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International Crimes Tribunal-2 (ICT-2)

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

Old High Court Building, Dhaka, Bangladesh

ICT-BD Case No. 01 of 2012

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

The Chief Prosecutor

Vs

Md. Abdul Alim @ M.A Alim

Before

Justice Obaidul Hassan, Chairman

Justice Md. Mozibur Rahman Miah, Member

Justice Md. Shahinur Islam, Member

For the Prosecution:

Mr. Golam Arief Tipoo, Chief Prosecutor

Mr. Rana Das Gupta, Prosecutor

Mr. Zead-Al-Malum, Prosecutor

Mr. Mukhlesur Rahman Badal , Prosecutor

Ms. Tureen Afroz, Prosecutor

Ms. Sabina Yesmin Khan, Prosecutor

Mr. Tapas Kanti Baul, Prosecutor

For the Accused:

Mr. Khalilur Rahman, Advocate, Bangladesh Supreme Court

Mr. Ahsanul Haque Hena, Advocate, Bangladesh Supreme Court

Mr Tajul Islam, Advocate, Bangladesh Supreme Court

Mr. Huzzatul Islam Al-Fesani, Advocate

Date of delivery of Judgment: 09 October 2013

JUDGEMENT

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

I. Opening words

Before we render our verdict we take the privilege to stamp our appreciation for the commendable performance presented and assistance provided by both sides, at all stages of proceedings. This is the first case in which a person accused of the offences enumerated in section 3 of the International Crimes (Tribunals) Act, 1973 faced the trial remaining on bail. Md. Abdul Alim @ M.A. Alim has been arraigned of internationally recognized crimes i.e. crimes against humanity which are among the most egregious harms to human dignity perpetrated in 1971 in the territory of Bangladesh, during the War of Liberation, under the International Crimes (Tribunals) Act, 1973. This Tribunal [ICT-2], a domestic court of law constituted under the International Crimes (Tribunals) Act, 1973 is sitting today to render its unanimous Judgement and verdict.

In addition to resolving the legal and factual aspects agitated by the parties, we deem it indispensable and relevant to portray and resolve the historical and contextual background, characterization of crimes, commencement of proceedings, procedural history relating to the proceedings before the Tribunal, charges framed, in brief, and the laws applicable to the case for the purpose of determining culpability of the accused.

In resolving legal issues we have made reiteration of deliberations and endorsed our finding on it rendered in the earlier cases [*Chief Prosecutor v. Abdul Quader Molla*, ICT-BD Case No. 02 of 2013 Judgment: 05 February 2013 ; *Chief prosecutor v. Muhammad Kamaruzzaman* , ICT-BD Case No. 03 of 2012 Judgment: 09 May 2013 and *Chief Prosecutor v. Ali Ahsan Muhammad Mujahid*, ICT-BD case No. 04 of 2012, Judgment 17 July 2013] with some addition. Finally, on cautious appraisal of evidence adduced, we have penned our finding on alleged culpability of the accused, in relation to the alleged criminal acts constituting the offences, by making independent adjudication.

Now, having regard to section 10(1) (j), section 20(1) and section 20(2) of the International Crimes (Tribunals) Act, 1973[Act No. XIX of 1973] this ‘Tribunal’ known as International Crimes Tribunal-2 (ICT-2) hereby renders and pronounces the following unanimous judgment.

II. Commencement of proceedings

1. On 15 March 2012, the Prosecution filed the ‘formal charge’ in the form of petition as required under section 9(1) and Rule 18(1) of the Rules of Procedure 2010 [ICT-1] against accused Md. Abdul Alim. After affording due opportunity of preparation to accused, the Tribunal [ICT-1], took cognizance of offences as mentioned in section 3(2) (a)(b)(g)(h) of the Act of 1973 on 27.3.2012. Tribunal-1 by its order dated 16.4.2012 transmitted the case record to this Tribunal [ICT-2]. On receipt of the case record on transfer on 19.4.2012 this Tribunal [ICT-2], after hearing both sides and on perusal of the formal charge, documents and statement of witnesses framed seventeen charges on distinct event of criminal acts constituting the offence of ‘crimes against humanity’ and ‘genocide’ as specified in the Act of 1973. The charges so framed were read out and explained to the accused Md. Abdul Alim @ M.A. Alim in open court when he pleaded not guilty and claimed to be tried and thus the trial started.

III. Introductory Words

2. This International Crimes Tribunal (hereinafter referred to as the “Tribunal”) was established under the International Crimes (Tribunals) Act enacted in 1973 (hereinafter referred to as the “Act”) by Bangladesh Parliament to provide for the detention, prosecution and punishment of persons responsible for genocide, crimes against humanity, war crimes, and crimes committed in the territory of Bangladesh, in violation of customary international law. It is to be noted that for ensuring expeditious trial, the government has set up this Tribunal (Tribunal-2) under section 6(1) of the Act on 22nd March .2012. The notion of fairness and due process as have been contemplated in the Act and the Rules of Procedure, 2012 (ROP) formulated by the Tribunal [ICT-2] under the powers conferred in section 22 of the principal Act is to be assessed with reference to the national wishes such as, the long denial of justice to the victims of the horrific atrocities involving large magnitude of violence committed during the war of liberation 1971 and the nation as a whole, together with the recognized norms and jurisprudence evolved.

3. The Act XIX enacted in 1973 which is meant to prosecute crimes against humanity, genocide and system crimes committed in violation of customary international law is *ex-post facto* legislation. It is fairly permitted. It is to be noted that the ICTY, ICTR and SCSL the adhoc Tribunals backed by the United

Nations (UN) have been constituted under their respective retrospective Statute. Only the International Criminal Court (ICC) is founded on prospective Statute [Rome Statute]. The 1973 Act of Bangladesh has the merit and means of ensuring the standard of safeguards recognized universally to be provided to the person accused of crimes against humanity.

IV. Jurisdiction of the Tribunal

4. The Act of 1973 is meant to prosecute, try and punish not only the armed forces but also the perpetrators who belonged to ‘auxiliary forces’, or who committed the offence as an ‘individual’ or a ‘group of individuals’ or ‘organisation’[as amended with effect from 14.7.2009]. It is manifested from section 3(1) of the Act of 1973 that even any person (individual), if he is *prima facie* found accountable either under section 4(1) or 4(2) of the Act of 1973 for the perpetration of offence(s), can be brought to justice under the Act.

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

V. Brief Historical Background

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

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

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

9. The history goes on to portray that in the general election of 1970, the Awami League under the leadership of Bangabandhu Sheikh Mujibur Rahman became the majority party of Pakistan. But defying the democratic norms Pakistan Government did not care to respect this overwhelming majority. As a result, movement started in the territory of this part of Pakistan and Bangabandhu Sheikh Mujibur Rahman in his historic speech of 7th March, 1971, called on the Bangalee nation to struggle for independence if people’s verdict is not respected. In the early hour of 26th March, following the onslaught of “Operation Search Light” by the Pakistani Military on 25th March, Bangabandhu declared Bangladesh independent immediately before he was arrested by the Pakistani authorities.

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

11. The Pakistan government and the military formed Peace Committee as an ‘associate organization and number of auxiliary forces such as the Razakars, the Al-Badar, the Al-Shams etc, essentially to act as a team with the Pakistani

occupation army in identifying and eliminating all those who were perceived to be pro-liberation, individuals belonging to minority religious groups especially the Hindus, political groups belonging to Awami League and Bangalee intellectuals and unarmed civilian population of Bangladesh.

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

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

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

VI. Brief account of the Accused

14. Accused Md. Abdul Alim son of late Abdul Wahed of Ismailia Rice Mill, thana road, police station Joypurhat under district Joypurhat, at present 2/A and 2/D, House No. 81, Road No. 03, Block-F, Banani Residential Area, Dhaka-1213[house of Faysal Alim, son of accused], Dhaka was born on 01 November 1930 in the village *Pandua* under police station Hooghli, West Bengal, India. He and his family migrated to the then East-Pakistan in the year of 1950-51 and settled at Joypurhat. After having MA and LLB degree he joined the legal

profession. In 1958 he joined the Muslim League and got the responsibility of divisional organizing secretary of the party in 1962. In 1971 he was an influential leader of the Convention Muslim League and vice-chairman, Bogra district council. It is alleged by the prosecution that he established an army camp, peace committee office and training centre for Razakars and lodging arrangement for one Pakistani Major Afzal by occupying the 'gadighar'(trading office) and trading and homestead premises of one Shaonlal Bajla, a significant Marwari jute trader of Joypurhat when they became compelled to deport to India leaving all of their assets. Accused Alim was the chairman of Joypurhat Municipality for twice. In 1979 he joined the Bangladesh Nationalist Party (BNP) and was elected Member of Parliament and then a Cabinet Minister of Ziaur Rahman's government.

VII. Brief Procedural History

15. On an application under Rule 9(1) of the ROP submitted by the Chief Prosecutor seeking arrest of the accused Md. Abdul Alim for the purpose of effective and proper investigation, at pre-trial stage the Tribunal-1 issued warrant of arrest on 27.3.2011 in execution of which the accused was arrested by the enforcement and then produced before the Tribunal (Tribunal-1) on 28.3.2011 and then he was sent to prison rejecting the bail application brought on behalf of him. Thereafter, further application was submitted on behalf of the accused seeking his bail. The Tribunal-1, on hearing both sides allowed the accused to remain at large on conditional bail by its order dated 31.3.2011. Since then he is on conditional bail and made his appearance before the Tribunal as and when directed.

16. The Tribunal (Tribunal-1), at pre-trial stage has entertained a number of applications and the same were disposed of in accordance with law and on hearing both sides. The Tribunal however, instead of allowing the investigation agency to bring the accused to safe home as prayed by the Chief Prosecutor ordered directing the investigation agency to interrogate the accused at his home in Dhaka where he has been residing, considering his old age health complications.

17. Finally, the Chief Prosecutor submitted the Formal Charge under section 9(1) of the Act on 15.3.2012, relying on the investigation report of the Investigating

Agency, alleging that the accused as the local 'commander' of Razakar Bahini as well as the Chairman, local 'Peace Committee' or member of a 'group of individuals' had committed crimes against humanity, genocide and also abetted, aided, instigated, encouraged, facilitated and substantially contributed to the commission of such crimes in different places in Joypurhat sub-division (now district) during the period of War of Liberation in 1971.

18. The Tribunal (Tribunal-1), on 27.3.2012, took cognizance of offences against the accused having found *prima facie* case in consideration of the documents together with the Formal Charge, statement of witnesses submitted by the prosecution. Tribunal directed the prosecution to furnish copies of the Formal Charge and documents submitted therewith which it intends to rely upon for supplying the same to the accused for preparation of defence as required under section 9(3) of the Act.

19. At the stage of hearing on charge framing matter, on application filed by the Chief Prosecutor, the Tribunal-1 transmitted the case record to this Tribunal (Tribunal-2) under section 11A(1) of the Act by an order dated 16.4.2012.

20. On receipt of the case record on 19.04.2012, This Tribunal[ICT-2] had to hear the charge framing matter afresh as required under 11A(2) of the Act and as such the hearing took place on 24 April and on several dates. The hearing on charge framing matter concluded on 23.5.2012. Meanwhile, the Tribunal by its order dated 3.5.2012 extended the conditional bail granted earlier by the Tribunal-1.

21. Tribunal [ICT-2] by its decision and order dated 11 June 2012 framed in all 17 charges against the accused Md./ Abdul Alim and the charges so framed were read over and explained to Md. Abdul Alim to which he pleaded not guilty intended to be tried according to law and thus trial started.

22. The defence preferred review [application filed on 18.6.2012] of the order framing charges under Rule 26(3) of the ROP on hearing which the Tribunal by its order dated 28.6.2012 rejected the application with observations that the issues raised at that stage would be better resolved at trial.

23. Through placing ‘opening statement’ on 9.7.2012, prosecution started adducing and examining witnesses to substantiate the charges framed. By examining its first witness on 6.8.2012 prosecution eventually adduced and examined in all 35 witnesses including Investigating Officer and two seizure list witnesses. The phase of examining prosecution witnesses ended on 22.8.2013.

24. The Tribunal by its order dated 9.7.2013 partly allowed an application initiated by the prosecution under section 19(2) of the Act of 1973 with prayer to receive statement of some witness on the grounds stated therein. The Tribunal received such statement only of two witnesses who are now dead, as warranted by section 19(2) of the Act of 1973.

25. The defence submitted a list of 3328 witnesses under section 9(5) of the Act of 1973. However, keeping consonance with the section 11(3) of the Act of 1973 and Rule 43(5) of the ROP the Tribunal in exercise of its inherent powers contained in Rule 46A of the ROP together with the powers given under section 22 of the Act of 1973, considered it just and appropriate to pass an order regulating the number of defence witnesses and accordingly the Tribunal by its order dated 21.8.2012 permitted the defence to examine in all 03 witnesses preferably from the list.

26. In rendering our decision, on this issue, we recorded our finding that it is not correct to say that the accused was ‘not involved’ with the commission of crimes alleged needs to be proved by examining countless number of witnesses. Besides, ‘negative assertion’ is not required to be proved or established by adducing evidence. We have further observed that allowing the defence, particularly when no burden lies upon it, to produce and examine thousands of witnesses, rather it does not conform to the Rule 53(iii) of the ROP. We reiterated, in rendering the order, that the Tribunal is very much empowered, in exercise of its inherent power given under Rule 46A of the ROP, to regulate any kind of tricky mechanism presumably adopted purposefully to halt the process of expeditious and effective trial of a case.

27. Afterwards, defence came up with an application seeking re-call of the order limiting defence witnesses, on the grounds stated therein. The Tribunal on hearing both sides rejected the application by rendering its reasoned order dated 29.8.2013.

28. Defence duly produced and examined three witnesses to prove some of documents and books which have been marked as well and also to prove the plea of alibi. Defence concluded examining its witnesses on 3.9.2013 and thus the Tribunal fixed 04.9.2013 for summing up of the prosecution case as required under section 10(1)(i) of the Act of 1973.

29. Prosecution started its summing up on 04 September 2013 and concluded on 11 September 2013. Next, defence placed its summing up for couple of days starting from 15 September 2013 and it ended on 19 September 2013. Prosecution was allowed to place rebuttal submission on law points only, for one hour.

30. Defence by filing an application prayed to permit the accused Md. Abdul Alim @ M.A. Alim to remain on bail till pronouncement of judgment, on the grounds stated therein. The Tribunal by giving the following observations rejected the prayer and sent the accused to prison to keep him detained till pronouncement of verdict:

“The accused Md. Abdul Alim is on conditional bail and has been residing at home in Dhaka city. He did not default in making his appearance before the Tribunal, true. But in the event of any detrimental situation arising out of such violent activities, if occurs, it may cause grave obstruction to accused’s coming and appearance before this Tribunal and a peril to accused’s personal safety too that may likely to cause impediment to the scheduled judicial function of the Tribunal.”

31. The Tribunal however directed the prison authority to provide the accused with all necessary support and treatment, considering his physical and old age complications. After closing the summing up of cases on 22.9.2013, the Tribunal kept the case under CAV for rendering and pronouncement of its Judgment.

VIII. Applicable laws

32. The proceedings before the Tribunal shall be guided by the International Crimes (Tribunals) Act 1973, the Rules of Procedure 2012 formulated by the Tribunal under the powers given in section 22 of the Act. Section 23 of the Act of 1973 prohibits the applicability of the Code of Criminal Procedure, 1898 and the Evidence Act 1872. Tribunal is authorized to take judicial notice of fact of common knowledge which is not needed to be proved by adducing evidence [Section 19(4) of the Act]. The Tribunal may admit any evidence which it deems to have probative value [Section 19(1) of the Act]. The Tribunal shall have discretion to consider hearsay evidence by weighing its probative value [Rule 56(2)]. The defence shall have liberty to cross-examine prosecution witness on his credibility and to take contradiction of the evidence given by him [Rule 53(ii)]. Defence shall have right to examine witnesses [Section 10(1) (f) of the Act of 1973].

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

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

34. Ensuring rights of accused is a pertinent issue involved in any criminal trial. Fair trial concept stems from the recognized rights of accused. The Tribunal [ICT-2], a domestic judicial forum constituted under our own legislation enacted in the Parliament is obliged to guarantee the rights of the accused and key elements of fair trial. .

Right to Disclosure

35. Article 9(2) ICCPR contains-“Anyone who is arrested shall be informed, at the time of arrest, of the reasons for his arrest and shall be promptly informed of any charges against him.” This provision compatibly reflects in the Rule 9(3) of

ROP that provides-“At the time of executing the warrant of arrest under sub-rule (2) or later on, copy of allegations is to be served upon such person.” Further, Rule 18 (4) of ICT-BD provides “The Chief prosecutor shall file extra copies of formal charge and copies of other documents for supplying the same to the accused(s) which the prosecution intends to rely upon in support of such charges so that the accused can prepare his defence.”

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

To be presumed innocent till found guilty

37. The right to be presumed innocent until proven guilty is one of the cornerstones of fair trial proceedings and is related to the protection of human dignity. No one can be convicted unless the charge brought against him is proved 'beyond reasonable doubt'. This is the standard and universally settled criminal jurisprudence that all the courts constituted under valid legislation will follow. In ICT-BD the provision that the burden of proving the charge shall lie upon the prosecution (Rule 50) amply implicates the theory of innocence of an accused until and unless he is held guilty through trial. Besides, a person charged with crimes as described under section 3(2) of the Act shall be presumed innocent until found guilty [Rule 43(2) of the ROP].

Expeditiousness of the proceedings

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

“Procedural time-limits are to be respected, and . . . they are indispensable to the proper functioning

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

39. In the case in hand, both parties were afforded adequate time in conducting their respective case. Keeping the settled notion in mind the Tribunal was mindful in providing every practicable facility it was capable of granting under the Rules and the Act of 1973 when faced with a request by either party for assistance in presenting its case.

Adequate time to prepare defence

40. The key element of fair trial notion is the right of an accused to have adequate time and facilities for the preparation of his defense during all stages of the trial. What time is considered adequate depends on the circumstances of the case. The concept of fairness is the idea of doing what's best and level-headed.

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

Right to examine witnesses

42. Under section 10(1) (f) of the Act of 1973 defence shall have right to examine witness, if any. In the case in hand, defence submitted a list of 3328 witnesses under section 9(5) of the Act of 1973 at the commencement of trial. Submitting such a long list is indeed unheard of. However, eventually considering the defence case extracted from the trend of cross-examination of prosecution witnesses the Tribunal [ICT-2] permitted the defence to produce and examine only 03 witnesses preferably from their list, in exercise of power given in section 22 of the Act and Rule 46A of the ROP.

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

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

X. Universally Recognised Rights of Victims

45. The Tribunal notes that the State has an obligation to remedy serious human rights violations. Bangladesh recognizes Article 8 of the Universal Declaration of Human Rights [UDHR] and Article 2(3) of the International Covenant of Civil and Political Rights [ICCPR] which ensure the right to an effective remedy for the violation of human rights.

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

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

XI. Summing up of cases

Brief of Summing up by the Prosecution

47. Mainly the learned conducting prosecutor Mr. Rana Das Gupta has advanced summing up to establish the success of the prosecution in proving the charges framed. He, at the outset, submitted that the prosecution has been able to produce and examine witnesses in respect of 15 charges out of 17 charges framed. There has been no evidence, oral or documentary, to prove the charge no.4 and charge no.5. Accordingly the learned Prosecutor placed summing up submission. Dr. Tureen Afroz, the learned Prosecutor also assisted the learned conducting prosecutor by placing argument on some related and pertinent issues involved in the case.

48. Mr. Rana Das Gupta, the learned Prosecutor has made argument chiefly on factual aspects. He has made effort to show how far the prosecution has been able to prove the event of criminal act and involvement of accused Alim therewith as narrated in the charges, by drawing attention to the testimony made by the prosecution witnesses coupled with documentary evidence on material facts.

49. Mr. Gupta submitted that many of witnesses had opportunity to witness the material facts relevant to the actual commission of the event of killing and criminal acts and some are hearsay witnesses, particularly as regards the event of killing. Due to lapse of long passage of time inconsistencies may occur in witnesses' testimony and they may not be able to narrate the event in exact detail. But merely for this reason their sworn testimony cannot be discarded, if it offers reasonable indication as to involvement of the accused with the crimes committed. Defence could not impeach what has been stated by the prosecution witnesses before the Tribunal, on material particular. Rather crucial part of testimony of witnesses has been re-affirmed in their cross-examination and thus there can be no earthly reason to negate its credibility and probative value.

50. Mr. Rana Das Gupta, the learned Prosecutor went on to argue further that it has been proved from evidence that the accused Alim being the potential leader of local peace committee had played a key decisive role in determining the fate of the civilians captured by his accomplices and the group of perpetrators

comprising army, Razakars. Evidence also shows that the accused Alim did not respond the victims' relative's approach made to him for release of detained victims. Such inaction or omission to respond indicates his culpable attitude that tends to impel the conclusion that he was the person having significant authority to decide the fate of detained civilians.

51. Learned Prosecutor Mr. Rana Das Gupta took pain in placing argument by drawing attention to the relevant part of testimony of witnesses together with relevant documents which the prosecution intends to rely upon to prove the charges and accused's culpability, in a systematic manner and the same deserves to be addressed and considered in the segment of adjudication of charges.

52. Ms. Tureen Afroz , the learned Prosecutor in advancing argument on some crucial issues involved, has submitted that within the geographical area of Joypurhat, Panchbibi, Akkelpur and Khetlal accused Alim had acted as '*crime compass*' and provided '*navigational services*' to the Pakistani occupation army in carrying out criminal activities targeting pro-liberation civilians in 1971. As regards formation of local 'peace committee' and Alim's position of domination over it and also over the group of perpetrators comprising army, Razakars it has been first submitted that in 1971, accused Md. Abdul Alim was involved with 'public activities' during the entire period of war of liberation and it is not at all true that the accused was not in Joypurhat since April 1971 to January 1972. Accused Alim was an educated local elite and a leader of Convention Muslim League and he had visible nexus with the local peace committee as he himself organised its formation pursuant to decision of the central committee of Convention Muslim League.

53. Learned prosecutor went on to argue that in 1971, with intent to assist Pakistani occupation army in carrying out its activities several peace committees were formed under different names and supervision of different fanatic Muslim rightist parties. Accused Md. Abdul Alim was the chairman or leader of local peace-defence committee formed under the guidance of Convention Muslim League. Another peace committee was formed by Jamat E Islami [JEI] to which Abbas Ali Khan was the leader or chairman. Additionally, the positions stated by the prosecution witnesses establish accused Alim's 'position of leadership' in the local 'peace committee'. Under the generic name 'peace committee' was

working through out the country in 1971. In Joypurhat, 'peace committee' was formed by the local unit of Convention Muslim League pursuant to party's central and internal political decision.

54. Ms. Tureen, the learned prosecutor, argued on next issue i.e 'pattern of crimes' for which accused Alim has been charged with show a 'common trend'. The trend in committing almost all crimes narrated in the charges will go to show that first the victim civilians were captured from a place; second, they were brought to some other place or at the camp of army or peace committee office for 'assessment' and third, they were brought to some selected places for accomplishing the act of killing. This trend shows that the criminal activities were carried out in furtherance of common policy and design to which accused Alim was a part.

55. Ms. Tureen Afroz, the learned Prosecutor in placing his argument on Joint Criminal Enterprise[JCE] liability has submitted that the patterns in the commission of the crimes alleged is fair indicative of existence of common plan, design or purpose and thus the accused Alim can be held liable under the theory of JCE which conforms to the liability described in section 4(1) of the Act of 1973. The charges excepting charge nos. 1 and 2[no evidence adduced to prove charge 4 and 5] all the charges involve three phases : (i) place of capture (ii) place of assessment and (iii) place of execution. For the act of 'assessment' [decision as to fate of detained civilians] was done by accused Alim and for accomplishing further action [execution] the victims were brought to the execution site.

56. Accused Alim, in this way, took consenting part in an unlawful common enterprise and each one of the enterprise acted in furtherance of common purpose. The accused Alim is therefore equally liable as he would be found to have played a part for the actual commission of crimes alleged. He participated by his conscious act or conduct to further the object of the group of perpetrators with foreseeable knowledge of consequence of his act or conduct. Therefore the accused may be held responsible under the JCE liability which is covered by section 4(1) of the Act of 1973.

b. Summing up of case by the defence

57. Mr. Tajul Islam first started argument on raising some legal issues which have been already settled by this tribunal [ICT-1] in earlier cases. The legal issues the learned defence counsel has agitated are : (i) that the delay in bringing prosecution (ii) that the ‘tripartite agreement of 1974’ is a clog in bringing prosecution against the present accused (iii) that since the accused was prosecuted under the collaborators Order 1972 he now cannot be prosecuted and tried for the same offence (iv) that the accused has been brought to justice under the Act of 1973 with political motive. Mr. Tajul Islam however without making vivid submission on all the legal issues submitted to adopt the argument advanced by the defence in earlier cases by the defence.

58. Mr. Ahsanul Haque Hena, the learned conducting defence counsel took pain in arguing the case by addressing some related pertinent factual aspects. He submitted that accused Md. Abdul Alim was not involved with the Joypurhat Peace Committee. He was neither chairman of peace committee nor he was the commander of Razakar bahini. Prosecution has failed to establish the fact of accused’s involvement with and position in peace committee and Razakar. Rather from the defence document it will reveal that Abbas Ali Khan was the chairman of local peace committee.

59. Mr. Hena, the learned defence counsel went on to submit that there has been no proof that the accused by dispossessing the owner of ‘gadighar’ [Shaonlal Bajla’s trading office] occupied it and set up peace committee’s office there. The IO did not visit the alleged ‘gadighar’ for ascertaining the probability of the fact of setting the office of peace committee. It has been further submitted that the size of the alleged ‘gadighar’ as found from evidence does not make the matter of carrying out those offices there probable. The IO did not visit the said ‘gadighar’ and did not interrogate the people surrounding it.

60. Mr. Hena, the learned defence counsel went on to submit that the peace committee in Joypurhat was formed at the end of April 1971, after the Pakistani army rolled into Joypurhat. Peace committee was not an ‘auxiliary force’ as defined in the Act of 1973. It has been further argued that the prosecution could not be able to prove as to when the local peace committee was formed and that the accused was in command position of Razakars too.

61. Mr. Hena further submitted that Major Afjal was not posted in Joypurhat. The defence document shows that he was posted elsewhere and as such association of accused Alim with major Afjal in carrying out alleged criminal activities goes on air. Not the 8 Beluch but 3 Beluch was in Joypurhat in 1971 which is proved by the defence documents. As regards Razakar bahini formation, the learned defence counsel argued that it came through an Ordinance and it was formed at the behest of army and training was provided with them by the army and police. Thus it is not true that the local Razakar bahini was formed and trained under the coordination of accused Alim.

62. On arguing on the charges, Mr. Hena, the learned defence counsel has advanced his submission in detail. The submission so made shall be conveniently deliberated in the segment of adjudication of charges. However, his submission centered on argument that the prosecution witnesses are not reliable and their testimony inspires no credence as it suffers from fatal contradiction on material particular. Most of the witnesses are hearsay witness. It could not be proved that accused Alim physically participated to the actual commission of the crimes alleged. There has been no proof that accused Alim abetted, substantially contributed the commission of alleged crimes by the principal perpetrators. Since accused Alim was not the chairman of peace committee of Joypurhat and he did not occupy the 'gadighar' [Shaonlal Bajla's trading office] no question arises of carrying out activities by the accused remaining at the said 'gadighar', as claimed by the prosecution witnesses.

63. On plea of alibi, the learned defence counsel by drawing attention to the testimony of prosecution witnesses and D.W.s has submitted that accused Alim had not been in Joypurhat till independence since 20 April. Remaining away from Joypurhat during the said period negates accused's involvement with any of atrocities alleged. However, detail submission on this issue, made by the learned defence counsel, shall be taken into consideration while resolving the issue of plea of alibi.

Prosecution's Rebuttal

64. Ms. Tureen Afroz, in making rebuttal submission on law points, has submitted that a photo if admitted into evidence it carries probative value. In the case in hand, prosecution has proved and exhibited a photo showing accused

Alim standing with Major Afjal behind the detained unarmed freedom fighters keeping arms in front of them speaks volume, as regards culpability of accused. Such photo's authentication typically is provided by the testimony of witness who is familiar with the subject i.e the photo. In the present case Motasim Billah who was a photographer and took the photo came on dock and proved the authentication of the photo which has been marked as Material Exhibit-I.

65. Next, it has been argued that the Tribunal is to arrive at its finding relying upon only the evidences place before it and not to get involved in an speculating evidence, for the purpose of proving prosecution case. In support of this submission the learned prosecutor has cited a decision of ICTR Appeal Chamber in the case of **Kajelijeli, May 23, 2005, para.74** wherein it has been observed that "It would be entirely speculative and inappropriate for the Tribunal to enter into a consideration of what other evidence could have been brought." Therefore, it is not correct to say, as submitted by the defence counsel, that some particular witnesses could have been examined by the prosecution and since they have not been brought and examined it may be assumed that they would testify something else not favourable to prosecution.

66. Ms. Tureen Afroz, the learned prosecutor argued that accused Alim incited, by his act and conduct, to the commission of actual crimes as narrated in charge nos. 2 and 13. She went on to argue that the act of inciting' is not confined to making speech only. 'Inciting' even can take any form, either words or deeds. Citing the case of **Race Relations Board v Applin**, the learned prosecutor submitted that **Lord Denning** stated that a person may incite another to do an act by threatening or by pressure, as well as by persuasion [**Race Relations Board v Applin**[1973]1 QB 815,[1973] 2 WLR 895,[1973]2 A11 ER 1190, CA, affirmed[1975] AC 259,HL]. She further cited the decision of **R v Fitzmaurice** [1983]QB 1083,[1983] 2 WLR 227, [1983] 1 A11 ER 189, 76 Cr App R 17,[1982] Crim LR 677, CA] wherein it has been observed that the necessary element of persuasion was satisfied by a 'suggestion, proposal or request'. Here, conduct or act of accused Alim forming part of attack, so far as it relates to charge no.2, it is proved that he incited the commission of the offence of 'genocide'. Similarly he is proved to have incited to the commission of the offence of murder as Crimes against Humanity, as narrated in charge no.13.

