

International Crimes Tribunal-1 (ICT-1)
Old High Court Building, Dhaka, Bangladesh.
ICT-BD Case No.03 OF 2011

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

The Chief Prosecutor
Versus
Motiur Rahman Nizami

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

Date of delivery of Judgment 29th October, 2014.

Prosecutors:

Mr. Golam Arif Tipu, Chief Prosecutor with
Mr. Syed Rezaur Rahman
Mr. Syed Haider Ali
Mr. Muhammad Ali
Mr. Md. Altab Uddin
Mr. Zead-Al-Malum
Mr. Moklesur Rahman Badal
Mr. Abdur Rahman Howladar
Mr. Abul Kalam
Mr. Sheikh Mosfeq Kabir
Ms. Tureen Afroz
Mr. Hrishikesh Saha
Mr. Md. Zahid Imam
Mr. Syed Sayedul Haque (Suman)
Ms. Sabina Yesmin Khan

Defence Counsels:

Mr. Abdur Razzak, senior counsel with
Mr. Mizanul Islam
Mr. Tajul Islam
Mr. Asad Uddin.
Mr. Md. Nazibur Rahman
Mr. Muhammad Tarequl Islam

Judgment

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

I. Introduction

01. This Tribunal [ICT-1] has been lawfully constituted as a domestic judicial forum for the purpose of holding trials relating to internationally

recognised crimes, such as, crimes against humanity, genocide and other class offences committed during the War of Liberation of Bangladesh in 1971. Bangladesh Parliament enacted the International Crimes (Tribunals) Act in 1973 [hereinafter referred to as “the Act”] to provide for the detention, prosecution and punishment of persons for genocide, crimes against humanity, war crimes and other crimes under International law, committed in the territory of Bangladesh during the War of Liberation, particularly from 25th March to 16th December, 1971.

02. On behalf of both the parties the learned prosecutors and defence counsels raised some legal issues and factual aspects relating to historical background of War of Liberation, characterization of international crimes, commencement of proceedings, charges framed, and the laws applicable to the case for the purpose of determining criminal liability of the accused.

II. Commencement of proceedings and procedural history

03. The Investigation Agency established under the Act completed investigation of the case on the basis of the complaint Register being serial No.1 dated 21.07.2010. During investigation of the case, the prosecution filed an application praying for showing the accused arrested in the instant case pursuant to ICT-BD Misc. Case No. 01 of 2010 and accordingly the accused was shown arrested vide order dated 02.08.2010. During investigation, the accused filed a series of applications such as adjournment petition, application for privileged communication of the lawyers with the accused in prison, application for providing treatment to the accused in the hospital and to provide health friendly transport to the accused for coming

and going to the tribunal from the prison. All the aforesaid applications were sympathically considered in order to provide him sufficient opportunity to defend his case. On receipt of the investigation report along with documents, the prosecutors prepared Formal Charge and submitted the same on 11.12.2011 in the tribunal.

04. The learned prosecutor and the learned defence counsel made elaborate submissions on charge framing matter . After hearing the learned lawyers of both the parties on charge framing matter and on perusal of Formal Charge and documents, the tribunal framed 16 charges against accused Motiur Rahman Nizami on 28.05.2012 under section 3(2)(a), 3(2)(c), 3(2)(f), (g) and (h) read with section 4(1) and 4(2) of the Act which are punishable under section 20(2) of the Act.

05. The charges framed were read over and explained to the accused on dock to which he pleaded not guilty and claimed to have fair justice and thus Trial was started.

06. At the fag end of trial during arguments, the defence senior counsels abstained from appearing before the tribunal on four consecutive days consequently arguments for defence was closed with a direction to submit rest part of argument in writing within five days. Thereafter, on the prayer of the defence, the tribunal gave an opportunity to the learned counsels of the defence to conclude the rest part of their verbal arguments. The learned prosecutor was also given an opportunity to reply on law points before closing the case.

07. It may be mentioned here that after summing up of the case by way of argument by the parties, the case was kept for CAV, but before the delivery of judgment the Tribunal has been reconstituted due to retirement of Mr. Justice A.T.M. Fazle Kabir, the then Chairman of the tribunal, and as such, we heard again summing up arguments of both the parties afresh in the interest of fair justice.

III. Historical Background

08. In 1971, during the War of Liberation of Bangladesh, atrocities in a large scale, crimes against humanity, war crimes and genocide were committed by Pakistani forces, auxiliary forces and their associates which resulted the birth of Bangladesh as an independent country. It was estimated that during nine-month long war, about three million people were killed, nearly a quarter million women were raped, and over ten million people were deported to India causing brutal persecution upon them.

09. In August, 1947, the partition of British India based on two-nation theory, gave birth to two new states, one a secular state named India and the other the Islamic Republic of Pakistan. The two-nation theory was propositioned on the basis that India will be for Hindus while Pakistan will be a state for the Muslims. This theory culminated into the creation of Pakistan which was comprised of two geographically and culturally separate areas to the east and the west of India. The western zone was eventually named West Pakistan and the eastern zone was named East Pakistan, which is now Bangladesh.

10. Ever since the creation of Pakistan, the Pakistan Government adopted discriminatory policies backed by its bureaucracy and Army to rule over the people of East Pakistan that caused great disparity in every field including education, welfare, health, armed services, civil bureaucracy, economic and social developments. One of the first patently discriminatory and undemocratic policies of the Government of Pakistan was manifested when in 1952 the Pakistani rulers 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 recognised as a state language thus marking the beginning of language movement that eventually turned to the movement for greater autonomy and self-determination and eventually independence. Numerous Bangalees sacrificed their lives to realise Bangla as a state language. After February 21, 1952, the historic language movement, a new sense of awareness regarding cultural identity, apart from political and economic, of the Bangalees of East Pakistan began to manifest. And this awareness and consciousness awakened all the Muslims, Hindus, Buddhist, Christians of the then East Pakistan and united them with the spirit and perception of Bangalee Nationalism. And 'Bangalee Nationalism' got new exuberance. The prime object of the Pakistani Military Junta and their associate political parties were to destroy and sweep away the 'Bangalee Nationalism' from root once for all and make the Bangalees a hundred percent Pakistani. In order to achieve such an ill-advised end, they did not only hesitate to kill millions of innocent Bangalees but also did their best to change their identity as Bangalee. These awareness and perception of

'Bangalee Nationalism' of the Bangalee people of East Pakistan spirited and perceived them to be non-communal and secular.

11. In the general election of 1970, the Awami League, under the leadership of Bangabandhu Sheikh Mujibur Rahman, won 167 seats out of 300 seats of the National Assembly of Pakistan and thus, became the majority party of Pakistan. Of the 300 seats, 169 were allocated to East Pakistan of which Awami League won 167 demonstrating an absolute majority in the Parliament. 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 7th March, 1971 called on the people of Bangladesh to strive for national liberation and independence if people's verdict is not respected and power is not handed over to the leader of the majority party. On 26th March, 1971 following the onslaught of "**Operation Search Light**" by the Pakistani military on 25th March, Bangabandhu declared Bangladesh independent immediately before he was arrested by the Pakistani rulers.

12. With this declaration of independence, the war to liberate Bangladesh from the occupation of Pakistan military began that ended on 16th of December, 1971 with the surrender of all Pakistani military personnel present in Bangladesh before the 'Mitra Bahini' comprising India and Bangladeshi forces in Dhaka. In the War of Liberation that ensued, all people of East Pakistan wholeheartedly supported and participated in the call to free Bangladesh but a small number of Bangalees, Biharis, other pro-Pakistanis, as well as members of a number of different religion-based

political parties joined and/or collaborated with the Pakistan military to actively oppose the creation of independent Bangladesh. Except those who opposed, Hindu communities like others in Bangladesh, supported the Liberation War which in fact drew particular wrath of the Pakistani military and their local collaborators, who perceived them as pro-Indian and made them targets of attack, persecution, extermination and deportation as members belonging to a religious group.

13. As a result, 3 million [thirty lakh] people were killed, more than 2[two] lakh women raped, about 10 million [one crore] people deported to India as refugees and million others were internally displaced. It also saw unprecedented destruction of properties all over Bangladesh.

14. To prosecute their policy of occupation and repression, and in order to crash the aspiration of the freedom-loving people of an independent Bangladesh, the Pakistan government and the military junta in aid of their some local collaborators set up number of auxiliary forces such as the Razakars, the Al-Badr, the Al-Shams, the Peace Committee etc, essentially to collaborate with the military in identifying and eliminating - all those who were perceived to be sympathized with the liberation of Bangladesh, individuals belonging to minority religious groups especially the Hindus, political groups belonging to Awami League and other pro-Independence political parties, Bangalee intellectuals and civilian population of Bangladesh. The truth about the nature and extent of the atrocities and crimes perpetrated during the period of liberation war by the Pakistani military and their allies became known to the wider world through

independent reports by the foreign journalists and dispatches sent home by the diplomatic community in Dhaka.

15. 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.

16. Pursuant to Bangabandhu's Declaration of Independence, a provisional government-in-exile was formed on April 17th, 1971 in Mujibnagar with Bangabandhu as the President of Bangladesh. In his absence, Syed Nazrul Islam was the Acting President and Tajuddin Ahmed was the Prime Minister who coordinated the operations to expel the occupying Pakistani forces and to liberate Bangladesh.

17. In order to bring to justice the perpetrators of the crimes committed in 1971, the International Crimes (Tribunals) Act, 1973 was promulgated. However, no tribunal was set up and no trial took place under the Act until the government established the tribunal on 25th of March 2010.

IV. Brief account of the accused

18. Accused Motiur Rahman Nizami was born on 31.03.1943 at village Monmothpur under police station-Sathia, District- Pabna. In his early life, he studied in Boalmari Madrasha at Sathia and passed his Dakhil examination in 1955, then he passed Alim examination in 1959 and Fazil examination in 1961. He got his Kamil degree in Figh from Madrasha-e-Alim, Dhaka in 1963. He also obtained graduation degree in 1967 from the University of Dhaka, as a private student. During the War of Liberation in 1971, he was

the President of Pakistan Islami Chhatra Sangha [ICS], the student wing of Jamaat-e-Islami [JEI] and also the chief of Al-Badr Bahini. The Al-Badr Bahini was mainly formed by the members of Islami Chhatra Sangha under the leadership of the accused. Both Jamaat-e-Islami and Islami Chhatra Sangha actively opposed the Liberation War of Bangladesh and those organizations formed Razakar Bahini, Al-Badr Bahini and Al-Shams which acted as auxiliary forces in collaboration with Pakistan occupation forces and thus they committed crimes against humanity, genocide and atrocities all over Bangladesh. After completion of student life he joined the Jamaat-e-Islami and became Ameer of Dhaka city Unit as well as member of central executive committee of Jamaat-e-Islami from 1978 to 1982. He held the post of Assistant Secretary General of Jamaat-e-Islami from 1983 to 1988. He became the Secretary General of the said party in December, 1988 and held the said post up to 2000. He became the 'Ameer' [Chief] of Jamaat-e-Islami in 2000 and since then he has been holding the post of 'Ameer' of the said party till now. During the War of Liberation, he assisted the then 'Ameer' of Jamaat-e-Islami Professor Ghulam Azam in forming Shanti Committees, Razakars, Al-Badr and Al-Shams to collaborate Pakistan occupation forces. He was elected as a Member of Parliament in 1991 and was the leader of Parliamentary party of Jamaat-e-Islami. He was also elected as a Member of Parliament in 2001 and he became the Minister for Agriculture from 2001-2003 and Minister for Industries from 2003-2006 under the Bangladesh Nationalist Party [BNP] led government.

V. Jurisdiction of the Tribunal

19. The International Crimes (Tribunals) Act, 1973 has empowered the tribunal to prosecute and punish not only the armed forces but also the perpetrators who belonged to auxiliary forces or who committed the offence(s) as an individual or a group of individuals and nowhere in the Act, it has been said that without prosecuting the armed forces [Pakistani] an individual or group of individuals having any other capacity specified in section 3(1) of the Act cannot be prosecuted. Rather it is manifested in section 3(1) that even any person if he is prima facie found criminally responsible for the offences specified in section 3(2) of the Act can be brought to justice. Moreover, the provisions of section 4(1) and 4(2) of the Act are the guiding principles for fixing up liability of a person or in the capacity of superior command responsibility, if any offences committed specified in section 3(2) of the Act.

20. Thus, the tribunals set up under the Act are absolutely domestic tribunals but empowered to try internationally recognized crimes committed in violation of customary international law [CIL].

VI. Consistency of ICT Act, 1973 with other statutes on international Crimes

21. Section 3(2)(a) of International Crimes (Tribunals) Act, 1973 defines the crimes against Humanity in the following manner:

“Crimes against Humanity: namely, murder, extermination, enslavement, deportation, imprisonment, abduction, confinement, torture, rape or other inhumane acts committed

against any civilian population or persecutions on political, racial, ethnic or religious grounds, whether or not in violation of the domestic law of the country where perpetrated;”

22. Many have expressed their concern by the degree to which the above definition of ‘Crimes against Humanity’ under the Act differs from international standards. It may be stated that ‘international standard’ itself is a fluid concept, it changes with time and requirement through a mechanism of progressive development of law. Therefore, one can look at the concept of ‘standard’ from entirely a technical perspective; whereas, others can see it as a matter of inherent spirit.

23. Looking at the contemporary standards of definition of ‘Crimes against Humanity’ in various Statutes on international crimes, the first observation can be made is that there is no consistency among definitions. The Statute of the International Criminal Tribunal for the former Yugoslavia, 1993 [ICTY Statute], the Statute of the International Criminal Tribunal for Rwanda, 1994 [ICTR Statute], the Rome Statute of the International Criminal Court, 1998 [Rome Statute] or the Statute of the Special Court for Sierra Leone, 2002 [Sierra Leone Statute] although share common spirit, do differ in legal technical nitty-gritty.

VII. The Rome Statute: Article-7

Crimes against humanity

24. 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 intentionally causing great suffering, or serious injury to body or to mental or physical health.

VIII. The ICTR Article 3: Crimes against Humanity

25. The International Criminal 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:

- (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.

IX. THE ICTY Article 5

26. The International Criminal 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.

X. ICT, 1973[BD] Section 3

27. Section 3(1) confers the power upon the tribunals 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 subsection (2).

28. Section 3(2) (a) enumerates crimes against Humanity as 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;.

XI. Elements differ in the different Statutes

29. The ICTY requires the crime to be taken place in an armed conflict, be it international or national. The Statute does not require the crime to be committed as a part of widespread or systematic attack on the civilian population, nor it requires that the crime to be perpetrated on discriminatory grounds.

XII. Case laws

30. In February 1995, the Prosecutor of the ICTY indicted Dusko Tadic for war crimes and crimes against humanity. Tadic challenged the ICTY's jurisdiction over crimes against Humanity, Tadic argued that the definition of crimes against humanity did not conform to contemporary International law, which required such crimes to be committed in an international armed conflict. In its decision on the Defense Motion for Interlocutory Appeal on Jurisdiction ["Tadic Decision on Jurisdiction"], the Appeals Chamber of the ICTY rejected this argument by affirming that crimes against humanity can even be committed in peacetime: the Trial Chamber of the ICTY ["ICTY Trial Chamber"] reaffirmed that although Article 5 of the ICTY Statute required a nexus with armed conflict, such a requirement is unnecessary under international law. The ICTY Trial Chamber also noted that Article 5 required crimes against humanity to be committed under a second set of circumstances, that is, the acts must be "directed against any civilian population." The ICTY Trial Chamber interpreted the term "ANY CIVILIAN POPULATION" as having three elements. First, the civilian population must be "specifically identified as a group by the perpetrators of these acts." Although the ICTY Trial Chamber does not articulate the bases for such as identification, this interpretation suggests that the ICTY Trial Chamber accepted the need for a discriminatory motive. The other two components raised by the ICTY Trial Chamber are that the crimes must be "organized and systematic" and "of a certain scale and gravity". The ICTY Trial Chamber's approach in reading these elements into the meaning of "any civilian population" is a novel one. The ICTY Trial Chamber also

appeared to require both elements to be present, rather than accepting them as alternative conditions.

31. However, customary international humanitarian law requires that the attack to be either systematic or widespread. Rome Statute and the ICTR also require these two elements to be alternatively present.

32. Next, the ICTY Trial Chamber noted that a crime against humanity must be widespread or demonstrate a systematic character. However, as long as there is a link with the widespread or systematic attack against a civilian population, a single act could qualify as a crime against humanity. As such, an individual committing a crime against a single victim or a limited number of victims might be recognized as guilty of a crime against humanity if his acts were part of the specified context identified above.

33. So it appears that though the ICTY Statute requires the crime to be taken place in an armed conflict, the tribunal holds that armed conflict is not necessary. And though the Statute did not require the crime to be taken place as a part of widespread or systematic attack, the tribunal holds that the term 'any civilian population' instead of any civilian people indicates that the crime to be taken place as a part of widespread or systematic attack on civilian population. Court's language 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, as elaborated below, that the acts must occur on a widespread or systematic basis that there must be some

form of a governmental, organizational or group policy to commit these acts and that the perpetrator must know of the context within which his actions are taken, as well as the requirement that the actions be taken on discriminatory grounds.

34. The above paragraph and the structure of the opinion made it clear that the ICTY Trial Chamber viewed the term “population” as having three essential components: “widespread or systematic” commission of the acts that constitute crimes against humanity; a discriminatory motive for those acts; and a governmental, organizational, or group policy to commit those acts. Furthermore, the ICTY Trial Chamber held that if a population was “predominantly” civilian, then the presence of a few non-civilians would not defeat this characterization. The Tadic Judgment did not elaborate on how to construe “Widespread” or “Systematic.” But customary IHL mandates that either systematic or widespread is enough to qualify a crime to be a crime against humanity.

XIII. Law in the International Crimes Tribunal Bangladesh

35. Existence of armed conflict is not necessary though it is admitted that there was an armed conflict in 1971.

36. There is no requirement of discriminatory element except in the case of persecution. The plethora of international case law suggests that “law in this area is mixed”. But as our Statute clearly mentioned the discriminatory element for the act of persecution, the proper law should be to impose the existence of discriminatory elements only for persecution and not for the other acts mentioned in section 3(2)(a).

37. Widespread or systematic: Our law does not require the attack to be part of a widespread or systematic attack. But as discussed in Tadic case by ICTY the word 'civilian population' indicates that the attack to be a part of widespread or systematic attack. It is now well-settled that the attack in Bangladesh in 1971 was widespread and systematic in nature. Tadic case elaborately discussed what constitutes an attack widespread and systematic.

38. The criterion of “widespread” describes a quantitative element. The widespread nature of the attack can arise from the number of victims or its extension over a broad geographic area. The criterion of a “Systematic” attack is qualitative in nature. It refers to the organized nature of the committed acts of violence and thus serves to exclude isolated acts from the notion of crimes against humanity. Earlier case law of the ad hoc tribunals required that the individual act follow a predetermined plan or policy. The Appeals Chamber of the Yugoslavia Tribunal has now distanced itself from such a requirement. Although attacks on a civilian population will typically follow some form of predetermined plan, this does not make the existence of a plan or policy an element of the crime. Under customary international law, crimes against humanity do not call for a “policy element”. However, Article 7(2) (a) of the ICC Statute requires that the attack on a civilian population be carried out “pursuant to or in furtherance of State or organizational policy to commit such attack.”

39. The International Crimes (Tribunals), Act, 1973, Bangladesh defines crimes against Humanity in section 3 as following manner:

"(1) A Tribunal shall have the power to try and punish any individual or group of individuals, or organisation, or any

member of any armed, defence or auxiliary forces, irrespective of his nationality, who commits or has committed, in the territory of Bangladesh , whether before or after the commencement of this Act, any of the crimes mentioned in subsection(2).

(2).....

(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."

To our understanding the proper construction of this section should be

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

41. Though the Statute of the tribunal does not explicitly requires the attack to be a part of systematic or widespread attack against the civilians,

the very term “any civilian population” instead of civilian people indicates the plurality of the attack and thus implies that the attack to be part of a systematic or widespread attack against civilian [Tadic case for references]. However, the term ‘systematic and widespread’ is a disjunctive, rather than cumulative requirement. The Rome Statute and the ICTR Statute provide that the attack must be part of a systematic or widespread attack against civilians. That means the existence of either systematic or widespread attack is enough to qualify crime against Humanity.

42. “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.

43. 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 of 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.

44. 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.

45. 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 International Crimes (Tribunals) Act, 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 ICT Act of 1973, legislation with its amendments upto 2013 provides a system which broadly and fairly compatible with the current international standards.

46. In the cases of **Abdul Quader Molla vs. Government of Bangladesh** and vis-a-vis, the Appellate Division of our Supreme Court has also held [majority view]:

“ For commission of the said offence, the prosecution need not require to prove that while committing any of the offences there must be ‘widespread and systematic’ attack against ‘civilian population’. It is sufficient if it is proved that any

person/persons committed such offence during the said period or participated or attempted or conspired to commit any such crime during operation search light in collaboration with the Pakistani Regime upon unarmed civilian with the aim of frustrating the result of 1970 National Assembly election and to deprive the fruits of the election result." [Page 241-242]

XIV. Special feature of laws and rules applicable to trial procedure

47. The proceedings before the tribunal shall be guided by the International Crimes (Tribunals) Act, 1973 and the Rules of Procedure, 2010 [hereinafter referred to as "the ROP"] formulated by the tribunal under the powers given in section 22 of the Act. Section 23 of the Act prohibits the applicability of the Code of Criminal Procedure, 1898 and the Evidence Act, 1872. The tribunal is authorized to take into its judicial notice of facts of common knowledge and some official documents which are not needed to be proved by adducing evidence [section 19(3) and (4) of the Act]. The tribunal may admit any evidence without observing formality, such as reports, photographs, newspapers, books, films, tape recordings and other materials which appear to have probative value [section -19(1) of the Act]. The tribunal shall have discretion to consider hearsay evidence too by weighing its probative value as per rule-56(2) of the ROP. The defence shall have right to cross-examine prosecution witnesses on their credibility and to take contradiction of the evidence given by them before the tribunal as per

rule -53(ii) of the ROP. The accused deserves right to conduct his own case or to have assistance of his counsel [section-17 of the Act]. The tribunal may release an accused on bail subject to conditions as imposed by it as per rule-34(3) of the ROP. 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.

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

49. ICT Act of 1973 has ensured all the universally recognised rights to the accused in order to make fair trial. The fundamental and key elements of fair trial are-

- (i) Right to disclosure
- (ii) Holding trial in public
- (iii) Presumption of innocence of the accused
- (iv) Adequate time for preparation of defence case
- (v) Expeditious trial
- (vi) Right to examine defence witness
- (vii) Right to defend by engaging counsel

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 were taken by the tribunal to ensure fair investigation as well as trial.

XV. Witnesses adduced by the Parties

50. The prosecution submitted a list of 67 witnesses along with Formal Charge and documents, while the defence a voluminous list of 10111 witnesses for the obvious reasons which need not be expressly disclosed. At the time of trial, the prosecution examined total 26 witnesses including seizure list witnesses and the investigation officer.

51. It is a settled principle of law, in a criminal case, the defence is not under obligation to prove his innocence. Moreover, no plea of alibi was taken by the defence in the instant case. Therefore, the tribunal by exercising power under Rule 51A(2) and 53(3) of the ROP, allowed the defence to examine maximum number of 04 witnesses out of listed defence witnesses. The defence examined 04 witnesses to disprove the prosecution case, though the defence is no longer under the obligation to do so.

XVI. Defence Case

52. There is no denying that during the War of Liberation of Bangladesh accused Motiur Rahman Nizami was the President of Islami Chhatra Sangha, the student wing of Jamaat-e-Islami. After completion of student life, he joined the Jamaat-e-Islami and ultimately he held different posts of executive body of the party including the post of Secretary General and at present he is performing as 'Ameer' of Jamaat-e-Islami.

53. From the trend of cross-examination of prosecution witnesses and the suggestions put to them, it is the defence case, that the accused was never a High Command or member of Al-Badr Bahini and he never took part in atrocities as alleged in the charges brought against him. He never played the role of anti-liberation of Bangladesh. He made no inciting speech in any meeting and never collaborated Pakistan occupation forces to commit atrocities in Pabna district or in any part of Bangladesh. As such, all the charges brought against him involving with crimes against humanity and genocide during the War of Liberation are false, fabricated and motivated. He is a popular leader of Jamaat-e-Islami, after independence of Bangladesh, he was elected Member of Parliament twice and also became a Minister in the cabinet of BNP led government. He is innocent.

XVII. Universally recognised rights of the accused are ensured by the Tribunal during trial

54. The tribunal believes that it is under obligation to ensure the rights of the accused which is a vital element of a fair trial of a criminal case. Fair

trial concept stems from the recognised rights of the accused. The tribunal is a domestic judicial forum constituted under our own legislation enacted in the Parliament and is obliged to guarantee the rights of the accused. Key elements of fair trial are :- (i) right to disclosure (ii) public hearing (iii) presumption of innocence (iv) adequate time to prepare defence (v) right to cross-examine prosecution witnesses and to examine defence witnesses (vi) right to defend by engaging counsel. All the rights mentioned above were provided to the accused by the tribunal to satisfy the requirements of fair trial.

XVIII. Summing up the prosecution case

55. Mr. Muhammad Ali, the learned Prosecutor at the very outset of his argument has contended a brief portrayal of historical background that had inspired the Bengalee nation to dive into the movement for self determination which ultimately got the shape of the War of Liberation. The learned Prosecutor has submitted that admittedly accused Motiur Rahman Nizami was the president of All-Pakistan Islami Chhatra Sangha during the War of Liberation and at that time under his leadership Al-Badr Bahini was formed by the members of Islami Chhatra Sangha to assist Pakistan army in committing atrocities in all over Bangladesh. It is further submitted that the accused was the chief of both Islami Chhatra Sangha and Al-Badr Bahini who directly participated in the crimes against Humanity and genocide with the members of Al-Badr Bahini which has been proved by both documentary and oral evidence beyond reasonable doubt. It is further submitted that the accused was the pivot of crimes by dint of his superior status and

accordingly he is liable under section 4(1) and 4(2) of the Act for committing the offences as specified in section 3(2) of the Act by his subordinates.

56. Mr. Syed Haider Ali, the learned Prosecutor has submitted that the prosecution has successfully proved accused's superior responsibility and material charges brought against him by both oral and documentary evidence and there is no evidence that the accused being a defacto leader of Al-Badr Bahini ever tried to prevent his subordinates from committing atrocities during the War of Liberation.

57. Ms. Tureen Afroz, the learned Prosecutor by referring a Fortnightly Report of Police [Ext.18] and some speeches of the accused published in some newspapers [Exts. 2(5), 2(10), 2(15) and 2(16)] has submitted that during the War of Liberation the accused travelled different parts of Bangladesh and made inciting speeches to his subordinates directing them to launch attack upon freedom fighters as well as pro-liberation supporters and thus, in the context of 1971, the accused is guilty to the offence of incitement read with section 4(2) of the Act.

XIX. Summing up the defence case

58. The learned defence counsels made their submissions denying the allegations brought against the accused. It is submitted that the accused was the president of Pakistan Islami Chhatra Sangha from 1969 to September; 1971 but he was in no way involved with Al-Badr Bahini or their atrocious activities in 1971. It is submitted that the narration of occurrences mentioned

in the books referred by the prosecution is not reliable as not supported by any direct evidence . It is further submitted that after independence of Bangladesh a criminal case was filed for abduction and killing of Dr. Azharul Huq and Dr. Humayan Kabir but the accused of that case got acquittal as such this case is barred by the principle of double jeopardy.

59. The learned defence counsels took us through a lot of decisions passed by different war crimes tribunals and have submitted that there is no evidence to prove that the accused was involved in making a common plan to commit any particular offence and as such the accused cannot be held responsible under section 4(1) and 4(2) of the Act. It is contended that there is no evidence to connect the accused with the perpetrators or he had prior knowledge about any charge related offence. It is submitted that it is the guiding principle of command responsibility that the superior must have relationship with his subordinates and the former must have effective control over the subordinates but in the instant case prosecution has miserably failed to prove the requirements of command responsibility. Lastly, it is submitted that during the War of Liberation the accused was simply a student leader who had no ability to punish so-called unidentified subordinates and as such he cannot be held liable under section 4(1) or 4(2) of the Act.

XX. Reply of prosecution to the defence arguments

60. Mr. Syed Haider Ali with Mr. Muhammad Ali, the learned prosecutors have replied on those legal points raised by the defence. It is submitted by the prosecution that it has been well proved that during War time the accused being the chief of All-Pakistan Islami Chhatra Sangha was

ex-officio chief of Al-Badr Bahini having full control over the members of Al-Badr but he did not prevent them from committing crimes as specified in section 3(2) of the Act. It is further submitted that the accused acted as a civil superior officer having knowledge of plan and design to commit offences through his subordinates and sometimes he directly participated in the commission of offences with his subordinates and as such he is responsible for his civil superior responsibility in the matter of commission of crimes against humanity and genocide as brought against him in the charges.

XXI. Discussion and decision

61. Before going into discussion of the evidence on record, we consider it convenient to address legal issues regarding charges brought against the accused. It may 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. Delwar Hossain Sayeedi [ICT-BD Case No. 01/2011], The Chief Prosecutor Vs. Professor Ghulam Azam (ICT-BD case No. 06/2011] and the Chief Prosecutor Vs. Salauddin Quader Chowdhury [ICT-BD Case No. 02/2011]. Therefore, we prefer to reiterate the findings of the tribunal recorded earlier in the said cases on the common issues in brief.

Tripartite Agreement and immunity to 195 Pakistani war criminals

62. It is not acceptable to say that no individual or member of auxiliary force as stated in section 3 of the Act can be brought to justice under the Act

for the offence (s) enumerated therein for the reason that 195 Pakistani war criminals belonging to Pakistan Armed Forces were allowed to evade justice on the strength of 'tripartite agreement' of 1974. Such agreement was an 'executive act' and it cannot create any clog to prosecute member of 'auxiliary force' or an 'individual' or member of 'group of individuals' as the agreement showing forgiveness or immunity to the persons committing offences in breach of customary international law was derogatory to the existing law i.e the Act enacted to prosecute those offences.

63. It is settled that the jus cogens principle refers to peremptory principles or norms from which no derogatory is permitted, and which may, therefore, operate a treaty or an agreement to the extent of inconsistency with any such principles or norms. We are thus inclined to pen our conclusive view that the obligation imposed on the state by the UDHR and the Act is indispensable and inescapable and as such the Tripartite Agreement which is an 'executive act' cannot liberate the state from the responsibility to bring the perpetrators of atrocities and system crimes into the process of justice.

64. As a state party of UDHR and Geneva Convention, Bangladesh cannot evade obligation to ensure and provide justice to victims of those offences and their relatives who still suffer the pains sustained by the victims and as such an 'executive act' [tripartite agreement] can no way derogate this internationally recognized obligation. Thus, any agreement or treaty if seems to be conflicting and derogatory to jus cogens [compelling laws] norms does not create any hurdle to internationally recognized state obligation.

65. Further, the Act is meant to prosecute and punish not only the armed forces but also the perpetrators who belonged to ‘auxiliary forces’, or who committed the offence as an ‘individual’ or member of ‘group of individuals’ and nowhere of the Act says that without prosecuting the armed forces [Pakistani] the person or persons having any other capacity specified in section 3(1) of the Act cannot be prosecuted. Rather, it is manifested from section 3(1) of the Act that even any person [individual or member of group of individuals], if he is prima facie found individually criminally responsible for the offence(s), can be brought to justice under the Act. Therefore, the argument that since the main responsible persons [Pakistan Army] have escaped the trial, on the strength of the tripartite agreement providing immunity to them, the next line collaborators cannot be tried is far-off to any canons of criminal jurisprudence.

66. In this connection we refer to the observation made by the Appellate Division in the cases of **Abdul Quader Molla vs. Government of Bangladesh**, vis-a-vis, as under:

" The Act, 1973 is a protected law and the moment, sub-section (1) was amended by way of substitution in the manner as stated hereinbefore it became part of the statute and it got the protection of any legal challenge to be void or unlawful or ever to have become void or unlawful in view of the provisions of article 47(3) of the Constitution..... . The clemency given to the admitted prisoners of war, in no way, either made the Act, 1973 or any of its provisions ineffective, invalid or

void and mere failure of the successive Governments to act in accordance with the Act for a longer period (forty one years), in any way, gave any right to the accused to be exonerated from being tried for the commission of crimes as mentioned in sub-section (2) of section 3 thereof. Therefore, the objection taken by the learned counsel for the appellant is not sustainable. The Tribunal did not commit any illegality in trying the appellant."[Page, 279]

67. Therefore, we are of the view that the ‘tripartite agreement’ is not at all a barrier to prosecute civilian perpetrator under the Act. Thus, we also hold that the Act was not enacted only for holding trial of 195 Pakistani war criminals, rather it has jurisdiction under section 3(1) of the Act to try armed forces, auxiliary forces, an individual or group of individuals for the commission of offences specified under section 3(2) committed in Bangladesh before and after commencement of the Act.

Amendment of section 3(1) of the Act in 2009

68. It is submitted by the learned counsel appearing on behalf of the accused that since the subsequent amendment brought in 2009 of the Act of 1973 by inserting the words ‘individual’, or ‘group of individuals’ in section 3(1) carries ‘prospective effect’, in reality, the present accused cannot be prosecuted in the capacity of an ‘individual’ or a superior for the offences underlying in the Act which is admittedly ‘retrospective’. Since such amendment has not been expressly given retrospective effect interpretation stands that the amendment is prospective.

69. At the out set, it is to be noted that it is rather admitted that even under retrospective legislation [Act enacted in 1973] initiation to prosecute crimes against Humanity, genocide and system crimes committed in violation of customary international law is quite permitted. It is further to be noted that the ICTY, ICTR, SCSL and the judicial bodies backed by the UN have been constituted under their respective retrospective Statutes. Only the ICC is founded on prospective Statute.

