpur Bazaar. On the next day, Chairman Abdul Aziz took him from the house of Ershad Gazi to his house. He also stated that while he came back to his house, Gaziur Rahma (P.W.1) and Fazlur Rahman (P.W.2), sons of Martyr Chandtulla Gazi and nephew of Martyr Chandtulla Gazi namely Momin Gazi (PW4) came to his house and wanted to know about the killing of

Chandtulla Gazi and he had given them detail information about the killing of Chandtulla Gazi. |

973. In cross-examination P.W. 3 stated that Captain Shafiullah was his Commander of training Camp in India and Major Monjur was the Commander of Sector No. 8. His house was situated ½ mile away from Chingra Bazaar. The house of Martyr Chandtulla Gazi was situated to the ½ mile south-west side from his house. He denied the suggestions that accused Mujibur Rahman and Lutfor Rahman Morol were not Razakars or they were also not involved in the alleged occurrence. He admitted that accused Sakhawat Hossain contested in the general election from his locality. He further stated that he saw accused Sakhawat Hossain before and after War of Liberation in 1971. He firmly asserted that accused Sakhawat Hossain was the Razakar Commander of No.2 Sagardari Union and that in 1971, the Razakars killed Chandtulla Gazi and many other people of his Union. In reply to a question put to him by the defence, P.W.3 stated that the Razakars killed Hasan, Patu, another young boy aged about 15/16 years and Chandtulla Gazi in the Chingra Razakar Camp. While the Razakars came to his house, they were wearing lungi, trousers, panjabi and different kind of local dress, but he could not remember the name of other Razakars except the name of Razakars who abducted him. In reply to a question put to him by the defence, he further stated that in both the

list of freedom fighters prepared in 1971 and present list, his name has been included as a freedom fighter and now he is enjoying the allowances as a freedom fighter. He stated that the bank of Kapotakha River was situated within the 25 yards south side from the Chingra Razakar Camp. He denied the suggestions that the Razakars did not kill Chandtulla Gazi or other persons to take revenge of killing their family members, killed Chandtulla Gazi.

974. P.W. 4 Momin Gazi is an old man of 70 years and at the time of War of Liberation in 1971; he was aged about 18/19 years. He used to help the freedom fighters at the time of War of Liberation in 1971. As regards captivity of P.W.3, he stated that when he (P.W.3) came back to his house from Razakar Camp, he (P.W.4) and his relations also heard about the torture and killing of Chandtulla Gazi from Nuruddin Morol (P.W.3) who was also confined in the Chingra Razakar Camp along with Chandtulla Gazi.

975. P.W. 13 Md. Mozid Morol is an old man of 72 years and brother of Nuruddin Morol (P.W. 3). He claimed to be an eyewitness to the event of the abduction of his brother. He stated that his brother Nuruddin Morol (P.W.3) went to India for training to take part in the War of Liberation in 1971 and on 25th Bangla month, Ashwin in 1971 he came back in Bangladesh from India to see his parent and being informed about Nuruddin Morol, the Razakar accused Md. Sakhawat Hossain on 28th Bangla month,

Ashwin in 1971, at about 7:00 am sent other Razakars to their house to abduct his brother Nuruddin Morol (P.W.3) and at that time, he and his brother Nuruddin Morol (P.W.3) were present at their house. He further stated that the Razakars attacked their house and detained Nuruddin Morol and due to fear of his life, he (P.W.13) went into hiding behind their dwelling hut; wherefrom he witnessed that the accused Md. Mujibur Rahman, accused Md. Billal Hossain Biswas and Akram Hossain along with other Razakars having detained his brother Nuruddin Morol abducted from their house and confined him in Chingra Razakar Camp. On the same day in the afternoon, he went to Chingra Razakar Camp to see his brother Nuruddin Morol and through the window of the Primary School (Razakar Camp), he witnessed that his brother Nuruddin Morol was lying in a bleeding condition for which he started crying and consequently Razakars dragged him out from the Razakar Camp.

976. P.W.13 further stated that after dragging him out, he came back to his house and informed the matter to his parent who along with their relations went to the local Chairman Aziz to release his brother Nuruddin Morol (P.W.3). Subsequently, Chairman Aziz went to Razakar Commander Aminuddin Master and thereafter Nuruddin Morol having executed bond was released from the captivity of Chingra Razakar Camp and came back to his house.

After returning to his house, Nuruddin Morol informed P.W. 13 and others that at the order of accused Md. Sakhawat Hossain accused Billal and accused Sheikh Mohammad Mujibur Rahman inhumanely tortured him in the Chingra Razakar Camp.

977. In cross-examination P.W. 13 stated that Chingra Bazaar was situated less than ½ kilometres away from his house. In 1971, Chandtulla Gazi was the President of No. 2 Sagardhari Union. He could not say the name of any freedom fighter of his village, except his brother Nuruddin Morol. He could not say when for the first time, he saw accused Md. Sakhawat Hossain, but stated that at the very early age, he saw him. He could not remember in which year accused Md. Sakhawat Hossain was elected Member of Parliament from his locality. In 1971, there were three Razakar Camps at Keshobpur, Trimohani, and Chingra Bazaar. He denied the suggestions that on 28th Bangla month, Ashwin in 1971 he did not see any occurrence or he did not go to Chingra Razakar Camp to see his brother. He also denied the suggestion that accused persons were not the Razakar. In reply to a question put to him by defence, he stated that in 1971, he was aged about 25 years and that he did not go to India for training. He further stated that he could not remember who were present at his house except him while Razakars abducted his brother Nuruddin Morol.

Evaluation of the evidence

978. The learned Prosecutor Mr. Zead-Al-Malum appearing with Ms. Razina Sultana on behalf of the Prosecution submitted that to prove the event of abduction, confinement, and torture of Nuruddin Morol, the Prosecution examined P.Ws.1 to 4 and 13, out of which P.W.3 is the victim of the offence narrated in Charge No.3 and P.W.13 is the direct witness. The learned Prosecutor further submitted that P.W.3 is a freedom fighter and victim of abduction and during cross-examination, the defence failed to impeach the credibility of the evidence of P.W.3 whose evidence is also corroborated by another eyewitness P.W.13. P.Ws. 1,2 and 4 as hearsay witness also corroborated the evidence of P.W. 3 as regards confinement and torture, thus the prosecution proved the event narrated in Charge No.3.

979.The learned counsel Mr. Abdus Sattar Palwan appearing on behalf of accused Md. Sakhawat Hossain, Abdul Khaleque Morol submitted that the prosecution witnesses contradicted each other on material point and P.W. 3 was not a freedom fighter and in a wartime situation there was no reason for releasing a freedom fighter from the captivity of Razakars.

980.The learned advocate Mr. Abdus Sukur Khan appearing on behalf of accused Sheikh Mohammad Mujibur Rahman alias Mujibur Rahman and Md. Ibrahim Hossain alias Ghungur Ibrahim submitted that P.Ws. 3 and 13 did not mention the name of accused

Md. Ibrahim alias Ghungur Ibrahim and they also did not say anything against accused Sheikh Md. Mujibur Rahman alias Mujibur Rahman regarding torture and confinement and the prosecution failed to prove the charge against the accused persons for which they are legally entitled to be acquitted of the charge .

981. The event narrated in charge No.3 relates to abduction, confinement, and torture of freedom fighter Nuruddin Morol [P.W. 3]. Out of 5 P.Ws examined by the prosecution, P.W.3 is the victim and P.Ws.1, 2 are sons of freedom fighter Chandtullah Gazi and P.W.4 is the nephew of Chandtullah Gazi. P.Ws.1 and 4 are hearsay witnesses to the event narrated in charge No. 3. P.W.2 is both hearsay and direct witnesses. P.W.13 Md. Mazid Morol is the brother of P.W.3 Nuruddin Morol and claimed to be an eyewitness to the event of abduction, confinement, and torture.

982. As regards the cause of abduction of P.W.3, he stated that at the time of War of Liberation in 1971, he was involved with politics of Bangladesh Awami League. At the last part of Bangla month Ashar in 1971, he along with Chandtulla Gazi who was the President of Sagardari Union Awami League went to India for training to take part in the War of Liberation. After training of 18 (eighteen) days in the Youth Camp, he took part in the War of Liberation under Sector No. 8. The above-mentioned evidence of P.W.3 is corroborated by evidence of P.W. 13, brother of P.W.3,

who stated that in 1971, his brother Nuruddin Morol went to India to take training to join in the War of Liberation.

983. As regards the event of abduction, P.W.3 Nuruddin Morol stated that on 25th Bangla month Ashwin in 1971, he along with Chandtulla Gazi came back to his house from India to see his mother. Being informed about P.W.3 and Chandtulla Gazi, on 28th Bangla month, Ashwin of 1971 at about 7:00 am Razakar accused Mujibur Rahman, Akram Hossain, accused Abdul Khaleque, accused Lutfor, accused Billal, accused Md. Sakhawat Hossain along with other 10/12 Razakars of Chingra Bazaar Camp attacked his house and having detained him abducted and confined in Chingra Razakar Camp and inhumanely tortured him while he was confined in Chingra Razakar Camp which was situated within Primary School, Land Office, and Union Parish Office. The Razakars confined him in the Primary School and on that day at about 11/12 am the Razakars also confined Chandtulla Gazi in the Primary School. The Razakars inhumanely tortured him and Chandtulla Gazi and other detainees to know the information about the freedom fighters and their arms. He also stated that while Chandtulla Gazi was confined in the Chingra Razakar Camp, his son Fazlur Rahman (P.W.2) went to the Chingra Razakar Camp with food for his father, but the Razakar Moshier snatched away the food and forcibly dragged him out from the Razakar Camp. The

above-mentioned evidence as regards the event of abduction is corroborated by P.W.13 who stated that on 25th Bangla month Ashwin in 1971 P.W. 3 came back in Bangladesh from India to his house to see his parent and being informed about P.W.3, the Razakar accused Md. Shakhawat Hossain on 28th Bangla month Ashwin in 1971 at about 7:00 am sent other Razakars to their house to abduct his brother Nuruddin Moral (P.W.3). At that time, P.W. 13 and his brother Nuruddin Moral (P.W.3) were present at their house. The Razakars attacked their house and due to fear of his life, he (P.W.13) went into hiding behind their house, wherefrom he witnessed that the accused Md. Mujibur, accused Md. Billal Hossain Biswas and Akram Hossain along with other Razakars having detained his brother Nuruddin Moral abducted and confined him in Chingra Razakar Camp. On the same day in the afternoon, he went to Chingra Razakar Camp to see his brother Nuruddin Moral and through the window of the Primary School (Razakar Camp), he saw that his brother Nuruddin Moral was lying in a bleeding condition for which he started crying and consequently Razakars dragged him out from the Razakar Camp.

984. As regards involvement of accused Md. Sakhawat Hossain, P.W.3, stated that at the time of the abduction, Razakar Commander accused Md. Sakhawat Hossain was present in his house along with the Razakars, but P.W.13 stated that Razakar

Commander accused Md. Sakhawat Hossain sent other Razakars Mujibur Rahman, Billal Hossain, and Akram Hossain to abduct Nuruddin Morol. It is to be noted that accused Md. Ibrahim Hossain alias Ghungur Ibrahim is the inhabitant of village Nehalpur which is also situated within No.2 Sagardari Union and about two kilometer away from the village Chingra which proved that as locals of the crime site accused Md. Ibrahim Hossain alias Ghungur Ibrahim was previously known to P.Ws.3 and 13 but they did not mention the name of accused Md. Ibrahim Hossain alias Ghungur Ibrahim at the time of testifying the event narrated in charge No.3.

985. On a careful reading of the evidence of P.W.3 and 13 it reveals that while they testified as regards the event of abduction, they did not mention the name of accused Md. Ibrahim Hossain alias Ghungur Ibrahim, although P.W.3 Nuruddin Morol mentioned that Razakar Mujibur Rahman, Akram Hossain, Abdul Khaleque, Lutfor Morol [now dead], accused Billal Hossain and Md. Sakhawat Hossain were present along with the group of Razakars at the time of abduction. P.W.13 stated that at the time of abduction, accused Md. Mujibur Rahman, Akram Hossain, accused Billal Hossain were present along with the group of Razakars. Although P.W. 3 stated that accused Akram Hossain, Lutfor Morol [now dead] and Billal Hossain were present at the time of his abduction,

but formal charge has not been submitted against them as regards the event narrated in charge No.3. Since P.W.3 and P.W.13 did not mention the name of the accused Md. Ibrahim Hossain alias Ghungur Ibrahim, he is legally entitled to get the benefit of doubt so far it relates to the event narrated in charge No.3, inasmuch as P.W.3 is the star witness and saw all the phases of the event narrated in charge No.3.

986. As regards abduction and confinement of Nuruddin Morol (P.W.3), P.W.1 stated that he heard about the torture and killing of his father from Nuruddin who was also confined in Chingra Bazaar Razakar Camp along with his father. P.W.1 further stated that after releasing from the captivity, Nuruddin (P.W.3) informed him about the killing of his father. As regards abduction, confinement and torture of Nuruddin Morol [P.W.3], P.W.2 Fazlur Rahman Gazi, son of Martyr Chandtullah Gazi stated that after two hours of the abduction of his father, he went to Chingra Razakar Camp with food for his father and saw his father and Nuruddin Morol [P.W.3] in captivity in the Chingra Razakar Camp. He stated that the accused and the Razakars inhumanely tortured Nurruddin Morol [P.W.3] while he was confined in Chingra Razakar Camp. P.W.13 stated that while P.W.3 was in confinement in Chingra Razakar Camp, he went to Chingra Razakar Camp to see Nurruddin Morol and saw him in the Razakar Camp lying in a bleeding condition and

at that time he started crying, consequently, Razakars dragged him out from the Razakar Camp. P.W.4 also stated that Nuruddin Morol [P.W.3] was confined in Chingra Bazaar Razakar Camp along with his uncle and he [P.W.3] informed him about torture and killing of his uncle Chandtullah Gazi, while he came back from the captivity of Chingra Razakar Camp.

987. It is very natural that after abduction, confinement and torture close relations of the victim will try to release the detainee from the captivity of the Razakars. In this respect, P.W.13 brother of P.W.3 stated that while the Razakars dragged him out from the Razakar Camp, he came back to his house and informed the matter to his parent who along with their relations went to the local Chairman Aziz to release his brother Nuruddin Morol (P.W.3). Chairman Aziz went to Razakar Commander Aminuddin Master and thereafter Nuruddin Morol having executed bond was released from the captivity of Chingra Razakar Camp and came back to his house. After returning to his house, Nuruddin Morol informed P.W. 13 and others that at the order of accused Md. Sakhawat Hossain, accused Billal and accused Sheikh Mohammad Mujibur Rahman inhumanely tortured him while he was confined in the Chingra Razakar Camp.

988. Regarding the release of Nuruddin Morol [P.W.3] from the captivity of Chingra Razakar Camp, he stated that after killing

Chandtullah Gazi, on Ist Bangla month Kartik in 1971 at 10/11:00 am the above mentioned accused and Razakars transferred him to Keshobpur Girls High School [another Razakar Camp] and confined him there. Abdul Aziz, the Chairman of Sagardari Union, went to Keshobpur Razakar Commander Aminuddin Master (now dead) to release him and by giving an undertaking to the Razakars to the effect that he will not do anything against Pakistan, P.W. 3 was released from the captivity of Razakars. After release, he went to the house of Ershad Gazi (now dead) situated at Keshobpur Bazaar. On the next day, Chairman Abdul Aziz took him from the house of Ershad Gazi to his house and while he came back to his house, Gaziur Rahman (P.W.1) and Fazlur Rahman (P.W.2), sons of Chandtulla Gazi and nephew of Chandtulla Gazi namely Momin Gazi (PW4) came to his house and wanted to know about the killing of Chandtulla Gazi. P.W. 3 had given them detail information about the killing of Chandtulla Gazi. P.Ws.1 stated that after the release of Nurrudin Morol from the captivity of Chingra Razakar Camp, they went to him to know the information about the killing of Chandtullah Gazi who was confined along with P.W.3. The above evidence of P.W.1 is corroborated by P.W.2 and 4.

989. P W.2 stated that while his father was confined in Chingra Bazar Camp, the Razakars inhumanely tortured and killed his father

which he heard from Nuruddin who after release from the captivity informed P.W.2. P.W. 4 stated that he and his relations also heard about the torture and killing of Chandtalla Gazi from Nuruddin Morol (P.W.3) who was also confined in the Chingra Razakar Camp along with Chandtulla Gazi.

990. As regards the event narrated in charge No. 3, P.W. 1 stated that Nuruddin Morol [P.W.3] was confined in Chingra Razakar camp while his father was confined in the same camp which the defence by giving suggestion to P.W. 1 denied, but the defence did not cross-examine him, as regards confinement of P.W. 3.

991. P.W. 2 Fazlur Rahman Gazi stated that after two hours of the abduction of his father, he went to Chingra Bazaar Razakar Camp with food for his father and he saw his father and Nuruddin Morol [P.W.3] in the captivity of the Chingra Bazaar Razakar Camp. The accused persons and the Razakars inhumanely tortured Nuruddin Morol while he was confined in Chingra Bazaar Razakar Camp. He further stated that his father and Nuruddin Morol were confined in the Primary School (Chingra Bazaar Razakar Camp). In respect of recognition of the accused persons, he stated that Razakar accused persons were the inhabitant of the same locality for which they were previously known to him. As regards recognition, the defence did not cross-examine PW.2. The evidence of P.W.2 has been merely denied by the defence. As regards confinement of

Chandtullah Gazi in Chingra Bazaar Razakar Camp, the defence did not cross-examine P.W.2 and thereby the evidence of P.W.2 regarding confinement of Nuruddin Morol (P.W.3) remain unshaken.

992. P.W. 3 stated that on 28th Bangla month Ashwin in 1971 at about 7.00 am Razakar accused Mujibur Rahman, Akram Hossain, accused Abdul Khaleque, accused Lutfor Morol, accused Billal Hossain, accused Md. Sakhawat Hossain along with 10/12 Razakars of Chingra Bazaar Razakar Camp attacked his house and having detained him from his house abducted and confined him in Chingra Bazaar Razakar Camp and inhumanely tortured him while he was confined in Chingra Bazar Razakar Camp. During cross-examination of P.W.3, the defence completely remains silent as regards incriminating evidence of P.W.3 who is the victim of the event narrated in Charge No.3. The defence only by giving suggestion to P.W.3 denied the evidence given in examination -in-chief.

993. As regards event narrated in Charge No.3, P.W.4 stated that he heard about the torture and killing of Chandtullah Gazi, from Noruddin Morol who was confined in Chingra Bazaar Razakar Camp along with Chandtullah Gazi when he (P.W.3) came back to his house from Razakar Camp. The evidence of P.W.4 merely denied by the defence but the defence did not cross-examine him as

regards the above statement which proved that Nuruddin Morol was confined in Chingra Razakar Camp.

994. P.W.13 Abdul Mozid Morol is the brother of P.W.3 Nuruddin Morol who was abducted from his house. It is very natural that the family members who were present in the house at the relevant time saw the occurrence. P.W.13 claimed that at the time of abduction of his brother Nuruddin Morol, he was present in his house and he identified the accused Mujibur Rahman, accused Md. Billal Hossain Biswas, Akram Hossain amongst the Razakars who abducted Nuruddin Morol from his house and subsequently they confined him in Chingra Bazaar Razakar Camp. He also claimed that after the abduction, he went to Chingra Bazaar Razakar Camp and saw that his brother Nuruddin Morol was lying in a bleeding condition in the Primary School(Chingra Bazaar Razakar Camp) and started crying for which the Razakars dragged him out from the Razakar Camp. On careful reading of the evidence of P.W.13 it appears that the defence did not cross-examine P.W.13 as regards above incriminating evidence, but merely denied his statement and no suggestion was given to him that at the time of abduction of Nuruddin Morol, he was not present in his house or he did not see the accused persons or he did not go to Chingra Bazaar Razakar Camp to see his brother or he did not see Nuruddin Morol in Chingra Bazaar Razakar Camp in a bleeding condition.

Rather during cross-examination on behalf of accused Mujibur Rahman, in reply to a question put to P.W.13, he stated that he could not say the names of his family members who were present in his house at the time of abduction of Nuruddin Morol.

995. From the evidence presented to the Tribunal, it is proved beyond reasonable doubt that after setting up Razakar Camp at Chingra Bazaar in the month of Jyestha in 1971, the Razakar Commander Md. Sakhawat Hossain along with his cohorts Razakar accused-persons Sheikh Mohammad Mujibor Rahman and Abdul Khaleque Morol and other Razakars to implement the further policy and plan of the Pakistani army consciously forming part of a criminal enterprise to commit the crime on 28th Bangla month, Ashwin in 1971 at about 7.00 am having attacked the house of Nuruddin Morol abducted him from his house and confined him in Chingra Razakar Camp and inhumanly tortured him while he was confined there for 4(four) days.

996. On the evaluation of the evidence of P.Ws 1 to 4 and 13, it reveals that P.W. 3 and 13 proved the abduction, confinement and torture and P.Ws.2 corroborated the evidence of P.Ws. 3 and 13 as regards torture of Nuruddin Morol in the captivity of Chingra Razakar Camp and the hearsay witness P.W. 1 and 4 also corroborated the evidence of P.W.3 as regards confinement and torture. P.W. 13 is the brother of P.W. 3 and natural witnesses.