67. As regards the elements to constitute the offence of ‘deportation’ as crime against humanity learned prosecutor has submitted that no physical force is needed to cause one’s deportation. Creating a coercive climate by destructive criminal activities is sufficient to force or compel an individual to deport.

68. On the issue of ‘double jeopardy’ , the learned prosecutor submitted that despite the fact that accused Alim was prosecuted under the Collaborators Order 1972, the doctrine of ‘double jeopardy’ shall not be applicable in prosecuting him under the Act of 1973. Because the offences scheduled in the Order of 1972 are not the ‘same offences’ for which accused Alim has been arraigned. On JCE, the learned prosecutor simply reinforced the submission made in earlier case on part of the prosecution.

XII. The way of adjudicating the charges

69. It should be kept in mind that the alleged incidents took place 42 years back, in 1971 and as such memory of live witness may have been faded. Invaluable documents could have been destroyed. Collecting and organizing evidence was a real challenge for the prosecution. The evidence produced by the prosecution in support of its respective case was mainly testimonial. Some of prosecution witnesses allegedly directly experienced the dreadful events and material facts they have narrated before the Tribunal and the trauma they sustained naturally could have an impact on their testimonies.

70. The Tribunal notes that it is required to examine whether the alleged facts constituted the offences alleged and involvement of the accused therewith in a most dispassionate manner, keeping in mind that the accused is presumed innocent. In this regard the Tribunal (ICT-2) recalls the provisions contained in section 6(2A) of the Act of 1973.

71. Prosecution, in the light of the charges framed, is burdened to prove-(**i**) commission of the crimes alleged (**ii**) who were the principal perpetrators (**iii**) The accused had authority of position over the perpetrators (**iv**) mode of participation of the accused in committing any of crimes alleged (**v**) how he acted in aiding or providing encouragement or moral support or approval to the commission of any of alleged crimes (**vi**) was he a part of Joint Criminal

Enterprise[JCE] (vii) context of committing the alleged crimes (viii) the elements necessary to constitute the offence of crimes against humanity (ix) liability of the accused.

XIII. Addressing legal issues agitated

72. Mr. Tajul Islam, the learned defence counsel, at the beginning of summing up of defence case, started placing submission on some crucial and related legal issues. At a stage of his submission the learned defence counsel concluded his argument on those points by adopting the argument already placed by the defence, in relation to some other cases which have already been disposed of by this Tribunal [ICT-2]. The learned Prosecutor similarly submitted to adopt their argument they made in earlier cases, on these legal issues.

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

73. The argument on legal issues considered to have been reiterated and adopted by the defence may be succinctly categorized as below, for the purpose of rendering our findings:

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

that the accused alone had committed the offences alleged and thus without bringing his accomplices to justice the accused alone cannot be prosecuted; **(vi)** that the offences have not been adequately defined in the Act of 1973 and for characterizing the criminal acts alleged for constituting offence of crimes against humanity the Tribunal should borrow the elements as contained in the Rome Statute as well as from the jurisprudence evolved in adhoc Tribunals.

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

74. In reply to the above reiterated and adopted argument on legal aspects, prosecution has also submitted to adopt their earlier submission made in the earlier cases which have been disposed of by this Tribunal [ICT-2]. Accordingly, prosecution's argument on the legal issues agitated by the defence may thus be categorized as below:

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

therein are perceived to have been committed as part of 'systematic attack'. The context of war of liberation is enough to qualify the acts as the offences of crimes against humanity which were perpetrated in violation of customary international law.

XIV. Determination of Legal Aspects

(i) Does Unexplained Delay frustrate prosecution case

75. There has been no controversy as to the settled legal proposition that mere delay does not create any clog in bringing criminal prosecution. But the defence argued that unexplained inordinate delay of long 40 years occurred in prosecuting the accused impairs the truthfulness of the case and it reflects political motive too. Such inordinate delay of long 40 years should have been explained in the formal charge submitted under section 9(1) of the Act which is the foundation of the case.

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

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

78. Even long 70 years after the commission of crimes Nazi war criminals still are being brought to justice. Delay creates no clog in prosecuting them. Recently Laszlo Csatory, a Nazi war criminal has died, during his trial in Budapest. Another one who is now 92 years old, Siert Bruin is facing trial in a court in Germany. According to the indictment, Mr. Bruins and another member of the border patrol took Mr. Dijkema to an abandoned factory, where he was killed with four shots, including one to the back of his head.

79. A 92-year-old man who served as a border guard in Adolf Hitler's elite Waffen-SS troops went on trial on Monday on charges that he shot and killed a Dutch resistance fighter in the final months of World War II. His prosecution is part of a German effort to bring aging Nazis to justice before it is too late. [**New York Times September 2, 2013**].

80. Therefore, we conclude that delay in bringing an individual to justice for his misdeeds causing harm to humanity and human dignity cannot be seen to be a barrier for holding trial. Finally we are persuaded to record our further observation that the mere delay occurred in bringing prosecution, taking the context prevailed since last couple of decades into account, does not lead accused's acquittal or impairs the prosecution case the effective adjudication of which fundamentally rests on evaluation of totality of evidence presented.

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

81. Defence argument on this legal issue, as made in earlier cases is that the Act of 1973 and first amendment of the constitution will go to show that intention of the framers of the legislation was to prosecute and try the 195 listed war criminals of Pakistan armed force and not the civilians as the phrase 'including any person' was replaced by the phrase 'any person' belonging to armed force or auxiliary force. The first amendment of the constitution was brought so that no 'civilian person' could be prosecuted and tried under the Act of 1973.

82. Conversely, prosecution's argument is that The Act of 1973 is meant to prosecute, try and punish any 'individual' or 'group of individuals', or any member of armed, defence or auxiliary force for the offences specified in section

3(2) of the Act of 1973. Prosecuting the accused even in the capacity of an ‘individual’ is lawful even if he is not found to have had membership of any ‘auxiliary force’.

83. The Tribunal notes that the history says, for the reason of state obligation to bring the perpetrators responsible for the crimes committed in violation of customary international law to justice and in the wake of nation’s demand the Act of 1973 has been amended for extending jurisdiction of the Tribunal for bringing the local perpetrator to book if he is found involved and concerned with the commission of the criminal acts constituting offences of crimes against humanity and genocide as enumerated in the Act of 1973 even in the capacity of an ‘individual’ or member of ‘group of individuals’ .

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

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

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

“The legislative modification that has been adopted by bringing amendment in 2009 has merely extended jurisdiction of the Tribunal for bringing the perpetrator to book if he is found involved with the commission of the criminal acts even in the capacity of an ‘individual’ or member of ‘group of individuals’. The right to move the Supreme Court for calling any law relating to internationally recognised crimes in question by the person charged with crimes against humanity and genocide has been

taken away by the provision of Article 47A(2) of the Constitution. Since the accused has been prosecuted for offences recognised as international crimes as mentioned in the Act of 1973 he does not have right to call in question any provision of the International Crimes (Tribunals) Act 1973 or any of amended provisions thereto.

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

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

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

88. This issue is much talked about, in all the cases before this Tribunal[ICT-2]. Defence, in all cases, has argued that pursuant to the ‘tripartite agreement’ dated 09.4.1974, 195 listed war criminals belonging to Pakistani armed force have been given clemency. Thus, the matter of prosecuting and trying them under the Act of 1973 ended with this agreement. The government, in order to prosecute and try the local perpetrators who allegedly aided and abetted the Pakistani occupation armed force in committing atrocities including murder, rape, arson enacted the Collaborators Order 1972 and thus the local collaborators could have been prosecuted and tried only under the said Order of 1972.

89. This Tribunal [ICT-2] has already resolved this pertinent issue by giving its reasoned finding, in the case of *Abdul Quader Molla* and also in the case of *Muhammad Kamaruzzaman and Ali Ahsan Muhammad Mujahid*. Deliberations made therein, on this issue, may briefly be reiterated in the case in hand too, as below.

90. First, the backdrop of entering into the ‘tripartite agreement’ needs to be considered. Bangladesh’s decision was to prosecute and try 195 Pakistani POWs

who were detained in India. Finally they were repatriated to Pakistan followed by the ‘tripartite agreement’. **N. Jayapalan**, in his book titled **‘India and Her Neighbours’** has attempted to give a light on it, by narrating

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

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

91. Besides, a closer look at the repatriation process of 195 Pakistani War Criminals [tripartite agreement] suggests that the political direction of the day had to put on hold the trial process at that time, but intended not to terminate the option of any future trial. The Tripartite Agreement visibly mentioned Bangladesh’s position on the 195 Pakistani War Criminals in the **Article 13** of the agreement which is as below:

“There was universal consensus that persons charged with such crimes as 195 Pakistani

prisoners of war should be held to account and subjected to the due process of law”.

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

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

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

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

95. It is now settled that one of the main justifications for prosecuting crimes against humanity, or genocide is that they violate the *jus cogens* norms. As state party of Universal Declaration of Human Rights (UDHR) and Geneva Convention Bangladesh cannot evade obligation to ensure and provide justice to victims and sufferers of those offences and their relatives who still suffer the pains sustained by the victims and as such an ‘executive act’ (tripartite agreement) can no way derogate this internationally recognized obligation. Thus, any agreement or treaty if seems to be conflicting and derogatory to *jus cogens* (compelling laws) norms does not create any hurdle to internationally recognized state obligation.

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

97. Here is what is said in Article 53 of the Vienna Convention:

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

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

(iv) Whether prosecuting the accused under the Act of 1973 is malafide and barred by the doctrine of double jeopardy.

99. Defence avers [as presented in the case of *Abdul Quader Molla*] that the cumulative effect of intention of enacting the Act of 1973, unexplained delay in bringing instant prosecution and bringing amendment of the Act of 1973 in 2009 by incorporating the phrase ‘individual’ or ‘group of individuals’ inevitably shows that bringing prosecution against the accused under the Act of 1973 is *malafide* and politically motivated.

100. Admittedly accused Md. Abdul Alim was arrested under the Collaborators Order 1972 in connection with two cases and subsequently he was released thereof. The defence argument, on the basis of this admitted fact, is that the accused Alim cannot be prosecuted and tried again for the same offence. The preamble of the Order of 1972 patently reflects that the persons who collaborated with Pakistani army in committing the offence of murder, rape, arson, looting in 1971 could have been prosecuted and tried under the said Order of 1972. Prosecuting the accused again for the ‘same offence’ is barred and simply to satisfy the political vengeance.

101. First, we reiterate that the Collaborators Order 1972 was a piece legislation aiming to prosecute and try the persons responsible for the offences enumerated in the schedule thereof. The offences punishable under the Penal Code were scheduled in the Collaborators Order 1972. While the Act of 1973 was enacted to prosecute and try the ‘crimes against humanity’, ‘genocide’ and other ‘system crimes’ which are recognised as international crimes committed in violation of customary international law. There is no scope to characterize the offences underlying in the Collaborators Order 1972 to be the ‘same offences’ as specified in the Act of 1973.

102. In the case in hand we have found that there are sufficient grounds to presume *prima facie* that the accused was associated with the orchestration and perpetration of the offences enumerated in the 1973 Act, by his conscious act and conduct. Therefore, we are disinclined to accept the proposition of the fact that the accused was freed from the prosecution initiated under the Collaborators Order 1972 in no way immune him from being prosecuted under the Act of 1973.

103. Admittedly accused Alim was prosecuted under the Collaborators Order 1972 but later on released. But there has been no proof that he was released on full trial of the case. Additionally, the offences enumerated in the Act of 1973 are quite distinct from those scheduled in the Order of 1972. The Tribunal, in determining the issue of ‘double jeopardy’, is concerned with offences or crimes as clearly refer to the Act of 1973 and not the Collaborators Order 1972.

104. Double jeopardy is a **procedural defense** and, in many countries such as the United States, Canada, Japan, India, and Bangladesh a constitutional right

that forbids an accused from being tried a second time for the ‘same crime’. The legal principle of ‘Double Jeopardy’ is that one can’t be in jeopardy of punishment by the state twice for the ‘same offence’. The legal principle of double jeopardy prevents an individual from being ‘tried’ for the ‘same crime’ twice.

105. Bangladesh Constitution contains a provision [Article 35(2)] that deals with the issue of ‘double jeopardy’ (also known as *ne bis in idem*). This principle essentially means that a person should not be tried or punished twice for the ‘same offence’. But what we see in the case in hand? We see that the accused was merely prosecuted under a different Act for the offences punishable under the Penal Code, and not for the crime’ punishable under the ICTA 1973. Ingredients of offences punishable under the Penal Code are not identical to those of offences punishable under the ICTA 1973. If it is so, how it can be inferred that the accused is now being prosecuted and tried for the ‘same offences’? Thus, question of being jeopardized does not arise at all.

106. ‘Prosecuting a person’ means to institute or conduct legal proceedings against him. Finding a person guilty of offence is founded on lawful trial followed by the final verdict of the court of law. Mere prosecuting him does not *ipso facto* predict that he was guilty of the criminal act constituting offence for which he is prosecuted.

107. The words ‘Same offence’ and ‘same criminal act’ always may not carry same notion of offence. In the case in hand, it appears that the criminal acts for which the accused was prosecuted were the scheduled offence of the Collaborators Act. The offences punishable under the Penal Code were the scheduled offences of the said Order of 1972. Despite prosecuting under the said Order of 1972 the accused was not ultimately tried and found guilty of those offences. On this score as well plea of bar in prosecuting for the ‘same offence’ goes on air.

108. It is to be tested as well whether two criminal offences are the same for the purposes of double jeopardy jurisprudence, **Lord Morris** explained that-

what has to be considered is whether the crime or offence charged in the later indictment is the same or is in effect or is substantially the same as the crime

charged (or in respect of which there could have been a conviction) in a former indictment and that it is immaterial that the facts under examination or the witnesses being called in the later proceedings are the same as those on some earlier proceedings. [1964] **A.C. 1254 at 1306 [H.L.(E.)].**

109. Now, in ICT-BD the prosecution has come up to conduct legal proceedings against the accused for the criminal acts which are enumerated as ‘crimes’ punishable under the International Crimes (Tribunals) Act 1973. This being the position, we are in unmistakable disposition that the accused cannot have the shield of the principle of double jeopardy as enshrined in Article 35(2) of the Constitution. Additionally, it would be incorrect to interpret that double jeopardy does occur even if a person is said to have been prosecuted further for the ‘same offence’ if it is found that he was merely prosecuted and in the end not tried and punished.

110. Admittedly, the accused was prosecuted under the Collaborators Order 1972 but could not be tried as subsequently he was freed. That is to say the earlier prosecution was not ended on the merits. Additionally, offence (*dicta*) refers to the legal characteristics of an offence and not the facts on which it is based. It is true that the Article 35(2) of the Constitution prohibits prosecution and punishment for twice for the ‘same offence’. But on mere reading of the preamble of the Collaborators Order 1972 it cannot be said that the offences under it are the same offences as mentioned in the Act of 1973. In these circumstances, we are of view that there is a separate and distinct new criminal offence (*i.e.* separate defining elements) under the Act of 1973 that may be prosecuted without violating the common law double jeopardy prohibition.

(v) Definition and Elements of Crime

111. On this legal aspect, defence’s adopted argument is that the offences specified in section 3(2) are not well defined and the same lack of elements. Section 3(2) of the ICTA 1973 does not explicitly contain the ‘widespread or systematic’ element for constituting the crimes against humanity. It has been further argued that an ‘attack’ may be termed as ‘systematic’ or ‘widespread’ if it was in furtherance of policy and plan. The offence, if actually happened, in

absence of context, and policy or plan, cannot be characterized as crimes against humanity.

112. First, we consider it appropriate to have glance to the finding recorded in earlier case by this Tribunal [ICT-2]. It is now settled that ‘policy’ and ‘plan’ are not the elements to constitute the offence of crimes against humanity. It is true that the common denominator of a ‘*systematic attack*’ is that it is carried out pursuant to a preconceived policy or plan. But these may be considered as factors only and not as elements [*Kamaruzzaman*, Judgment 09 May 2013, para 128].

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

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

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

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

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

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

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

118. The Tribunal notes that if the specific offences of 'Crimes against Humanity' which were committed during 1971 are tried under 1973 Act, it is obvious that they were committed in the '**context**' of the 1971 war of liberation. This '**context**' itself is sufficient to prove the existence of a '*systematic attack*' on Bangladeshi self-determined population in 1971. It is the '*context*' that transforms an individual's act or conduct into a crime against humanity and it may be validly presumed that the accused being aware of this context, participated the commission of crimes by his culpable act or conduct.

119. According to provisions of section 3(2)(a) of the Act states the 'acts' forming part of 'attack' that constitutes the offences of crimes against humanity are required to have been 'committed against any civilian population' or

'persecution on political, racial, ethnic or religious grounds'. To qualify as a crime against humanity, the acts enumerated in section 3(2)(a) of the Act thus must be committed against the 'civilian population'.

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

XV. General Considerations Regarding the Evaluation of Evidence in a case of Crimes against Humanity and Genocide

121. We reiterate that the case relates to trial of internationally recognised crimes committed in violation of customary international law. The offences are alleged to have been committed in context of war of liberation in 1971. Section 22 of the Act of 1973 provides that provisions of the Criminal Procedure Code, 1898(V of 1898), and the Evidence Act, 1872(I of 1872), shall not apply in any proceedings under the Act of 1973.

122. Section 19(1) of the Act provides that the Tribunal shall not be bound by technical rule of evidence and it shall adopt and apply to the greatest possible extent non technical procedure and may admit any evidence which it deems to have probative value. Thus, the crimes enumerated in section 3(2) of the Act of 1973 are the crimes committed in violation of customary international law and these are not isolated crimes punishable under the normal Penal law of the land.

123. In the case in hand, if we keep the provision of section 22 together with section 19 of the Act of 1973 in mind it would be clear that the task of determination of culpability of a person accused of offences enumerated in section 3 of the Act of 1973 involves a quite different jurisprudence. Proof of all forms of criminal responsibility, through participation in any manner can be given by direct or circumstantial evidence. It is now settled jurisprudence.

124. It is now settled that the offence of crimes against humanity is considered as 'group crime' and it is not perpetrated by a single individual. But however, an individual may participate to the actual commission of the principal crime by his act or conduct, before or midst or after the crime committed.

125. The Tribunal notes that context of committing such crimes which are internationally recognised crimes and totality of its horrific profile naturally leaves little room for the people or civilians to witness the events of the criminal acts. Where a significant period of time has elapsed between the acts for which the accused has been charged, it is not always reasonable to expect the witness to recall every detail with precision. In the case in hand, Prosecution depends mainly on testimony made by the witnesses before the Tribunal.

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

127. However. Onus squarely lies upon the prosecution to establish accused’s presence, acts and conducts forming part of attack resulted in commission of the offences of crimes against humanity as enumerated in section 3(2) of the Act of 1973 for which he has been arraigned. Most of the prosecution witnesses have testified the acts, conducts of the accused claiming him as a potential leader of an associate organization [peace committee].

128. Proof of all forms of criminal responsibility can be given by direct or circumstantial evidence. It is now settled jurisprudence. The acts of the accused do not always need to be committed in the midst of the attack provided that if they are sufficiently connected to the attack. This view finds support from the decision of Trial Chamber, ICTY in the case of *Limaj*, [November 30, 2005, para 189]. An insignificant discrepancy does not tarnish witness’s testimony in its entirety. Any such discrepancy needs to be contrasted with surrounding circumstances and testimony of other witnesses.

129. Inconsistency itself should not be the sole consideration to exclude the entire evidence, particularly on material fact, cannot be excluded. The ICTR Appeal Chamber laid its view that “*the presence of inconsistencies within or*

amongst witnesses' testimonies does not per se require a reasonable Trial Chamber to reject the evidence as being unreasonable"[**Muhimana**, (Appeals Chamber), May 21, 2007, para. 58].

130. Assessment of the evidence is to be made on the basis of the totality of the evidence presented in the case before us. The Tribunal, however, is not obliged to address all insignificant inconsistencies, if occur in witnesses' testimony. We may recall the decision of the ICTR Appeal Chamber given in the case of **Muhimana** that ,

“The Appeals Chamber reiterates that a Trial Chamber does not need to individually address alleged inconsistencies and contradictions and does not need to set out in detail why it accepted or rejected a particular testimony.” [ICTR Appeals Chamber, Judgment May 21, 2007, para. 99]

131. In dealing with the offence of crimes against humanity which is known as ‘group crime’ it would be immaterial to argue that the accused was not the actual perpetrator or he himself physically participated to the commission of the criminal acts. It is to be adjudicated whether in furtherance of attack directed against the civilian population the alleged crimes as enumerated in section 3(2) of the Act of 1973 were committed. It is not the ‘act’ but the ‘attack’ is to be systematic in nature and even a single act forms part of the ‘attack’.

132. Thus we are to see how the accused acted or conducted forming part of ‘attack’ that resulted in commission of the principal criminal acts directing the non combatant civilians. Prosecution even is not required to identify the actual perpetrator. This has been now a settled proposition and it finds support from the principle enunciated in the case of *Akayesu* which is as below:

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

also Musema, (ICTR Trial Chamber, January 27, 2000, para.174].

133. The matter of weighing hearsay evidence depends as to what extent the question of hearsay evidence is clarified by other evidence and it is proved to be reliable. In this regard, the decision in the case of *Limaj* it has been observed that “ whether any weight, and if so, what weight will attach to[hearsay opinion] will depend to what extent the question of hearsay is clarified by other evidence and it is shown to be reliable [**Archbold International criminal Courts: page 751 : 9-104: HEARSAY**].

134. It is now settled that hearsay evidence is admissible in determining the material facts related to the principal event of crimes. But mere admission of hearsay evidence does not render it carrying probative value. Such hearsay evidence is to be weighed in context of its credibility, relevance and circumstances. Keeping this legal position the Tribunal will take advantage to weigh the probative value of hearsay evidence of witnesses made before the Tribunal in relation to charges framed against the accused.

135. Finally, it would be jurisprudentially appropriate and logical if, in the process of appraisal of evidence, we separate the grains of acceptable truth from the chaff of exaggerations and improbabilities which cannot be safely or prudently accepted and acted upon. It is sound commonsense to refuse to apply mechanically, in assessing the worth of necessarily imperfect human testimony, the maxim : "*falsus in uno falsus in omnibus*."

XVI. Peace Committee and Accused Md. Abdul Alim

Objective of Forming Peace Committee

136. What was objective of forming peace committee through out the country in 1971? Providing support and assistance to the occupation army in carrying out its activities with intent to combat and liquidate the ‘anti-state elements’, ‘miscreants’, was the key purpose of the ‘peace committee’. The report titled ‘Peace Committee formed’ by **Sydney H. Schanberg** speaks that

“Throughout East Pakistan the Army is training new para-military home guards or

simply arming “loyal” civilians, some of whom are formed into peace committees. Besides Biharis and other non-Bengali, Urdu-speaking Moslems, the recruits include the small minority of Bengali Moslems who have long supported the army----adherents of the right wing religious parties such as the Moslem League Jamaat-e-islami.

[Source: Sydney H. Schanberg, New York Times July 14 1971; see also Bangladesh Documents, Vol. I , Ministry of External Affairs, new Delhi, page 414]

137. The report titled “শান্তি কমিটির অহ্বায়কের বিবৃতি: সশস্ত্র বাহিনীকে সাহায্য করার আহ্বান” published in **The Daily Dainik Pakistan 23 April 1971.**

“সশস্ত্র বাহিনী যেখানেই যাবে সেখানে জাতীয় পতাকা হাতে নিয়ে এগিয়ে আসার এবং রাষ্ট্র বিরোধী ব্যক্তি ও দৃষ্টিভঙ্গিকারীদের নির্মূল করার অভিযানে সমস্ত বাহিনীকে সাহায্য করে অপ্রীতিকর ঘটনা এড়ানোর জন্য শান্তি কমিটি

138. Similar report titled “কেন্দ্রীয় শান্তি কমিটির আবেদন: সশস্ত্র বাহিনীর সাথে সহযোগীতা করুন” published in **The Daily Purbadesh, 23 April 1971**

“ঢাকা, ২২ শে এপ্রিল (এপিপি)।- রাষ্ট্রবিরোধী লোকদের ধ্বংসাত্মক কার্যকলাপ প্রতিরোধ এবং সশস্ত্র বাহিনীর লোকদের সব রকম সহযোগীতা করার জন্য পূর্ব পাকিস্তানের কেন্দ্রীয় শান্তি কমিটি পূর্ব পাকিস্তানের সকল দেশপ্রেমিক নাগরিকদের আহ্বান জানিয়েছেন।”

[Source: সংবাদপত্রে মুক্তিযুদ্ধের বিরোধীতা: একাত্তরের যাতকদের জবান জুলুম ষড়যন্ত্র চিত্র : বাংলাদেশ প্রেস ইন্সটিটিউট, ২০১৩: সম্পাদনা: দুলাল চন্দ্র বিশ্বাস, পৃষ্ঠা ৪৪৩]

139. Both the above reports thus portray that ‘peace committee’ around the territory of Bangladesh was formed in the month of April 1971; that it was formed to act as an ‘auxiliary organisation’ meant to prove active assistance to combat and annihilate the ‘miscreants’ and ‘anti-state elements’. Who were called as ‘miscreants’ and ‘anti-state elements’? It is now a fact of common knowledge and also proved from various reports depicting speeches of leaders of pro-Pakistan political parties including JEI that the freedom fighters, pro-

liberation Bengali people having spirit of Bengali nationalism were termed as ‘miscreants’, ‘agents of India’, ‘anti-social elements’.

Peace Committee and its Formation in Joypurhat

140. All the events as narrated in the charges proved happened within the geographical area of Joypurhat, Panchbibi, Akkelpur and Khetlal, the four police stations [now known as Joypurhat district]. It is needless to seek proof of committing genocide, crimes against humanity in the territory of Bangladesh in 1971. It is now an undisputed history and a fact of common knowledge. Besides, mayhem of atrocities committed against the unarmed pro-liberation Bangalee civilians is also known to the world community. There has been no debate on commission of such horrific atrocities causing untold mayhem to the Bangalee nation.

141. Peace committee office was set up at Shaonlal Bajla’s[Hindu Marwari] gadighar. It is proved. In addition to oral testimony, prosecution adduced two reports published in the daily ‘**Dainik Bangla**, 18 January 1972[**Exhibit-17**, Original documents Volume 17, p. 3304] and the daily ‘**Dainik Bangladesh**, 23 January 1972[**Exhibit- 32**, Original Documents Volume 11, p. 2901-2902] to establish it unerringly that the peace committee office in Joypurhat was set up at the ‘gadighar’ [trading office] of Shaonlal Bajla. It was near Alim’s residence in Joypurhat town. It has also been proved that Alim made arrangement for staying army and actively participated in committing atrocities, by acts and conduct.

142. In addition to oral testimony there has been some authoritative documents mainly report published in the domestic and international news papers and books which unerringly show that the accused Alim was chairman/ influential leader of Joypurhat peace committee which was presumably formed in the month of April. We have found that the central peace committee was formed during the second week of April 1971 under the active initiation of leaders belonging to JEI, Muslim League, Convention Muslim League and other rightists Muslim parties after they met General Tikka Khan and thus the process was started to extend its committee at district, thana, union and village levels through out the country aiming to assist the occupation army to resist the pro-liberation people who were termed as ‘miscreants’ , ‘agents of India’ in the name of preserving Pakistan.

143. Exhibit 25 [*Dainik Pakistan* 13 April 1971, **Original Volume 11, p 3008-3009**] shows that as early as 13 April 1971 there was already in existence a peace committee titled ‘citizen peace committee’ which organised a public procession on 14 April in Dhaka city. The ‘fortnightly report dated 19 April 1971 on political situation for the first half of April 1971 from special branch, East Pakistan, Dacca endorses similar information.

144. Exhibit-25 Report titled ‘ *Bharotiyo Procharonar Mokabilar Jonno : Farid Ahmed er Netritte Steering committee* ’, *Dainik Pakistan* 13 April 1971, [**Original Volume 11 p.3008 and 3010**] shows that under the leadership of Moulavi Farid Ahmed on 10 April 1971 the Convention Muslim League was the first political party to have urged its own units to form peace committee immediately in their respective areas.

145. Apart from the information published in those reports, in respect of formation of peace committee, the book titled ‘ **Jibone ja dekhlam: Ghulam Azam(Vol III)**, Dhaka: Kamyab Prokashon Ltd. 2004, [Material Exhibit V, p. 157] describes when and how the peace committee was centrally formed and that it urged for its formation at grass root level. Additionally, The fortnightly report on political situation for the first half of April 1971 from Special Branch, East Pakistan, Dacca [**Defence Documents Volume 9 p. 004**] again endorses exactly the similar information.

146. Cumulative evaluation of above authoritative information leads us to conclude that instantly after the decision of central committee of Convention Muslim League, its Joypurhat unit led by accused Md. Abdul Alim local peace committee was formed during the first half of April 1971, before rolling of Pakistani army into Joypurhat.

147. On contrary, the defence claims that Abbas Ali Khan was the chairman of Joypurhat peace committee. Even accepting it to be true, we may safely arrive at conclusion, on the basis of circumstances and oral evidence that Alim was a potential leader of local peace committee. During conflict situation leadership does not act or remain effective and disciplined following organizational hierarchy. . On cumulative evaluation of testimony made by the prosecution witnesses it is inferred that Alim had close, active and culpable affiliation with

the local peace committee and Razakars, by virtue of his political position. He had been able to establish his position of authority over them and had played a decisive role even on the matter of fate of the persons detained by the army.