70. We are to perceive the intent of enacting the main Statute together with fortitude of section 3(1). At the same time we cannot deviate from extending attention to the protection provided by the Article 47(3) of the Constitution to the Act which was enacted to prosecute, try and punish the perpetrators of atrocities committed in 1971 during the War of Liberation. The legislative modification that has been adopted by bringing amendment in 2009 has merely extended jurisdiction of the tribunal for bringing the perpetrator to book if he is found involved with the commission of the criminal acts even in the capacity of an ‘individual’ or member of ‘group of individuals’. It is thus validly understood that the rationale behind this amendment is to avoid letting those who committed the most heinous atrocities go unpunished. This is the intent of bringing such amendment.

71. It may be further mentioned here that the words ‘individual’ or member of ‘group of individuals’ have been incorporated both in section 3 of the Act and in Article 47(3) of the Constitution of the Peoples Republic of Bangladesh by way of amendments in 2009 and 2011 respectively. The right to move the Supreme Court for calling any law relating to internationally recognised crimes in question by the persons charged with crimes against

Humanity and genocide has been taken away by the provision of Article 47A(2) of the Constitution. Since the accused has been prosecuted for offences recognized as international crimes as mentioned in the Act he does not have right to call in question any provision of the Act or any of amended provisions thereto. Thus, we hold that the application of prospectiveness or retrospectivity as to amendment to section 3 and subsequent amendments of the Act raised by the accused is quite immaterial to him in consideration of his legal status and accordingly the defence objection is not sustainable in law, particularly in the light of Article 47(3) and Article 47A of the Constitution.

72. In this regard we can rely upon the observation made by the Appellate Division **in the case of Abdul Quader Molla** as under:

" Therefore, even if this amendment is inconsistent with any provision, still it can not be declared void or unlawful. The constitutionality of this amendment being protected by the Constitution itself, there is no legal bar to holding trial and convict the appellant under the Act, 1973."[Page, 180]

Delay in bringing prosecution

73. From the point of morality and sound legal dogma, time-bar should not apply to the prosecution of human rights crimes. Neither the Genocide Convention of 1948, nor the Geneva Convention of 1949 contains any provision on statutory limitation to war crimes and crimes against Humanity. General Assembly Resolution No. 2391(XXIII) of 26 November 1968 provides protection against even any statutory limitation in prosecuting

crimes against Humanity, genocide etc. Thus, criminal prosecutions are always open and not barred by time limitation.

74. It may be cited here that the Second World War was concluded in 1945 but still the Nazi War Criminals are being prosecuted. Similarly, the trial of international crimes committed during Chilean revolution in 1973 is still going on. In Cambodia during Polpot regime, international crimes were committed in the year 1975 to 1978 but due to internal conflicts and lack of political will, the then government could not start prosecution against perpetrators in time. The Royal Government of Cambodia waited 25 years for attaining a strong political will, thereafter in association with the United Nations, they established a Hybrid Tribunal and thus trial against the perpetrators was started in 2003 which is still going on. In fact, the criminal prosecution as regards international crimes is always open and not barred by any time-limit. The Sovereign immunity of Slobodon Milosevic of Serbia, Charles Taylor of Liberia and Augusta Pinochet of Chile, as head of the states could not protect themselves from being detained and delayed prosecution for committing genocides, crimes against Humanity and war crimes.

75. In view of the above settled position and in the absence of statutory limitation, only the delayed prosecution does not preclude prosecutorial action to adjudicate the culpability of the perpetrators of core international crimes. It requires strong public and political will together with favourable and stable political situation for holding such trial. Therefore, justice delayed is no longer justice denied, particularly when the perpetrators of core international crimes are brought on the process of justice. However, delay

may create a doubt but such matter is addressed after taking all the factual circumstances into consideration.

76. The defence submitted that the alleged statements and speeches of the accused do not amount to incitement to commit genocide under customary international law. The Tribunal has to consider it in the light of culture of the country and specific circumstance of the case whether such speeches constitute direct incitement to commit genocide in a particular context.

77. It is not correct to say that during War of Liberation, no protected group as required under Genocide Convention was targeted by Pakistani occupation forces and its allied forces to commit offences of genocide. It is gathered from common facts of knowledge that the occupation forces launched war in the night following 25th March 1971 against a protected group Bangalee nation who sided for the independence of Bangladesh.

78. It is submitted by the defence that only Razakar Bahini was the statutory body which acted as an auxiliary force under the command of Pakistan occupation forces but other organs namely, Peace Committee, Al-Badr, Al-Shams and Al-Mujaheed were not statutory auxiliary forces upon which the accused had no command or control and as such he cannot be held liable for any kind of superior responsibility as contemplated in section 4(2) of the Act.

79. Section 3(1) of the Act of 1973 was amended in 2009 by incorporating the phrase 'any individual' or 'group of individuals' with intent to broaden the jurisdiction of the tribunal so that both armed and non-armed persons can be brought to justice. We do not hesitate to hold that after amendment of section 3(1) of the Act, it has become immaterial to determine

whether the alleged subordinate organs of Jamaat-e-Islami were statutory or non-statutory body for the purpose of holding trial against them under the Act. Now, law stands that any person or group of persons or their superiors whether armed forces or not, can be prosecuted on the charge of offences as specified in section 3(2) of the Act.

80. Mr. Tajul Islam, the learned counsel has submitted that the offences of abduction, torture and confinement were not listed as offences in the customary international crimes in 1971 and as such the accused cannot be charged for those offences on the basis of ICT Act of 1973.

81. In the above context it is our considered view that the offences of abduction, torture and confinement are very much scheduled offences under section 3(2)(a) of the Act and as such enlistment of those offences in the customary international law prior to 1971 is quite immaterial to the tribunal. No law whether national or international can debar the tribunal to try the scheduled offences as specified in section 3(2) of the Act as it is a special Statute of the country. Moreover, the provisions of trial relating to international crimes under ICT Act of 1973 have been protected by Article 47(3) and 47A of the constitution.

82. On this issue our Appellate Division has observed **in the case of Abdul Quader Molla** as under:

" So, CIL cannot be applied by a domestic tribunal if those are inconsistent with an Act of Parliament or prior judicial decisions of final authority. The domestic courts have to make sure that what they are doing is consonant with the conditions of internal competence under which they must work.

Thus the rule of international law shall not be applied if it is contrary to a statute.

There is no rule of CIL that prohibits our domestic tribunal to proceed with the trial as per our domestic legislation, and as such, it can be safely said that rules of public international law allows our domestic tribunal to proceed with the trial as per our Act. In short, the rules of international law whether applicable or not, our domestic tribunal has the jurisdiction to continue with the trial in any manner acting in derogation of the rules of public international law. Besides, there is nothing repugnant to CIL in the Act, 1973, which is consonant with the provisions of CIL." [Page, 79]

XXII. The status and role of accused Motiur Rahman Nizami in 1971

83. From the submissions of the learned lawyers of both the parties as well as from the documents submitted by both the parties, it is an admitted fact that accused Motiur Rahman Nizami was the president of East Pakistan Islami Chhatra Sangha for 3 years, thereafter he became President of All-Pakistan Islami Chhatra Sangha for the years 1969 to 1971. The accused himself admitted the above fact in an interview published in a urdu book titled as "Job Huh Nazime-Ala" which was translated in Bengali named as "বাজি হলে মফবিকরী উজ্জ্বল" Ext. no. [AS].

84. The list of central committee of Islami Chhatra Sangha [Al-Badr High Command] has been incorporated in the book titled as "GKvĒġi i NvZK `vj vġj iv tK ‡Kv_vq" [Ekattorer Ghatok Dalalra Ke Kothai] at page no. 190 published in 1987 by " gyl "hġk †PZbv weKvk†Kv`" [Muktijoddhha Chetana Bikashkendro].

The name of the members of that ICS Central Committee (Al-Badr High Command) is quoted below:

Name with designation in 1971----- Where then in 1987

Motiur Rahman Nizami: Head of whole Pakistan	Assist. Gen. Secretary, Jamaat-e-Islami
Ali Ahsan Muhammed Mujahid: Head of East Pakistan	Amir: Dhaka Mohanogori Jamat and Director of Weekly Sunar Bangla.
Mir Kashem Ali: Chittagong head to start wity, later 3 rd in rank	Dhaka Mohanagari Jamt Nayebe Amir, Director of Rabaat-e-Alaam (Bangladesh) and member, Ibn Sina Trust.
Muhammed Yunus:	Jamt Majlish-e-Sura member, Director of Islami Bank, director of Islamic Somaj Kollyan Somiti, President of Muslim Businessmen's Society.
Muhammed Kamrujjaman: Chief Organizer of Bodor Bahini	Central Propaganda Secretary of Jamat-e-Islami and Editor of Weekly Sunar Bangla

Ashraf Hussain: Established Bodor Bahini and head of Mymensingh district.	Businessman in Dhaka
Muhammed Shamsul Haque: Head of Dhaka City	Member: Majlish-e-Sura, Jamat-e-Islami
Mustafa Sawkat Imran: One of the leader of Dhaka City	Never found after the liberation war
Ashrafujjaman Khan: member of Dhaka City High Command and 'Chief Executor' (PRODAN JALLAD) of systematic killing of the intellectuals	Now, working in Saudi Arabia
A.S.M. Ruhul Kuddus: One of the leader of Dhaka City	Member: Majlish-e-Sura, Jamat-e-Islami
Sardar Abdus Salam: Head of Dhaka district	Central Training Secretary Jamaat-e-Islami
Kurram Ja Murad:	International Jamat leader in London, Coordinates liason between Jamat in different countries
Abdul Bari: Head of Jamalpur district	Businessman in Dhaka
Abdul Hai Faruki: Head of Rajshahi district	Businessman in Dubai
Abdul Jaher Muhammed Naser: Head of Chittagong district	Saudi Ambassador's personal assistant

Matiur Rahman Khan: Head of
Khulna district

Work in Jeddah, Saudi
Arabia

Chowdhury Mayeen uddin:
'Operation in- charge' (main killer)
of systematic killing of the intellectuals

Lives in London and
Editor of Jamat's Weekly
Dawaat and leader of
London-based Jamat-
crony, Dawatul Islam

85. Mr. Mizanul Islam , the learned defence counsel has submitted that accused Motiur Rahman Nizami was the president of Pakistan Islami Chhatra Sangha up to September 1971 but he was never chief of Al-Badr Bahini and the prosecution could not produce any document which came into existence prior to 1980 to prove the allegations as brought by the prosecution.

86. In reply, Mr. Muhammad Ali, the learned prosecutor has submitted that prosecution has produced sufficient documents to prove that the accused was the President of All-Pakistan Islami Chhatra Sangha as well as ex-officio chief of Al-Badr Bahini during the War of Liberation of Bangladesh.

87. P.W.1 Misbahur Rahman Chowdhury, the Chairman of Bangladesh Islami Oikka Jote has testified that during the War of Liberation of Bangladesh in 1971, accused Motiur Rahman Nizami was the president of the then Pakistan Islami Chhatra Sangha as well as the chief of Al-Badr Bahini till its victory day.

88. P.W. 13 Shamoli Nasrin Chowdhury, the wife of martyr Dr. Abdul Alim Chowdhury has testified that on 15th December 1971 in the afternoon

some members of Al-Badr Bahini forcefully entered into their house and directed her husband saying " hands up" and also told him that at the instance of their High command Motiur Rahman Nizami they came there and took him away blind folded.

89. P.W. 23 Syeda Salma Mahmud, the wife of martyr Dr. Azharul Huq has testified that on 15th November, 1971 in the morning while her husband Dr. Azharul Huq and her neighbour Dr. Humayan Kabir were taking preparation for going to hospital at that time, Pakistan army accompanied by some armed Bangalees appeared there and abducted them at gun-point and on query they claimed themselves as the members of Al-Badr Bahini and at the instance of their High Command Motiur Rahman Nizami they took away the said two doctors therefrom.

90. D.W.4 Md. Nazibur Rahman is the son of accused Motiur Rahman Nizami, has admitted in cross-examination that his father was the president of East Pakistan Islami Chhatra Sangha from 1966 to 1969 and he was also president of All-Pakistan Islami Chhatra Sangha since 1969 to September, 1971, but he was never involved in atrocious activities of the perpetrators in 1971. The evidence adduced by D.W.4 lead us to hold that the accused as the president of the student wing of the Jamaat-e-Islami had control and supervision over all the members of Islami Chhatra Sangha at least upto September, 1971.

91. Let us examine some books and news reportings filed by both the parties to have a true picture about the role of accused Motiur Rahman Nizami and his students organization namely Islami Chhatra Sangha [ICS]

during the War of Liberation, 1971. In this regard, some citations from some nationally and internationally reputed books and news reportings are discussed below.

92. The vital role of Jamaat-e-Islami in creating the Al-Badr Bahini is reflected from the narration of the book titled "Sunset at Midday" [Ext. 28(3)] written by Mohiuddin Chowdhury, a leader of the peace committee, Noakhali district in 1971 who left Bangladesh for Pakistan in May, 1972 [publishers note] Qirtas publications 1998, Karachi, Pakistan at page 97 of the book. The said narration is quoted below:

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

93. The writer of "Sunset at Midday" is a Bangladeshi origin who in his book claimed himself to be a district level leader of political party and peace committee of Noakhali. He candidly narrated that he sided with Pakistan army and played important role to save Pakistan. His narrations about the

formation of Rajakar and Al-Badr Bahini as depicted in his book appear to be most trustworthy.

94. Al-Badr Bahini acted as the Pakistani Army's ' death squads' and exterminated leading left wing professors , journalists, litterati, and even doctors [Source: Pakistan Between Mosque and Military (Ext. 28/1)]: Written by Husain Haqqani, published by Carnegie Endowment For International Peace, Washington D.C, U.S.A. first published in 2005, page 79. Acting as 'death squads' of Pakistan occupation army in furtherance of policy and plan unequivocally proves that the Al-Badr Bahini was a para militia force created to assist the Pakistan Army as its auxiliary force. The author narrated at page 79 in his said book that-

" The Jamaat-e-Islami and especially its student wing, the Islami Jamiat -e-Talaba (IJT), joined the military's effort in May 1971 to launch two paramilitary counterinsurgency units. The IJT provided a large number of recruits. The two special brigades of Islamist cadres were named Al-Shams (the sun, in Arabic) and Al-Badr (the moon)A separate Rajakars Directorate was established 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 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, even doctor. "

95. Hussain Haqqani, the writer of the book titled "Pakistan between Mosque and Military" is Pakistani origin. His career as a journalist started with work as East Asian correspondent for the Muslim world . He served as an adviser to three Pakistani Prime Ministers. This book is an authoritative and comprehensive account of the origins of relationship between Islamist group and Pakistani army. The above citation testifies that Jamaat-e-Islami and its student wing Islami Chhatra Sangha had played a substantial role in organising and establishing its notorious wing Al-Badr, the death squads in execution of common policy and plan. Accordingly, the above citation of the book bears probative value to rely upon.

96. It is narrated at page no. 258 of the book named " Sectarianism and Politico-Religious Terrorism in Pakistan" revised edition, 1993 by Musa Khan Jalazai [Ext.31] about the role played by the accused in the activities of Al-Badr Bahini which is quoted below:

" The campaign confirmed Jamiat's place in rational politics, especially in 1971, when Jamiat began to interact directly with the military government of East Pakistan in an effort to crush Bengali nationalism. As a

result of these contracts, Jamiat Joined the Pakistani military's effort in May 1971 to launch two paramilitary counterinsurgency units in East Pakistan, Al-Badr and Al-Shams, to combat Mukti Bahini, the Bengali guerrilla organization. Jamiat provided a large number of recruits for the two units, especially Al-Badr, the decision of join Al-Badr and Al-Shams was taken by Motiur Rahman Nizami, Jamiat's nazimia'la at the time who was stationed at Dacca University."

97. Musa Khan Jalazai is an Afghan author and renowned journalist. He has obtained research experience in politics for more than two decades in all over Asian countries. He is also an expert of intelligence and security analysis . The contents of the book are most authoratative and reliable as the author is a reputed journalist and researcher in the field of terrorism issues. The writer in his book has specifically mentioned the name of the accused as the chief of Al-Badr Bahini.

[under line is supplied by us]

98. Seyyed Vali Reza Nasr wrote a book titled as " Vanguard of the Islamic Revolution [Ext. 28] published in 1994 in the United States of America . This book contains the structure and social base of the Jamaat-e-Islami narrating its religious and political activities including its role during the War of Liberation of Bangladesh. A relevant portion of the book cited at the bottom of page no. 66 is as under:

" The campaign confirmed the IJTs (Islami Jamaat-e-Talabah) in national politics specially in May 1971, when the IJT joined the army's counter insurgency campaign in East Pakistan with the help of the army the IJT organised two paramilitary units, called Al-Badr and Al-Shams to fight the Bangalee guerrilus. Most of the Al-Badr consisted of IJT members who also galvanised support for the operation among the Muhajir community settled in East Pakistan, Motiur Rahman Nizami, the IJT's Nazim-e-Ala (supreme head or organiser) at the time, organized Al-Badr and Al-Shams from Dhaka University."

99. Pakistani writer Selim Mansur Khaled wrote a book named "Al-Badr" which was published in February 2010 at Lahore, Pakistan and it was translated in Bengali with the assistance of Abed Hussain. It has been narrated in that book [Ext. 28(2)] at page nos. 129 to 131] that during War of Liberation of Bangladesh that the members of Al-Badr Bahini were provided both psychological and military training by Pakistani army and they were also provided with monthly allowance to the tune of Tk. 90/- per head. It is also evident that Al-Badr Bahini had structural body with five units indicating requisite number of personnel for each of such units. All the aforesaid informations set out in the book 'Al-Badr' gives us sufficient indication to hold that the Al-Badr Bahini collaborated Pakistan occupation army as auxiliary force in committing atrocities all over Bangladesh in 1971.

100. A question may arise how Al-Badr Bahini was formed and by whom ?

It is evident from the above citations of different books and news reportings that Al-Badr Bahini was formed by the members of Islami Chhatra Sangha [ICS], the student wing of Jamaat-e-Islami [IJT] and it provided support to the Pakistan occupation force in executing their plans and designs. A report published in the Economist dated 01 July 2010 is as follows:

" Bangladesh formerly East Pakistan became independent in December 1971 after a nine month war against West Pakistan. The west's army had the support of many of East Pakistan's Islamic Parties. They included Jamaat-e-Islami, still Bangladesh's largest Islamist Party, which has a student wing that manned a pro-army paramilitary body, called 'Al-Badr'. "

[Source: - The Economist, 01 July 2010.]

101. Rabindranath Tribedi wrote a book on liberation war titled "71 Gi `kgvm" [Ext. no. 42] published in 1997. The writer has depicted accused Motiur Rahman Nizami as the chief of both Al-Badr Bahini and Islami Chhatra Sangha in that book at page no. 341 . It has been narrated therein that the accused made an inciting speech in presence of the members of Islami Chhatra Sangha, Chittagong Unit where ICS leaders of Chittagong University namely Abu Naser and Mir Kashem Ali were present.

102. Mr. Mizanul Islam, the learned defence counsel and D.W.4 Md. Nazibur Rahman, the son of accused Motiur Rahman Nizami, have categorically contended that during the War of Liberation, accused Motiur Rahman Nizami was the president of All-Pakistan Islami Chhatra Sangha and the same was the student wing of Jamaat-e-Islami but there was no proof that he was in any way involved with Al-Badr Bahini or he participated in any activities of Al-Badr Bahini at that time.

103. The above submissions made on behalf of the defence is found to be incorrect. D.W.4 Md. Nazibur Rahman , the son of accused Motiur Rahman Nizami who is a lawyer by profession, has candidly admitted in cross-examination that he read the referred citations of the prosecution [exhibited] documents namely " Sectarianism and Politico, Religious Terrorism in Pakistan, Sunset at Midday, Vanguard of the Islamic Revolution and Pakistan Between Mosque and Military. From the citations of those books, it is well proved that 'Al-Badr' Bahini was formed mainly by the members of Islami Chhatra Sangha [ICS]. It is also admitted fact that during the War of Liberation accused Motiur Rahman Nizami was the president of All-Pakistan Islami Chhatra Sangha. By the aforesaid documentary evidence it is well proved that Al-Badr Bahini was formed under the control and supervision of the ICS Chief accused Motiur Rahman Nizami in 1971. This fact has also been corroborated by the book named GKvĔī i NvZK I `vj vj iv tK tKv_vq [Ext. -35] at page -190 where the name of the accused has been listed at the top of central committee of Islami Chhatra Sangha depicting him as a High Command of Al-Badr Bahini. Thus, we find that the accused was not

only the Chief of ICS, but also Ex-Officio Chief of Al-Badr Bahini during the War of Liberation of Bangladesh.

104. In the case in hand, in the light of evidence discussed above, we are led to hold that the accused as the chief of both ICS and Al-Badr Bahini had civil superior responsibility in the commission of offences of crimes against Humanity and genocide pursuant to their plan and design.

105. The oral evidence adduced by P.W. 1 Misbahur Rahman Chawdhury, P.W. 5 Md. Nazim Uddin Khattab, P.W. 13 Shamoli Nasrin Chawdhury and P.W. 23 Syeda Salma Mahmud have corroborated the documentary evidence discussed above that accused Motiur Rahman Nizami was the Chief of both All-Pakistan Islami Chhatra Sangha and Al-Badr Bahini during the War of Liberation of Bangladesh.

106. It is thus validly inferred that accused Motiur Rahman Nizami being the President of ICS exercised his superior position in transforming Islami Chhatra Sangha into Al-Badr Bahini knowing the consequence of his actions that substantially encouraged, approved and provided moral support to the members of Al-Badr Bahini in committing crimes against Humanity, genocide including intellectual killings all over Bangladesh. The accused's superior power, a position and authentic influence on Al-Badr is a fair indication to hold that he had causal relationship with the members of Al-Badr as his subordinates having effective control over them. Thus, he cannot be relieved from the responsibility for the planned crimes committed by the members of Al-Badr Bahini with whom he had defacto superior-subordinate relationship. It is evident on record that during liberation war the accused

gave a lot of provoking speeches before members of ICS who ultimately became members of Al-Badr Bahini and committed crimes against Humanity at random. Those speeches of the accused were published in the Daily Sangram in the months of August and September 1971 which were marked as Ext. nos. 2(5), 2(10), 2(15) and 2(16).

107. The tribunal is convinced to record its findings that accused Motiur Rahman Nizami as the Chief of both ICS and Al-Badr Bahini for his acts, provoking speeches and culpable association with the "criminal organisation" Al-Badr, is criminally responsible for all criminal activities committed by Al-Badr Bahini and shall also be liable to be punished because of his superior status.

108. Section 4(1) of the Act refers to joint criminal Enterprise [JCE] for joint criminal enterprise liability. Section 4(1) refers that if any scheduled offence of the Act is committed by several persons, in that case each of such persons is liable to be punished as if it were committed by him alone. Therefore, the accused be held responsible for participation in collective criminality under section 4(1) of the Act. On the other hand, the prosecution has successfully proved that the accused enjoyed superior status because of his position as the chief of Islamic Chhatra Sangha [ICS] and ex-officio chief of Al-Badr Bahini. It is evident that the accused as the "civil superior" did never take any measure to prevent his subordinates i.e. members of Al-Badr Bahini from committing the crimes against humanity and genocide in question.

109. The status of the accused is proved to have been 'superior' during War of Liberation and thus he would be liable under section 4(2) of the Act for the commission of offences as specified under section 3(2) of the Act by his subordinates.

XXIII. Adjudication of charges

Adjudication of Charge No. 01

[Committing the offences for causing arrest, detention, torture and killing of three victims including Kasim Uddin]

110. Summary Charge: On 04.06.1971 Kasim Uddin, the Head Moulana of Pabna Zila School and a social worker, was apprehended by Pakistani invading force at the instigation of the accused and he was severely tortured in presence of the accused in the army camp at Nurpur Wapda Power House in Pabna town as he was perceived to be a supporter of the campaign to free Bangladesh from Pakistani invading force. On 10.06.1971 he was taken to the bank of Isamoti River along with two other persons where they were shot dead at the instance of the accused. Upon such allegation, accused Motiur Rahman Nizami has been indicted for the physical participation and also for substantially contributing to the actual commission of offence of acts of arrest, detention, torture and killing as crimes against Humanity as specified in section 3(2)(a) of the Act read with section 4(1) and 4(2) of the Act.

Discussion of evidence:

111. Md. Habibur Rahman Habib as P.W.4 has testified before the tribunal that he is a freedom-fighter and now he is the commander of Pabna District Command of freedom fighters. During his training in India he came to know

that Moulana Kasim Uddin, the Head Moulana of Pabna Zila School, was killed. He has further testified that for showing sympathy to the family of Moulana Kasim Uddin he went to meet his [Kasim Uddin] son Shibly in their house on 19th August, 1971. Shibly told him that on 4th June, 1971 his father asked him to escape from the house because Motiur Rahman Nizami made a list of pro-liberation supporters including his father Moulana Kasim Uddin to arrest them for torture and killing. Feeling insecure Kasim Uddin made an attempt to escape by riding on a bus but he was apprehended by Pakistani invading force at the instance of some Jamaat-e-Islami supporters and then Kasim Uddin was taken to Nurpur army camp. Shibly and his family members went to that army camp to release Moulana Kasim Uddin, where they saw Motiur Rahman Nizami entering the army camp. Thereafter, they cried out and requested Nizami [accused] to release Kasim Uddin but Nizami told Shibly's mother in a satirical tone to ask her husband to give training to the freedom fighters. It has been further stated that during the liberation war Moulana Kasim Uddin rendered training to the students by demi-rifle at Pabna Zila School. On 10th June, 1971 Moulana Kasim Uddin was taken to the bank of Madhpur Isamoti River in a bamboo bush along with two other persons from Nurpur army camp, where they were shot dead by Pakistani invading force.

112. Shibly further told him that on getting such news of murder, they went to the scene and found a grave of Kasim Uddin. They also heard from the local people that Motiur Rahman Nizami was present during the killing of Moulana Kasim Uddin and two others. He has further stated that they used to get newspaper named " Daily Sangram" in which they saw some 'articles'

written by Motiur Rahman Nizami and Moulana Abdus Sobhan along with their photographs. After the liberation war such atrocities and crimes against Humanity were reported in the local newspapers. He has further stated that his friend Shibly along with family members went to America around fifteen years ago and they are now residing there. He has identified the accused in the dock.

113. In cross-examination this witness has replied that he heard about accused Motiur Rahman Nizami who usually used to stay in Dhaka and go to Pabna including Sathia twice or thrice a month. He has replied to a question put to him that there were two camps of Pakistani invading force in Pabna town, one at old Polytechnic Institute and another at Nurpur WAPDA Bhaban which he heard while staying in India.

114. Dr. Rothindranath Kundu as P.W.12 has deposed that he obtained MBBS degree in 1984 as IST and then he was posted to the Health Sub-Centre, Atgoria on 14.07.1985 by the order of the government. During his stay at Atgoria he met one of his boyhood friends named Shawpon in the late August, 1971. Shawpon told him that on 10th June, 1971 Moulana Kasim Uddin, a teacher of their school, along with two other persons being blind-folded, was taken to eastern side from the western in an army jeep. Shawpon could see Motiur Rahman Nizami sitting in that jeep accompanied by Pakistan army. He has identified the accused in the dock.

115. In cross-examination this witness has replied that he knew Motiur Rahman Nizami since his student life in college but he never went to the house of Nizami. Motiur Rahman Nizami was the founder of Al-Badr Bahini

which he knew from "Daily Songram" or " Daily Ittefaq" in 1971, but he cannot recall whether he knew it before or after he went to India.

116. Md. Yusuf Ali Biswas as P.W. 21 has stated in his deposition that on 30.12.1970 he joined Pakistan army and he managed to escape from service place in Chittagong when Pakistani invading force made an attack on them. He has further deposed that he came back to his locality facing a serious struggle after attack by Pakistan army. On 9th June, 1971 he was staying in the house of his friend Arshed Ali at village Madhpur where he along with his other friends decided to go to India to have heavy arms with them after training in India for combating with the Pakistani occupation forces.

117. On 10th June, 1971 they had gone to Madhpur Bazar to have breakfast at about 07:00 A.M. -08:00 A.M. At that time they could see two Pakistan army pickup vans coming from Pabna and stopped at the intersection of Madhpur. Then he saw Motiur Rahman Nizami sitting in the front seat of a pickup van with one Pakistani Major. He further saw three persons sitting in the back seat of the van, being blind-folded accompanied by Pakistani invading force. One Kuddus and his [P.W. 21] friend Arshed Ali were sitting with him in the tea stall at that time.

118. After a while Motiur Rahman Nizami showed a sign fingering at the street of Sathia. Then the pickup van started going towards the street of Sathia. Around 15-20 minutes later, they heard numerous sounds of firing from the bank of Isamoti River, the street of Sathia. Feeling insecure they had gone into hiding in a hut. 10-15 minutes later, they saw those pickup vans moving towards Pabna and they also saw Motiur Rahman Nizami beside a Pakistani Major sitting in the pickup van and thereafter they saw the

vans going towards Pabna. They further went to Madhpur Bazar after departure of pickup vans. At that time, the killing news of three persons had spread in the locality and the local people started to speak each other that three persons were killed on the bank of the Isamoti River. They went to the spot and saw three Bangalees being blind folded, tied with black cloths and blood stained with bullet injury lying in a hole. Thereafter, he got down in the hole and took off black cloths, from their faces and he then identified one as Moulana Kasim Uddin, the Head Moulana of Pabna Zila School, among the trio. Remaining dead bodies of two other persons could not be identified by him but the locals used to say each other that Motiur Rahman Nizami brought the Pakistani army and killed them [Moulana Kasim Uddin and two others] on his instruction. He has identified the accused in the dock.

119. In cross-examination he has replied that he saw two pickup vans of Pakistani army standing at the Madhpur intersection, which came from western side to eastern side. The front seat of a pickup van can be used for sitting one or two persons. During his service in the army he rode in the similar pickup van. He did not take measure of length of the front seat but he told that the front seat was bigger than that seat of driver of the pickup van and the pickup van was covered by triple on the top while its back face was open. He saw the face of Motiur Rahman Nizami sitting in the pickup van. He has further replied that his face [accused] was towards south side while he was sitting in the tea stall.

Evaluation of evidence and findings

120. Having gone through the evidence of P.W. 4 it is revealed that P.W. 4 is a valiant freedom fighter who came to know about the killing of Moulana Kasim Uddin, the Head Moulana of Pabna Zila School, during his stay in India. Thereafter, he heard the vivid description about the killing of Moulana Kasim Uddin from his son Shibly when he went to meet Shibly on 19th August, 1971 to show his sympathy. Shibly also told him that Motiur Rahman Nizami made a list of pro-liberation supporters including Kasim Uddin for apprehending them to cause torture and killing.

121. On getting such news Shibly's father tried to escape but ultimately he was captured on 4th June, 1971 by some Rajakars who thereafter took him along with two other persons on 10th June, 1971, after torture at the camp, to the bank of Madhpur Isamoti River nearby a bamboo bush where they were liquidated by them [the Pakistani Invading Force] in presence of Motiur Rahman Nizami. This piece of evidence as stated by P.W. 4 has not been discarded by the defence rather it has revealed from cross-examination that Motiur Rahman Nizami used to stay in Dhaka and sometimes he went to Sathia thana area where the occurrence took place.

122. In the event of such killing the family members of deceased Moulana Kasim Uddin have not been examined and adduced evidence as they left for America around 15[fifteen] years ago. Regarding the killing of Kasim Uddin at the instigation of Motiur Rahman Nizami, P.W. 12 has also described in evidence that Moulana Kasim Uddin, a teacher of their school, along with two others being blind folded, were taken to the eastern side in an army jeep

in which Motiur Rahman Nizami was sitting accompanied by Pakistani army.

123. This part of evidence has been given by P.W. 12 on hearing from his boyhood friend Shawpan. By evaluating the evidence of both the witnesses [P.Ws. 4 and 12] as stated above, it may have considered as hearsay evidence. But P.W. 21 in his deposition has stated that on 10th June, 1971 he along with his two other friends had gone to Madhpur Bazar to have breakfast at about 07:00 to 08:00 A.M. During their stay in the tea stall they saw Motiur Rahman Nizami sitting in the front seat of a pickup van beside one Pakistani Major while three other persons were being blind folded, accompanied by Pakistani invading force sitting in the back seat of the pickup van. After a short while they heard numerous sounds of firing from the bank of Isamoti River on the street of Sathia.

124. On hearing sounds of such firing they being feared, had gone into hiding in a hut. After departure of the pickup vans they went to the crime site along with many other locals who started to speak each other that three persons were killed and dumped in a hole on the bank of the Isamoti River by the Pakistani occupation force in presence of Motiur Rahman Nizami.

125. Subsequently, they could identify blood-stained dead body of Moulana Kasim Uddin but identification of two other persons could not be ascertained. This version of evidence has not been rebutted by the defence rather on cross-examination P.W. 21 has given a vivid description of an army pickup van re-affirming the evidence regarding the pickup van used during the killing of Moulana Kasim Uddin and two others by the accused and Pakistan army.

126. Here, we find material evidence of three witnesses, examined by the prosecution in proving the instant charge. Of them, P.W. 21 is an eye witness who had occasion to witness the complicity and actual physical presence of the accused in the killing of Moulana Kasim Uddin and two others. Sustaining conviction on the basis of hearsay evidence is no longer approved by general law but it has been praised by enacting ICT Act, 1973, if the hearsay evidence is being found credible to be corroborated by the testimony of other witnesses. Hearsay evidence is admissible and the court can act on it arriving at a decision on fact in issue provided it carries reasonable probative value [Rule 56 (2) of the ROP].

127. It is also found from the evidence of P.W. 4 that he came to know about the killing of Moulana Kasim Uddin from his [deceased] son who had left for America around 15 years ago. So there was no scope to produce him in the tribunal by the prosecution as long as he went away many years ago. In his absence P.W. 4 supports the case of P.W. 21 who is an eye witness. Nevertheless, P.W. 12 has also described in the same tune as stated by P.W. 4 deposing that he came to know from his boyhood friend Shawpan how Kasim Uddin was liquidated in presence of the accused.

128. Therefore, we do not find any reason to disbelieve the above mentioned hearsay witnesses by whose testimonies do not appear to have been stained by any flaw. Rather these testimonies have supported the direct evidence adduced by P.W. 21. Although defence has tried to convince us that P.W.21 is not a credible witness as he was sacked from service by a departmental proceeding. With regard to this effect it is not acceptable in law that any evidence of witness in crime can not be considered credible for

his personal conduct in service, particularly the crimes against Humanity committed during the Liberation War , 1971.