Since P.W.3 was abducted from his house it is quite natural that his relation who was present at that time of occurrence saw the event of abduction and during cross-examination of P.W. 13, his presence at his house at the relevant time could not assail by the defence. At the time of cross-examination, the defence could not shake the credibility of the evidence of P.Ws. 1 to 4 and 13. Furthermore at the time of cross-examination of P.W.3 and 13 defence only denied their evidence by giving a suggestion, but did not cross-examine them as regards incriminating evidence involving the accused -persons in the act of abduction, confinement, and torture. Mere denial of the prosecution evidence will not negate the truth of the evidence. It is now settled jurisprudence

997. From the evidence of P.Ws. 1, 5 and 9 presented to the tribunal it is proved beyond reasonable doubt that to implement the further policy and plan of the Pakistani occupation army, the Razakar Commander Md. Sakhawat Hossain along with accused persons and other Razakars set up Razakar Camp at Chingra Bazaar in the Bangla month Jystha in 1971. Thereafter convened a meeting one day at 10.00/10.30 am in the middle of Bangla month Sraban in 1971 at Chingra Bazaar in the Gadi Ghar [business office]of Muslim League leader Munshi Solimuddin and decided to

prepare the list of freedom fighters to be killed after finding them out.

998. From the evidence presented to the tribunal it is proved beyond reasonable doubt that on 25th Bangla month Ashwin in 1971 after completing training freedom fighter Nurruddin Morol came back to his home from India to see his parent and being informed about Nurruddin Morol, on 28th Bangla month Ashwin in 1971 at about 7:00 am the Razakar Commander accused Md. Sakhawat Hossain, (2) accused Sheikh Mohammad Mujibur Rahman alias Mujibur Rahman and (3) Md. Abdul Khaleque Morol along with other Razakars consciously forming part of a criminal enterprise to commit the crimes sharing the common criminal intent of all accused persons attacked the houses of civilian Nurruddin Morol and having abducted him from his house confined him in Chingra Razakar Camp for 3/4 days and during confinement period the accused –persons inhumanely tortured Nurruddin Morol and after 3 days at the request of local Chairman Abdul Aziz [now dead]released the victim Nurruddin Morol from the captivity of Razakar Camp and thereby (1) accused Md. Sakhawat Hossain, (2) accused Sheikh Mohammad Mujibur Rahman alias Mujibur Rahman and (3) Md. Abdul Khaleque Morol participated, facilitated and committed the offences of abduction, confinement and torture constituting the offence of crimes against

humanity as specified in section 3(2) (a)(g)(h) of the Act of 1973 and thus (1) accused Md.Abdul Khaleque Morol and (2) Sheikh Mohammad Mujibur Rahman alias Mujibur Rahman incurred liability under section 4(1) of the Act of 1973 which is punishable under section 20(2) read with section 3(1) of the Act of 1973.

999. It is proved beyond reasonable doubt that accused Md. Sakhawat Hossain was the Razakar Commander of Chingra Bazaar Razakar Camp and he perpetrated the offence as Razakar Commander and committed the offence of abduction, confinement and torture as specified in section 3(2)(a)(g)(h) of the Act of 1973 and incurred the liability under section 4(2) of the said Act which is punishable under section 20(2) of the Act of 1973.

Charge No. 04.

[Abduction, confinement, torture and murder of A. Malek Sardar of Village Hijoldanga under Police Station-Keshobpur, District-Jessore].

1000. Summary of Charge; It is alleged that at the end of Bangla month Ashwin, in 1971 [1378 BS] the Razakars of Chingra Razakar Camp under Police Station Keshobpur, District- Jessore having abducted A. Malek Sardar, a source of freedom-fighters, of village Chingra under Police Station –Keshobpur, District Jessore confined him in Chingra Razakar Camp and tortured him

mercilessly there. Thereafter, on 28 Bangla month Ashwin, in 1971 at about 8.00/ 8.30 am(1) accused Md. Sakhawat Hossain, (2) accused Md. Ibrahim Hossain alias Ghungur Ibrahim, (3) accused Md. A. Aziz Sardar, son of late Ful Miah Sardar, (4) accused Abdul Aziz Sardar, son of late Ahmmad Sardar and (5) accused Md. Abdul Khaleque Morol along with other 6/7 Razakars brought said A. Malek Sardar from Chingra Razakar Camp to Chingra Bazar Ferry [Kheya Ghat] and then accused Md. Sakhawat Hossain killed him by gun-shot there and the dead body of A. Malek Sardar was thrown down on the bank of Kapotakkha River.

1001. Thereby accused (1) Md. Sakhawat Hossain, (2) Md. Ibrahim Hossain alias Ghungur Ibrahim, (3) Md. A. Aziz Sardar, son of late Ful Mia Sardar, (4) Abdul Aziz Sardar, son of late Ahmmad Sardar, and (5) Md. Abdul Khaleque Morol have been charged for participating, aiding, abetting, facilitating and complicity in the commission of offences of abduction, confinement, torture and murder as crimes against humanity as part of systematic attack directed against unarmed civilians as specified in section3(2)(a)(g)(h) of the Act of 1973 and the said accused persons have incurred liability under section 4(1) of the Act of 1973 which are punishable under section 20(2) read with section 3(1) of the Act of 1973.

1002. The prosecution has examined P.Ws.1, 3, 5 and 9 to prove the event narrated in charge No.4.P.W.3 is a freedom fighter and he was confined in the Chingra Razakar Camp at the relevant time of the event narrated in charge No.4. P.W. 5 claimed to be an eye-witness of the killing of Martyr A Malaque Sardar and P.W.9 is a witness of both circumstance and hearsay of the killing of A.Maleque Sardar. The prosecution also relied on the evidence of Khondakar Abdur Razzak whose statement has been received in evidence under section 19(2) of the Act of 1973, since he died during the trial.

1003. P.W 1 Gaziur Rahman is the son of freedom fighter Chandtulla Gazi who was also the President of Sagardari Union Awami League in 1971. He was aged about 17 years at the time of War of Liberation in 1971 and an eye witness to the event of the abduction of his father. He stated that in the middle of Bangla month, Sraban in 1971 one day at about 10 am accused Md. Sakhawat Hossain along with other 30/40 Razakars convened a meeting in the ghadi ghar [business office] of Muslim League leader Munshi Solimuddin situated at Chingra Bazaar and delivered an inciting speech stating that the members of Awami League and the people who say “Joy Bangla” are ‘Kafer, Monafek’ and decided to prepare their list to be killed after finding them out.

1004. P.W.3 Nuruddin Morol is a freedom fighter and an old man of aged about 73 years. P.W.3 did not say anything in examination in chief regarding the killing of A.Maleque Sardar, but in cross-examination in reply to a question put to him by the defence, he stated that while he and Chandtullah Gazi were confined in Chingra Razakar Camp another young boy was also confined there, but he could not remember the name of that boy. In cross-examination, he could not say as to whether except the above mentioned three detainees [P.W.3, Chandtullah Gazi, and a young boy], any other persons were confined in the Razakars Camp. He also could not say the exact date of setting up Chingra Razakar Camp. He further stated that in both the list of freedom fighters prepared in 1971 and present list, his name has been included as a freedom fighter and now he is enjoying allowances as a freedom fighter.

1005. P.W.5 Kazi Abdul Aziz is an old man of 66 years and claimed to be an eye-witness of the killing of A.Maleque Sardar. At the time of War of Liberation in 1971, he was aged about 21/22 years. He used to look after the business of his uncle Kazi Abdur Rashid at Chingra Bazaar since 1965. He stated that on the last part of Bangla month Jystha in 1971, the Razakars set up Chingra Razakar Camp and Razakar accused Md. Sakhawat Hossain was the Commander of the said Camp.

1006. P.W.5 stated that on 28th Bangla month, Ashwin in 1971, in the morning he was present in the godown of his uncle Kazi Abdur Rashid. At about 8/8:30 am Razakar (1)accused Md. Ibrahim Hossain alias Ghungur Ibrahim, (2)accused Abdul Aziz Sardar, (3) accused Md. A. Aziz Sardar, (4) accused Abdul Khaleque Morol, (5) accused Lutfor Morol[now dead] and other 4/5 armed Razakars having tied a young boy took him through the front side of the godown of his uncle to the west side of the tailor of Alauddin Munshi. After sometimes, he closed his shop to go to his house and started walking along with another shopkeeper Khondakar Abdul Razzak. While P.W.5 and Khondakar Abdur Razzak[died during trial] reached in front of the tailor of Alauddin, the above mentioned Razakars detained them. At that time, he heard that Razakar Ibrahim told the boy, to be ready and the young boy was requesting the Razakars to allow him to perform his prayer, but the Razakar Ibrahim told him to perform the last prayer of his life. Thereafter Razakar accused Ibrahim asked P.W.5 and Abdur Razzak to take the detainee (young boy) to the boat house (Khaya Ghat) situated to the west of Chingra Bazaar Razakar Camp. Since they did not agree to take the young boy, Razakar accused Ibrahim and accused Md. A. Aziz Sardar, son of Ful Mia Sardar had beaten them by a rifle and thereafter due to fear of their

life, they took the boy to the boat house and the Razakars also went there along with them.

1007. He further stated that after going to the boat house, Razakar accused Md. Sakhawat Hossain told that you have not yet killed the boy. At that time, Razakar accused Md. Sakhawat Hossain took the rifle from Ibrahim and gunned down the young boy to death from a closed distance. Thereafter accused Ibrahim, accused Abdul Aziz, son of Ful Sardar again started beating P.W.5 and Abdur Razzak, and due to fear of their life, both of them had thrown down the dead body of the young boy in the mud of the bank of Kapotakha river and thereafter the Razakars and accused persons left the crime site and P.W. 5 and Abdur Razzak came back to their house.

1008. He also stated that after killing A. Maleque Sardar, due to fear of his life; he did not go to Chingra Bazaar many days. Subsequently, P.W. 5 heard that name of the young boy who was killed by Razakar accused Md. Sakhawat Hossain is Abdul Maleque and his house was situated at village Hijaldanga. He [Abdul Maleque] was a “source” of freedom fighters and used to inform different information about the Razakars to them.

1009. In cross-examination, P.W.5 stated that house of Kazi Abdur Rashid was situated to the western side of Chingra Bazaar and Chingra Primary School [Chingra Razakar Camp] was situated to the 450 yards eastern side from the shop of his uncle. The shop of

Kazi Abdur Rashid was situated 75/100 yards away from the Kapotakha river and tailor of Alauddin Munshi was situated to the west side of the shop of his uncle. The boy who was confined and killed was aged about 12/14 years and he was taken from Razakar Camp to the boat house. He could not say the exact date when the young boy was abducted and confined in Razakar Camp. In reply to a question put to him by defence, P.W.5 stated that he used to open the shop of his uncle in the early morning and closed the same at night before dinner. On the date of occurrence, he closed the shop at 8:45 am. He denied the suggestions that in 1971 he was a source of Razakars or he was a Razakar. There were also two other Razakar Camps at Keshobpur Thana except Chingra Bazaar Razakar Camp and none of the accused was his classmate. He denied the suggestion that accused persons were not Razakars or Razaker Commander or they were not involved in any killing in the manner as stated by P.W. 5. He also denied the suggestion that as tutored, he falsely deposed against the accused persons. In 1971, Chingra Bazaar used to sit on Friday and Tuesday and there were 100/150 shops at Chingra Bazaar and in 1971 the people used to come to Chingra Bazaar timidly. He denied the suggestion that accused Ibrahim, accused Lutfor Morol, accused Abdul Aziz, son of Ful Sardar were never Razakars or the victim Abdul Maleque was not a minor boy.

1010. P.W.9 Md. Kamal Sardar is an old man aged about 63 years and the nephew of P.W. 5. He stated that on 28th Bangla month Ashwin in 1971, in the morning he went to Chingra Bazaar to purchase flour and while he was coming back from the Bazaar, he heard the sound of a gunshot and when he reached on the west side of the Bazaar saw that the Razakars were coming to the east from the boat house. Razakar accused Md. Sakhawat Hossain, accused Abdul Abdul Aziz Sardar, accused Md. A. Aziz Sardar, and accused Lutfor Morol[now dead] accompanied the group of Razakars, but he could not remember the names of other Razakars. At that time, he went to the boat house and saw the dead body of a young boy. Thereafter he went to his house and informed his father that the Razakars having killed a young boy at the boat house left his dead body there.

1011. He further stated that after three days of the above incident, he went to Chingra Bazaar and his uncle Aziz (P.W.5) informed him that Razakar accused Md. Sakhawat Hossain ordered him to catch the hands of that young boy. Since he refused to do the same, Razakar accused Md. Sakhawat Hossain had beaten him. At one point of time, his uncle Aziz [P.W.5] caught the hands of the young boy and Razakar accused Md. Sakhawat Hossain gunned down the young boy to death by a rifle shot and further ordered him [P.W.5] to throw the dead body of the boy in the Kapotakha River.

Thereafter his uncle Aziz having thrown down the dead body of the young boy in the mud of the boathouse came back to his house. His uncle further informed that the name of the young boy who was killed at the boat house was Abdul Malek and his house was situated at village Hijaldanga. He further stated that the Razakars who were going to the boathouse were known to him by face and he used to see them in the Bazaar for which he could recognise them.

1012. In cross-examination, P.W.9 stated that accused Md. Sakhawat Hossain was known to him by his name before the War of Liberation. After Liberation, he saw him and recognised him again and before the War of Liberation he also saw accused Md. Sakhawat Hossain, but he could not remember clearly. Chingra Bazaar was situated to the one-kilometer east side from his house. The bank of Kapotakha River is situated near Chingra Bazaar. The boat house of Kapotakha River was situated on the 100 feet west from Chingra Bazaar. In reply to a question put to him by the defence, he stated that it was not required to cross the river to come to Chingra Bazaar from his house. He stated that the young boy who was killed at boat house was aged about 7/8 years and at about 9:00 am in the morning, he saw the dead body and accused Md. Sakhawat Hossain was the Razakar Commander of No. 2 Sagardari Union. He further stated that in 1971, Chingra Bazaar used to sit on

Friday and Tuesday. He denied the suggestion that accused Md. A. Aziz Sardar, son of Ful Miah Sardar, accused Lutfor Morol was not known to him or they were not involved in the occurrence in the manner as stated by him. He denied the suggestion that accused persons were not Razakars in 1971 or he deposed falsely as tutored by others concealing his age.

1013. During the investigation of the case, the Investigation Officer having examined Khondaker Abdur Razzak [65], son of late Khondaker Abdul Wazed and late Ashiron Bibi of village-Chingra, Thana-Keshobpur, District –Jessore recorded his statement. During the trial, witness Khondakar Abdur Razzak died and on the prayer of the learned Prosecutor, this Tribunal by order dated 15.5.2016 received his statement recorded by the investigating officer in evidence and marked as exhibit-16.

1014. Witness Khondakar Abdur Razzak stated that in 1967 he started his business as grocery shop keeper at Chingra Bazaar and due to his illness he discontinued his business one year ago. In 1971 Chingra Bazaar was a famous business Centre. The Razakars set up Chingra Bazaar Razakar Camp in the last part of Bangla month Jytha in 1971 and Md. Sakhawat Hossain was the Commander of Chingra Bazaar Razakar Camp. The Razakars used to reside in Primary School and Council Office and Razakars of Chingra Bazaar Camp used to come to his shop to purchase goods, but they

did not pay the cost. Md. Sakhawat Hossain also used to come to his shop and he requested him [accused Md. Sakhawat Hossain] to take necessary step for payment of dues. On 28th Bangla month, Ashwin in 1971 in the morning he opened his shop and started to go to his house at about 8/8.30 am. At that time accused (1) Md. Ibrahim Hossain alias Ghungur Ibrahim,[60],(2) accused Md. A. Aziz Sarder[65], (3) accused Abdul Aziz Sardar[66], (4) Md. Lutfor Morol[69] [new dead] and (5) Md. Abdul Khaleque Morol[68] along with 3/ 4 other armed Razakars having tied folded a young boy were going to western side through the front side of the tailor of Alauddin Munshi. After some time, while he along with another shopkeeper Aziz[P.W.5] reached in front of the tailor of Alauddin Munshi, the aforesaid Razakars detained them and at that time Razakar Md. Ibrahim Hossain alias Ghungur Ibrahim told the young boy to be ready. At that time, the young boy requested the Razakars to allow him to perform his prayer, but the Razakar accused Md. Ibrahim Hossain alias Ghungur Ibrahim told him to perform the last prayer of his life, and asked him and Aziz(P.W.5) to take the young boy to the boathouse (ferry ghat). Since both of them refused to take the boy, the Razakar Md. Ibrahim Hossain alias Ghungur Ibrahim and Abdul Aziz Sardar (Mominpur) had beaten them by rifle and due to fear of their life, he caught right hand and Aziz (P.W.5) caught the

left hand of the boy. In the meantime, accused Md. Sakhawat Hossain reached there and told the Razakars that you have not yet killed the boy. At that time, he took the rifle from Razakar Md. Ibrahim Hossain alias Ghungur Ibrahim and from a close distance gunned down the young boy; consequently, the young boy succumbed to his injury on the bank of Kapotakha River. At that time, the Razakars had beaten both of them for which they had thrown down the dead body of the young boy in the mud of the bank of Kapotakha River and came back to their house. Thereafter, he did not go to Chingra Bazaar due to fear of his life. After few days of the above-mentioned killing, he came to know that the name of the “young boy” who was killed was Maleque and his house was situated at Hijaldanga. Since he used to inform different information of Razakars to the freedom fighters, at the order of Md. Sakhawat Hossain, his cohorts Razakars abducted him and confined him in the Chingra Bazaar Razakar Camp.

Evaluation of evidence presented to the Tribunal.

1015.The learned Prosecutor Mr Zead-Al-Malum appearing with another prosecutor Ms Rezina Sultana on behalf of the Prosecution submitted that P.W.5 and witness Khondaker Abdur Razzak are eye witnesses of the event narrated in Charge No.4 and there is no contradiction in their evidence as regards killing of A. Maleque Sardar. Furthermore, P.Ws.3 and 1 also corroborated the

evidence of P.W.5 and the prosecution proved the charge against all accused persons beyond all reasonable doubt.

1016. The learned counsel Mr. Abdus Sattar Palwan, appearing on behalf of accused Md. Sakhawat Hossain and absconding accused Abdul Aziz Sardar and Abdul Khaleque Morol submitted that the evidence of P.W.5 and statement of witness Khodakar Abdur Razzak so far it relates to the event narrated in charge No.4 is not at all believable inasmuch as P.W.5 and Khondakar Abdur Razzak as per their statement proved that they took the victim A. Maleque Sarder from Chingra Bazaar to the bank of Kapotakha river, but they were not implicated in this case and P.W.9 is a chance witness and all of them are inimical to the defence for which relying on their evidence conviction cannot be awarded against the accused persons.

1017. Mr Abdus Sukur Khan, the learned State defence counsel appearing on behalf of accused Md. Ibrahim Hossain alias Ghungur Ibrahim and Md. A. Aziz Sardar submitted that there is no allegation of killing against the accused persons and the prosecution only to harass them falsely implicated in the instant case and failed to prove the charge to the hilt against the accused persons.

1018. Out of five witnesses examined by the prosecution, none is a family member of the victim. It is to be noted that the victim A. Maleque Sardar and the Razakar Commander accused Md.

Sakhawat Hossain was inhabitants of village Hijoldanga and before killing victim A. Maleque Sardar was abducted from somewhere else and confined in Chingra Razakar Camp, but the prosecution could not examine any witness regarding his abduction. P.W. 3 Nuruddin Morol did not say anything in examination –in-chief as regards killing of A. Maleque Sardar, but in reply to a question put to him by the defence, he stated that while he and another freedom fighter Chandtullah Gazi were confined in Chingra Razakar Camp another young boy was also confined there.

1019. P.W. 5 Kazi Abdul Aziz [66] was a young boy aged about 20/22 years at the time of War of Liberation in 1971. He used to look after the business of his uncle Kazi Abdur Rashid at Chingra Bazaar since 1965. He stated that in the last part of Bangla month, Jytha in 1971, Razakars set up Chingra Bazaar Razakar Camp and accused Md. Sakhawat Hossain was the Razakar Commander of the said Camp. It is alleged that victim A. Maleque Sardar was killed on 28th Bangla month, Ashwin in 1971 after 8/8.30 am. The prosecution also alleged that before killing A. Maleque Sardar was confined in Chingra Razakar Camp and the Razakars accused- persons having forcibly dragged A. Maleque Sardar out from the Razakar Camp took him at the boathouse (ferry ghat) and killed him there. It is claimed that while the victim A. Maleque Sardar

was taken for killing from the Razakar Camp, P.W. 5 Kazi Abdul Aziz and witness Khondakar Abdur Razzak saw the Razakars.

1020. As regards taking the victim A. Maleque Sardar from Chingra Razakar Camp to the boathouse (Ferry Ghat), P.W. 5 Kazi Abdul Aziz stated that on 28th Bangla month Ashwin in 1971 in the morning he opened the godown of his uncle Kazi Abdur Rashid and at about 8/8:30 am Razakar accused Ibrahim, accused Abdul Aziz Sardar, accused Md. A. Aziz Sardar, accused Abdul Khaleque Morol, accused Lutfor Morol[now dead] and others 4/5 armed Razakars having tied a young boy took him through the front side of the godown of P.W. 5 to the west side of the tailor of Alauddin Munshi. After sometimes, he closed his shop to go to his house and started walking along with another shopkeeper Khondakar Abdur Razzak. While P.W.5 and Khondakar Abdur Razzak reached in front of the tailor of Alauddin, the aforesaid Razakars detained them. At that time, he heard that Razakar Ibrahim told the boy, to be ready and the young boy requested the Razakars to allow him to perform his prayer, but the Razakar Ibrahim told him to perform the last prayer of his life. In the deposition sheet, in Bangla, it has been recorded as “ aMe I RmW IjSjLjltcl htm ptjl, BjjtL HLWASltl 2 IjLja ejjS fsjl pkjN ce z aMe IjSjLjI Chfj htm HLhjl ejjS fospz”

1021. It is alleged that while the Razakars took the victim from Chingra Bazaar Razakar Camp to Chingra boathouse (ferry ghat), the Razakars also detained Kazi Abdul Aziz (P.W.5) and Khondaker Abdur Razzak. In this respect, P.W. 5 Kazi Abdul Aziz stated that Razakar accused Ibrahim asked P.W.5 and Razzak to take the detainee (young boy) to the boat house (Khaya Ghat) situated to the west side of Chingra Bazaar. Since they did not agree to take the young boy, Razakar accused Ibrahim and accused Abdul Aziz had beaten them up by rifle and thereafter due to fear of their life, they took the boy to the boat house and the Razakars also went along with them. The above evidence of P.W.5 is corroborated by witness Khondakar Abdur Razzak.