148. Joypurhat[now a district] , a northern part of the country was not thus kept free from the horrendous criminal activities carried out by the Pakistani occupation army with the assistance and support of local collaborators and anti-liberation elements. The Pakistani army rolled into Joypurhat in the month of April, it is admitted. Presumably, after formation of the central peace committee during the early part of April, 1971 its local committee was also formed under the auspices of the leaders of Muslim fanatic political parties aiming to provide ‘assistance’ to the Pakistani occupation army in executing their activities targeting the unarmed Bangalee pro-liberation civilians, in the name of preserving Pakistan. The accused Md. Abdul Alim was an influential political person of Joypurhat in 1971. Admittedly he was involved with the politics of Convention Muslim League.

Public Activities of accused Alim in 1971

149. Defence has taken the plea that since 20 April accused Alim had not been Joypurhat till January 1972 and he took refuge first at a village *Am-Doi* and next at village *Bambu*. Accused’s son claims so by testifying as D.W.3.

150. But the relevant information revealed from authoritative documents does not speak so. Rather it is found that the accused Alim was publicly active in 1971 by virtue of his political affiliation with Convention Muslim League. **Material Exhibit II [Original Documents Volume 8 , p. 2002]** a photo clearly proves that he [accused] continued with his activities in 1971 remaining present in Joypurhat.

151. The Daily Sangram 23, October 1971, at page 3 [**Exhibit 28: Original Documents Volume 11, p. 3068-3070**] shows that the accused Alim submitted his nomination paper for by-election on 58 seats of the then Provincial Council, as a candidate nominated by Convention Muslim League. Another report published in the Daily Sangram, 31 October 1971[**Exhibit 30**] goes to show that accused Alim and others declared uncontested winners of 1971 by-election.

152. We are thus convinced with argument advanced by Ms. Tureen Afroz, the learned prosecutor that the above information first proves that accused Alim was very much active in public and political affairs in 1971 and next it negates the claim of plea of alibi i.e. accused Alim was not in Joypurhat since 20 April till January 1972.

Accused Alim and his Role and Position in Peace Committee

153. Prosecution alleges that accused Alim had actively acted in aid of the army to the accomplishment of crimes targeting chiefly the Hindu community and pro-liberation civilians in Joypurhat, Panchbibi, Khetlal and Akkelpur [at present 04 police stations of Joypurhat district] , in the capacity of chairman or influential leader of local peace committee.

154. Already we have discussed why and when local peace committee was formed in 1971. Now the pertinent question is that who led or headed the Joypurhat peace committee. Appraisal of oral testimony coupled with some authoritative documents, mainly reports published in the domestic and international news papers and books, impels to an unerring conclusion that the accused Alim, the local leader of Convention Muslim League, was the chairman/ influential leader of Joypurhat peace committee which was presumably formed during the first half of April 1971.

155. Further a report published in **The Daily Dainik Bangla, 10 January 1972** portraying attitude of accused Alim he had shown in 1971 towards the pro-liberation civilians, freedom fighters, civilians belonging to minority community add strength to the above conclusion. The report speaks as below:

“জয়পুরহাট শান্তি কমিটির নেতা জয়পুরহাট ইউনিয়ন কাউন্সিলের চেয়ারম্যান মুসলিম লীগের আব্দুল অলীমকে একদিন জিজ্ঞাসা করা হয়েছিল, প্রেসিডেন্ট সাধারণ ক্ষমা ঘোষনার পর সংখ্যালঘুদের দেশে ফেরার নিশ্চয়ই আর কোন বাধা নেই। উত্তরে তিনি বলেছিলেন যে, ওদের ক্ষমা নেই। ওরা দেশে ফিরলেই ওদের সামরিক বাহিনীর হাতে তুলে দেয়া হবে। শুনে স্তম্ভিত হতে হয়েছে। একজন উচ্চ শিক্ষিত ব্যক্তি যদি এরকম ধারণা পোষণ করে তবে সংখ্যালঘুদের সম্পর্কে অশিক্ষিত ও অশিক্ষিত দালালদের

কি রকম মনোভাব ছিল তা অতি সহজেই অনুমান করা যায়। বস্তুত ইয়াহিয়া খানের লোক দেখানো ক্ষমা ঘোষণার পরিপ্রেক্ষিতে যেসব মুষ্টিমেয় সংখ্যালঘু ফিরে এসেছিল তাদের আর পৃথিবীর আলো-বাতাস দেখতে হয়নি।”

[সূত্র: দৈনিক বাংলা, ২০ জানুয়ারী ১৯৭২: যুদ্ধাপরাধ প্রেক্ষিত বাংলাদেশ; অধ্যাপক আবু সাইদ, পৃষ্ঠা, ৯৯, প্রথম প্রকাশ ২০০৮]

156. In the case in hand, it is thus proved that Alim belonged to Convention Muslim League, a pro-Pakistan political party. It is proved by the documentary evidence that he was a local elite and contested by-election in October 1971. Admittedly the Pakistani army rolled into Joypurhat through Panchbibi on 20 April 1971. Evidence of P.W.2, P.W.5 and P.W.6 proves that accused Alim and his accomplices accompanied the Pakistani troop when it had rolled into Panchbibi. The act of accompanying the troop is a strong indicative as to his authority and capacity that he achieved by virtue of leadership in local peace committee which was formed intending to assist the army in carrying out its activities.

157. Accused Alim was a local potential leader of Convention Muslim League. Presumably he was a local Bengali elite having strong pro-Pakistan ideology and he acted to preserve Pakistan and in doing so he provided substantial assistance to the Pakistani occupation army. Almost all the PWs the residents of Joypurhat, Panchbibi and Akkelpur deposed that accused Alim was a leader of peace committee having a significant position of authority even on army's activities.

158. Evidence of P.W.s together with circumstantial proof and relevant reports published during the relevant time unequivocally lead us to conclude that accused Alim was not only an active collaborator of Pakistani army in carrying out their atrocious activities within the geographical area of Joypurhat, Panchbibi, Akkelpur but he was rather in significant position of local peace committee having substantial position of authority and control over the collaborator associated with the army.

159. Admittedly, accused Alim immediately after the independence was prosecuted under the Collaborators Order 1972 and eventually he got release. The offences punishable under the Penal Code scheduled in the Order of 1972

are not the offences of 'crimes against humanity' or 'genocide'. However, the very fact of prosecuting accused Alim under the Order of 1972 itself strengthens the material allegation that accused Alim was a collaborator and he actively and being associated with the Pakistani army had provided support, assistance and contributed substantially to the commission of atrocities.

160. Thus, the oral evidence coupled with above authoritative information prompts us to the conclusion that the position of accused Alim in the peace committee of Joypurhat 1971 became an anecdote to the locals, victims and the sufferers of atrocities.

161. We, considering the argument extended by Ms. Tureen Afroz, the learned Prosecutor, are convinced that there were many Peace Committees formed in 1971 which had the generic title of 'peace committee' and each differed from the other in title or in organizational affiliation. Accepting this argument it may be said that there might have existed another 'peace committee' led by Abbas Ali Khan and thus the 'peace committee' formed of the local unit of the Convention Muslim League headed by accused Alim cannot be said to be non-existent in 1971.

XVII. Razakar Formation in Joypurhat and Role of Accused Alim

162. Perpetration of crimes, as narrated in charges framed, is alleged to have been committed by the group of perpetrators comprising of army, Razakars and peace committee members. The accused Alim has been charged for those atrocities committed since 20 April 1971 till the final victory of Bengali nation through a bloody war of liberation, on different dates. Naturally the question comes forward too whether Razakar was formed in Joypurhat and when and under whose supervision. It will appear that it remains undenied that the 'group of perpetrators' in committing the alleged crimes was accompanied by the Razakar members too. Now, it is to be seen whether accused Alim was involved with its formation and he had significant domination even over the Razakar members in Joypurhat.

163. We have already observed in the case of Abul Kalam Azad, on this issue as below:

“The East Pakistan Police Abstract of Intelligence [Vol XXV No. 17] dated April 24 1971(**Exhibit-10**) has adequately proved that the then Pakistan Government organized the Razakar force in Faridpur instantly after the Pakistani troop rolled into Faridpur in furtherance of ‘operation search light’ on 25 March 1971 to encounter the Bengali nation who started fight for freedom.” [**Abul Kalam Azad, Judgment 21 January 2013, Para 96**]

164. In respect of formation of ‘Razakar’ force in 1971 we have rendered our reasoned observation which is as below:

“It is found that before formal formation of Razakar force pursuant to a gazette notification dated 02 August 1971 the then Pakistani government and Pakistani army in the then East Pakistan organized ‘Razakar’ (Volunteer) force almost instantly after they took the territory under their armed control. The purpose was to have aid and assistance to carry out their atrocious operations against the Bengali civilian population including the Hindu group, intellectuals, pro-liberation civilians. [**Abul Kalam Azad, Judgment 21 January 2013, Para 325**]

165. The report titled “প্রদেশের বিভিন্ন অঞ্চলে রাজাকার বাহিনী গঠন” published in **The Daily Azad 17 May 1971**[see also a report titled প্রদেশের বিভিন্ন স্থানে রেজাকার সংস্থা গঠিত” published in **The Daily Dainik Pakistan 16 May 1971**

“পূর্ব পাকিস্তানের বিভিন্ন স্থানের অধিবাসীগণ দুষ্কৃতিকারীদের মোকাবেলার করার জন্য তাহাদের নিজ নিজ এলাকায় রাজাকার সংস্থা সংগঠন করিয়াছে। এই সকল সংস্থা নিকটস্থ সামরিক কর্তৃপক্ষের সংগে যোগাযোগ রক্ষা করিতেছে এবং প্রয়োজন বোধে তাহাদের এলাকা

হইতে রাষ্ট্র বিরোধী ব্যক্তিদের নিশ্চিহ্ন করার কাজে
তাহাদের সাহায্য কামনা করিতেছে।---এপিপি”

166. Therefore, it is not correct to say that ‘Razakar’ force was formed on 02 August 1971 by a gazette notification. Publication of such gazette is undisputed. But the fact remains that even long before such gazette notification the ‘Razakar’ force were formed and had started receiving training and providing active assistance in carrying out criminal activities by the occupation Pakistani army. The gazette notification simply endorsed government’s formal approval to such force. It is found in a report titled “**Pakistani Regime Is Preparing For Long Guerrilla War in East**” published in the New York Times , July 30 1971 issue (By MALCOLM W. BROWNE) that-

“After brief training the recruit is given a rifle.....The Government says it has already recruited more than 22,000 Razakars of a planned force of 35,000.”[Abul Kalam Azad , para 95]

167. Another report titled “প্রদেশের বিভিন্ন স্থানে রেজাকার সংস্থা গঠিত” published in **The Daily ‘Dainik Pakistan 16 May 1971**

“ পিপিআই পরিবেশিত খবরে বলা হয় যে, পূর্ব পাকিস্তানের বিভিন্ন স্থানে শান্তিপ্রিয় নাগরিকরা তাদের স্ব স্ব এলাকায় দুষ্কৃতিকারীদের দমন করার জন্য রেজাকার সংস্থা গঠন করেছে। এসব সংস্থা নিকটবর্তী সামরিক কর্তৃপক্ষের সাথে সর্বদা যোগাযোগ রক্ষা করে চলেছে এবং স্ব স্ব এলাকা থেকে রাষ্ট্রবিরোধী ব্যক্তিদের উৎখাত করার জন্য প্রয়োজনবোধে সামরিক কর্তৃপক্ষের সাহায্য নিয়ে থাকে।

[Source: সংবাদপত্রে মুক্তিযুদ্ধের বিরোধীতা: একাত্তরের ঘটকদের জবান জুলুম ষড়যন্ত্র চিত্র : বাংলাদেশ প্রেস ইন্সটিটিউট, ২০১৩: সম্পাদনা: দুলাল চন্দ্র বিশ্বাস, পৃষ্ঠা ২৫৬]

168. From the above report published in mid May 1971 proves that the process of formation of Razakar started since almost within one month of the ‘operation search light’ and objectives of its formation was to chase and liquidate the ‘miscreants’ [freedom fighters and pro-liberation Bengali people] and it by

maintaining constant connection with the local military authority sought their assistance in carrying out the task of annihilating the ‘anti state elements’. So it is not correct to say that the Razakar force was formed in the month of September 1971 by a gazette notification. However, it is proved that the Razakar force got a formal shape by the said official gazette notification later on.

169. The narration made in the book titled “যুদ্ধাপরাধ প্রেক্ষিত বাংলাদেশ” speaks of role of peace committee in forming and organizing the ‘Razakar’ force. The relevant narration is as below:

রাজাকার বাহিনী সাধারণভাবে শান্তি কমিটির নেতৃত্বাধীন ছিল। প্রতিটি রাজাকার ব্যাচ ‘ট্রেনিং’ গ্রহণের পর শান্তি কমিটির স্থানীয় প্রধান তাদের শপথ গ্রহণ অনুষ্ঠান পরিচালনা করতেন। এই অনুষ্ঠানে সারিবদ্ধভাবে দণ্ডায়মান রাজাকারদের কোরান শরীফ ছুঁয়ে আনুগত্যের শপথ গ্রহণ করত। এরপর রাজাকারদের ‘কুচকাওয়াজে’ শান্তি কমিটি প্রধান সালাম গ্রহণ করত।তাদের মূল কাজ হয়ে দাঁড়ায় গ্রামে গঞ্জে অত্যাচার, নির্যাতন এবং সামরিক বাহিনীর অগ্রবর্তী পথ প্রদর্শক।.....মে জুন মাসে শান্তি কমিটির উদ্যোগে প্রদেশের সর্বত্র রাজাকার বাহিনী গঠনের পর কেন্দ্রীয় শান্তি কমিটির নেতৃত্ব এই বাহিনীকে সরকারী স্বীকৃতি প্রদানের জন্য সামরিক সরকারের কাছে আবেদন জানাতে থাকেন। ”

[সূত্র : যুদ্ধাপরাধ প্রেক্ষিত বাংলাদেশ , অধ্যাপক আবু সাইয়িদ, প্রকাশক সূচীপত্র, প্রকাশকাল : প্রথম প্রকাশ ফেব্রুয়ারী ২০০৮, পৃষ্ঠা, ৭৩-৭৪]

170. Since it is not disputed that the group of perpetrators responsible for launching attack directing civilians, as narrated in charges framed, consisted of Razakars together with the army and peace committee men, it may be validly inferred that ‘Razakar’[volunteer] force was also formed simultaneously with the formation of ‘peace committee’ in Joypurhat and the accused Alim as the chairman or influential leader of peace committee organised the formation of ‘Razakar’ too over whom he had substantial domination. On this score too,

accused Alim is considered to be a person who had a position of authority even over the local ‘Razakars’

XVIII. Adjudication of charges

171. In all 17 charges have been framed against the accused Md. Abdul Alim @ M.A Alim. He has been indicted to have *participated, abetted* and *substantially contributed* to the commission of the crimes as narrated in Charge no.1, 10 and 17. The accused is alleged to have *abetted, substantially contributed* and *incited* to the commission of the crimes described in charge no. 8. In relation to all other remaining charges the accused has been indicted for *abetting* and *substantially contributing* to the actual commission of the crimes.

172. The crimes described in the charges allegedly took place during the war of liberation on different dates starting from 20 April 1971. Joypurhat is now a district comprising of police stations Joypurhat, Panchbibi, Akkelpur and Khetlal. The atrocities are perceived to have taken place within the geographical area of these police stations in 1971 mostly directing the civilians belonging to Hindu community, pro-liberation civilians and captured freedom fighters.

Adjudication of Charge No.1

[Deportation by looting and setting the house of Meher Uddin Chowdhury ablaze: Panchbibi]

173. Summary Charge: This charge involves the event of attack by the Pakistani army accompanied by accused Md. Abdul Alim causing looting of Meher Uddin’s [local Awami League leader] house in Panchbibi on 20 April 1971, setting his house ablaze and forcing him and his inmates to deport to India. Therefore, the accused Md. Abdul Alim has been charged for participating and substantially abetting and contributing the actual commission of offence of **‘deportation as crime against humanity’** caused to unarmed civilians as specified in section 3(2) (a) (g) of the Act which are punishable under section 20(2) read with section 3(1) of the Act. And thereby he is liable for the above offences under section 4(1) of the Act.

Witnesses

174. Accused M.A Alim has been indicted accompanied the Pakistani occupation force and the members of the peace committee to the crime site , the village Dom

Doma under police station Panchbibi in launching attack directing the civilians that caused looting, arson and deportation of Meher Uddin and his inmates. The alleged event took place on 20 April at about 05:00 pm. To prove the charge prosecution examined four witnesses as P.W.2, P.W. 5, P.W.6 and P.W.14. The first three witnesses claim that they remained present at the crime locality at the relevant time and they allege to have experienced the rolling of Pakistani army into Panchbibi and the accused Alim and local peace committee leaders were with them. P.W.14 is the son of victim Meher Uddin Chowdhury. He is a hearsay witness and has testified the fact of forcible deportation of their family to India owing to the criminal acts forming attack directed against their property i.e house which was burnt into ashes, as he claims.

Evidence

175. P.W.2 Saidur Rahman, a former member of Akkelpur Sarbadaliya Sangram Committee [আক্কেলপুর সর্বদলীয় সংগ্রাম কমিটি] of Joypurhat. He has testified couple of events allegedly carried out by the accused and his fellow members of peace committee and Razakars. As regards the event narrated in charge no.1 P.W.2 stated that he [P.W.2] along with some other members of Akkelpur all-party action committee went to Panchbibi to meet the leaders of the Panchbibi action committee on April 19, 1971. They stayed the night there.

176. The above version could not be dislodged by cross-examining P.W.2. Rather on questioned by the defence P.W.2 has re-affirmed it that he came to Panchbibi and stayed there in the night of 19 April at the action committee camp set up at Panchbibi girls' school.

177. P.W.2 further stated that on the next day [20 April], a group of Pakistan army troops led by Abdul Alim and Panchbibi Peace Committee leader Joybar attacked Panchbibi from the east. They looted and torched homes, and conducted mass killing there, said the witness, adding that around noon, they looted the home of Meher Uddin Chowdhury before setting it alight.

178. Defence could not impeach the above version implicating the accused. Rather in reply to question elicited to him, during cross-examination, P.W.2 has re-affirmed that on 20 April 1971 accused Alim and his cohorts led by Joybar of Panchbibi coming from Ghoraghat by army vehicle launched attack at Panchbibi

and at that time he [P.W.2] had been at Panchbibi girls' school. He however returned to Akkelpur fleeing from Panchbibi.

179. P.W.5 Abdus Samad Mondal On April 20, 1971, the Pakistani army along with local leaders of the peace committee of Panchbibi attacked Panchbibi Bazaar. "Those who had come with the Pakistani army were Abdul Alim [accused], Azgar Bihari, Ayub Bihari, Joybar Ali Akand and others."The force killed at least ten people including Abdus Sattar, Nani Kundu on their way to the house of Awami League leader Meher Uddin Chowdhury, which they looted before setting it on fire.

180. Defence failed to shake what has been stated by the P.W.5 on material act. Rather it has been re-affirmed in cross-examination that he was at Panchbibi 'haat' premises when the troops accompanied by the accused Alim was approaching towards the 'haat.

181. P.W.6 Solaiman Ali Fakir [71], stated that on 20 April at noon the Pakistani troops suddenly attacked 'Panchbibi haat' and started firing. The day was 'haat day'. The troops were accompanied by the peace committee leader accused Alim, Joybar Ali Akand. In conjunction with the event they killed one Sattar, Nani Kundu and many others on their way to western side of Panchbibi where they by launching attack looted and torched the home of Panchbibi Awami League leader Meher Uddin Chowdhury before setting it alight. It was then about 05:00 pm. With this situation he and his brother's son Abdus Samad Mondol deported to India, P.W.6 added and returned on 24 October 1971.

182. P.W.14 Mustafizur Rahman Chowdhury [69] the son of Meher Uddin Chowdhury [the victim] has deposed the incident. He stated that his father was the founder President of Panchbibi thana Awami League since 1954 and during the period of war of liberation 1971 he was a member of Panchbibi thana all party action committee. His [P.W.14] father was the chief election agent of Dr Mofiz Chowdhury who participated in 1970's election as a nominee of Awami League and accused Alim contested the election as a candidate nominated from Convention Muslim League.

183. P.W.14 further narrated that on 20 April 1971 accused Alim along with the Pakistani army attacked their house at Panchbibi at about 05:00 pm and looted

the households and set their house on fire. At that time he[P.W.14] was in Joypurhat and came to know that the people attacked the house of accused Alim as he along with Pakistani army launching attack to their[P.W.14] house at Panchbibi looted and set it on fire, but they could not trace Alim and he[Alim] managed to flee. He learnt the event of attack causing looting and setting their house on fire from one Advocate Anisur Rahman. The evidence of P.W.14 on material particular necessary to prove the fact of attack causing looting and setting the house of Meher Uddin Chowdhury ablaze leading to their compelling deportation to India remained unshaken.

184. According to P.W.14, on the following day, coming to Panchbibi he [P.W.14] found their burnt and destructed house and later on he became aware of the event also from his cousin brother Shamsul Huda Chowdhury who deported to India on 21 April 1971 and he also asked him [P.W.14] not to remain here and thus he also deported to India where he discovered his parents at Narayanpur camp. They returned home after the independence.

Deliberations

185. Mr. Rana das Gupta, the learned prosecutor submitted that P.W.2, P.W.5 and P.W.6 have testified the attack launched by the Pakistani army on 20 April 1971 at Panchbibi haat and they committed indiscriminate destructive activities including killing of civilians while they were rolling into Panchbibi. Accused Alim had accompanied the troops, the P.W.s have testified. Since from evidence it transpires that by launching such attack death was caused to several civilians, the accused may be held responsible for the offence of ‘murder’ as crimes against humanity too.

186. The learned prosecutor further submitted that P.W.14 the son of Meher Uddin Chowdhury testified why and how they were compelled to deport to India. P.W.14 testified how he learned about the attack directing their house at Panchbibi. It was not possible for the troops to identify the house of Meher Uddin Chowdhury a local Awami League leader without the assistance of local collaborator. It makes it strengthen too that accused Alim by accompanying the troop facilitated the attack directing the house of Meher Uddin Chowdhury, the learned prosecutor added.

187. On contrary, Mr. Ahsanul Haque Hena, the learned defence counsel submitted that the prosecution relies upon the book titled '*Muktijudhdhe Joypurhat*', edited by Abul Kashem and published by Joypurhat Zilla Parishad which has been exhibited and marked as **Material Exhibit No.06**. Information narrated at **page 51** of the said book [**Material Exhibit-06**] negates the fact that accused Alim accompanied the Pakistani army on 20 April 1971 while they rolled into Panchbibi and thus he facilitated and contributed to the commission of atrocious activities.

188. Mr. Hena, the learned defence counsel, in advancing argument on charge no.1, has submitted that the prosecution has failed to establish that Meher Uddin Chowdhury and his inmates were physically forced to deport to India, by offering any proof whatsoever. There has been no proof that at the time of alleged attack launched, Meher Uddin Chowdhury and his inmates had been at their house under attack. Prosecution refrained from examining additional witness Shamsul Huda Chowdhury who could have disclosed the truth. P.W.2, P.W.5 and P.W.6 upon whose testimony prosecution relies to substantiate this charge are hearsay witnesses and they cannot be treated as credible as they made embellishment by making improved statement on material particular what they omitted to state to the IO. P.W.14 the son of Meher Uddin Chowdhury is also a hearsay witness and he is not trustworthy as he made different versions on the period of his staying in India, immediately after the alleged event.

189. In reply to defence submission, Ms. Tureen Afroz, the learned prosecutor added that mere return from India afterwards does not diminish the offence of deportation already committed. She also submitted that for causing deportation no physical force is needed to be applied and it is to be seen whether any coercive climate was created by the destructive acts directing civilians happened. She further submitted that merely for non examination of any particular witness cannot tarnish the prosecution case and in such case a court of law cannot get involved in an adventurous expedition of speculating on alternative evidences to prove the prosecution case. In support of this submission the learned prosecutor cited a decision given by the ICTR Appeal Chamber in the case of *Kajelijeli*, May 23, 2005, para. 74 that "it would be entirely speculative and inappropriate for the Tribunal to enter into a consideration of what other evidence could have been brought."

190. First it appears that the attack as narrated in charge no.1 was launched within almost one month of ‘operation search light’ in Dhaka carried out by the Pakistani army. Second, corroborative evidence of P.W.2, P.W.5, and P.W.6 has proved it beyond reasonable doubt that the Pakistani army coming from Ghoraghat [a neighbouring police station under Dinajpur district] end suddenly attacked ‘Panchbibi’ locality and in conjunction with the event of attack they looted the house of local Awami League leader Meher Uddin Chowdhury and set it on fire. The witnesses who were at the crime locality at the relevant time had fair reason to know and see the attack and the accomplices of the Pakistani troop. According to them accused Alim a peace committee leader and local peace committee leader Joybar Akand also accompanied the troop. It remained unimpeached.

191. The fact of looting and torching homes including the home of Meher Uddin Chowdhury before setting it alight around noon on 20 April at Panchbibi thus remains proved. Defence could not bring anything favourable to conclude that the P.W.2 was not around the crime site or he had no opportunity to know or see the incident. It is found that P.W.2 has stated of conducting mass killing occurred there and it remains undisputed and unimpeached.

192. However if we take the account made by P.W.2 so far as it relates to the event described in the charge no.2, into consideration , it inspires credence to prove the fact that the group of perpetrators[Pakistani army] was accompanied by the accused Alim too. Trend of cross-examination of P.W.2 impels to conclude that it has been re-affirmed that P.W.2 saw the event of attack by the Pakistani troops accompanied by accused Alim.

193. Why the accused so accompanied the perpetrators in launching attack directing unarmed civilians? In what capacity the accused made his very presence with the group of perpetrators? Pakistani army rolled into Joypurhat through Panchbibi for the first time on 20 April 1971. It is undisputed.

194. The act of accompanying the troop by the accused Alim proves it adequately that he, a local elite and a local convention Muslim League leader, was extremely enthusiastic to approve their entry and criminal activities. And as such it substantially enabled the army to identify the target of atrocities to be

committed and thus the act of accompanying the troop by the accused Alim is considered to have had substantial contribution and assistance to the actual commission of the crimes alleged by the army.

195. In absence of anything contrary it may be validly concluded that P.W.5 had fair occasion to know and see the troop launching attack directing civilians including the home of local Awami League leader Meher Uddin Chowdhury causing looting and setting it on fire. P.W.5 also proves the fact of rolling of Pakistani army into Panchbibi accompanied by accused Alim on 20 April 1971.

196. Defence failed to bring, by cross-examining P.W.6, anything indicative that could negate the presence of P.W.6 at the 'haat' at the relevant time and that he had no opportunity to see and know the attack. Rather, It has been re-affirmed in cross-examination that the P.W.6 had been at the 'Panchbibi haat' premises at the time of attack launched and he came out from hid when the troop was approaching towards the place known as '*pachmatha*' at Panchbibi. It has not been denied that the troop accompanied by peace committee leader accused Alim and others raided attack directing the home of local Awami League leader Meher Uddin Chowdhury and they looted and torched his house.

197. It has been argued by the learned defence counsel that prosecution relies upon the book titled '*Muktijudhdhe Joypurhat*', edited by Abul Kashem and published by Joypurhat Zilla Parishad which has been exhibited and marked as **Material Exhibit No.06**. Information narrated at **page 51** of the said book [**Material Exhibit-06**] negates the fact that accused Alim accompanied the Pakistani army on 20 April 1971 while they rolled into Panchbibi and thus facilitated and contributed to the commission of atrocious activities.

198. The Tribunal notes that the information narrated in **Material Exhibit-06** depicts that in the morning of 20 April 1971 the people raided Alim's house in Joypurhat to capture him, but they could not and Alim was rescued by the followers of Muslim League and then he took shelter first at the house of one Belal Fakir at village 'Pachur Chak'.

199. It has been found that the Pakistani troop accompanied by accused Alim and local pro-Pakistani leaders rolled into Panchbibi at noon on 20 April 1971. If we accept the information so narrated in **Material Exhibit-06** to be correct it will

appear that Alim, on the face of the raid made at his house in the morning on 20 April 1971 he escaped quitting his house and there is no proof to infer that it was not at all possible for him [Alim] to join the army at noon while it rolled into Panchbibi, even after taking ready shelter at village '*Pachur Chak*'.

200. Besides, person providing such information published in the **Material Exhibit-06 did** not come before the Tribunal to depose and explain it. Thus, the information, without being assured as to its authoritativeness, provided by an individual cannot readily supersede and negate the testimony of a witness made under solemn declaration, particularly on the fact that accused Alim on 20 April 1971 at noon accompanied the Pakistani troop at the time of rolling into Panchbibi and approved and assisted them in carrying out destructive criminal activities. .

201. Cross-examination of the above P.W.s does not offer any indication that can reasonably insist to deduce that they had no reason to see or know the attack by the army accompanied by the accused Alim on the date and time alleged. Thus, their testimony made before the Tribunal can safely be relied upon.

202. The narration made by P.W.14 as to the fact of the attack remained unshaken. In reply to question put to him, during cross-examination, P.W.14 stated that he could not say whether there had been initiation of any case against accused Alim on the incident of looting and torching their house, but, as he recollects, a general diary was entered. P.W.14 further stated, in cross-examination, that the Pakistani army rolled into Panchbibi on 20 April 1971. On total evaluation of evidence of P.W.14 it will appear patently that the event of launching attack of their house and looting and setting it on fire, in other words, remained undisputed.