129. The defence has drawn our attention to Ext. BG, a press release published in a Bengali newspaper named 'Bangla Patrika' dated 25.09.2013 wherefrom it appears that one Shibly gave a interview to a reporter of said newspaper to the effect that he came to know from various newspapers that Habibur Rahman Habib, the District Commander of Pabna Muktiyodha Sangsad in his evidence before this tribunal stated that Matiur Rahman Nizami had been involved in the killing of his father Moulana Kasim Uddin. Said Shibly told the reporter of that newspaper that he did not know Habibur Rahman Habib and he never told to him about the killing of his father. It appears from the record that the alleged statement had been published after more than five months of the testimony given by P.W. 4 Habibur Rahman Habib before this tribunal on 16.04.2013. It further appears from the said exhibit that the name of the correspondent of the said newspaper, who allegedly took interview of Shibly, has not been mentioned in the said alleged news item. Rather it appears that at the end of said news report it has been mentioned ' প্রেস রিলিজ ' [press release] which clearly shows the very inconsistency of the source of the said alleged news report. And the very source of the said report is suspicious and doubtful and as such, there is no reason to consider the said exhibit against the testimony of P.W. 4 who has testified before this tribunal on oath. A suspicious and doubtful document cannot nullify the testimony of a witness who testified before the tribunal on oath.

130. Now let us see whether the accused has individual criminal liability in killing of Moulana Kasim Uddin and two others. The person involved by aiding or abetting in the execution of a crime, shall be individually responsible for the same pursuant to a common purpose or design for killing or mistreating the prisoners in the concentration camp where it was foreseeable that such crime might be perpetrated by one or other members of the groups.

131. In the present case, it has come into evidence by P.W. 4 that Motiur Rahman Nizami [accused] had made a list of pro-liberation forces including deceased Moulana Kasim Uddin to apprehend them for torture and killing. And he [Moulana Kasim Uddin] was apprehended on 4th June, 1971 on instruction of the accused. From 4th June to 10th June morning, Kasim Uddin was kept detained in the concentration camp for mistreating and torture.

132. Immediately after his arrest, family members of deceased Kasim Uddin made an approach to the accused for his release, but he [accused] did not pay heed to that effect. Finally he [deceased] was taken to the bank of Isamoti River in order to execute the common plan and design on 10th June, 1971 between 07:00 A.M. to 08:00 A.M. on instruction and presence of the accused as stated by eye witness Md. Yusuf Ali Biswas [P.W. 21]. So, material elements and ingredients have been found against the accused to qualify Joint Criminal Enterprise [JCE] under section 4(1) of the Act of 1973 and intent of the accused was emerged when a list of pro-liberation people was prepared.

133. P.W. 21 Md. Yusuf Ali Biswas, as an eye-witness of the occurrence has candidly testified that he saw accused Motiur Rahman Nizami with

Pakistani Major in a pickup van at Madhpur Bazar on 10.06.1971 while victim Kasim Uddin being blindfolded was carried on by the said pickup van to the bank of Isamoti River where he was gunned down along with two others. P.W. 21 has been cross-examined by the defence but his evidence remains unshaken. 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.

134. In view of the discussion as narrated above, we find that the prosecution has been able to prove the instant charge beyond reasonable doubt against the accused for his substantial contribution and abetment as to abduction and killing of Kasim Uddin and found him guilty to the commission of offences as crimes against Humanity as specified in section 3(2)(a)(g) read with section 4(1) of the Act.

Adjudication of Charge No. 02

[Committing conspiracy, murder, rape and deportation of the civilians of villages of Baousgari, Ruposhi and Demra]

135. Summary charge: On 10-05-1971, accused Motiur Rahman Nizami invited the inhabitants of village Baousgari under Sathia police station, district Pabna, to gather at Baousgari Ruposhi Primary School at around 11.00 A.M. for a meeting, where the accused made a speech telling the villagers that soon Pakistani Army would arrive there to secure “peace” in the area. Indeed, on 14-05-1971 at about 6.00/6.30 A.M. Pakistani Army arrived there along with Rajakars and Asad, an accomplice of the accused. They surrounded the villages of Baousgari, Ruposhi and Demra and then picked up about 450 civilians who were all shot dead. The entire operation was carried out pursuant to pre-arranged plan to indiscriminately eliminate

unarmed civilians. After Killing them, the Pakistani Army and Rajakars then raped about 30-40 women, as a result of which, many of the raped victims were forced to leave the country and, as such, effectively deported to India as refugees. The said Rajakars, comprised of the followers of the accused, were organized under the direction of the accused. Thus, the accused has been charged for commission of offences of conspiracy, murder, rape and deportation as specified under section 3(2)(a) and (g) read with section 4(1) and 4(2) of the Act.

Discussion of evidence:

136. P.W. 9 Md. Aynul Haque has stated that he was a teacher of Ruposhi Govt. Primary School. On 10-05-1971 he having gone to his school saw that 10/12 persons along with the headmaster were sitting there and, he then came to know from the headmaster that those persons had assembled there to form peace committee and at that time headmaster showing a person among those persons said that he was Motiur Rahman Nizami. He has further stated that among those persons he knew Asad since before who was an agent of Pakistani Army. On 14-05-1971 at about 6.00/6.30 A.M. his maternal uncle told them that Pakistani Army having arrived surrounded the villages of Demra, Ruposhi and Baousgari and then he along with others went out to save their lives. At about 11.00/11.30 A.M. he [P.W. 9] saw a helicopter to fly away and, thereafter firing was started and, flames and smoke were being seen and, at about 12.00/1.00 P.M. a man came out from the said surrounding and told them that many people were killed therein. He has further stated that on the following day [15-05-1971] in the morning he having returned back to his village Baousgari at Pagar saw there 300/350

dead bodies including the dead bodies of his maternal uncle Asgar Ali Pramanik, uncle A.K.M. Fakir, cousins namely Ahes Fakir, Afil Fakir, Zamaluddin Pramanik, Azhar Ali Pramanik, his student Moksed Ali, Ram Jogonnath Roy, Boloram Roy, Monindra Nath Nandi, Dilip Kumar Roy, Nirmolendu Nath Roy, Gora Babu and Abdul Jabbar. Then with the help of local people he buried the dead bodies of his relatives in the graveyard and they also buried the dead bodies of the Hindus and the dead bodies of other Muslims were taken away by their relatives. On the same day [15-05-1971] in the afternoon, he came to know that the Pakistani Army raped women most of whom were ultimately deported to India. The aforesaid agent Asad and his accomplices showing path took Pakistani Army to their village. He has further stated that said Asad was involved with the politics of Jamaat-e-Islami. He has identified accused Motiur Rahman Nizami in the dock.

137. In cross-examination, P.W.9 Md. Aynul Haque has stated that during the 9 month long Liberation War, 1971 he was throughout a teacher of Ruposhi Primary School. He has denied the defence suggestion that on 10-05-1971 he did not see accused Motiur Rahman Nizami in his school.

138. P.W. 17 Md. Jamal Uddin has deposed that in the first part of May, accused Motiur Rahman Nizami, a leader of the then Islami Chhatra Sangha, in order to form Al-Badr and Rajakar Bahinis, held a meeting with the local members of Jamaat-e-Islami and Chhatra Sibir in the Ruposhi Govt. Primary School, which he heard from Aynul Haque [P.W. 9] and Shamsul Haque alias Nannu [P.W. 11]. In continuation of that meeting, on 14-05-1971 at dawn under the leadership of accused Motiur Rahman Nizami, Pakistani Army, local Rajakars and Al-Badrs having surrounded the villages of

Ruposhi, Demra and Baousgari killed 450 unarmed civilians by firing shots. Besides, at that time they set fire on 2/3 hundred of houses and shops and plundered the houses and shops of the Hindus and also raped many Hindu and Muslim women there. He has further deposed that he was a commander of a group of freedom-fighters and, he came to know from the apprehended Rajakars and Al-Badrs that at the advice and direction of accused Motiur Rahman Nizami, the atrocities were committed at different places including Sathia police station under district Pabna. He has identified the accused in the dock.

139. P.W. 17 in cross-examination has stated that teacher Md. Aynul Haque [P.W. 9] is an inhabitant of village Baousgari and he [P.W. 17] used to go to his house and said Aynul Haque was a teacher of Ruposhi School. He has denied the defence suggestions that he has deposed falsely against the accused and the allegations brought against him are all false.

140. P.W. 18 Md. Zahurul Haque has testified that he is a freedom-fighter and he is the acting commander of Sathia police station command of Bangladesh Muktiyodda Sangsad. In 1971, he was the headmaster of Rajnarayanpur Girls School under Bera police station. He came to know from Md. Aynul Haque [P.W. 9], a teacher of Ruposhi Primary School, that on 10-05-1971 accused Motiur Rahman Nizami, the president of the then Islami Chhatra Sangha, along with 10/12 agents having come to Ruposhi Primary School held a meeting with the headmaster of that school and others and disclosed that Pakistani Army would come there very soon to form a peace committee. In that meeting the accused directed that Rajakar and Al-Badr Bahinis were also to be formed in order to co-operate with the

Pakistani Army to that end. Thereafter, on 14-05-1971 after the Fazr prayer, he waked up on hearing the sudden firing shots and went towards the road and he saw from behind the back of a bush that accused Motiur Rahman Nizami, Asad, Quader, Sattar along with some agents and Pakistani Army indiscriminately by firing shots were going towards south through the road. Seeing that situation, he along with his companions fled away to a beel [pond], eastern side of their village and, after 6/7 hours they having come back to Ruposhi Baousgari, saw there about 400 dead bodies of Hindu and Muslim male and females lying beside the road and then they heard from the crowd assembled there that in presence of accused Motiur Rahman Nizami and under his direction, the Pakistani Army having gathered those unarmed innocent persons killed them by firing indiscriminate shots, and amongst those dead bodies he could identify 50/60 dead bodies including the dead bodies of martyrs, namely, Abdul Jabbar, Asgar Ali, Muksed Ali, Idris Ali, Eken Ali, Malom Pramanik and his brother Kalom Pramanik, Wajuddin, Sree Baloram Das, Upendra Nath and Zitendra Nath. He has identified the accused in the dock.

141. In cross-examination, P.W. 18 has stated that he had no talk with accused Motiur Rahman Nizami in 1971 or before that, but he saw him. In 1971, he was the convener of the Sathia Shadhinata Songram Parishad [Independence Liberation Council]. He heard the firing shots in the villages of Baousgari and Demra from the Baousgari beel [pond] where he was staying and, that firing was stopped just after the sun rose. After having been stopped of firing shots, they came back to the villages of Baousgari and Demra from the Beel at about 1.00/2.00 P.M. Accused Motiur Rahman

Nizami was the president of the then Islami Chhatra Sangha. He has further stated that he heard from the apprehended Rajakars and Al-Badrs that the accused staying in Pabna used to make plans with the Pakistani Army. He has denied the defence suggestion that he has deposed falsely.

142. P.W. 11 Md. Shamsul Haque alias Nannu has deposed that on 10-05-1971 at about 10.00/11.00 A.M., accused Motiur Rahman Nizami along with Asad, an agent of Pakistani Army, and others came to Ruposhi Primary School and held a meeting in the office room of the headmaster and made a speech telling the people assembled there that soon Pakistani Army would come there to secure 'peace' in the area. Having been informed about the said meeting he went towards that school and saw that accused Motiur Rahman Nizami, Asad and others coming out from that primary school were going towards Sathia. He has further deposed that on 14-05-1971 Pakistani Army along with accused Motiur Rahman Nizami, Asad and their accomplices having surrounded the villages of Ruposhi, Baousgari and Demra killed about 450 civilians, set fire on 137 houses, shops, etc. and raped 30/40 women. He has identified the accused in the dock.

Evaluation of evidence and findings:

143. The prosecution has examined as many as 4 witnesses as mentioned above [P.Ws. 9, 11, 17 and 18] to prove the charge no. 02 relating to committing the offences of conspiracy, mass killing, rape and deportation of the unarmed civilians of villages of Baousgari, Ruposhi and Demra. Among these 4 witnesses, P.W.9 Md. Aynul Haque and P.W. 18 Md. Zahurul Haque are very important witnesses as they have claimed themselves as eye witnesses of the alleged occurrence. P.W. 9 was a teacher of Ruposhi Govt.

Primary School during the Liberation War, 1971. He has stated in his deposition that on 10-05-1971 he having gone to his school saw 10/12 persons including accused Motiur Rahman Nizami and Asad, an agent of Pakistani Army, assembled there to form peace committee and at that time the headmaster of that school was sitting with them. P.W. 18 was the headmaster of Rajnarayanpur Girls School under Bera police station during the Liberation War, 1971 and he is a freedom-fighter. He having corroborated the said testimony of P.W. 9 has stated that he came to know from P.W. 9 Aynul Haque that on 10-05-1971 accused Motiur Rahman Nizami, the president of the then Islami Chhatra Sangha, along with 10/12 agents having come to Ruposhi Primary School held a meeting with the headmaster of that school and others and disclosed that Pakistani Army would come there very soon to form peace committee, Rajakar and Al-Badr Bahinis. P.W. 17 Md. Jamal Uddin has also stated that he heard from Aynul Haque [P.W. 9] and Shamsul Haque alias Nannu [P.W.11] that in the first part of May, accused Motiur Rahman Nizami, a leader of the then Islami Chhatra Sangha, in order to form Al-Badr and Rajakar Bahinis, held a meeting with the local members of Jamaat-e-Islami and Chhatra Sibir in the Ruposhi Govt. Primary School. P.W 11 Shamsul Haque alias Nannu has also corroborated the testimonies of P.Ws. 9, 17 and 18 about the holding of said meeting.

144. P.W. 9 Md. Aynul Haque has further stated that on 14-05-1971 in the morning Pakistani Army having surrounded the villages of Demra, Ruposhi and Baousgari committed mass-killings in those villages and, on the following day [15-05-1971] in the morning, he having returned back to his

village Baousgari saw there 300/350 dead bodies including his maternal uncle Asgar Ali Pramanik, uncle A.K.M. Fakir, Afil Fakir, Zamaluddin Pramanik, Azhar Ali Pramanik, his student Moksed Ali, Ram Jogonnath Roy, Boloram Roy, Monindra Nath Nandi, Dilip Kumar Roy, Nirmolendu Nath Roy, Gora Babu and Abdul Jabber. On the same day [15-05-1971] in the afternoon, he came to know that Pakistnai Army raped women most of whom were ultimately deported to India. P.W. 18 Md. Zahurul Haque having corroborated the said testimony of P.W. 9 has stated that on 14-05-1971 after Fazr prayer, he waked up hearing the sudden firing shots and saw that accused Motiur Rahman Nizami, Asad, Quader, Sattar along with some agents and Pakistani Army were indiscriminately firing shots towards south and then he along with others fled away to a beel. After 6/7 hours they having come back to Ruposhi Baousgari saw there about 400 dead bodies lying beside the road and then they heard from the crowd assembled there that in presence of accused Motiur Rahman Nizami and under his direction the Pakistni Army had killed those unarmed innocent civilians by firing indiscriminate shots. P.W. 17 Md. Jamal Uddin has also deposed in line with the testimonies of P.Ws. 9 and 18 stating that on 14-05-1971 at dawn under the leadership of accused Motiur Rahman Nizami, Pakistani Army, local Rajakars and Al-Badrs having surrounded the villages of Ruposhi, Demra and Bauousgari killed there 450 unarmed civilians by firing shots and also raped many women. P.W. 11 Md. Shamsul Haque alias Nannu has also corroborated the testimonies of the above mentioned witnesses. It may be mentioned here that all these prosecution witnesses have identified the accused in the dock.

145. Upon scrutiny of the testimonies of the witnesses as discussed above, we find corroboration among their testimonies. The defence cross-examined these witnesses thoroughly, but could not shake their evidence in respect of charge no. 02. Having considered all the attending facts and circumstances and the evidence on record as discussed above, we are inclined to hold that it is proved beyond reasonable doubt that accused Motiur Rahman Nizami, being the president of the then Islami Chhatra Sangha and ex-officio the commander of Al-badr Bahini, on 10-05-1971 held a meeting with the local members of Jamaat-e-Islami and Islami Chhatra Sangha at Ruposhi Govt. Primary School and made a conspiracy to commit atrocities in the local villages. Pursuant to that conspiracy, on 14-05-1971 in the morning, the accused and his accomplices along with the Paksitani Army having surrounded the villages of Baousgari, Ruposhi and Demra and killed hundreds of unarmed civilians by gun shots in those villages. The accused had direct complicity with the commission of those atrocities. As such, accused Motiur Rahman Nizami is criminally liable under section 4(1) of the Act, 1973 and held him guilty for substantially contributing the actual commission of the offences of conspiracy and murder as crimes against Humanity as specified in section 3(2)(a) and (g) of the Act which are punishable under section 20(2) of the Act.

Adjudication of Charge No. 3

[Committing different international crimes at Physical Training Institute, Mohammadpur, Dhaka]

146. Summary Charge: As a leader of Islami Chhatra Sangha [ICS] accused Motiur Rahman Nizami along with other leaders of Jamaat-e-Islami

started to pay visit to Physical Training Institute, Mohammadpur, Dhaka since early May 1971 and the said institute was turned into a training centre for various auxiliary forces including Rajakar and Al-Badr. Subsequently, it was also used as a Detention Camp and a Torture Cell. In the said Torture Cell many victims were always liquidated after inhuman torture. It was also a centre in which many victims had been eliminated and executed in a pre-arranged manner. As a Chief of Al-Badr accused Motiur Rahman Nizami conspired with Pakistani army officers in order to commit different crimes against Bangalees during his visit to the Physical Training Institute, as a result of which the auxiliary forces along with Pakistani invading force committed different international crimes and crimes against Humanity all over the country. Thus, the accused has been charged for the physical participation and also for substantially contributing to the commission of offences of torture, murder, rape as crimes against Humanity specified in section 3(2)(a), 3(2)(g) and 3(2)(h) read with section 4(1) and section 4(2) of the Act.

Discussion of evidence:

147. P.W-2 Zahir Uddin Jalal @ Bichchu Jalal has deposed that he is a freedom fighter and was adorned by his company commander as Bichchu for his remarkable contribution as a teenager in the guerilla activities during the war of liberation in 1971. He could recognize Motiur Rahman Nizami as he was the leader of Islami Chhatra Sangha [ICS] by his [P.W-2] father's indication when Motiur Rahman Nizami, Ali Ahsan Mujahid along with others went to Circuit House from nearby Pakistan army camp on 11th April,

1971. According to intelligence report, they were men of infamous nature and they had started acting as agents of Pakistan army. For which his father being a Superintendent of Police [SP] cautioned him to be aware of those men. He took guerilla training in India and after returning to Dhaka he joined 'Sajib Group' by taking responsibility of Operation of War in the western part of Dhaka where Mohammadpur Physical Training Institute was used as Al-Badr head quarters. In the said Institute Motiur Rahman Nizami, Ali Ahasan Mujahid and others used to come for attending several meetings with Pakistani invading force who gave training to the members of Al-Badr Bahini. Doctors, Writers, Intellectuals, Journalists, Freedom Fighters and many other professionals being blind folded [eyes], were brought to the Physical Training Institute from the different parts of Dhaka City and the said blind folded victims were tortured there on the instruction of Motiur Rahman Nizami and others. Missing news of the said professionals was being increased since 7th December to 14th December, 1971. Al-Badr Commander Motiur Rahman Nizami and his accomplices holding musk of black clothes brought pro-liberation supporters to the said Physical Training Institute. They [freedom fighters] had followed the exact locations of the Pakistani invading forces around and inside the institute under leadership of Commander Sajib and he [P.W 2] got slaughtered dead bodies and nine human amputated skulls of victims on 17th December, 1971. Thereafter, he went to Rayer Bazar Brick Field where he had seen many bullet injured dead bodies being blind folded of which some were decomposed and some were fresh. Local said each other that Motiur Rahman Nizami along with Al-Badr Bahini threw the dead bodies in the brick field after killing them by fire

arms. Later, photographs of the said dead bodies were published in the daily newspapers. This witness has identified the accused in the dock.

148. In cross-examination he has replied that it is not a fact that he did not tell the above incidents to the Investigation Officer.

149. Md. Rustom Ali as P.W-3 has testified that he used to reside with his father in the premises of Mohammadpur Physical Training College, Dhaka as his father was a fourth class employee of the college. In describing what he witnessed occasionally for the reason of his staying at the college premises with his parents, he has narrated that training activity for Razakar and Al-Badr was started in the college field since 4/5 months after establishment of the camp following the war of liberation. One day he had seen Motiur Rahman Nizami, Ghulam Azam and Mujahid coming to army camp by an army jeep when he reached at the college gate with a view to go for bazar. On asking he heard from Razakars and Al-Badr men guarding the college gate telling that they were of their leaders. They [Nizami, Ghulam Azam and Mujahid] often moved towards Al-Badr, Razakar office inside the college and spent sometimes having talks with army officers, Razakars and Al-Badr staying in the college field, which he heard. One day he expressed his desire to join the Liberation War when he met Jahir Uddin Jalal but Jalal asked him to provide information about the Pakistani army, Rajakars and Al-Badr at the camp. Accordingly, he provided some information to Jalal who made an attempt to attack but in vain due to huge gathering of Razakars and Al-Badrs. Around 200/250 people including intellectuals, artists, freedom fighters, some Bangalee women and Bangalee army were brought to the

college camp [Al-Badr Head Quarters] by Al-Badrs, Rajakars and Pakistani invading forces, 10(ten) days before the victory and subsequently they were killed after inhuman torture. P.W. 3 has also deposed that Al-Badr and Rajakars before fleeing away from the camp at Physical College, on the day of independence, having shaved 'their beard and moustache' slaughtered a Bangalee doctor inside the camp. He [P.W.3] recovered around two sacks of beard and moustache of Al-Badr and Rajakars. He handed over nine human skulls of victims recovered from inside the camp and 100/150 gouged human eyes abandoned at the brick of Rahim Bepary to the P.W. 2 [Jahir Uddin Jalal].

150. P.W. 13 Shamoli Nasrin Chowdhury wife of martyr Abdul Alim Chowdhury has deposed that she came to know from various articles, written by one Delwar Hossain, published in various news papers that intellectuals including doctors, engineers, journalists, literati, being blind folded, were used to take to Mohammadpur physical training Institute, the place of execution and killed them there after having tortured. Said Delwar Hossain himself was also taken to that place of execution, but he luckily survived.

Evaluation of evidence and findings:

151. In the event of proving this charge prosecution has examined and adduced live witnesses relating to mass killing of various professionals including freedom fighters at Mohammadpur Physical Training Institute, established as 'Detention and Torture cell'. P.W. 2 Jahir Uddin Jalal @ Bichhu Jalal has described in his deposition that Motiur Rahman Nizami

along with other leaders of Jamaat-e- Islami and Al-Badr Bahini used to come for attending several meetings with Pakistani invading forces and its auxiliary forces including Al-Badr Bahini at Mohammadpur Physical Training Institute during the war of liberation in 1971 where various professionals being blind folded, were brought and liquidated there, after brutally tortured them. He has further stated that Al-Badr Commander Motiur Rahman Nizami and his accomplices holding musk of black cloths brought pro-liberation supporters to the said Physical Training Institute.

152. On 17th December, 1971 just one day after independence of Bangladesh, he found slaughtered dead bodies and nine human amputated skulls of victims abandoned at the Physical College. He also went to Rayer Bazar brick field near the Physical Training Institute where he had seen many bullet injured dead bodies of which some were decomposed and some were fresh. Local said to each other that Motiur Rahman Nizami along with Al-Badr Bahini threw the dead bodies in the brick field after killing them by fire arms. The defence did not put any suggest to the above witnesses that the Physical Training Institute was not established as ‘Torture Cell’ and Training Centre for Al-Badr Bahini and its accomplice forces.

153. It is a fact of common knowledge that many Bangalees including women and pro-liberation forces of our country were liquidated by Pakistani invading force along with its auxiliary forces including Al-Badar Bahini of which accused Motiur Rahman Nizami was a high command until the liberation war ended. It is also a fact of common knowledge that Al-Badr Head Quarters was established at Mohammadpur Physical Training Institute,

Dhaka which has been supported by exhibit-35 containing at page no. 55 as under:

“তমতপত গবমি 17 ZwiতL ivRvKvi ewnbxi cাব I
 kwiś Kivgwi vj qvতRv AvdmvিতK vbতq tMvj vg AvRg tgvnvৎ cti
 vdiRKvj tUvbs tm>Uvতি th ivRvKvi I Avje`i vki ei cwi`k
 Kti vQতj b, tmiU vQj Avje`িত`i tnWতKivqvUত | `vaxbZvgbv
 evxRvত`i tekxi fvMতK Avje`i iv c`tg tPvL tetta GLvতbB
 vbতq Avtm | vbhতZতি ci GLvb ত`তKB Zত`i ivতqi evRvতি I
 gxi cti i vkqvj ewnomn Ab`vb` ea`fvতZ vbতq vMতq nZ`v Kiv
 nq |”

154. Ext. 35 the book titled " GKvত`i i NvZK I `vj vj iv তK তKv_vq" [relevant page 124, 125] narrates that

" তmB AwZ bksm nZ`vhÁ m•bæ Kivi Rb` Avje`i iv
 e`vcKfvte evxRvত`i AcniY Kiv ii" Kti 10 vMতmত` ত`তK | Kvd
 এবং ব্লাক আউটের মধ্যে জীপে করে আলবদররা দিন রাত বুদ্ধিজীবীদের বাড়ী
 evox thতq Zত`i তK c`tg mvi v Mvতq Kiv`v gvLv GKvU evtm তZvতj | Gici
 evm tevSvB evxRvত mn bvbv তরের বন্দীকে প্রথম মোহাম্মদপুরের ফিজিক্যাল
 tUvbs Kতj তRi Avje`i tnWতKivqvUতi vbhতZ I vRÁvmvত` Kivi Rb`
 vbতq hvI qv nq | Avje`িত`i GB AcniY
 ত`vqvতWi tbZZj w`Z nq তKvb Avje`i KgvUvi bZev cvKewnbxi
 Abvাক K`ততb gh`vi তKvb Avdmvi | mতZt cvK ewnbxi vbR`^

Uv#M@ epxRixet` i Acni#Yi e`vcv#i wbwOZ nevi Rb`B cvK tmbv
 Awdmvi AcniY t`«qv#Wi tbZZ;w` Z| "

155. A report published in The Daily Ittefaque, 19 December 1971 and in the Daily Ovserver, 19 December 1971. The report narrates that

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

**[Source: Report titled " Intellectual murdered in cold blood
 " published in the Daily Ovserver, 19 December 1971]**

156. By supporting and corroborating the evidence of P.W 2, Md. Rustom Ali as P.W 3 has narrated in his deposition that 4/5 months after establishment of the camp at Mohammadpur Training Institute, one day he had seen Motiur Rahman Nizami along with two other stalwarts coming to the camp by an army jeep when he was at the college gate and on asking he came to know from Rajakars and Al-Badr while they were on duty at the college gate that they [Accused himself, Ghulam Azam and Mujahid] were of their leaders who often moved towards office inside the college and spent there sometimes having talks with army officers, Rajakars and Al-Badr.

157. This version of evidence finds directly the presence and movement of the accused in the Al-Badr camp at Mohammad Physical Institute. It finds further that this witness had also seen directly and recognized the accused at the indication of Al-Badr and Rajakars staying at the college gate. This

witness also heard that Motiur Rahman Nizami [accused], Ghulam Azam and Mujahid often moved towards Al-Badr, Rajakars office inside the college. This witness, one day had approached to join the Liberation War when he met Zahir Uddin Jalal @ Bichchu Jalal [P.W 2] who asked him to extract information about Al-Badr, Rajakars and Pakistani army of the Al-Badr camp. This version of evidence shows that both the witnesses had interaction to each other about collecting information and location of the Al-Badr and Pakistani army at Mohammadpur Physical Training Institute, during the liberation war, in 1971.

158. P.W. 3 has further testified that Al-Badr, Rajakars before fleeing away from the camp at Physical Institute, on the day of independence, having shaved, their beard and moustache slaughtered a Bangalee doctor inside the camp. He recovered around two sacks of beard and moustache of Al-Badr and Rajakars. He handed over nine human skulls of victims and 100/150 of gouged human eyes recovered from inside the camp and the brick field of Rahim Bepary.

159. The defence has raised question regarding the character and veracity of this witness. But it appears from his evidence that he had been staying at his father's quarters inside the college campus as his father was a 4th Class employee of the college and thereby it was possible of being aware of the activities carried out there [Al-Badr Head Quarters] and now this witness himself is an employee of the Physical Institute at Mohammadpur and as such there is no reason to disbelieve the evidence adduced by him before the tribunal.

160. Defence has also challenged veracity of P.W.2 Zahiruddin Jalal alias Bichhu Jalal on the plea that in his cross-examination he has made some inconsistent statements regarding his participation in the S.S.C Examination and the date of death of martyr Rumi's father. These inconsistent statements as alleged by the defence will not ipso facto make his entire testimony unreliable. It has to be borne in mind that P.W. 2 is a valient freedom-fighter when he was a teenager and he took risk of his life and this fact has not been challenged by the defence and as such his entire evidence cannot be brushed aside on the plea of a few inconsistencies on irrelevant issue.

161. It is now the history of common knowledge that during the liberation war many pro-liberation supporters belonging to diverse professions were picked up forcibly from their homes from different parts of Dhaka city by armed men belonging to Al-Badr, an auxiliary force formed mainly of workers of ICS, of which the Chief was Motiur Rahman Nizami, for perpetrating the atrocious crimes with the Pakistani army. It stands proved that Mohammadpur Physical Training Institute was the Al-Badr Head Quarters and it was known as 'Torture Cell'.

162. Most of the great sons and daughters did not return home and their dead bodies could not be identified and traced even, although many of the distorted corpses were barely recognizable at different killing sites in Dhaka City. The unshaken fact of discovering nine amputated human skulls from the place of Al-Badr Head Quarters and 100/150 gouged human eyes behind the camp on 17th December, 1971 are envisaged to be vital and material which prove beyond reasonable doubt that Al-Badr men exterminated many pro-liberation supporters including intellectuals of different professions with

extreme brutality at the Al-Badr Head Quarters at Mohammadpur Physical Training Institute in Dhaka City.

163. Though it is evident that one day P.W. 3 had directly seen the accused in the Al-Badr Camp 4/5 months after its establishment as Al-Badr Head Quarters at Mohammadpur but even then, it is not required to prove the presence of the accused at the camp as he was the Chief of ICS and a High Command of Al-Badr Bahini during the Liberation War, 1971

164. From the acts and conduct of the accused during the liberation war as narrated by P.Ws. 2, 3 and 13 and the documentary evidence on record it is difficult to ignore the joint criminal enterprise as well as superior responsibility of the accused under any circumstances in respect of the instant charge. Regarding the principles of superior responsibility and joint criminal enterprise would be discussed later on in this judgment.

165. Considering all the evidence both oral and documentary, the facts and circumstances and the context of the Liberation War, 1971, we are inclined to hold that on the principles of Superior 'Responsibility' and the ' Joint Criminal Enterprise' it is proved beyond reasonable doubt that accused Motiur Rahman Nizami, during the Liberation War, 1971 conspired, participated and also substantially contributed to the commission of offences, committed in a pre-arranged manner at Mohammadpur Physical Training Institute for torture, murder and other inhuman acts as crimes against Humanity as enumerated in section 3(2)(a), 3(2)(h) and 3(2)(g) read with section 4(1) and 4(2) of the Act.

Adjudication of Charge No. 04

[Committing murders, rape and persecution in village Karamja]

166. Summary charge: On or about 24/25 April, 1971, on the direction and planning of accused Motiur Rahman Nizami, he [accused] along with the help of local Rajakars including Rajakar Afzal killed Habibur Rahman Sarder of Purbo Karamja at the bus stand allegedly for helping the freedom-fighters. Thereafter, sequence to his same plan, in early morning on 08-05-1971, a member of Al-Badr Bahini, Rafiqunnabi Bablu along with Rajakars and Pakistani Army reached village Karamja and surrounded the house of Megha Thakur and killed Megha Thakur, Sosthi Halder, Adu Halder, Daru Thakur, Kartik Halder, Suresh Chandra Halder, Deju Halder, Mohammad Fakir Chand, Santi Halder and Murali Das in that house by firing shots. Tara Halder was injured and he somehow managed to escape. Later on, members of Pakistani Army with the help of Rajakars raped Shebani, the daughter of said Megha Thakur, son's wife and two other Muslim women. After departure of the Pakistani Army, the Rajakars looted the belongings of Megha Thakur and destroyed the house of Wahed Pramanik by setting it on fire. Thus, the accused has been charged for commission of offences of murder, rape and persecution as specified under section 3(2)(a)(g) and (h) read with section 4(1) and 4(2) of the Act.

Discussion of evidence:

167. P.W. 5 Md. Nazim Uddin Khattab has deposed that on 28-04-1971 at about 8.00 A.M. his maternal uncle freedom-fighter named Habibur Rahman Sarder and another freedom-fighter named Akkas had been going together

towards C & B bus stand from his maternal uncle's house and, on their way under the direction of accused Motiur Rahman Nizami, Rajakar and an agent named Afzal and other Rajakars and Pakistani Army killed said Habibur Rahman Sarder and Akkas by firing shots at the bus stand. Having been informed about the said occurrence, he rushed to the place of occurrence and found their dead bodies lying there. He has further deposed that on 08-05-1971 genocide, plundering, arson and other atrocities were committed in his village Karamja Moddaypara. On that day at the time of Azaan of Fazer Prayer, he woke up having heard hue and cry and then proceeded towards the house of Zamindar and saw the mother of Pronob Bhattacharya unclothed and shouting in front of the gate of their house and at that time he saw Al-Badr commander Rafiqunbi Bablu, Moslem, Asad, Afzal and Pakistani army standing beside hers. Thereafter, he went into hiding and after sometime he along with others again proceeded towards Zamindar's house and when they arrived at a hut, they saw there Tara Halder sustaining blood injury who told them that in presence of accused Motiur Rahman Nizami, Rafiqunabi Bablu, Asad, Afzal, Moslem and Pakistani Army killed his [Tara Halder] brothers Sasti Halder and Shanti Halder, two cousins Abu and Kartik, Zamindar Shailendra Nath Bhattacharya alias Megha Thakur and his son Dijendra Nath Bhattacharya and Kuru Tagore, Morali Chandra Das [gardener], Suresh Chandra Halder, Fakir Chand in front of the prayer house of said Shailendra Nath Bhattacharya alias Megha Thakur and he [Tara Halder] was injured but he somehow managed to escape. Then they went to the place of occurrence and saw the dead bodies sustaining severe injuries and also saw the Zamindar's daughter Shebani and son's wife along with the

wife of Asgar raped and thereafter those dead bodies were buried. He has also deposed that in 1971 accused Motiur Rahman Nizami was the central commander of Al-Badr Bahini and president of Islami Chhatra Sangha. He has identified the accused in the dock.