1022. As regards taking the boy to the boathouse, witness Khondakar Abdur Razzak stated that on 28th Bangla month Ashwin in the morning he opened his shop and started to go to his house at about 8/8.30 am. At that time accused (1) Md. Ibrahim Hossain alias Ghungur Ibrahim,[60],(2) accused Md. A. Aziz Sarder[65], (3) accused Abdul Aziz Sardar[66], (4) Md. Lutfor Morol[69] [new dead] and (5) Md. Abdul Khaleque Morol[68][now dead] along with 3/ 4 armed Razakars having tied folded a young boy were going to western side through the front side of the tailor of Alauddin Munshi. After some time, while he along with another shopkeeper Aziz reached in front of the tailor of Alauddin Munshi,

the aforesaid Razakars detained them and at that time Razakar Md. Ibrahim Hossain alias Ghungur Ibrahim told the boy to be ready. At that time, the young boy requested the Razakars to allow him to perform his prayer, but the Razakar accused Md. Ibrahim Hossain alias Ghungur Ibrahim told him to perform the last prayer of his life and asked him and Aziz(P.W.5) to take the young boy to the boathouse (ferry ghat). Since both of them refused to take the boy, the Razakar Md. Ibrahim Hossain alias Ghungur Ibrahim and Abdul Aziz Sardar (Mominpur) had beaten them by rifle and due to fear of their life, he caught the right hand and Aziz (P.W.5) caught the left hand of the boy.

1023. As regards killing A. Maleque Sardar, P.W. 5 Kazi Adul Aziz stated that after going to the boat house, Razakar accused Md. Sakhawat Hossain told the Razakars that “you have not yet killed the boy. In the deposition sheet, in Bangla, it has been recorded as "a|j| HMtej ®RtmWTK j;|l ptez" At that time, Razakar accused Md. Sakhawat Hossain took the rifle from Ibrahim and gunned down the young boy to death from a closed distance. Thereafter accused Ibrahim, accused Md. A. Aziz Sardar, son of Ful Miah Sardar again started beating P.W.5 and Abdur Razzak and due to fear of their life, both of them had thrown down the dead body of the young boy in the mud of the bank of said river. Thereafter the Razakars and accused -persons left the crime site keeping them on the bank

of the river and subsequently P.W. 5 and Abdur Razzak came back to their house.

1024. As regards killing A. Maleque Sardar, witness Khondakar Abdur Razzak stated that in the meantime, accused Md. Sakhawat Hossain reached there [boat house] and told his cohorts Razakars that you have not yet killed the boy. At that time, he took the rifle from Razakar Md. Ibrahim Hossain alias Ghungur Ibrahim and from a close distance gunned down the boy to death at the bank of Kapotakha River. At that time, the Razakars had beaten both of them for which they had thrown down his dead body in the mud of the bank of Kapotakha River and thereafter they came back to their house. Thereafter he did not go to Chingra Bazaar many days due to fear of his life. After few days of the above-mentioned killing, he came to know that the name of the “young boy” who was killed was Maleque and his house was situated at Hijaldanga. Since he used to inform different information of Razakars to the freedom fighters, at the order of accused Md. Sakhawat Hossain, his cohorts Razakars having abducted him confined in the Chingra Bazaar Razakar Camp.

1025. P.W.9 Md. Kamal Sardar [63] claimed that he was present at Chingra Bazaar before the alleged killing of A. Maleque Sardar and he heard the sound of a gunshot. In this respect, P.W.9 Md. Kamal Sardar stated that on 28th Bangla month Ashwin in 1971 in the

morning he went to Chingra Bazaar to purchase flour and while he was coming back from the Bazaar, he heard the sound of a gunshot and when he reached on the west side of the Bazaar, he saw that the Razakars were coming to the east from the boat house. He could recognise Razakar accused Md. Sakhawat Hossain, accused Abdul Aziz, accused Md. A. Aziz Sardar and accused Lutfor Morol[now dead] amongst Razakars who were coming back, but he could not remember the names of other Razakars. At that time, he went to the boat house and saw a young boy was lying there dead. Thereafter he went to his house and informed his father that the Razakars having killed a young boy at the boat house left his dead body there.

1026. As regards identification of the victim A. Maleque Sardar, during cross-examination in reply to a question put to him by the defence, P.W. 5 stated that the boy who was confined and killed was aged about 12/14 years and he was taken from Razakar Camp to the boat house. He could not say the exact date when the boy was detained and confined in Razakar Camp.

1027. As regards identification of the young boy who has been killed on the bank of Kapotakha River, witness Khondakar Abdur Razzak stated that after few days of the above-mentioned killing, he came to know that the name of the “young boy” who has been killed was Maleque and his house was situated at Hijaldanga.

Since he used to inform different information of Razakars to the freedom fighters, at the order of Md. Sakhawat Hossain, his cohorts Razakars having abducted him confined in the Chingra Bazaar Razakar Camp.

1028. P.W. 9 is the nephew of P.W. 5 and heard about the event narrated in Charge No. 4 from his uncle Abdul Aziz[P.W.5]. He stated that after three days of the incident, he went to Chingra Bazaar and his uncle Aziz informed him that Razakar accused Md. Sakhawat Hossain asked him to catch the hands of that boy. Since he refused to do the same, Razakar accused Md. Sakhawat Hossain had beaten him. At one point of time, due to fear of life, his uncle Aziz caught the hand of the boy and Razakar accused Md. Sakhawat Hossain gunned down the young boy to death by a rifle shot and ordered him [P.W.5] to throw the dead body of the boy in the Kapotakha River. Thereafter his uncle Aziz having thrown down the dead body of the young boy at the boat house came back to his house. His uncle further informed that the name of the boy who had been killed at the boat house was Abdul Maleque and his house was situated at village Hijaldanga, and that the Razakars who were going to the east side from the boathouse, were known to him by face and he used to see them in the Bazaar for which he could recognize them.

1029. During cross-examination of P.W.3, in reply to a question put to him by the defence he stated that four persons were killed in Chingra Bazaar Razakar Camp and they are Hasan, Potu and a young boy of aged about 15/16 years and Chandtullah Gazi and that while he and Changtullah Gazi were confined in Chingra Bazaar Razakar Camp, another young boy was also confined there, but he could not remember the name of that boy. In examination –in-chief, P.W.3 did not say anything regarding the event narrated in charge No. 3, but by cross-examining him, the defence confirmed that a young boy aged about 15/16 years was also killed while he was confined in Chingra Bazaar Razakar Camp.

1030. P.W.5 stated that before killing Abdul Maleque Sardar, Razakar accused Md. Ibrahim Hossain alias Ghungur Ibrahim, accused Abdul Aziz Sardar, accused Md. A. Aziz Sardar, Abdul Khaleque Morol, Lutfor Morol [now dead] took Maleque through the Chingra Bazaar at 8.00 am on 28th Ashwin in 1971 to the bank of Kapotakha river and accused Razakar Commander Md. Sakhawat Hossain gunned down him there to death. During cross-examination, the defence only denied the evidence of P.W.5 who is the direct witness of the killing of A. Maleque Sardar, but did not cross-examine to assail the incriminating evidence of P.W.5 and regarding recognition of the accused persons, P.W.5 stated that the accused persons used to come to Chingra Bazaar for which

they were known to him before 1971 and the above evidence regarding recognition has not been denied by the defence.

1031. P.W.9 Md. Kamal Sardar stated that after hearing the sound of the gunshot while the Razakars were coming back from the boathouse(ferry ghat) he recognised accused Md. Sakhawat Hossain, Abdul Aziz Sardar, Md. A. Aziz Sardar, Lutfor Morol and thereafter he went to the boathouse (ferry ghat) near Chingra Bazaar and found the dead body of a young boy and after going to his house he informed his father that Razakar accused –persons gunned down a young boy to death at Chingra Bazaar Razakar Camp and he also heard about the occurrence from his uncle Kazi Abdul Aziz (P.W.5). During cross-examination in reply to a question put to him by the defence, he stated that his uncle informed him that the name of the young boy who had been killed was A. Maleque and his house was situated at Hijaldanga. As regards recognition of the accused persons, he stated that the Razakers were previously known to him for which he could identify them. The above-mentioned evidence of P.W .9 was only denied by the defence by giving suggestion to him. During cross-examination, the defence did not cross-examine P.W.9 regarding incriminating evidence given in examination- in- chief in respect of the event narrated in Charge No. 4.

1032. As regards identification of the accused persons who killed the victim A. Maleque Sardar, P.W.3 did not mention the name of any accused, but fact remains that before killing the victim A.Maleque Sardar, he was confined in Chingra Razakar Camp and accused Md. Sakhawat Hossain was the Razakar Commander of Chingra Razakar Camp and accused Ibrahim, Abdul Aziz Sardar, Md. A. Aziz Sardar and Abdul Khaleque Morol are accomplices of Razakar Commander Md. Sakhawat Hossain and they were closely associated with Chingra Bazaar Razakar Camp. It is evident in the evidence of P.W.5 and witness Khondakar Abdur Razzak that accused Ibrahim, accused Abdul Aziz Sardar, accused Md. A. Aziz Sardar, accused Khaleque Morol, Lutfor Morol[now dead] took the victim A. Maleque Sardar through Chingra Bazaar to near boathouse(ferry ghat) and Razakar accused Md. Sakhawat Hossain gunned down A. Maleque Sardar to death at Chingra Bazaar boathouse(ferry ghat).

1033. Although the prosecution could not adduce any witness as regards the event of abduction of A. Maleque Sardar, a “source” of freedom fighters, but it is proved that before killing he was confined in Chingra Bazaar Razakar Camp and from exhibit-6, list of freedom fighters, it reveals that the name of A. Maleque Sardar has been mentioned in the list of Martyr freedom fighters. From the evidence presented to the Tribunal it is proved beyond

reasonable doubt that before killing, Razakar accused-persons abducted A. Maleque Sardar from somewhere else and confined him in Chingra Bazaar Razakar Camp.

1034. Like other Tribunals created under the respective Statutes made at the instance of the United Nation, in the International Crimes [Tribunal-1] Rules of Procedure, 2010, provision has been provided for due consideration of the hearsay evidence. As per provision of Rule 56(2) of the ROP, 2010, this Tribunal shall also accord in its discretion due consideration to both hearsay and non-hearsay evidence and the reliability and probative value in respect of hearsay evidence shall be assessed and weighed separately. Hearsay evidence is admissible for corroboration of other credible and direct evidence adduced by the prosecution to arrive at a correct finding of fact beyond reasonable doubt.

1035. In the case of Katanga & Ngudjolo [n.43, ICC. P.T.C. I, 30 September 2008 para 137] the ICC Pre-Trial Chamber held that

“Hearsay evidence will normally meet the threshold of the current admissibility test and it has specifically been confirmed as being generally admissible by the Pre-Trial Chamber.” Such evidence may appear in the form of a witness testifying about the experience of another person. In Lubanga [n. 33] ICC Trial Chamber I, June 2008[I] para 28 the Trial Chamber of ICC assessed the hearsay evidence

under the admissibility criteria, acknowledging that “the context and character of the evidence will have an influence on its probative value.”

1036. The Pre-Trial Chamber of the ICC II in the case of the Prosecutor vs. Jean-Pierre Bemba Gombo [Case No. ICC-01/ 05-01/08 Para 52, judgment dated 15th June 2009] emphasised the probative value of the indirect or hearsay evidence and held that

“The Chamber approaches direct and indirect evidence differently and finds it necessary to lay down its approach with regard to indirect evidence. The Chamber adopts and follows a two-step approach. First, it assesses the relevance, probative value, and admissibility of indirect evidence, as it would undertake with respect to direct evidence. Once this assessment is made, it then turns to the second step, namely whether there exists corroborating evidence, regardless of its type or source. Thus, the Chamber is able to verify whether the piece of evidence in question, considered together with other evidence, acquires high probative value as a whole.”

1037. On perusal of exhibit-6 and the evidence of P.Ws.3, 5, 9 and witness Khondakar Abdur Razzak it is proved beyond reasonable doubt that the victim A.Maleque Sardar was a source of freedom fighters and his killing in 1971 has not been specifically disputed by the defence, although at the time of cross-examination, the

defence by giving suggestion to P.Ws. 5 and 9 denied the evidence of those witnesses given in examination-in-chief. The learned defence counsel appearing on behalf of accused persons vehemently argued that the prosecution totally failed to examine the family member of the victim A. Maleque Sardar, who are the real persons to depose as regards killing of A. Maleque Sardar.

1038. As regards confinement of A. Maleque Sardar, the evidence of P.W.3 Nuruddin Morol has not been denied by the defence. In fact there is no scope of denial inasmuch as, P.W. 3 did not say anything in his examination- in-chief as regards confinement of A. Maleque Sardar in Chingra Bazaar Razakar Camp, but during cross-examination of P.W.3 in reply to a question put to him by the defence, he stated that while he and another freedom fighter Chandtullah Gazi were confined in Chingra Bazaar Razakar Camp, another young boy was also confined there. Although P.W.3 did not mention the name of the young boy, but confinement of a young boy in Chingra Bazaar Razakar Camp is indirectly admitted by the defence. It is proved that before killing A. Maleque Sardar he had been in captivity in Chingra Bazaar Razakar Camp. The defence did not give any suggestion to the effect that another young boy, except A. Maleque Sardar, had been in the captivity of Chingra Bazaar Razakar Camp. In cross-examination in reply to a question put to him by the detainee, P.W.5 firmly stated that before

killing, the young boy was taken from Razakar Camp to the boathouse [kheya ghat]. The above-mentioned evidence of P.W.3 and 5 recorded during their cross-examination and the statement of witness Khondaker Abdur Razzak impels to draw the irresistible conclusion that the victim A. Maleque Sardar was confined in Chingra Bazaar Razakar Camp before killing. In view of the above, I am inclined to hold that the name of the young boy as mentioned by P.W.3 is A. Maleque Sardar.

1039. As regards non-examination of the family member of the victim A. Maleque Sardar it transpires that both Razakar Commander accused Md.Sakhawat Hossain and victim A. Maleque Sardar were an inhabitant of the same village-Hijaldanga and it also proved that accused Md. Sakhawat Hossain contested in the general elections in 1979,1991, 1996 and he was also elected Member of Parliament in 1991 and 1996 from Jamaat-e-Islam and BNP respectively. It is proved that the Razakar Commander accused Md. Sakhawat Hossain is an influential person in the locality. During cross-examination of P.Ws. 5 and 9 the defence did not cross-examine them as regards the close relatives of the victim A. Maleque Sardar as to whether any of them are still alive. In view of the above, non-examination of the family members of the victim after 45 years is not at all fatal.

1040. This view is also supported by our Apex Court in the case of **Mir Quasem Ali Versus The Chief Prosecutor**, Criminal Appeal No.144 of 2014, Judgment dated 8th March 2016 PDF Page 168-169 wherein it has been held that

“**The** expression common knowledge used in sub-section (3) of section 19 of the Act 1973 denotes facts that are commonly accepted or universally known, such as general facts of the history of liberation war or geography or the laws of nature. When there is no direct evidence to connect the accused with a particular incident even though the common knowledge pointing fingers towards the accused, the tribunal is given the liberty to accept secondary sources, such as the reports, articles, books, video interviews treating them as corroborating evidence without attempting to collect primary sources of evidence because the lapse of time impacts on the quality of evidence. The accused was a powerful central leader of Islami Chatra Sangha and leader of Al-Badar forces which formed the killing squad. He is also a central leader of Jamat-e-Islami, one of the powerful political parties in the country which maintain a cadre force. This party has influence over a section of people at Chittagong, and also over a good section of people around the country; so naturally, the witnesses remain traumatised all the time.”

1041. As regards age of victim A. Maleque Sardar, during cross-examination P.W.5 stated that the boy who was confined and killed was aged about 12/14 years and he was taken from Razakar Camp to Chingra Bazaar boathouse(ferry ghat). Since the victim A., Maleque Sardar was a “ source” of freedom fighters and a young boy at the relevant time, there was no other reason for his confinement in Chingra Razakar Camp except killing. Since both Razakar Commander accused Md. Sakhawat Hossain and victim A. Maleque Sardar were inhabitants of the village Hijaldanga and both of them belonged rival ideology, it was none, but only Razakar Commander Md. Sakhawat Hossain had the knowledge about A. Maleque Sardar and since Razakar Commander Md. Sakhawat Hossain was Commander of Chingra Razakar Camp, it is only he and his cohorts Razakar accused persons were involved in the abduction of A. Maleque Sardar before his killing. Furthermore, witness Khondakar Abdur Razzak also stated that at the order of Md. Sakhawat Hossain his cohorts Razakars abducted A.Maleque Sardar and confined him in Chingra Bazaar Razakar Camp.

1042. On perusal of the evidence of P.Ws.3,5 and 9, it reveals that they were locals of the crime site at the relevant time and their evidence is self-explanatory. The defence did not give any specific and cogent suggestion as regards their false implication and failed

to make out any case in their favour to disbelieve their evidence. The defence also failed to bring any material contradiction or discrepancy in their evidence by cross-examining them. Furthermore, witness Khondakar Abdur Razzak [died during trial] who was a local of the crime site and businessman of Chingra Bazaar also corroborated the evidence of P.W.5. The evidence of prosecution witnesses so far it relates to forcible taking the victim A. Malaque Sardar from Chingra Bazaar Razakar Camp to the crime site and his killing is consistent and corroborated by each other. In view of the above, I do not find any reason to disbelieve the evidence of P.Ws. 3,5, 9 and witness Khondakar Abdur Razzak.

1043. On scrutiny of the evidence of the prosecution witnesses, it reveals that there is a direct link in between the circumstantial evidence and the direct evidence of P.W.5 and witness Khondaker Abdur Razzak. From the above evidence of P.W.3,5, 9 and Khondakar Abdur Razzak it is proved beyond reasonable doubt that before killing, Razakar Commander Md. Sakhawat Hossain and his cohorts Razakar accused persons having abducted victim A.Maleque Sardar from somewhere else confined him in Chingra Bazaar Razakar Camp on or before 28th Bangla month Ashwin in 1971.

1044. From the evidence of P.Ws.3, 5, 9 and Khondakar Abdur Razzak it reveals that there is a nexus between the confinement of A. Maleque Sardar in Chingra Razakar Camp and killing. On evaluation of the evidence of the prosecution witnesses presented to the Tribunal it is proved that before killing A. Maleque Sardar, a “source” of freedom fighters, he was abducted from somewhere else and from the evidence of P.W.3, it transpires that a young boy was confined in Chingra Razakar Camp and it is evidenced from the evidence of P.W.5 and Khondakar Abdur Razzak that on 28th Bangla month, Ashwin at 8/8.30 am the Razakar accused Ibrahim, accused Abdul Aziz Sardar, accused Md. A. Aziz Sardar, accused Abdul Khaleque Morol and other 4/5 armed Razakars forcibly had taken the victim to the front side of the godown of P.W.5 situated at Chingra Bazaar to the boathouse (ferry ghat) to kill and all accused persons wait at the bank of river till Razakar Commander Md. Sakhawat Hossain arrived there and after going to the crime site Razakar Commander Md. Sakhawat Hossain took the rifle from accused Md. Ibrahim Hossain alias Ghungur Ibrahim and gunned down A. Maleque Sardar to death from a close distance at boathouse (ferry ghat) near Chingra Bazaar and the evidence of P.W.5 as regards killing of A. Maleque Sardar is corroborated by another eyewitness Khondakar Abdur Razzak. Thus all the accused persons have been found to have committed

the offence of abduction, confinement, torture and killing of civilian A. Maleque Sardar as listed in the charge No.4.

1045. It transpires from the evidence presented to the Tribunal that A. Maleque Sardar was a “source” of freedom fighters and accused Razakar Commander Md. Sakhawat Hossain and victim A. Maleque Sardar were the inhabitants of village Hijaldanga. As per evidence of P.Ws.1,5,9 and witness Khondakar Abdur Razzak, the Razakars set up Razakar Camp at Chingra Bazaar in the Bangla month Jystha in 1971, and thereafter in the middle of Bangla month Sraban in 1971 the Razakar Commander Md. Sakhawat Hossain decided to prepare the list of freedom fighters and pro-liberation people to kill them after finding them out to implement the further policy and plan of the Pakistani occupation army and thereafter accused persons having abducted A. Maleque Sardar, a “source” of freedom fighters, confined him in Chingra Bazaar Razakar Camp and on 28th Bangla month Ashwin in 1971 at about 8.00/8.30 am accused Md. Ibrahim Hossain alias Ghungur Ibrahim, accused Abdul Aziz Sardar, accused Md. A. Aziz Sardar, accused Khaleque Morol consciously forming a killing squad sharing the common criminal intent of all to commit the crime forcibly dragged the victim A. Maleque Sardar out from Chingra Razakar Camp took him to the bank of Kapotakha river to kill him and Razakar Commander Md. Sakhawat Hossain gunned down him there to

death. It stands proved beyond all reasonable doubt. Thus these four accused persons aided, abetted, facilitated and contributed to the commission of offence of abduction, confinement, torture and murder constituting the offence of crimes against humanity as specified in section 3(2)(a)(g)(h) of the Act of 1973 and these four accused persons incurred the liability under section 4(1) of the said Act.