203. P.W.14 is thus a material hearsay witness. According to him he learnt the event from advocate Anisur Rahman and also from his cousin brother Shamsul Huda Chowdhury. On careful examination we do not find any earthly reason to discard his testimony merely for the reason that it is hearsay in nature. It is now established that hearsay evidence is quite admissible and it carries probative value if it is found to have been corroborated by 'other evidence'. Already from evidence of three other P.W.s , as discussed, seems to have offered adequate

corroboration to what the P.W.14 had learnt about the incident of attacking their house at Panchbibi by the Pakistani army accompanied by the peace committee leader accused Alim.

204. P.W.7 Md. Golam Rasul a resident of village Dhuroil under Panchbibi police station is a hearsay witness. He stated that he on 20 April 1971 at about 04:00-04:30 pm came to know from the people who were running hastily from Panchbibi Haat that the Pakistani army accompanied by Alim [accused] , chairman of peace committee and Joybar Akand, member of peace committee had rolled towards Panchbibi from Ghoraghat[a police station of neighbouring district Dinajpur] and during their attack. P.W.8 Mst. Laily Begum P.W.8 the wife of P.W.7 has made similar hearsay version on this material fact.

205. The hearsay evidence of P.W.7 and P.W.8 Mst Laily Begum P.W.8 the wife of P.W.7 on the fact that the army rolled into Panchbibi being accompanied by peace committee men including accused Alim on 20 April 1971 does not appear to have been shaken by the defence. Rather the same is found to have been corroborated by the P.W.2, P.W.5, P.W.6 and P.W.7.

206. True that none of the above witnesses stated that accused Alim physically participated to the commission of the criminal act of looting and setting victim's house on fire causing destruction and climate of terror. But it has been proved beyond reasonable doubt that the accused Alim consciously accompanied the Pakistani army towards the crime locality knowing the consequence and thereby he [accused] provided aid and substantial assistance to the principals in perpetrating the atrocious activities by the army.

207. It is immaterial to show that at the relevant time whether peace committee was formed locally and Alim was one of its leader. Accused Alim was actively involved with the politics of Convention Muslim League and he contested 1970's election as its nominee. In that sense he was a local elite person bearing pro-Pakistan ideology. The facts remain proved that accused Alim as an individual and local elite accompanied the Pakistani army who on their way to Panchbibi committed atrocious activities including killing of civilians, as deposed by the first three witnesses.

208. It is true that the fact of conducting mass killing in conjunction with the attack has not been brought to the charge no.1. But merely for this reason the criminal act carried out in conjunction with the event of attack directing the home of Meher Uddin Chowdhury and looting his home and setting it ablaze as has been proved by the above P.W.s cannot be negated. Evaluation of their evidence together with that of P.W.14, a member of the victim family impels the conclusion that the ‘*attack*’ launched by the Pakistani army whom the accused accompanied consciously eventually forced Meher Uddin Chowdhury and his family to deport to India, crossing the national border. Presumably the criminal acts forming attack created a climate of terror and coercion that validly suggests that the intention of the attackers was to displace the victim and his inmates from their own place. Of course a criminal act with such intention is considered as an attack directed against unarmed civilian population constituting the offence of crimes against humanity.

209. The accused Alim, by accompanying the troops had rather provided tacit approval to carry out criminal activities at the crime locality [Panchbibi] and thereby substantially contributed and assisted to the commission of criminal acts constituting the offence of ‘deportation’ as crime against humanity. However since the accused has not been indicted for the event of alleged killing of civilians we refrain from holding him responsible for it excepting the criminal act of attack causing looting and setting the house of Meher Uddin Chowdhury on fire that eventually created a coercive climate which forced him and his family inmates to deport to India.

210. Displacements within a state or across a national border, for reasons not permitted under international law, are crimes punishable under customary international law. Deportation, and forcible displacement constitutes crimes of equal gravity to other crimes listed in section 3(2). In this regard it has been observed by the ICTY Trial Chamber in the case of *Blagojevic and Jokic*,

“It is well established that displacements within a state or across national borders, for reasons not permitted under international law, are crimes punishable under customary international law.”[ICTY

Trial Chamber , January 17, 2005, para. 595]

211. It has been further observed in the above cited case that

“Traditionally, the distinction between forcible transfer and deportation is that the first one consists of forced displacements of individuals within state borders, while the second one consists of forced displacement beyond internationally recognised state borders.”[*Blagojevic and Jokic*, (Trial Chamber), January 17, 2005, para. 595]

212. In the case in hand, it has been proved that the criminal acts resulted from the attack launched by the Pakistani army being accompanied by accused Alim, a local elite and notable individual belonging to sturdy pro-Pakistan attitude, Meher Uddin Chowdhury and his family inmates eventually, for the climate of devastation created by such criminal acts, had to deport beyond internationally recognised state borders. In light of settled jurisprudence we are persuaded to conclude that the prohibition against forcible displacements aims at safeguarding the right and aspiration of individuals to live in their own communities and homes without outside interference.

213. We do not agree with the submission advanced by the learned defence counsel that physical force is to be applied to civilians for constituting the offence of ‘deportation’ and the prosecution requires to show that the victims of the offence must remain present at their dwelling house at the time of attack. The forced character of displacement and the forced uprooting of the inhabitants of a territory entail the criminal responsibility of the perpetrator who is found to have consciously participated to criminal acts creating a climate of dismay and coercion. From the evidence of P.W.14 it depicts clearly that the victim and his inmates had no other option excepting to avail deportation across the state border, for the reason of criminal acts forming attack by the perpetrators accompanied by the accused Alim.

214. Evidence adduced in support of the charge no.1 demonstrates beyond reasonable doubt that the intent of the accused and the group of perpetrators [the army], by carrying out the criminal acts forming attack, was to cause forcible displacement of the victim and his family and eventually they remained deported till the independence.

215. Yes, the victim and his family, after nine months' war of liberation returned to independent Bangladesh. But returning to home at a later time does not impact in any manner on the illegality of the criminal acts causing forcible displacement constituting the offence of 'deportation' as crime against humanity. In this regard we find substance in what has been submitted by the learned prosecutor Ms. Tureen Afroz.

216. On total evaluation of evidence, context and circumstances together with the position of accused Alim that he achieved by virtue of his significant affiliation to Convention Muslim League and the local peace committee it is validly inferred that he[accused] with intent to consciously share the intent of the perpetrators[Pakistani army] accompanied them in carrying out criminal activities including looting, setting house on fire including destructive atrocities that created a horrific and coercive climate compelling Meher Uddin Chowdhury and his inmates to deport across the national border. Accused's act and conduct formed part of attack directing the unarmed civilian population. The act of accompanying the troops by the accused Alim itself is consisted of practical assistance, encouragement or moral support to the principal offenders of the crime. It is immaterial to show that the atrocities would not have been committed if the accused did not accompany the group of army men. Sharing intent of the principals is enough to incur culpability.

217. Thus, we conclude that the prosecution has been able to prove beyond reasonable doubt that the accused, for his substantial act and culpable conduct of providing abetment by accompanying the principals is equally accountable for the crimes as listed in charge no.1 in the same manner as if it were done by him alone. Thus, he is held **guilty** for participating the actual commission of the offence 'deportation' as crimes against humanity as enumerated in section 3(2)(a)(g) of the Act of 1973 and thus the accused Md. Abdul Alim @ M.A Alim incurs criminal liability under section 4(1) of the Act of 1973.

Adjudication of Charge no.2

[Genocide: killing civilians of Hindu community of village Koroï Kadipur]

218. Summary charge: This charge involves killing of 370 civilians belonging to Hindu community of village Koroï Kadipur, Chwakpara, Sonarpara, Palpara, Munshipara under police station Joypurhat on 26 April 1971 in between 09:00 am to 05:00 pm following prior plan and consultation with Pakistani army Major Afzal. Accused Alim is alleged to have accompanied the perpetrators and participated to the commission of the crimes and thereby created havoc and caused death of 370 Hindu unarmed civilians including one 90 years old Kanchira Mohan who was slaughtered to death and one Aswini Kumar Debnath who was buried alive to death. Accused Alim has been charged for substantially abetting and contributing to the commission of large scale 'killing' of Hindu community with discriminatory intent constituting the offence of 'genocide' with intent to destroy the community either whole or in part as specified in section 3(2) (c) (g) of the Act which are punishable under section 20(2) read with section 3(1) of the Act.

Witnesses

219. Prosecution, to prove this charge, examined two witnesses i.e P.W.4 and P.W.24. Of them P.W.4 Molla Shamsul Alam claims to have witnessed 26 people getting killed before him on the day of event while P.W.24 was an inhabitant of the crime village and had opportunity to see the massacre. He is a hearsay witness so far his testimony relates to involvement of the accused with the massacre. According to the charge accused Alim accompanied the gang of perpetrators to the crime sites and had launched attack directing the Hindu populated villages, with discriminatory intent and physically participated to the commission of killing of hundred of Hindu civilians. Now let us see what the P.W.s have testified before the Tribunal.

Evidence

220. P.W.4 Shamsul Alam Molla[58], stated that when the Pakistani army, led by Major Afzal, arrived in Joypurhat on April 21, Abdul Alim[accused] "managed" the houses, storehouse and office of Shaonlal Bajla, a reputed businessman of Joypurhat, to set up the office of the Shanti Committee, camps of the Pakistani army and the Razakars. Defence simply denied this version but however could not refute it by cross-examining the P.W.4.

221. P.W.4 further stated that Abdul Alim [accused] set up Razakar recruitment camp at his own home near the [Joypurhat] police station. He[P.W.4] had occasion to see some incidents and he heard the rest when he used to go to Joypurhat as his father had his business there.

222. The version relating to affiliation of accused Alim with Pakistani army and the fact that he formed peace committee in Joypurhat , Razakar recruitment camp and had provided active assistance to army in settling in Joypurhat, as made by P.W.4 remained unshaken.

223. As regards the alleged event P.W.4 stated that around 12:30pm on April 26, 1971, he was talking to some people near Kural Pukur of Kadipur village and at that time an officer of Pakistani army appeared there by a vehicle and after some time, Pakistani army personnel also arrived there on trucks and along with them Abdul Alim [accused] was also there. He [accused Alim] beckoned the army to Hindu villages like Sonarpara, Jugipara, and Palpara. Afterwards, some of his [Alim's] selected people who accompanied the Pakistani army in committing the act of looting and setting fire of the Hindu villages and 370 people were brought from those villages to a place known as Kural Pukur. He [P.W.4] saw 26 among them being gunned down there.

224. P.W.4, in narrating the event of massacre he witnessed stated that at least 85 people were killed and buried at Dompukur pond which was later recognised as a "killing ground" by the government. According to P.W.4, in conjunction with the event of massacre, the Pakistani army shot dead five people who were hiding on a banyan tree and 90-year-old Kanchira Mohanta was stabbed to death there. The Pakistani army and their collaborators left the crime villages around 5:00pm, after committing the massacre.

225. Defence could not refute what has been testified by the P.W.4, on material particulars. Rather, it has been affirmed in cross-examination that the P.W.4 as an inhabitant of the crime village had opportunity to see the event, as far as practicable for him despite the climate of horror created by the atrocious attack.

226. P.W.24 Bhagirathi Chandra Barman[60] who lost many of his relatives in the incident of massacre narrated how the Peace Committee men accompanied

by the Pakistani army chased down the Hindus who were running for their lives and handed them over to the Pakistani army to have them slaughtered.

227. P.W.24, at the time of event, was a resident of village Koroi Kadipur under police station Joypurhat stated that on Monday of second week of Baisakh of the Bangla month [corresponding to April 22 to 28, 1971], the Pakistani army and Peace Committee men attacked and raided their village Kadipur around noon. He [P.W.24] saw them approaching and thus he rushed home and then ran northwards with his family members. At that time, Peace Committee men surrounded them and the Pakistani army was also with them. They [Peace Committee men] gathered 50-55 people of their locality on the bank of Dom Pukur, which was on the east of their home. Peace Committee men then separated the men and the women. The men were taken to the slope of the pond but he [P.W.24] managed to escape and reach home.

228. P.W.24 further stated that he left home and headed northwards again and later, when he was going towards the east, he saw the people [who were at the Dom Pukur] being shot one after another on the slope of the pond. He [P.W.24] went to Karai Palpara and found it desolate and he saw all the Hindu civilians of the locality had gone to the field at north. He [P.W.24] later went to Karai Alia Madrasa wherefrom he saw Peace Committee men chasing and apprehending civilians belonging to Hindu community when they were trying to flee the area. They handed the Hindus over to the Pakistani army and the army gunned them down.

229. P.W.24 went on to narrate that he returned to Dom Pukur before sunset and saw bodies of the people of his neighborhood, his paternal uncle Bani Kanta, Santos, Banga, Ghona, Tarmuza, Krishna, Shiben, Duka, Prionath, Mahendra, Jogen, Chandra, Dinonath, Kristo were lying there. He [P.W.24] stated that among them almost all of them [deceased] were his relatives and neighbours. He [P.W.24] saw bodies of 80-85 people there. On the following Wednesday, he [P.W.24] and 300-350 Hindu women and children from Barmanpara and Palpara of Kadipur village deported to India.

230. P.W.25 Ajit Mohonto was an inhabitant of the village located at eastern part of village Kadipur[crime village]. He claims to have witnessed the attack as

narrated in the charge no.2. According to him on 26 April 1971 at about 11: 00-12:00 hrs while he was at their field nearer to the road to village Kadipur he saw the people of their village running towards ‘Haji para’ at northern direction. With this he[P.W.,25] returned home when his mother told that Pakistani army had launched attack and killed numerous civilians and his mother insisted to flee with his[P.W.25] younger sister Minoti[2-2.5 years old]. With this he [P.W.25] taking his sister on his lap had gone to courtyard of Moulana Jasim Uddin’s house at village north Hajipara where he found many people crying. P.W.25 further stated that his Biswanath uncle asked Moulana Jasim Uddin why he had told them last night not to be feared and he[Jasim Uddin] would save them; but now why indiscriminate firing around village Kadipur was going on and the feared people were running with this . Moulana Jasim Uddin who was a fellow of Alim [accused] replied that some wicked guys would loot their house if they flee and thus he [Jasim Uddin] insisted them to go back home.

231. P.W.25 went on to state that they could not trust Jasim Uddin’s saying and thus he found many people moving towards a jungle on the bank of ‘Tulsi Ganga’ river and they took shelter there. He[P.W.25] was then about to go back home and on his way he found Yunus Ali and his accomplices chasing civilians with ‘*lathi*’ and ‘*hasua*’ and they apprehended many of them who were line up at field of their[P.W.25] ‘*para*’. With this he[P.W.25] took shelter near a pond at ‘*Koyet pukur*’ wherefrom he saw Dr. Rahim Uddin a follower of Alim[accused] dragging his grand-father Kanchira Mohonto, aged 90/91 years to the field of ‘Chak para’ where many people were killed. Seeing it he[P.W.25] again moved to ‘Koyet pukur’ where inside a bush he found his mother and others in hiding and he informed them of the fact of taking away of Kanchira Mohonto. His mother told him to flee and save life. Then he came and remained in hiding in a graveyard surrounded by bush and 200-250 yards far from ‘Chakpara’ field wherefrom he could hear frequent gun firing. After a short while, at about 01:00 pm a Muslim woman whom he[P.W.25] used to call ‘Kaki’ came there and asked not to come out from the ‘grave-yard [hiding place]’; that the Pakistani army had indiscriminately killed the civilians apprehended by the peace committee men and accomplices of Alim[accused] and that Dr. Rahim Uddin slaughtered his[P.W.25] grand-father[Kanchira Mohonto].

232. According to him, he [P.W.25] remained in hiding there till 05:00 evening till gun firing had stopped. At about dusk time ‘Kakima’[wife of Kamal] came there and asked him to come out as the army and others had left. Coming out of the hiding place he then had gone to ‘Chakpara’ field where he found dead body of 26/27 of his neighbours whom he could identify and they were Nani Debnath, Laxman Debnath, Gopen Debnath and others. He also found the dead body of his slaughtered ‘dadu’[grand-father Kanchira Mohonto]. Then he returned home and on the way of returning home he [P.W.25] heard about killing of one Aswini from his[victim] mother.

233. In reply to question put to him P.W.25 stated that he did not have any documentary proof relating to the killing of Nani Debnath, Laxman Debnath, Gopen Debnath; his eyes and memory itself are the proof of it. In absence of anything contrary, this statement seems to be consistent with the reality and situation existing at the relevant time. Additionally, the fact of killing of those Hindu civilians has been re-affirmed by this statement.

234. P.W.25 further stated that after returning home , the mother of Asgar of ‘Chakpara’[whom they used to call ‘Barama’] came to them and brought them to their house secretly for safe shelter and at dead night sent them back to their [P.W.25] house through her son Abdur Rahim[now dead] and then they started deporting to India.

235. He [P.W.25] heard from said Abdur Rahim that Alim [accused] masterminded the massacre of killing, destruction, looting [narrated in the charge no.2]. After independence, on returning home from India they found their houses destructed and on asking the mother of Asgar informed that they first brought their looted households but they deposited all those to ‘chataal’ of Alim[accused], chairman, peace committee, on his order.

236. Defence, as it appears, could not dislodge the above pertinent version by cross-examining P.W.25. Thus, it offers inevitable conclusion that accused Alim was involved with the massacre committed by the army and local collaborators i.e peace committee men. It is to be noted that even an act or conduct of accused subsequent to the commission of the crime forms part of attack for which the accused can lawfully be held responsible.

237. P.W.26 Jogesh Chandra Pal [63] was a resident of Hindu dominated village 'Koroi Palpara', in 1971. He narrated how he experienced the attack launched on Monday at about 12:00 noon during second week of Bangla month 'Baisakh' [corresponds to last part of third week of April, 1971] by the group formed of Alim's [accused] peace committee men and the army. Defence does not dispute that the P.W.26 had no occasion to experience the 'attack'. On hearing indiscriminate gun firing and seeing the houses of ablaze he remained in hiding at a bush of a graveyard, P.W.26 stated. Afterwards, ½ hour after the dusk he came to 'Dom pukur' where he found numerous dead bodies and of them he could identify three who were Krishna, Shibben and Tarmuja. P.W.26 stated that he saw more dead bodies lying scattered while he was on the way to India.

238. P.W.26 thus corroborates the fact of launching attack by the army and their collaborators peace committee men targeting the Hindu community that resulted killing of countless Hindu civilians, destruction of properties by looting and setting fire. However, P.W.26 stated nothing incriminating the accused Alim with the attack.

239. P.W.26 is believed to have testified what he experienced, without any exaggeration and embellishment, in conjunction with the event of attack. Thus his testimony so far as it corroborates the event of attack on the day and time targeting the Hindu villages is reliable and natural. The Tribunal notes that the horrific climate created by abrupt devastating attack targeting the unarmed civilians belonging to Hindu community might not have left equal and full opportunity of seeing the entire event and the act or presence of all the persons participating to the attack.

Deliberations

240. Prosecution argued that it has been able to prove the event of horrific 'genocide' to the commission of which accused Md. Abdul Alim provided substantial contribution and abetment to the principals. P.W.4 Molla Shamsul Alam , an eye witness, narrated the event of killing of 26 people at the crime site. P.W.24, an inhabitant of the crime village, also had opportunity to see the massacre. He is a hearsay witness so far his testimony relates to involvement of the accused with the massacre. Target of the perpetrators was Hindu

population, with discriminatory intent. Accused Alim participated to the commission of crimes, by his conscious act and conduct. In conjunction with the attack hundreds of Hindu civilians were killed brutally.

241. Mr. Ahsanul Haque Hena, the learned defence counsel, as regards charge no.2, has argued that since P.W.4 was with P.W.20 till evening of 26 April, according to statement of P.W.20, it becomes untrue that P.W.4 witnessed the event that allegedly happened on 26 April in between 09:00 am to 05:00 pm. Besides P.W.4 is an interested witness and he omitted to state to the IO the material fact of seeing accused Alim indicating the Hindu dominated villages. It was not probable to see the event from a distance of 200 yards, as claimed by P.W.4. The testimony of P.W.24, P.W.25 and P.W.26, on material particular, will appear to be contradictory to what they stated to IO and thus they cannot be relied upon.

242. ‘Genocide’ is the gravest crime. This type of crime never gets old and that the perpetrators will face justice. We should not forget it that the victims who deserve that their tormenters are held accountable; the passage of time does not diminish the guilt. The accused Alim has been charged with the offence abetting and substantially contributing to the commission of ‘killing members of the Hindu religious group’ with ‘intent to destroy’ it, ‘in whole or in part’. The meaning of ‘genocide’ as contained in the Act of 1973 seems to be in conformity with the Article 6 of the Rome Statute.

243. Before holding the accused responsible for the act of aiding and contributing to the commission of the crime alleged, the criminal act of the principals for which for which he has been charged with must be established. In the context of genocide, the accomplice has been defined as someone who associates him or herself in the crime of genocide committed by another. “The accomplice will also be responsible for all that naturally results from the commission of the act in question”. [*Blagojevic and Jokic*, (Trial Chamber), January 17, 2005, para. 777].

244. The fact that the accused Alim accompanied the Pakistani troop to the crime villages and after beckoning the army to Hindu villages he selected the people to accompany the troops in committing the act of looting and setting the houses of

Hindu civilians on fire and afterwards bringing hundreds of Hindu civilians to Kural Pukur, as narrated by P.W.4 remained unshaken and does not appear to have been dislodged materially.

245. The event of massacre directing the Hindu community and killing hundreds of Hindu unarmed civilians by launching attack appears to have been corroborated by the P.W.24 and statement made by him in this regards could not be impeached by the defence. From evidence of P.W.24 it is also proved that the principal attackers were the Pakistani army and the Peace Committee men accompanied them who substantially contributed in selecting the Hindu civilians as their target.

246. In reply to question put to him in cross-examination, P.W.4 stated that at the time of the incident of attack he was about 200 yards far from Kural Pukur wherefrom he and his friends with him could see the incident of shooting and the banyan tree [where a 90 year old Kanchira Mohonto remained in hiding and was stabbed to death] was about 200 feet far from the place he [P.W.4] himself remained standing.

247. On cross-examination, P.W.4 stated that he did not see any Muslim civilian fleeing at the time of attack launched by the Pakistani army and their accomplices. He however saw some pro-Pakistan Muslims collaborating with the Pakistani army in committing the act of looting the houses of Hindu civilians. Thus, it has been re-affirmed that P.W.4 had occasion to witness the event of massacre directing the Hindu civilians and presumably the target of the attackers was the Hindu community residing at the crime villages and it also suggests that the attack was launched with discriminatory intent.

248. P.W.24 however has not incriminated the accused Alim by saying that he[accused] also accompanied the army to the crime site. But it cannot straightway be considered contradictory to what has been stated by P.W.4, in this regard. The offence of 'genocide' is a gravest crime causing extreme terror and horror around the crime locality, at the time of its perpetration. The Tribunal notes that in course of an event of massacre that resulted from horrific attack and killing of hundreds of unarmed civilians naturally the vulnerable people of the

crime site opted to run, flee and hid and thus they had no equal opportunity of seeing the manner of the event and the perpetrators and their role as well.

249. P.W.24 stated that both Muslims and Hindus were the inhabitants of village Kadipur. The Muslim inhabitants of the village, after the incident of massacre, were telling that they could not have been survived if the Peace Committee men and Alim [accused] would not come [to the crime village accompanying the army].

250. It appears that the P.W.24 omitted to state the above version to the Investigation Officer. We reiterate that such ‘omission’ in earlier statement is not considered as ‘contradiction’, particularly if it does not affect the essence of testimony on material fact substantially. The above piece of evidence is hearsay in nature. It is admissible if it is found to be relevant, reasonable and corroborated by ‘other evidence’.

251. We have found from testimony of P.W.4 that accused Alim actively accompanied the army to the crime village and contributed substantially by his act of beckoning the army to Hindu villages and some of his [accused] chosen people accompanied the army in committing the criminal act of looting and setting fire the houses of Hindu civilians of the village. Therefore, the hearsay evidence as made by P.W.24 inspiring indisputable credence goes to show that the attackers with discriminatory intent had targeted the Hindu civilians only, keeping the Muslim civilians of the crime village aside and as such they could survive, as learnt by the P.W.24.

252. Besides, on cross-examination, P.W.4 stated that he did not see any Muslim civilian fleeing at the time of attack launched by the Pakistani army and their accomplices. He however saw some pro-Pakistan Muslims collaborating with the Pakistani army in committing the act of looting the houses of Hindu civilians. This unshaken piece of evidence also corroborates to the fact of learning by P.W.24 that the Muslim inhabitants of the village, after the incident of massacre, were telling that they could not have been survived if the Peace Committee men and Alim[accused] would not come [to the crime village accompanying the army] .

253. We are not convinced with the argument advanced by the defence that for the reason of discrepancies occurred in witnesses' testimony and omission to state, what he testified before the Tribunal, to the Investigation Officer [IO] make them unreliable. It is now settled that earlier statement made to Investigation officer is not evidence and any non significant omission in stating any fact to the IO which does not necessarily affect witness's sworn testimony is not fatal and cannot be treated as glaring contradiction. Additionally, failure to describe precise detail about an event that took place four decades back rather makes witness' testimony more reliable. Additionally, discrepancies in sworn testimony may naturally occur, due to lapse of long passage of time.

254. Admittedly P.W.20 Sardar Md. Abdul Hafiz is a cousin brother [mother's sister's son] of P.W.4 Molla Shamsul Alam. P.W.20 claims that on 20 April 1971 attack was launched with gun firing at about 09:00 am and with this they along with Shamsul Alam Molla[P.W.4] went into hiding inside the house[of Shamsul Molla]. It appears that P.W.20 was a boy of 12 years old and P.W.4 was his elder brother. Launching attack directing the villages nearer to the house of P.W.4 seems to have been corroborated by P.W.20. But for the reasons best known to him, P.W.20 refrained from narrating detail about the event happened on 26 April 1971.

255. Presumably, P.W.20 may not be able to reminisce what he experienced about the alleged attack, due to memory loss for the reason of lapse of long passage of time. On the other hand P.W.4 Shamsul Alam Molla who was 16 years old at the relevant time made almost a precise detail what he witnessed, experienced and heard relating to the alleged attack and the extent and consequence caused by such attack. Defence could not dislodge what the P.W.4 stated in relation to the event of attack causing destruction and killing of civilians by the group of perpetrators accompanied by accused Alim.

256. Omission to state to IO that accused Alim indicated the Hindu dominated village to the army, the principal perpetrators does not make the testimony of P.W.4 infirm in its entirety. In this regard, we are not convinced with the argument advanced by the learned defence counsel. The fact that accused Alim accompanied the group of attackers and remained present at the crime sites could not be shaken by the defence. This is the essence of statement made by P.W.4

that is to be taken into account for determination of culpability of accused Alim. Thus the above omission cannot be a contradiction of fatal nature that could tarnish the credibility of P.W.4 and what he has deposed on material particular.

257. On total evaluation of evidence of P.W.4 and P.W.24 we are persuaded to conclude that on the date and time the Pakistani army being accompanied by the accused Alim and Peace Committee men by launching attack, with discriminatory intent, directing the Hindu dominated villages committed looting and burnt the houses of Hindu civilians. It is also found that the accused substantially contributed to the commission of the horrific massacre and killing by his conscious and culpable act that facilitated the principals in locating the Hindu civilians and their houses. Accused, by his act, also incited the actual commission of atrocities. We are convinced to agree with the proposition, as advanced by Ms. Tureen Afroz, that the act of ‘inciting’ is not confined to making speech only and it even can take any form, either words or deeds. **Lord Denning** stated that a person may incite another to do an act by threatening or by pressure, as well as by persuasion [**Race Relations Board v Applin**[1973]1 QB 815,[1973] 2 WLR 895,[1973]2 A11 ER 1190, CA, affirmed[1975] AC 259,HL]. In the case of **R v Fitzmaurice** [1983] QB 1083,[1983] 2 WLR 227, [1983] 1 A11 ER 189, 76 Cr App R 17,[1982] Crim LR 677, CA] it has been observed too that the necessary element of persuasion was satisfied by a ‘suggestion, proposal or request’. Here, conduct or act of accused Alim forming part of attack, so far as it relates to the charge no.2, it is proved that he ‘incited’ by his act constituting ‘persuasion’ to the commission of the offence of ‘genocide’.

258. It is inferred too unerringly that the intent of acts forming such attack was to cause destructive wrongs to the civilian population belonging to Hindu religion. It has also been established that the destructive and atrocious acts that resulted in killing of hundreds of Hindu civilians and looting and burning of numerous houses on fire eventually compelled the victims and sufferers of the crime village including the P.W.24 to deport to India leaving their houses and properties. The event was simply horrific and was done in grave breaches of Humanitarian law and Geneva Convention too.

259. Further, Section 3(2) (c)(i) of the Act of 1973 defines ‘**Genocide**’ as an act committed with intent to destroy, in whole or in part, a national, ethnic, racial, religious or political group, such as, killing members of the group. From the charge no.2 framed we find that the criminal acts narrated therein were directed against the Hindu community which falls within the meaning of ‘religious group’ or a particular ‘members of the group’, with intent to destroy it, either whole or in part. Chiefly from testimony of P.W.24 one of members of victims’ family it has been established that almost instantly after accomplishment of crimes targeting the Hindu community, the members of this community who were residents of the crime villages deported to India, in fear of further fatality and harms. This amply indicates that the attack was launched with ‘genocidal intent’ of causing massive destruction and killing of civilians belonging to the Hindu community, as has been narrated in charge no. 2.

260. Targeting the group of Hindu community residing at the crime villages itself is rather emblematic of the overall Hindu community of the country. Thus, targeting part of the community qualifies as substantial, for the purpose of inferring the ‘genocidal intent’. If a specific part of the group is emblematic of the overall group, or is essential to its survival, that may support a finding that the ‘part’ qualifies as substantial.