168. In cross-examination P.W. 5 has stated that during the election held in 1970, he saw the accused once and in 1971 during the Liberation War he also saw the accused in the Board room of Union Council. The house of Tara Halder is situated at village Karamja and his [P.W.5] house is situated after 5/6 houses of that house. He has denied the defence suggestion that his maternal uncle Habibur Rahman Sarder was not killed as he stated. He has also denied the defence suggestion that he did not hear that the accused was present at the place of occurrence when the occurrence took place in the house of Megha Thakur.

169. P.W.7 Prodip Kumar Dev has testified that on 08-05-1971 at dawn he climbed a litchi-tree to get litchis and after sometime Pakistani Army having surrounded the house of Megha Thakur entered into that house and forcibly took the persons therefrom to beside the temple and shot them dead. The persons killed were namely, Megha Thakur, Diyu Thakur, Kuru Thakur, Sasti Halder, Shanti Halder, Adu Halder, Kartik Halder, Suresh Halder and his [P.W.7] uncle Murali Chandra and Tara Halder was luckily saved. At the time of said occurrence, Shukur, Afzal, Asad, Moslem and others were present at the place of occurrence. Having seen the occurrence he fled away.

170. This witness was declared hostile and cross-examined by the prosecution. In cross-examination he has stated that he cannot remember whether he made statement to the investigation officer mentioning the names

of accused Motiur Rahman Nizami and Rafiqunnabi. The defence declined to cross-examine this witness.

171. P.W. 17 Md. Jamal Uddin has stated that he is a freedom-fighter and he is a former Deputy Commander of Sathia Upazila Muktijodda Sangsad. In the month of December, 2000, under the leadership of the then State Minister for Information Professor Abu Sayeed and with the help of local administration some skulls and bones of human beings were recovered from inside a hole situated beside the house of Megha Thakur and, at that time he came to know from the persons present there that in the month of May, 1971 one day after Fajr prayer Pakistani Army and local Rajakars under the leadership of accused Motiur Rahman Nizami having surrounded the house of Megha Thakur of village Karamja, killed 9 [nine] unarmed innocent persons and a daughter and son's wife of Megha Thakur were raped. He has further stated that as a commander of a group of freedom-fighters he could know from the apprehended Rajakars and Al-Badr that under the advice and direction of accused Motiur Rahman Nizami all the atrocities were committed at different places including the area of Sathia police station of Pabna district. He has identified the accused in the dock.

172. In cross-examination, P.W. 17 has stated that he was present when the skulls and bones were recovered from village Karamja. He was aware of the occurrence committed in village Karamja since long before. He has denied the defence suggestion that he has deposed falsely against the accused.

173. P.W. 19 Md. Abu Sama Fakir has testified that on 28-04-1971 at about 9.00 A.M. he saw a vehicle of army coming towards Sathia from eastern side and having seen the vehicle he went into hiding in a bush beside

the road wherefrom he further saw accused Motiur Rahman Nizami sitting beside an army officer and in the back side some other bangalees sitting with army inside the said vehicle. He further saw that at that time Habibur Rahman and Akkas were going from west to east and the said two persons having seen the army's vehicle went into hiding behind the back of a tree beside the southern side of the road and then the army's vehicle stopped beside the said tree and accused Motiur Rahman Nizami by gesture told something to the army officer sitting beside him and then two army men got down from the vehicle and shot Habibur Rahman and Akkas to death who were hiding beside the said tree. He has further stated that thereafter the army's vehicle went back towards east instead of west and sometime after he having gone to the place of occurrence saw there the dead bodies of Habibur Rahman and Akkas sustaining bullet injuries and, then he went to the house of deceased Habibur Rahman and told the deceased's brother and other relatives about the said occurrence.

174. P.W. 19 has further testified that on 08-05-1971 after Fazr prayer, he heard sounds of heavy firing coming from village Karamja and being frightened he went into hiding in a bamboo-bush and after about one hour, firing shots were stopped. Then he went to village Karamja and saw there the dead bodies with bullet injuries of 9 [nine] persons including Megha Thakur, Dijju Thakur, Kuru Thakur, Sasti Thakur, Kartick Halder, Shanto Halder, Murali Malee and Fakir Chand lying beside the prayer room of the house of Megha Thakur and, thereafter, the dead bodies of Fakir Chand and Murali Malee were buried in the graveyard and in a hole respectively and the dead bodies of others were buried in a well and, he also saw the houses burnt

and at that time he came to know from the persons present there that the daughter and son's wife of Megha Thakur were raped by Pakistani Army men and Rajakars. He also came to know from them that those atrocities were committed as per showing of accused Motiur Rahman Nizami, Rafiqunnabi Bablu, Afzal, Asad and Shukur Khan. He has identified the accused in the dock.

175. In cross-examination P.W. 19 has stated that on 08-05-1971 having heard the sounds of firing he went into hiding in the bamboo-bush situated beside their house. He went to village Karamja on 08-05-1971 at about 7.00 A.M. He has denied the defence suggestions that no killing took place on 28-04-1971 as he has stated in his deposition and that he did not see any occurrence of 28-04-1971 or 08-05-1971. He has also denied the defence suggestion that he has deposed falsely against the accused.

Evaluation of evidence and findings:

176. The prosecution has examined as many as 4 witnesses as mentioned above [P.Ws. 5,7,17 and 19] to prove the charge no. 04 relating to murder, rape and persecution in village Karamja. Among these 4 witnesses, P.W. 19 Md. Abu Sama Fakir is an important witness as he has claimed himself as an eye witness of the alleged incidents. P.W. 19 has vividly narrated the incidents allegedly took place in two separate days as mentioned in this charge. In describing the incident of the first day, P.W. 19 has stated that on 28-04-1971 at about 9.00 A.M. he saw a vehicle of army coming towards Sathia from eastern side and, he also saw accused Motiur Rahman Nizami and some other Bangalees sitting inside the said vehicle. At that time victim Habibur Rahman and Akkas were going from west towards east and having

seen the army's vehicle they went into hiding behind the back of a tree and then the army's vehicle stopped there. P.W. 19 has further stated that he also saw that at that time accused Motiur Rahman Nizami by gesture told something to the army officer sitting beside him and then two army men got down from the vehicle and shot Habibur Rahman and Akkas to death. P.W. 5 Md. Nazim Uddin Khattab is a nephew of deceased Habibur Rahman. He has corroborated the said testimony of P.W. 19 stating that on 28-04-1971 at about 8.00 A.M. his maternal uncle, a freedom-fighter, Habibur Rahman and another freedom-fighter named Akkas had been going together towards C & B bus stand from his maternal's uncle's house and, on their way, under the direction of accused Motiur Rahman Nizami, Rajakar and an agent named Afzal and other Rajakars and Pakistani Army killed his uncle Habibur Rahman and said Akkas at the bus stand by firing shots. He has further stated that having been informed about the said incident he rushed to the place of occurrence and found dead bodies lying there.

177. P.W. 19 Md. Abu Sama Fakir, an eye witness, while describing the incidents of the other day which allegedly took place on 08-05-1971, has stated that on 08-05-1971 after Fazr prayer, he heard sounds of heavy firing-shots coming from the village Karamja and being frightened he went into hiding in a bamboo-bush and after about one hour firing shots were stopped. Then he went to village Karamja and saw the dead bodies sustaining bullet injuries of 9 [nine] persons including Megha Thakur, Diju Thakur, Kuru Thakur, Sasti Thakur, Kartick Halder, Shanto Halder, Murali Malee and Fakir Chand lying beside the prayer room of the house of Megha Thakur. He has further stated that at that time he also saw the houses burnt and came to

know from the persons present there that the daughter and son's wife of Megha Thakur were raped by Pakistani Army men and Rajakars. He also came to know from them that those atrocities were committed as per showing of accused Motiur Rahman Nizami, Rafiqunnabi Bablu, Afzal, Asad and Shukur Khan. P.W. 5 Md. Nazim Uddin Khattab having corroborated the said testimony of P.W. 19 has stated that on 08-05-1971 genocide, plundering, arson and other atrocities were committed in his village Karamja Moddaypara. On that day, at the time of Azaan of Fazer prayer he woke up having heard hue and cry and then proceeded towards the house of Zamindar and saw the mother of Pronob Bhattacharya unclothed and shouting in front of their house and, at that time he saw Al-Badr commander Rafiqunnabi Bablu, Moslem, Asad, Afzal and Pakistani Army standing beside hers. He has further stated that thereafter, he went into hiding and after sometime he along with others again proceeded towards Zamindar's house and when they arrived at a hut, they saw there Tara Halder sustaining with blood injury who told them that in presence of accused Motiur Rahman Nizami, Rafiqunnabi Bablu, Asad, Afzal, Moslem and Pakistan Army killed his [Tara Halder] brothers Sasti Halder and Shanti Halder, two cousins Adu and Kartik, Zamindar Shailendra Nath Bhattacharya alias Megha Thakur and his son Dijendra Nath Bhattacharya and Kuru Tagore, Morali Chandra Das [gardener], Suresh Chandra Halder, Fakir Chand in front of the prayer house of said Megha Thakur and, he [Tara Halder] was injured, but he somehow managed to escape. P.W. 5 has further stated that then they went to the place of occurrence and saw the dead bodies there and also saw Megha Thakur's daughter Shebani and son's wife along

with the wife of Asgar who were raped. He has also stated that in 1971, accused Motiur Rahman Nizami was the central commander of Al-Badr Bahini and president of Islami Chhatra Sangha. P.W. 7 Prodig Kumar Dev has also corroborated the said testimonies of P.Ws. 19 and 5 relating to the atrocities committed in the house of Megha Thakur. P.W. 7 has stated in his deposition that on 08-05-1971 at dawn he climbed a litchi-tree to get litchis and after sometime Pakistani Army having surrounded the house of Megha Thakur entered into that house and forcibly took the persons therefrom to beside the temple and shot them to death. The persons killed were namely, Megha Thakur, Diji Thakur, Kuru Thakur, Sasti Halder, Shanti Halder, Adu Halder, Kartik Halder, Suresh Halder and his [P.W. 7] uncle Murali Chandra and, Tara Halder were luckily saved. P.W.7 has further stated that at the time of said occurrence, Shukur, Afzal, Asad, Moslem and others were present at the place of occurrence. Having seen the occurrence he fled away. P.W. 7 has not mentioned the name of the accused. It may be mentioned here that this witness was declared hostile by the prosecution. P.W. 17 Md. Jamal Uddin has stated that in the month of December, 2000, under the leadership of the then State Minister for Information Professor Abu Sayeed, some skulls and bones of human beings were recovered from inside a hole situated beside the house of Megha Thakur and at that time he came to know from the persons present there that in the month of May, 1971, one day after Fazr prayer Pakistani Army and local Rajakars under the leadership of accused Motiur Rahman Nizami having surrounded the house of Megha Thakur of village Karamja, killed 9 [nine] unarmed innocent persons and a daughter and son's wife of Megha Thakur were raped. P.W. 17 has further stated that

as a commander of a group of freedom-fighters he could know from the apprehended Rajakars and Al-Badrs that under the advice and direction of accused Motiur Rahman Nizami all the atrocities were committed at different places including the area of Sathia police station. It may be mentioned here that all these prosecution witnesses have identified the accused in the dock except P.W. 7 who was declared hostile by the prosecution.

178. Upon scrutiny of the testimonies of the witnesses as discussed above, we find corroboration among their testimonies. Among the 4 prosecution witnesses, some of them are eye witnesses as mentioned above who partly witnessed the alleged occurrence and partly heard of the occurrence from some eye witnesses. The defence cross-examined these witnesses thoroughly, but their evidence remains unshaken in respect of charge no. 04, and as such, there is no reason to disbelieve their evidence. Having considered all the facts and circumstances and the evidence on record as discussed above, we are inclined to hold that it is proved beyond reasonable doubt that accused Motiur Rahman Nizami, being the president of the then Islami Chhatra Sangha and ex-officio the commander of Al-Badr Bahini, under his direction, planning and conspiracy, the accused along with local Rajakars and Al-Badrs in the month of April, 1971 killed Habibur Rahman Sarder at the bus stand. It is also proved beyond reasonable doubt that in continuation of the same planning and conspiracy, on 08-05-1971 under the leadership of the accused, Pakistan Army, local Rajakars and Al-Badrs having surrounded the house of Megha Thakur of village Karamja killed many unarmed civilians including said Megha Thakur and his family

members and women including Megha Thakur's daughter and son's wife were raped by them. The houses of Megha Thakur were also looted and destroyed by them. It is also proved beyond reasonable doubt that at the time of commission of those atrocities, accused Motiur Rahman Nizami was present in person at both the places of occurrence. Thus, accused Motiur Rahman Nizami is criminally liable under section 4(1) of the Act, 1973 and found him guilty for substantially contributing the actual commissions of the offences of murder, rape and persecution as crimes against Humanity specified in section 3(2)(a)(g) and (h) of the Act which are punishable under section 20(2) of the Act.

Adjudication of Charge No.5

[Mass killing in Arpara and Vutergari under Ishwardi Police Station]

179. Summary charge: With the help of accused Motuir Rahman Nizami on 16.04.1971, Pakistan occupation force and its associates attacked villages Arpara and Vutergari under Ishwardi Police Station and killed unarmed 21 civilians and burnt houses after looting valuables. Thus, charge has been framed against the accused under section 3(2)(a)(h) read with section 4(1) and 4(2) of the Act.

180. In order to prove the charge, the prosecution did not examine any witness nor it submitted any documentary evidence in support of the prosecution case.

181. Mr. Muhammad Ali, the learned prosecutor has frankly submitted that he could not produce any kind of evidence to prove the charge.

Therefore, we hold that the prosecution has miserably failed to prove charge no. 5 for want of evidence.

Adjudication of Charge No.6

[Involvement and responsibility for murder of 22 (twenty two) unarmed civilians]

182. Summary Charge: On 27.11.1971 around 3.30 A.M accused Motiur Rahman Nizami along with Rajakars and members of Pakistani invading force raided the house of Dr. Abdul Awal and other adjacent houses in the village-Dhulaura on the pretext to find out freedom fighters. At about 6.30 A.M the accused along with his accomplices got hold of a number of men, women including children and placed them all together in the field of Dhulaura School where they all about thirty unarmed villagers were indiscriminately killed by gun-shots.

183. After departure of Pakistani invading force, accused along with his accomplice Rajakars caught twenty two persons, who survived from the hands of Pakistani invading force and took them to the bank of Isamoti River where they all were brutally killed. Thus, the accused has been charged for commission of offence as specified in section 3(2) (a) read with section 4(1) and 4(2) of the Act.

Discussion of evidence:

184. Mr. Shajahan Ali as P.W-6 has testified that he is a cripple freedom fighter. On 28th November, 1971 he went to Dhulaura village and participated in a combat held between freedom fighters and Pakistani occupation forces along with its auxiliary forces. During fight he along with

seven other freedom fighters were caught by Pakistani army in the late night and then he was physically beaten. He along with three other freedom fighters were taken to the bank of Isamoti River at the instance of Motiur Rahman Nizami and Sattar Rajakar. He was charged with a bayonet on his throat. Remaining freedom fighters were also charged with bayonet to death.

185. Thereafter, locals came to the scene and took him to Pabna hospital where he took treatment for a month. For getting better treatment he got admitted into Dhaka Medical College Hospital and remained there for about four years. In that combat around 300-400 unarmed men and women were killed in village Dhulaura. He has identified the accused in the dock.

186. In cross-examination he has denied the suggestion that there was no action or influence of Jamaat-e-Islami in their locality at that time. He did not see Motiur Rahman Nizami before 1970, but he heard his name. He has further replied that he did not visit the house of Motiur Rahman Nizami but he heard that his [accused] house is located at village Monmothpur under Sathia Police Station. On further cross-examination he has replied that he had seen Motiur Rahman Nizami before 28th November, 1971 at an election meeting of Advocate Anwarul Hoque, the nominee of Jamaat-e-Islami.

187. P.W-8 Md. Kholilur Rahman has stated in his deposition that he is a freedom fighter. After receiving training, he returned to Bangladesh from India. On 27th November, 1971 around 12-12:30 at mid night he went to the house of Dr. Abdul Awal of Dhulaura village under Sathia Police Station. In that late night he got sound of boot of Pakistan army. Then he saw through his room's window that accused Motiur Rahman Nizami, some Pakistani occupation forces and Rajakars were coming towards his house. Thereafter,

he got out of the house and heard sound of some firing, and he realized that they were besieged by army and Rajakars. At that time he managed to hide himself on a banian tree.

188. After rising the sun up in the early morning he could see men and women were brought under the banian tree from different houses by the Pakistani occupation force and Rajakars. Hearing hue and cry he could also realize that women were raped in the house. Thereafter, he could see Motiur Rahmam Nizami telling the Rajakars to take the men towards the primary school field nearby Isamoti River. Around 09:00-9:30 A.M. he got down from the top of the tree and went to the bank of Isamoti River beside the school. He saw there around 25/30 dead bodies lying on the earth. He also found dead bodies of his four associates while two others alive, one was Shajahan and another Majed. He found Shajahan's throat cut while Majed was charged with bayonet on the stomach. He knew Motiur Rahman Nizami since before as his house was about one kilometer far from his own house. He heard that before the liberation war Motiur Rahman Nizami was the President of Islami Chhatra Sangha[ICS].

189. In cross-examination he has replied that Motiur Rahman Nizami had three brother-sisters [siblings]. He has also replied that on the day of alleged occurrence, those who were caught by Rajakars, Al-Badr and Pakistani occupation force, among them Shajahan, Majed and Kuddus survived, rest of them were martyred. Kuddus was not killed because of his tender age and he was one of the ten members group. In reply to a question he has said that he had met first with freedom fighter Shajahan at youth camp in India. Among the ten persons of the group there were Khalilur Rahman, Akther

Alam [commander], Shajahan [injured], another Shajahan, Muklessur Rahman @Ronju, Salam, Kuddus, Majed, Muksed, Jalil and he himself but Jalil was not with them when the occurrence took place. He had seen dead bodies of Akhter Alam, Shajahan, Muksed and Muslim which were lying on the earth. Besides this, he could identify Shajahan and Majed in an injured condition.

190. P.W-17 Md. Jamal Uddin has stated in his deposition that he is a freedom fighter. On 27th November, 1971 he was staying at village Dhulaura with a group of freedom fighters. On getting news of their stay at village Dhulaura, Pakistani occupation force, Rajakars and Al-Badr surrounded them under the leadership of Motiur Rahman Nizami and killed nine freedom fighters along with fourteen un-armed people and they ignited many houses of the village. One of the freedom fighters named Shajahan luckily survived from the hands of Al-Badr, Rajakars and Pakistani invading force. But he [P.W-6 Md. Shajahan Ali] became maimed and now popularly known as 'galakata' [throat slit] Shajahan. This witness has testified that he came to know from Shajahan that on the bank of the Isamoti River, Sattar Rajakar slaughtered him with a bayonet at the instance of Motiur Rahman Nizami who was present at the time of such incident but Shajahan Ali survived at the blessing of Almighty Allah.

191. In cross-examination this witness has replied that he went to the village Dhulaura on 27th November, 1971 in the late night after war ended. He heard the name of Dr. Abdul Awal whose house was situated at village Dhulaura nearby a school and he went to his house where he found Abdul Awal as dead and burnt houses. A freedom fighter named Abdul Kuddus

was with their group but he was a boy of tender age among them. He has further replied that he came to know about injured Shajahan immediately after he went to scene of the occurrence.

Evaluation of evidence and findings:

192. For proving the charge no.6 prosecution has produced and examined three live witnesses. Of them P.W-6 Md. Shajahan Ali is a cripple freedom fighter, who has deposed in evidence that he participated in a combat, occurred between freedom fighters and Pakistani army along with its auxiliary forces on 28th November, 1971. He along with his seven other freedom fighters were caught by Pakistani army in the late night. Of them four including P.W. 6 himself were taken to the bank of Isamoti River at the instance of Motiur Rahman Nizami and Sattar Rajakar and they were charged with bayonet to death, except him [P.W. 6], who luckily survived with a severe throat slit.

193. In that combat around 300-400 men and women were liquidated at village Dhulaura. Thereafter, he was admitted to Dhaka Medical College Hospital and took treatment for more than four years.

194. However, defence has shown some discrepancies from the evidence of cross-examination of this witness that he [P.W. 6] passed S.S.C examination in 1972 and went to Pabna for the first time in 1975. In that event how could he appear in S.S.C examination while he had undergone treatment in Dhaka Medical College Hospital for four years after occurrence took place as claimed by the defence.

195. On this plea, we can remind ourselves that human memory can happen to be faded by passage of time. Every human being can not retain his power of memory for an indefinite period of time. In view of the fact, minor discrepancies with the evidence of prosecution witnesses are liable to be overlooked in consideration of crimes committed about 42 years ago. Therefore, the evidence adduced by P.W. 6 is found to be reliable.

196. It is further revealed from the evidence that the accused had been involved in the crimes by giving direction upon the perpetrators. It is noted that Md. Shajahan Ali [P.W-6] is an eye witness of the occurrence who corroborated prosecution case to the effect that the accused along with his accomplices committed mass killing on the bank of Isamoti River. Md. Khalilur Rahman as P.W-8, has testified that being a freedom fighter he went to the house of Dr. Abdul Awal of Dhulaura village under Sathia Police Station at mid-night on 27th November, 1971. In the late night they [P.W-8 and others] were seized by army and Rajakars along with Motiur Rahman Nizami, but he managed to hide himself on a banian tree. From where he could see the atrocities committed by the perpetrators and he saw Motiur Rahman Nizami telling the Rajakars to take away the apprehended men towards the primary school field nearby Isamoti River and he [P.W-8] heard sound of firing from the hiding place.

197. Next morning around 9:00-9:30 A.M on 28th November, 1971 he went to the bank of Isamoti River after getting down from the top of the banian tree where he found 25/30 dead bodies including four of his associates but two men luckily survived. One survived victim was Shajahan and another Majid who were charged with bayonet. On cross-examination,

he has re-affirmed regarding the dead bodies and two survived persons of his group. On a careful assessment of the evidence we find clear corroboration about the date, time and place of occurrence in the evidence of P.Ws. 6,8 and 17. There is no reason to disbelieve the evidence of P.W-8 as he has corroborated other witnesses.

198. P.W-17 is also a freedom fighter, who was staying in the village of Dhulaura with a group of freedom fighters on 27th November, 1971. Sensing their presence in the village, Pakistani Occupation Force, Rajakar and Al-Badrs surrounded them under the leadership of Motiur Rahman Nizami and they liquidated nine freedom fighters and they also killed fourteen un-armed people after setting fire to many houses of that village. One of the freedom fighters named Shajahan [P.W-6] luckily survived from their hands. Now he is popularly known as 'galakata' [throat slit] Shajahan as he became maimed. This witness further came to know from Shajahan that Sattar Rajakar slaughtered him [P.W-6] with bayonet at the instance of Motiur Rahman Nizami who was present at the scene when the occurrence took place but he [P.W-6] luckily survived at the blessing of Almighty Allah.

199. On further cross-examination he has re-affirmed about the killing of Dr. Abdul Awal depicting that he visited the house of deceased Dr. Abdul Awal immediately after the occurrence took place. Upon evaluation of the evidence it finds that he [P.W-17] has corroborated and supported the evidence of P.Ws-6 and 8. On further perusal of evidence it finds presence of the accused at the crime site from every single version of the above witnesses during occurrence took place. Though the direct participation of

the accused is found absent in evidence but his presence at the place of occurrence and giving direction to his accomplices for committing atrocities and killing are found in the evidence.

200. As per evidence of these three witnesses it appears that the accused, prior to committing the offence, had a common plan and purpose to apprehend valiant and brave guerilla fighters to vanish them for ever so that they could not liberate the country. It is pertinent to say that although some of the victims are freedom-fighters, were not fighting in a combat at the time of holding them by the Pakistani invading force and its accomplices but they were caught hold of and killed by army when they staying with unarmed civilian people at the populated village. It is further evident that the accused involved himself in the atrocities committed by his accomplices in the name of solidarity of Pakistan.

201. The behavior, culpable conduct and actual physical presence of the accused at the crime site have been remarkably found and his participation in abetting, facilitating and complicity to the actual commission of offences have been proved beyond reasonable doubt. Under the above facts and evidence on record accused Motiur Rahman Nizami is held criminally liable for the offence of crimes against Humanity enumerated in section 3(2)(a) read with section 4(1) of the Act of 1973 which are punishable under section 20(2) of the Act.

Adjudication of Charge No. 07

[Complicity in torture and murder of Sohrab Ali of village Brishalikha]

202. Summary charge: After midnight on 03-12-1971, on receiving information from accused Motiur Rahman Nizami and the Rajakars, the Pakistani Army surrounded the village Brishalikha and arrested Sohrab Ali from his house at about 5.30 A.M. He was brought on to the road and tortured inhumanly and asked questions to him about whereabouts of his son Md. Abdus Selim Latif. Failing to extract information, he was shot-at and killed in presence of his wife and children. Thus, the accused has been charged for complicity in torture and murder of the above victim as crimes against Humanity specified under section 3(2)(a)(h) read with section 4(1) and 4(2) of the Act.

Discussion of evidence:

203. P.W.14 Md. Abdus Selim Latif has deposed that he is a freedom-fighter and he took active part in different operations during the Liberation War, 1971 and in one operation he was caught hold of by the Rajakars and Al-Badrs and tortured by them and Pakistani Army. His father martyr Sohrab Ali also went to India during the Liberation War and he came back to his own village home at Brishalikha on 02-12-1971. The members of Al-Badr Bahini having known about the return back of martyr Sohrab Ali, informed the same to accused Motiur Rahman Nizami, the chief of Al-Badr Bahini. He has further deposed that on 03-12-1971 at dawn the Al-Badrs, Rajakars and Pakistani Army surrounded their village Brishalikha and apprehended his father from their house and brought him on to the road and

tortured him inhumanly and asked questions about his [P.W. 14] whereabouts and, failing to get any information from him, he was shot-at and killed. He heard about the said occurrence from his mother, Asgar Ali Munshi, Ahed Ali Pramanik, Shahjahan Ali and many others. He also heard that under the direction of accused Motiur Rahman Nizami, Al-Badrs, Rajakars and Pakistani Army having tortured his father inhumanly killed him. He has also deposed that besides his father, they also killed Monu, Sosthi Pramanik, Vadu Pramanik, Gyanendra Nath Halder and many other unarmed civilians. He has identified the accused in the dock.

204. In cross-examination, P.W. 14 has stated that in 1971, accused Motiur Rahman Nizami was the chief of Al-Badr Bahini and president of Islami Chhatra Sangha. He has further stated that while he was a student of college, he was involved with the politics of the Student League and his father was involved with the politics of the Awami League. He has denied the defence suggestion that he has deposed falsely that his father was killed under the direction of the accused.

205. P.W. 15 Md. Aminul Islam Dablu has stated that his father martyr Sohrab Ali and brother Md. Abdus Selim Latif [P.W. 14] were freedom-fighters. During the Liberation War his said brother was a first year student of H.S.C. of Bera College. On 15-08-1971 his said brother was apprehended by the Rajakars and Al-Badrs and tortured by the Pakistani Army. He has further stated that on 02-12-1971 his father came back to their village home from India. The members of local Rajakar and Al-Badr Bahinis having known about the return back of his father, told the same to accused Motiur Rahman Nizami. On 03-12-1971 at dawn the Al-Badrs, Rajakars and

Pakistani Army surrounded their village Brishalikha and apprehended his father from their house and brought him on to the road and tortured him inhumanly and then killed him by shot. Besides, they also killed Monu, Sosthi, Adu, Gyanendra Nath Halder and many other innocent persons of their village and set fire on 70/75 houses. He has also stated that he heard about the said occurrence from his mother, brother and sisters and their neighbours. He has identified the accused in the dock.

206. P.W. 15 has stated in cross-examination that he passed the S.S.C Examination in 1986. He has denied the defence suggestions that his father was not killed during the Liberation War, 1971 and, on 02-12-1971 the local Rajakars and Al-Badrs did not inform the accused about his father's return back from India. He has also denied the defence suggestion that he has deposed falsely against the accused.

207. P.W. 16 Md. Jane Alam alias Janu has deposed that he is a freedom-fighter and he belongs to village Brishalikha. He heard that under the direction of accused Motiur Rahman Nizami, the then president of Islami Chhatra Sangha, and under the leadership of Rafiqunnabi alias Bablu, the then commander of Rajakar and Al-Badr Bahini of Sathia police station, local Rajakars, Al-Badrs and Pakistani Army killed Sohrab along with Sasthi, Vadu, Monu, Profulla, Pintu and many others of village Brishalikha and set fire on 70/72 houses. He has identified the accused in the dock.

208. In cross-examination P.W. 16 has stated that Sohrab was killed on 3rd December. He has denied the defence suggestion that Sohrab was not killed on that date and he died long after the Liberation of the country. He has also denied the defence suggestion that he has deposed falsely.

209. P.W. 22 Md. Shajahan Ali has testified that his cousin Abdus Selim Latif [P.W. 14] is a freedom-fighter who was apprehended by Rajakars and Al-Badrs during the Liberation War and tortured by Pakistani Army. His cousins Abdus Selim Latif and Alauddin, uncle martyr Sohrab Ali along with 20/25 young men went to India for getting training of Liberation War. On 02-12-1971, his said uncle martyr Sohrab Ali came back to his village home from India. On the following day i.e. 03-12-1971, just before the Azaan of Fazr prayer a big sound was happened and as such he woke up and saw, opening the door of his room, Rafiqunnabi Bablu, Asad along with 4/5 members of Rajakar and Al-Badr Bahinis having broken the door of the room of his uncle Sohrab Ali got into and dragged out his said uncle from the room on to the village road and then he [P.W. 22], his aunt and all other family members went to the village road after them and saw that the said abductors were taking his uncle towards the junction of four roads. He also went there and kept himself in hiding in a bamboo-bush near the said junction. Thereafter, he saw from the bamboo-bush that accused Motiur Rahman Nizami was standing there beside the Pakistani Army, Rajakars and Al-Badrs and then he could understand that under the direction of the accused, Rajakars and Al-Badrs had abducted his uncle. He also saw that Pakistani Army asked his uncle questions to which he replied 'No' shaking his hands and then the accused told the Army men something by gesture and then and there one Pakistani Army man shot 2/3 round bullets at his uncle and as such his uncle fell down on the ground. After 5/6 minutes of the said occurrence, when the accused and the Pakistani Army along with all Rajakars and Al-Badrs left the place of occurrence, he [P.W. 22] went to his

uncle and could understand that his uncle was not alive. Then he heard sounds of firing coming from Hindu para and saw the houses of Hindu para burning. Thereafter, he along with others took his uncle's dead body to their house and then he went to Hindu para at his aunt's house. He has further testified that he having gone to Hindu para saw there many houses burnt and 7/8 dead bodies of unarmed innocent Hindus, lying on the road, who were killed by bullet shots. At that time one woman told them that under the direction and presence of accused Motiur Rahman Nizami, Pakistani Army, Rajakars and Al-Badr set fire on the Hindus' houses and killed 7/8 Hindus by shots and Pakistani Army raped them. He has also testified that after Asr prayer his uncle's dead body was buried in the graveyard of their village. He has identified the accused in the dock.

210. In cross-examination, P.W. 22 has stated that accused Motiur Rahman Nizami came to their village 4/5 times since his [P.W.22] uncle left for India upto before 3rd December. Except on 03-12-1971, Pakistani Army did not commit any atrocity in their village. He has further stated that after the Liberation of the country he narrated to his cousin Abdus Selim Latif [P.W.14] about the killing of his uncle Sohrab Ali. He denied the defence suggestions that his uncle was not killed on 03-12-1971 as he has stated in his deposition and his uncle died long after the Liberation of the country. He has also denied the suggestion that he has deposed falsely against the accused.

Evaluation of evidence and findings:

211. The prosecution has examined as many as 4 witnesses as mentioned above [P.Ws. 14, 15, 16 and 22] to prove the charge no. 07 relating to committing torture and murder of Sohrab Ali of village Brishalikha. Among these 4 witnesses, P.W. 22 Md. Shajahan Ali is a very important witness as he has claimed himself as an ocular witness of the alleged occurrence mentioned in this charge. P.W. 22 Md. Shajahan Ali is a nephew of deceased Sohrab Ali. In supporting the charge brought against the accused, P.W. 22 has stated that his cousin Abdus Selim Latif [P.W. 14] along with his [P.W. 14] father martyr Sohrab Ali and others went to India for receiving training of the Liberation War. On 02-12-1971, his uncle Sohrab Ali came back to his village home from India. On the following day i.e. 03-12-1971, just before the Azan of Fazr prayer a big sound was happened and as such he woke up and saw that Rafiqunnabi Bablu, Asad along with 4/5 members of Rajakar and Al-Badr Bahinis having broken the door of the room of his uncle Sohrab Ali got into and dragged out his said uncle from the room on to the village road and then he [P.W. 22], his aunt and all other family members went to the village road after them and saw that the said abductors were taking his uncle towards the junction of four roads. He has further stated that he also went to said junction and kept himself in hiding in a bamboo-bush. Thereafter, he saw from the bamboo-bush that accused Motiur Rahman Nizami was standing there beside the Pakistani Army, Rajakars and Al-Badrs. He also saw that then Pakistani Army asked his uncle questions to which he replied 'No' shaking his hands and, then the

accused told the Army men something by gesture and, then and there one Pakistani Army man shot his uncle Sohrab Ali to death.