1046. Thus it is proved beyond all reasonable that before killing A. Maleque Sardar a source of freedom fighter, the accused Md.Ibrahim Hossain alias Ghungur Ibrahim, Abdul Aziz Sardar, Md. A.Aziz Sardar and Khaleque Morol having forcibly taken him out from the captivity of the Chingra Razakar Camp took him to Chingra Bazaar boathouse (ferry ghat) and in the meantime Razakar Commander Md. Sakhawat Hossain reached there and gunned down A.Maleque Sardar to death on the bank of Kapotakha River near Chingra Bazaar and thereby Razakar Commander Md. Sakhawat Hossain committed the offence of abduction, confinement, torture and murder constituting the offence of crimes against humanity as specified in section 3(2)(a)(g)(h) of the Act of 1973 and he incurred the liability under section 4(2) of the Act of 1973.

1047. Although as per evidence of P.W.5 and Khondakar Abdur Razzak, accused Lutfor Morol [now dead] was present along with

the group of Razakars who forcibly taken A.Maleque Sardar from Chingra Razakar Camp to Chingra boathouse(ferry ghat) before killing, but formal charge has not been submitted against him regarding the event narrated in charge No.4.

Charge No. 05

[Abduction, confinement, torture and other inhumane acts (arson and plundering) committed at village-Mohadebpur, under Police Station-Keshobpur, District-Jessore.]

1048. Summary of charge: It is alleged that one day in the first part of Bangla month, Ashwin in 1971 [1378 BS] at about 6.00 am freedom-fighter Miron Sheikh of village Mohadebpur under Police Station-Keshobpur, District-Jessore being unarmed came to his house to meet his parent. Accused Md. Sakhawat Hossain having got that message from secret source ordered his companion Razakars of Chingra Razakar Camp to abduct him, and accordingly 30/40 Razakars of that Camp entered into Mohadebpur village from western side of the village and started plundering and setting fire to the houses of freedom-fighters, supporters of pro-liberation people and voters of boat symbol one after another and burnt about 20/22 houses. At one stage at about 10.00/11.00, am 10/12 Razakars having raided the house of said Miron Sheikh tried to apprehend him, but he ran away from the back side of the house through an open field, and when Razakars ran after him he stood up raising his

two hands. At that time accused Md. Abdul Khaleque Morol shot him with his rifle in hand, for which he sustained serious injuries on his fingers of his left hand, and thereafter the Razakars having abducted injured Miron Sheikh brought him to Chingra Razakar Camp. Subsequently in presence and direction of (1) accused Md. Sakhawat Hossain, (2) accused Md. Ibrahim Hossain alias Ghungur Ibrahim, (3) accused Md. A. Aziz Sardar, son of late Ful Miah Sardar, (4) accused Abdul Aziz Sardar, son of late Ahmmad Sardar, (5) accused Md. Lutfor Morol and (6) accused Md. Abdul Khaleque Morol tortured Miron Sheikh mercilessly and in the evening he [Miron Sheikh] was thrown in the Kapotakkha River thinking that he died.

1049. Thereby(I) accused Md. Sakhawat Hossain, (2) accused Md. Ibrahim Hossain alias Ghungur Ibrahim, (3) accused Md. A. Aziz Sardar, son of late Ful Miah Sardar (4) accused Abdul Aziz Sardar, son of late Ahmmad Sardar, (5) accused Md. Lutfor Morol, and (6) accused Md. Abdul Khaleque Morol have been charged for participating, aiding, abetting, facilitating and complicity in the commission of offences of abduction, confinement, torture and other inhumane acts [arson and plundering] as crimes against humanity as part of systematic attack directed against unarmed civilians as specified in section 3(2)(a)(g)(h) of the Act of 1973 for which the accused persons have incurred liability under section

4(1) of the Act of 1973 which are punishable under section 20(2) read with section 3(1) of the Act of 1973.

1050. To prove the event narrated in the charge No. 5, the prosecution has examined P.Ws. 6, 7 and 8. P.W. 6 Miron Sheikh is a freedom fighter and victim of alleged abduction, confinement, and torture. P.W. 7 is a freedom fighter and a hearsay witness; P.W. 8 Hasan Ali Sheikh is a neighbour of victim Miron Sheikh and claimed to be an eyewitness of the event of the abduction of P.W. 6. He was aged about 91 years at the time of recording his evidence.

1051. P.W. 6 Miron Sheikh was aged about 22/23 years at the time of War of Liberation in 1971. He took part in the War of Liberation under the leadership of Mofazzal Hossain Master [now dead]. He used to collect information about the Razakars and informed the same to the freedom fighters. At the time of War of Liberation, he used to live in the adjacent area of his village Mohadebpur.

1052. P.W.6 stated that in the first part of Bangla month, Ashwin in 1971, one day at about 6:00 am he came back to his house to see his wife, brother, and sister. Being informed about P.W.6, 30/40 Razakars of Chingra Razakars Camp having attacked his village Mohadebpur set fire in the house of the freedom fighters and the pro-liberation people. At that time, he was present in his house. At the time of the attack, when he came out from his house, he saw

that the Razakars set fire in several neighbouring houses and about 10/12 Razakars attacked his house. At that time he tried to flee away to the north side of his house through an open field, but the Razakar accused Abdul Aziz Sardar, Md. A. Aziz Sardar, accused Abdul Khaleque, accused Ibrahim and accused Lutfor Morol [now dead] along with other Razakars chased him and due to fear of his life, he stood up raising his hands up at a place in the field 200 yards away from his house. At that time, accused Abdul Khaleque shot Miron Sheikh to kill with his rifle and he sustained a grievous bleeding injury on his fingers of left hand. Thereafter the aforesaid Razakar accused persons having detained him confined in Chingra Razakar Camp.

1053. He further stated that while he was confined in the Razakar camp, at the order of Razakar accused Md. Sakhawat Hossain, accused Abdul Aziz Sardar, accused Md. A. Aziz Sardar, accused Ibrahim, and accused Lutfor inhumanely tortured him, consequently, he lost his sense. When he regained his sense at about 10/10:30 pm Razakar accused Md. Sakhawat Hossain wanted to know information about the camps of freedom fighters. When he refused to give any information about freedom fighters, accused Md. Sakhawat Hossain by twisting had broken his left leg; consequently, he again lost his sense. After 3(three) days, he regained his sense and found himself lying on the bank of

Kapotakha river and hearing scream and weeping of P.W.6, the locals took him to the house of Altab Master of village Bharsa wherefrom he was taken to Taki Hospital, India, and the doctor cut his two fingers (this witness had shown his three fingers of his left hand to the Tribunal). While he was in India, his nephew Liakat (P.W. 7) went there to see him and he disclosed the occurrence to P.W. 7. After independent, he came back in Bangladesh and saw that the Razakars had destroyed his houses. P.W. 6 claimed that the accused persons were inhabitants of the same locality for which they were previously known to him.

1054. In cross-examination P.W. 6 stated that he was born in 1950 and that the name of the village of accused Md. Sakhawat Hossain is Parchakra which is situated to the east side from his house, but he could not say the distance. The Chingra Bazaar was situated 3 /4 kilometres away from village Mohadebpur, and that his father died while he was aged about 10 years old. He could not say as to whether in the Bangla month, Ashwin in 1971, the Razakars detained any other person of his Biddyanandakathi Union. He stated that the village Boga is situated within the Biddyanandakathi Union. He admitted that his name was not included in the list of freedom fighters. He denied the suggestions that he was not a freedom fighter or falsely deposed in the case to include his name in the list of freedom fighters or as tutored by others due to political

reason he deposed falsely against the accused Md. Sakhawat Hossain. He also denied the suggestions that the occurrence did not take place in the manner as stated by him or the accused persons were not Razakars in 1971. P.W. 6 admitted that nowadays he is suffering from financial hardship and he has no children, and he is a beggar.

1055. P.W. 7 Md. Liakot Ali Sheikh is a freedom fighter and aged about 59 years. He is the nephew of P.W. 6. At the time of War of Liberation in 1971, he was a student of Class IX and he went to Bashirhat, India on 23rd April along with his villagers Nurul Islam Khokon, Fajar Ali, Abdul Motaleb, Md. Tohiduzzaman and other 10/12 persons of his village for the purpose of training to take part in the war of Liberation. Subsequently, he went to Chakunia of Bihar for training. After training, he came back in Bangladesh along with a group of 10 freedom fighters through Hakimpur border and took his position at village Khurdo of Kolaroa Thana wherefrom he took part in the different war against the Pakistani occupation army and Razakars.

1056. P.W 7 stated that while he was staying at Khurdo Camp, in the first part of Bangla month Ashwin in 1971, he came to know through their source that the Razakars injured his uncle Miron Sheikh (P.W.6) by a rifle shot and inhumanely tortured him. He further came to know that Miron Ali Sheikh was admitted to Taki

Hospital, India. Thereafter he along with other 2/3 freedom fighters went to Taki Hospital to see his uncle and found bandage on the left hand and leg and also saw several marks of torture on the body of Miron Ali Sheikh who informed him that he (P.W. 6) used to work with freedom fighter Mofazzal Master and on the first part of Bangla month Ashwin in 1971, one day in the morning, he went to his house, but being informed about Miron Ali Sheikh, the Razakars of Chingra Razakar Camp having attacked the village Mohadebpur set fire to the dwelling houses of his villagers and 10/12 Razakars attacked the house of Miron Ali Sheikh. P.W. 6 further informed that amongst those Razakars accused Ibrahim, accused Lutfor Morol, accused Billal Biswas, accused Abdul Aziz Sardar, accused Md. A. Aziz Sardar, accused Abdul Khaleque having accompanied the group of Razakars set fire in the dwelling houses of Miron Sheikh. While Miron Ali Sheikh tried to flee away to the north side of his house through the open field, the Razakars chased him and one point of time he stood up raising his hands up and at that time accused Abdul Khaleque shot him by rifle for which two fingers of his left hand was seriously injured. Thereafter, the Razakars having detained Miron Ali Sheikh took him to Chingra Razakar Camp and confined him there.

1057. P.W.6 further informed P.W.7 that while he was confined in the Chingra Razakar Camp, accused Ibrahim, accused Lutfor and

other Razakars inhumanely tortured him, consequently he lost his sense and while he regained his sense, Razakar accused Md. Sakhawat Hossain wanted to know information about freedom fighters. When he (P.W.6) refused to give information about freedom fighters, accused Md. Sakhawat Hossain by twisting had broken his left leg and he again lost his sense. After one day while he regained his sense, he found himself lying on the south side of the bank of Kapotakha River. P.W.6 also informed P.W.7 that hearing scream and weeping of Miron Sheikh, the locals of village Barsha took him to the house of Altaf Master who sent him to Taki Hospital, India wherefrom he was taken to Bangor Hospital, Calcutta for better treatment. Thereafter, P.W.7 came back to Khurdo Camp in Bangladesh. P.W.7 further added that on 6th December 1971, the freedom fighters attacked Chingra Razakar Camp and on that day he heard from his parent and the villagers that accused Abdul Aziz Sardar, accused Md. A. Aziz Sardar, accused Ibrahim, accused Abdul Khaleque, and accused Lutfor Morol along with other Razakars having plundered set fire in the dwelling houses of their villagers.

1058. In cross-examination P.W. 7 stated that he was born in 1957 and is a supporter of Awami League. In reply to a question put to him by the defence, P.W.7 stated that accused Md. Sakhawat Hossain was the Commander of Chingra Bazaar Razakar Camp.

The Chingra Bazaar was situated to the 5 kilometres west side from his village. There were three Razakar Camps within Keshobpur Thana which were located at Keshobpur, Trimahoni, and Chingra Bazaar. He stated that Khurdo freedom fighters Camp was situated within Kalaroa Thana of Shatkhira district which is adjacent to Keshobpur Thana of Jessore District. He further stated that he could not remember the particular month when he came back to Khurda Camp from India, but stated that probably it was the first part of Bangla month, Bhadra of 1971. Subsequently, he again went to India to see his uncle Miron Ali Sheikh (P.W.6). On different occasions, he also went to India to bring arms and ammunitions. He took part in the War of Liberation under the command of freedom fighter Shuvash. P.W.7 denied the suggestion that as tutored by others to take revenge he falsely deposed against them due to political reason or to take revenge falsely deposed against accused Md. Sakhawat Hossain. He further denied the suggestion that Miron Sheikh (P.W.6) was not injured in the manner as stated by him. In reply to a question put to him by the defence, he stated that he took training for about one month and three days at Chakunia of Bihar in India and took part in the War of Liberation under Sector No. 8 and Major Monjur was his Sector Commander. He admitted that freedom fighter Mofazzal Master is not alive. He denied the suggestion that accused persons were not Razakars or they were

also not involved with any occurrence in the manner as stated by P.W.7. He further denied the suggestion that as tutored by others, he falsely deposed against the accused persons.

1059. P.W. 8 Hasan Ali Sheikh is an old man of 91 years. He is a neighbour of P.W.6 Miron Ali Sheikh. He stated that Miron Sheikh (P.W.6) took part in the War of Liberation in 1971 and he used to inform information of Razakars to the freedom fighters and his (P.W.6) nephew Liakat Ali (P.W.7) also took part in the War of Liberation in 1971, for which one day at about 10/10:30 am in the Bangla month Ashwin in 1971, 30/40 Razakars of Chingra Razakar Camp having attacked the village Mohadabpur set fire to the houses of pro-liberation people and supporter of Awami League. At that time, he was present in his house and sensing the enormity of attack he hide in the bush to the north side of his house wherefrom he witnessed that Miron Sheikh was fleeing away through the open field from his house and at that time, the Razakars chased him. At one point of time, Miron Sheikh stood up in the field raising his hands up and the Razakar accused Abdul Khaleque shot Miron Sheikh by rifle and the Razakars having detained Miron Sheikh abducted him from his house and confined him in Chingra Razakar Camp. At the time of occurrence, he could identify the accused Ibrahim, accused Abdul Aziz Sardar, accused

Md. A. Aziz Sardar amongst the Razakars who chased and detained Miron Sheikh.

1060. In cross-examination, P.W.8 stated that the name of the village of accused Abdul Aziz, son of Ahammed Sardar was Boga and the name of the village of accused Abdul Khaleque was Altapul which was situated to the 8/9 kilometres north side from his house. In reply to a question put to P.W.8, he stated that accused Abdul Aziz Sardar, accused Md. A. Aziz Sardar, accused Billal, and accused Abdul Khaleque were the Razakars of his Union and Chingra Razakar Camp was situated 3/4 kilometres away from his village Mohadabpur. He stated that House of Miron Sheikh was situated to the north side and adjacent to his house. He denied the suggestion that Miron Sheikh was not injured in the manner as stated by him. He further stated that accused persons also set fire in the house of Miron Sheikh (P.W.6). He denied the suggestion that accused Ibrahim, accused Md. A. Aziz Sardar, son of Ful Miah Sardar were not Razakar or they were also not accomplices of Razakar or he deposed falsely.

Evaluation of evidence.

1061. P.W 1 Gaziur Rahman is the son of freedom fighter Chandtulla Gazi who was also the President of Sagardari Union Awami League in 1971. He was aged about 17 years at the time of War of Liberation in 1971. He stated that in the middle of Bangla

month Sraban in 1971 one day at about 10 am accused Md. Sakhawat Hossain along with other 30/40 Razakars convened a meeting in the Ghadi Ghar [business office] of Muslim League leader Munshi Solimuddin situated at Chingra Bazaar and delivered an inciting speech stating that the members of Awami League and the people who say “Joy Bangla” are ‘Kafer, Monafek’ and decided to prepare their list to be killed after finding them out.

1062. Event narrated in charge No.5 relates to abduction, confinement, torture and other inhuman acts [plundering and arson]. The event narrated in charge No.5 happened in three phases. In the first phase, the Razakars attacked the village Mohadedpur and having the plundered set fire to the houses of freedom fighters, supporters of Pro-liberation people and voters of boat symbol one after another. In the second phase the Razakar attacked the house of Miron Sheikh to apprehend him and while he tried to flee away from his house, the Razakars chased him and to kill shot him by rifle and he sustained grievous injury on the fingers of his left hand and the Razakar accused persons having detained Miron Sheikh abducted him. In the third phase, the Razakar accused-persons confined Miron Sheikh in Chingra Razakar Camp and inhumanely tortured him.

1063. As regards cause of abduction and torture, P.W.6 Miron Sheikh stated that in 1971, he took part in the War of Liberation

under the leadership of Mofazzal Hossain Master [now dead]. He used to collect information about the Razakars and informed the same to the freedom fighters. At the time of War of Liberation, he used to live in the adjacent area of his village. The above mentioned evidence of P.W.6 regarding cause of abduction is corroborated by evidence of P.W. 7 who stated that while Miron Sheikh was admitted in Taki Hospital in India, he went to see him and at that time Miron Sheikh informed him that he [P.W.6] took part in the War of Liberation and he used to inform information of Razakars to the freedom fighters for which the Razakars attacked their village. P.W.8 stated that Miron Sheikh used to inform different information to the freedom fighters and his (P.W.6) nephew Liakat Ali (P.W.7) took part in the War of Liberation in 1971.

1064. As regards abduction, P.W.6 stated that in the first part of Bangla month, Ashwin in 1971 at 6.00 am 30/ 40 Razakars attacked the houses of his villagers and set fire and at that time 10/ 12 Razakars attacked his house for which to save his life he tried to flee away to the north side of his house, but the Razakar accused Abdul Aziz Sardar, accused Md. A. Aziz Sardar, accused Abdul Khaleque, accused Ibrahim and accused Lutfor Morol along with other Razakars chased him and due to fear of his life, he stood up raising his hands up at a place in the field 200 yards away from his house. At that time, accused Abdul Khaleque shot him with his rifle

in his hand for which P.W.6 sustained a grievous bleeding injury on his fingers of his left hand. Thereafter the aforesaid Razakar accused persons having abducted him from his house confined him in Chingra Razakar Camp. Evidence of P.W.6 as regards abduction is corroborated by evidence of P.Ws.7 and 8. As regards abduction, P.W.8, an old man of 91 years, stated that while the Razakars attacked the house of Miron Sheikh, he [P.W.8] was present in his house and hide in the bush situated to the north side of his house wherefrom he witnessed that Miron Sheikh was fleeing away through an open field from his house and at that time, the Razakars chased him. At one point of time, Miron Sheikh stood up in the field raising his hands up and the Razakar accused Abdul Khaleque shot Miron Sheikh by rifle and having detained Miron Sheikh abducted and confined him in Chingra Razakar Camp. He could identify the accused Ibrahim, accused Abdul Aziz Sardar, accused Md. A. Aziz Sardar amongst the Razakars who chased and detained Miron Sheikh.

1065. As regards abduction, P.W.7 stated that while he went to India to see his uncle, his uncle Miron Ali Sheikh informed him that on the first part of Bangla month, Ashwin one day in the morning he went to his house, but being informed about Miron Ali Sheikh, the Razakars of Chingra Razakar Camp attacked the village Mohadebpur and set fire to the dwelling houses of his villagers and

10/12 Razakars attacked the house of Miron Ali Sheikh. He further informed that amongst those Razakars accused Ibrahim, accused Lutfor Morol, accused Billal Biswas, accused Abdul Aziz Sardar, accused Md. A. Aziz Sardar, accused Abdul Khaleque accompanied the group of Razakars and set fire to the dwelling houses of his villages. While Miron Ali Sheikh tried to flee away to the north side of his house, the Razakars chased him and one point of time Miron Ali Sheikh stood up raising his hands up and at that time accused Abdul Khaleque shot him for which two fingers of his left hand was grievously injured.

1066. As regards confinement and torture, P.W.6 stated that while he was confined in Chingra Razakar Camp at the order of accused Md. Shakhawat Hossain, accused Abdul Aziz Sardar, accused Md. A. Aziz Sardar, accused Ibrahim, and accused Lutfor inhumanely tortured him; consequently, he lost his sense. He regained his sense at about 10/10:30 pm and at that time accused Md. Shakhawat Hossain wanted to know information about the Camp of freedom fighters. When he refused to give any information about freedom fighters, accused Md. Shakhawat Hossain by twisting had broken his left leg; consequently, he again lost his sense. After 3(three) days, he regained his sense and found himself lying on the bank of Kapotakha river. The above-mentioned evidence of P.W.6

regarding his confinement and torture is corroborated by evidence of P.W.7.

1067. As regards confinement and torture P.W.7 stated that while he was staying at Khurdo Camp, in the first part of Bangla month Ashwin in 1971, he came to know through their “source” that the Razakars injured his uncle Miron Sheikh (P.W.6) by a rifle shot and inhumanely tortured him. He further came to know that Miron Ali Sheikh was admitted to Taki Hospital in India. Thereafter he along with other 2/3 freedom fighters went to Taki Hospital to see his uncle and found bandage on the left hand and leg and also witnessed several marks of torture on the body of his uncle. P.W.7 further stated that P, .W. 6 informed him that the Razakars having detained Miron Ali Sheikh abducted him and confined in Chingra Razakar Camp. While he was confined in the Chingra Razakar Camp, accused Ibrahim, accused Lutfor and other Razakars inhumanely tortured him, consequently he lost his sense and while he regained his sense, Razakar accused Md. Shakhawat Hossain wanted to know information about freedom fighters. When he refused to give information about freedom fighters, accused Razakar Md. Shakhawat Hossain by twisting had broken his left leg and he again lost his sense. After one day while he regained his sense, he found himself lying on the bank of Kapotakha River. Hearing scream and weeping of Miron Sheikh, the locals of village

Barsha took him to the house of Altaf Master who sent him to Taki Hospital, India wherefrom he was taken to Bangor Hospital, Calcutta for better treatment.