261. The pattern of perpetration of the crime adequately indicates that the intent of the perpetrators was to ‘destroy a group’ as it has been established that the destruction was related to a significant section of the Hindu group. In the case of *Jelusic*, (Trial Chamber: ICTY), December 14, 1999, para. 83 it has been observed that

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

262. ‘Hindu Community’ indeed is a collection of individuals who are perceived to belong bonds founded on a common religious belief coupled with reciprocity

of their religious rights, culture and language. The individuals of this group were chosen by the perpetrators in carrying out massive destructive and indiscriminate atrocities that resulted in mass killing, looting, torching houses, deportation, and displacement. We are of an unerring view that the atrocities were committed targeting a particular group, with genocidal intent.

263. It is established that the victims were chosen by reason of their membership in a particular religious group [Hindu] by the perpetrators. Context and pattern together demonstrate that the local Hindu community was chosen by the perpetrators for no other reason, but with intent to destroy it even in part. Barbarity of combined acts aiming to cause organized destruction was against the members of collectivity i.e Hindu religious group which exceeded the concept of human rights. Offenses of this type bring harm not only to human rights, but also and most especially they undermine the fundamental basis of the social order.[**Raphael Lemkin**, ‘Acts Constituting a General (Transnational) Danger Considered as Offences against the Law of Nations’, 1933: <http://www.preventgenocide.org/lemkin/madrid1933-english.htm>]

264. Considering the pattern of the organized attack launched by the army accompanied by accused Alim and his local accomplices i.e peace committee men we arrive at an unerring finding that the killings, together with the forced deportation of the remaining members of the targeted group i.e individuals belonging to Hindu religion of the crime village, and the destruction of their homes by torching and looting, constituted a single operation which was executed with ‘intent to destroy a group’ ‘in part’.

265. It is not claimed that accused alone himself committed the crimes. The pattern and extent of horrendousness of atrocities adequately demonstrates that the accused Md. Abdul Alim, by his conscious act and conduct, joined the gang of perpetrators with *actus reus* of aiding to the accomplishment of crimes.

266. The judicial pronouncements of *ad hoc* tribunals have established that the accused himself need not have participated in all aspects of the alleged criminal conduct. The *actus reus* of aiding and abetting a crime may occur before, during, or after the principal crime has been perpetrated. It is thus not needed to prove that the accused himself directly participated to the actual commission of crimes

267. However, in holding the accused criminally responsible for the offence of genocide with which he has been charged we are to arrive at a finding that he committed such a crime, as an individual or as a potential leader of local peace committee jointly with Pakistani army, regardless of whether that other person is criminally responsible or he induced, aided and substantially contributed to the commission of such a crime with the knowledge of the intention of the principals by acting with a common purpose with the aim of furthering the perpetration of crime of genocide. As regards aiding and abetting genocide it has been observed by the ICTY Trial Chamber in the case of *Blagojevic and Jokic* that

“Aiding and abetting genocide refers to ‘all acts of assistance or encouragement that have substantially contributed to, or have had a substantial effect on, the completion of the crime of genocide.’” [Blagojevic and Jokic, (Trial Chamber), January 17, 2005, para. 777]

268. If it is found that the accused was present at the crime site when the principals committed the crimes. It is not indispensable to ask whether the commission of the crime would have occurred if the accused had acted differently. Rather, it is to be seen whether in acting or failing to act, the accused gave assistance to (be it of a practical or moral nature) or encouraged the principal to commit the alleged crimes.

269. The expression ‘committed’ occurred in section 4(1) of the Act includes participation in JCE. Section 4(1) tends to cover the necessary elements of JCE, especially JCE category 1 and 3.. We reiterate that JCE is a form of co-perpetration that establishes personal criminal liability. In fact section 4(1) of the Act of 1973 refers to JCE liability.

270. The act of ‘consenting part’ in the commission of the crime alleged and ‘connection’ with plans or enterprise or activities involving commission of crimes can be well inferred and perceived from circumstances. The matter of ‘belonging’ to the perpetrator group or enterprise and occupying position of authority on it need to be inferred from circumstances revealed. Commission of killing targeting specific class of population or group [Hindu religion] perceivably was the outcome of common plan and purpose of the perpetrators.

Inherent nature and extent of killing and the class the victims belonged to Hindu community suggest the conclusion that the crimes were perpetrated by a collective enterprise or group to which accused Alim was a consenting party and connected.

271. Finally we conclude that it has been established beyond reasonable doubt from evidence of P.W.4 that accused Alim was a potential associate of Pakistani army since it, led by Major Afzal, rolled into Joypurhat, Abdul Alim[accused] "managed" the houses, storehouse and office of Shaonlal Bajla, a reputed jute trader of Joypurhat, to set up the office of the peace committee, camps of the Pakistani army. This being the role of the accused he was holding at relevant time, his presence at the crime site as an accomplice of Principals inevitably prompts us to infer unerringly that he actively and substantially provided practical assistance, encouragement and moral support to the principals in perpetration of the mass killing of individuals belonging to Hindu Community and mass destruction, with discriminatory intent constituting the offence of 'genocide' and thereby the accused Md. Abdul Alim is held criminally liable under section 4(1) of the Act of 1973 and found **guilty** for the offence of 'genocide' enumerated in section 3(2)(c)(g) of the Act of 1973 which is punishable under section 20(2) read with section 3(1) of the Act.

Adjudication of Charge No.3

[Killing of 22 civilians]

272. Summary charge: This charge involves killing of 22 pro-liberation and Awami League followers in Joypurhat on June 18, 1971 by the Pakistani army local peace committee members and Razakars. The perpetrators allegedly committed the crime following instruction and instigation of accused Alim communicated by one Reaz Mridha, a peace committee member. Victim civilians were selected by the army on having a 'list' given by accused Alim through Reaz Mridha. Therefore, the accused has been charged for substantially abetting and contributing to the actual commission of offence of attack directing the civilians causing their 'murder as crime against humanity' caused to a pro-liberation unarmed civilians as specified in section 3(2) (a) (g) of the Act which are punishable under section 20(2) read with section 3(1) of the Act.

Witnesses

273. Prosecution, to prove this charge, produced and examined two witnesses namely P.W.15 and P.W 19. They were allegedly captured, detained, tortured and targeted for killing. But somehow they managed to survive, as alleged. P.W.15 claims to have seen Reaz Mridha, a peace committee members providing list to the army for selecting the targets. Such 'list' was allegedly given by the accused Alim to Reaz Mridha.

Evidence

274. P.W.15 Mozammel Hossain [65] , who was a farmer at a village near the Indian border stated that after the Pakistani army entered Joypurhat in 1971, accomplices of Razakar commander and Muslim League leader Alim started torturing local people on his instructions and thus being frightened, he along with his family members leaving the country in the second week of Baisakh took refuge at Pirichpur refugee camp in India. But he[P.W.15] returned home the following Friday.

275. P.W.15 stated further that on Friday of the first week of *Ashar* [corresponding to mid of June 1971], he went to the mosque in his village to say *jumma* prayer. He found 11 Pakistani army men standing along with Riaz Mridha, a peace committee member when he came out of the mosque after saying prayer and they took him and 20 other people to nearby Chirala village where they found around 500 people and they were employed by the Pakistani to pull up an army vehicle from a ditch. The vehicle had plunged into the ditch in a mine attack and afterwards they were brought the house of one Afaj at village Chak pahunanda. The above relevant and material fact does not appear to have been shaken in any manner by the defence, in cross-examination. Thus the fact of accompanying the army by Reaz Mridha stands proved.

276. In narrating the event of apprehending 28 civilians including himself, according to the list furnished by the accused Alim[accused] through a peace committee member Reaz Mridha, of whom 06 could survive and 22 were killed the P.W.15 stated that later, the occupation army took all of them to the house of one Afaz at Chakpahananda village and lined them up. Then the Peace Committee member Reaz Mridha pulling out a list from his pocket gave it to the Pakistani army and told in Urdu that Alim Shaheb[accused] had given him the

list. According to the list, the Pakistani army then called out the names of 28 people, including him [P.W.15], and released others. Then the group was hit with rifle butts and taken to the house of one Afaz with their hands tied. A little later, the army forced them to dig a big hole near the house. When the job was done around 7:00pm, army men again confined them in the house. The army men then took them near the big hole and hacked them severely before kicking them into the hole one after another. He[P.W.15] was among the last eight who were pushed into the hole.

277. P.W.15 went on to narrate that at first, they [army] pulled him by his hair and threw him to the ground. Then they hacked him with a large machete on his right shoulder and throat. With this several of his teeth were broken as the army men hit his jaw and kicked him into the hole. Due to the brutal torture, he fell unconscious there. After sometime, he regained his senses and found some people were groaning inside the hole. Later he managed to flee from the hole and went to India again where he underwent treatment at Balurghat Hospital for three months. He also had to receive treatment at Gangarampur Hospital for full recovery. At Pirichpur refugee camp he found five surviving victims. P.W.15 stated that 22 victims were buried in the mass grave [hole].

278. On cross-examination, P.W.15 stated that he could not say in which language the 'list' furnished by Alim was written, but they were called and separated according to the said 'list'. With this the matter of furnishing a list through Reaz Mridha, as stated in examination-in-chief, rather has been re-affirmed. Next, the circumstances suggests that it was not possible for the P.W.15 or any of the group of apprehended civilians to know in which language the 'list' or 'letter' was written.

279. Causing brutal torture to P.W.15 as stated in examination-in-chief has neither been denied nor refuted. Rather, in reply to question put to him P.W.15 has re-affirmed that the army men chopped them with 'da' after '*magrib*' and there was none excepting the army men. And on the day he sustained injury he had gone to Balurghat and got himself admitted in hospital.

280. P.W.19 Abed Hossain testified corroborating the event of taking the detained civilians at the premises of Afaj's house. It remains unshaken too that

P.W.19 was also one of the detained civilians whom the army took them near the big hole and hacked them severely before kicking them into the hole one after another. P.W.19 somehow finally escaped although sustained injuries. He also , afterwards, went to Balurghat, India where he received treatment for long three to three and half months. Defence could not refute it., by cross-examining him. P.W.19 however remained silent as to furnishing ‘list’ by Reaz Mridha to the army allegedly given by accused Alim.

Deliberations

281. Prosecution submitted that the event has been proved by corroborating evidence of P.W.15 and P.W.19, although P.W.19 did not say the material fact to connect the accused with the event of killing of civilians. But the Tribunal is authorized to act even on testimony of a single witness if it inspires credence.

282. Conversely, the learned defence counsel argued that the alleged fact of furnishing ‘list’ by Reaz Mridha to the army as allegedly given by accused Alim has not been corroborated by P.W.19. Besides, it was not probable to know as to who was the author of the alleged ‘list’ and the same was given to Reaz Mridha. Thus, the accused cannot be connected with the alleged event of killing in any manner. The learned defence counsel further submitted that the accused Alim was not in the crime site and he was not involved with the criminal acts constituting the offence of crimes against humanity in any manner. Defence however does not dispute the event causing death of civilians as alleged in the charge no.3.

283. The alleged fact of cataloging 28 people including the P.W.15 by releasing the others is a fair indicative that it was done in discriminatory manner. Because it was in no way possible for the army to know who were to be segregated for annihilation. P.W.15 stated that he and the other victims were pro-Awami League people and as such they were so targeted by accused Alim and his accomplice Riaz Mridha.

284. According to P.W.15, after pulling up the army vehicle they all including the 500 hundred people were taken to the house of one Afaz at Chakpahunanda village and the army lined them up. Then the Peace Committee member Reaz Mridha pulling out a list from his pocket gave it to the Pakistani army and told in

Urdu that Alim Shaheb[accused] had given him the list. According to the list, the Pakistani army then called out the names of 28 people, including him [P.W.15], and released others.

285. But the Tribunal notes that after saying *jumma* prayer the 500 people including the P.W.15 and P.W.19 were brought first to a place at *Chirala* village to pull up an army vehicle from a ditch and then to Afaj's house[crime site] where on furnishing a list given to the army by accused Alim through Reaz Mridha 28 civilians were segregated for annihilation. It is not understood how Reaz Mridha obtained the list from accused Alim and when. It was not probable of procuring such a list from the accused instantly after causing detention of the victims at Afaj's house.

286. According to P.W.15 when he came out of the mosque after saying prayer, he found 11 Pakistani army standing along with Peace Committee member Riaz Mridha who accompanied the army first to village Chirala and then to the crime site. Be that as it may, Reaz Mridha arrived in front of the mosque along with the army having the said 'list' with him just after *jumma* prayer. If it is so, question arises how accused Alim knew as to who would be apprehended outside the mosque after *jumma* prayer and be brought first to Chirala village and then to Afaj's house?

287. It is not denied that said Riaz Mridha was a member of local peace committee. Of course the Pakistani occupation army would not have acted in such a selective manner without information obtained from any reliable collaborator. But lack of probability revealed does not prompt us to infer that such a 'list' was provided with by accused Alim to Reaz Mridha. Might be the act of annihilation occurred following the list furnished by Reaz Mridha. But in view of preponderance of sequences depicted we are not convinced to rely upon testimony of P.W.15 so far as it relates to seeing Reaz Mridha telling that the 'list' was so given by accused Alim while it was handed over to the army.

288. The killing was accomplished by selecting 28 detainees who were tortured and eventually 22 were killed and 06 could survive and managed to flee somehow. It is true that the accused need not be shown to have directly participated to the commission of crime or remained present at the crime site. His

act or conduct forming part of attack is sufficient in proving his culpability. But in the case in hand, we have found that the prosecution has not been able to prove it beyond reasonable doubt that accused Alim himself in fact sent a 'list' through Reaz Mridha to segregate 28 civilians from several hundreds of civilians who were allegedly taken to village Chirala to pull up an army vehicle from a ditch.

289. Besides, P.W.19 is one of 28 persons so detained for killing. He was too tortured and the army took him near the big hole and hacked him severely before kicking him and other destined persons into the hole one after another. P.W.19 somehow finally escaped although sustained injuries. He also, afterwards, went to Balurghat, India where he received treatment for long three to three and half months.

290. It appears that the event causing such torture and killing of detained civilians at the premises of Afaj's house at village Pahunanda remained unshaken. Rather, it has been proved beyond reasonable doubt by the evidence of P.W.15 and P.W.19. Defence could not refute it, by cross-examining them. But P.W.19 however remained silent as to the material fact of furnishing 'list' by Reaz Mridha to the army allegedly given to him by accused Alim.

291. It is proved from evidence of P.W.15 that after giving a list to the army, 28 civilians were made segregated. Thus, the alleged 'list' substantially contributed to the targeted killing. But this fact itself does not prove that such list was made and provided by accused Alim through Reaz Mridha. For holding the accused responsible for the act of abetting and contributing to the commission of crimes he [accused] is to be connected with the said 'list'. Evidence of P.W.15, on this material particular, does not appear to be probable. Additionally, since P.W.15 and P.W.19 were two of detained 28 civilians selected according to a 'list', naturally, P.W.19 also would have seen the handing over the 'list' to the army by Reaz Mridha and telling him [Reaz Mridha] the army that such 'list' was given by Alim [accused]. But P.W.19 did not state anything on this material fact.

292. On total evaluation of evidence adduced and considering the matter of probability of the material facts testified we come to decision that the prosecution has failed to prove accused Alim's involvement with the commission of crimes

narrated in charge no.3. Therefore, accused Md. Abdul Alim is found **not guilty** of the offence specified in section 3(2)(a)(g) of the Act of 1973.

Adjudication of Charge 4

[Murder of 19 civilians at village Kuktara , Bagjan]

293. Summary charge: This charge relates to the event of killing 19 pro-liberation civilians at village ‘Kuktara, ‘Ghorapara’, ‘Bagjana’ and Kutahara’ in Joypurhat and the event allegedly took place in early May, 1971. The accused Alim is alleged to have abetted and contributed to the actual commission of the offence launching attack directing the civilians.

294. Mr. Rana Das Gupta, the learned Prosecutor, in course of summing up of case, submitted that prosecution could not bring and examine any witnesses in support of this charge and thus it be deemed not proved.

295. In view of above, the accused Md. Abdul Alim is found **not guilty** for the above charge constituting the offence of murder as crimes against humanity specified in section 3(2)(a)(g) of the Act of 1973.

Adjudication of Charge No.5

[Murder of 67 civilians of village Pahunanda]

296. This charge relates to the horrific event of killing of 67 civilians belonging to the Hindu community at ‘Pagla Dewan’ in Joypurhat that occurred between Mat 9 and 15, 1971. The accused Alim has been arraigned to have abetted and substantially contributed to the actual commission of the offence by launching attack directing the Hindu unarmed civilians.

297. In similar way, Mr. Rana Das Gupta, the learned prosecutor frankly admitted the failure of the prosecution to bring and examine any witness to substantiate this charge and accordingly it be deemed not proved.

298. In view of above, the accused Md. Abdul Alim is found **not guilty** for the charge constituting the offence of murder as crimes against humanity specified in section 3(2)(a)(g) of the Act of 1973.

Adjudication of Charge 06

[Murder of 9 civilians of Koktara village]

299. Summary Charge: This charge relates to the event of capture of 10 civilians from the house of one Syed Ali and then brought to Akkelpur Railways Station where they were kept detained under guarded by the peace committee members and Razakars for three days, during the first part of May, 1971 and then they were handed over to the army, on decision of accused Alim. Afterwards the detained civilians were killed at a place near *Bakul Tala* of Koktara village and one Mofazzal however managed to escape. Therefore, the accused has been charged for substantially abetting and contributing to the actual commission of offence of ‘murder as crime against humanity’ caused to a pro-liberation unarmed civilian as specified in section 3(2) (a) (g) of the Act which are punishable under section 20(2) read with section 3(1) of the Act.

Witnesses

300. Prosecution, in order to prove this charge, relies upon P.W.2, P.W.9 and P.W.17. They have deposed on material facts including the fact of keeping 13 civilians detained first at the house of Syed Ali doctor, the then UP Chairman of Vadsa and then keeping them confined at waiting room of Akkelpur railways Station for three days. According to the charge framed, accused Alim is alleged to have ‘ordered’ to finish the detainees after they were brought to Akkelpur railway Station and accordingly they were handed over to the army who eventually accomplished the task of their killing at a place at village Koktara. P.W.2 claims to have had talk with one of detainees, his childhood friend, while he was kept confined at the Akkelpur railway station. P.W.17 claims to have heard that the Razakars who kept the detainees guarded there used to assure [the detainees] that they would be released after talking with Alim Shaheb [accused]. However, now let us see what the P.W.s have testified on dock.

Evidence

301. P.W.2 Md. Saidur Rahman[67] a resident of Akkelpur in 1971 stated that on May 7, 1971, a group of 13-14 people were leaving the country after becoming victims of the Pakistani army's atrocities. When they reached *Bhadsha* union at night, Syed Ali Doctor, a cohort of Alim [accused] and the then Chairman of *Bhadsha* union, allured them to stay the night at his place. He [Syed

Ali doctor] locked them in his house and informed it to Alim [accused] and Alim's cohort Matiur Rahman on that night.

302. P.W.2 further stated that on the following morning, Abdul Alim [accused] along with the Pakistani army appeared and Alim's cohort Matiur Rahman also came there and after holding a meeting, three of the detained civilians were handed over to the Pakistani army in Joypurhat and the rest 10 were handed over to a group comprising of Pakistani army and Razakars.

303. P.W.2 went on to state that 10 civilians were kept detained at the waiting room of Akkelpur Railway Station and among them, one Abdus Salam was his childhood friend from whom he[P.W.2] heard the whole story through a window at the rear of the waiting room. Defence could not dislodge it. Rather this piece of version appears to have been re-affirmed in cross-examination.

304. P.W.2 also stated that on the next day, he heard that the three handed over to the Pakistani army were killed at Khanjanpur Khuthibari following Abdul Alim's instruction, said Saidur. The next day, Alim showed up in Akkelpur again and after holding a meeting with the peace committee members, he [accused] handed over the 10 detainees to the Pakistan army who shot them after taking them near a pond at Koktara and all but one were killed.

305. P.W. Jahidul Islam [58] a resident of village Naldanga under police station Akkelpur, in 1971 stated that on 7 or 8 May in 1971 he along with 13 other people started for India after the war started. When they reached Bhadsha union around 11:00pm, they heard sound of bombing and shooting and with this they got dispersed.

306. P.W.9 further stated that he had taken shelter in a nearby house and the members of that house told him that 13 others of his group had gone to the house of one Syed Ali Doctor, who confined them at his guest house. He [P.W.9] then returned home and informed Rahim Uddin, brother of Samir Uddin Mandol, who was in their 14-member group, and then Rahim moved to Syed Ali.

307. P.W.9 next stated that later he heard from Rahim that Razakar commander Abdul Alim and his men of peace committee and Pakistani army had come to

Syed Ali's house and the army took three of the 13 people and 10 others were handed over to the Razakar and Peace Committee men. The 10 were detained at the waiting room of Akkelpur Railway Station for three days. He had seen them at the waiting room one day and heard rumor they would be handed over to the Pakistani army.

308. In the morning [of the third day] he went towards Akkelpur Railway Station and saw Abdul Alim, Azim Munshi, Noor Bakht and Matiur Rahman Chairman there and under their instruction, Khan sena [Pakistani army] took away the 10, P.W.9 added..

309. P.W.9, also stated that three days after detention of 10 civilians he went to Akkelpur Railway Station and he found there accused Abdul Alim, Ajim Munshi, Nur Bakht, Matiur Rahman and on their consultation 10 detainees brought there from by a train. Drawing attention to this statement defence suggested that he [P.W.9] did not state it to the IO. P.W.9 denied it.

310. P.W.17 Abdus Sobhan Sarder[67] a resident of village Amatra under police station Akkelpur in 1971 stated that in the first week of May in 1971, 14 to 15 people of Akkelpur were leaving for India. At one stage, they had taken shelter at the house of Bhadsha Union Parishad Chairman Syed Ali due to a battle between the Pakistani army and freedom fighters. On information from Syed Ali, who was a Razakar, the Pakistani army had taken away three of the people, said Sobhan. He [P.W.17] heard from locals about taking of the three.

311. P.W.17 further stated that Syed Ali had later handed over the rest of the detained people to Akkelpur Peace Committee who kept them confined at the waiting room of Akkelpur Railway Station for three days. After three days, Makbul Kabiraj, Mati Chairman and Noor Bakth, who were members of Razakar force, had handed them over to Pakistani army, who shot them near a pond at a place Bakjana station. Only Mofazzal Hossain of them survived.

312. P.W.17 also stated that during the three days' confinement at the railway waiting room, Razakars used to assure [the detainees] that they would be released after talking with Alim Shaheb [accused]. He[P.W.17] had heard it

from local people. Defence simply denied this statement. But it could not be shaken in cross-examination.

Deliberations

313. Prosecution argued that the civilians were first captured and detained at Syed Ali's house wherefrom 10 were handed over to peace committee members and Razakars who brought them to Akkelpur railway Station there they kept them guarded and detained for three days. Afterwards, on decision of accused Alim they were handed over to the army who killed them bringing to a place at Koktara, by train. Prosecution witnesses have proved the fact of detaining the civilians and testified material facts from which it has been proved beyond reasonable doubt that accused Alim acted substantially in contributing and abetting the actual commission of the crimes.

314. On the other hand, the learned defence counsel has argued that the witnesses upon whom prosecution relies for proving this charge are not credible and they did not state to the IO what they have testified before the Tribunal on material particular. They have made exaggeration and thus their testimony suffers from glaring contradiction. Prosecution evidence, as revealed from testimony of witnesses, shows that the Akkelpur Railway Station waiting room where the 10 civilians were detained was kept guarded by peace committee members and Razakars and thus it was not probable to have talked with any of detainees through the window of waiting room. P.W.9 went to India and as such his statement of his seeing some detainees there is untrue.

315. It has been further argued that coming of accused Alim, as claimed by the witnesses, at Akkelpur railway Station is not also true as at that time there had been no train communication. It was not at all probable for any of witnesses to hear or aware of the 'order' given by accused Alim. According to P.W.9 one Rabeya one of 10 detainees was not killed and such death was caused to 08 detainees out of 10 which is inconsistent with the narration made in the charge framed.

316. According to the charge framed 13 civilians were kept confined at the house of one Syed Ali doctor and then 3 of them were handed over to Pakistani army and 10 were so handed over to a group of Razakars and peace committee members who were taken to Akkelpur railways Station and kept detained there.

It is further alleged that after taking the 10 detained persons there the matter was informed to accused Alim who ordered to finish them and thus the detainees were taken to crime site at Koktara village where they were gunned down to death. It will appear from the charge that accused Alim had neither appeared at the house of Syed Ali doctor nor at the Akkelpur railway Station. Thus, in order to prove the nexus of accused Alim with the event it must be established that he[accused] by his act or conduct 'ordered' to finish the detainees and it is to be proved by circumstantial evidence.

317. It is not disputed that 09 of the 10 detained civilians were taken to the crime site from Akkelpur railways Station where they were kept detained for three days and then they were shot by a pond at village Koktara near Panchbibi station and nine of them died on the spot and one Mofazzal escaped with injury.

318. The charge framed does not allege accused Alim's physical presence neither at Syed Ali doctor's house nor at Akkelpur railway Station. The charge framed narrates that after taking the detainees to Akkelpur Railway Station from the house of Syed Ali doctor the matter was informed to accused Alim in Joypurhat when he allegedly ordered to finish them[detainees] and accused Alim is not alleged to have appeared either at Syed Ali doctor's house or at Akkelpur railway Station. But the P.W.2 has made exaggeration by saying that on being informed accused Alim came to Syed Ali doctor's house, on the following morning and on next day he came to Akkelpur Railway Station and as such version made by P.W.2 in this regard deserves no consideration.

319. The fact of informing the matter of detaining 13-14 civilians to Alim [accused] and Alim's cohort Matiur Rahman on that night [May 7, 1971] does not appear to have been alleged in the charge framed. The charge framed does not allege too that accused Alim being accompanied by army and his cohort Matiar Rahman, on being informed came to the house of Syed Ali doctor, on the following morning and after holding meeting there they handed over the detainees to army and Razakars.

320. However, from evidence of P.W.2 it stands proved that the 13 civilians were first kept detained at the house of Syed Ali doctor and then 03 of them were handed over to the army and 10 were handed over to the group comprising of

Razakars and army who kept them detained at Akkelpur Railway station. P.W.2 is hearsay witness in respect of the fact of detaining them at Syed Ali doctor's house.

321. From evidence of P.W.2 it is further proved that 10 civilians were kept detained at Akkelpur Railway Station waiting room as he had occasion to see it while had talk with Abdus Salam who was his childhood friend[one of 10 detainees] from whom he[P.W.2] heard the whole story through a window at the rear of the waiting room.

322. Through reply to question elicited to him, in cross-examination, P.W.2 has re-affirmed this piece of version. On cross-examination of P.W.2 it has also been depicted that the Razakars and peace committee members had kept the Akkelpur railway Station guarded. It, in other words, makes the fact proved that the 10 civilians were handed over to Razakars and peace committee members by Syed Ali doctor and they were kept detained at Akkelpur Railways Station's waiting room. Be that as it may, the act of handing over to the army, three days after their detention there, was executed by the peace committee members and Razakars who had kept them guarded.

323. Evidence of P.W.9 so far as it relates to the fact of keeping 13 civilians confined at the house of Syed Ali doctor on the date and in the manner and handing over 3 detainees to the army and 10 to the Razakars and peace committee members who were kept detained at Akkelpur Railway Station waiting room for three days inspires credence as it remained totally unshaken by the defence.

324. Defence could not impeach the version as made by P.W.17 which relates to handing over 10 detained civilians to Razakars and peace committee members and Razakars by Syed Ali doctor; keeping them detained at Akkelpur railway Station waiting room for three days and finally handing them over to the army. Rather the statement made by P.W.17 corroborates to what has been stated by P.W.2 and P.W.9 so far as it relates to the fact of confining 13 people at Syed Ali doctor's house and on the following day 3 were handed over to army and the rest 10 were handed over to Razakars and peace committee members who took them to Akkelpur railways Station where they kept confined for three days.

325. According to the charge framed, it is to be adjudicated whether accused Alim being informed of the matter of detaining the civilians ‘ordered’ to finish them, after taking 10 detainees to Akkelpur Railway Station and it is to be inferred from the circumstantial proof.

326. P.W.2 and P.W.9 claim to have seen accused Alim and his cohorts on third day at Akkelpur railway Station and on their consultation the 10 detainees were brought there from by a train. While contradicting this version by the IO, he [IO] stated that they did not state it to him during investigation.

327. But the tribunal notes that in a case dealing with the offence of crimes against humanity that happened more than 04 decades ago the witness’ testimony may naturally suffer from discrepancy or omissions. But it cannot impair his or her testimony in its entirety. Besides, the witness may not have narrated to the IO what he states in court for reason of not being asked on it. Thus, we are not convinced to disbelieve the testimony of P.W.2 and P.W.9 relating to arriving of accused Alim at Akkelpur railway Station and holding meeting with his cohorts.

328. Why the 10 civilians were kept confined at Akkelpur Railway station waiting room for three days ? Why the Akkelpur peace committee members and Razakars waited to cause their handing over to the army for three days? Had the peace committee members of Akkelpur peace committee and Razakars who kept the detained persons guarded there for three days waited for decision from anybody in position of authority?

329. P.W.17 stated that during the three days’ confinement at the railway waiting room, Razakars used to assure [the detainees] that they would be released after talking with Alim Shaheb [accused]. He [P.W.17] had heard it from local people. This piece of evidence remained unshaken. That is to say, decision was awaited till instruction or order of Alim [accused] on consultation with him.

330. We have found that accused Alim was the influential leader/ chairman of Joypurhat peace committee and the atrocious activities carried out within the geographical area of three other police stations, apart from Joypurhat, were very much within his knowledge and the fate of detainees rested on his[Alim] decision

and the peace committee members and Razakars had acted on consultation with him.