212. P.W. 14 Md. Abdus Selim Latif and P.W. 15 Md. Aminul Islam Bablu are the sons of martyr Sohrab Ali. Both of them having corroborated the testimony of P.W. 22 Md. Shajahan Ali, have stated that their father martyr Sohrab Ali went to India during the Liberation War and he came back from India to their village home on 02-12-1971. The members of local Rajakar and Al-Badr Bahinis having known about the return back of Sohrab Ali, informed the same to accused Motiur Rahman Nizami. They have also stated that on 03-12-1971 at dawn the Al-Badrs, Rajakars and Pakistani Army surrounded their village Brishalikha and apprehended their father from their house and brought him on to the road and tortured him inhumanly and then killed him by shot. They have also stated that they heard about the said occurrence from their mother, family members and others. P.W. 16 Md. Jane Alam alias Janu also having corroborated the testimonies of the above three witnesses stated that under the direction of accused Motiur Rahman Nizami, the then president of Islami Chhatra Sangha, local Rajakars, Al-Badrs and Pakistani Army killed Sohrab Ali and many others. It may be mentioned here that all these four prosecution witnesses have identified the accused in the dock.

213. The defence by adducing documentary evidence Ext. H, the women voter list of village Shambhupur under Upazila Bera, District -Pabna, has submitted that in the said voter list the date of birth of Most. Suraia Sohorab, daughter of Sohorab Ali has been mentioned as 31.12.1976 which makes the prosecution case fatal that Soharab Ali was killed by the Pakistani army at

the instance of accused Motiur Rahman Nizami. Question has been raised by the defence if the daughter of Sohorab Ali was born in the year 1976, then how it was possible that Sohorab Ali was killed in 1971.

214. In our society for many reasons, best known to them, the people used to mention different dates of birth in different documents like S.S.C certificate, voter list, National ID card, passport etc. and thus, we can not brush aside or disbelieve the evidence of live witness [P.W.22] and the evidence of the members of the victim family [P.Ws. 14 and 15] on the plea that since the date of birth of the daughter of martyr Sohorab Ali has been mentioned as 31.12.1976 in the voter list and thus he was not killed in 1971 by the Pakistani army at the instance of the accused Motiur Rahman Nizami.

215. Upon scrutiny of the testimonies of the witnesses as discussed above, we find that these four witnesses have corroborated to each other in respect of charge no. 07 of torturing and killing of Sohrab Ali. Particularly, P.W. 22 Md. Shajahan Ali, a nephew of martyr Sohrab Ali, witnessed the alleged occurrence from the beginning to the end and his testimony has been corroborated in toto by P.Ws. 14, 15 and 16. The defence has cross-examined these witnesses thoroughly, but their evidence remains unshaken. Having considered all the attending facts and circumstances and the evidence on record as discussed above, we are inclined to hold that it is proved beyond reasonable doubt that accused Motiur Rahman Nizami as a High Command of Al-Badr Bahini, under his direction and leadership, Pakistani Army, local Al-Badrs and Rajakars on 03-12-1971 at dawn having abducted martyr Shorab Ali from his house took him to the road and tortured him inhumanly there and then shot him dead. Accordingly, the accused had

direct complicity with the commission of those crimes. As such, accused Motiur Rahman Nizami is criminally liable under section 4(1) of the Act, 1973 and found guilty for substantially contributing the actual commission of the offences of abduction, torture and murder as crimes against Humanity as specified in section 3(2)(a) and (h) of the Act which are punishable under section 20(2) of the Act.

Adjudication of Charge No.8

[Killing of Badi, Rumi, Jewel and Azad at MP Hostel, Nakhal Para, Dhaka]

216. Summary charge: On 30.08.1971 accused Motiur Rahman Nizami being the president of Islami Chhatra Sangha as well as head of the Al-Badr Bahini accompanied by Ali Ahasan Mujahid, Secretary of the East Pakistan Islami Chhatra Sangha, visited the army camp at old MP Hostel, Nakhal Para in Dhaka where the accused verbally abused detained Jalal, Badi, Rumi, Jewel and Azad. Accused asked Pakistani Army Captain to kill all of them before the proclamation of general amnesty by the President. Subsequently, all of them were killed, except one, following instigation of the accused and thereby the accused has been charged for commission of offence as specified in section 3(2)(a) read with section 4(1) and 4(2) of the Act.

Discussion of evidence:

217. P.W-2 Zahir Uddin Jalal @ Bichchu Jalal has testified that he is a freedom fighter and was rewarded by his company commander as Bichchu for his remarkable contribution to the Liberation War in 1971 as a teenager.

He received guerilla training in India. He had recognized Motiur Rahman Nizami as he was the leader of Islami Chhatra Sangha by his [P.W-2] father's indication when Motiur Rahman Nizami, Ali Ahsan Mujahid along with others went to Circuit House from nearby Pakistani army camp on 11th April, 1971. According to him, in 1971 his father was Superintendent of Police [SP], Special Branch, Dhaka. As per intelligence report Motiur Rahman Nizami and Ali Ahsan Mujahid were men of infamous nature and they had started acting as agents of Pakistan army. For which his [P.W-2] father cautioned him to be aware of those men.

218. He was captured by Rajakars on 30.08.1971 in the evening when he moved on instruction of his company commander Abdul Aziz for preparation of carrying out an action at the residence of one Dolly Asad at 19, New Eskaton Road, as Al-Badr and Rajakars used to sit there for meeting with Pakistani occupation forces and was taken to army camp at Nakhal Para MP Hostel where he saw Badi, Rumi son of Shaheed Janani Jahanara Imam, Azad, Jewel and singer Altaf Mahmud in confinement. They all took guerilla training in India with him. He also found them in severely tortured and wounded condition.

219. At the training camp in India, one day Major Haider suggested him not to disclose any body's name if he is apprehended by his opponent during combat. Jewel also told him that Al-Badr commander Motiur Rahman Nizami, Ali Ahasan Mujahid, Chowdhury Moinuddin and Ashraf of Al-Badr Bahini and their accomplices brutally tortured them. Jewel also told him that Motiur Rahman Nizami and Ali Ahasan Mujahid along with Al-Badr Bahini would kill them within two or three days. At the same time he could see by

sitting from his prison cell that one Captain Quayum along with Motiur Rahman Nizami, Ali Ahasan Mujahid, Chowdhury Moinuddin and Ashraf entered into the room of Captain Quayum and then he was called by one Habilder to Captain Quayum.

220. Thereafter, Motiur Rahman Nizami took his pistol angrily from his waist and hit at his [P.W-2] both the shoulders by that pistol giving pressure upon him to name other miscreants. And further asked him that if he failed, they [accused and others] would bring his mother and sister there for torture. Subsequently, he was severely tortured by others as he kept himself mum and then they put him in a prison cell. Motiur Rahman Nizami and others had decided to kill them before the President's clemency that would come into effect from 5th, September 1971, as they did not name any of the persons involved in the Liberation War. Within a short while Captain Quayum along with his accomplices brought him to the room of Lt. Col. Hejaji at MP Hostel where he [P.W-2] found Panjabee ADC C.M. Afzal [Neighbor of P.W-2]. Lt. Col. Hejaji obtained his signature on a plain paper and handed him over to ADC C.M Afzal who brought him back to his house by his vehicle.

221. Thereafter, he left for India again through border and joined Melaghor Camp in Tripura Province of India. Upon instruction of Sector Commander, he along with others came back to Dhaka with arms and ammunitions and tried to find out the trace of Badi, Rumi, Azad, Jewel and Altaf Mahmud, but in vain. Then they could realize that all of the said victims were liquidated and their dead bodies were disappeared by Motiur Rahman Nizami and others before President's clemency came into effect.

222. In cross-examination he has replied that those who got in touch with Professor Golam Azam at his residence as leaders of Islami Chhatra Sangha, were not known to him but he saw connection of Motiur Rahman Nizami in the house of Golam Azam. Motiur Rahman Nizami and Ali Ahasan Mujahid being the leaders of Islami Chhatra Sangha [ICS] had been identified by his father to him. He has further replied that he again saw Motiur Rahman Nizami when he was tortured on 30th August, 1971.

Evaluation of evidence and findings:

223. P.W-2 Zahir Uddin Jalal has stated that he was captured by Rajakars on 30th August, 1971 in the evening when he moved on instruction of his company commander Abdul Aziz for preparation of carrying out an action at the residence of one Dolly Azad at 19, New Eskaton Road where Al-Badrs, Rajakars and Pakistan army used to sit together for meeting. Having been arrested he had occasion to witness the victims namely Badi, Rumi, Azad, Jewel and Altaf Mahmud confined in the army camp at Nakhla Para old MP Hostel as he was taken there and kept him detained for a couple of hours. He also allegedly found the accused along with his accomplices present there when the accused mistreated him. The above version that has been made by P.W-2 as to how he was abducted and taken up to army camp where he found some of his co-guerilla fighters detained in severely wounded and injured condition. It is also found that they were also kept in confinement to extract information from them.

224. It has been further stated that it was about 8:00 P.M when Jewel told him not to disclose anything to them [Pakistan army and its auxiliary forces] despite torture and Jewel described how he was subjected to torture and

mistreatment. At that time Jewel saw captain Quayum accompanied by Al-Badr Commander Motiur Rahman Nizami, Ali Ahsan Mujahid, Chowdhury Mainuddin and Ashraf of Al-Badr Bahini, while they were moving to Captain's room passing through their room.

225. It is further evident that Motiur Rahman Nizami hit at his [P.W-2] both shoulders by pistol giving pressure upon him to tell the names of other miscreants [freedom fighter]. From the above un-impeached version of evidence, it has revealed that the object of torture was to extract information in respect of guerilla operation carried out in Dhaka city. The accused participated actively in mistreating him as the Chief of Al-Badr Bahini and the President of Islami Chhatra Sangha [ICS] at the time when the occurrence took place. Panjabee ADC C.M Afzal was his [P.W-2] close neighbour naturally, he might have affection to P.W-2. Thereafter, he [ADC C.M Afzal] rushed to the army camp to get him back. Defence has failed to dislodge this version of evidence.

226. From the evidence of P.W-2 it is found that the victims were valiant and brave guerilla fighters including P.W-2 and at the relevant time they were in Dhaka city for the purpose of carrying out guerilla action targeting army and its auxiliary forces.

227. It has emerged from Ext. 37, the book *GKvÈti i w`b_wj* [Ekattorer dinguli] written by Jahanara Imam, page nos. 176-179, 187--289 that Romy, [Son of the said authoress] Jewel,, Azad and others were taken to Nakhal para MP Hostel, which was used as army camp and torture cell, and they were tortured therein. It has been further narrated in the book that the said

victims ultimately did not return homes and whereabouts of them could not be traced out.

228. It is revealed from the circumstantial evidence and relevant facts of common knowledge that the victims were liquidated by the army or Al-Badr and Rajakars either at the camp or somewhere else at the instigation of the accused and his accomplices with the assistance and support of non-military individual or a group of individuals. It is evident that the accused had the command on non-military individuals or a group of individuals who captured the victims including the P.W-2.

229. Pakistani occupation army was not aware of the identification of the pro-liberation forces and freedom fighters as they had been deployed in this part of territory for the first time. But the accused failed to take preventive measure on his followers who took the victims to the army camp at Nakhal Para. Admittedly, the accused was the President of Islami Chhatra Sangha [ICS] at the relevant time but the defence has failed to discard that by virtue of his position he was not the Chief of Al-Badr Bahini as claimed by the prosecution. In view of the facts as stated above, he [accused] had access and affiliation to the army camp and encouraged to act providing assistance in carrying out activities of army camp.

230. It has emerged from evidence that the accused himself participated in torturing the P.W-2, also abetted and facilitated the commission of offence of murder of the victims detained at the camp at Nakhal Para old MP Hostel; although there is no evidence as to who had committed the offence of actual killing of above victims detained at the army camp at Nakhal Para. Accused Motiur Rahman Nizami at the relevant time was in a leading position

[President] of the ICS, the then student wing of jamaat-e-Islami and by virtue of that position he became the Chief of Al-Badr Bahini.

231. It stands proved that Al-Badr Bahini was a Para militia auxiliary force as it was close, active and culpable affiliation with the Pakistani Occupation Army which enabled the accused along with his accomplices belonging to ICS having superior position of authority on Al-Badr to render assistance including all sort of supports to the accomplishment of criminal activities, in furtherance of plan and policy. The direct participation of the accused in the commission of offence is not needed in all aspect of the alleged criminal conduct. The link of the accused if connected is enough to take decision in proving the commission of offence. This view finds support from the decision of trial chamber, ICTY in the case of Limaj [November 30, 2005 Para 189].

232. Though it has been proved by corroborating evidence of P.W-3 with P.W-2 that accused Motiur Rahman Nizami was the leader of Al-Badr Bahini but in respect of presence of the accused at the army camp at Nakhal Para the only witness is P.W-2. It is a settled jurisprudence that corroboration is not a legal requirement for a finding to be decided. It was observed by ICTR trial chamber that-

“Corroboration of evidence is not necessarily required and a chamber may rely on a single witness, testimony as proof of a material fact. As such, a sole witness, testimony suffices to justify a conviction if the chamber is convinced beyond all

reasonable doubt.” [Nchamihigo, ICTR Trial Chamber, November 12, 2008, Para-14].

233. By virtue of his [accused] position in ICS and Al-Badr Bahini he had access and affiliation to the army camp and used to act giving assistance to Pakistani Occupation Force and Auxiliary Forces in carrying out their activities and thus, he involved himself in the commission of offences. On perusal of the evidence it is found that the victims kept captive at the army camp wherein they were subjected to brutal torture as stated by P.W-2, an eye witness, were not handed over to any other group, but his [accused] culpable presence and significant role at the army camp and subsequent disappearance of the victims as described by P.W-2 have proved that the accused was involved with the commission of offence. It was observed in the case of Tadic, [ICTY Trial Chamber May 7, 1997 Para-69] that-

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

234. The conduct and presence of the accused at the camp at MP Hostel, Nakhil Para prior to the event of killing of victims witnessed by P.W-2 and subsequently seeing the accused at the Al-Badr Head Quarters, Mohammadpur along with high ups of pro- Pakistani ideology as stated by P.W-3 have led us to hold that the evidence of both persons have corroborated each other as to his complicity with the actual commission of offences beyond reasonable doubt. The defence has raised question

regarding veracity of P.W.2 in the given evidence but we find no major discrepancy or inconsistency in the evidence about the occurrence of Nakhal Para at MP Hostel. It is to be noted that we have already discussed about the veracity of P.W. 2 at the time of evaluating the evidence in charge no. 3.

235. For the purpose of executing common plan and design they, including the accused rounded from one camp to another camp during the Liberation War as disclosed by the witnesses. We, therefore, find the ingredients of section 4(1) of the Act, 1971 refer to the concept of Joint Criminal Enterprise [JCE]. Thus, the accused is held responsible in the same manner as if it were done by him alone.

236. In view of the factual and legal positions as stated above, we are led to hold that the prosecution has been able to prove the instant charge beyond reasonable doubt as the accused had substantial contribution and participation in the commission of murder and torture and personally liable for his participation in the offences as crimes against Humanity specified in section 3(2)(a) read with section 4(1) of the Act.

Adjudication of Charge No. 09

[Committing genocide and persecution in village Brishalikha.]

237. Summary charge: On 03-12-1971, based on information supplied by accused Motiur Rahman Nizami and the Rajakars, Pakistani Army, past midnight, surrounded the village Brishalikha. After committing other crimes in the village, and in order to destroy in whole or in part the members of Hindu religious group, with the help of the accused, the Pakistani Army and the Rajakars killed Profulla, Vadu, Monu, Sosthi Pramanik, Gyanendra Nath Halder, Poltu totalling about 70 Hindus. Also, 72

houses of the said village were set on fire and destroyed. Thus, the accused has been charged for genocide and persecution as crimes against Humanity as specified under section 3(2)(c)(i) and 3(2)(a) read with section 4(1) and 4(2) of the Act.

Discussion of evidence:

238. P.W. 14 Md. Abdus Selim Latif has stated that he is a freedom-fighter and he took active part in different operations during the Liberation War, 1971 and in one operation he was caught hold of by the Rajakars and Al-Badr and tortured by them and Pakistani Army. His father martyr Sohrab Ali also went to India during the Liberation War and he came back to his own village home at Brishalikha on 02-12-1971. The members of Al-Badr Bahini having known about the return back of martyr Sohrab Ali, informed the same to accused Motiur Rahman Nizami, the chief of Al-Badr Bahini. He has further stated that on 03-12-1971 at dawn the Al-Badr, Rajakars and Pakistani Army surrounded their village Brishalikha and apprehended his father from their house and was brought on to the road and having tortured inhumanly killed him. Under the direction of the accused, Al-Badr, Rajakars and Pakistani Army killed his father. He has also stated that besides his father, they also killed Monu, Sosthi Pramanik, Vadu Pramanik, Gyanendra Nath Halder and many other unarmed civilians. He has stated that he heard about the said occurrence from his mother, Ajgor Ali Munshi, Ohed Ali Pramanik, Shahjahan Ali and many others. He has identified the accused in the dock.

239. In cross-examination, P.W. 14 has stated that in 1971, accused Motiur Rahman Nizami was the chief of Al-Badr Bahini and president of Islami

Chhatra Sangha. He has further stated that while he was a student of college he was involved with the politics of the Student League and his father was involved with the politics of the Awami League. He has denied the defence suggestion that he has deposed falsely against the accused.

240. P.W. 15 Md. Aminul Islam Dablu has deposed that his father martyr Sohrab Ali and brother Md. Abdus Selim Latif [P.W.14] were freedom-fighters. On 15-08-1971 his said brother was apprehended by the Rajakars and Al-Badr and tortured by the Pakistani Army. He has further stated that on 02-12-1971 his father came back to their village home from India. The members of local Rajakar and Al-Badr Bahinis having known about the return back of his father, told the same to accused Motiur Rahman Nizami. On 03-12-1971 at dawn the Al-Badr, Rajakars and Pakistani Army surrounded their village Brishalikha and apprehended his father from their house and was brought on to the road and tortured inhumanly and then killed him by shot. He has further deposed that besides, they also killed Monu, Sosthi, Vadu, Gyanendra Nath Halder and many other innocent persons of their village and set fire to 70/75 houses. He has stated that he heard about the said occurrence from his mother, brothers and sisters and his neighbours. He has identified the accused in the dock.

241. In cross-examination, P.W. 15 has stated that he heard that his father having collected arms from Bera police station and licenced arms from the public participated in the Liberation War. He has denied the defence suggestion that his father was not killed on 03-12-1971 on the road of their village and 70/75 houses of their village were not set on fire. He has also

denied the defence suggestion that he has deposed falsely against the accused.

242. P.W. 16 Md. Jane Alam alias Janu has testified that he is a freedom-fighter and he belongs to the village Brishalikhha. He heard from the elderly people of his village that under the direction of accused Motiur Rahman Nizami, the then president of Islami Chhatra Sangha, and under the leadership of Rafiqunnabi alias Bablu, the then commander of Rajakar and Al-Badr Bahini of Sathia police station, local Rajakars, Al-Badrs and Pakistani Army killed Sohrab along with Sosthi, Vadu, Monu, Profulla, Pintu and many others of village Brishalikhha and set fire to 70/72 houses. He has identified the accused in the dock.

243. P.W. 16 in cross-examination has stated that Sohrab was killed on 3rd December. He has denied the defence suggestion that Sohrab died long after the Liberation of the country. He has also denied the defence suggestion that he has deposed falsely.

244. P.W. 22 Md. Shajahan Ali has stated that his cousins Abdus Selim Latif and Alauddin, uncle martyr Sohrab Ali along with 20/25 young men went to India for getting training of the Liberation War. On 02-12-1971, his uncle Sohrab Ali came back to his village home from India. On 03-12-1971, just before the Azaan of Fazr prayer a big sound was happened and as such he woke up and saw, opening the door of his room, that Rafiqunnabi Bablu, Asad along with 4/5 Rajakars and Al-Badrs having abducted his said uncle from his room took him on to the village road and, then he [P.W. 22], his aunt and all other family members went to the village road after them and saw that the abductors were taking his uncle towards the junction of four

roads. He also went there and kept himself hiding in a bamboo-bush wherefrom he saw that accused Motiur Rahman Nizami was standing there along with Pakistani army, Rajakars and Al-Badrs. He also saw the accused telling the army something by gesture and, then and there one Pakistani army man killed his uncle by firing shots. He has further stated that thereafter, he heard sounds of firing coming from Hindu para and saw the houses of Hindu para ablaze.. Then he having taken the dead body of his uncle to their house went to his aunt's house at Hindu para where he saw many houses were burnt and 7/8 dead bodies of unarmed innocent Hindus lying on the road who were killed by bullet shots. At that time a woman told them that under the direction and presence of accused Motiur Rahman Nizami, Pakistani Army, Rajakars and Al-Badrs set fire to the Hindus' houses and killed 7/8 Hindus by shots and Pakistani Army raped them. He has identified the accused in the dock.

245. In cross-examination, P.W. 22 has stated that accused Motiur Rahman Nizami came to their village 4/5 times since his [P.W. 22] uncle left for India upto before 3rd December. Except on 03-12-1971, Pakistani Army did not commit any atrocity in their village. He has further stated that he went to Hindu para at about 8.00/8.30 in the morning. His aunt's name is Nazeda Khatun and her husband's name is Meer Ali Sarker. He has denied the defence suggestion that he has deposed falsely against the accused.

Evaluation of evidence and findings:

246. The prosecution has examined as many as 4 witnesses [P.Ws. 14, 15, 16 and 22] to prove charge no. 09 relating to committing genocide and

persecution in village Brishalikhha. It may be mentioned here that none of them is an eye witness of the alleged incident, i.e. they are all hearsay witnesses. P.W. 14 Md. Abdus Selim Latif has stated that he heard about the incident from his mother, Ajgor Ali Munshi, Ohed Ali Pramanik, Shahjahan Ali and many others. His brother P.W. 15 Md. Aminul Islam Dablu has stated that he heard about the incident from his mother, brothers and sisters and his neighbours. P.W. 16 Md. Jane Alam has stated that he heard about the incident from the elderly people of his village. And P.W. 22 Md. Shahjahan Ali has stated that he heard about the incident from a woman of the Hindu para where the incident took place. But none of those persons, from whom these four witnesses heard about the alleged incident, has been examined by the prosecution to prove charge no. 09. It has been alleged in this charge that at the time of alleged incident, about 70 Hindu people were killed and 72 houses were set on fire and destroyed. But none of the victim families has been examined by the prosecution to prove the charge against the accused, nor it has been explained by the prosecution for non-examination of such person [s].

247. Upon scrutiny of the evidence adduced by the aforesaid four prosecution witnesses it transpires that all witnesses are hearsay who have no direct knowledge about the alleged genocide and persecution. As hearsay, the evidence has limited probative value standing alone. The reliability of the testimony and its probative value are likely to depend primarily on corroborative or contradictory evidence to be presented later by the defence or prosecution. Proof of charge must depend upon judicial evaluation of totality of evidence, oral and circumstantial, and not by an isolated scrutiny.

It is always to be remembered that graver the charge, greater the standard of proof is required to prove the offence.

248. On consideration of the entire evidence and the materials on record as discussed above, it appears to us that only the four witnesses adduced hearsay evidence having no probative value to rely upon. The involvement of the accused with the commission of those offences appears to be doubtful, and as such the benefit of doubt must be given to the accused. Consequently, we are inclined to hold that the prosecution has failed to prove the instant charge beyond reasonable doubt. Therefore, the accused cannot be held guilty for the commission of offences of genocide and persecution in charge no. 09 .

Adjudication of Charge No. 10

[Committing persecution by destroying the house of Onil Chandra Kundu and many other houses by setting fire.]

249. Summary charge: At the beginning of the Liberation War, Onil Chandra Kundu along with his parents, brothers and sisters left the country and went to India as refugees for safety. However, in August, 1971, he came back to his village Sonatala under Sathia police station. Accused Motiur Rahman Nizami obtained information that Onil Chandra Kundu was taking part in the Liberation War. Thereafter, on the direction of the accused, the local Rajakars destroyed their house and many other houses by setting fire. Thus, the accused has been charged for persecution as crimes against humanity as specified under section 3(2)(a) read with section 4(1) and 4(2) of the Act.

Discussion of evidence:

250. P.W. 12 Dr. Rathindra Nath Kundu has stated that in the year 1985, he heard from his brother-in-law [wife's sister's husband] named Onil Chandra Kundu that after beginning of the Liberation War, he along with his friends went to India for getting training to liberate the country and after 3/4 months, he having received training there came back to Bangladesh and participated in the Liberation War. His parents also having been oppressed by accused Motiur Rahman Nizami, the then president of Islami Chhatra Sangha and the founder of Al-Badr Bahini, went to India. He has further stated that Onil Chandra Kundu had also told him that under the direction of the accused, one of his [accused] nephew [sister's son] along with a group of Rajakars plundered his [Onil Chandra Kundu] house and then burnt it to ashes in the month of May, 1971 as because he participated in the Liberation War. He has also stated that Onil Chandra Kundu died on 8th May, 2010 in Nilphamari where he had been living being afraid of the accused.

251. P.W. 12 has stated in cross-examination that Onil Chandra Kundu did not tell him the name of said nephew of the accused nor does he know his name.

Evaluation of evidence and findings:

252. On perusal of the materials on record it appears that the prosecution has examined as many as 26 witnesses to prove all the charges brought against the accused. But it is evident that solitary witness P.W. 12 Dr. Rathindra Nath Kundu has been examined to prove charge no. 10. He has testified that in the year 1985, he heard from his brother-in-law [wife's sister's husband] named Onil Chandra Kundu that under the direction of

accused Motiur Rahman Nizami, one of his [accused] nephew [sister's son] along with a group of Rajakars plundered his [Onil Chandra Kundu] house and then burnt it to ashes in the month of May, 1971 as because he participated in the Liberation War. P.W. 12 has stated in his cross-examination that Onil Chandra Kundu did not tell him the name of said nephew of the accused nor does he know his name. It is alleged in the charge that the house of Onil Chandra Kundu was set on fire sometime after August, 1971. But P.W. 12 has stated that the house of Onil Chandra Kundu was plundered and set on fire in the month of May, 1971. P.W. 12 could not tell the name of the nephew of the accused who along with other Rajakars allegedly plundered and destroyed the house of Onil Chandra Kundu. It may be mentioned here that except P.W. 12, any other inhabitant of the village of Onil Chandra Kundu has been examined by the prosecution to corroborate the evidence of P.W. 12. So, the evidence of solitary hearsay witness i.e. P.W. 12 is not corroborated by any other oral or documentary evidence.

253. Considering all the facts and circumstances and the evidence on record as discussed above, we are of the opinion that a reasonable doubt arises whether the alleged occurrence took place and whether the accused in any way was involved with the commission of the alleged offence. So, the prosecution has failed to prove charge no. 10 against the accused beyond reasonable doubt.

**Adjudication of Charge Nos. 11 to 14
[Incitement involving the commission of crimes specified in section 3(2)(f) of the Act, 1973]**

254. Above captioned charge nos. 11 to 14 relate to incitement under section 3(2)(f) of the ICT Act, 1973 i.e. any other crimes under international law. All the aforementioned four charges have arisen out of inciting speeches made by accused Motiur Rahman Nizami published in the Daily Sangram on different dates during the War of Liberation in 1971. Attested 04 scan copies of paper clipping have been marked as Ext. nos. 2(5), 2(10), 2(15) and 2(16). Accused has been charged under section 3(2)(f) read with section 4(1) and 4(2) of the Act for committing common offences of incitement in all four charges . Therefore, all the four charges are taken up together for discussion and decision as the common fact and law are involved.

255. Incitement to commit crimes against Humanity is recognised crime under customary international law [CIL] which is also specified in section 3(2)(f) of the Act.

INCITEMENT

256. The definition of incitement in the draft criminal code, cl, 47 as recently approved by the Divisional Court of Appeal in England as a person is guilty of incitement for committing an offence or offences if he incites another to do or cause to be done as an act or acts which, if done will involve the commission of the offence or offences, by the other, and he intends or believes that the other, if he acts as incited, shall or will do so with the fault required for the offence or offences.

257. The elements of the offence of direct and public incitement to commit genocide are described in both the plea Agreement and the Tribunal Jurisprudence as:

- (i) that the accused incited others to commit genocide;
 - (ii) that the incitement was direct;
 - (iii) that the incitement was public; and
 - (iv) that the accused had the specific intent to commit genocide, that is destroying in whole or in part a nation, ethnic, racial or religious group.
- Incitement to commit genocide is an inchoate offence which does not require nexus to commit any offence. Incitement is complete when uttered or published.

258. As regard charge no. 11, Ms. Tureen Afroz, the learned Prosecutor has submitted that the accused made an inciting speech [Ext. no. 2(5)] to the members of Islami Chhatra Sangha [ICS] treating Pakistan as the house of Allah which was repeatedly protected by Allah and there was no power on earth that could destroy Pakistan.

259. As regards charge no. 12 the learned Prosecutor has submitted that in a meeting the accused made an inciting speech [Ext. no. 2(10)] stating that Al-Madani was killed by the enemies of Islam with intent to uproot Islam from Pakistan and urged people to dive into Jihad for taking revenge against the killers of Al-Madani.

260. As regards charge no. 13, the learned Prosecutor has submitted that the accused made an inciting speech [Ext. no. 2(15)] at a gathering to the members of ICS urging them to strike India, the main enemy of Pakistan and to eliminate the persons who were collaborating with India.

261. As regards charge no. 14, the learned Prosecutor has submitted that the accused made an inciting speech [Ext. no. 2(16)] to the Rajakars by quoting two verses 111 and 112 of surah 'Tawbah' of the Holy Quran urging them invoking religious sentiment to the effect that Allah has purchased the lives of pious people in exchange of heaven then it is the duty of the pious men to fight on the path of Allah in that event they would get killed and sometimes be killed and as such that speech incited Rajakar and Al-Badr to eliminate the persons who were fighting to free Bangladesh.

262. The learned Prosecutor referred to the following decisions of the ICTR Trial Chamber in Bikindi [2008], Muvunyi [2006] and Kajelijeli [2003] in support of her contention.

263. In reply to the above submissions, Mr. Tajul Islam, the learned defence counsel has submitted that accused Motiur Rahman Nizami was a student leader in 1971 who made aforesaid four speeches [charge nos. 11 to 14] in order to safeguard the integrity and solidarity of Pakistan. It is submitted that treating Pakistan as the house of Allah [Charge no. 11], to take revenge against the enemies of Islam and killer of Al-Madani [Charge no. 12], to urge people of Pakistan to strike India and its collaborators [charge no. 13] and to explain true meaning of two verses of sura 'Tawbah' before the members of ICS do not fall within the purview of incitement as offence. It is further submitted that not a single speech was made for committing any offence against any particular person or group of persons and as such those four speeches did not constitute the offence of incitement and as such the accused is entitled to get an acquittal for the alleged offences of incitement brought in charge nos. 11 to 14.

Evaluation of Evidence and findings:

264. We have perused four charges being nos. 11 to 14 brought against the accused. We have also gone through some decisions of international war crimes tribunals produced before this tribunal by both the parties. It is evident on record that the prosecution did not examine any witness to prove the offence of incitement brought in charge nos. 11 to 14. Prosecution has produced only four pieces of clipping of the "Daily sangram" marked as Ext nos. 2(5), 2(10), 2(15) and 2(16) to prove those charges mentioned above. It is settled principle of law that incitement is an inchoate offence which does not require nexus to commit any offence. The offence of incitement is completed as and when it is uttered or published in common law jurisdictions.

265. It goes without saying that as per principle of 'text' and 'context' argument, the context is the principal consideration for assessment of a particular speech whether it will be incitement as an international offence.

266. On perusal of evidence on record, we find that prosecution did not examine any witness to prove charge nos. 11 to 14 in respect of common charge of incitement. To prove the said four charges, prosecution has adduced only four pieces of newspaper clipping Ext. nos. 2(5), 2(10), 2(15) and 2(16). Prosecution has also submitted six Police Abstract Reports compiled in volume no. 09 at page nos. 2689 to 2755. It is found on scrutiny that those reports do not disclose any element of incitement as offence.

267. Upon scrutiny of the newspaper clipping [Ext-2(5)] as regards of charge no. 11 that in a meeting the accused made a speech treating Pakistan

as the house of Allah and declared that no one could destroy Pakistan. To treat a country like Pakistan as house of Allah is no doubt a wrong interpretation of Quranic injunction but that speech does not appear to have been made for inciting members of Islami-Chhatra Sangha to commit any offence against a particular person or group of persons. Thus, the elements of offence of direct and public incitement are found absent in charge no. 11.

268. As regards charge no. 12, it is found that this charge suffers from materials defect as the place of delivering speech has not been mentioned in the charge. It is further found that the accused made the speech Ext. no. 2(10) in a condolence meeting of one Al-Madani urging people to dive into jihad for taking revenge against the killer of Al-Madani. This charge did not disclose as to how and by whom Al-Madani was killed. The charge of incitement must be direct and specific but such elements of offence of incitement are found to be absent, in the instant charge.

269. As regards charge no. 13 it is found on scrutiny that the accused made a speech Ext. 2(15) in a gathering of the Islami Chhatra Sangha directing them to strike India, the main enemy of Pakistan and to eliminate the persons who were collaborating with India. It is found from the speech that the accused urged the members of Islami Chhatra Sangha to fight against India along with its collaborators. This speech appears to be inciting to crash India without specifying any other group of people. This charge also suffers from vagueness as the speech was made intending to crash India only which is not a matter in issue of this case for the purpose of determining the offence of incitement.

270. As regards charge no. 14, it is found on scrutiny that the accused made a speech [Ext. 2(16)] to the members of Rajakars by explaining real meaning of verses 111 and 112 of surah 'Tawbah' of the Holy Quran. By quoting the said verses, the accused inspired the members of Rajakars to fight on the path of Allah even at the cost of life. We find no element of the offence of incitement in the said speech as no intention to commit any offence has been manifested against any particular person or group of persons.