1068. As regards disclosure of the event narrated in charge No. 5, to P.W.7, P.W.6 Miron Sheikh stated that while he was in India, his nephew [P.W. 7] went there to see him and he disclosed about the occurrence to P.W.7. The above evidence of P.W.6 is also corroborated by P.W. 7, who stated that he along with other 2/ 3 freedom fighters went to Taki Hospital to see his uncle and found bandage on his left hand and leg and his uncle informed him about the occurrence.

1069. As regards plundering and arson P.W.6 stated that in the first part of Bangla month, Ashwin in 1971, one day at about 6:00 am he came back to his house to see his wife, brother, and sister and being informed about P.W.6, 30/40 Razakars of Chingra Razakar Camp having attacked his village Mohadebpur set fire in the houses of the freedom fighters and the pro-liberation people. He further stated that after independent, he came back in Bangladesh and saw that the Razakars had destroyed his dwelling huts. He stated that accused Abdul Aziz Sardar, accused Md. A. Aziz Sardar, accused Abdul Khalque, accused Md. Ibrahim Hossain alias Ghungur Ibrahim, Lutfor and other Razakars plundered and set fire to his house and villagers.

1070. The above-mentioned evidence of P.W.6 regarding other inhuman acts is also corroborated by P.Ws. 7 and 8. As regards other inhuman acts P.W.8 stated that one day at about 10/10:30 am in the Bangla month Ashwin in 1971, 30/40 Razakars of Chingra Razakar Camp having attacked the village Mohadabpur set fire to the houses of pro-liberation people and supporter of Awami League. He could identify accused Md. Ibrahim Hossain alias Ghungur Ibrahim, Abdul Aziz Sardar, and Md. A. Aziz Sardar amongst the Razakars who plundered and set fire to the dwelling houses of his villagers. As regards other inhuman acts P.W.7 stated that on 6th December 1971, the freedom fighters attacked Chingra Razakar Camp and on that day he heard from his parent and the villagers that accused Abdul Aziz, accused Ibrahim, accused Abdul Khaleque, and accused Lutfor Morol along with other Razakars having plundered set fire in the dwelling houses of their villagers.

1071. P.W.6 is the victim of abduction, confinement, and torture as narrated in Charge No. 5. He is the star witness of the event narrated in Charge No. 5. He stated that while he tried to flee way, Razakar accused Abdul Aziz Sardar, Md. A. Aziz Sardar, Abdul Khaleque, Md. Ibrahim Hossain alias Ghungur Ibrahim, Lutfor Morol[now dead] along with other Razakars chased him and Abdul Khaleque Morol shot by his rifle to kill P.W.6, consequently two fingers of his left hand was grievously injured for which the

Doctors cut two fingers of his left hand and after abduction the Razakar accused persons confined him in Chingra Bazaar Camp and accused Abdul Aziz Sardar, accused Md. A. Aziz Sardar, accused Md. Ibrahim Hossain alias Ghungur Ibrahim, accused Lutfor Morol, accused Md. Sakhawat Hossain inhumanely tortured him to know the information about the freedom fighters and their camps. As regards abduction, causing injury by gunshot, confinement, and torture, the defence by giving suggestion to P.W.6 merely denied his evidence given in examination -in-chief but the defence did not cross-examine him as regards the incriminating evidence. The above-mentioned evidence of P.W.6 remains unshaken during cross-examination.

1072. As regards the event narrated in Charge No. 5, P.W. 7 is a hearsay witness. He stated that he heard from the victim P.W.6 Miron Sheikh about his abduction, confinement, and torture while he was admitted in Taki Hospital, India. The evidence of P.W.7 regarding event narrated in Charge No. 5 merely denied by the defence, but by cross-examining him, the defence could not bring out any discrepancy or contradiction to his statement given in examination- in- chief.

1073. P.W.8 is the witness of the event of abduction narrated in Charge No. 5. He stated that Razakar accused Md. Ibrahim Hossain alias Ghungur Ibrahim, Abdul Aziz Sardar, Md. A. Aziz Sardar

Hospital in India, the Doctors cut his other two fingers of left hand due to an injury sustained at the time of the abduction. Although accused Md. Sakhawat Hossain was not present at the time of abduction but he inhumanely tortured Miron Sheikh while he was confined in Chingra Razakar Camp and the accused persons who abducted Miron Sheikh also tortured him while he was confined wherefrom it can be legally inferred that at the order of Md. Sakhawat Hossain all other accused persons abducted Miron Sheikh.

1076. From the evidence presented to the Tribunal it is proved beyond reasonable doubt that to execute the further plan and policy of Pakistani occupation army of annihilation of freedom fighters and pro-liberation people about 30/40 Razakars of Chingra Bazaar Razakar Camp consciously forming part of a criminal enterprise sharing the common criminal intent of all to commit the crime on 28th Bangla month Ashwin in 1971 at about 6.00 am attacked Mohadebpur village and having plundered set fire to the houses of freedom-fighters, supporters of pro-liberation people and voters of boat symbol one after another and burnt houses and thereafter 10/12 Razakars having attacked the house of Miron Sheikh tried to apprehend him and while he tried to flee away to the north side of his house; the Razakar accused Abdul Aziz Sarder, Md. A. Aziz Sarder, accused Abdul Khaleque, accused Md. Ibrahim Hossain

alias Ghungur Ibrahim, accused Lutfor Morol [now dead] and other Razakars chased him and accused Md. Abdul Khaleque Morol shot him by rifle in his hand, for which Miron Sheikh sustained a grievous injury on his fingers of left hand and thereafter accused persons having abducted injured Miron Sheikh confined him in Chingra Razakar Camp and Razakar commander Md. Sakhawat Hossain, accused Abdul Aziz Sardar, accused Md. A. Aziz Sardar, accused Md. Lutfor Morol [now dead], accused Md. Ibrahim Hossain alias Ghungur Ibrahim inhumanely tortured Miron Sheikh. Therefore, (1) accused Md. Ibrahim Hossain alias Ghungur Ibrahim, (2) accused Md. A. Aziz Sardar, (3) accused Abdul Aziz Sardar, (4) accused Md. Lutfor Morol [now dead], and (5) accused Md. Abdul Khaleque Morol committed the offences of abduction, confinement, torture and other inhumane acts [arson and plundering] constituting the crimes against humanity as specified in section 3(2)(a)(g)(h) of the Act of 1973 and incurred the liability under section 4(1) of the said Act which is punishable under section 20(2) read with section 3(1) of the Act of 1973.

1077. It is proved beyond reasonable doubt that the accused Md. Sakhawat Hossain was the Razakar Commander of Chingra Bazaar Razakar Camp and he inhumanely tortured Miron Sheikh while he was in confinement in the said Camp. Therefore it is legally presumed that at the order of Razakar Commander accused Md.

Sakhawat Hossain his accomplices Razakar accused-persons attacked the village Mohadebpur and having abducted Miron Sheikh (P.W.6) from his house confined him in the Chingra Razakar Camp and thereby accused Md. Sakhawat Hossain committed the crimes against humanity as specified in section 3(2)(a)(g)(h) of the Act of 1973 and he incurred the liability under section 4(2) of the said Act.

1078. As per prosecution, Miron Sheikh [P.W.6] was a source of freedom fighters for which about 30/40 Razakars of Chingra Bazaar Razakar Camp in the first part of Bangla month, Ashwin in 1971 at about 6.00 am attacked the house of Miron Sheikh and his villagers and set fire to his house and pro-liberation people and the workers of Awami League. While he tried to flee way by running, the Razakar accused persons and other Razakars chased him to apprehend and kill Miron Sheikh. The Razakar accused Md. Abdul Khaleque Morol shot him by a rifle which caused grievous bleeding injury on the fingers of his left hand and thereafter Razakars having abducted him confined in Chingra Bazaar Razakar Camp and inhumanely tortured him to know the information of freedom fighters. Since he refused to give any information about the freedom fighters, the Razakar Commander Md. Sakhawat Hossain had broken his left leg. While the Tribunal recorded his evidence, he had shown three fingers of his left hand to the Tribunal and

stated that while he was hospitalized in Taki Hospital in India doctors cut his two fingers and in the deposition sheet it has been recorded in Bangla in the following language, " a|fl Bma|g j;ø;tii h;sf ®b†K a|l t;vLSe NI?l N;sf K†i i |l†Z V;CL q;pf;a;tj t;tq i cañLI;uz †pM;†b X;š?ll; Af;†i kb L†i Bj;l c€V Bw...m ®L†U ®g†j ®cu (p†f V†h†e;tj a|l hij q;†al caeV BwNm f†n†e L†l)z" In reply to a question put to him by this Tribunal he stated that now he is begging and in the deposition sheet it has been recorded in Bangla as "Bj;l p;le;†c e;C z h†i Ø†e† Av†Q z B†j ha†j;†b †i r;†h†Š L†i Š†he k;†fe L†l z" On scrutiny of the evidence of P.W.6, 7 and 8 it transpires that P.W.6 Miron Sheikh is an injured freedom fighter and during War of Liberation in 1971, he was admitted to Taki Hospital in India for better treatment. But it is surprising that the name of P.W.6 Miron Sheikh, an injured freedom fighter, has not been included in the list of freedom fighters who is now begging for his livelihood. P.W.6 took the risk of his life for the independence of his motherland and after 45 years, the State by adducing Miron Sheikh as prosecution witness admitted that he was an injured freedom fighter in 1971, but I do not find any reason, why his name has not been included in the list of freedom fighters. In view of the above, it is the holy desire of this Tribunal that the Ministry of Liberation War Affairs shall take a necessary step to include the name of freedom fighter Miron Sheikh, son of late Jobed Ali

Sheikh and late Komala Begum, village-Mohadebpur, Thana-Keshobpur, District-Jessore in the list of freedom fighters.

Liability of the Commander under the Act of 1973.

1079. The individual responsibility of a commander is spelt out in section 4(2) of the Act of 1973 wherein it has been stated that if any commander or superior officer orders, permits, acquiesces or participate in the commission of any of the crimes specified in section 3 or is connected with any plans and activities involving the commission of such crimes, he is individually liable under section 4(2) of the Act of 1973. Inserting the word “ any commander” in section 4(2) of the Act of 1973, the Legislature also included the “ civilian commander” within the purview of the Act of 1973 and a commander may be either de facto or de jure commander and both are liable under section 4(2) of the Act of 1973. If any commander or superior officer fails or omits to discharge his duty to maintain discipline, or to control or supervise the actions of the persons under his command or his subordinates, whereby such persons or subordinates or any of them commit any such crimes, or who fails to take necessary measures to prevent the commission of such crimes, is guilty of such crimes under section 4(2) of the Act of 1973 as commander for the crimes committed by his subordinate perpetrator.

1080. The notion “any commander” or “superior officer” as mentioned in Section 4(2) of the Act of 1973 has not been defined in the said Act. The Razakar Bahini was an “auxiliary force” as defined in Section 2(a) of the Act of 1973. During the War of Liberation in 1971, the Razakars were recruited and trained by the Pakistani Army for the operational, static and military purpose and performed their duties as “source, guide, agent, and killing squad” of the Pakistani army. On a bare reading of the provision of Section 4(2) of the said Act, it transpires that the Legislature had no intention to limit the notion “command” or “superior responsibility” to the military command only. Furthermore, under Section 3(1) of the Act of 1973 this Tribunal has the jurisdiction to try any civilian or any group of individual who commits or has committed any of the crimes as mentioned in sub-section (2) of Section 3 of the Act of 1973.

1081. The main essence of the notion “superior “or command responsibility” is the “effective control” over the perpetrator. This notion may be either singular or plural and it applies in the case of both “civil “ and “military” superior and at the same time presence of the commander at the place of occurrence is not at all relevant. A superior or a commander by his/her act or conduct may acquiesce atrocities committed by his subordinates. The question as to whether the civil superior or commander had “effective control”

over the perpetrator at the time of the commission of the offences is a matter of fact which can be proved either by adducing evidence or may be inferred from the facts proved by the prosecution.

1082. Now it is well- settled that if any commander or superior officer who orders, permits, acquiesces or participates in the commission of any of the crimes specified in section 3 or is connected with any plans and activities involving the commission of such crimes or who fails or omits to discharge his duty to maintain discipline, or to control or supervise the actions of the persons under his command or his subordinates, whereby such persons or subordinates or any of them commit any such crimes, or who fails to take necessary measures to prevent the commission of such crimes, is guilty of such crimes committed and he is liable under Section 4(2) of the Act of 1973. The legislature made provision in Section 4(2) of the Act of 1973 to effectively bring any commander within the criminal net if he perpetrates any offence as specified in Section 3(2) of the Act of 1973 and in the given situations, he incurred the liability under section 4(2) of the Act of 1973, not under section 4(1) of the said Act.

1083. The above view is supported by the Hon'ble Appellate Division in the case of Motiur Rahman Nizami, wherein our Apex

Court found the civilian commander guilty under section 4(2) of the Act of 1973 and observed as follows.

“It is now, in our jurisdiction also, an established position that “superior officers” mentioned in section 4(2) of the ICT Act include any civilian superior having effective control over the subordinates and also that a civilian superior need not be de-jure, rather a de-facto civilian superior also may incur the responsibility of the crimes perpetrated by his subordinates in the situations mentioned in section 4(2) of the ICT Act. Section 4(2) of the ICT Act, quoted above, explicitly makes a superior liable in a situation where the latter “acquiesces” a crime committed by his subordinates or fails to take necessary measures to prevent the commission of such crime. In this case, we have found that accused Motiur Rahman Nizami was the ex-officio leader of Al-Badr Bahini and he had effective control over the members of Al-Badr Bahini. **[Motiur Rahman Nizami vs. the Government of Bangladesh, Criminal Appeal No.143 of 2014, Judgment on: 06.1.2016 PDF page-141:**

1084. Under the doctrine of command responsibility adopted in section 4(2) of the Act of 1973 effective command over the perpetrator is the main essence and in this regard observation made by our Hon’ble Appellate Division in the case of Motiur

Rahman Nizami is relevant wherein it has been further observed in the following language;

“It is a proven fact that Al-Badr Bahini was formed mainly with the members of Islami Chhatra Sangha. The evidence adduced by the prosecution, which we have already discussed while assessing the status and role of the appellant, have proved sufficiently that the appellant Motiur Rahman Nizami, being the president of Islami Chhatra Sangha became the Ex-officio leader of Al-Badr Bahini and he had authority and effective control over the members of this Bahini until the last day of liberation war.” [**Motiur Rahman Nizami vs. the Chief Prosecutor, Criminal Appeal No.143 of 2014, Judgment on 06.1.2016 PDF page-142**]

1085. In the case of Mir Queshem Ali vs the Chief Prosecutor, Criminal Appeal No. 144 of 2014, Judgment dated 8th March 2016 PDF-Page No.228 our Apex Court again made detail discussion on the notion command responsibility and made following observation;

“Sub-section (2) is altogether different and if any commander or superior officer under whose command any one of his force commits any of the crimes described in section 3 or is connected with any plans or who fails to discharge his duty

to maintain discipline or who fails to control or supervise the actions of his persons under his command and if the subordinates or any one of them commits any such crime, he will be guilty of such crimes. If the superior officer participates in any of the crimes mentioned above, he cannot escape from superior responsibility because of the fact that his responsibility is to prevent his subordinates from committing crimes. The commander is responsible for failure to perform an act required by law. This omission is culpable because the law imposes a responsibility to prevent and punish crimes committed by his subordinates. Even if it is proved that he did not participate but his subordinates committed the offence within his knowledge or that he has prepared a plan to commit any of the offences, in that case also, he cannot avoid the responsibility because law imposes a responsibility on the part of a commander or superior officer to shoulder the responsibility for commission of any crimes committed by his subordinates.”

1086. The prosecution witness presented to the Tribunal proved beyond reasonable doubt that the accused Md. Sakhawat Hossain was the de facto Razakar Commander of Chingra Bazaar Razakar Camp and the principle perpetrator and he had also effective command and control over the members of locally formed Razakar

Bahini of Chingra Bazaar Razakar Camp, but the prosecution submitted a formal charge against all the accused –persons under section 4(1) of the Act of 1973 and accordingly this Tribunal framed charges against all the accused –persons under section 4(1) of the said Act. During the trial of the case accused Md. Sakhawast Hossain engaged his learned counsel and has defended the charges by his engaged counsel and he knows what have been testified by the witnesses against him and the learned defence counsel cross-examined all the prosecution witnesses, therefore, no prejudice is caused to the accused Md. Sakhawat Hossain in framing charges under section 4(1) of the Act of 1973 inasmuch as he got all the opportunity of cross-examination of the prosecution witnesses. Since accused Md. Sakhawat Hossain was the de facto Razakar Commander of Chingra Bazaar Razakar Camp, he incurred the liability under section 4(2) of the Act of 1973.

1087. In this respect, I recall the observation of our Hon’ble Appellate Division made in the case of Mir Quasem Ali vs The Chief Prosecutor, Criminal Appeal No.144 of 2014 Judgment dated 8th March 2016, PDF-Page No. 183 wherein our Apex Court held that

“It is now the established jurisprudence that mere error, omission or irregularity in the charge does not vitiate the trial

or conviction. The accused has defended the charge by Counsel and he knows what have been deposed by the witnesses against him, and therefore, no prejudice is caused to the accused, and the accused cannot plead in such a case that by reason of such error, a failure of justice has occasioned due to defect in framing the substantive charge against him. It is now established that mere omission to frame a proper charge will not vitiate the trial if the accused has sufficient opportunity to defend the accusation and cross-examine the witnesses. In determining whether any error, omission or irregularity in a proceeding has occasioned a failure of justice, it is the tribunal which shall consider having regard to the facts by reason of not framing of the substantive charge.”

Verdict on conviction

1088. In view of the above evidence, both oral and documentary, facts and circumstances of the case and considering the submission of the parties and reasons set out in the judgment I find-

(1) Accused Md. Sakhawat Hossain in-

Charge No.1: **Guilty** of the offences of abduction, confinement, torture and rape as crimes against humanity as enumerated in section 3(2)(a)(g)(h) read with section 4(2) of the

Act of 1973 and he be convicted and sentenced under section 20(2) of the said Act.

Accused (1)Md. Ibrahim Hossain alias Ghungur Ibrahim (absconded), (2) Abdul Aziz Sardar, son of late Ahmmad Sardar (absconded) and (3) Md. A. Aziz Sardar, son of late Ful Miah Sardar (absconded) in-

Charge No.1: **Guilty** of the offences of abduction, confinement, torture and rape as crimes against humanity as enumerated in section 3(2)(a)(g)(h) read with section 4(1) of the Act of 1973 and they be convicted and sentenced under section 20(2) of the said Act.

Accused Md. Sakhawat Hossain in-

Charge No. 2: Guilty of the offences of abduction, confinement, torture, murder and other inhumane acts [plundering and arson] as crimes against humanity as enumerated in section 3(2)(a)(g)(h) read with section 4(2) of the Act of 1973 and he be convicted and sentenced under section 20(2) of the said Act.

Accused (1) Md. Billal Hossain Biswas, (2) Md. Ibrahim Hossain alias Ghungur Ibrahim (absconded), (3) Sheikh Mohammad Mujibur Rahman alias Mujibur Rahman (absconded), (4) Md. A. Aziz Sardar (absconded), (5) Abdul Aziz Sardar

(absconded), (6) Kazi Ohidul Islam alias Kazi Ohidus Salam (absconded) and (7) Md. Abdul Khaleque Morol (absconded) in-

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

Accused Md. Ibrahim Hossain alias Ghungur Ibrahim (absconded) in-

Charge No. 3: **Not Guilty** of the offences of abduction, confinement and torture as crimes against humanity as enumerated in section 3(2)(a)(g) (h) and he be acquitted thereof accordingly.

Accused Md. Sakhawat Hossain in-

Charge No. 3: Guilty of the offences of abduction, confinement and torture as crimes against humanity as enumerated in section 3(2)(a)(g)(h) read with section 4(2) of the Act of 1973 and he be convicted and sentenced under section 20(2) of the Act of 1973.

Accused (1) Sheikh Mohammad Mujibur Rahman alias Mujibur Rahman (absconded) and (2) Md. Abdul Khaleque Morol (absconded) in-

Charge No. 3: **Guilty** of the offences of abduction, confinement and torture as crimes against humanity as enumerated in section 3(2)(a)(g) (h) read with section 4(1) of the Act of 1973 and they be convicted and sentenced under section 20(2) of the said Act.

Accused Md. Sakhawat Hossain in-

Charge No. 4: Guilty of the offences of abduction, confinement, torture and murder as crimes against humanity as enumerated in section 3(2)(a)(g)(h) read with section 4(2) of the Act of 1973 and he be convicted and sentenced under section 20(2) of the said Act.

Accused (1) Md. Ibrahim Hossain alias Ghungur Ibrahim (absconded), (2) Md. A. Aziz Sardar (absconded), (3) Abdul Aziz Sardar (absconded) and (4) Md. Abdul Khaleque Morol (absconded) in-

Charge No. 4: **Guilty** of the offences of abduction, confinement, torture and murder as crimes against humanity as enumerated in section 3(2)(a)(g) (h) read with section 4(1) of the Act of 1973 and they be convicted and sentenced under section 20(2) of the said Act.

Accused Md. Sakhawat Hossain in-

Charge No.5: Guilty of the offences of abduction, confinement, torture and other inhumane acts [arson and plundering] as crimes against humanity as enumerated in section 3(2)(a)(g)(h) read with section 4(2) of the Act of 1973 and he be convicted and sentenced under section 20(2) of the said Act.