331. In relation to charge no.6 it stands proved that the 10 detainees were kept confined at the waiting room of Akkelpur railway Station under the active guard of Razakars and peace committee members of Akkelpur peace committee. Three days after their detention they were handed over to the army. The sequences of the event together with circumstances and evidence of P.W.17 that the detained persons would be released after talking with Alim Shaheb[accused] which he had heard from local people prompt us to arrive at an unerring conclusion that the detained persons were so handed over to the army on instruction or order of accused Alim.

332. For providing instruction or order the accused need not be physically present at the detention site. It may even be provided remaining away from the place where the persons are kept detained. It is significant to note that the Pakistani army did not bring the detained persons voluntarily to the crime site from Akkelpur railway station. It may thus legitimately inferred that the act of handing over the detained persons to the army was done pursuant to consultation between the group comprising of local Razakars and peace committee members and accused Alim, the influential leader of peace committee having a position of domination over Razakars and peace committee members .

333. ‘Consultation’ is an act that takes between two or more persons for arriving at a decision and way of materializing the decision, in furtherance of common plan. The circumstances and sequences as found from evidence of P.W.2 and P.W.17 impel to the conclusion that the army brought the detained persons to the crime site to cause their death as handed over by the Razakars and peace committee members who kept them guarded for three days, following instruction obtained through such consultation.

334. Therefore, Razakars and Akkelpur peace committee members being abetted by the instruction or order provided by accused Alim finally handed over the detainees to the army. We have got from unimpeached evidence of P.W.17 that after three days, Makbul Kabiraj, Mati Chairman and Noor Bakth, who were members of Razakar force, had handed the detained persons to Pakistani army,

who shot them near a pond at a place Bakjana station. Only Mofazzal Hossain of them survived.

335. Tribunal notes that the accused himself need not have participated in all aspects of the alleged criminal conduct carried out by the principals. It is now settled that participation, by an act of abetment, may occur before, during or after the actual commission of the offence.

336. On cumulative evaluation of evidence and circumstances revealed we may thus safely conclude that it has been proved beyond reasonable doubt that the group comprising of Akkelpur peace committee and Razakars by keeping the 10 persons detained at the waiting room of Akkelpur Railway Station had waited for decision from accused Alim, the chairman / influential leader of peace committee Joypurhat as he [accused] was considered a person having position of authority over the peace committee members and Razakars within the geographical areas of four police stations including Akkelpur.

337. Defence argued that according to P.W.9 one Rabeya one of 10 detainees was not killed and such death was caused to 08 detainees out of 10 which is inconsistent with the narration made in the charge framed.

338. The above argument rather confirms the event of detaining 10 civilians and handing them over to the army. Mere discrepancy in number of civilians killed does not make the event untrue in any manner.

339. It has been further argued by the defence that coming of accused Alim, as claimed by the witnesses, at Akkelpur railway Station was not also true as at that time there had been no train communication. It was not at all probable for any of witnesses to hear or aware of the 'order' given by accused Alim.

340. 'Order' always need not be a tangible act. The Akkelpur Railway Station waiting room was a place where 10 civilians were kept detained and guarded by the peace committee members and Razakars and on third day accused Alim arrived there and then the detainees were handed over to the army who brought them by a train, as witnessed by P.W.9. Thus, being aware of the fact of detaining 10 persons there and having opportunity to talk with some of detainees

secretly through the rear window of the waiting room presumably enabled him to be aware also of such ‘order’. Besides, if we say that P.W.9 was not in position to have practical knowledge about such ‘order’, it may fairly and adequately be inferred from circumstances and relevant facts.

341. Providing ‘order’ or ‘instruction’ may not always be tangible. It may be perceived or inferred from circumstances and material facts. It has been observed by the ICTY in the case of *Simic, Tadic, and Zaric that*

“The acts of aiding and abetting need not be tangible, but may consist of moral support or encouragement of the principals in the commission of the crime.”[*Simic, Tadic, and Zaric* , (Trial Chamber), October 17, 2003, para. 162]

342. On total appraisal of evidence and circumstances depicted we conclude that if the act of handing over the detained persons to the army was not done on ‘decision’ or ‘order’ of accused Alim, the detained persons would have been executed or handed over to the army earlier or instantly after capturing them from the house of Syed Ali doctor and the group of Razakars and peace committee members would not have kept them guarded for three days at waiting room of Akkelpur Railways Station. Thus, it has been proved beyond reasonable doubt that the group of Razakars and local peace committee members, in true sense, waited for having decision and instruction from accused Alim and as soon as they got it, the detained civilians were handed over to the army. In this way accused Md. Abdul Alim is found to have substantially abetted the actual commission of the offence of killing of 9 [according to P.W.9 number of civilians killed was 8] unarmed civilians and thereby he is found **guilty** for the offence of murder as crime against humanity enumerated in section 3(2)(a)(g) of the Act of 1973 and thus the accused Md. Abdul Alim @ M.A Alim incurs criminal liability under section 4(1) of the Act of 1973.

Adjudication of Charge no.7

[Murder of 04 civilians of village Nowda]

343. Summary charge: This charge relates to the offence of murder as crimes against humanity. Four civilians of Nowda village of Panchbibi were killed. The victims were apprehended on 26 May 1971 in between 11:00 am to 06:00 pm by the group of Pakistani army, peace committee members, Razakars, following order and instigation of the accused Md. Abdul Alim. The victims namely Ilias Uddin Sarder, Yusuf Uddin Sarder, Yunusuddin Sarder and Abdul Kader Mondol were first brought to Balighata UP office and kept there confined. The relatives of the detained persons met and approached the accused Alim, potential leader/ chairman of peace committee, Joypurhat for their release. But the accused did not pay heed to it. Afterwards, on the same day at about 06:30- 07:00 pm the detained civilians were killed by the side of a pond of one Kali Saha. Therefore, the accused has been charged for substantially abetting and contributing to the actual commission of offence of ‘murder’ as crime against humanity’ caused to a pro- liberation unarmed civilians as specified in section 3(2) (a) (g) of the Act which are punishable under section 20(2) read with section 3(1) of the Act. And he is thus liable for the above offences under section 4(1) of the Act.

Witnesses

344. Prosecution produced two witnesses who have been examined as P.W.16 and P.W.18, to prove this charge. Accused Alim, according to the charge, is not alleged to have physically participated to the actual commission of the crimes. For the act of inaction on part of the accused Alim to the approach made by the relatives of the victims detained by the army, Razakars and peace committee members the accused has been charged for substantially abetting and contributing to the offence of killing of victims, as narrated in the charge. P.W.16 A.K.M Mahbubur Rahman[63] the nephew of victims incriminated the accused Alim with the commission of crimes alleged mainly by deposing that ignoring earnest approach made to him accused Abdul Alim had denied releasing the victims captured from their village in Panchbibi of Joypurhat by the Pakistani army and their collaborators i.e the peace committee members and Razakars. P.W.18 Mustafizur Rahman testified corroborating P.W.16 on this material particular including the event of detaining and afterwards killing the victims.

345. P.W.16 A.K.M Mahbubur Rahman [63] in narrating the event has stated that on 26 May of 1971 at around 11:00 am the occupation army had attacked their home at village Nowda village. Before the attack, members of the Razakar force and also Peace Committee members Ahmed Bihari and Rashid Bihari gathered information about their [Mahbub's] home. Being aware of their presence, he [P.W.16] and his elder brother Bazlar Rahman, like many other villagers, had hidden in a nearby place wherefrom they witnessed the incident.

346. P.W.16 further stated that after sometime, Ahmed Bihari and Rashid Bihari, who came along with the army, had announced that the army was there to restore peace and that they would form a peace committee there. On hearing the announcement, many people including his [P.W.16] three uncles Yusuf Uddin Sardar, Yunus Uddin Sadar and Ilias Uddin Sardar appeared there. Next, on identifying his[P.W.16] uncles in cooperation of Razakars, the Pakistani army had picked them up and took them to an army camp at Balighata union in Panchbibi and with this he[P.W.16] and his brother[Bazlar Rahman] had followed them. The above version relating to the event of capturing the victims from their house remained unimpeached in cross-examination.

347. Thus the P.W.16 has testified how and by whom his three uncles were picked up from their home and where they were taken. This part of the event remains totally undenied in cross-examination.

348. As regards next part of the event P.W.16 went on to state that on returning home they informed the incident [taking away his three uncles] to his father and then his [P.W.16] father sent Abul Kashem Sardar to look for the detainees. Kashem first had met Moulana Mohabbatpuri [now dead], the peace committee leader of Panchbibi and on his advice he [Kashem] then had met and talked with Dr. Rustom Ali [now dead], a notable leader of peace committee and Joybar Ali Akand [now dead]. All of them asked Kashem to meet and talk Alim [accused] as there was a protest against the detainees.

349. The above version remained unshaken and undenied even in cross-examination. Thus the material fact that Kashem met and had talk three significant leaders of local peace committee over the matter of picking up the victims to the army camp stands proved.

350. P.W.16 next narrated how they made approach to accused Alim in Joypurhat for release of the detained victims and the outcome of their efforts. In narrating this material part of the charge, P.W.16 stated that as per their[three local peace committee leaders] instructions, his cousin [Kashem] went to Joypurhat and met Abdul Alim[accused] at the peace committee office set up at Shaonlal Bajla's 'gadighar'. But Alim Shaheb told his cousin that there were allegations against them that all of their family members were either freedom fighters or organizers of Liberation War; the army had picked them up and would not release them; rather efforts were on to cause arrest of others too. On hearing it Kashem had returned home in evening and all of their family members knowing the feedback hastily left home and took shelter at a nearby village.

351. In respect of last part of narration enumerated in the charge P.W.16 stated that on the same day around 6:30pm or 7:30pm, they had heard gunshots from the end of *Kali Saha's* pond. With this their family understood that the detainees [three uncles' of the witness] and others had been killed. Then they had left the country and took refuge in India until the war of liberation ended.

352. P.W.16 added that on their return to home from India, they by collecting information identified the killing spot at Kali Saha's pond and they reburied his killed uncles with proper funeral rites exhuming the bodies from a mass grave. P.W.16 also stated that from Alam Mondol[now dead] of village Radhabari adjacent to 'Kali Saha's pond' they became aware as to how the four detainees including Abdul Kader Mondol of Domdoma village were gunned down there on 26 may 1971 at about 06:00 pm.

353. P.W.18 Mostafizur Rahman [57], the son of victim Ilias Uddin Sarder, testified that on 26 May 1971 at around 11 AM, the Pakistani Army accompanied by Peace Committee and Razakar members came to his uncle's house. With this he went hid himself in a nearby bush along with his cousin Mahbubur Rahman [PW-16], Bazlar Rahman and other villagers. Soon after, two Biharis named Ahmed Koshai and Rashid announced that the Army had come there to form the peace committee and therefore everyone should return to their respective homes. Then they came back to their house but his father Ilias Uddin Sardar, uncles Yusuf Uddin Sardar and Yunus Uddin Sardar, and some other elderly people were then taken away by the Pakistani Army. With this his cousins

Mahbubur[P.W.16] and Bazlar following them secretly found that Ilias, Yusuf, Yunus and others [victims] were kept detained at the Balighata Union Parishad office, which was then being used as a camp for army and Razakar forces.

354. P.W.18 corroborating P.W.16 has stated that three Peace Committee members advised the witness' cousin, Abul Kashem Sardar, to go to Abdul Alim for help in getting their relatives released. Abul Kashem Sardar went to Alim [accused] and approached for their release. But Alim told that they [detained victims] would not be released because they supported the independence movement.

355. On cross-examination, P.W.18 stated that he could not say whether anybody accompanied Kashem when he went to meet Alim in Joypurhat. With this it has been rather re-affirmed that Kashem had gone to Alim to make request for release of the detained victims.

356. Next, P.W.18 stated that on returning home [from Joypurhat] his cousin Kashem informed of it[feedback of meeting accused Alim] and on the same day at around 6:30 pm he[P.W.18] heard gunshots from a nearby location that was used by the Pakistani Army as a killing site. They presumed that it was their family members who were being killed. P.W.18 stated that they, being panicked, deported to India and took refuge at a camp there.

357. On cross-examination P.W.18 has re-affirmed that the place near 'kali Saha's pond' was the killing spot. It has not been denied even that the father of P.W.18 and his uncles were taken away from their house on the date and in the manner by the army in active collaboration of local peace committee members and Razakars

358. On returning home [after independence] from India they gathered information of the precise spot where the killing had taken place. He said that he unearthed his family members' bodies from the mass grave in order to rebury them with proper funeral rituals.

Deliberations

359. The learned prosecutor Mr. Rana Das Gupta submitted that each part of the event narrated in this charge has been proved by evidence made by eye witnesses. They have narrated how the victims were captured and where they were brought and kept detained till the relative of victim had met accused Alim in Joypurhat seeking his decision for release of the detained victims. Defence could not impeach their testimony.

360. The learned defence counsel, on contrary, argued that the accused was in no way involved with act of capturing and detaining the victims and he is not alleged to remain present at the crime site. Evidence of P.W.16 and P.W.18 cannot be relied upon as they made discrepant versions on material particular. Mere making alleged approach to Alim for release of detained persons does not create any nexus between him and the criminal acts of capturing and detaining the civilians and alleged non response to such approach by the accused cannot be considered to have abetted and substantially contributed to the commission of the killing.

361. It is true that accused Alim did not physically participate to the crime. But eventually fate of the detained victims was decided by the act of ‘inaction’ of accused Alim when he refused to act positively for their release on approach made to him. Such act of ‘inaction’ encompasses a significant act on part of the accused that substantially facilitated the actual accomplishment of the crime of murder and thus accused cannot be absolved of responsibility.

362. The Tribunal notes that the first part of the event that relates to capturing the victim from their house and taking them to Balighata UP camp and keeping them detained there has been proved by the corroborating and reliable evidence of P.W.16 and P.W.18. We do not find anything to distrust their testimony made in this regard. Defence even could not dislodge this material fact in any manner. Rather, this part of the event remains totally undenied in cross-examination.

363. Another material fact that Kashem met and had talked three local significant leaders of local peace committee over the matter of picking up the

victims to the army camp stands proved by the corroborating description of the P.W.s.

364. The pertinent fact of meeting and talking with accused Alim in Joypurhat Peace Committee office set up at Shaonlal Bajla's 'gadighar' and the fact that on approach made by Kashem, accused Alim had told him that there were allegations against them that all of their family members were either freedom fighters or organizers of Liberation War; the army had picked them up and would not release them; rather efforts were on to cause arrest of others too, as stated by P.W.16, appear to have been simply denied. But the defence, as it appears, did not attempt to refute it by cross-examining P.W.16. Thus it stands proved that despite approach made to him for release of detainees accused Alim had shown inaction on his part and he rather by his utterance had made himself part of the entire event.

365. True, that P.W.18 did not state it to the IO that on advice of three local peace committee leaders Kashem had gone to meet accused Alim in Joypurhat. But it does not materially affect the essence of testimony made by P.W.18 on material particular i.e on fact of making approach by Kashem to accused Alim. Besides, from evidence of P.W.16 it stands proved that Kashem had gone to accused Alim to make approach for release of his detained uncles. Rather the version made by P.W.16 on this material particular remains totally undenied even in cross-examination. As a cousin brother and son of a detained victim P.W.18 had reasonable and fair opportunity of being aware of the fact of approaching accused Alim and feedback thereof.

366. Advice given by three local peace committee leaders to make approach to accused Alim for release of detainees, as stated by the P.W.16 is a fair indicative as to position of authority of accused Alim, by virtue of his leadership in Joypurhat peace committee. We have already found that the detainees were captured by the army on identification, in cooperation from the Razakars.

367. Selection of targets was thus designed by the local collaborators over whom the accused, for the reason of his significant position and authority, had effective control by dint of which he could make necessary initiation for release of the detainees, on approach made to him by Kashem to prevent the crime. But

accused Alim deliberately ‘inacted’ to the approach for the reason that they were either freedom fighters or organizers of Liberation War and thus by his act of ‘omission’ and ‘inaction’ forming part of the ‘attack’ the accused Alim has incurred responsibility of abetting and substantially contributing to the actual commission of the killing of 04 unarmed civilians.

368. We are not convinced with the defence argument that mere ‘inaction on part of the accused cannot connect him with the event of killing, for the reasons above. In some circumstances even such ‘inaction’ is considered as an act forming part of attack when it is found proved that the accused had a position of authority or domination over the principals. Admittedly accused Alim was a local elite and a leader of Convention Muslim League having profile of a legal practitioner too in Joypurhat.

369. In the case in hand, we have already recorded our reasoned finding that the accused Alim was a potential leader of peace committee and had set up its office at Shaonlal Bajla’s ‘*gadighar*’ in Joypurhat and used to provide navigational services to the peace committee members, Razakar and the army in carrying out their activities. Naturally, the peace committee members, Razakars, in carrying out their activities and taking decision in respect of the fate of the detained civilians they were dependent upon the accused Alim, as perceived from circumstances revealed.

370. It is the only reasonable inference that can be made from the totality of the evidence that by an act of ‘inaction’ that encompasses endorsement or approval the accused consciously and knowing the foreseeable consequence refused to prevent the crime. Instead of preventing the commission of crimes, the accused who had effective control over the peace committee members and Razakars, rather approved its commission by his act of inaction and thus he incurs liability also under section 4(2) of the Act of 1973.

371. It may reasonably be presumed that only after refusal by the accused Alim, on approach made by Kashem, on the same day at about 06:00 pm the detained persons were gunned down. We have found that the persons were captured at about 11:00 am and were taken to a camp of army and Razakars which was

nearer to the victims' home. The detained victims could have been slaughtered instantly they were taken to the camp. But causing their death by gunshot was accomplished about seven hours after their capture and 'refusal' of accused Alim to respond for release of detainees as approached by Kashem lead us to an unerring conclusion that surely on getting signal from accused Alim or considering his [accused] 'inaction' as a 'signal' or 'approval' the principals eventually killed the detained victims at about 06:00 pm.

372. Capturing the victims from their home and taking them to army camp, first approach made to three local leaders of peace committee, next on their advice Kashem had gone to accused Alim in Joypurhat to make request for release of the detained victims, inaction on part of accused Alim, thereafter killing of detained victims on the same day in evening at a place near 'Kali Saha's pond', fleeing the family members of the victims, being frightened, to India --- all these facts proved beyond reasonable doubt are chained together.

373. On total evaluation of evidence of P.W.16 and P.W.18 on these material and relevant facts we get a frightening portrayal of a systematic attack directed against unarmed civilians who belonged to pro-liberation ideology and this was the reason of omission or inaction on part of accused Alim, despite his authority to prevent the actual commission of offence. Behaviour of an accused even may in fact clearly constitute instigation or abetment to the perpetrators of the crime. It is now settled that 'abetment' or 'instigation' may arise from a positive act or a culpable omission. Accused Alim could have acted, by virtue of his position of authority, to get the victims released. But he by his act of 'omission' or 'inaction' abetted, substantially contributed, provided moral support and encouragement to the actual perpetrators and thereby facilitated the perpetration of the offence of killing. . Therefore, the accused Md. Abdul Alim is found **guilty** for the offence of murder [of 04 civilians] as crime against humanity enumerated in section 3(2)(a)(g) of the Act of 1973 and thus the accused Md. Abdul Alim @ M.A Alim incurs criminal liability under section 4(1) of the Act of 1973.

Adjudication of Charge 08 **[Genocide: Killing of 10 civilians of Hindu Community or religious Group]**

374. Summary charge: On any day of last part of May during the period of War of Liberation in 1971, the accused Md. Abdul Alim, being the local influential leader of Razakar Bahini as well as the chairman of local peace

committee and or member of group of individuals, accompanied by Pakistani army Major Afzal and other accomplices belonging to peace committee and Razakar Bahini came to the place known as ‘Uttarhat Shahor’ under ‘police station ‘*Khetlal*’ and arranged a meeting attended by 500/700 audiences where the accused Md. Abdul Alim made inciting speech that “ the Hindus would not be forgiven(হিন্দুদের ক্ষমা করা যাবেনা। এদের যা পাও লুট করে নাও) and also encouraged to loot whatever they (Hindus) had. Following such inciting speech made by the accused the members of peace committee and Razakar Bahini along with Pakistan army at the end of May raided ‘*Hindu Palli*’, ‘Uttarhat Shahor’, ‘*Harunjahat*’ and surrounding area and launched attack targeting ‘Hindu community’, with intent to destroy it, either whole or in part and started damaging and looting their properties and houses. 10 Hindu civilians including Badal, Shachin @ Vanu, Bishu, Probas Chandra Sheel, Monibhushan Chakravarti, Kartik Chandra Barman, Nimai Chandra were apprehended and brought to Khetlal Sadar, with intent to kill them. Thereafter, they were brought to office of the peace committee located at the ‘*gadi ghar*’ of Shaonlal Bajla where you M.A Alim ordered to kill them and accordingly all of them were killed at a place *Khanjanpur Kuthibari Ghat.*. Therefore, accused Md. Abdul Alim has been charged for substantially abetting, inciting and contributing to the actual commission of offence of killing members of a group i.e Hindu community which is an offence of genocide as specified in section 3(2) (c) (g) of the Act which are punishable under section 20(2) read with section 3(1) of the Act. And the accused is thus liable for the above offences under section 4(1) of the Act.

Witnesses

375. Prosecution examined three witnesses namely P.W.1 Abdul Momen, P.W.3 Md. Nurul Islam and P.W.11 Dilip Kumar Chakravarty, to prove the event narrated in charge no.8. Of them P.W.1 and P.W.3 claim to have witnessed the event of attack as far as they can and taking away the Hindu civilians to Khetlal army camp. P.W.11 was a resident of crime village which was mainly Hindu populated. According to the charge framed the atrocious attack was perpetrated by the gang of members of peace committee and Razakar Bahini along with Pakistan army.

376. The accused Alim is not alleged to have accompanied the gang of attackers to the crime site wherefrom they captured Hindu civilians who were first brought

to Khetlal and then to the office of peace committee in Joypurhat or physically participated to the commission of the crimes alleged. He has been arraigned of inciting abetting and contributing to the commission of the crimes, by his act and speech.

377. Prosecution thus is required to prove that accused Alim made such encouraging and inciting speech; the perpetrators being substantially encouraged by it launched attack and apprehended 10 civilians; the detainees were brought to accused Alim at peace committee office in Joypurhat; that the accused ordered to kill the detainees and thus the actual commission of crime was effected with intent to destroy the Hindu community or group, either whole or in part. That is to say, first, the cause effect relationship between such 'speech' and the event of attack directing the Hindu community is to be established, for holding the accused responsible for his act forming part of attack. However, keeping these aspects in mind let us look to what the witnesses have testified, in relation to charge no.8.

Evidence

378. P.W.1 Abdul Momen[71] a resident of village *Tarakul* under police station Khetlal stated that a few days before the Eid-ul-Fitr in 1971, Abdul Alim and Major Afzal, a Pakistan army official responsible for Joypurhat during the war of liberation came to *Hatsahar Hat* in Khetlal [now upazila] around 3:00pm on a four wheel drive vehicle. The Pakistan army, Razakars and local *Shanti Committee* [peace committee] leader Mohammad Ali and Soleman Member were present there too. Around 500-600 peace committee members of the union and thana levels were there. Major Afzal addressed them in Urdu and Abdul Alim [accused] translated his speech in Bangla and later Abdul Alim also addressed them and in his speech, he [Alim] said that they would offer their upcoming Eid prayers at the *Garer Math* in Kolkata [apparently wishing to occupy some parts of India during the war] and said '*loot all properties of the Hindus*'.

379. P.W.1 further stated that he had heard Alim's [accused] speech 30-40 yards away from the meeting spot. But he [P.W.1] could not recall the exact date of the meeting.

380. Connecting the said inciting speech allegedly made by the accused Alim with the commission of the attack targeting the Hindu civilians P.W.1 stated that

seven or eight days after the said meeting, he[P.W.1] went to the house of Paban Babu of Hatsahar Hindu Palli [হাটশহর হিন্দু পল্লী] in the morning and heard that the Pakistan army, Razakars and Shanti Committee members had laid siege to Hatsahar village and the Pakistan army picked up Badal, Sachin, Bhanu, Bishu, Pravash Chandra Sheel, Manibhushan Chakravarty, Kartik, Nitai and Prionath from there and took them to the office of Khetlal Shanti Committee at Puratan Dakterkhana [পুরাতন ডাক্তারখানা] in the Hospital area where they were subjected to torture.

381. P.W.1 also stated that the detainees were brought to accused Alim at the peace committee office in Joypurhat where he [accused] coming out of the office ordered to kill the detainees and accordingly they were brought to Khanjanpur Kuthibari and were killed there by the army and peace committee members.

382. P.W.3 Md. Nurul Islam [68] was the Assistant Head Master of Akhlas Shibpur Shyampur Secondary School under Khetlal police station in 1971. He was the president of National Awami Party [Mozaffar], Khetlal thana unit. He narrated the event of capturing Hindu civilians from the crime village by launching attack and taking the detained civilians first to Khetlal army camp set up at a local high school and that there from they were taken to Joypurhat. According to him, he witnessed all these acts forming attack directing the Hindu community.

383. P.W.3 Md. Nurul Islam [68] stated that the Pakistani army rolled into Khetlal in the month of May and they set up a camp at a local high school. At the end of May 1971, he being accompanied by Professor Abdur Rashid [now dead] moved to the Hindu villages under Khetlal police station, to see what happened at village *Harunjahat*, *Uttarhat* and other Hindu villages. On their way, at a southern part of *Harunjahat* they saw the army, peace committee members, Razakars entering into the village *Harunjahat*. It was about 10:00 am. Remaining in hiding there he [P.W.3] came to know the atrocious activities of looting, destruction, setting the houses ablaze and creating climate of horror; that a group of the attackers captured Badal and Sachin from *Harunjahat*. He [P.W.3] then moved towards village *Pakuria* wherefrom he [P.W.3] saw the Pakistani army, peace committee members and Razakars approaching towards Khetlal bringing

Probhas Chandra Sheel, Monibhusan Chakravarty, Kartik Barman, Nimai Chandra, Prionath barman, Badal, Sachin and others with them on capture.

384. P.W.3 stated that on seeing the gang of attackers moving towards Khetlal by taking the detainees with them they [P.W.3 and Professor Abdur Rashid] started following them and finally they found that the detainees were taken to the peace committee office set up at Khetlal Charitable dispensary. They [P.W.3 and his companion] could hear the screaming of the detainees. About one hour after the detainees were brought to Joypurhat by a jeep. Later on he came to know that after bringing them to the peace committee office at Shaonlal Bajla's 'gadighar' in Joypurhat where on instruction of accused Alim and army men the detainees were taken to 'Khanjanpur Kuthibari' where they were killed and buried .

385. The fact seeing the taking of victims Nimai Chandra, Kartik Barman and others, on capture, by the army and Razakars from the village *Pakuria*, as stated by P.W.3 appears to be re-affirmed in his cross-examination. It makes the reliability of P.W.3 and proves the fact of capture and taking away of Hindu civilians to Khetlal army camp. Defence however could not refute the material fact that afterwards the detained Hindu civilians were brought to Joypurhat peace committee office.

386. P.W.11 Dilip Kumar Chakravarty[59] a resident of the crime village '*Harunjahat*' [হারুনজাহাট] stated that around 9:00am on a day of May, 1971, possibly the ninth of Bangla month *Jaistha*, Pakistani army, local peace committee members and Razakars attacked the village and tortured the civilians and people and looted their belongings. They [Pakistani army and their local collaborators] carried out such atrocities with intent to destroy the Hindu community on religious vengeance.

387. P.W.11 went on to state that he [P.W.11] took shelter near a bush to save his life and observed their [attackers] activities and movement and around 10:30am, he heard the screaming and saw plumes of smoke from neighbouring *Harunjahat* [হারুনজাহাট] village. After some time, he heard that Pakistani army was taking away five people from their village towards Hatsahar Hat and he and one Saidur [now dead] saw that the captured people were his uncle Monibhusan Chakravarty, his neighbour Provash Chandra Sheel, Nimai

Chandra, Kartik Chandra Barman and Prionath Barman. Meanwhile, another group comprising of the Pakistani army, Razakars and peace committee members joined the former group at *Hatsahar hat* bringing 05 civilians with them, on capture from village Harunjahat, of whom he could recognise Badal and Sachin. Then they [group of attackers] moved towards Khetlal with those 10 captured Hindu civilians. He[P.W.11] and Saidur then started following them and found that the captured civilians were taken to peace committee office at Khetlal and they heard the screaming of the detainees from 300 yards away from the peace committee office.

388. Defence could not refute the above version relating to capture of 10 Hindu civilians by launching attack by the groups comprising of army, Razakars and peace committee members and taking them to Khetlal peace committee office and afterwards bringing them to accused Alim at Joypurhat peace committee office by a pickup van. Rather , the event and making provoking speech by accused Alim seven days before the event took place has been reaffirmed as P.W.11, in reply to question put to him, in cross-examination, stated that he could not recollect the exact date of said meeting that was held 7/8 days before the event.

389. P.W.11 further stated that after some time, the 10 detainees were put inside a pickup van and a Razakar and Peace Committee member asked its driver loudly to 'produce the 10 before Alim [accused] in Joypurhat peace committee office. Afterwards, he [P.W.11] and Saidur on returning home described what they witnessed with their family members and others.

390. P.W.11 stated that the 10 detainees never returned to their village and on the next day he heard that the Pakistan army either killed or arranged their deaths at '*Khanjanpur Kuthibari ghat*' following the order of Alim and buried them there. Defence could not dislodge the above version. It remained undenied too that the detainees were taken to '*Khanjanpur Kuthibari*, in Joypurhat on accused Alim's order and were killed there.

391. P.W.11 also stated that seven or eight days before that event, Alim [accused] and Pakistani Major Afzal addressed a meeting at village *Hatsahar Hat* [হাটশহর হাট] with peace committee members and Razakars and around 500-

600 people joined that meeting. In his speech, Abdul Alim [accused] asked to loot whatever belongings the Hindus had. They heard him [accused Alim] in the loudspeakers from their house. After the said killings, 100-150 Hindu people including his [P.W.11] family members deported to India.