271. We have meticulously assessed evidentiary value of those four paper clippings Ext. nos. 2(5), 2(10), 2(15) and 2(16) adduced by the prosecution in term of the offence of incitement. Wherefrom we do not find sufficient elements of incitement as enunciated in the customary international law. It is pertinent to mention here that in the ICT Act, 1973 incitement has not been made as an offence directly, but the offence of incitement can be tried under the Act as 'any other crimes under international law' [section 3(2)(f)]. As such we have to depend on customary international law to deal with the offence of incitement.

272. Therefore, we are led to hold that the prosecution has failed to prove the charges of incitement brought in charge nos. 11, 12, 13 and 14 against the accused beyond reasonable doubt.

Adjudication of Charge No.15

[Committing the crimes of conspiracy by frequently visiting the Rajakar's camp situated at Sathia Pilot High School along with Rajakar-Commander Samad Mia at his office to commit crimes]

273. Summary Charge: During the period of liberation war, accused Motiur Rahman Nizami frequently visited the Rajakar camp situated at Sathia Pilot High School and made conspiracy with Rajakar Commander Samad Mia at his office to commit crimes. As a result, Rajakars committed different crimes under the Act in the locality by such conspiracy in which accused had complicity in the commission of those offences. Therefore, the accused has been charged for commission of offence of conspiracy as specified under section 3(2)(g)(h) read with section 4(1) and 4(2) of the Act.

Discussion of evidence:

274. Md. Tofazzal Hossain Master as P.W-10 has testified that he along with accused Motiur Rahman Nizami studied in the same class at Boulamari Madrasha. He has also stated that he started his career as a teacher in Sathia Pilot High School since 1965. In the mid May, 1971 Sathia Pilot High School was closed for establishing a Rajakar camp there and it was inaugurated in the mid May by Motiur Rahman Nizami, Moulana Abdus Sobhan, Moulana Ishaque along with 100/150 Rajakars and some curious people were also present there. He came to know from the people present in inaugural session that those who worked in favour of the Liberation War would be killed by bringing them to the camp and inspired the youth to be admitted in the Rajakar Bahini.

275. Thereafter, this witness could not go to that school furthermore, rather he went to India for getting guerilla training. In the month of September, 1971 Rajakars began to torture upon the unarmed civilians. They brought two simple and ordinary people to Sonatola village and killed them near the street of Dhulaura village. They also having abducted ordinary inhabitants from the remote area of the village confined them in the Pilot High School. They also took some villagers to the army camp at Nagarbari Ghat. Among them one Kalu, a Physical Instructor of Edward College as well as a resident of Chamurpur village along with many others were disappeared. He has further deposed that accomplices of Motiur Rahman Nizami and Abdus Sobhan used to persecute, exterminate people of Hindu communities and plunder their houses and wife of Sunil Joadder was raped in his [accused] presence. Subsequently, Sunil's wife committed suicide in protest of the untoward incident.

276. In cross-examination this witness has echoed that he and Motiur Rahman Nizami both used to call each other as Mama [maternal uncle]. Students of their class called Nizami as Moti or Motiur but they never called him as Nizami. In reply to a question he has further told that in May, 1971 Khorshid Alam was the Headmaster of Sathia High School, who is still alive but Rustom Ali, Assistant Headmaster of the school is now dead.

277. At the time of forming Rajakar Bahini by holding a meeting at Sathia Pilot High School there was no official of the Government. He has further replied that he was afar from Sathia High School camp during the operation on 17th November, 1971 but after the operation he came there to see the dead bodies of the victims. Among the dead bodies some were taken by their

relatives and rest of them were dumped in the earth which he heard from the freedom fighters.

278. Md. Shamsul Huq Nannu as P.W. 11 has testified that on 24th March he heard from a shopkeeper of nearby Alia Madrasha that Motiur Rahman Nizami, the president of Islami Chhatra Sangha [ICS] and his accomplices formed an anti-liberation cell for helping the Pakistani occupation force by the members of Islami Chhatra Sangha and Jamaat-e-Islami [JEI] and while Pabna was freed from Pakistani occupation force, Motiur Rahman Nizami and others fled away from Pabna. In the mid May of 1971, Motiur Rahman Nizami along with 100/150 Rajakars came to Sathia Pilot High School where Motiur Rahman Nizami inaugurated a Rajakar camp and spoke on the occasion with a direction that freedom fighters and their supporters would be killed and he asked the youths to join the Rajakar Bahini.

279. Md. Zahirul Hoque as P.W. 18 has stated that he is a freedom fighter. Now he is the acting Commander of Muktijoddha Sangsad, Sathia Thana Command. He has deposed that perhaps on 11th or 12th May, 1971 Motiur Rahman Nizami, the president of Islami Chhatra Sangha, along with about 100/150 Rajakars and Al-Badr including Ishaque Moulana came to Sathia Pilot High School and they inaugurated a Rajakar Camp there. In the inaugural session Motiur Rahman Nizami delivered a speech in public that freedom fighters and their supporters would be killed and invited the youths to join the Rajakar Bahini.

280. In cross-examination he has replied that he did not have talk with Motiur Rahman Nizami before or after 1971 but he knew him. He prepared a

full list of Al-Badr, Al-Shams and Rajakar Bahinis which was handed over to the investigation officer. He did not scrutinize the list which he supplied to the investigation officer as it was prepared on the basis of old record of the office. Motiur Rahman Nizami used to stay at different places of Bangladesh including Sathia but he did not know where he used to reside permanently during the Liberation War.

Evaluation of evidence and findings:

281. The prosecution has examined three witnesses to prove charge no. 15. P.W. 10 has testified that he came to know that a Rajakar camp was established at Sathia Pilot High School by Motiur Rahman Nizami along with his accomplices in the mid May, 1971. He has further testified that Motiur Rahman Nizami and others had inspired the local people to get admitted in the Rajakar Bahini. That Bahini being auxiliary force of Pakistan army brought innocent and ordinary people to the alleged camp from the remote area of the villages. After killing them their dead bodies would have been disappeared.

282. Among them, one Kalu along with many others were disappeared. He heard that wife of Sunil Joadder was raped in his [accused] presence. On a careful assessment of the aforesaid evidence it finds ambiguity that from whom and when he [P.W. 10] heard the presence of the accused. There has to be a place and person from whom he heard but such evidence is found absent in this regard. Therefore, it is very difficult to rely on such hearsay evidence only. P.W. 11 has also given evidence in the same tune and manner

as he was not present at the time when the accused allegedly established Rajakar camp at Sathia Pilot High School.

283. In furtherance of which, P.W. 18 heard from P.W. 15 that on 11th May or 12th May, 1971 Motiur Rahman Nizami along with 100/150 Rajakar and Al-Badrs visited Sathia High School where they established a Rajakar camp.

284. Although P.W. 10 was a teacher of Sathia Pilot High School during the Liberation War but he did not state that he was present at the time of establishing the Rajakar Camp by the accused. Moreso, on scrutiny of the evidence adduced by the prosecution it is found that P.Ws. 10, 11 and 15 are hearsay witnesses in respect of the charge. They [P.Ws. 10, 11 and 15] were not present at the time of alleged occurrence. It is evident on record that there is no reliable evidence to prove that accused was involved in making conspiracy with his associates at Sathia Pilot School. In view of the fact, we are inclined to hold that the prosecution has failed to prove the instant charge beyond reasonable doubt.

Adjudication of Charge No. 16

[Committing genocide by killing professionals and intellectuals]

285. Summary charge: Throughout the period when atrocities were committed in Bangladesh, accused Motiur Rahman Nizami as president of Islami Chhatra Sangha and head of Al-Badr Bahini, an auxiliary force, that committed said atrocities all over Bangladesh over the period, but when defeat of Pakistani occupation and auxiliary forces was imminent, his organizations Islami Chhatra Sangha and Al-Badr Bahini mounted Gestapo

like attacks to devoid Bangladesh professionals and intellectuals, amongst others, and launched mortal blow to free and independent Bangladesh, by selective elimination of respected professionals and intellectuals, found their homes, dragged out, often blind-folded, tortured, murdered and their dead bodies then dumped in mass-graves and other places. Such attacks were largely carried out on or around 14th December 1971. These well orchestrated and finely executed plans to eliminate a group of individuals who were all members of a national, ethnic and racial group. Thus, the accused has been charged for genocide as specified under section 3(2)(c)(i) read with section 4(1) and 4(2) of the Act.

Discussion of evidence:

286. P.W. 1 Misbahur Rahman Chowdhury has deposed that he is the Chairman of Bangladesh Islami Oikka Jote. During the Liberation War, 1971 accused Motiur Rahman Nizami was the president of the then Pakistan Islami Chhatra Sangha and also the chief of Al-Badr Bahini. In the month of December, 1971 until the victory, the members of Al-Badr Bahini collaborated directly and indirectly with the Pakistani Army and having made list of intellectuals either they killed them or caused them to be killed. The Al-Badr Bahini was formed with the members of Jamaat-e-Islami and its allied organization Islami Chhatra Sangha and the accused is the sitting 'Ameer' (Head) of Jamaat-e-Islami. He has identified the accused in the dock.

287. In cross-examination, P.W.1 has stated that in 1971, accused Motiur Rahman Nizami was the president of Nikhil [entire] Pakistan Islami Chhatra

Sangha as well as East Pakistan Islami Chhatra Sangha. During his research, he took interview of more than one Al-Badr and visited 3/4 mass-graveyards. He has denied the defence suggestion that he has deposed falsely against the accused.

288. P.W. 13 Shamoli Nasrin Chowdhury has testified that she retired as the principal of Udayan High School and at present she is the principal of Uddipon School established by herself. In 1971, she used to live with her husband martyr Dr. Abdul Alim Chowdhury and other family members in a rented house situated at 29/1, Purana Paltan, Dhaka. In 1955, her husband passed the M.B.B.S Examination from Dhaka Medical College and got diploma degree in ophthalmology from the Royal College of Physicians, U.K. in 1961. He served as an Assistant Professor in many Medical College and Hospitals at Dhaka. During the Liberation War, he was working in Sir Salimulla Medical College. Besides, he had a clinic and chamber in his rented house at Purana Paltan. He was also attached with different social organizations.

289. P.W. 13 has further testified that her husband martyr Dr. Abdul Alim Chowdhury worked infavour of the Liberation War since 25th March, 1971 and on that day the acting President of the People's Republic of Bangladesh, Sayed Nazrul Islam took shelter in their house. She has further testified that during the whole nine-month long Liberation War, they gave shelter to the journalists, litterati and freedom-fighters. Her husband used to collect money and medicine for the freedom-fighters and he along with Dr. Fazle Rabbi gave medical treatment secretly to the injured freedom-fighters.

290. P.W. 13 has also testified that during the Liberation War, they came to know that Al-Badr Bahini was formed with the members of Islami Chhatra Sangha which was against the Liberation War and Professor Ghulam Azam, Motiur Rahman Nizami [the present accused] and Ali Ahsan Mujahid were the central leaders of those organizations. The Al-Badr Bahini collaborated with the Pakistani Army in the offences of killing, genocide, rape, arson, plundering, etc. The members of the Al-Badr Bahini, under the direction of their high command, having abducted the supporters of the Liberation War, particularly, the intellectuals including professors, engineers, doctors, artists, litterati, took them to the Physical Training Institute at Mohammadpur and then tortured them to death. She has further stated that on 15th December, 1971 in the afternoon, some members of Al-Badr Bahini came to their house with a microbus and forcefully entered into their house and directed her husband saying 'hands up' and also told him that under the direction of their high command Motiur Rahman Nizami, they came there to take him and, thereafter, they took away her husband binding his eyes. Thereafter, she had been waiting whole night for her husband but he did not come back [*at this stage this witness started bursting into tears*]. She has also stated that on 16th December, the victory day, and 17th December, 1971, they tried to find out her husband, but failed. On 18th December, 1971 in the morning, they came to know that many dead bodies were lying on the place of execution at Rayer Bazar. Thereafter, her husband's younger brother Hafiz Chowdhury, Hakim, Momin and other relatives having gone to that place of execution saw the dead bodies of her husband martyr Dr. Abdul Alim Chowdhury, Dr. Fazle Rabbi, Labu Bhai, journalist Selina Parveen and many others

sustaining severe injuries lying on the brick-field and then they brought her husband's dead body to their house. She prayed for capital punishment of the members of Al-Badr Bahini and their high command who killed her husband and other intellectuals. She has identified the accused in the dock.

291. In cross-examination, P.W. 13 has stated that in 1971 in the month of August, he saw a news report in the daily Sangram wherein it was stated that Motiur Rahman Nizami was the founder of Al-Badr Bahini and the high command of the same Bahini all over Pakistan. In 1971, she came to know that there was an organization named Islami Chhatra Sangha. She has further stated that she herself heard from the members of Al-Badr Bahini who came to abduct her husband under the direction of accused Motiur Rahman Nizami. She has denied the defence suggestions that accused Motiur Rahman Nizami was not involved in any way with the killing of her husband and that the accused was not the chief of the Al-Badr Bahini nor even a member of that Bahini. She has also denied the defence suggestion that she has deposed falsely against the accused.

292. P.W. 23 Syeeda Salma Mahmud alias Syeeda Salma Haque has deposed that on 15-02-1970 she got married with martyr Dr. Azharul Haque. On 26th March, 1971 in the morning many teachers and students of Iqbal Hall, Jagannath Hall and the Dhaka University including Dr. G.C. Dev, Professor Dr. Moniruzzaman, Dr. Jotirmoy Guha Tagore and also many general people of different areas of Dhaka city were killed. During the Liberation War, 1971, her husband was posted at the Dhaka Medical College Hospital and, he also used to practice in a pharmacy named "Saida Pharmacy" situated at near to their house. During the Liberation War, her

husband used to give medical treatment to the injured freedom-fighters in the said pharmacy, in the camp of the freedom-fighters and sometimes secretly in the Dhaka Medical College Hospital after 2.00 P.M.

293. P.W. 23 has further deposed that on 15th November, 1971 in the morning, the Pakistani Army and armed Bangalees cordoned off the entire areas of Hatirpul, Central Road and Vutergoli, and as such, her husband made a telephone call to his hospital authority from his landlord's house to send an ambulance to take him to the hospital. Thereafter, her husband and their next door neighbour martyr Dr. Humayun Kabir were waiting at in front of their house for the ambulance to go to the hospital. Then she saw that the Pakistani Army and the armed Bangalees abducted her husband martyr Dr. Azharul Haque and said martyr Dr. Humayun Kabir at gun point. She has further stated that at the time of abduction, she tried to resist the abductors from abducting her husband but failed, rather some armed Bangalees pushed her to her house at gun point and on her query, those armed Bangalees told her that they were the members of the Al-Badr Bahini and under the direction of their high command Motiur Rahman Nizami they came there to take her husband Dr. Azaharul Haque and Dr. Humayun Kabir.

294. P.W. 23 has also deposed that on the following day i.e. on 16th November, 1971, Dr. Quamruzzaman and Dr. Bobi having come to her brother's house situated at Poribagh informed them that her husband's boss Dr. Shamsuddin went to the morgue of Dhaka Medical College Hospital and saw there the dead bodies of her husband and Dr. Humayun Kabir. They also informed them that the dead bodies sustaining bullet injuries were recovered

from the drain under the culvert situated at beside the Notre Dame College, Dhaka. Then her brothers having gone to the morgue brought her husband's dead body to her brother's house at Poribagh and thereafter the dead bodies of her husband, Dr. Azharul Haque and Dr. Humayun Kabir were buried at the Azimpur graveyard. She has identified the accused in the dock.

295. In cross-examination, P.W. 23 has stated that in the month of May/June, 1971, her husband joined the 'Saida Pharmacy'. She has further stated that Dr. Quamruzzaman and Dr. Bobi had told them that two police men brought the dead bodies of her husband and Dr. Humayun Kabir to the morgue of the Dhaka Medical College Hospital. She has denied the defence suggestion that she has deposed falsely against the accused as he is a leader of a different political party.

Evaluation of evidence and findings:

296. We have discussed the oral evidence of the prosecution witnesses relating to killing of professionals and intellectuals. These prosecution witnesses [P.Ws. 1, 13 and 23] have claimed that the members of Al-Badr Bahini in collaboration with Pakistani Army exterminated the professionals and intellectuals including Dr. Abdul Alim Chowdhury, Dr. Azharul Haque and Dr. Humayun Kabir at the fag end of the Liberation War, 1971.

297. Robindra Nath Trivedi is the author of the book titled " 71 HI cn j jp " [Ten months in 1971], first published in 1997 and, the prosecution has exhibited the second edition of the book published in 2007 as Ext. 42. The author compiled the book mainly on the basis of information obtained from various sources including the daily news papers of the relevant time. The book reflects information narrating events in brief including situation he

experienced during the Liberation War, 1971. It appears from page nos. 595, 596 of the said book that the Al-Badr Bahini formed of armed members of Jamaat-e-Islami's student wing named Islami Chhatra Sangha [ICS] started abducting Bangalee intellectuals by selecting in furtherance of plan designed by General Rao Farman Ali under the leadership of Army Captain Quayum. From the narration made in the book further shows that there had been a plan designed with intent to annihilate the selected intellectuals in order to cripple the Bangalee nation and the criminal activities were carried out by the fascist Al-Badr Bahini. The above narration described at page 620 of the book is as follow:

" পাকিস্তান বাহিনীর সহযোগী QIj c(rZF; ENËp;fDQUL gÉ;p0V
 গেস্টাপো আল-বদর বাহিনীর ঘাতকের; ঢাকা শহরে যুদ্ধ ও কারফিউর মধ্যে
 ১০ ডিসেম্বর থেকে ১৪ ডিসেম্বরের মধ্যে খুঁজে খুঁজে সেরা বাঙালী অধ্যাপক,
 চিকিৎসক, সাংবাদিক, সাহিত্যিকদের রায়েরবাজার ও মীরপুর অবাঙালী
 অধ্যুষিত এলাকায় নিয়ে গিয়ে নৃশংসভাবে হত্যা করে। উল্লেখ্য, পাক সামরিক
 অফিসারদের আদেশে এ জঘন্য হত্যাকাণ্ড সম্পন্ন হলেও এ qaÉI f0L0fe;
 a;0mLj f0ue, BÍ গোপনকারী বুদ্ধিজীবীদের খুঁজে বের করা, তাদের ধরে
 নিয়ে নৃশংস অত্যাচারের মধ্যে দিয়ে হত্যা করার কাজটি আল-hcl J I;S;LjI
 বাহিনীর বাঙালী সদস্য ও তাদের নেতাদের দ্বারা p0fæ quz "

298. It is also narrated in above mentioned book [Ext.42] at pages 615, 616 as under:

"..... *Squads of al Badar, armed Bihari irregulars, toured the city in buses and rounded up Bengali intellectuals. At gun point, doctors, lawyers,*

University professors, and writer were taken from their homes and driven to a swamp on the edge of the city. There they were tortured and killed.....It seemed that the Pakistani military was determined to destroy the future of Bengal.”

299. Thus it is found that the Al-Badr men used to carry out specialized operations and it acted as a ‘death squad’ and exterminated leading professors, journalists, litterati, and even doctors. The book titled “ একাত্তরের ঘাতক ও দালালরা কে কোথায় ” [Ekattorer Ghatok Dalalra ke Kothai], edited by Dr. Ahmed Sharif, Kazi Nur-uzzaman and Shahriar Kabir, 4th edition, 1989 [Ext. 35] narrates at page 56 as under:

“ সেপ্টেম্বর মাসের ১৭ তারিখে রাজা Ljl h;ŋqefl fŋe J n;ŋ;¹ Lŋj Wl লিয়াজোঁ অফিসারকে নিয়ে গোলাম আজম মোহাম্মদপুরে ফিজিক্যাল ট্রেনিং সেন্টারে যে রাজাকার ও আলবদর শিবির পরিদর্শন করেছিলেন, সেটি ছিল আলবদরদের হেডকোয়ার্টার। স্বাধীনতামনা বুদ্ধিজীবীদের বেশীরভাগকে আলবদররা প্রথমে চোখ বেঁধে এখানেই নিয়ে আসে। নির্যাতনের পর এখান থেকেই তাদের রায়ের বাজারে ও মীরপুরের শিয়ালবাড়িসহ অন্যান্য বধ্যভূমিতে নিয়ে গিয়ে হত্যা করা হয়। ”

300. The above mentioned book [Ext. 35] further narrates at page 100 as follow:

“.....27/12/71 তারিখের দৈনিক আজাদে বিরাট হেড লাইনে বড় বড় হরফে লেখা আর একটা সপ্তাহ গেলেই ওরা বাঙালী বুদ্ধিজীবীদের সবাইকে মেরে ফেলত- hcl h;ŋqefl j;ŋj l fŋe শীর্ষক দীর্ঘ প্রতিবেদনটি অংশ বিশেষ এখানে উদ্ধৃতি হল-

“..... qjefcjl fjl`ef hjqefl eefhjl NZqafju
 সহায়তা করেই জামাতে ইসলামী ক্ষান্ত হয়নি- বাংলাদেশের বুদ্ধিজীবী
 সম্প্রদায়কে সম্পূর্ণভাবে নির্মূল করার উদ্দেশ্য তারা গড়ে তুলেছিল এক
 pnU» ...ঢ় p২pph;cf p৭NWe-বদর বাহিনী নামে যা সর্বসাধারণের
 কাছে পরিচিত ছিমz fjlUjef qjefcjl hjqefl Avl mgcঈর শেষ
 মুহুর্তে এই বদর বাহিনী বহুসংখ্যক বুদ্ধিজীবীকে রাতের আঁধারে ধরে
 নিয়ে নৃশংসভাবে হত্যা করেছে- এ খবর এখন সবাই জেনে
 গেছে।.....”

301. The vital role of Jamaat-e-Islami in creating the Al-Badr Bahini is reflected from the narration of the book titled ‘Sunset at Midday’ [Ext. 28/3], written by Mohiuddin Chowdhury, a leader of Peace Committee, Noakhali district in 1971 who left Bangladesh for Pakistan in May, 1972 [publisher’s note : Qirtas Publications, 1998, Karachi, Pakistan, at page 97 of the book]. The said narration has already been discussed in the event of " The Status and Role of accused Motiur Rahman Nizami".

302. Al-Badr Bahini acted as the Pakistani Army’s ‘death squads’ and exterminated leading left wing professors, journalists, litterati, and even doctors [Source: Pakistan Between Mosque and Military (Ext. 28/1): Written by Husain Haqqani, published by Carnegie Endowment For International Peace, Washington D.C, U.S.A. first published in 2005, page 79]. Acting as ‘death squad’ of Pakistan occupation army in furtherance of policy and plan unequivocally proves that the Al-Badr Bahini was a para militia force created to assist the Pakistan Army as its auxiliary force. The relevant

narration of the author has already been quoted when we discussed " **The Status and Role of accused Motiur Rahman Nizami** ".

303. Fox Butterfield sent a report which was published in the New York Times on 03-01-1972 which is quoted below:

“Al-Badr is believed to have been the action section of Jamaat-e-Islami carefully organised after the Pakistani crackdown last March.”

[Source: Bangladesh Documents, Vol. II, page 577. It was referred to Professor Ghulam Azam's case.]

304. Mr. John Stone House, British Labour M.P. told to PTI in an interview in New Delhi on 20-12-1971 which is quoted below:

“.....during his visit to Dacca yesterday (December-19) he got the names of these Pakistani Army officers who organized the murder and members of Al-Badr, an extremist Muslim Group, who carried out these heinous crimes just before the surrender of Pakistani forces in Dacca.”

[Source: The Hindustan Times, New Delhi, 21-12-1971, published in Bangladesh Documents, Vol. II. It was referred to Professor Ghulam Azam's case.]

305. The report titled ‘ Butchery By Al-Badr’ was published in the PATRIOT, New Delhi on 23-12-1971 which manifestly demonstrates the role of Jamaat-e-Islami and its armed wing Al-Badr that perpetrated the killing of leading intellectuals, the best sons of the soil. The said report speaks that-

“When the Pakistanis were over powered, they left the killing to the fascist Al-Badr , the armed wing of Jamaat-e-Islami. This fascist body has already butchered about 200 leading intellectuals, doctors, professors, and scientists, including such eminent men like Shahidulla Kaiser and Munir Chowdhury.”

[‘PATRIOT’ New Delhi, 23-12-1971, also published Bangladesh Documents, Volume II, page 573. It was referred to Professor Ghulam Azam's case.]

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

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

[Source: Fox Butterfield, ' A Journalist is Linked to Murder of Bengalis', New York times, Monday, January 3, 1972]"

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

" One of them was Enayet Ullah Khan, editor of a left-list weekly called Holiday. Khan said he was contacted by Jamaat-e-Islam, the nationalist organisation which had worked in concert with the former government in Dacca..... They said I was an Indian collaborator and did not believe in Islam. They told me, 'we will eliminate you'. I didn't take them too seriously at the time." But Khan discovered this month that he, too, was on the Al Badr execution list drawn up on the eve of surrender....."

had the war not ended on the 16th, you would find the city of Dacca without a politically conscious or educated element."

He said.

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

308. In a report on killing of some 150 of Dacca's leading intellectuals The Washington Post accused squarely the al Badr-the extremist action front of

the right wing Moslem political party Jamat E Islami of the intellectuals killing. The report speaks as under:

" Right wing religious fanatics have now been accused of the mass murder of Bengali intellectuals at Mohammadpur on the outskirts of Dacca two days before the surrender of the Pakistan forces Pakistani troops were originally blamed for the killing of some 150 of Dacca's leading intellectuals including doctors, lawyers, professors, teachers and journalists..... But student groups and local news papers have now laid the blame squarely on the al Badr- the extremist action front of the right wing Moslem political party Jamaat-e-Islam."

[Source: Report titled " Dacca Massacre Laid to Fanatics" The Washington Post, December 26, 1971]

309. It appears from the evidence both oral and documentary as discussed above, and it is also a fact of common knowledge that Al-Badr Bahini was an armed para militia force which was created for 'operational' and 'static' purpose of the Pakistani Army. Al-Badr was one of the two wings of Rajakar force. Another wing was Al-Shams. Under the government management and supervision Al-Badr and Rajakars were provided with training and allocated fire arms. Why these para militia force were created? Of course, objective was not to guard lives and properties of civilians. Rather, it is reasonably undisputed that the Al-Badr Bahini 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 Bangalee civilians through out the territory of Bangladesh in 1971. Pro-liberation civilians, intellectual group, Hindu community were their key targets. It has been proved beyond reasonable doubt that armed Al-Badr men, in collaboration with Pakistani Army, pursuant to common planned and designed, at the fag end of Liberation War, 1971, exterminated hundreds of unarmed intellectuals of various professions including Dr. Abdul Alim Chowdhury, Dr. Azharul Haque and Dr. Humayun Kabir. The pattern and feature of the persecution lead us to conclude that it was a 'large scale killing' having all the required elements to constitute the offence of extermination as crimes against Humanity, although the accused has been charged for genocide in charge no. 16. It is not denied by the defence that Al-Badr force committed the offence of extermination as crimes against Humanity by killing of hundreds of unarmed intellectuals of different professions. But the defence argued that accused Motiur Rahman Nizami was not involved with the activities of Al-Badr Bahini nor was he involved in any manner with the extermination of the intellectuals. Now, we have to ascertain whether the accused was involved with the activities of Al-Badr Bahini or he was involved with the extermination of the intellectuals.

310. It is quite evident that Al-badr Bahini was formed of armed members of Islami Chhatra Sangha [ICS]. The ICS was the student wing of Jamaat-e-Islami. It has been argued by the prosecution that during Liberation War, 1971, accused Motiur Rahman Nizami was the president of Islami Chhatra Sangha and ex-officio commander of Al-Badr Bahini, and as such, he cannot evade liability of perpetration of the event of intellectuals killing.

Per contra, the defence has argued that the accused was not involved with the activities of Al-Badr Bahini in 1971, and as such, responsibility of the said Bahini does not fall upon him. So, the crux of the controversy between the parties is that whether accused Motiur Rahman Nizami was involved with the Al-Badr Bahini and with the killing of the intellectuals during the Liberation War, 1971.

311. There is a list of the names of the members of the then central committee of Islami Chhatra Sangha in the appendix at pages 190, 191 of the book titled ‘Ekattorer Ghatak Dalalra Ke Kothai’ [Ext.35], first published in 1987 wherein it is stated that accused Motiur Rahman Nizami was the president of the Islami Chhatra Sangha of whole Pakistan and ex-officio commander of Al-Badr Bahini. There is another list of the names of Al-Badr High commands and the central committee of Islami Chhatra Sangha at pages 113, 114 of the book named “ একাত্তরের ঘাতক ও দালালরা ” [Ekattorer Ghatak O Dalalra], written by Azadur Rahman Chandan, 2nd edition, published in 2011 [first published in 2009] submitted by the prosecution under section 9(4) of the Act, 1973 wherein it is also stated that the accused was the commander of Al-Badr Bahini and president of the Central Committee of the Islami Chhatra Sangha. Ext. 33 is a book titled “ পাবনা জেলার মুক্তিযুদ্ধের কথা,” written by Md. Zahurul Islam Bishu” published in 2009. At page 58 of he said book it is stated that the Al-Badr Bahini was created for the purpose of killing freedom-fighters, particularly, intellectuals and genocide. It is also stated therein that accused Motiur Rahman Nizami was the commander of Al-Badr Bahini. It is admitted by D.W. 4 Md. Nazibur Rahman alias Nazib Momen that his father accused

Motiur Rahman Nizami was the president of Islami Chhatra Sangha of whole Pakistan from 1966 to September, 1971.

312. It is narrated at page 258 of the book titled “**Sectarianism and politico- religious Terrorism in Pakistan,**” revised edition, 1993, by **Musa Khan Jalazai** [Ext. 31] about the role played by the accused in the activities of Al-Badr Bahini which is as follows:

“The campaign confirmed Jamiat’s place in rational politics, especially in 1971, when Jamiat began to interact directly with the military government of East Pakistan in an effort to crush Bengali nationalism. As a result of these contracts, Jamiat joined the Pakistani military’s effort in May 1971 to launch two paramilitary counterinsurgency units in East Pakistan, al-Badr and al-Shams, to combat Mukti Bahini, the Bengali guerrilla organization. Jamiat provided a large number of recruits for the two units, especially al-Badr, the decision to join al-Badr and al-Shams was taken by Motiur Rahman Nizami, Jamiat’s nazimia’la at the time who was stationed at Dacca University.”

313. It may be reiterated that P.W. 13 Shamoli Nasrin Chowdhury has testified that during the Liberation War, 1971, Al-Badr Bahini was formed with the members of Islami Chhatra Sangha and accused Motiur Rahman Nizami was a central leader of those organizations. The members of Al-Badr Bahini, under the direction of their high command, having abducted the

supporters of the Liberation War, particularly the intellectuals to the physical Training Institute at Mohammadpur and then tortured them to death. She has further testified that on 15-12-1971 in the afternoon some members of Al-Badr Bahini, under the direction of the accused, abducted her husband Dr. Abdul Alim Chowdhury from their house and, on 18-12-1971 his dead body along with the dead bodies of many others were found at Rayer Bazar. P.W. 23 Sayeeda Salma Mahmud alias Sayeeda Salma Haque has deposed that on 15-11-1971 in the morning the armed members of Al-Badr Bahini and Pakistani Army, under the direction of accused Motiur Rahman Nizami, the high command of Al-Badr Bahini, abducted her husband Dr. Azharul Haque and Dr. Humayun Kabir from in front of their house and on 16-11-1971 their dead bodies were found at the morgue of Dhaka Medical College Hospital and those dead bodies had been recovered from the drain under the culvert situated at beside the Notre Dame College, Dhaka. Ext. 30 is a book titled “বাংলাদেশে মৌলবাদ ও সাম্প্রদায়িকতা,” [Bangladeshe Moulabad O Samprodaikata] written by Shahriar Kabir, first edition, 1998. It is also narrated at page 68 of this book that Dr. Azharul Haque and Dr. Humayun Kabir were killed by Al-Badr men on 15-11-1971.

314. It is admitted by D.W. 1 Md. Nazibur Rahman alias Nazib Momen that his father accused Motiur Rahman Nizamin was the president of Islami Chhatra Sangha [ICS] of whole Pakistan from 1966 to September, 1971, although the prosecution has claimed that the accused was the president of ICS from 1966 to 16th December, 1971, the victory day. It is quite evident that Al-Badr Bahini was formed of armed members of ICS which was the student Wing of Jamaat-e-Islami and, this is not denied by the defence. It is

also evident that the accused was ex-officio commander of Al-Badr Bahini. It is argued by the prosecution that during the Liberation War, accused Motiur Rahman Nizami was in commanding position of Al-Badr Bahini both as de jure and de facto at least upto 30th September, 1971 and since then upto 16th December, he had de facto authority or commanding position over the members of Al-Badr Bahini.