Accused (1) Md. Ibrahim Hossain alias Ghungur Ibrahim (absconded), (2) Md. A. Aziz Sardar, son of late Ful Miah Sardar (absconded), (3) Abdul Aziz Sardar, son of late Ahmmad Sardar(absconded) and (4) Md. Abdul Khaleque Morol(absconded) in-

Charge No. 5: **Guilty** of the offences of abduction, confinement and torture and other inhumane acts [arson and plundering] as crimes against humanity as enumerated in section 3(2)(a)(g) (h) read with section 4(1) of the Act of 1973 and they be convicted and sentenced under section 20(2) of the said Act.

Verdict on sentence

1089. The Legislature made provision in section 20 of the Act of 1973 directing the Tribunal to impose the death penalty considering the nature of the “crimes against humanity,” genocide, war crime and other International Crimes and also had given the Tribunal ample discretion to impose such other punishment proportionate to the gravity of the crimes appears to the Tribunal to be just and

proper. The words just and proper used in section 20 of the Act of 1973 must be interpreted considering the gravity of the offence. The exercise of this sentencing principle cannot be said to be untrammelled and unguided. It can be exercised judicially in accordance with sound and well-reasoned principles enlightened and crystallized by judicial decisions of our Apex Court. Crimes are only to be measured by the injury done to the victim and the society. The discretion given to the Tribunal is not wide but limited to the words “just and proper”–“proportionate to the gravity of the crime” as appears to the Tribunal.

1090. It is the duty of Tribunal to award proper sentence having regard to the nature of the offence and the manner in which it was executed or committed. In awarding sentence this Tribunal shall consider all relevant facts and circumstances bearing on the question of sentence and proceed to impose a sentence commensurate with the gravity of the offence. The general policy which this Tribunal has followed with regard to sentencing is that the punishment must be appropriate and proportional to the gravity of the offence committed. Imposition of appropriate sentence is the manner in which the Tribunal responds to the society’s cry for justice against the criminals. Justice demands that Tribunal should impose punishment befitting the crime considering public abhorrence of the crime.

1091. Proportionality is a general principle in law which covers several concepts. The concept of proportionality is used as a criterion of fairness and justice in statutory interpretation processes as a logical method intended to assist in discerning the correct balance between the restriction imposed by a corrective measure and the severity of the nature of the prohibited act. In criminal jurisprudence, it is used to convey the idea that the punishment of an offender should fit the crime.

1092. In the case of Jagmohan, reported in 2 SCR 541(1973) Indian Supreme Court took due note of the fact that for certain types of murders, death penalty alone is considered an adequate deterrent wherein it has been observed that;

“A large number of murders are undoubtedly of the common type. But some, at least, are diabolical in conception and cruel in execution. In some others where a victim is a person of high standing in the country, society is liable to be rocked to its very foundation. Such murders cannot simply be wished away by finding alibis in the social maladjustment of the murderer. Prevalence of such crimes speaks, in the opinion of many, for the inevitability of death penalty not only by way of deterrence but as a token of emphatic disapproval of the society.”

1093. In *Ediga Anamma v. State of Andhra Pradesh*, AIR 1974 SC 799, V. R. Krishna Iyer J, speaking for the Bench observed that “deterrence through threat of death may still be a promising strategy in some frightful areas of murderous crime.” It was further observed that “horrendous features of the crime and the hapless and helpless state of the victim steel the heart of law for the sterner sentence.”

1094. Sir James Fitzjames Stephen, the great jurist and member of the British Viceroy's Council in India, who was concerned with the drafting of the Indian Penal Code, also, was a strong exponent of the view that capital punishment has the greatest value as a deterrent for murder and other capital offence and opined in the following language;

“No other punishment deters men so effectually from committing crimes as the punishment of death. This is one of those propositions which it is difficult to prove, simply because they are in themselves more obvious than any proof can make them. It is possible to display ingenuity in arguing against it, but that is all. The whole experience of mankind is in the other direction. The threat of instant death is the one to which resort has always been made when there was an absolute necessity for producing some result. No one goes to certain inevitable death except by compulsion. Put the

matter the other way. Was there ever yet a criminal who, when sentenced to death and brought out to die, would refuse the offer of commutation of his sentence for the severest secondary punishment. Surely not, why is this? It can only be because ‘All that a man has will he give for his life.’ In any secondary punishment, however terrible, there is hope; but death is death; its terrors cannot be described more forcibly.”

1095. Thorsten Sellin a Swedish American sociologist and a penologist who has made a scientific study of the subject of capital punishment and compiled the views of various scholars of the 19th and 20th centuries. In his book “Capital Punishment,” he has made an attempt to assemble the arguments for and against the death penalty. He had also given extracts from the Debates in the British House of Commons in 1956 and, also, in March and April 1966, in the Canadian House of Commons. In the last part of his book, the learned Editor summarizes his ideas about capital punishment. In his opinion, retribution seems to be outdated and unworkable. ‘It is neither efficient nor equitably administered. Justice is a relative concept that changes with the times. A retributive philosophy alone is not now socially acceptable. In the last analysis, the only utilitarian argument that has to be given attention is the one that defends capital punishment as being a

uniquely powerful means of protecting the community.” He ends his book with the observation: “I have attempted to show that, as now used, capital punishment does not perform one of the utilitarian functions claimed by its supporters, nor can it ever be made to serve such functions. It is an archaic custom of primitive origin that has disappeared in most civilized countries and is withering away in the rest.”

1096. J. J. Maclean, the Canadian Parliamentarian justifies, from another angle, as regards the right of the State to award capital punishment for murder opined that;

“If the State has the right and the duty defends the community against outside aggression, such as in time of war, and within the country, for instance, in case of treason, crimes against the State, etc., and that to the extent of taking the life of the aggressors and guilty parties, if the citizen wants to protect his own life by killing whoever attacks him without any reason, the State can do the same when a criminal attacks and endangers the life of the community by deciding to eliminate summarily another human being..... Capital punishment must be retained to prove the sanctity of that most precious thing which is the gift of life; it embodies the revulsion and horror that we feel for the greatest of crimes..... For most people, life is priceless and they will do

anything and suffer the worst privations to preserve it, even when life itself does not hold many consolations or bright prospects for the future..... As a deterrent, the death penalty is playing its part for which there is no substitute... I suggest that statistics do not prove much, either on one side or the other..... There are too many variations, too many changes as regards circumstances, conditions, between one period and the other, to enable us to make worthy comparisons.”[Page 84 of Sellin’s Capital Punishment.]

1097. The Law Commission of India in its 35th Report, after carefully sifting all the materials collected by them, recorded their views regarding the deterrent effect of capital punishment which runs as follows:

“In our view, capital punishment does act as a deterrent. We have already discussed in detail several aspects of this topic. We state below, very briefly, the main points that have weighed with us in arriving at this conclusion:

[a] Basically, every human being dreads death.

[b] Death, as a penalty, stands on a totally different level from imprisonment for life or any other punishment. The difference is one of quality, and not merely of degree.

[c] Those who are specifically qualified to express an opinion on the subject, including particularly the majority

of the replies received from State Governments, Judges, Members of Parliament and Legislatures and Members of the Bar and police officers- are definitely of the view that the deterrent object of capital punishment is achieved in a fair measure in India.

[d]As to the conduct of prisoners released from jail (after undergoing imprisonment for life), it would be difficult to come to a conclusion, without studies extending over a long period of years.

[e]Whether any other punishment can possess all the advantages of capital punishment is a matter of doubt.

[f]Statistics of other countries are inconclusive on the subject. If they are not regarded as proving the deterrent effect, neither can they be regarded as conclusively disproving it.”

1098. Lord Justice Denning, Master of the Rolls of the Court of Appeal in England, appearing before the British Royal Commission on Capital Punishment, stated his views on this point as under:

“Punishment is the way in which society expresses its denunciation of wrong –doing; and in order to maintain respect for law, it is essential that the punishment inflicted

for grave crimes should adequately reflect the revulsion felt by the great majority of citizens for them. It is a mistake to consider the objects of punishment as being deterrent or reformatory or preventive and nothing else.....The truth is that some crimes are so outrageous that society insists on adequate punishment, because the wrong-doer deserves it, irrespective of whether it is a deterrent or not.”

1099. The Supreme Court of United States as expressed by Stewart J, in *William Henry Furman v. Georgia*, Judgment dated June 29, 1972, at page 389, opined that retribution is still socially acceptable function of punishment and it has been held as follows;

“I would say only that I cannot agree that retribution is a constitutionally impermissible ingredient in the imposition of punishment. The instinct for retribution is part of the nature of man, and channeling that instinct, in the administration of criminal justice serves an important purpose in promoting the stability of a society governed by law. When people begin to believe that organized society is unwilling or unable to impose upon criminal offenders the punishment they ‘deserve,’ then there are sown the seeds of anarchy- of self-help, vigilantes justice, and lynch law.”

1100. Some penologists justify capital punishment and life imprisonment on the ‘isolation’ or ‘elimination’ theory of crime

and punishment. Vernon Rich in his “Law & the Administration of Justice” (Second Edition, at page 10), says:

“The isolation theory of crime and punishment is that the criminal law is a device for identifying persons dangerous to society who are then punished by being isolated from society as a whole so that they cannot commit other anti-social acts. The isolation theory is used to justify the death penalty and long-term imprisonment. Obviously, this theory is effective and preventing criminal acts by those executed or permanently incarcerated.”

1101. In the case of Bachan Singh v. the State of Punjab reported in AIR 1980(SC) 898 Para 79 the question of constitutional validity of death sentence was raised before the Supreme Court of India and the Hon’ble Court after due consideration to the issue leave the discretion to the Court to award appropriate sentences and observed as follows;

“The poignantly pathological grip of macabre superstitions of some crude Indian minds in the shape of desire to do human and animal sacrifice, in defiance of the scientific ethos of our cultural heritage and the scientific impact of our technological century, shows up in crimes of primitive horror such as the one we are dealing with now, where a blood-curdling butchery of one’s own beloved son was

perpetrated, aided by other ‘pious’ criminals, to propitiate some blood-thirsty deity. Secular India, speaking through the Court, must administer shock therapy to such anti-social ‘piety,’ when the manifestation is in terms of inhuman and criminal violence. When the disease is social, deterrence through court sentence must perforce, operate through the individual culprit coming up before the court. Social justice has many facets and Judges have a sensitive secular and civilising role in suppressing grievous injustice to humanist values by inflicting condign punishment on dangerous deviants.”

1102. The Supreme Court of India in the case **of Bachan Singh v. the State of Punjab reported in AIR 1980(SC) 898 para 161** considered all previous decisions as regards awarding death sentence and recast the principle in awarding death sentence and observed that;

“In the light of the above conspectus, we will now consider the effect of the aforesaid legislative changes on the authority and efficacy of the propositions laid down by this Court in Jagmohan’s case. These propositions may be summed up as under:

(i)The general legislative policy that underlies the structure of our criminal law, principally contained in the Indian

Penal Code and the Criminal Procedure Code, is to define an offence with sufficient clarity and to prescribe only the maximum punishment therefore, and to allow a very wide discretion to the Judge in the matter of fixing the degree of punishment.

With the solitary exception of Section 303, the same policy permeates Section 302 and some other sections of the Penal Code, where the maximum punishment is the death penalty.

(ii)(a) No exhaustive enumeration of aggravating or mitigating circumstances which should be considered when sentencing an offender is possible. “The infinite variety of cases and facts to each case would make general standards either meaningless ‘boilerplate’ or a statement of the obvious that no Jury(Judge) would need.” (Referred to McGautha v. California, (1971) 402 US 183).

(b)The impossibility of laying down standards is at the very core of the criminal law as administered in India which invests the Judges with a very wide discretion in the matter of fixing the degree of punishment.

(iii) The view taken by the plurality in *Furman v. Georgia* decided by the Supreme Court of United States, to the effect, that a law which gives uncontrolled and unguided

discretion to the Jury (or the Judge) to choose arbitrarily between a sentence of death and imprisonment for a capital offence, violate the Eighth Amendment, is not applicable in India. We do not have in our Constitution any provision like the Eighth Amendment, nor are we at liberty to apply the test of reasonableness with the freedom with which the Judges of the Supreme Court of America are accustomed to applying “ the due process” clause. There are grave doubts about the expediency of transplanting western experience in our country. Social conditions are different and so also the general intellectual level. Arguments which would be valid in respect of one area of the world may not hold well in respect of another area.

(iv) (a) This discretion in the matter of sentence is to be exercised by the Judge judicially, after balancing all the aggravating and mitigating circumstances of the crime.

(b) The discretion is liable to be corrected by superior courts. The exercise of judicial discretion on well-recognized principles is, in the final analysis, the safest possible safeguard for the accused.

In view of the above, it will be impossible to say that there would be at all any discrimination since crime as crime may appear to be superficially the same but the facts and

circumstances of a crime are widely different. Thus considered, the provision in Section 302, Penal Code is not a violation of Article 14 of the Constitution on the ground that it confers on the Judges an unguided and uncontrolled discretion in the matter of awarding capital punishment or imprisonment for life.

(v)(a) Relevant facts and circumstances impinging on the nature and circumstances of the crime can be brought before the Court at the preconviction stage, notwithstanding the fact that no formal procedure for producing evidence regarding such fact and circumstances had been specifically provided. Where counsel addresses the Court with regard to the character and standing of the accused, they are duly considered by the Court unless there is something in the evidence itself which belies him or the Public Prosecutor challenges the facts.

(b) It is to be emphasized that in exercising its discretion to choose either of the two alternative sentences provided in Section 302, Penal Code, “the Court is principally concerned with the facts and circumstances whether aggravating or mitigating which are connected with the particular crimes under inquiry. All such facts and circumstances are capable of being proved in accordance with the provisions of the

Indian Evidence Act in a trial regulated by the Cr.P.C. The trial does not come to an end until all the relevant facts are proved and the counsel on both sides has an opportunity to address the Court. The only thing that remains is for the Judge to decide on the guilt and punishment and that is what Sections 306 (2) and 309(2), Cr.P.C. purport to provide for. These provisions are part of the procedure established by law and unless it is shown that they are invalid for any other reasons they must be regarded as valid. No reasons are offered to show that they are constitutionally invalid and hence the death sentence imposed after a trial in accordance with the procedure established by law is not unconstitutional under Article 21.”

Another proposition, the application of which, to an extent, is affected by the legislative changes, is No. (v). In the portion (a) of that proposition, it is said that circumstances impinging on the nature and circumstances of the crime can be brought on record before the pre-conviction stage. In the portion (b), it is emphasized that while making choice of the sentence under Section 302, Penal Code, the Court is principally concerned with the circumstances connected with the particular crime under inquiry. Now, Section 235(2) provides for a bifurcated trial and specifically gives the

accused person a right of pre-sentence hearing, at which stage, he can bring on record material or evidence, which may not be strictly relevant to or connected with the particular crime under inquiry, but nevertheless, have, consistently with the policy underlined in Section 354(3), a bearing on the choice of sentence. The present legislative policy discernible from Section 235(2) read with Sec. 354 (3) is that in fixing the degree of punishment or making the choice of sentence for various offences, including one under Section 302, Penal Code, the Court should not confine its consideration “principally” or merely to the circumstances connected with particular crime, but also give due consideration to the circumstances of the criminal.”

1103. In the case of Bachan Singh v. the State of Punjab reported in AIR 1980(SC) 898 Para -165 the Supreme Court of India recast the principle of death sentence and held as under;

Attuned to the legislative policy delineated in Sections 354(3) and 235(2), propositions (iv) (a) and (v) (b) in Jagmohan, shall have to be recast and may be stated as below:

(a)The normal rule is that the offences of murder shall be punished with the sentence of life imprisonment. The Court

can depart from that rule and impose the sentence of death only if there are special reasons for doing so. Such reasons must be recorded in writing before imposing the death sentence.

While considering the question of sentence to be imposed for the offence of murder under Section 302 Penal Code; the court must have regard to every relevant circumstance relating to the crime as well as the criminal. If the court finds, but not otherwise, that the offence is of an exceptionally depraved and heinous character and constitutes, on account of its design and the manner of its execution, a source of grave danger to the society at large, the court may impose the death sentence”.

1104. As regards the duty of the Court in an awarding sentence, in Bachan Singh reported in AIR 1980(SC) 898 Para 195, the Supreme Court of India observed that-

“In Jagmohan, this Court had held that this sentencing discretion is to be exercised judicially on well-recognized principles, after balancing all the aggravating and mitigating circumstances of the crime. By “well-recognized principles” the Court obviously meant the principles crystallized by judicial decisions illustrating as to what were regarded as aggravating or mitigating circumstances in those cases. The

legislative changes since Jagmohan- as we have discussed already – do not have the effect of abrogating or nullifying those principles. The only effect is that the application of those principles is now to be guided by the paramount beacons of legislative policy discernible from Sections 354 (3) and 295 (2), namely: (1) The extreme penalty can be inflicted only in gravest cases of extreme culpability: (2) In making choice of the sentence, in addition to the circumstances of the offence, due regard must be paid to the circumstances of the offence also.”

1105. In the case of Gurmukh Singh vs. the State of Haryana, reported in JT 2009 (II) SC 122=2009(II) SCAL 688 the Indian Supreme Court enumerated the various aspects which will be taken into consideration at the time of awarding sentence. The Supreme Court of India observed as under;

“These are some factors which are required to be taken into consideration before awarding appropriate sentence to the accused. These factors are only illustrative in character and not exhaustive. Each case has to be seen from its special perspective. The relevant factors are as under:

a) Motive or previous enmity;

- b) Whether the incident had taken place on the spur of the moment;
- c) The intention/knowledge of the accused while inflicting the blow or injury;
- d) Whether the death ensued instantaneously or the victim died after several days;
- e) The gravity, dimension, and nature of injury;
- f) The age and general health condition of the accused;
- g) Whether the injury was caused without premeditation in a sudden fight;
- h) The nature and size of weapon used for inflicting the injury and the force with which the blow was inflicted;
- i) The criminal background and adverse history of the accused;
- j) Whether the injury inflicted was not sufficient in the ordinary the course of nature to cause death but the death was because of shock;
- k) Number of other criminal cases pending against the accused;

- l) Incident occurred within the family members or close relations;
- m) The conduct and behavior of the accused after the incident whether the accused had taken the injured/the deceased to the hospital immediately to ensure that he/she gets proper medical treatment?

These are some of the factors which can be taken into consideration while awarding an appropriate sentence to the accused. The list of circumstances enumerated above is only illustrative and not exhaustive. In our considered view, proper and appropriate sentence to the accused is the bounded obligation and duty of the court. The endeavour of the court must be to ensure that the accused receives an appropriate sentence, in other words, the sentence should be according to the gravity of the offence. These are some of the relevant factors which are required to be kept in view while convicting and sentencing the accused.”

1106. The United States Supreme Court proposed the Proportionality Doctrine in three cases during the 1980s, namely *Enmund v. Florida* (1982), *Solem v. Helm* (1983) and *Tison v. Arizona* (1987), to clarify this key principle of proportionality within the Cruel and Unusual Punishment Clause of the Eighth Amendment. The fundamental principle behind proportionality is

that the punishment should fit the crime. In 1983, the U.S. Supreme Court ruled that courts must do three things to decide whether a sentence is proportional to a specific crime which is stated below;

“1.Compare the nature and gravity of the offense and the harshness of the penalty,

2.Compare the sentences imposed on other criminals in the same jurisdiction; i.e., whether more serious crimes are subject to the same penalty or to less serious penalties, and

3.Compare the sentences imposed for commission of the same crime in other jurisdictions.”

1107. What is a just and fair punishment for criminal offences, the mantra ‘the punishment must fit the crime’ has been the prevailing sentiment, that the severity of the penalty should be proportionate to the gravity of the offence . Where the criminal justice system imposes punishments, it should do so only in proportion to the crimes to which it seeks to respond. The principle of proportionality in criminal punishment is a fundamental aspect of most modern legal systems.

1108. In the case of **Mohammed Ajmal Mohammad Amir Kasab VsThe State of Maharashtra AIR 2012 (SC) 3565** para 566 the Supreme Court of India relied on its earlier observation made in **Machhi Singh vs the State of Punjab** reported in AIR

1983(SC) 957 wherein the Supreme Court of India confirmed the death sentence affirmed by the High Court Division and held that;

“The Bachan Singh (AIR 1980 SC 898) principle of the ‘ rarest of rare cases’ came up for consideration and elaboration in Machhi Singh v. State of Punjab(AIR 1983 SC 957). It was a case of extraordinary brutality (from normal standards but nothing compared to this case!). On account of a family feud Machhi Singh, the main accused in the case along with eleven (11) accomplices, in the course of single night, conducted raids on a number of villages killing seventeen(17) people, men, women and children, for no reason other than they were related to one Amar Singh and his sister Piyaro Bai. The death sentence awarded to Machhi Singh and two other accused by the trial court and affirmed by the High Court was also confirmed by this Court.”

1109. In the case of **Mohammed Ajmal Mohammad Amir Kasab VsThe State of Maharashtra AIR 2012 (SC) 3565** para 585 the Supreme Court of India followed the “ rare or one in a million” principle in awarding death sentence and observed that;

“Putting the matter once again quite simply, in his country death as a penalty has been held to be Constitutionally valid though it is indeed to be awarded in the “rarest of rare cases” when the alternative option (of a life sentence) is

unquestionably foreclosed”. Now, as long as the death penalty remains on the statute book as punishment for certain offences, including “waging war” and murder, it logically follows that there must be some cases, howsoever rare or one in a million, that would call for inflicting that penalty. That being the position we fail to see what case would attract the death penalty, if not the case of the appellant. To hold back the death penalty, in this case, would amount to obdurately declaring that this Court rejects death as a lawful penalty even though it is on the statute book and held valid by Constitutional benches of this Court.”