Deliberations

392. Learned prosecutor Mr. Rana Das Gupta argued that being substantially encouraged and provoked by the inciting speech of accused Alim the perpetrators raided the attack directing the Hindu dominated villages, with intent to destroy the community or religious group in part that resulted in destructive activities together with apprehending Hindu civilians who were first brought to Khetlal and then to the office of peace committee set up at Shaonlal Bajla's '*gadighar*' in Joypurhat where on Alim's [accused] order detained 10 Hindu civilians were brought to a place known as *Khanjanpur Kuthibari ghat* by the principals and they killed them there.

393. The learned Prosecutor went on to argue further that the acts of accused Alim before and after capture of the Hindu civilians formed part of attack directing Hindu community and in conjunction with the event the perpetrators committed destructive activities which together with the event of killing of 10 Hindu civilians of the crime villages forced to deport 100-150 Hindu civilians to India. Such atrocious activities were carried out with intent to destroy the Hindu community, in part and accused Alim substantially abetted, contributed and incited to the actual killing of 10 Hindu civilians which constituted the offence of 'genocide'.

394. P.W.3 and P.W.11, the eye witnesses have proved the event of attack, capturing 10 civilians, bringing them first to Khetlal and there from to the accused Alim at the peace committee office in Joypurhat. The fact of killing the detained victims at Khanjanpur Kuthibari, in Joypurhat remained unshaken. All these circumstances together with the evidence adduced prove it beyond reasonable doubt that the accused Md. Abdul Alim, by his act of making provoking speech incited the perpetrators to target Hindu community and thus he substantially abetted and contributed the principals.

395. On contrary, the learned defence counsel submitted that it was not probable to listen the alleged speech of accused Alim from a distance far from the meeting place and thus statement of P.W.3 and P.W.11 are not reliable. Neither of those witnesses claim to have witnessed where the detained persons were brought from Khetlal and they did not see the actual accomplishment of the alleged killing and accused's involvement with it. P.W.1 cannot be relied upon as he claims to have heard the alleged speech of Alim few days before the Eid-ul-Fitre in 1971 and seen the event seven days after the said speech. It will appear that 'few days before Eid-ul-Fitre in 1971' corresponds to middle part of November 1971. But the charge framed describes that the event took place in last part of May, 1971.

396. The Tribunal notes that the charge involves four parts—**(i)** making inciting and provoking speech by accused Alim **(ii)** following such inciting speech the attackers comprising of army peace committee members, Razakars had launched attack directing Hindu dominated village wherefrom they captured 10 Hindu civilians and took them to Khetlal camp **(iii)** On the same day the detained 10 Hindu civilians were brought to accused Alim at the peace committee office set up at Shaonlal Bajla's *gadighar* when Alim ordered to kill them **(iv)** finally the detained civilians belonging to Hindu community were killed at a place known as *Khanjanpur Kuthibari ghat* by the principals.

397. The event alleged took place in last part of May, 1971. But P.W.1 claiming him to be an eye witness narrated that the event of meeting where accused Alim allegedly made provoking speech was held few days before Eid-ul-Fitre in 1971 and the event of attack that resulted in capture of 10 Hindu civilians took place seven days after such speech. It appears that Eid-ul-Fitre in 1971 corresponds to mid of November 1971.

398. Due to memory loss one may not be able to recollect the exact date or time of an atrocious event that took place four decades ago. But variation of about six months is not a mere inconsistency occurred due to memory failure. P.W.1 also stated that he could not recall the exact date of the meeting. However, P.W.1 ended his examination-in-chief by stating the final sentence that the event might have taken place in the month of May. But it appears from the statement of the IO, the P.W.35 that P.W.1 narrated the event claiming to have taken place before the Eid-ul-Fitre.

399. Deviation of six months is not a mere inconsistency. For the reason of above statement glaringly contradictory to the month of the event described in the charge cannot be relied upon. In this regard we find substance in what has been submitted by the learned defence counsel. The testimony made by P.W.1 so far as it relates to seeing and hearing the meeting and experiencing the event cannot be safely relied upon.

400. Also for the above reason, the statement made by P.W.3 in respect of his going to the peace committee office of Joypurhat set up at Shaonlal Bajla's gadighar where he found accused Alim giving order, coming out of the office, to kill the detained civilians does not appear to be reliable.

401. Besides, the alleged event took place at the last part of May, 1971 while according to P.W.1, he witnessed the accused delivering speech and afterwards giving order to the perpetrators to kill the detainees when they were brought to him [accused] at peace committee office in Joypurhat. P.W.1 claims to have witnessed the accused giving order to kill the detainees. It is a very vital piece of fact. If really P.W.1 witnessed it surely he would have stated it to IO. But he did not make any such statement to the IO. This is a grave omission on material particular and thus a glaring contradiction.

402. P.W.1 claims that accused Alim ordered to kill the detainees when they were brought to the peace committee office in Joypurhat. But it is not clear as to how he became aware of this material fact. Besides, it appears that the IO [P.W.35] while contradicting to the above piece of evidence of P.W.1 has stated that he [P.W.1] did not state it to him.

403. It is true indeed that earlier statement made to IO is not 'evidence' and only sworn testimony is to be evaluated. Rule 53(ii) of the ROP of the ICT-2 provides provision that the accused shall be at liberty to take contradiction of the evidence given by a witness. Intent of such Rule is to assess truthfulness and credibility of evidence presented before the Tribunal. In absence of any reasonable explanation we consider such omission to be a glaring and fatal contradiction on material particular. P.W.1, to our cautious consideration, has made intelligent

improvement and embellishment on material particular. It would not be safe to act and rely upon this piece of evidence incriminating the accused.

404. However, from the corroborative testimony made by P.W.3 and P.W.11 it has been proved that following provoking speech made by accused Alim, few days before the event took place, the group of perpetrators comprising of army, peace committee members and Razakars capture 10 Hindu civilians from the crime villages and brought them first to Khetlal army camp set up at a local high school and that there from they were taken to Joypurhat peace committee.

405. According to P.W.11, an eye witness, stated that some time after taking the 10 detained civilians to Khetlal camp they were put inside a pickup van and a Razakar and Peace Committee member asked its driver loudly to 'produce the 10 before Alim[accused] in Joypurhat peace committee office. Afterwards, he [P.W.11] and Saidur on returning home described what they witnessed with their family members and others. This version remained unimpeached in cross-examination. We do not find any reason to disbelieve P.W.11

406. It stands proved by the evidence of P.W.11 who testified that seven or eight days before that event, Alim [accused] and Pakistani Major Afzal addressed a meeting at village *Hatsahar Hat* [হাটশহর হাট] with peace committee members and Razakars and around 500-600 people joined that meeting. In his speech, Abdul Alim [accused] asked to loot whatever belongings the Hindus had. They heard him [accused Alim] in the loudspeakers from their house

407. The event of attack and making provoking speech by accused Alim seven days before the event took place has been rather re-affirmed as P.W.11, in reply to question put to him in cross-examination, stated that he could not recollect the exact date of said meeting that was held 7/8 days before the event.

408. Asking to '**loot whatever belongings the Hindus had**' by making speech in public is indeed inciting particularly when an individual like accused Alim had made it. Because, accused Alim was a local elite and a legal practitioner, potential leader/ chairman of Joypurhat peace committee having significant position of authority on peace committee members and Razakars and he had active association with the army. Naturally his[accused] speech, in other words,

urging to destroy the Hindu community was inciting and provoking and it had substantial effect on launching the attack directing Hindu community which was a distinct 'religious group' as well. We are thus convinced to conclude that the accused Alim by his act of making such inciting speech intended to share the genocidal intent of the principals.

409. As regards act and conduct of the accused Alim, before the event P.W.11 stated that at around 0-3:00 noon on a day seven or eight days before the event of attack, Alim[accused] and Pakistani army Major Afzal addressed a meeting at Hatsahar Hat with Peace Committee members and Razakars and around 500-600 people joined that meeting. In his speech, Abdul Alim [accused] asked the audience to loot the belongings of the Hindus. He [P.W.11] heard his [accused] speech made through the loudspeakers from their house.

410. The above piece of version remained unshaken. We disagree with the argument by the defence that since this piece of statement was not made to IO it being contradiction deserves no consideration and can be relied upon. It is found that on cross-examination on this issue P.W.11 has re-affirmed by replying to question elicited to him that he could not say the exact date of meeting of accused Alim with peace committee members that was held 7/8 days before the event took place. Date of holding meeting may not be memorized. The essence of evidence of P.W.11 is that 'a meeting was held 7/8 days before the incident had happened when accused Alim made an inciting and provoking speech and the audience were peace committee members.

411. P.W.3 had heard of capturing Badal and Sachin by a group of army, peace committee members and Razakars. However, he [P.W.3] saw the army, peace committee members and Razakars taking the other detainees to Khetlal. On cross-examination, P.W.3 has re-affirmed it by stating that he saw the Pakistani army and Razakars taking the detainees i.e. Probhas Chandra Sheel, Nimai Chandra, Fani Bhusan Chakravarty, Kartik Barman, Prionath from village *Pakuria*.

412. It has also been re-affirmed, on cross-examination, by the P.W.3 that he and some other locals namely Shamsul, Lutfar Master [now dead] and others could hear the screaming of detainees from the 'charitable dispensary' [camp of army

at Khetlal]. Thus, the fact of capturing Hindu civilians from the crime village and taking them to Khetlal camp and causing torture to the detainees there are found to have been proved by the evidence of P.W.3. We do not find any reasonable ground to discard what the P.W.3 has stated on material particular.

413. Now the question comes forward as to whether the 10 detained Hindu civilians were brought to accused Alim at peace committee office in Joypurhat. It is proved from evidence of P.W.11 that he and one Saidur had followed the group of perpetrators when they were taking 10 captured Hindu civilians to Khetlal and thus they had occasion to witness the subsequent activities carried out by the group of attackers. As regards taking the 10 detainees to Joypurhat P.W.11 testified that some time after taking the victims at Khetlal camp the 10 detainees were put inside a pickup van and a Razakar and Peace Committee member asked its driver loudly to 'produce the 10 before Alim[accused] in Joypurhat peace committee office. It remained unshaken.

414. Thus it has been proved that the 10 detained Hindu civilians were brought to accused Alim at the peace committee office set up at Shaonlal Bajla's 'gadighar' in Joypurhat. Defence does not dispute that the detainees were killed at 'Khanjanpur Kuthibari' in Joypurhat. Testimony of P.W.3 so far as it relates to what happened to the detainees in Joypurhat and on whose order they were killed is hearsay. P.W.3 stated that later on, he [P.W.3] heard that the detainees were taken to peace committee office in Joypurhat where on order of accused Alim and the army the detainees were taken to 'Khanjanpur Kuthibari' and were killed. This part of anonymous hearsay evidence needs to be corroborated by 'other evidence'.

415. Defence does not dispute the event of attack directing Hindu dominated village causing destructive activities including looting, burning houses and picking up Hindu civilians from the crime village. Defence could not refute the fact of taking the detained 10 Hindu civilians from the crime village to Khetlal [army camp set up at a charitable dispensary]. P.W.3 stated the event up to the stage of bringing the 10 detained Hindu civilians to *Khetlal*, on his own knowledge.

416. But the testimony made by P.W.3 on the ending sequences of the event i.e taking the detainees to Joypurhat peace committee office; accused Alim ordered to kill the detainees and then they were killed at a place Khanjanpur Kuthibari is 'hearsay'. But from the evidence of P.W.3 it reveals that the defence could not dislodge the material fact that the 10 detained Hindu civilians were brought to Joypurhat peace committee office from Khetlal, on the same day.

417. Why the detained persons were brought to the accused Alim? The detained civilians could have been executed instantly or after taking them to Khetlal camp, if they intended to do so. But it was not done. The principal perpetrators had to seek decision from accused Alim who had effective and significant authority and control on them. Presumably, one thing is clear that even the army persons participating in launching the attack were also in need of 'approval' of the peace committee of Joypurhat to decide the '*fate*' of the detainees, on '*assessment*' by accused Alim. We unerringly conclude that this was the reason why the detainees were brought to Joypurhat peace committee office.

418. The Tribunal notes that D.W.1 has also stated that in 1971, persons detained by the Pakistani army could be released on intervention of the 'peace committee'. This circumstance on material particular inevitably offers corroboration to the hearsay version of P.W.3, made in this regard. Thus, we get strong and of course a fair indication that principally the peace committee of Joypurhat had a significant and potential authority to the accomplishment of atrocious activities carried out by the army in collaboration with local thugs belonging to Razakar and peace committee. Now the question comes as to how the Joypurhat peace committee and its leader/chairman accused Md. Abdul Alim played decisive role on such matter?

419. We have already recorded our reasoned finding that the accused Alim was a potential leader/chairman of Joypurhat peace committee and had substantial influence and position of authority or domination over the peace committee, Razakars and even in some case on the army who used to opt seeking 'decision' or 'assessment' from accused Alim. Indisputably, accused Alim despite being a potential leader/chairman of Joypurhat peace committee failed or inacted to prevent the crime when the detained Hindu civilians were brought before him. Rather he approved and endorsed their execution and thereby he abetted and

contributed to the actual commission of the crime. In this way accused Alim also incurs liability under section 4(2) together with section 4(1) and it may be taken into account as an aggravating factor only.

420. The Tribunal is authorized to considering both forms of responsibility in order to have a full reflection about the culpability of the accused in light of the facts. But however, ‘cumulative convictions’ under both liabilities is impermissible if for the same conduct. Incurring liability under civilian superior responsibility together with individual criminal liability aggravates accused’s culpability which may be considered in awarding sentence.

421. On evaluation of evidence of P.W.3 and P.W.11 we conclude that the prosecution has been able to prove that the accused Alim made inciting speech for targeting Hindu community, before the event of attack took place and the 10 Hindu civilians were captured by the group comprising army peace committee members and Razakars and they brought them first to Khetlal camp wherefrom they took them to accused Alim in Joypurhat for his ‘assessment’ and ‘decision’ and finally on his[accused] ‘decision’ or ‘order’ or ‘assessment’ the army and peace committee members took them to Khanjanpur Kuthibari and killed them.

422. The inciting speech made by accused Alim is a fair indicative that intent of targeting the Hindu community was to destroy it in part which is a constitutive element of the offence of ‘genocide’ and eventually he[accused] shared the intent of the principals. It remained undisputed that destructive activities were also carried out in conjunction with the event of attack and eventually 100-150 Hindu civilians had to deport to India as they became terrorized by such destructive and coercive activities targeting Hindu community, a particular religious group. Therefore, the accused Md. Abdul Alim is found **guilty** for the offence of genocide enumerated in section 3(2)(c)(g) of the Act of 1973 and thus he incurs criminal liability under section 4(1) of the Act of 1973.

Adjudication of Charge No. 09

[Killing of 15 unarmed freedom fighters]

423. Summary Charge: During the period of War of Liberation, on 14 June 1971 your accomplices belonging to the peace committee apprehended 15 youths suspecting them to be the ‘freedom fighters’ while they were on the way to Bogra through Akkelpur and were brought to the office of the peace committee

set up at '*gadighar*' of Mohanlal and kept them confined there. On being informed, the accused Md. Abdul Alim, being the local influential leader of Razakar Bahini as well as the chairman of local peace committee and or member of group of individuals, came there and then consulted Pakistani army Major Afzal at their camp set up at Mohan Lal's '*gadi ghar*' and decided to kill them. Following this decision the detained civilians were brought to village '*West Amatra*' and were tortured to death and then they were buried in a mass grave. Therefore, the accused Md. Abdul Alim has been charged for substantially abetting and contributing to the actual commission of offence of 'murder as crime against humanity' caused to pro-liberation unarmed civilians as specified in section 3(2) (a) (g) of the Act which are punishable under section 20(2) read with section 3(1) of the Act.

Witnesses

424. Prosecution, in order to prove the charge, has examined one witness i.e. P.W.2 Saidur Rahman who is a hearsay witness. In course of trial, prosecution by filing an application under section 19(2) of the Act prayed for receiving statement of a listed witness Md. Dulu Talukder made to the Investigation Officer, on the ground that subsequently he died. The Tribunal allowed the application as the contention made therein is covered by section 19(2) of the Act of 1973. Now, let us see how far the prosecution has been able to prove the alleged fact of killing of unarmed youths and involvement of the accused therewith.

Evidence

425. P.W.2 Saidur Rahman stated that on June 14, 1971, members of Akkelpur Shanti Committee[peace committee] captured 15 youths led by one Khokon Paikar when they were on way to Bogra[a neighbouring district] passing through Akkelpur. The peace committee members first took them to their local office. Accused Alim came there by train, on getting information and had a meeting with the peace committee members and decided to hand over the detainees to the Pakistani army. Alim then directed the army to cause torture to the detainees.

426. P.W.2 further stated that accordingly the Pakistani army took them [detainees] to Akkelpur Senior Madrasa premises where they were hung from trees and beaten with thorny branches of date trees. Afterwards, they were taken to *Amatra* village where they along with some locals were forced to dig their

own graves and the detainees were buried there after being shot dead. Khokon was killed and buried separately in the same village.

427. Listed witness **Md. Dulu Talukder** [subsequently dead] who was a resident of 'Amatra village' [where the detainees were killed] narrated what he witnessed by making statement to the IO. According to him, on 14 June 1971 around 04:00 pm he was near their house when he saw that Alim [accused], peace committee members, armed Razakars came there and apprehended him [Md. Dulu Talukder] and one Ramjan and they were taken to a place known as west 'Amatra' where he found 15 detainees having their hands and legs tied up. He [witness] could identify Khokon and Ashraful of the detained persons. They [group of perpetrators] forced them to dig ditch and after a short while the Pakistani army gunned them down in front of them and their dead bodies were buried in the grave they had digged. After burial of dead bodies in the mass grave they [witness and his companion] were released and thus they returned home.

Deliberations

428. Learned prosecutor submitted that the testimony of P.W.2 who is a hearsay witness has been corroborated by the statement of witness Md. Dulu Talukder [subsequently dead]. Md. Dulu Talukder and one Ramjan were taken to the crime site west Amatra where he found 15 detainees having their hands and legs tied up and he could identify two of detained persons who were Khokon and Ashraful. The fact of accompanying the perpetrators to the crime site, as stated by P.W.2 will appear to have been corroborated by the statement of Md. Dulu Talukder. Thus it patently proves that accused Alim, by his conduct, abetted and contributed to the actual commission of the crime.

429. On the other hand, the learned defence counsel argued that P.W.2 is a hearsay witness and his testimony remained uncorroborated by other evidence and as such reliance on his testimony cannot be placed, in finding the accused guilty.

430. The charge involves four parts. The event was started by apprehending 15 youths and bringing them to the peace committee office set up at the 'gadighar' of Mohanlal at Akkelpur by the peace committee members. The second part involves coming of accused Alim to that office. The third part involves

consultation with the Pakistani army Major Afjal and taking decision to kill the detainees. The last part involves bringing the detainees to the village 'west Amatra' where they were tortured to death and were buried in a mass grave.

431. The material fact as stated by P.W.2 is that the peace committee members first took the captured persons to the Akkelpur peace committee office where accused Alim came by train, on getting information and had a meeting with the peace committee members and decided to hand over the detainees to the Pakistani army. Alim then directed the army to cause torture to the detainees.

432. P.W.2 is a hearsay witness. But, as it appears, the above version made by this witness on material particular remained undenied and it could not be controverted in any manner by cross-examining him. It is now settled that 'hearsay evidence' is admissible if it is corroborated by other evidence and offers reasonable probative value. In respect of charge no.9 only one witness [P.W.2] has been examined. Since the Tribunal, on prayer initiated by the prosecution, received the statement of a listed witness named Md. Dulu Talukder, died subsequently, into evidence as warranted under section 19(2) of the Act of 1973 now such statement of this witness made to IO may lawfully be taken into consideration, for the purpose of adjudication of the charge no. 9 and also to see whether it corroborates the hearsay testimony of P.W.2.

433. Witness Md. Dulu Talukder is a eye witness and his statement which has been received into evidence under section 19(2) of the Act of 1973 corroborates the hearsay version in respect of taking the detainees to west Amatra village where they and some locals were forced to dig grave and afterwards the detainees were gunned down to death there by the army. It also depicts from the statement of eye witness Md. Dulu Talukder that accused Alim also accompanied the group of perpetrators to the crime site west Amatra village where the detainees were killed.

434. Statement of witness Md. Dulu Talukder impels another crucial matter that the killing was targeting selected civilians belonging to freedom fighters, the pro-liberation youths. Releasing the witness Md. Dulu Talukder and his companion Ashraful from the crime site after digging grave inevitably indicates that the attack was directed against the unarmed youths or civilians and thus they were so captured, detained, tortured and finally killed.

435. Thus it appears that accused Alim , in furtherance of common object, came at Akkelpur peace committee office and on holding meeting with the local peace committee members decided to hand over the detainees to the Pakistani army, as stated by the P.W.2 seems to have been corroborated by the relevant material fact that the accused Alim accompanied the gang of perpetrators to the crime site ‘west Amatra’, as narrated by the witness Md. Dulu Talukder[subsequently dead] in his statement which has been received under section 19(2) of the Act of 1973. .

436. On rational appraisal of evidence, the acts done on part of accused Alim are not found to be isolated. These formed part of ‘attack’. The Tribunal notes that it is possible to conclude that even a single act constituting the offence makes an accused culpable for the offence of crime against humanity. In this regard the ICTY has observed in the case of *Deronjic that*

“All other conditions being met, a single or limited number of acts on [the accused’s] part would qualify as a crime against humanity, unless those acts may be said to be isolated or random.”[*Deronjic, (Appeals Chamber), July 20, 2005, para. 109]*

437. It has been found from evidence that the alleged killing of 15 unarmed civilians took place as a part of systematic attack following concerted decision of accused Alim, his cohorts and the army. Crime against humanity is a ‘group crime’ and usually it happens by participation of several individuals who act in different manners. Thus there can be several perpetrators in relation to the same crime where the conduct of each one of them forming ‘attack’ fulfils the requisite elements to constitute the substantive offence.’

438. On cumulative evaluation of evidence of P.W.2 and the statement received under section 19(2) of the Act of 1973 of listed witness Md. Dulu Talukder [subsequently dead] impels an unerring conclusion that the accused Alim had actively participated to the actual commission of the killing of 15 civilians by his act of accompanying the gang of principals, taking decision to hand over the

detainees to the army with direction to kill them. Evidence and circumstances offer lawful indicative as to accused's conscious knowledge about the consequence of his acts forming part of the 'attack'.

439. After taking the detainees at the peace committee office of Akkelpur set up at Mohon Lal's 'gadighar' why the matter was informed to accused Alim and why he[accused] came there and gave decision to hand over the detainees to the army, on holding meeting with the peace committee members? These material and relevant facts offer adequate indication that the accused had a position of domination over the principals and he was in position to play a key and decisive role even as regards fate of the detainees.

440. The detainees could have been killed instantly after their capture by the army. But it did not happen. The killing rather took place in presence of the accused Alim at 'west Amatra' village which was witnessed by the witness Md. Dulu Talukder. Therefore, the accused Alim is considered to have participated in the commission of a crime as he is found to be 'concerned with the killing', by his culpable conduct and act. Accompanying the gang of perpetrators and remaining present at the crime site accused Alim rather provided tacit 'approval' and effective and substantial 'support' which tantamount to abetment to the commission of the offence of killing by the principal perpetrators.

441. Accused Alim, as it stands proved from evidence, remained with the group of perpetrators when it moved towards the crime site 'west Amatra'. This act of accused coupled with the act of coming to Akkelpur peace committee office, on getting information about the fact of detaining 15 civilians and taking decision to hand over them to the army had a substantial and encouraging effect to the actual commission of the offence, and thus he is viewed to have participated to the commission of crime. Because, it is assumed that the accused had neither withdrawn him from the group of perpetrators nor spoken out and did anything against the conduct and activities carried out by the group he accompanied.

442. We are thus convinced to conclude that the prosecution has been able to prove beyond reasonable doubt that after taking the detained civilians to Akkelpur peace committee office, on capture, accused Alim came there and

joined the group of perpetrators and accompanied them to the crime site where the detainees were killed. The discussion as made above suggests that conscious act and conduct of the accused Alim abetted, encouraged the principals in accomplishing the act of killing the detained civilians at west Amatra village and thus he[accused] shared the intent of the principals. It remained undisputed that the killing of 15 detained unarmed civilians took place on the date and place alleged. Therefore, the accused Md. Abdul Alim is found **guilty** for the offence of ‘murder’ enumerated in section 3(2)(a)(g) of the Act of 1973 and thus he incurs criminal liability under section 4(1) of the Act of 1973.

Adjudication of Charge No. 10 **[Genocide: 26 unarmed freedom fighters killing]**

443. Summary Charge: In one morning of last part of June, during the period of War of Liberation in 1971, 26 civilians[freedom fighters] were captured suspecting them to be freedom fighters and **were brought to western open site of Joypurhat Railway Station by a truck.** Thereafter, keeping some arms of their[detainees] own in front of them, the Pakistani army, members of peace committee and Razakar Bahini including the accused Alim and Major Afzal stood behind them. One Motasim Billah, owner of ‘Alokhela Studio’, as brought by the accused, took their photograph and thereafter, the accused consulted Major Afzal following which 26 detainees were taken to Joypurhat College and were killed. Therefore the accused Md. Abdul Alim has been charged for participating, substantially abetting and contributing to the actual commission of offence of ‘killing a group’ which is an offence of ‘**genocide**’ as specified in section 3(2) (c)(i) (g) of the Act which are punishable under section 20(2) read with section 3(1) of the Act.

Witnesses

444. Prosecution asserts that three witnesses have been examined to prove this charge. P.W.2 Md. Saidur Rahman and P.W.22 A.H.M Motasim Billah have testified some related and material facts which they claim to have witnessed. None of them claims to have seen the event of alleged killing. P.W.23 Md. Abdul Hye is eye witness who claims to have seen the accused Alim accompanying the group of perpetrators towards the crime site with the 26 detained civilians.

Evidence

445. P.W.2 Md. Saidur Rahman [67] narrated a material fact related to the alleged event which he claims to have witnessed. He [P.W.2] organised ‘Sangram Parishad’ [action committee] in 1971, in Akkelpur. During the latter part of June, 1971, when he[P.W.2] went to Joypurhat for some ‘action committee’ work, he saw Abdul Alim, Major Afzal , a Pakistani army official, and 26 civilians were having their photos taken at a place western side of Joypurhat Railway Station. Afterwards he [P.W.2] came to know that the photo was taken by Motasim Billah[P.W.22] , the owner of ‘*Alokhela Studio*’ and a copy of the photo was collected by one Abdul Hai, brother of martyred Fazlul Karim.

446. P.W.2 stated the reason which enabled him seeing what he has stated. It remained unshaken. The above version in respect of seeing 26 civilians detained at a place near the Joypurhat railway station and the accused Alim and Major Afzal had a photo with them there offers legitimate inference of accused Alim’s active, conscious and culpable nexus with the act of detaining those civilians. Defence could not dislodge this pertinent version by cross-examining the P.W.2, in any manner.

447. P.W.22 A.H.M Motasim Billah[79-80] the owner of ‘Alokhela Studio’ in 1971 came on dock to prove the alleged ‘photo’ he shoot during last part of June as asked by accused Alim. He[P.W.22] stated that during the last part of June 1971 at about 10:00 am Abdul Alim[accused], leader of Convention Muslim League and chairmen, peace committee came to his studio by a rickshaw and asked to go with him for taking photo of 26 ‘miscreants’ apprehended. With this he[P.W.22] taking his camera arrived at Joypurhat railway station with Alim[accused]. At a place western side of the railway station he saw 26 youths sitting having their hands tied behind and fire arms were kept in front of them. The Pakistani army were standing behind them having arms in hand and of them Major Afzal and one Mina Mokhles, a local Muslim League leader were also with them. Alim [accused] after standing with Major Afzal ordered him to take photo and he[P.W.22] complied it.

448. P.W.22 further stated that on the following day Alim [accused] procured three copies of the said photo with its negative. He[P.W.22] kept a copy of the said photo as extra with him that he had given to Mahatab Uddin Sarder[now dead], an Awami League leader, after independence and subsequently he[P.W.22] found the said photo published in a book titled “ *Ekattorer Ghatok Dalalra Ke Kothai, Shahriar Kabir*. P.W.22 has proved and exhibited [**Material Exhibit-I**] the photo published in the above book. On cross-examination, P.W.22 emphatically re-affirmed that the photo which he identified, though a bit illegible, is the photo that he took.

449. Defence could not impeach the above version on material particular. Rather it has been re-affirmed in cross-examination that he [P.W.22] was the owner of ‘Alokhela studio’ in Joypurhat and he himself took the alleged photo. Evidence of P.W.22 seems to be consistent to what he stated to the IO [P.W.35] as regards the fact of taking photo of the detained civilians, on accused Alim’s initiation.

450. P.W.23 Md. Abdul Hye[62] is eye witness to the entire event. He stated that during the last part of June 1971 he had been at a room of ‘chataal’ owned by his friend Idris Ali about 200/300 ‘haat’ [হাত] to the western side of Joypurhat railway station. On a day sensing running of some labourers of ‘chataal’ he came out of his room and saw some army and some people keeping about 26 civilians sitting in front of them having their hands tied behind and fire arms were kept in front of them[detainees].

451. At that time he [P.W.23] saw Alim [accused] coming there by a rickshaw along with a man having a camera in hand. It was about 11:00 am. Alim [accused] then stood by the side of an army officer and asked the man he[accused] brought with him to take their photo. Subsequently he [P.W.23] knew that it was Major Afzal with whom Alim stood for shooting photo.