315. It is very much relevant to mention here that accused Motiur Rahman Nizami wrote an article under the caption ‘e`i w`emt cwik`tan ও আলবদর’ [Badr Dibosh: Pakistan O Al-Badr] which was published in Dainik Sangram dated 14.11.1971 [Ext. 2/22]. The relevant portion of the said article is quoted below:

“w`yewnbxi msL`vkwil “ Avgv` i Zj bvq cvP` b tekx| ZvQvov
 AvaybK mgi v`d`ও তারা পাকিতানের চেয়ে অধিক সুসংগঠিত | `f`ekZt
 cwik`taner কিছু মুনাফিক তাদের পক্ষ অবলম্বন করে ভেতর থেকে
 Avgv` i`K `p` Kivi lohš;wj B n`q`Q| Zv` i gKwejv K`iB -
 Zv` i mKj lohš; evbPvj K`iB cwik`taner আদর্শ ও অতিত্ i`v
 Ki`Z n`e| `iay cwik`tan i`vi Av` i`vgj K c`P`v Pwvj `qB G
 cwik`taner রক্ষা করা যাবে না। হিন্দুবাহিনীকে পর্যুদত ও ভারতকে
 c`vbZ K`iB cwik`taner অতিত্ i`vi msK`i M`Y Ki`Z n`e|
 cwik`tanee মুসলমানদের মনে অনুর`c msK`i m`p` Ki`Z n`j e`tii
 `Z`K Aek`B mvg`b Avb`Z n`e| e`tii h`x` th Cgvbx kwil “
 g`j gvb` i w`Rq `vb K`i`Qj tmB Cgvbx kwil “ Avgv` i Aek`B
 m`q Ki`Z n`e| ----- Avgv` i ci g tm`f`M`B ej `Z
 n`e| cvK tmbvewnbxi mn`thwMZvq G``tki Bmjvg w`c` Zi`Y

QvImgvR e`i hfxi `ZK mvgtb titL Avj e`i ewnbx MVb
 KtitQ| ----- cwikতানের আদর্শ ও অতিত্ i vi `pmsKi
 wbtq MWZ Avj e`tii hftKiv Gevtii e`i w`etm bZb Kti kc_
 wbtqtQ, hv`i tZtRv`β Kg© ZrciZvi dtj e`i w`etmi KgPx
 t`kevmx Z_v `ybvqi gmj gvt`i mvgtb nvtbv `Z Ztj aitZ
 mfg ntqtQ| BbkvAvj In e`i hfxi ev`eb `Zl Zviv Ztj aitZ
 mfg nte| Avgv`i weklm tmw`b Avi Lp tekx `fi bq thw`b Avj -
 e`tii Zi`Y hftKiv Avgv`i mkত্র বাহিনীর পাশাপাশি দাঁড়িয়ে হিন্দু
 ewnbxtK chত করে হিন্দুতানের অতিত্ LZg Kti mvi wek! Bmj vtgi
 weRq cZvKv DÇxb Kite | Avi tmw`bB ciY nte wek! gmj gvtbi
 AŠti i AcYAvKজ্ঞা । ”

316. Accused Motiur Rahman Nizami has stated in the said article that the number and power of Hindu Bahini were five times higher than that of Pakistani Bahini. But unfortunately, some betrayers of Pakistan having taken the side of India were involved in the conspiracy to make Pakistan weak and as such, the ideology and existence of Pakistan would have been protected after having foiled their conspiracy. The accused has further stated in the article that a promise would have been made to protect the existence of Pakistan after having defeated the Hindu Bahini and prostrated India and, the religious strength, which brought the victory to the Muslims in the Badr war, would be gathered. In collaboration with Pakistan Army, Islam loving young students of the country had formed Al-Badr Bahini keeping the memory of Badr War in their minds. The accused has also stated in his said article that the day is not so far away when the young members of Al-Badr

Bahini along with Pakistani army would hoist the victory flag of Islam in the whole world after having defeated the Hindu Bahini and destroyed the existence of Hindustan [India] . It appears that during the Liberation War, 1971 accused Motiur Rahman Nizami wrote said article on the eve of Badr Day directing the members of Al-Badr Bahini to exterminate so-called betrayers of Pakistan i.e. freedom-fighters and unarmed civilians who wanted liberation of Bangladesh. If the accused would not have been in a superior or commanding position over the members of Al-Badr Bahini during the Liberation War, 1971, he would not have directed them to exterminate the so-called betrayers of Pakistan. So, the article written by the accused himself also supports that the accused was the commander of Al-Badr Bahini during the Liberation War, 1971.

317. Ext. 18/5, a Fortnightly Report on political situation for first half of June, 1971, from Special Branch, East Pakistan, Dhaka, from which it appears that on 14.06.1971 accused Motiur Rahman Nizami as the president of all Pakistan ICS delivered speech in a meeting [1000] of Islami Chhatra Sangha praising the Pakistani Army for its timely action and called them [ICS members] to co-operate with the Pakistani Army.

318. Ext. 18/8, a Fortnightly Report on political situation for the first half of July, 1971, from Special Branch, East Pakistan, Dhaka from which it appears that accused Motiur Rahman Nizami on 16.07.1971, 18.07.1971 and 20.07.1971 addressed the ICS members in Rangpur, Bogra and Rajshahi respectively. And his speeches eulogized the Pakistan Army.

319. Ext. 18/12 another Fortnightly Report of first half of September, 1971 from where it appears that on 16.09.1971 a public meeting was held under

the auspices of Jalalabad Chhatra Samiti and ICS at Sylhet town where accused Motiur Rahman Nizami condemned the outlawed Awami League leaders defaming Pakistani Muslims by revoting against Pakistan and joining hands with with India.

320. Ext. 18/9, another Fortnightly Report of first half of August, 1971 reveals that on 02.08.1971 a conference of Pakistan Jamiat-e-Talaba-e-Arabia [JTA] was held at Dhaka University Jymnasium. In the said conference accused Motiur Rahman Nizami addressed along with Prof. Ghulam Azam , Moulana Abdur Rahim and other Jamaat leaders where the speakers condemned secular education and Indian imperialism.

321. From the aforesaid fortnightly report it has clearly emarged that accused Motiur Rahman Nizami as the leader of the then Islami Chhatra Sangha [ICS] moved all over the country and delivered speeches by praising the activities of the Pakistan occupation army to his followers, supporters and members of ICS, who were eventually transformed into Al-Badr, death squad, to co-operate with the Pakistan occupation force during the Liberation War, in 1971. So, the contention advanced by the defence that accused Motiur Rahman was not involved with the atrocious activities committed by Pakistani occupation force, Al-Badr and Razakars has no merit for consideration.

322. Pakistan occupation army along with auxiliary forces including Al-Badr Bahini during the Liberation War, 1971 committed heinous crimes like murder, rape, arson, plundering etc. which are crimes against Humanity, and those atrocious activities were praised by accused Motiur Rahman Nizami and other Jamaat leaders in different meetings held at different places of the

country, and as such, those sort of praises of the accused supported and encouraged the commission of those crimes against Humanity committed by the Pakistan occupation army and their auxiliary forces.

323. In order to show one's 'superior responsibility' there should be a superior-subordinate relationship and the superior should have 'effective control' over the subordinates. A superior might incur responsibility only after having failed to take 'necessary and reasonable measures' to prevent or punish a crime committed by subordinates. But the accused Motiur Rahman Nizami despite having effective control over the Al-Badr men failed to prevent them from committing crimes. It is also agreed by the prosecution that not necessarily the 'superior-subordinate relationship' must be formal. It may be informal as well, and can be well perceived from relevant facts and circumstances constituting his de facto authority or commanding position over the perpetrators.

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

“Formal designation as a commander or a superior is not required in order to trigger Article 7(3) responsibility: such responsibility can arise by virtue of a

superior's de facto as well as de jure power over those who committed the crime or underlying offence.

[Celebici Appeal Judgment, paras-191-192; Kajelijeli Appeal Judgment, para-85]”

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

326. It may be mentioned here that the defence has submitted an opinion dated 07.06.2012 [Ext. V] on Command Responsibility under the caption 'Report on Command Responsibility Bangladesh War 1971' obtained from General (Retd.) Sir Jack Deverell KCB OBE by the defence wherein he opined that accused Motiur Rahman Nizami had no command authority nor command responsibility and as such the accused is not liable under section 4(2) of the ICT Act, 1973. The settled proposition of law is that to establishing the existence of a superior-subordinate relationship for any accused superior, whether *de facto* or *de jure*, military or civilian- is that he exercised effective control over the actions of the alleged subordinates. This settled proposition of law is applicable both in our tribunals as well as in international crimes tribunals. We have already held that accused Motiur Rahman Nizami as *de jure* and *de facto* superior had effective control over his subordinates i.e. members of Al-Badr Bahini who along with Pakistan occupation force and other auxiliary forces committed a large scale of

atrocities in the country during the Liberation War, 1971. As such, the said opinion [Ext.V] has no merit for consideration.

327. Considering all the evidence both oral and documentary, the facts and circumstances and the context of the Liberation War, 1971, we are inclined to hold that it is proved beyond reasonable doubt that accused Motiur Rahman Nizami was the president of Islami Chhatra Sangha since 1966 upto at least 30th September, 1971, and he was then ex-officio commander of Al-Badr Bahini and, as such, he was aware of consequence of his act and conduct that substantially encouraged, endorsed, approved, provided moral support to the Al-Badr men in committing the killing of intellectuals. The accused's authoritative position on Al-Badr, both as de jure and de facto, is a fair indication that he had 'effective control' and ability over the members of Al-Badr, the 'the action section' of Jamaat-e-Islami, and thus he cannot be relieved from responsibility of planned crimes committed by Al-Badr men with whom he had a 'relationship'. The accused's act and conduct had substantial impact on the Al-Badr, the criminal organization, in carrying out its activities and 'operation' at the fag end of the Liberation War, 1971 directing the selected intellectuals, including Dr. Abdul Alim Chowdhury, Dr. Azharul Haque and Dr. Humayun Kabir, all over the country. Therefore, accused Motiur Rahman Nizami as de jure and de facto 'superior' had effective control over his subordinates i.e. members of Al-Badr Bahini and ICS. The accused as chief of Al-Badr Bahini exercised his superior status but he never tried to prevent his subordinates from committing atrocities. Thus, he is criminally liable under section 4(2) of the Act. He is thus found guilty for substantially contributing to the commission of the offence

‘exterminations’ as crimes against Humanity as enumerated in section 3(2)(a)(h) of the Act which is punishable under section 20(2) of the Act.

XXIV. Misuse of religion in politics by Jamaat-e-Islami during the War of Liberation of Bangladesh in 1971

328. It is undisputed that Jamaat-e-Islami was founded in 1941 in this sub-continent by Maulana Abul Ala Maududi. Jamaat-e-Islami is a political party having cadre based structures in its formation. In August, 1947 the partition of British India took place and Pakistan came into being as a sovereign state based on two nation theory under auspices of the Muslim League. On being inspired by thoughts and writings of Maulana Abul Ala Maududi, a group of students formed the Islami Jamaat-e-Talaba (Islami Chhatra Sangha) in December 1947 as a student wing of Jamaat-e-Islami.

329. Though Maulana Maududi opposed the very creation of Pakistan in 1947, but while it came into being on the basis of two nation theory, the leaders of Jamaat-e-Islami gradually made intimacy with the Muslim League leaders claiming themselves as vanguard of Islamic revolution. Pakistan has been created as the homeland of only Muslims, this dogma inborned in the minds of Muslim League leaders and some of them became communal in their feelings, thoughts and actions. Virtually, communal feeling is the by-product of two nation theory upon which Pakistan was founded in 1947 as an independent country.

330. It is needless to mention that it was one of the objects of Jamaat-e-Islami to capture the state power of Pakistan in the name of Islam. Jamaat-e-

Islami gradually established a close tie with Muslim League leaders and ultimately borrowed communal feeling, the by-product of two nation theory from the leaders of Muslim League. Thus, both Jamaat-e-Islami and Muslim League used to legitimate political and social functions giving islamic terms in strengthening their common communal attitude for the purpose of making Pakistan as the only homeland for Muslims.

331. Ms. Tureen Afroz has submitted that during the War of Liberation in 1971, accused Motiur Rahman Nizami along with Jamaat-e-Islami leaders made a lot of inciting speeches to their young followers in public by giving wrong interpretation of religious injunctions for motivating partymen to resist Indian agents and the miscreants [freedom fighters] at the cost of lives. She referred to an attested copy of the "Daily Sangram" dated 5 August 1971 Ext. no. 2(5) and a relevant portion of the news report is quoted below:

"cwi tk̄t̄l Rbve w̄bRv̄ḡx et̄j b̄ c̄w̄K̄-̄w̄b̄ Av̄j̄ ōi Ni | Av̄j̄ ōn Ḡt̄K̄ evi evi ī q̄v̄
K̄t̄īt̄Q̄b̄ f̄w̄el̄ t̄Z̄I ī q̄v̄ K̄īt̄eb̄ | `̄ȳb̄q̄vī t̄K̄v̄b̄ k̄w̄l̄ " c̄w̄K̄-̄w̄b̄t̄K̄ w̄b̄w̄ō̄ȳ K̄īt̄Z̄
c̄vī t̄eb̄v̄ |"

332. Referring to verse- 26 of surah 'Hajj' she has submitted that Allah depicts kaabah [place of worship] as only house of Allah in the Holy Quran but the accused knowing the true meaning of the verse, purposely treated Pakistan as the house of Allah in a meeting attended by the members of Islami Chhatra Sangha with intent to infuse wrong conception about the house of Allah in the minds of the members of Islami Chhatra Sangha so that they can blindly counter the 'miscreants' [freedom fighters] and pro-liberation Bangalees treating them as enemies of Islam.

333. Similarly, Professor Ghulam Azam, the then Ameer of Jamaat-e-Islami delivered a direct and public speech on 17.07.1971 addressing a gathering of peace committee at Rajshahi to the effect that Hindus are always enemies of Muslims and there is no evidence to show that Hindus are friends of Muslims. The above hateful speech made by him manifestly demonstrates that he expressed hatred and communal feeling towards Hindu community with intent to create hostility between the Hindu and Muslims. Followers and disciples of Professor Ghulam Azam on being inspired by such inciting speech, they made the people of Hindu community living in Bangladesh, a target for attack, subsequently it happened in a heinous manner across the country in 1971.

334. Infact, the history of Sultani regime and Mughal Empire of this sub-continent is the best evidence to show that the people belonging to the Hindu and Muslims have been living together peacefully by maintaining a friendly and harmonious relations to each other for about one thousand years last.

335. Professor Ghulam Azam the chief of Jamaat-e-Islami made an open speech reported in the Daily Sangram dated 26.9.1971 claiming that "Pakistan Jamaat-e-Islami considers Islam and Pakistan are one and indivisible. Pakistan is the house of Islam of the world. Therefore, Jamaat supporters do not consider to live in the world if Pakistan does not exist".

[Ref:- Ghulam Azam Case:- Ext. No. 22]

336. The above proposition that Pakistan and Islam are one and indivisible is completely a fallacy, virtually Pakistan is the name of a sovereign state created on two-nation theory.

337. On the other hand, Islam is the most sophisticated religion of the Muslims in the world which is derived from the Holy Al-Quran and Hadith and that was preached by the greatest prophet Hazrat Muhammad [S.M.]. A country like Pakistan in no way can be a part of Islam. It is an attempt to impure Islam, the holy religion of the Muslims of the world.

338. It is undisputed that about 1400 years ago, our great prophet Hazrat Muhammad [S.M.] made a contract between Muslim and Non-Muslims living in Medina and established a non-communal nation. That contract is known as 'Medina Charter', probably it is the first written constitution in the world.

339. The famous Mawlana Akram Kha of this sub-continent has cited the philosophy of the 'Medina Charter' in his book named "Mostafa Charit" under the caption "Modinai Shadharon Tranto Protistha". A relevant portion of his discussion is quoted below:

" gw` bv I Zrcvk®Zx©j ½, wj GLb wewfboagfej ¼± wZbuU `ZšjRwZi
 Avevmfjg| ci`•i weci xZ wPš®i`wP, I ag®ve m¼•baBù`x, tcŠEwj K I
 gjnj gvb±` i±K ±`±ki mvavib ±`_®i¶v I gjz weav±bi Rb" GKB Kg®K±`ª
 mgveZ Kwi ±Z nB±e, Zvrvw` M±K GKwU i vR%bwZK RwZ ev KI ±g cwibZ Kwi ±Z
 nB±e| Zvrvw` M±K wLvb±Z nB±e th, GK ±`±ki wewfboagfej ¼± m¼•ª vq mgj,

বর্তমান তি আগ্রহী হইয়াছে। মসৃণভাবে কবি কবি, তঁহঁকে তমের কবিতা গুলি মতে
নব্বইটি গেস গি "চ নল কবি কবি"। "

340. The 'Medina Charter' has guaranteed to the equality before law, freedom of religion and profession among the different classes of people for establishing a non-communal nation and to work together irrespective of caste, creed and religion. According to Medina Charter, there is no room for utilising religion in the field of politics. It is noticed that only a group of communal people in our society try to misuse religion by misinterpreting its true meaning with intent to misguide bulk of the Allah-fearing Muslims for protecting their self interests.

341. There is no denying that accused Motiur Rahman Nizami was the then leader of Islami Chhatra Sangha who had education in Islamic religion. He is the writer of several Islamic books out of which the defence has submitted a book titled "ইসলামিক মত-আগেবগ আগ্রহীক ইব্রাহিম" in which he depicted true islamic attitude towards non -Muslims under the caption "Bmj vgx i vto' Agmij g' i agx' -'axbZv" of which the relevant portion of his ideological belief is quoted below:-

"Avj bn mKj gvb' i m'v | GZ` m'Éj | Avj bi c'Z Cgvb Avbte
wK Avbtebv GB e'vcv' i, wZwb -'axbZv w' tqtQb Ges Zvi c'Z Cgvb
Avbvi e'vcv' i wZwb -'axbZv w' tqtQb Ges Zvi c'Z Cgvb Avbvi t'q' t'
ej c'q'vM | Rei` w' t'K w' t' l a K' i t' Qb | AZGe GKwJ Bmj vgx t' t' k
Agmij gvb' i cb' agx' -'axbZv -vKte | Rei` w' করে তাদের ধর্ম আগ
Kwi tq g' m'j gvb evb' t' bvi t' Kvb c'K B D' t' Vbv | w' ZxqZ Avb' v' w' b' K Gev` Z |

GUv tKej Zv` i Rb` hviv Cgvb Gtb`Q| Avi Av_©mvgwRK weva
 weav`bi t`q`i Bmj vg th wbgg bwiZ I AvBb Kvb`p w` tq`Q Zv RwiZ ag©,
 eb©wve`k`l mKj gvb`l i Kj `vb wvwiZ Kti | G`tjv Abmib KiZ
 tMtj tKvb atg` tjvK` iB ag`q wek`m I Abkvm`b AvNvZ jvMvi
 AvksKv bvB"

342. The above ideological belief of the accused as manifested in his writings is squarely in consonance with the directives of Medina Charter as discussed above.

343. But while we go back to fateful 1971, the year of Liberation War, we find quite opposite picture in the deeds and thoughts of the accused and his associates including Professor Ghulam Azam, the then Ameer of Jamaat-e-Islami.

344. It is gathered from facts of common knowledge as well as exhibited documents filed by both the sides that Pakistan occupation forces and their collaborators did never utter the word 'Muktijodda' or freedom fighter, they always referred them as miscreants, rebels, separatists , anti-state elements, intruders of India etc. in order to give message to the world that no War of Liberation was going on in Bangladesh in 1971.

345. On perusal of speeches of accused Motiur Rahman Nizami, published in the Daily Sangram on different dates in 1971 marked as Ext. nos. 2(5), 2(10), 2(15), 2(16), 2(17), 2(22) and Police Abstract Reports, it is evident that during the War of Liberation accused Motiur Rahman Nizami, his religious and political Guru (leader) Professor Ghulam Azam and other

leaders of Jamaat-e-Islami used to deliver speeches in public to their followers using religion in their party politics giving wrong interpretation of Islam with intent to inspire young generation to counter freedom fighters and pro-liberation Bangalees treating them as enemies of Islam.

346. The following citations namely, "Pakistan is the house of Allah," "Hindus are always enemies of Muslims" and "Islam and Pakistan are one and indivisible", may appear to be not so dangerous in its plain meaning . But, we are to evaluate those speeches considering the prevailing circumstances and the Liberation War context under which those speeches were made to whom and for what purpose.

347. It is gathered from the facts of common knowledge that the accused and his associates made a lot of speeches addressing their subordinates to resist the independence of Bangladesh. The meaning of such speeches is to be determined in the context of 1971. Context is the principal consideration for finding out real meaning of such speeches.

The following elements of context were prevailing in Bangladesh in 1971

(a) All most all the Bangalees irrespective of caste and religion, living in the then East Pakistan, whole heartedly supported the War of Liberation of Bangladesh;

(b) the accused as the, president of Islami Chhatra Sangha made speeches in public to the members of ICS encouraging, instigating , and persuading them to counter 'miscreant's' [freedom fighters] branding them as enemies of Islam;

(c) leaders of Jamaat-e-Islami and its notorious student wing Islami Chhatra Sangha including accused Motiur Rahman Nizami used to make speeches in public branding freedom fighters and pro-liberation people as miscreants and Indian agents as a result members of Rajakar and Al-Badr Bahini firmly believed that freedom fighters and pro-liberation people were not Muslims enough.

348. In the context of on going the Liberation War the following wrong messages namely "Pakistan is the house of Allah", "Hindus are always enemies of Muslims", and " Islam and Pakistan are one and indivisible" were infused in the minds of young members of Rajakar and Al-Badr Bahini as gospel of truth and on being inspired by those propaganda in the name of Islamic ideology, they committed more atrocities vigorously in collaboration with Pakistan occupation forces. The citations quoted above are the classic instances of misuse of Islam in politics in the name of protecting Pakistan.

349. It is found from the facts of common knowledge that ' Islam' teaches us to be non-communal and pure in thoughts, words and deeds but during the War of Liberation, the leaders of Jamaat-e-Islami taught its followers to be communal in thought, words and deeds and also treating non-jamaat-e-Islamis as bad Muslims and the freedom-fighters as miscreants.

350. *Almighty Allah says in the Holy Qur'an [Surah-5, Al-Ma'idah: verse-32]-*

'Whoever kills a person [unjustly], except as a punishment for murder or [as a prescribed punishment for spreading] disorder in the land, it is as if he killed all of humanity.'

This verse uses the word 'person' [nafs], which is a general expression that gives the verse a broad-based application.

351. In Surah-4, An-Nisa: Verse 29 & 30 the Almighty Allah also says-

'And do not kill yourselves (nor kill one another). Surely, Allah is most merciful to you. And whoever commits that through aggression and injustice, we shall cast him in to Fire, and it is easy for Allah.'

Islam not only outlaws the mass killing of Muslims but the whole of humanity, without any discrimination on the basis of caste, colour, race or religion. One can appreciate the value and inviolability of human life in Islam by realising that the act of killing a human being has been equated with slaughtering the entire human race. So in other words unjust killing is completely forbidden, no matter what religion, language or citizenship is held by the victim. This is a sin as grave as killing the whole of humanity. Therefore, the killing of non-Muslim citizens living in an Islamic state falls in the same category.

352. The Prophet Muhammad [S.M] categorically forbade people to provide help or material support to terrorists. He ordered to isolate them and deny them any numerical strength, financial assistance and moral support. Abu Hurayra reported that the Prophet Muhammad [S.M] said-

'If any one helps in the murder of a believer-even if with only a few words he will meet Allah with the words written on his forehead: hopeless of Allah's mercy.'

[Source: Fatwa on Terrorism And Suicide Bombings; written by Shaykh-Ul-Islam Dr. Muhammad Tahir Ul-Qadri; published by

**Minhaj-ul-Quran International (U.K), 292-296 Romford Road,
London U.K, Page 65]**

This Hadith contains a strict warning to those who mastermind terrorist acts and misinterpret the Qur'an by brainwashing youth with glad tidings of Paradise for murdering peaceful civilians.

353. On the occasion of his Last Sermon, the Prophet Muhammad [S.M] said, guaranteeing the protection of life, property and honour of the whole humankind,

'Indeed your blood and your property and your honour are inviolable, like the inviolability of this day of yours and this month of yours and this land of yours until the day you meet your Lord.'

**[Source: Fatwa on Terrorism And Suicide Bombings; written by
Shaykh-Ul-Islam Dr. Muhammad Tahir Ul-Qadri; Page-93]**

Therefore, it is completely forbidden to kill anyone unjustly, or plunder his wealth, or humiliate him or malign his honour. Following this principle, killing Muslim and non-Muslim citizens wherever they reside, is strictly prohibited on the basis of equality.

354. According to the Qur'an and Sunna, every person is responsible for his or her actions. Only the doer of an act of injustice is liable to punishment, and no one else can be held responsible for that. The punishment for his or her crime cannot be awarded to his or her family, friends or tribe. The Almighty Allah says in Holy Qur'an **[Surah-6, Al-An'am: Verse-164]:**

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

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

'No man amongst them [the peaceful non-Muslim citizens] shall be punished as a penalty for the injustice of a coreligionist'.

[Cited by Abu Yusuf al-Khardi; Source: Fatwa on Terrorism And Suicide Bombings; written by Shaykh-Ul-Islam Dr. Muhammad Tahir Ul-Qadri; Page-106]

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

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

This verse prohibits the believers from exceeding the limits or resorting to oppressive measures in their interactions with other nations, despite the extreme hostility that may be between them.

357. According to Islamic law, the protection of non-Muslim citizens is one of the duties of the State. If any person-irrespective of his association with any nation, religion or state commits aggression against a non-Muslim citizen and oppresses him or her, it is the responsibility of the State to protect that non-Muslim citizen, even if such protection entails entering into a war. The Almighty Allah says, [**Qur' an, Surah-7, Al-A'raf: verse-165**]

'And We seized [the rest of] the people who committed injustice [actively or passively] with a very harsh punishment because they were disobeying.'

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

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

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

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

[Source: Fatwa on Terrorism And Suicide Bombings; written by Shaykh-Ul-Islam Dr. Muhammad Tahir Ul-Qadri; Page-113]

360. Hajrat Ali (Ra:)said;

'The non-Muslim citizens pay the tax so that their blood and property should be as inviolable as ours.'

[Source: Fatwa on Terrorism And Suicide Bombings; written by Shaykh-Ul-Islam Dr. Muhammad Tahir Ul-Qadri; Page-114]

361. The Prophet [S.M] also stated that those who take up arms against the Muslims do not belong to the Muslim Umma. It is narrated by Abd Allah b. Umar (R:) that the Prophet [S.M] said,

'He who raises arms against us is not from us.'

**[Source: Fatwa on Terrorism And Suicide Bombings;
written by Shaykh-Ul-Islam Dr. Muhammad Tahir Ul-Qadri;
Page-211]**

362. If we consider the above Qur'anic verses and Hadiths, then there is no room to say that the acts of killing unarmed civilians, plundering their properties, infringing their fundamental rights, reigning coercive climate by causing Physical and Psychological harms in furtherance of common design and plan are compatible to the spirit of 'Islam' and 'humanity'. The holy religion 'Islam' never permits or suggests such barbaric atrocities and violent attitude to be shown towards '*Ashraful Mukhlukat*' [human being], the best creature of Almighty Allah.

363. Many of the Islamic scholars and Alims of the country had condemned and criticised the role of Jamaat-e-Islami in 1971 during the liberation war.

Maulana Obaidul Haque, Khatib of Baitul Mukkaram National Mosque, in his life time, in an interview given to the weekly 'Bichitra' criticising the role of Jamaat-e-Islami in 1971 said that;

" gñj gvbṭ` i wei`× gñj gvbṭ` i †Kvb ¶Rnv` nṯZ cvṯi bv| eis GUv
 ,ß nZ`v, gvbeZv ¶ṯivax KvR| Bmj vg gvbeZv ¶ṯivax KvR KLbI mg_® Kṯi
 bv|"

364. Another Islamic leader Maulana Fazlul Haque Amini [now dead] condemning the role of Jamaat-e-Islami during the Liberation War in 1971 opined that;

" GUv uQj Rvwj tgi wei "t× gRj tgi h×-Bmj vtgi wei "t× bq|
 hviv 71 - Gi `faxbZv h×tK Bmj vtgi wei "t× h× etj uQj Zviv fj
 etj uQj | ----- RvgvqtZi weivaxZv gvfb Bmj vtgi weivaxZv
 GUv WK bq|"

365. Maulana Ishaque Obaidi criticising the role of Jamaat-e-Islami in 1971 also stated that;

" 71 mvjt RvgvZ metPtq eo fj uJ Kti etm| `faxbZv h×tK Zviv
 Bmj vg Ges Kdti i j ovB wntmte Dc`vcb Kti | Avgiv gfb Kwi ivR%auZK
 gZcv_℞` _vKtj B tKvb gnj gvbtK tm Avl qvqx j xM ev Kg`wb÷ cvuU® tj vKB
 tnvK- Kvtdi fvev WK bq| 71 mvjt RvgvtZi wKQy tj vtKi wei "t× MYnZ`v
 al#bi gtZv RNb` Kvtr RwoZ _vKvi AwfthvM itqtQ- Bmj vtgi `wotZ Gme
 Aek`B bvrvtqh| "

366. Shaikhul Hadith Allama Azizul Haque had translated 'Bokhari Sharif' in Bangla. In translating the same [in appendix portion] indicating Jamaat-e-Islami, he opined that;

" `^_@Üi ct¶| me wKQy KivB mæe | `i agvî `ybqvi ¶lgZv Kw¶MZ
 Kivi nxb gvbtm Zviv Bmj vtgi gj wfvÉtK KlvivNvZ Kti boeto Kti w`tqtQ
 Øxtbi tmSatK| cwi Zvc GB Rb` th, Gt¶t¶ e`envi Kti tQ Zviv Bmj vgtKB|
 wbtm¶` tn Zviv mxgvj জনকারী, তারা বাতিল । i a†i tbevi thvM`Zv Zviv nwi tq

তদ্বিষয়ে বিচারকগণের মতামতের আলোকে এ বিষয়ে নিম্নোক্ত সিদ্ধান্তে উপস্থিত হওয়া যায়।

[Source: Maulana Rezaul Haque Chanpuri Vs. Bangladesh Jamaat-e-Islami and others, reported in 66 DLR, page 14, [para 200, 203 and 270].

367. In view of the above, we have no hesitation to hold that during the Liberation War in 1971 the offences as crimes against Humanity, namely murder, extermination, torture, rape, arson and other inhuman acts committed by Jammata-e-Islami, Islami Chhatra Sangha [ICS], Al-Badr and Rajakar Bahinis, are absolutely against the sanction of the Holy Qur'an and Hadiths. The accused Motiur Rahman Nizami being a renowned Islamic Scholar [as claimed by the defence] also violated the Quranic injunctions and prophetic traditions in forming Al-Badr Bahini, the 'death squad' and commanding, supporting, and encouraging the said Bahini in order to exterminate and kill the Bangladeshi intellectuals and pro-liberation people and also, providing moral support and endorsing the barbaric activities of Pakistani Army.

368. Thus, we are constrained to hold that Motiur Rahman Nizami being educated in Islamic education had consciously and also deliberately misused the name of the Almighty Allah and the holy religion 'Islam' in 1971 during the Liberation War of Bangladesh in order to ruin and root out the '*Bangalee Nation.*'

XXV. Command Responsibility and Civilian's Superior Responsibility

369. It is an agreed position that the present case is a unique of its kind before the International Crimes Tribunal, Bangladesh as it involves 'legal question' as to civilian's superior responsibility and command responsibility.

Conditions of establishing command responsibility

370. From the jurisprudence emanating from the International Criminal Tribunals, it is generally agreed that four elements must be proved for a person to be held responsible as superior. In general terms, these are: (1)an international crime has been perpetrated by someone other than the accused;(2) there existed a superior-subordinate relationship between the accused and the perpetrator;(3) the accused as a superior knew or had reason to know that the subordinate was about to commit such crimes or had done so; and (4) the accused as a superior failed to take the necessary and reasonable measures to prevent such crimes or punish the perpetrator.

([Source: Prosecutor vs. Oric, ICTY, Case number-IT 03-68-T293]).

Command Responsibility of Civilian Superiors

371. Yael Ronen has rightly pointed out the doctrine of superior responsibility that grew out of the military doctrine of command responsibility. By now it has been part of the customary international humanitarian law that the military doctrine of command responsibility is also applicable for the civilian superiors in slightly varied form. Article 87(1), 86(1) and 86(2) of the Additional Protocol I to the Geneva

Conventions encompasses the doctrine of superior responsibility. Apparently these provisions are not limited to military superiors only. ICTR Statute Article 6(3) and ICTY Statute Article 7(3) contain a provision resembling the similar provision as mentioned in the Additional protocol I to the Geneva Conventions.

372. In our jurisdiction, section 4(2) of the International Crimes (Tribunals) Act, 1973, provides that:

“4(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.”

373. Considering the sentence structure and wording of section 4(2) of the ICT Act, 1973 and also the context and intention of the legislators it is for the tribunal to interpret whether section 4(2) of the Act imposes superior responsibility to the civilian superiors.

374. A civilian superior need not to be the official superior of the perpetrators rather a de facto command over the perpetrators is enough to hold someone responsible.

375. Jean Paul Akayesu was bourgmestre of Taba. He was indicted for both direct and superior responsibility for crimes against humanity and war crimes committed by the Interahamwe, whom the judgment referred to as “armed local militia.” According to the indictment, Akayesu knew that the crimes were being committed, facilitated them, and encouraged them. The ICTR found that “a superior/subordinate relationship existed between the Accused and the Interahamwe who were at the bureau communal.” The ICTR then noted that there was no allegation in the indictment that the Interahamwe were subordinates of the accused, although the indictment relied on Article 6(3). Accordingly, it acquitted Akayesu of responsibility as a superior [**Prosecutor v. Akayesu, Case No. ICTR-96-4-T**]

376. Ferdinand Nahimana was born in Rwanda in 1950. From 1977 until 1984, he held various posts at the National University of Rwanda. He was also a member of the MRND political party. In 1990, he was appointed Director of the Rwandan Office of Information and remained in that post until 1992. He and others then initiated the establishment of the Radio Television Libre des Mille Collines [RTLM] radio station, owned largely by members of the MRND party. RTLM started broadcasting in July, 1993 and was a popular source of information. Its broadcasts engaged in ethnic stereotyping, branding Tutsis as the enemy and Hutu opposition members as their accomplices. After April 6, 1994, the virulence and the intensity of RTLM broadcasts propagating ethnic hatred and calling for violence increased, and the ICTR found that certain RTLM broadcasts in that period constituted direct and public incitement to genocide. The ICTR found that Nahimana had been a superior of the RTLM staff. It also found that

Nahimana knew or had reason to know that his subordinates at RTLM were going to engage in incitement to genocide. For these reasons, it convicted him on superior responsibility grounds for not having taken reasonable and necessary steps to prevent the incitement or punish its perpetrators [Prosecutor vs. Nahimana, Case No. ICTR-99-52-T]

377. The above case references from the ICTY and ICTR show that the doctrine of command responsibility is also applicable to the political leaders and other civilian superiors in position of authority. The crucial question is not the civilian status of the accused but the degree of authority he or she exercised over his or her subordinates. By the adaptation of this civilian superior responsibility in numerous international instruments and through volumes of judgments from international tribunals it has now become part of customary international law that the military doctrine of command responsibility is also applicable to civilians in the form of civilian superior responsibility.