1110. The Legislature of Canada in the Criminal Code of Canada set out the principles and purposes of sentencing in Section 718 of the Criminal Code of Canada which is quoted below;

Section 718. The fundamental purpose of sentencing is to contribute, along with crime prevention initiatives, to respect for the law and the maintenance of a just, peaceful and safe society by imposing just sanctions that have one or more of the following objectives:

- (a) to denounce unlawful conduct;
- (b) to deter the offender and other persons from committing offences;

- (c) to separate offenders from society, where necessary;
- (d) to assist in rehabilitating offenders;
- (e) to provide reparations for harm is done to victims or to the community; and
- (f) to promote a sense of responsibility in offenders, and acknowledgement of the harm done to victims and to the community.

Fundamental principle

A Court that imposes a sentence shall also take into consideration the following principles:

- (a) The sentence must be proportionate to the gravity of the offence and the degree of responsibility of the offender.
- (b) a sentence should be increased or reduced to account for any relevant aggravating or mitigating circumstances relating to the offence or the offender, and, without limiting the generality of the foregoing,
- (i) evidence that the offence was motivated by bias, prejudice or hate based on race, national or ethnic origin, language, colour, religion, sex, age, mental or physical disability, sexual orientation, or any other similar factor,

(ii) evidence that the offender, in committing the offence, abused the offender's spouse or common-law partner or child,

(iii) evidence that the offender, in committing the offence, abused a position of trust or relation to the victim,

(iv) evidence that the offence was committed for the benefit of, at the direction of or in association with a criminal organisation, or

(v) evidence that the offence was a terrorism offence

shall be deemed to be aggravating circumstances;

(c) a sentence should be similar to sentences imposed on similar offenders for similar offences committed in similar circumstances;

(d) where consecutive sentences are imposed, the combined sentence should not be unduly long or harsh;

(e) an offender should not be deprived of liberty, if less restrictive sanctions may be appropriate in the circumstances; and

(f) all available sanctions other than imprisonment that is reasonable in the circumstances should be considered for all

offenders, with particular attention to the circumstances of aboriginal offenders.

1111. To arrive at a correct decision in awarding sentence as regards the charges proved beyond reasonable doubt, it is required to quote the provision of Section 20 of the Act of 1973 which runs as follows;

Section 20 of the Act of 1973

20.(1) The judgment of a Tribunal as to the guilt or the innocence of any accused persons shall give the reasons on which it is based:

Provided that each member of the Tribunal shall be competent to deliver a judgment of his own.

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

1112. In expanding the principle of sentence enumerated in section 20 of the Act of 1973 our Apex Court in the case of Abdul Quader Mollah Vs The Chief Prosecutor, reported in 22 BLT(AD) 8 para 207 observed in the following language;

“As regards sentence, section 20(2) provides the ‘sentence of death or such other punishment proportionate to the gravity

of the crime ...” A plain reading of sub-section (2) shows that if the tribunal finds any person guilty of any of the offences described in subsection (2) of section 3, awarding a death sentence is the rule and any other sentence of imprisonment proportionate to the gravity of the offence is an exception. Therefore, while deciding just and appropriate sentence to be awarded for any of the offences to any accused person, the aggravating and mitigating factors and circumstances in which the crimes have been committed are to be balanced in a disproportionate manner. In awarding the appropriate sentence, the tribunal must respond to the society’s cry for justice against perpetrators of crimes against Humanity, the perpetrator like the appellant has committed most worst and barbarous types of Crime against Humanity. He participated in the killing and rape of innocent persons without just cause. His horrific crimes have been highlighted in the beginning of the judgment. Entire world raised voice against his barbaric Crimes against Humanity. Justice demands that it should impose a sentence befitting the crime so that it reflects public abhorrence of crime. In Cases of murders in a cold and calculated manner without provocation cannot but shock the conscience of the society which must abhor such heinous crime committed on helpless innocent persons.”

1113. The extreme penalty should be given in extreme cases. In an awarding sentence, the Court is principally concerned with the facts and circumstances which are connected with the particular crime under inquiry. In our country, under Penal Code death sentence is the normal rule for murder and imprisonment for life is the

exception. As per provision of section 20 of the Act of 1973 upon conviction of accused, the tribunal shall award sentence of death or such other punishment proportionate to the gravity of the crimes as appears to the Tribunal to be just and proper. Under the Act of 1973 death sentence is the normal rule and such other punishment proportionate to the gravity of the offence as per discretion of the Tribunal is the exception.

1114. As per provision of section 20(2) of the Act of 1973, although the death sentence is the rule, but not the absolute rule, inasmuch as the Legislature also provided provision in section 20(2) to award “such other punishment proportionate to the gravity of the crimes as appears to the Tribunal to be “just and proper.” In view of the above, it reveals that the death sentence is not the only punishment for committing the “murder” as crimes against humanity “to be just and proper.” For example, if one hundred accused persons commit “single murder” at the time of launching attack directing the civilian population, it will not be “just and proper” to award death sentence against one hundred accused – persons. At the time of awarding sentence, the Tribunal shall consider the nature of the crimes committed and the numbers of the victim, and the numbers of the perpetrators and their mode of participation. In the case of physical participation in “multiple

murder” as crimes against humanity, the death sentence may be the absolute rule in awarding sentence.

1115. It is to be noted that it is the duty of the Tribunal to award proper sentence having regard to the nature of the offence and the manner in which it was executed or committed. It is expected to consider all relevant facts and circumstances bearing on the question of sentence and proceed to impose a sentence commensurate with the gravity of the offence. The general policy which the Tribunal have followed with regard to sentencing is that the punishment must be appropriate and proportionate to the gravity of the offence committed. Imposition of appropriate punishment is the manner in which the Tribunal responds to the society’s cry for justice against the criminals. Justice demands that Tribunal should impose punishment befitting the crime.

1116. In the case of *Kamruzzaman vs Bangladesh* (review) reported in 67DLR (AD)157 our Apex Court made an observation as regards intention of the legislator and observed as follows;

“When our legislators enacted the 1973 Act, the horrendous memory of the genocide committed by Paki army in collaboration with their Bengali cronies, were fresh in their minds. They saw or heard of the extent and the horror that atrocities committed by them left behind, which shattered the conscientious people throughout the world. Their memories

were also vibrant at that time as to the ramification this holocaust left behind for generations and with such fresh memories they placed death sentence at the peak of the list of the sentence. Indeed, when we affirmed death sentence, we had to reminisce the magnitude of the atrocities Paki forces committed with the help of their local outfits. Nobody can remain oblivious of the harrowing events that were followed by the so-called “Operation Search Light”.

1117. In the case of the Chief Prosecutor Vs Abdul Quader Mollah reported in 22 BLT(AD)8, para 208 in awarding sentence our Apex Court considered the right of the victims of the crimes wherein Justice Surendra Kumar Sinha (Majority view) observed that;

“It is now established by judicial pronouncements by the superior courts that while considering the punishment to be given to an accused, the court should be alive not only to the right of the criminal to be awarded just and fair punishment by administering justice tempered with such mercy as the criminal may justly deserve, but also rights of the victims of the crime to have the assailant appropriately punished and the society’s reasonable expectation from the court for the proportionate deterrent punishment conforming to the gravity of the offence and consistent with the public abhorrence for the heinous crime committed by the accused” and awarded death sentence for the offence of killing and rape holding that “ if the gravity of the

offence is considered as the basis for awarding sentence to the appellant, the highest sentence in respect of the charge No 6 in which the killing and rape were brutal, cold-blooded, diabolical and barbarous.”

1118. In the case of Abdul Quader Mollah Vs The Chief Prosecutor ICT reported in 22 BLT(AD) 541 para 69[Review judgement] our Apex Court settled the principles in which case awarding death sentence is justified and held that;

“The language is so clear that in convicting the accused person death sentence is the proper one, and if the Tribunal feels that a lesser sentence is to be awarded, it shall assign reasons therefore and in such case; it shall consider the gravity of the crime and the culpability of such accused person. The tribunal has totally ignored the above principle and the provision of law and imposed the lesser sentence on assigning a reason which does not carry the true intent of the sentencing principle. The principles of sentencing procedure, are uniform in our country and the court while awarding a sentence shall consider (a) the nature of the offence, (b) the culpability of the offender, (c) the circumstances of its commission, (d) the age and character of the offender, (e) the injury to individuals or to society, (f) effect of the punishment on the offender, amongst many other factors which would ordinarily be taken in mind.”

1119. In the case of Salauddin Quader Chowdhury vs The Chief Prosecutor reported in 67DLR (AD) 351 Para 166 Hon’ble Appellate Division further held that

“As regards sentence, the tribunal has taken a lenient view in respect of charge Nos. 2 and 4, the killing of five innocent people, although the prosecution has been able to prove the said charges beyond reasonable doubt. As regards other charges, particularly charge Nos. 3, 5, 6 and 8, the incidents were brutal and diabolical. There is strong evidence on record that the accused was not only physically present in those incidents, he had also actively participated in those killings. He showed no repentance or remorse for his conduct at any point of time rather he neglected the process of trial. The tribunal recorded his demeanor observing that he was arrogant and violated the decorum of the tribunal by shouting off and continued to such conduct throughout the process of the trial despite warnings. He did not show any respect to the members of the tribunal and disregarded the authority of the tribunal. In view of his conduct and behavior, and also in view of his direct participation, and the brutality exerted in those incidents, awarding of death sentences was proportionate to the gravity of those crimes. The awarding to death sentences were adequate and no leniency should be shown to him. He has directly involved in those heinous crimes and his participation was intentional with a motive to eliminate a religious community as a whole for political vengeance.”

1120. In addition to the gravity of the crime and the principles revolving around its assessment, the individualization of sentences is another principle uniformly emphasized and relied on by this Tribunal. The individualization of a sentence is closely connected to the evaluation of personal circumstances of accused. In the case

of Delwar Hossain Sayedee Vs the Chief Prosecutor, accused Delwar Hossain Sayedee abetted the murder of Bishabali and our Apex Court upheld the conviction awarded by this Tribunal, but awarded sentenced to imprisonment for life i.e. rest of his natural life considering the nature of the offences perpetrated by the accused and his culpability in those crimes and as regards sentencing principle Md. Muzammel Hossain C.J [Majority view] observed that;

“We have not as yet promulgated any textbook or Rules on sentencing and by the same time, we have not developed a uniform sentencing principles or criteria to assist in promoting the equitable administration of criminal laws. In U.K., the Streatfeild Committee’s (1961) recommendation has been accepted by the government. This Committee has termed a ‘tariff system’, i.e. giving a sentence proportionate to the offender’s culpability. In the words of the committee: ‘The courts have always had in mind the need to protect society from the persistent offender, to deter potential offenders and to deter or reform the individual offender.’ But in general, it was thought that the ‘tariff system’ took these other objectives in its stride. Over the last few decades, the other objectives have received increased attention.” [Criminal Appeal No. 39-40 of 2013, Judgment dated 17th September 2014, PDF Page 149]

1121. In awarding sentence in the case of Delwar Hossain Sayeedi Vs The Chief Prosecutor PDF 149 -151 the Hon’ble Appellate Division of Bangladesh endorse the principle of proportionately in

awarding sentence[Majority view] wherein Md. Muzammel Hossain C.J further observed that;

“In judging the adequacy of a sentence, the nature of the offence, the circumstances of its commission, the age and character of the offender, injury to individuals or to society, the effect of the punishment on the offender, and eye to the correction and reformation of the offender are some factors amongst many other factors which would ordinarily be taken into consideration by courts. Of the said factors, the last one is not applicable to the accused since he was involved in Crimes against Humanity, the worst type of crimes ever committed on the soil of this country and it was at a time when the people were fighting for their self-determination, both for political and economic liberation, against the tyranny of a military ruler, his force, and auxiliary force like the one Delwar Hossain Sayedee acted with. He committed Crimes against Humanity. There was no limit to the brutality of the Pak military dictators. The military junta perpetrated awful genocide which was deliberately planned and executed ruthlessly with the direct help and collaboration of persons like Delwar Hossain Sayedee. However, in awarding the sentence, the language used in sub-section (2) of section 20 is that ‘the Tribunal shall award sentence of death or such other punishment proportionate to the gravity of the crime as appears to the Tribunal to be just and proper’ which is in pari materia to the expressions ‘a sentence proportionate to the offender’s culpability’ used by Streatfield Committee.”

1122. Under Section 20(2) of the ICT Act, 1973 if the Tribunal award any other sentence except sentence of death, it shall

follow the principle of proportionality considering the gravity of the offences as appears to the Tribunal to be just and proper. The principle of proportionality is the modern sentencing principle closely related to the assessment of the gravity of crimes. At a glance, the principle of proportionality seems straightforward; the sentence should be proportionate to the gravity of the crime. The principle of proportionality is limited to ‘the offence relative proportionality’ i.e. punishment should be proportional to the gravity of the offence and excluded ‘the accused relative proportionality’ from their assessment i.e. punishment should be proportional relative to the other accused; more culpable accused should be punished more severely than less culpable accused. Crimes tried by this Tribunal are extremely heinous and grave compared to ordinary domestic offences. In the ICT jurisdiction, normally the offenders are usually convicted of multiple instances of serious mistreatment or killing of victims and one would expect, therefore, that penalties would be heavier than those imposed under Penal Code. Very severe sentences can also be imposed on those at lower levels who zealously participated in crimes. Following the proportionality principle, the Court compare the criminal conduct of an accused to that of other accused, taking into account, in particular, significance role he played in the commission of the crimes.

1123. “One of the fundamental principles of justice is consistency- like cases should be treated alike. The consistency of sentencing can be approached on several levels- the two fundamental ones being consistency in approach and consistency in the outcome. Consistency in approach requires that there is a uniform, consistent approach towards sentence determinations across all cases. Therefore, the sentencing discretion should be exercised in a principled manner. There should be a coherent judicial approach to the exercise of discretion in sentencing, which requires all decisions to be based on common standards- general underlying principles- that are uniformly applied to the facts of each case.” Cf. M. Trumble, *Atrocity, Punishment and International Law*, New York Cambridge University Press, 2007.

1124. The law gives Tribunal discretion and judges in their case law developed an approach that is consistently followed across all the decisions. In our jurisdiction, the gravity of the offence has been labeled as the starting point for consideration of an appropriate sentence. Since crimes against humanity, war crimes, and genocide are grave offences committed against the mankind, the legislature made statutory provision for awarding sentence of death for the offences enumerated in Section 3(2) of the Act of 1973. Like Penal Code, in the Tribunal’s jurisdiction, for murder, the

Tribunal shall award death sentence and if the Tribunal award any other sentence, it shall record its reason for doing so.

1125. In Case of the Prosecutor vs Aleksovski, Judgment, Case No. IT-95-14-A, Appeal Chamber, 24 March 2000, the Appeals Chamber generally approved the practice of precedent. It was held that under normal circumstances Trial Chambers and Appeals Chamber shall follow the previous Appeals Chamber's decisions unless there are cogent reasons in the interest of justice calling for the Appeals Chamber to depart from its previous decision. The Statutes of the ICTY and ICTR do not mention any objectives of punishment that should guide judges in meting out penalties in individual cases. Therefore, the ICTY and ICTR judges are generally free to switch from one self-chosen rationale to another as they see fit. The general aims, in a sense of restoration and maintenance of international peace and security, are provided in the resolutions establishing the Tribunals.”

1126. In the Case of Prosecutor vs Krajisnik, Judgment, Case No.IT-00-39-A. Appeal Cha.17 March 2009, Para- 808 it has been observed that-

“Some principles specific to sentencing have emerged in ICTY and ICTR case law. In this respect, judges clearly found inspiration in classic ‘domestic’ penal theories. Over the years, the following purposes have been listed by judges as relevant for international sentencing: retribution, justice,

deterrence (general and specific), rehabilitation, expressive, reprobation, stigmatization, affirmative prevention, incapacitation, protection of society, social defence and finally restoration/maintenance of peace and reconciliation. In some cases, the sentencing purposes are enumerated along the other sentencing factors such as the gravity of the crime or motivation of a perpetrator. In others they are deemed to form “the context within which an individual accused’s sentence must be determined”, they “form the backdrop against which the accused’s sentence has been determined” or constitute matrix in which the proportionate sentence is meted out.”

1127. From the practice developed in this Tribunal with regard to sentence under Section 20 of the Act of 1973 “imprisonment for life i.e. rest of natural life” is the alternative option to a death sentence for the offence of “murder” as “crimes against humanity” which also addresses the need in the facts and circumstances of a particular case. “Imprisonment for life i.e. rest of natural life” of a convict in prison is severe and certain punishment. The relations of the victim will know that the justice is being served. The reality is that in the case of imprisonment for life i.e. rest of natural life; the convicted accused has to die in prison. It is another form of a sentence of death i.e. “death in prison.”

1128. The Tribunal may consider many factors in deciding the sentence. There is no single correct sentence for each offence because each offence and offender have particular characteristics

which will influence the severity or continuation of the sentence. The Tribunal must award a sentence which is fair considering the gravity of the offence and the particular circumstance of the offender which is known as the 'principle of proportionality' as the Legislature adopted the same in the Act of 1973 as the principle of sentencing. The Tribunal first determines the 'objective seriousness' of the offence. Objective seriousness is how serious a particular case is and a case may also fall at the lower end of seriousness. To determine the objective seriousness, the Tribunal may take into account the facts and circumstances of the case, the maximum penalty that can be ordered for such an offence.

1129. The Tribunal will also consider the general pattern of sentencing for a particular offence and attempt to treat cases which are similar in a similar way and also may look at previous decisions and relevant statistics to identify if there is a pattern for the sentencing of that offence. An aggravating factor can increase the sentence while a mitigating factor may reduce it. However, the importance of each factor whether they influence the sentence will vary according to the nature of the crime and the circumstances of the case. The maximum penalty reflects the seriousness of that offence and will only be given when the case falls within the most serious category of cases for that offence. The maximum penalty is award by the Tribunal in our jurisdiction as the

upper limit for punishment. The Tribunal will adjust the penalty according to the seriousness or gravity of the offences.

1130. Where there is more than one offender, the degree of participation will be a factor that impacts the severity of the sentence. Where the degree of participation in the offence is lesser, the offence will attract a less severe penalty. The Tribunal also looks at the injury, harm, loss or damage done to the victim and the mankind as a result of the offence. Where the harm is greater, the penalty will reflect the greater seriousness of the offence.

1131. It is to be noted that the events narrated in all the charges happened without any assistance or participation of the Pakistani army. From the evidence of P.Ws. 10 and 11 it transpires that the freedom fighters took part in the war in the locality of village Nehalpur, Sagardari, and Sheikhpura of Keshobpur Thana against the locally formed Razakar Bhahini of Chingra Razakar Camp. From the unimpeachable evidence presented to the Tribunal, it transpires that convict Md. Sakhawat Hossain was a dangerous, cruel and indomitable Razakar Commander of locally formed Chingra Bazaar Razakar Camp and he and his cohorts Razakars without any help of Pakistani army, took part in the cruel war in the locality against the freedom fighters. The Razakar Commander convict Md. Sakhawat Hossain ordered other convicted accused persons and cohort Razakars for abducting Ashura Khatun, a

source of freedom fighters, and he along with other convicts and cohort Razakars abducted freedom fighters Chandtullah Gazi, A. Maleque Sardar, Nuruddin Morol (P.W.3) and Miron Sheik (P.W.6) in the Bangla month Ashwin(October) in 1971 while the entire nation took part in the War of Liberation against Pakistani occupation army for independent of Bangladesh and after inhuman torture Razakar Commander convict Md. Sakhawat Hossain committed rape on Ashura Khatun, a student of Class X, while she was confined for 3/4 days in Chingra Bazaar Razakar Camp, and killed civilian Chandtullah Gazi and A. Maleque Sardar on the bank of Kapotakha River, and also killed Atiar, one and half-year-old son of civilian Chandtullah Gazi which are aggravating factors to be considered in awarding sentence.

1132. The primary role the Razakar Commander convict Md. Sakhawat Hossain played in the commission of crimes in each of the event narrated in the charges was a reflection of his position and the manner in which he used his position to implement the further policy and plan of the Pakistani occupation army and his direct participation in the offences proved beyond reasonable doubt impulses this Tribunal to award appropriate sentence considering the gravity of the offences and only the highest sentence will match the offences committed by him. He exercised his de facto command authority in committing the offences and his superior

position should be considered as an aggravating factor in sentencing.

1133. In the Case of Mir Quasem Ali Versus The Chief Prosecutor ,Criminal Appeal No.144 of 2014, judgment dated 8th March 2016 PDF-Page No.192-193 our Apex Court also considered the superior position of the accused as aggravating factor for sentencing and held that-

“The International law imposes a responsibility on superiors to prevent and punish the crimes committed by the subordinates because if he does not prevent them, the commander should bear the responsibility for his failure to act. The commander is held responsible in proportion to the gravity of the offences committed. This view has been taken in case No. IT-01-44T, ICTR and affirmed by Zlatko Aleksovski, in case No. IT-95-14/1-T, ICTY; Milorad Kojelac, case No. IT-97-25-A, ICTY; Enver Hadzihasanovic and Amir Kubura, case No. IT-01-47-A, ICTY. It was emphasized that ‘direct and superior responsibility and it is not appropriate to convict under both grounds for the same count. In such a case, the accused should be convicted for direct responsibility and his superior position should be considered as an aggravating factor for sentencing.’”