378. On the other hand, the International Crimes (Tribunals) Act, 1973 in its section 4(2) doesn't require the commander or superior to have knowledge or had reason to know that his/ her subordinates were committing such crimes or about to commit such crimes. The prosecution may argue that since the law itself is silent about the knowledge requirements, the tribunal can not import an additional element of knowledge to hold a superior responsible for the acts of his subordinates. However, the tribunal thinks that it would be highly repugnant to common sense and natural justice to hold some one responsible for the crimes committed by his subordinates which was unknown to him. The crux of the doctrine of superior responsibility [be

it civilian's or be it military] is that the superior has a specific duty to maintain/ ensure that his/her subordinates respect International Laws. Deviations from this responsibility may incur criminal liability upon the superiors. The liability to maintain the subordinates in line with the prescription of law of the liability to punish the violations of it arises only if the superiors have knowledge or have reason to know that such crimes were committed or were about to commit.

379. It appears that section 4(2) of the ICT Act, 1973 is silent about the knowledge part of the superiors. But this tribunal thinks that the “Judges of the common law shall supply the omission of the legislatures.” The tribunal is quite competent to supply an additional element of knowledge to hold the superior responsible for the crimes committed by his subordinates if it is found that not doing so would frustrate the ends of justice and doing so would be conforming to natural justice and customary international laws.

380. On a plain reading of section 3 of the International Crimes (Tribunals) Act, 1973 it appears that the said Act is applicable to civilians as well. Now, the question as to whether section 4(2) of the Act encompasses a civilian superior and gives the tribunal jurisdiction to hold a civilian superior responsible for the crimes committed by his subordinates is yet to be resolved categorically.

381. It was mentioned earlier that the doctrine of command responsibility is also applicable to the political leaders and other civilian superiors in position of authority. The crucial question is not the civilian status of the accused but the degree of authority he or she exercised over his or her subordinates. It is also a settled position of law that civilian superior

responsibility has now become a part of customary international law. So, there is no scope to raise any question upon holding a civilian superior responsible under section 4(2) of the Act, 1973.

382. Now, if we read section 3(1) and section 4(2) of the Act together, we will see that the word **Officer** was not meant to be army military officers only. Rather a person who holds an office in civilian capacity in any organization can be called as officer. It will not be irrelevant to mention that the learned counsels for the litigant parties are also called as the officers of the court. The president of Islami Chhatra Sangha is no doubt a designated post and the person holding such post maintains an office for the purpose for supervising works of the members as his subordinates. The accused as the president of ICS was the ex-officio chief of Al-Badr Bahini in 1971 and thus he was a civil superior officer in its true sense. Therefore, the accused as chief of both ICS and Al-Badr Bahini had a superior -subordinate relationship with the members of Al-Badr Bahini.

383. The case in hands, we shall also have to consider the established legal principle of customary international law that a civilian superior can be held responsible for the acts of his subordinates. By the adaptation of civilian superior's responsibility in numerous international instruments and through volumes of judgments from international tribunals it has now become part of customary international law that a civilian superior can be held responsible for the crimes committed by his subordinates. So, if there exists two alternative interpretation of the word **Officer** used in section 4(2) of the Act of which one is compatible with the customary international law and another does not, the tribunal will accept the previous one. In that point of view,

also, the word **Officer** used in section 4(2) of the Act can not be given any meaning so that it excludes civilian superiors.

384. In conclusion, we have no hesitation to hold that section 4(2) is an open ended section so far military and civilian status of the accused is concerned. We hold that the superior responsibility mentioned in section 4(2) of the Act encompasses civilian superiors as well.

XXVI. Conclusion

385. It should be kept in mind that the alleged incidents took place 42 years back in 1971 and as such memory of live witnesses may have been faded. Invaluable documents might have been destroyed by the passage of time. To procure old evidence was a real challenge for prosecution. Therefore, in adjudicating the charges brought against the accused, we are to depend upon the provisions of sections 4 and 19 of the Act, such as (i) facts of common knowledge (ii) available old documents (iii) reporting of old news papers, photographs, tape recording, and books (iv) hearsay evidence having probative value (v) fixing up individual and superior command responsibility at the relevant time, and (vi) may receive decisions of international tribunals to supplement provisions of ICT Act 1973, if deemed it necessary.

386. It is pertinent to mention here that at the time of trial the defence submitted some books and DVDs containing interview of some persons. But the source of interview, from where, when and in what manner those interviews taken, has not been disclosed by the defence, and as such, these DVDs deserve no consideration. It is contended by the defence that the

name of accused Motiur Rahman Nizami has not been mentioned in those books submitted by the defence, and as such, he was not involved with the alleged offences committed during the Liberation War, 1971. But in the instant case to prove the charges the prosecution has adduced live witnesses who have deposed before the tribunal on oath, thus, we have to give emphasis on the testimonies of the live witnesses, and as such, these books *ipso facto* do not help the defence to disprove the prosecution case.

387. Mr. Mizanul Islam, the learned counsel has pointed out some procedural flaws in lodging complaint against the accused, investigation procedure, submitting report by the investigating officer, such as, he submitted his further report to the Chief Prosecutor by examining more persons as Additional witnesses by way of submitting supplementary case dairy, even after taking cognizance of the crimes by the tribunal and framing of charge by it to the prejudice of the accused.

388. Similar question was raised before the Appellate Division of our Supreme Court by the defence in the case of Abdur Quader Molla. The Appellate Division has turned down the above objection holding that;

"Although from the records, it appears that it is a fact that the Investigating Officer continued with his investigation even after submission of his report to the Chief Prosecutor and in the process, examined some more persons and recorded their statements and submitted his further report to the Chief Prosecutor as stated hereinbefore and on the basis of such report

Additional witnesses were examined in the case, in view of the provisions of Section 9(4) of the Act, 1973. I find no illegality to take recourse to such procedure by the Investigating Officer. Further the accused had the full opportunity to cross-examine the Additional witnesses. Consequently, I find no merit in point made by Mr. Razzaq on procedural flaws." [Page, 479]

389. In view of the above observation of the Appellate Division there is hardly any scope to consider the above point raised by the defence.

390. Though the War of Liberation took place 42 years back the testimony of P.Ws of whom some had fair occasion to see the accused involved in the commission of criminal activities with his subordinates such as Rajakars and Al-Badr in the district of Pabna during the War of Liberation in 1971. Human memory becomes fade to fader due to passage of time. Therefore, minor discrepancies in the evidence of P.Ws can be overlooked considering the same as old evidence. Some minor inconsistencies between their testimony made before the tribunal in examination-in-chief and cross-examination were found but those discrepancies would not destroy the credibility of the prosecution evidence as a whole.

391. Upon scrutiny of oral, documentary and circumstantial evidence led both the prosecution and the defence, we are fully convinced that during the War of Liberation of Bangladesh the accused as the president of Islami Chhatra Sangha [now Chhatra Shibir] as well as a High Command of Al-Badr Bahini actively participated in the atrocities committed in the

occurrences of charge nos. 1, 2, 3, 4, 6, 7 and 8 in Pabna and Dhaka in collaboration with Rajakars, Al-Badr and Pakistan occupation force.

392. Having borne in our mind about the observations [majority view] of the Appellate Division of the Supreme Court made in the cases of Abdul Quader Molla vs. Government of Bangladesh and vis-a-vis, we weighed, assessed and evaluated the testimonies of the witnesses in arriving at the findings that the accused committed the offences of crimes against Humanity as discussed above, and the said observations are quoted below:

“ It is the duty of the tribunal to separate the grain from the chaff. Where the chaff can be separate from the grain, it would open for the tribunal to convict an accused notwithstanding the fact that evidence has been found to be deficient to prove the guilt. Falsity of a particular material witness or material particular would not ruin the case from the beginning to end.”

[Page-247]

And

“ The tribunal illegally disbelieved the witnesses on the ground that they contradicted their earlier statements. As observed above, under the law there is no scope to draw contradiction of the statements made before the tribunal with the statements made before the investigating officer. The tribunal can infer contradiction of the statements made in the examination-in-chief with the cross-examination only and not otherwise.”

[Page, 244-245]

393. As per provisions of section 4(1) of the Act of 1973 accused Motiur Rahman Nizami is found equally liable, has incurred individual criminal liability for the commission of offences proved in relation to charge nos. 1,2, 3,4,6,7 and 8. It is also well-proved that the accused being the chief of Islami Chhatra Sangha [ICS] and ex-officio a High Command of Al-Badr Bahini by his acts and conduct also exercised superior responsibility under section 4(2) of the Act for the crimes described in the charge nos. 3 and 16. It has been proved by both documentary and oral evidence that Al-Badr Bahini was formed by the members of ICS over which the accused had exclusive control but he did not prevent his subordinates from committing atrocities and crimes against Humanity during the Liberation War, 1971. Thus, the accused has been held responsible under section 4(2) of the Act for the offence relating to charge nos. 3 and 16.

394. It is submitted by the defence that accused Motiur Rahman Nizami was the president of Islami Chhatra Sangha in 1971, but prosecution has failed to prove him as chief of Al-Badr Bahini. The above contention of the defence is not correct one. In this connection we reiterate that considering the books i.e. Exts. 33, 35, 42 and other evidence on record as discussed earlier, we have already held that accused Motiur Rahman Nizami was the chief of Islami Chhatra Sangha and a High Command of Al-Badr Bahini during the Liberation War, 1971.

395. It has been also narrated in the book titled 'Sunset at Midday' marked as Ext no. 28(3) at page 97 that the workers belonging to purely Islami Chhatra Sangha were called Al-Badr. It is also narrated in a book titled "

Sectarianism and Politico-religious Terrorism in Pakistan" marked as Ext-31 at page 258 that decision to join Al-Badr and Al-Shams was taken by Motiur Rahman Nizami, Jamaat's Nazime- Ala [Chief] at that time.

396. The citations of different books mentioned above prominently go to prove that Al-Badr Bahini was mainly formed by the members of Islami Chhatra Sangha [ICS] and the accused was the chief of both ICS and Al-Badr. The documentary evidence cited above have been corroborated by oral evidence adduced by P.W.1- Misbahur Rahman Chowdhury, P.W. 13 Shamoli Nasrin Chowdhury and P.W. 23 Syeda Salma Mahmud. They testified in one voice that the accused was the chief of both ICS and Al-Badr Bahini during the War of Liberation. Apart from their evidence, P.W. 2 Zahiruddin Jalal alias Bichhu Jalal and P.W. 3 Md. Rustom Ali have also deposed that Motiur Rahman Nizami was a leader of ICS and Al-Badr Bahini. Therefore, the contention of the defence that the accused had no connection with Al-Badr is not correct.

397. It is submitted by the defence that the accused was the president of Islami Chhatra Sangha up to September, 1971 having no connection with Al-Badr Bahini but charge of killing of intellectuals in charge no. 16 has been wrongly brought against the accused as the said killing took place in the 2nd week of December, 1971 .

398. In reply to the above submission, we like to say that we have already been convinced to hold that the accused was the chief of both ICS and Al-Badr Bahini and he had close link with Jamaat-e-Islami during whole period of the Liberation War and thus his superior status was never seized. The

jurisprudence of superior command responsibility has been widely developed. Now it is settled principle of law that a civilian superior need not to be the official superior of the perpetrators rather a de facto command over the perpetrators is enough to hold some one responsible under section 4(2) of the Act of 1973.

399. Moreso, on a careful examination of Ext. 2/22, an article written by accused Motiur Rahman Nizami which was published in Dainik Sangram on 14.11.1971 under the caption ' Badr Dibas [Day]: Pakistan and Al-Badr', it is crystal clear that by writing and publishing that article in the news paper he not only justified the formation of Al-Badr Bahini, but also urged the members of Al-Badr Bahini for taking oath to exterminate the so-called betrayers [indicating pro-liberation Bangalee people] of Pakistan and ordered to co-operate with the Pakistani army in order to achieve such goal. This single piece of document is enough to hold that accused Motiur Rahman Nizami was not only a High Command of Al-Badr Bahini, he was also a mastermind for forming the said Bahini in 1971, during the Liberation War and he had complicity with the Al-Badr Bahini even after September, 1971. Thus, Ext. 2/22 makes the defence claim untrue and baseless that Motiur Rahman Nizami had no connection with the Al-Badr Bahini in 1971.

400. It has also been argued by the defence that accused Motiur Rahman Nizami was first arrested by the law enforcing agencies in connection with Keraniganj Police Station Case No. 34(12) 2007 and Pallabi Police Station Case No. 60(1) 2008; but eventually records of the said cases were transmitted by the court below to the Registrar of the tribunal and the

investigation agency on getting the said records through Registrar of the tribunal started investigation into the crimes vide Complaint Register serial no. 1 dated 21.07.2010 and ultimately investigation agency submitted its report to the Chief Prosecutor, who eventually submitted formal charge against the accused Motiur Rahman Nizami and thus, instant trial has commenced; neither the Police nor the investigation agency has submitted any report in connection with the above two cases and as such said two cases are still pending and thereby, the proceeding of the present case is barred under Article 32(2) of the Constitution of the People's Republic of Bangladesh on the doctrine of 'double jeopardy.'

401. Let us now consider the above arguments made by the defence in the light of the facts and circumstances of the present case along with the provision of Article 35(2) of our Constitution.

Article 35(2) of the Constitution is as follow:

" No person shall be prosecuted and punished for the same offence more than once."

402. It is true that Article 35(2) of our constitution has given protection to a person against double jeopardy. In order to apply Article 35(2) of the Constitution there must have been a previous proceeding before a judicial tribunal having jurisdiction in which the accused was prosecuted and further, the accused must have been convicted or acquitted and the conviction or acquittal must be in force at the time of the subsequent proceedings. Article 35(2) will be attracted only when the subsequent proceeding is for the same offence for which the accused once tried and punished or acquitted.

403. The defence has failed to show any scrap of paper from the records that accused Motiur Rahman Nizami was previously charged and tried for committing offences as crimes against Huminity under ICT Act, 1973.

404. As considered and discussed above, we do not find any substance in the argument of the defence that the instant proceeding against accused Motiur Rahman Nizami is barred under Article 35(2) of the Constitution. Thus, the above argument advanced by defence is absolutely misconceived one and it has no substance.

405. It is submitted by the defence that P.W.11 Shamsul Hoque alias Nannu has given an interview before the media admitting that he was compelled to depose before the tribunal at the dictation of the ruling party and as such the evidence adduced by him have no evidentiary value in the eye of law.

406. It is evident from judicial record that P.W. 11 Shamsul Hoque alias Nannu has deposed before this tribunal on oath on 20.06.2013 and the defence counsel concluded the cross-examination of P.W. 11 on 27.06.2013 in the open court.

407. In view of the above facts, we are of the opinion that the depositions of P. W. 11 on oath recorded by this tribunal is to be assessed as his only evidence for the purpose of this case.

408. Therefore, if any statement of P.W. 11 is subsequently recorded voluntarily or by coercion in audio-vidio process by any media person or any authority other than a court of law, shall not be admissible in evidence

and such subsequent statement or interview of P.W. 11 shall be treated as a malafide product of collusion.

409. D.W.4 Nazibur Rahman, the son of accused Motiur Rahman Nizami has claimed in his deposition that his father is a born leader from his student life, he was elected Member of Parliament [M.P.] twice from his home constituency in Pabna and he was also a Minister for Industry and Agriculture during 2001 to 2006. He has further stated that the accused being a popular leader joined the national politics in 1987 since then his rival political parties have brought the alleged charges relating to crimes against Humanity and genocide in order to victimise his political career.

410. In reply, Ms. Tureen Afroz has submitted that the accused was the ring leader of all crimes committed by the members of Al-Badr Bahini during the War of Liberation. Nazibur Rahman [DW.4] has candidly admitted in cross-examination that some foreign writers have depicted the accused as the leader of Al-Badr Bahini in their books namely 'Sectarianism and Politico-Religious Terrorism in Pakistan' [Ext-31] at page -258, 'Sunset at Midday' [Ext- 28(3)] at page no. 97, 'Vanguard of the Islamic Revolution' [Ext. no. 28] at page 66, 'Pakistan Between Mosque And Military' [Ext. no. 28(1)] page 79. It is lastly contended that the documentary evidence cited above have squarely proved that during the War of Liberation Al-Badr Bahini acted as the death squad of Pakistan occupation army and the accused was the ex-officio leader of Al-Badr Bahini which exterminated intellectuals and pro-liberation people in 1971 in a planned way.

411. Further we do not find any material in the record to show that the prosecution is for political purpose. It is true that accused Motiur Rahman Nizami is at present, the Ameer of a political party i.e. Jamaat-e-Islami Bangladesh; but the mere fact that a politician perpetrator of an offence does not mean his trial is to be treated as one of the political purposes. Law does not and can not provide impunity to politicians for committing criminal offences particularly the crimes against Humanity. A person can obviously not claim impunity if he advances his political belief by resorting to criminal activities and if he does so, he can not allege that his trial is of political purpose.

412. Moreover, the accused Motiur Rahman Nizami has been facing trial for the offences as crimes against Humanity committed in 1971 during the Liberation War of Bangladesh. Present status and position of the accused is not same and similar to 1971. We have already observed that in 1971 the accused Motiur Rahman Nizami was the president of ICS and a High Command of Al Badar Bhahini, a 'death squad.'

413. Thus, we have no hesitation to hold that instant trial of the accused is not being held for political purpose. Rather 'the nation' has been discharging their unfinished task and obligation to million of martyrs who sacrificed their lives for the Independence of Bangladesh.

414. Accused Motiur Rahman Nizami may be an Islamic scholar and well-behaved man, but the matter in issue of the case is what role he played during the War of Liberation of Bangladesh. It is well-proved that the accused being the chief of Islami Chhatra Sangha and Al-Badr Bahini whole heartedly resisted the War of Liberation and also actively participated in the

crimes against Humanity in 1971. There is no proof before the nation that the accused had ever expressed repentance for his anti-liberation activities or he paid respect to the departed souls of three million martyrs.

415. Under such factual position, it is very much hard to believe that a person who actively opposed the very Liberation War of Bangladesh, was appointed as a Minister of the Republic. We are led to observe that the appointment of the accused as a Minister, by the then government, who happened to be an anti-liberation leader, was a great blunder as well as a clear slap on the face of the Liberation War as well as three million martyrs and two lakh women who sacrificed their chastities for the Liberation of Bangladesh. And as such this shameful act was disgraceful for the nation as a whole.

416. Having considered all attending facts and evidence on record, we do not hesitate to observe that during the War of Liberation both Jamaat-e-Islami and its notorious student wing Islami Chhatra Sangha (now Islami Chhatra Shibir) functioned as a 'communal' as well as 'criminal organisation' to implement plan and design of Pakistan occupation army which resulted killing of innumerable unarmed civilians and Bangalee intellectuals in 1971.

417. The Joint Criminal Responsibility or commonly known as, Joint Criminal Enterprise [JCE] is a widely used 'liability doctrine' that has been playing a vital role in the allocation of guilt in international criminal tribunals. It is to be noted that section 4(1) of the Act, 1973 refers to the concept of JCE that when any crime as specified in section 3 is committed by several persons each of such person is liable for that crime in the same

manner as if it were done by him alone. Fundamentally the JCE requires that a group of individuals had a common plan, design, or purpose to commit a crime, that the accused participated in some way in the plan and that the accused intended the accomplishment of common plan or purpose. For JCE liability an accused can participate in a joint criminal enterprise by passive, rather than active conduct.

418. From the discussions made earlier in relation to charge nos. 1,2,3,4,6,7 and 8, the tribunal is convinced to record its finding that accused Motiur Rahman Nizami, for his acts, conduct and culpable association with Pakistan occupation army, Al-Badr and Rajakars is criminally responsible for all the offences resulting from their common criminal design and shall be punished as if he himself committed those offences, irrespective of whether and in what manner he himself directly participated in the commission of any of these offences. This view is in conformity of provisions in respect of liability contained in section 4(1) of the Act, 1973. Accused Motiur Rahman Nizami, by his acts, conducts and act of common 'understanding' abetted and facilitated the commission of such crimes. Therefore, the accused who was a part of collective criminality incurs liability under section 4(1) of the Act, 1973 for the offences as crimes against Humanity as mentioned in charge nos. 1, 2, 3, 4, 6, 7 and 8 as discussed earlier.

XXVII. Verdict on Conviction

419. For the reasons set out in the judgment and having considered all evidence, both oral and documentary, and arguments advanced by both the

parties, this tribunal unanimously finds the accused Motiur Rahman Nizami in,

Charge No.1: **GUILTY** of the offences of abetting, contributing and participating the commission of the offences of 'abduction' and 'murder' as crimes against Humanity as specified in section 3(2)(a)(g) read with section 4(1) of the Act of 1973 and he be convicted and sentenced under section 20(2) of the said Act.

Charge No. 2: **GUILTY** of the offences of 'conspiracy' and contributing the commission of the offences of murder as crime against Humanity as specified in section 3(2)(a)(g) read with section 4(1)of the Act of 1973 and he be convicted and sentenced under section 20(2) of the said Act.

Charge No. 3: **GUILTY** of the offences of 'conspiracy' and 'complicity' and contributing the commission of the offences of 'torture' and 'murder' as crimes against Humanity as specified in section 3(2)(a)(g)(h) read with section 4(1) and 4(2) of the Act of 1973 and he be convicted and sentenced under section 20(2) of the said Act.

Charge No. 4: **GUILTY** of the offences of 'conspiracy' and 'complicity' and contributing the commission of the offences of 'murder', 'rape' and 'persecutions' as crimes against Humanity as specified in section 3(2)(a)(g)(h) read with section 4(1) of the Act of 1973 and he be convicted and sentenced under section 20(2) of the said Act.

Charge No. 5: **NOT GUILTY** of the offences of 'complicity', 'murder' and 'persecutions' as crimes against Humanity as specified in section 3(2)(a) of the Act of 1973 and he be acquitted thereof accordingly.

Charge No. 6: **GUILTY** of the offence of 'murder' as crime against Humanity as specified in section 3(2)(a) read with section 4(1) of the Act of 1973 and he be convicted and sentenced under section 20(2) of the said Act.

Charge No. 7: **GUILTY** of the offence of 'complicity' and contributing the commission of the offences of 'abduction', 'torture' and 'murder' as crimes against Humanity as specified in section 3(2)(a)(h) read with section 4(1) of the Act of 1973 and he be convicted and sentenced under section 20(2) of the said Act.

Charge No. 8: **GUILTY** for contributing the commission of the offences of 'torture' and 'murder' as crimes against Humanity as specified in section 3(2)(a) read with section 4(1) of the Act of 1973 and he be convicted and sentenced under section 20(2) of the said Act.

Charge No. 9: **NOT GUILTY** of the offences of 'genocide' and 'persecutions' as crimes against Humanity as specified in section 3(2)(a)(c)(i) of the Act of 1973 and he be acquitted thereof accordingly.

Charge No. 10: **NOT GUILTY** of the offence of 'persecutions' as crime against Humanity as specified in section 3(2)(a) of the Act of 1973 and he be acquitted thereof accordingly.

Charge No. 11: **NOT GUILTY** of the offence of 'incitement' as specified in section 3(2)(f) of the Act of 1973 and he be acquitted thereof accordingly.

Charge No. 12: **NOT GUILTY** of the offence of 'incitement' as specified in section 3(2)(f) of the Act of 1973 and he be acquitted thereof accordingly.

Charge No. 13: **NOT GUILTY** of the offence of 'incitement' as specified in section 3(2)(f) of the Act of 1973 and he be acquitted thereof accordingly.

Charge No. 14: **NOT GUILTY** of the offence of 'incitement' as specified in section 3(2)(f) of the Act of 1973 and he be acquitted thereof accordingly.

Charge No. 15: **NOT GUILTY** of the offences of 'conspiracy' and 'complicity' as specified in section 3(2)(g)(h) of the Act of 1973 and he be acquitted thereof accordingly.

Charge No. 16: **GUILTY** of the offence of 'complicity' in the commission of the offence of 'exterminations' as crime against Humanity as specified in section 3(2)(a)(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.

XXVIII. Verdict on sentence

420. Mr. Syed Haider Ali, Mr. Muhammad Ali and Ms. Tureen Afroz, the learned prosecutors have submitted that accused Motiur Rahman Nizami should face the highest sentence, being a sentence of death, as he is proved to have participated to the commission of barbaric criminal acts constituting the offence of genocide and crimes against Humanity. Accused's superior position of authority on the Al-Badr Bahini, a 'death squad' together with the intrinsic gravity and extent and pattern of criminal acts constituting the offences of genocide and crimes against Humanity deserves to be considered as an 'aggravating factor' in awarding the highest sentence. For only such sentence would be just and appropriate to punish, deter those crimes at a

level that corresponds to their overall magnitude and reflect the extent of the suffering inflicted upon the million of victims.

421. Per contra, the defence sought for acquittal of the accused as the prosecution has failed to prove his culpability with any of the events of atrocities. However, the defence did not dispute the commission of large scale crimes against Humanity during the Liberation War, 1971.

422. It is now settled that determination of gravity predominantly requires consideration of the particular circumstances of the case, as well as the form and degree of the accused's participation. The tribunal notes that gravity of offence is to be considered together with aggravating circumstances, in arriving at a finding in respect of sentence. In the case in hand, considering the charges proved and facts relevant thereto the tribunal takes some factors into account as the key requirement of aggravating circumstances for the purpose of sentence to be imposed and these are (i) the position of the accused, i.e. his position of leadership, his level of influence and control on the Al-Badr Bahini (ii) the accused's role as fellow perpetrator, and the enthusiastic participation of a superior in the criminal acts of subordinates, and (iii) the violent, and humiliating nature of the acts and the vulnerability of the victims.

423. As a cursory review of the history of punishment reveals that the forms of punishment reflect norms and values and aspirations of a particular society at a given time. Distressed victims may legitimately insist appropriate and highest sentence while the defence may demand acquittal, in a criminal trial. But either of such demands is never considered as a catalyst in deciding the sentence to be inflicted upon the person found guilty of a

criminal charge, in a court of law. Undeniably, the punishment must reflect both the calls for justice from the persons who have directly or indirectly been victims and sufferers of the crimes, as well as respond to the call from the nation as a whole to end impunity for massive human rights violations and crimes committed during the War of Liberation, 1971.

424. The preamble of the Act of 1973 unequivocally demonstrates that this piece of legislation was enacted for the detention, prosecution and punishment of persons for genocide, crimes against Humanity, war crimes and other crimes under international law. Thus, the accused has been arraigned not for committing any isolated offence as codified in normal penal law, and as such, the charge brought under the Act of 1973 itself portrays magnitude, gravity and diabolical nature of the crime and in the event of success of prosecution in proving the charge the accused must deserve just and highest punishment.

425. We have taken due notice of the intrinsic magnitude of the offence of murders as 'crimes against Humanity' being offences which are predominantly shocking to the conscience of mankind. We have also carefully considered the mode of participation of the accused to the commission of crimes proved and the proportionate to the gravity of offences.

426. We have already found in our foregoing discussion that the accused is guilty of the offences relating to crimes against Humanity mentioned in 8(eight) charges being charge nos. 1, 2, 3, 4, 6, 7, 8 and 16 in the commission of those offences as specified in section 3(2) of the Act of 1973.

427. On perusal of both oral and documentary evidence as discussed earlier it is found in charge No. 2 that accused Motiur Rahman Nizami, being the president of Islami Chhatra Sangha [ICS] and ex-officio the commander of Al-Badr Bahini, on 10.05.1971 held a meeting with the local members of Jamaat-e-Islami and ICS at Ruposhi Govt. Primary School and made a conspiracy to commit atrocities in the local villages. Pursuant to that conspiracy, on 14.05.1971 in the morning, the accused and his accomplices along with the Pakistani army having surrounded the villages of Baousgari, Ruposhi and Demra killed hundreds of unarmed civilians by gun shots in those villages. The accused had direct complicity with the commission of those atrocities.

428. As regards crimes narrated in charge no. 4, it is proved beyond reasonable doubt that the accused, under his direction, planning and conspiracy, along with local Rajakars and Al-Badrs in the month of April, 1971 killed one Habibur Rahman Sarder at the bus stand, and in continuation of the same planning and conspiracy, on 08.05.1971 they having surrounded the house of Megha Thakur of village Karamja killed many unarmed civilians including said Megha Thakur and his family members and raped women including Megha Thakur's daughter and son's wife and also plundered and destroyed the houses of Megha Thakur. It is also proved beyond reasonable doubt that at the time of commission of those atrocities, the accused was present in person at both the places of occurrence with the Pakistani occupation Army along with the Rajakar and Al-Badrs.

429. Charge no. 6 relates to mass killing of un-armed civilians. On 27.11.1971 around 3.30 A.M. the accused along with Rajakars and Pakistani invading force raided the house of Dr. Abdul Awal and other adjacent houses in the village Dhulaura and at about 6.30 A.M. they caught hold of a number of men, women including children and placed them all together in the field of Dhulaura School where they all about thirty un-armed villagers were indiscriminately killed by gun-shots. After departure of Pakistani invading force the accused along with his accomplice Rajakars caught hold of twenty two persons, who survived from the hands of Pakistani invading force, and took them to the bank of Isamoti River where they all were brutally killed.

430. Now let us have a glance to the gravity of the crimes under charge No. 16 which relates to killing of numerous intellectuals and professionals . This charge is proved beyond reasonable doubt that the accused, both as de jure and de facto, was a High Command of Al-Badr Bahini who killed numerous intellectuals and professionals including Dr. Abdul Alim Chowdhury [husband of P.W. 13], Dr. Azharul Haque [husband of P.W. 23] and Dr. Humayun Kabir at the fag end of the Liberation War, 1971. The accused was aware of the consequence of his act and conduct that substantially encouraged, endorsed, approved, provided moral support to the Al-Badr men in committing the killing of intellectuals and professionals. The accused as a High command of Al-Badr Bahini exercised his superior status but he never tried to prevent his subordinates from committing such atrocities.

431. All the crimes mentioned in the said four charges [charge nos. 2, 4,6 and 16] relating to killing of hundreds of un-armed civilians and numerous intellectuals and professionals were massive human rights violations committed during the War of Liberation, 1971. The fierceness of the events of 'intellectual killing' and the 'mass killing of un-armed civilians' were extremely detrimental to basic humanness . It deserves to be evaluated as 'crimes of serious gravity' intending to demean the human civilization. Designed plan, pattern of such large scale killing of intellectuals, professionals and un-armed civilians inescapably aggravate the magnitude of the criminal acts and liability of the accused as well. Mass killing of a large number of individuals belonging to the intelligentsia class of Bengali nation as well as un-armed civilians 'extremely serious' offence of crimes against Humanity. The case in hand concerns such type of unheard of killing committed in execution of designed murderous scheme. It not only increases the magnitude of the crimes but it has imprinted untold trauma to the nation. Such 'extreme seriousness' inevitably is considered as an aggravating factor in awarding sentence for the crimes of mass killing. Letters of law cannot remain non active to the enormous colossal and unspeakable pains being carried for decades together by the relatives of martyred intellectuals, professionals, un-armed civilians and the nation too.

432. Justice is to make it sure that the perpetrators have to pay for what they have done. Considering the extreme gravity of offences committed it is indeed indispensable to deliver justice to the relatives of brutally murdered intellectuals, professionals and un-armed civilians and no punishment other

than death will be equal to the horrendous crimes for which the accused has been found guilty beyond reasonable doubt in charge nos. 2, 4, 6 and 16.

433. In view of above discussion, and having found no mitigating factors we are of the unanimous view that there would be failure of justice in case 'capital punishment' is not awarded for all the murders forming 'large scale killing', as listed in the above mentioned four charges as the same indubitably trembles the collective conscience of mankind.

434. Keeping the factors as mentioned above in mind we are of agreed view that justice would be met if for the crimes as listed in charge nos. 2, 4, 6 and 16 accused Motiur Rahman Nizami who has been found guilty beyond reasonable doubt is sentenced to death for each of the said four charges under section 20(2) of the Act of 1973.

435. Considering the gravity of offences and mode of participation of the accused we deem it apposite to render our agreed decision that justice would be met if for the crimes as listed in charge nos. 1, 3, 7 and 8 accused Motiur Rahman Nizami who has been found guilty beyond reasonable doubt is sentenced to suffer 'imprisonment for life' for each of the said four charges under section 20(2) of the Act of 1973.

436. Accordingly, we do hereby render the following ORDER on SENTENCE.

Hence, it is

ORDERED

That accused Motiur Rahman Nizami, son of late Md. Lutfor Rahman of village-Monmothpur, Police Station-Sathia, District- Pabna, at

present -House No. 60, Road No. 18, Banani, Police Station-Gulshan, Dhaka is held guilty of the offences of 'crimes against Humanity' enumerated in section 3(2) of the International Crimes (Tribunals) Act, 1973 as listed in charge nos. 2, 4, 6 and 16 and he be convicted and 'sentenced to death' for each of the said four charges and he be hanged by the neck till he is dead under section 20(2) of the International Crimes (Tribunals) Act, 1973.

The accused is also held guilty of the offences of 'crimes against Humanity' enumerated in section 3(2) of the International Crimes (Tribunals) Act, 1973 as listed in charge nos. 1, 3, 7 and 8 and he be convicted and sentenced to 'imprisonment for life' for each of the said four charges under section 20(2) of the Act of 1973.

However, as and when any one of the four 'sentences to death' will be executed the other three sentences of death and the sentences to 'imprisonment for life' would naturally get merged into the sentence to death first executed. This sentence shall be carried out under section 20(3) of the Act of 1973. The accused is held not guilty of the offences of 'genocide' and 'crimes against Humanity' enumerated in section 3(2) of the International Crimes (Tribunals) Act, 1973 as listed in charge nos. 5, 9, 10, 11, 12, 13, 14 and 15 and he be acquitted of the said eight charges.

The convict is at liberty to prefer appeal to the Appellate Division of the Supreme Court of Bangladesh against the conviction and sentence within 30(thirty) days of the date of order of conviction and sentence as per provisions of section 21 of the Act of 1973.

The convict be sent to the prison with a conviction warrant accordingly.

Let a certified copy of the judgment be furnished to the prosecution and the convict free of cost at once.

Let a copy of the judgment be also sent to the District Magistrate, Dhaka for information and necessary action.

(M. Enayetur Rahim, Chairman)

(Jahangir Hossain, Member)

(Anwarul Haque, Member)