1134. It is to be further noted that the Razakars set up Razakar Camp at Chingra Bazaar in the Bangla month Jystha in 1971 and thereafter one day in the middle of Bangla month Sraban at about 10.00 am convened a meeting in the Gadi Ghar [business office] of

Muslim League leader Solimuddin at Chingra Bazaar wherein the Razakar Commander convict Md. Sakhawat Hossain holding the command of Razakars delivered an inciting speech stating that the supporters and activists of Awami League and people of “Joy Bangla” are “Kafer and Monafek” and decided to kill after finding them out. Thereafter in the middle of Bangla month, Bhadra in 1971 all convicts and their cohorts attacked the house of Chandtullah Gazi to apprehend him and killed his one and half year minor son Atiar, and on the first part of Bangla month Ashwin in 1971 at about 10/11 am convicted accused as indicted in charge No. 5 having caused grievous injury by gunshot abducted freedom fighter Miron Sheikh[P.W.6], and on 27th Bangla month, Ashwin in 1971 at about 9/9. 30 am abducted Ashura Khatun, a young girl aged about 16 years, and confined her in Chingra Razakar Camp and after inhuman torture committed rape on her while she was confined in the said camp for 3/ 4 days. On 28th Bangla month, Ashwin in 1971 at about 7.00 am the convicted accused persons as indicted in charge No. 3 abducted freedom fighter Nuruddin Morol [P.W.3] from his house and inhumanely tortured him while he was confined in Chingra Razakar Camp and on the same day at about 8.00/8.30 am killed A. Maleque Sardar, a source of freedom fighters and a young boy, at Chingra Bazaar boathouse [ferry ghat] and on the same day at 11.00/11.30 am all convicts abducted

another civilian Chandtullah Gazi from his house and inhumanely tortured him while he was confined in Chingra Razakar Camp and killed him on Ist Bangla month, Kartik at about 6.00 am on the bank of Kapotakha river.

1135. From the testimony of prosecution witnesses, it reveals that the events narrated in all the charges proved beyond all reasonable doubt happened in and around the Chingra Razakar Camp and Razakar Commander convict Md. Sakhawat Hossain directly participated in killing and rape without any cause and he is the principal perpetrator and committed the cruelest and barbaric offences of crimes against humanity to implement the further policy and plan of Pakistani occupation army. It further appears that (1) convicts Md. Ibrahim Hossain alias Ghungur Ibrahim, (2)accused Md. Billal Hossain Biswas, (3)accused Sheikh Mohammad Mujibur Rahman alias Mujibur Rahman, (4)accused Md. A. Aziz Sardar, (5) accused Abdul Aziz Sardar, (6) accused Kazi Ohidul Islam alias Kazi Ohidus Salam and (7) accused Md. Abdul Khaleque Morol were close accomplices of Razakar Commander convict Md. Sakhawat Hossain and all of them were closely connected with the Chingra Bazaar Razakar Camp and they jointly aided, abetted, facilitated and contributed to the commission of offences of abduction, confinement, torture, rape, murder and other inhumane acts as crimes against humanity and

played secondary role and did not directly participate in committing those offences. Only convicted accused Md. Abdul Khaleque Morol shot Miron Sheikh (P.W.6) with his rifle in his hand at the time of the abduction. In my view, they as accomplices of convict Md. Sakhawat Hossain deserves secondary punishment for the secondary role they played in each charge.

1136. It reveals that victim Ashura Khatun was a “source” of freedom fighters and the victims Nuruddin Morol [P.W. 31], Chantullah Gazi, A Malaque Sardar, and Miron Sheikh [P.W. 6] were the civilians and Atiar was a minor child of civilian Chandtullah Gazi. From the evidence presented to the Tribunal it is conclusively proved that at the time of War of Liberation in 1971, the “Chingra Bazaar Razakar Camp” was a “torture cell” of locally formed Razakar Bahini and convicted accused Md. Sakhawat Hossain was the Razakar Commander of that camp and he along with other convicted accused persons and his cohorts Razakars used to abduct the freedom fighters, pro-liberation people, and girls, and having confined them in the said Razakar Camp used to torture and after inhumane torture raped and killed them to implement the further policy and plan of the Pakistani occupation army to thwart the independence of Bangladesh and all the convicted accused persons are traitor and betrayer.

1137. All the events prove beyond all reasonable doubt took place when the people of Bangladesh were fighting against the Pakistani occupation army and its collaborators for the independence of Bangladesh. In the instant case in hand, it has already been proved that all the convicted accused persons being the members of locally formed Razakar Bahini committed the offence as narrated in five charges constituting the offences of crimes against humanity in and around the locality of Chingra Bazaar Razakar Camp under Police Station-Keshobpur, District Jessore. I have rendered my reasoned findings that all the convicted accused persons consciously forming part of a criminal enterprise sharing the common criminal intent of all convicts committed the offences without any help of Pakistani occupation army and all the victims of the crimes were civilian. It is proved beyond all reasonable doubt that the convict Md. Sakhawat Hossain was the Razakar Commander of Chingra Bazaar Razakar Camp and other convicted accused persons were the Razakars and close accomplices of Razakar Commander convict Md. Sakhawat Hossain who is the mastermind and principal perpetrator of all offences proved beyond all reasonable doubt and all other convicted accused persons played a secondary role and committed the offences as per order of their Commander convict Md. Sakhawat Hossain.

1138. The Proclamation of Independence dated 10th April, 1971 speaks that “whereas in the conduct of a ruthless and savage war the Pakistani authorities committed and are still continuously committing numerous acts of genocide and unprecedented tortures, amongst others on the civilian and unarmed people of Bangladesh.” and the accused –persons committed the most heinous crimes against humanity during wartime situation against the patriot and peace loving innocent civilian population of Bangladesh to protect the Pakistan and thwart the independence of Bangladesh.

1139. In view of the above findings and reasonings and considering the evidence of the prosecution witnesses presented to the Tribunal and the facts and circumstance of the case, the participation of the convicted accused-persons I am inclined to award the following sentence which I considered to be proportionate to the gravity of the crimes.

Accordingly, I do hereby render the following ORDER ON SENTENCE.

Hence it is

ORDERED

That accused (1) Md. Sakhawat Hossain[61], son of late Omar Ali and late Anowara Begum of village-Hijoldanga, Police

Station-Keshobpur, District- Jessore (2) Md. Ibrahim Hossain alias Ghungur Ibrahim [60](absconded), son of late Yakub Ali Biswas alias Akabbar alias Akbor and late Rupban Babi of village Nehalpur, at present Boga, Police Station- Keshobpur, District- Jessore, (3) Abdul Aziz Sardar[absconded] [66], son of late Ahmmad Sardar and late Sakina of village Boga, Police Station- Keshobpur, District –Jessore, and (4) Md. A. Aziz Sardar(absconded)[65], son of late Ful Miah Sardar and late Nurjahan Begum of village-Mominpur, Police Station- Keshobpur, District- Jessore are held guilty for the offences of crimes against humanity as specified in section 3(2)(a)(g)(h) of the International Crimes (Tribunals) Act, 1973 as listed in **charge No.01** and all of them be convicted accordingly and sentenced thereunder to imprisonment for 20(twenty) years under section 20(2) of the Act of 1973; AND

Accused (1) Md. Sakhawat Hossain [61], son of late Omar Ali and late Anowara Begum of village Hijoldanga, Police Station- Keshobpur, District- Jessore is held guilty of the offences of crimes against humanity as specified in section 3(2)(a)(g)(h) of the Act of 1973 as listed in charge No.2 and he be convicted accordingly and sentenced thereunder to death under section 20(2) of the Act of 1973.

Accused (1) Md. Ibrahim Hossain alias Ghungur Ibrahim,[60](absconded), son of late Yakub Ali Biswas alias Akabbar alias Akbor and late Rupban Babi of village Nehalpur, at present Boga, Police Station-Keshobpur, District-Jessore, (2) Md. Billal Hossain Biswas [75], son of late Yakub Ali Biswas alias Akabbar alias Akbor and late Rupban Babi of village Nehalpur, Police Station-Keshobpur, District-Jessore, (3) Sheikh Mohammad Mujibur Rahman alias Mujibur Rahman [absconded] [61], son of Skeikh Mohammad Afazulla alias Effaztulla and late Pachibibi of village Sheikhpara, Police Station-Keshobpur, District- Jessore, (4) Md. A. Aziz Sardar(absconded)[65], son of late Ful Miah Sardar and late Nurjahan Begum of village-Mominpur, Police Station-Keshobpur, District- Jessore, (5) Abdul Aziz Sardar[absconded] [66], son of late Ahmmad Sardar and late Sakina of village Boga, Police Station- Keshobpur, District –Jessore and (6) Kazi Ohidul Islam alias Kazi Ohidus Salam [absconded][61], son of late Kazi Motiassalam alias Motiar Salam and late Hosneara Begum of village-Sheikhpara, Police Station- Keshobpur, District-Jessore and (7) Md. Abdul Khaleque Morol[absconded] [68], son of late Hachan Ali Morol and late Rebeya Begum of village Altapoul, Police Station- Keshobpur, District- Jessore are held guilty for the offences of crimes against humanity as specified in section 3(2)(a)(g)(h) of the International Crimes (Tribunals) Act, 1973 as

listed in **charge No.02** and all of them be convicted accordingly and sentenced thereunder to imprisonment for life i.e. rest of their natural life under section 20(2) of the Act of 1973; AND

Accused (1)Md. Sakhawat Hossain[61], son of late Omar Ali and late Anowara Begum of village Hijoldanga, Police Station-Keshobpur, District- Jessore (2) Sheikh Mohammad Mujibur Rahman alias Mujibur Rahman [absconded] [61], son of Sheikh Mohammad Afazulla alias Effaztulla and late Pachibibi of village Sheikhpara, Police Station-Keshobpur, District- Jessore, and (3)Md. Abdul Khaleque Morol[absconded] [68], son of late Hachan Ali Morol and late Rebeya Begum of village Altapoul, Police Station- Keshobpur, District- Jessore are held guilty for the offences of crimes against humanity as specified in section 3(2)(a)(g)(h) of the International Crimes (Tribunals) Act, 1973 as listed in **charge No.03** and all of them be convicted accordingly and sentenced thereunder to rigorous imprisonment for 10(ten) years under section 20(2) of the said Act; AND

Accused Md. Ibrahim Hossain alias Ghungur Ibrahim,[60](absconded), son of late Yakub Ali Biswas alias Akabbar alias Akbor and late Rupban Babi of village Nehalpur, at present Boga, Police Station-Keshobpur, District-Jessore is found not guilty of the offences of crimes against humanity as listed in **Charge No. 3**, and he be acquitted of the said charge.

Accused (1)Md. Sakhawat Hossain[61], son of late Omar Ali and late Anowara Begum of village Hijoldanga, Police Station-Keshobpur, District- Jessore is held guilty for the offences of crimes against humanity as specified in section 3(2)(a)(g)(h) of the International Crimes (Tribunals) Act, 1973 as listed in **charge No.04** and he be convicted accordingly and sentenced thereunder to death under section 20(2) of the said Act, AND

Accused (1) Md. Ibrahim Hossain alias Ghungur Ibrahim[60](absconded), son of late Yakub Ali Biswas alias Akabbar alias Akbor and late Rupban Babi of village Nehalpur, at present Boga, Police Station-Keshobpur, District-Jessore, (2) Abdul Aziz Sardar[absconded] [66], son of late Ahmmad Sardar and late Sakina of village Boga, Police Station- Keshobpur, District – Jessore, and (3) Md. A. Aziz Sardar(absconded)[65], son of late Ful Miah Sardar and late Nurjahan Begum of village-Mominpur, Police Station- Keshobpur, District- Jessore and (4) Md. Abdul Khaleque Morol[absconded] [68], son of late Hachan Ali Morol and late Rebeya Begum of village Altapoul, Police Station-Keshobpur, District- Jessore are held guilty for the offences of crimes against humanity as specified in section 3(2)(a)(g) (h) of the International Crimes (Tribunals) Act, 1973 as listed in **charge No.04** and all of them be convicted accordingly and sentenced

thereunder to imprisonment for life i.e. rest of their natural life under section 20(2) of the said Act; AND

Accused (1)Md. Sakhawat Hossain[61], son of late Omar Ali and late Anowara Begum of village Hijoldanga, Police Station-Keshobpur, District- Jessore (2) Md. Ibrahim Hossain alias Ghungur Ibrahim[60] (absconded), son of late Yakub Ali Biswas alias Akabbar alias Akbor and late Rupban Babi of village Nehalpur, at present Boga, Police Station-Keshobpur, District-Jessore, (3) Md. A. Aziz Sardar(absconded) [65], son of late Ful Miah Sardar and late Nurjahan Begum of village-Mominpur, Police Station-Keshobpur, District- Jessore, (4) Abdul Aziz Sardar[absconded] [66], son of late Ahmmad Sardar and late Sakina of village Boga, Police Station-Keshobpur, District-Jessore and (5) Md. Abdul Khaleque Morol[absconded] [68], son of late Hachan Ali Morol and late Rebeya Begum of village Altapoul, Police Station- Keshobpur, District- Jessore are held guilty for the offences of crimes against humanity as specified in section 3(2)(a)(g)(h) of the International Crimes (Tribunals) Act, 1973 as listed in **charge No.05** and all of them be convicted accordingly and sentenced thereunder to rigorous imprisonment for 15 (fifteen) years under section 20(2) of the said Act AND

The above-mentioned sentences of death be executed by hanging the accused convicted as above by the neck or shooting him till he is dead, as decided by the government.

The sentences of imprisonment awarded to the convicted accused persons as above shall run concurrently.

However, as and when any sentence of death awarded to convict accused as above will be executed, the another sentence of death and / or sentence (s) of imprisonment awarded to him as above would naturally get merged into the sentence of death executed.

The sentences of death and sentences of imprisonment awarded as above under section 20(2) of the International Crimes (Tribunals) Act, 1973 shall be carried out and executed in accordance with the order of the government as required under section 20(3) of the Act of 1973.

TRIBUNAL'S ORDER ON SENTENCE

The Tribunal **UNANIMOUSLY** renders the **ORDER ON SENTENCE** as below.

Hence it is
ORDERED

That accused (1) Md. Sakhawat Hossain son of late Omar Ali and late Anowara Begum of Village Hijildanga, Police Station

Keshobpur, District Jessore (2) Md. Ibrahim Hossain alias Ghungur Ibrahim [absconded] son of late Yakub Ali Biswas alias Akabbar alias Akbor and late Rupban Bibi of Village Nehalpur, at present Boga, Police Station Keshobpur, District Jessore (3) Abdul Aziz Sardar [absconded] son of late Ahmmad Sardar and late Sakina of Village Boga, Police Station Keshobpur, District Jessore, and (4) Md. A. Aziz Sardar [absconded] son of late Ful Miah Sardar and late Nurjahan Begum of Village Mominpur, Police Station Keshobpur, District Jessore are found guilty of the offences of crimes against humanity as specified in section 3(2)(a)(g)(h) of the International Crimes (Tribunals) Act, 1973 as listed in **charge no. 01** and all of them be convicted accordingly and sentenced there under to rigorous imprisonment for 20 [twenty] years under section 20(2) of the said Act.

Accused (1) Md. Sakhawat Hossain is found guilty of the offences of crimes against humanity as specified in section 3(2)(a)(g)(h) of the International Crimes (Tribunals) Act, 1973 as listed in **charge no. 02** and he be convicted accordingly and sentenced thereunder to death under section 20(2) of the said Act;
AND

Accused (2) Md. Billal Hossain Biswas son of late Yakub Ali Biswas alias Akabbar alias Akbor and late Rupban Bibi of Village Nehalpur, Police Station Keshobpur, District Jessore (3)

Md. Ibrahim Hossain alias Ghungur Ibrahim [absconded] (4) Sheikh Mohammad Mujibur Rahman alias Mujibur Rahman [absconded] son of Sheikh Mohammad Afazullah alias Effaztulla and late Pachibibi of Village Sheikhpara, Police Station Keshobpur, District Jessore (5) Md. A. Aziz Sardar [absconded] son of late Ful Miah Sardar (6) Abdul Aziz Sardar [absconded] son of late Ahmmad Sardar (7) Kazi Ohidul Islam alias Kazi Ohidus Salam [absconded] son of late Kazi Motiassalam alias Motiar Salam and late Hosneara Begum of Village Sheikhpara, Police Station Keshobpur, District Jessore, and (8) Md. Abdul Khaleque Morol [absconded] son of late Hachan Ali Morol and late Rebeya Begum of Village Altapoul [72 No. Altapoul], Police Station Keshobpur, District Jessore are found guilty of the offences of crimes against humanity as specified in section 3(2)(a)(g)(h) of the International Crimes (Tribunals) Act, 1973 as listed in **charge no. 02** and all of them be convicted accordingly and sentenced thereunder to imprisonment for life i.e. rest of their natural life under section 20(2) of the said Act.

Accused (1) Md. Sakhawat Hossain (2) Sheikh Mohammad Mujibur Rahman alias Mujibur Rahman [absconded], and (3) Abdul Khaleque Morol [absconded] are found guilty of the offences of crimes against humanity as specified in section 3(2)(a)(g)(h) of the International Crimes (Tribunals) Act, 1973 as listed in **charge**

no. 03 and all of them be convicted accordingly and sentenced thereunder to rigorous imprisonment for 10 [ten] years under section 20(2) of the said Act; **AND**

Accused Md. Ibrahim Hossain alias Ghungur Ibrahim [absconded] is found not guilty of the offences of crimes against humanity as specified in section 3(2)(a)(g)(h) of the International Crimes (Tribunals) Act, 1973 as listed in **charge no. 03** and he be acquitted of the said charge.

Accused (1) Md. Sakhawat Hossain is found guilty of the offences of crimes against humanity as specified in section 3(2)(a)(g)(h) of the International Crimes (Tribunals) Act, 1973 as listed in **charge no. 04** and he be convicted accordingly and sentenced thereunder to death under section 20(2) of the said Act; **AND**

Accused (2) Md. Ibrahim Hossain alias Ghungur Ibrahim [absconded] (3) Md. A. Aziz Sardar [absconded] son of late Ful Miah Sardar (4) Abdul Aziz Sardar [absconded] son of late Ahmmad Sardar, and (5) Md. Abdul Khaleque Morol [absconded] are found guilty of the offences of crimes against humanity as specified in section 3(2)(a)(g)(h) of the International Crimes (Tribunals) Act, 1973 as listed in **charge no. 04** and all of them be convicted accordingly and sentenced thereunder to imprisonment

for life i.e. rest of their natural life under section 20(2) of the said Act.

Accused (1) Md. Sakhawat Hossain (2) Md. Ibrahim Hossain alias Ghungur Ibrahim [absconded] (3) Md. A. Aziz Sardar [absconded] son of late Ful Miah Sardar (4) Abdul Aziz Sardar[absconded] son of late Ahmmad Sardar, and (5) Md. Abdul Khaleque Morol [absconded] are found guilty of the offences of crimes against humanity as specified in section 3(2)(a)(g)(h) of the International Crimes (Tribunals) Act, 1973 as listed in **charge no. 05** and all of them be convicted accordingly and sentenced thereunder to rigorous imprisonment for fifteen [15] years under section 20(2) of the said Act.

The sentence of death awarded as above in respect of charge nos. 02 and 04 be executed by hanging the convict accused Md. Sakhawat Hossain by the neck or by shooting him till he is dead, as decided by the government.

The sentence of imprisonment awarded to the convicted accused persons as above shall run concurrently.

However, as and when any sentence of death awarded to convict accused Md. Sakhawat Hossain as above will be executed, the other sentence of death and sentence of imprisonment awarded to him as above would naturally get merged into the sentence of death executed.

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

Since the convicted accused persons, namely (1) Md. Ibrahim Hossain alias Ghungur Ibrahim (2) Sheikh Mohammad Mujibur Rahman alias Mujibur Rahman (3) Md. A. Aziz Sardar son of late Ful Miah Sardar (4) Abdul Aziz Sardar son of late Ahmmad Sardar (5) Kazi Ohidul Islam alias Kazi Ohidus Salam, and (6) Md. Abdul Khaleque Morol have been absconding, the sentence of imprisonment awarded to them as above shall be executed after causing their arrest or when they surrender before the Tribunal, whichever is earlier.

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

The convicts accused Md. Sakhawat Hossain and Md. Billal Hossain Biswas be sent to the prison with conviction warrants accordingly.

Issue conviction warrants against the six absconding accused, namely (1) Md. Ibrahim Hossain alias Ghungur Ibrahim (2) Sheikh Mohammad Mujibur Rahman alias Mujibur Rahman (3) Md. A. Aziz Sardar son of late Ful Miah Sardar (4) Abdul Aziz Sardar son of late Ahmmad Sardar (5) Kazi Ohidul Islam alias Kazi Ohidus Salam, and (6) Md. Abdul Khaleque Morol.

The Secretary, Ministry of Home Affairs and the Inspector General of Police [IGP] are hereby directed to ensure the apprehension of the above mentioned six fugitive convict accused persons, if necessary with the help of the Inter-Pol.

Let certified copy of this judgment be provided to the prosecution and the convicts accused Md. Sakhawat Hossain and Billal Hossain Biswas free of cost, at once.

If the above mentioned absconding convicts 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 above mentioned six fugitive convict accused persons be sent to the District Magistrate, Dhaka for information and necessary action.

Let a copy of this order be sent together with the conviction warrants of the above mentioned six fugitive convict accused

persons to the (1) Secretary, Ministry of Home Affairs, Bangladesh Secretariat, Dhaka, and (2) Inspector General of Police [IGP], Police Head Quarters, Dhaka for information and compliance.

(Justice Anwarul Haque, Chairman)

(Justice Md. Shahinur Islam, Member)

(Justice Md. Shohrwardi, Member)