452. P.W.23 went on to state that afterward he saw that after shooting photo the Pakistani army, Razakars, peace committee men were moving towards Joypurhat college with the detainees through the western road. On seeing this, he remained in a bit hiding and after a short while he came out and saw Major Afzal and Alim were moving forward with the detained civilians who were made assembled at

east-south part of the college and around 12:00 noon he [P.W.23] heard frequent gun firing for some time and thus they guessed that the detainees brought there were killed.

453. The above pertinent version relating to material facts including the fact of joining accused Alim the group of perpetrators who eventually brought the detainees to the crime site could not be controverted by the defence. It also appears that the version made by P.W.23 before the Tribunal seems to be consistent to what he stated to the IO [P.W.35] as regards taking photo of the detainees by the owner of studio 'Alokhela' Motasim Billah[P.W.22] as he was brought by the accused himself.

Deliberations

454. The learned prosecutor submitted that the facts of capturing 26 freedom fighters, taking photo of the detainees standing behind them with Major Afzal , on active initiation of accused Alim and afterwards accompanying the group in taking the detained persons to the crime site have been proved beyond reasonable doubt by the reliable witnesses. Conscious, deliberate and culpable act and conduct of accused Alim indisputably offers conclusion that he[accused] with intent to share the intent of the principals he joined the group of perpetrators, in furtherance of common object of liquidating the captured civilians[freedom fighters]. It is further submitted that the photo taken on initiation of accused Alim is the best evidence which speaks a lot including the fact of his belonging the group of perpetrators. The perpetrators targeted a particular group i.e group of freedom fighters, with intent to destroy this group and as such their killing constituted the offence of 'genocide'

455. On contrary, the learned defence counsel submitted that the alleged photo which is significantly illegible does not prove accused's presence with the group. P.W.2 is not a reliable witness. Prosecution claims that the detained persons were 'freedom fighters' , not civilians and as such the event if taken to be true cannot constitute 'attack' directing civilian population. Besides, no offence of 'genocide' was committed as the prosecution failed to prove that the perpetrators intended to destroy any 'group'

456. It will appear that the event narrated in the charge framed involves three parts. First, 26 civilians [freedom fighter] were kept detained at place near the Joypurhat railways station. Second, accused Alim brought a photographer for taking a photo of the captured civilians [freedom fighters] with him and the army and individuals belonging to the group of perpetrators presumably to show that a heroic deed was done. Third, the principals being accompanied by the accused brought the detained civilians to Joypurhat College where they were killed.

457. On careful appraisal it appears too that the version of P.W.2 that he saw 26 civilians were kept detained at a place near the Joypurhat railway station remained unshaken. P.W.22 and P.W.23 the eye witnesses also corroborated it. On evaluation of evidence of P.W.23 we have got a relevant and reliable depiction as to three material facts. First, the fact of keeping 26 civilians detained at a place near Joypurhat railway station. Second, Accused Alim came there with a photographer [P.W.22] who took their photo with the detainees. Third, Accused Alim consciously joined the group comprising of army, peace committee members and Razakars and they took the detainees to a place near Joypurhat College where they were killed.

458. The material facts as stated by P.W.2 and P.W.22 thus appear to have been sufficiently corroborated by P.W.23, the eye witness. Additionally, from evidence of P.W.23 it has been proved that in bringing the 26 detainees towards the crime site accused Alim had accompanied the group. Accused's act and conduct that he had shown by bringing photographer and asking him to take photo of the detained 26 civilians by standing with army officials behind the detainees sufficiently suggests that the accused substantially assisted, encouraged, provided moral support to the principals in accomplishing the actual crime of killing.

459. Besides, defence could not impeach the version made by P.W.22 on material fact of seeing the detained 26 civilians having their hands tied behind at a place near Joypurhat railway station and taking their photo as asked by accused Alim. Rather, the fact of detaining 26 civilians suspecting them to be 'freedom fighters' near Joypurhat railway station seems to have been proved by corroborating evidence of P.W.2 and P.W.22. It also stands proved too that

accused Alim actively accompanied the Pakistani army when a photo was taken by bringing a local photographer [P.W.22]

460. The Tribunal notes that due to situation prevailing in 1971, it was in reality not possible to witness the act of actual killing. Since the fact of killing 26 civilians is not disputed and the version of P.W.23 prompts us to conclude that instantly after bringing the detained civilians towards the crime site near the Joypurhat College he could hear frequent gun firing, it may legitimately be inferred that the group which brought the detained persons there committed the horrific offence of killing.

461. It stands also proved from evidence of P.W.23 that accused Alim accompanied the group which perpetrated the killing at the crime site. Presumably accused Alim, despite knowing the foreseeable consequence of taking the detained persons towards the crime site, had accompanied the group of perpetrators. It proves his culpable intention to further the object of perpetrators. Therefore, accused Alim, though not physically participated to the actual commission of crime, incurs criminal liability for his acts and conducts forming part of attack.

462. The Tribunal notes, considering the circumstances, if it is found that the accused Alim was present at the crime site when the principals committed the crimes it is not indispensable to ask whether the commission of the crime would have occurred if the accused had acted differently. Rather, it is to be seen whether in acting or failing to act, the accused provided assistance and moral support to the principals in committing the alleged crimes.

463. How the accused participated to the commission of the crimes? It is now settled that if a person abets the commission of the offence of murder as crimes against humanity, that person is guilty of aiding the crime under the forms of participation. The use of the term 'participate' is intended to address the question of culpability when many people are killed, but their deaths cannot be traced to individual responsibility. In the case in hand, accused's participation in the attack, by his culpable conduct and act, not only helped to constitute the attack but also helped to constitute the atmosphere favourable for the commission of crimes by others.

464. It has been established that accused Alim was a potential leader/chairman of Joypurhat peace committee having close association with the Pakistani occupation army and also had a position of authority over the local peace committee members and Razakars. It has also been proved that the accused significantly contributed in forming and organising peace committee and local Razakars. This being the status that the accused Alim was holding at relevant time his presence at the crime site as an accomplice of principals inevitably prompts us to infer unerringly that he abetted and substantially contributed to the commission of the crime that resulted in killing of 26 unarmed civilians[freedom fighters] . Accused's passive presence at the crime site was thus in connection with his prior encouraging behaviour that he demonstrated in taking photo of the detained civilians , standing with army Major Afzal. Besides, accused's presence at the crime site, when combined with his position of authority, constitutes 'assistance' in the form of moral support to the principal offenders

465. Tribunal notes that Nazi war criminal Adolf Eichmann didn't kill anyone with his own hand but was one of the main organiser of Nazi atrocities during WW-II. Eichmann was charged with membership in criminal organization--the Storm Troopers (SA), Security Service (SD), and Gestapo (all of which had been declared criminal organizations at the 1946 Nuremberg Trial). As head of the Gestapo, Eichmann coordinated with the collective criminality of the organisation. Finally, Adolf Eichmann was awarded a death sentence after his trial.

466. Therefore, the accused Md. Abdul Alim is considered to have participated even in the commission of the principal offence of murder based on the precedent of the Nuremberg war crimes trial as he is found to be '*concerned with the killing*'. This proposition finds support from the view set by the ICTY Trial Chamber in the case of *Tadic [Prosecutor v. Du/Ko Tadi]* , Case No. IT-94-1-T, judgment 7 May 1997, paragraph 690,691].

467. The 26 captured persons were 'freedom fighters'. Mainly on this ground defence argued that they were not 'civilians' as they were linked to a particular side of the conflict. We disagree with this argument. It is to be considered what

their status was at the time of crimes committed. Evidence together with the photo Material Exhibit-I clearly demonstrate that the captured freedom fighters were disarmed and were forced to sit on ground having their hands tied behind and fire arms were kept in front of them.

468. The settled jurisprudence states that the targeted population must remain predominantly civilian in nature and it is the situation of the victim at the time of the attack and not the victim's status that should be focus of inquiry. The 26 persons were captured, detained and afterwards killed in the context of crimes against humanity and thus even a non civilian [freedom fighters] may be considered part of the civilian population if at the time of the attack they were not participating in the hostilities. The 26 detained persons were no longer in position in taking part in hostilities and they were no longer bearing arms and thus had placed *hors de combat*, due to their being detained. In this regard the principle enunciated by the ICTY is as below:

“The definition of a ‘civilian’ is expansive and includes individuals who at one time performed acts of resistance, as well as persons who were *hors de combat* when the crime was committed.”[*Limaj* , ICTY Trial Chamber, November 30, 2005, para. 186]

469. The accused has been indicted for abetting and contribution to the commission of the offence of ‘genocide’ by killing 26 ‘freedom fighters’. Prosecution argued that since the detained persons were ‘freedom fighters’ they deserve to be considered to belong a ‘group’, for the purpose of constituting the offence of ‘genocide’. We disagree. They did not belong to any ‘stable’ group. The Genocide Convention does not protect all types of ‘human groups’. Its application is confined to national, ethnical, racial or religious groups. In addition to these four groups the Act of 1973 protects the ‘political group’ as well. On plain understanding the detained persons belonged to a group of freedom fighters, true. But we have already found the accused responsible for the killing of 15 unarmed freedom fighters, constituting the offence of murder as crimes against humanity, as narrated in charge no.9. Therefore, in respect of the event of

killing of 26 civilians because of their being freedom fighters, as narrated in the charge no.10, we are persuaded to conclude that the killing constituted the offence of ‘murder’ as crimes against humanity, instead of the offence of ‘genocide’.

470. On totality of evidence as discussed above we arrive at decision that the prosecution has been able to prove beyond reasonable doubt that 26 unarmed freedom fighters were finally taken to a place near Joypurhat College by the group of perpetrators whom the accused Md. Abdul Alim also accompanied consciously and by remaining present at the crime site he[accused] not only participated the criminal acts, he rather provided substantial contribution and moral support and approval too, by virtue of his position of authority, to the commission of tragic killing of 26 unarmed civilians who were no longer in position in taking part in hostilities, instantly after their capture. Therefore, the accused Md. Abdul Alim is found **guilty** for the offence of ‘murder’ as crimes against humanity enumerated in section 3(2) (a)(g) of the Act of 1973 and thus he incurs criminal liability under section 4(1) of the Act of 1973.

Adjudication of Charge 11

[Killing of 14 ‘garoals’ and their six relatives]

471. Summary charge: In between 25 June to 30 June, during the period of War of Liberation in 1971, accused Md. Abdul Alim’s accomplices along with Pakistani army apprehended Md. Mokhlesur Rahman, Ahad Ali, Najer Akond, Amjad Hossain, Abdul Gafur and unknown more 14 ‘garoals’(bullock-cart pullers) while they were on the way back from the Indian border leaving the civilians belonging to Hindu community and brought them to the accused Md. Abdul Alim in the office of the peace committee set up at ‘gadi ghar’ of Shaonlal Bajla at *thana* road, Joypurhat. On getting information, relatives of the detainees came and approached for their release but the accused detained them too. Later on, they were gunned down to death near the ‘*khanjanpur kuthibari bridge*’ and their dead bodies were thrown to river. Therefore, the accused Md. Abdul Alim has been charged for substantially abetting and contributing to the actual commission of offence of ‘**murder as crime against humanity**’ caused to a pro-liberation unarmed civilian as specified in section 3(2) (a) (g) of the Act which are punishable under section 20(2) read with section 3(1) of the Act. And thus the accused is liable for the above offences under section 4(1) of the Act.

Witnesses

472. To prove this charge, prosecution relies upon P.W.10 Abu Sayeed Joarder[55] and the statement of Akam Uddin[received under section 19(2) of the Act of 1973 as he is now dead] son of late Ahad Ali Garoan of village Matihass police station Khetlal, district Joypurhat made to the Investigation Officer. P.W.10 Abu Said Joarder is the brother [paternal uncle's son] of victim Mukhlesur Rahman. He is a hearsay witness. Apart from oral testimony and statement of witness Akam Uddin made to the IO, prosecution also relies upon **Material Exhibit VI** [The book titled Muktijudhdhe Joypurhat edited by Abul Kashem, published by Joypurhat Zilla Parishad, relevant page 220] and **Exhibit 14** [The 'Gono Tadanto Commission er Report : Original Documents Volume 13, relevant page 3738]

Evidence

473. P.W.10 Abu Said Joarder [55] was a student of class VII in 1971. He stated that one day, in between June 26 and 30, 1971, Aser Ali @ Aber Ali and his son Mukhlesur Rahman left with their bull-cart to ferry some Hindus across the Indian border and his uncle returned home after half an hour as he was not feeling well. He heard from his uncle that Mukhlesur Rahman had moved towards the border area to ferry the Hindus. On that day, at about 7:30pm-8:00pm, they learned from the villagers that local accomplices of Abdul Alim belonging to peace committee and Razakars detained Mikhles and 19 other bullock-cart pullers with the aid of Pakistani army while their return journey at village 'Beltoli'. This version remained unshaken in cross-examination.

474. P.W.10 went on to state that the detainees were taken before the peace committee leader Abdul Alim at the Peace Committee office set up at the 'gadighar' of Shaonlal Bajla in Joypurhat. On the next day, there were rumors that the detainees would be released if Alim was provided with Tk. 500 for each of the detainees. With this, six people including Mikhles' father and Vikon Pramanik went to Alim with the money. He [P.W.10] had seen them going [to accused Alim] and heard them uttering the name of Abdul Alim..

475. PW.10 stated that neither the 20 detainees nor the six who went to bring them back home on release ever returned. They later heard that the detainees and

the six [relatives of the detained ‘garoals’] were shot dead near ‘Khanjanpur Kuthibari’ in Joypurhat and their bodies were dumped in the nearby river.

476. Statement of witness Akam Uddin [received under section 19(2) of the Act of 1973 as he is now dead] made to the IO shows that he is a mere hearsay witness and his statement so made is anonymous hearsay in nature. It does not reveal how he became aware that on instruction of accused Alim 20 ‘garoals’ and their six relatives were captured.

477. Material Exhibit VI [The book titled Muktijudhdhe Joypurhat edited by Abul Kshem, published by Joypurhat Zilla Parishad, relevant page 220] and **Exhibit 14** [The ‘Gono Tadonto Commission er Report : Original Documents Volume 13, relevant page 3738] speak of the events of capturing and killing of ‘garoals’. They seem to be related to two distinct events and does not relate to charge no. 11.

Deliberations

478. The event involves three phases. First, 14 ‘garoals’[bullock-cart pullers] were allegedly captured by the accomplices of accused Alim while they were on the way back from the Indian border leaving the civilians belonging to Hindu community. Second, the captured ‘garoals’ were brought to accused Alim at the peace committee office set up at ‘gadighar’[Shaonlal Bajla’s trading office] in Joypurhat. Third, the relatives approached to accused Alim for release of the detained ‘garoals’. Finally, they [the relatives of victims] and the detained ‘garoals’ were gunned down to death at a place known as ‘Khanjanpur’ in Joypurhat.

479. According to P.W.10, hearsay witness, his brother [uncle’s son] Mokhles and 19 other bullock-cart pullers with the aid of Pakistani army while their return journey at village ‘Beltoli’. But the charge itself alleges the fact of capturing 14 garoals including Mokhles. It could not be gathered from his testimony how he became aware of the event of capture of ‘garoals’ at Beltoli village. Neither the charge framed nor any of prosecution documents relied upon does not describe that the event of capture of garoals’ took place at village ‘Beltoli’.

480. P.W.10 claims that he saw his uncle [father of detainee Mokhles] and Vikon Pramanik and four others moving to Joypurhat for approaching to the accused Alim. But it does not ipso facto proves that those six in fact went to accused Alim in Joypurhat and approached for release of the detained ‘garoals’. If it is so , prosecution appears to have been failed to prove that the accused Alim had participated at any stage of the entire event that resulted in killing of 14 ‘garoals’ and their six relative[according to P.W.10 20 ‘garoals].

481. Prosecution relies upon the book **Material Exhibit VI** [The book titled Muktijudhdhe Joypurhat edited by Abul Kshem, published by Joypurhat Zilla Parishad, relevant page 220] and **Exhibit 14** the ‘Gono Tadonto Commission er Report[Original Documents Volume 13, relevant page 3738] to substantiate the event of alleged capture of 19 ‘garoals’, bringing them to accused Alim at peace committee office in Joypurhat, approach made by the six relatives of detained persons and killing them at ,Khanjanpur Kuthibari’, Joypurhat. **Material Exhibit VI** [The book titled ‘Muktijudhdhe Joypurhat’ edited by Abul Kashem, published by Joypurhat Zilla Parishad, relevant page 220] and **Exhibit 14** [The ‘Gono Tadonto Commission er Report : Original Documents Volume 13, relevant page 3738] speak of the events of capturing and killing of ‘garoals’. They seem to be related to two distinct events and does not relate to charge no. 11.

482. What the above two documents narrate? The first one narrates as below:

“ মে মাসের মাঝামাঝি এমনিভাবে কতিপয় লোককে গাড়োয়ানরা বাংলাদেশের সীমানায় রেখে আসার পথে রাজাকাররা ঐ সমস্ত ১৬/১৭ জন গাড়োয়ানকে গ্রেফতার করে জয়পুরহাট শান্তি কমিটির অফিসে নিয়ে আসে। রাতে সেখানে বন্দী করে রেখে পরদিন ট্রাকে করে শামীম বিহারীর নেতৃত্বে তাদের আক্কেলপুর মিলিটারী ক্যাম্পে নিয়ে যায়। সেখানে তাদের ভালক্যা বাঁশের মোটা গোড়া দিয়ে কুপিয়ে ঐ সমস্ত গাড়োয়ানকে হত্যা করে। ”

[**Material Exhibit VI** : The book titled Muktijudhdhe Joypurhat edited by Abul Kshem, published by Joypurhat Zilla Parishad, relevant page 220]

483. The other prosecution document narrates that

“ইডপি চেয়ারম্যান শামসুল আলম মুক্তিযুদ্ধের সময় আব্দুল আলীম কর্তৃক নিরীহ গাড়োয়াল সম্প্রদায়কে হত্যা করার ঘটনা তাঁর জবানন্দীতে জানিয়েছেন। ১৯৭১ সালে এপ্রিল মাসের শেষের দিকে পাকিস্তানী সৈন্যরা সড়ক থেকে ২৬ জন নিরীহ গাড়োয়ালকে ধরে আব্দুল আলীমের বাড়ীতে নিয়ে গিয়েছিল। বাড়ীর চাতালে ৩/৪ দিন অটকে রাখার পর আব্দুল আলীমের নির্দেশে গাড়োয়ালদের খঞ্জনপুর বধ্যভূমিতে নিয়ে গিয়ে হত্যা করা হয়েছিল।”

[**Exhibit 14** :The ‘Gono Tadonto Commission er Report : Original Documents Volume 13, relevant page 3738]

484. It is quite patent that neither of the above prosecution documents supports the event that allegedly took place between 25 June and 30 June 1971, as narrated in the charge no. 11. The incident of capturing ‘*garoals*’ as found from Material Exhibit VI occurred in the mid of May 1971 and the detained *garoals* were shot to death at Akkelpur Military camp. But the event narrated in charge no.11 speaks of killing the detained *garoals* in Joypurhat.

485. The event of capturing ‘*garoals*’, as depicted from the latter prosecution document, occurred at the end of April 1971 and the detained 26 ‘*garoals*’ were killed at Khanjanpur in Joypurhat. But according to the event narrated in the charge no.11 the 19 *garoals* were captured between 25 June and 30 June 1971 and they including their six relatives were shot to death in Joypurhat. The latter prosecution document does not speak of the fact of making approach by six relatives of detained ‘*garoals*’ to accused Alim and that they were kept detained at the peace committee office at ‘*gadighar*’ in Joypurhat.

486. We fail to understand why the prosecution intends to rely upon these two documents in proving the event narrated in charge no.11 when it appears clearly that the narration made in those two documents are quite contradictory to what has been alleged in the charge framed. Rather the information narrated in these documents has adequately shaken not only the culpability and involvement of the

accused Alim with the alleged offence but the place, date and manner of the event too.

487. Prosecution has failed to prove, by lawful and credible evidence, that accused Alim had acted, in furtherance of common purpose and design to the accomplishment of the actual commission of crimes alleged even if it is understood that these two documents have been relied upon merely to show that accused Alim and his accomplices made the class of ‘garoals’ as they worked to ferry the pro-liberation civilians towards the Indian border and thus similar events, other than the event narrated in charge no.11, occurred. The information described in these two documents at best can be taken into account as relevant, only when evidence adduced by the prosecution proves culpability of accused Alim with the commission of alleged offence narrated in charge no.11.

488. But the Tribunal notes that despite the fact of capturing the ‘garoals’, as stated by the P.W.10, it does not appear to be evinced beyond reasonable doubt that afterwards the detained garoals were brought to accused Alim at the peace committee office set up at Shaonlal Bajla’s ‘*gadighar*’ in Joypurhat. Incomplete and uncorroborated anonymous hearsay evidence of P.W.10 who was only 10 years old at the relevant time does not inspire any degree of credence.

489. Statement of Akam Uddin made to IO is also taken into consideration as it has been received under section 19(2) of the Act of 1973 as he is now dead. But his statement transpires that he narrated to IO what he heard. His hearsay statement seems to be anonymous which has been left uncorroborated by any other evidence. According to statement of Akam Uddin 20 ‘garoals’ were captured, although he did not state as to in which place they were so captured. Thus, statement of Akam Uddin does not inspire any reasonable credence, particularly for holding the accused responsible for the event alleged.

490. Besides, it is not clear as to how P.W.10 became aware that the detained ‘*garoals*’ were brought to the office of peace committee set up at ‘*gadighar*’ in Joypurhat. Reliance cannot be placed on P.W.10 as his anonymous hearsay testimony too remains uncorroborated. There has been no reasonable and rationale indication that could enable a man of prudence to connect the accused

Alim with the event of capturing the ‘garoals’ and their detention and killing at Khanjanpur, Joypurhat, on his abetment and contribution.

491. In view of above we are constrained to conclude that the prosecution has failed to prove not only the date, manner and place of the event as alleged but culpability of the accused Alim with the alleged offence too by any lawful and credible evidence. As a result, the accused Md. Abdul Alim is found **not guilty** of the offence of murder as crimes against humanity enumerated in section 3(2) (a)(g) of the Act of 1973, as narrated in charge no.11.

Adjudication of Charge No. 12 **[Murder of Dr. Abul Kashem]**

492. Summary charge: that on 24 July , during the period of War of Liberation in 1971, Dr. Abul Kashem of ‘*Devipur Kajipara*’ under police station and district Joypurhat , a local significant Awami League leader was apprehended by Razaker Bahini being accompanied by Pakistani army, on order of accused Md. Abdul Alim. Captured Dr. Kashem was dragged to ‘*Teghor Bridge Rajaker Camp*’ wherefrom, by blind folding, he was dragged to Joypurhat Railway station and was kept confined ..**On the following morning Dr. Abul Kashem was brought to the office of the peace committee set up at ‘gadi ghar’ of Shownlal Bajla.** The accused did not respond to release him despite approach made by his relatives. Subsequently on 26 July, in the evening Dr. Abul Kashem was brought near the ‘*Khanjanpur Kuthibari bridge*’ where he was killed . Therefore, the accused Md. Abdul Alim has been charged for **substantially abetting and contributing** the actual commission of offence of ‘**murder as crime against humanity**’ caused to a pro-liberation unarmed civilian as specified in section 3(2) (a) (g) of the Act which are punishable under section 20(2) read with section 3(1) of the Act. The accused is thus liable for the above offences under section 4(1) of the Act.

Witnesses

493. Prosecution, in order to prove this charge, produced and examined daughter and grandson of the victim Dr. Abul Kashem as P.W.12 and P.W.13 respectively. They claim to have witnessed the event of capture of the victim and keeping him detained at Teghore bridge camp. They have also testified the effort they made

by making approach to accused Alim for release of the detained victim and the fact of providing money for Major Afzal. P.W.13 also claims to have seen taking victim to Khanjanpur the killing site from the peace committee office in Joypurhat.

Evidence

494. P.W.12 Laily Begum, daughter of the victim narrated how her father was abducted and eventually was killed, despite their request made to accused Alim for her father's release. At the relevant time she was at her father's place *Debipur Kazipara* in Joypurhat. She stated that at around 3:00am on July 24, 1971, when everyone was sleeping, a group of Razakars, Al-Badar men and Pakistani army laid siege to their house and on opening the door four of them entered their house and they [intruders] said 'Doctor Shaheb [Kashem], wake up, Abdul Alim has called you'. With this, when her father refused go with them, they forced him to go with them when one of her nephews appealed to a Razakar holding his leg to let his grandfather [Kashem] go, but he[Razakar] kicked him and they[attackers] took her father with them.

495. P.W.12 further stated that she and her brother Nazrul then followed them in the dark while they saw that they took her father to the Razakar camp at Teghore Bridge. After sometime, they [attackers] took her father to Joypurhat Railway Station. On the next day at about 8:00am her father, who was all bloodied, was taken to the peace committee chairman Abdul Alim at the Peace Committee office at Shaonlal Bajla's 'gadighar' in Joypurhat. Defence could not shake the above version by cross-examining her.

496. P.W.12 went on to state that after observing everything, they returned home and again she along with Nazrul, paternal uncle Mafiz Uddin, maternal uncle Malek Sarder went to Alim's Peace Committee office that day and made earnest approach to Alim [to release her father] but he[accused Alim] didn't pay heed to it. Then they returned home. At about 3:00pm on the next day, Razakar Atikullah Bihari came to their house and assured them that their father would be released if they paid Tk. 5,000 to Major Afzal, a Pakistani army officer. They accordingly gave the money to Atikullah. But after sometime, Atikullah returned and informed them that as per the order of 'boss' Abdul Alim, Doctor Shaheb

[Kashem] would be taken to Kuthibari [killing site]. After a while, one Siraj who used to cook at an army camp near the Peace Committee office informed them that Razakars had gouged the eyes of her father and broken the front teeth on instruction of Abdul Alim [accused] and later he was taken to Kuthibari. On the next day evening, they learnt that his father was no more and another person was also buried along with her father there.

497. P.W.13 Kazi Ezaz Ahmed[51], a grandson of victim testified how the Pakistani army along with their local collaborators abducted his grandfather, held him detained at the Peace Committee office in Joypurhat, caused torture on him and how his family tried to get him[victim] back on release.

498. P.W.13 stated that in the night of July 24, 1971, Pakistani army and Razakars took away Kashem, and his [P.W.13] father Kazi Nazrul Islam, aunty Laily Begum[P.W.12] and grandfather Kazi Aftab Uddin followed them to know Kashem's whereabouts. They [attackers] took Kashem first to an army camp at Teghore Bridge and on the next day, Kashem was taken to a nearby railway station with his hands tied and Ezaz saw him there. He [P.W.13] broke down in tears watching his grandfather [Kashem] smeared in blood. Kashem was then taken to the Peace Committee office at Joypurhat.

499. P.W.13 went on to state that at home, his father, aunty and others were talking about going to the Peace Committee office to make approach to Alim[accused] for release of his grandfather and accordingly they went to the peace committee office set up at Shaonlal Bajla's '*gadighar*' and they approached Alim for his grandfather's release. But Alim did not pay heed to their appeal.

500. P.W.13 stated too that at about 3:00pm on July 25, 1971, one Atikullah, a non-Bangalee, went to their house and assured them that Kashem would be released if they pay Tk. 5,000 to Major Afzal, a Pakistani army officer. Ezaz's father gave the money to Atikullah. Ezaz said Atikullah later returned the money to one of his grandfathers saying, "You take your money back ... Shaheb[Alim] has already ordered to kill your brother [Kashem]." Later Kashem

and another person were taken to the Pakistani army camp at Khanjanpur Kuthibari and on July 26, 1971.

Deliberations

501. The learned prosecutor Mr. Rana das Gupta argued that the fact of abducting the victim from his house and taking him to army camp at Teghore Bridge has been proved by the evidence of P.W.12 and P.W.13, the eye witnesses. P.W.13 is the grandson of the victim and P.W.12 is the daughter of victim. The victim was subsequently taken to the accused Alim at the office of the peace committee in Joypurhat. P.W.12 has proved this part of the event. Making approach to accused Alim for victim's release to which the accused did not respond, as stated by P.W.12 demonstrates that accused Alim was a part of the common design and as such he by his act and omission facilitated the commission of the killing of victim at Khanjanpur killing site.

502. On contrary, the learned defence counsel submitted that accused Alim was not involved with the commission of the crime alleged in any manner. He cannot be held responsible for the act of capturing, torturing, and detaining the victim Dr. Kashem. It was a group of Pakistani army who committed the criminal acts and accused Alim had no influence or control on the army. There had been no office of peace committee at Shaonlal Bajla's 'gadighar' in Joypurhat and as such accused Alim had no reason to be there, as alleged.

503. The charge framed demonstrates that the event involved several phases. First, capture of victim from his house by the accomplices of accused Alim on his [accused] order. Second, taking him to Teghore Bridge Razakar camp where he kept detained. Third, he was taken to peace committee office set up at Shaonlal Bajla's 'gadighar' in Joypurhat [which was under control of accused Alim. Fourth, the victim was taken to Khanjanpur, the killing site, flouting the appeal made by his relatives to accused Alim for victim's release.

504. From corroborating evidence of P.W.12 and P.W.13 it stands proved beyond reasonable doubt that the victim Dr. Kashem was captured by a group of Razakars and army from his house on the date and time and was first taken to

Teghore Bridge Razakar camp. Defence does not dispute that the victim was a local Awami League leader [pro-liberation people]. Presumably it was the reason to target him. Defence does not appear to have been able to shake the above version.

505. It also appears that the victim was next brought to accused Alim at the peace committee office and afterwards they made appeal to Alim for victim's release, as stated by the P.W.12, an eye witness [daughter of victim] and later on they agreed to get the victim released even in exchange of money that they had given to Atikullah Bihari for giving it to Major Afzal. Defence could not impeach the above version in any manner, in her cross-examination. Besides, statement made by P.W.12 before the Tribunal on the fact that the victim was taken to accused Alim at the peace committee office set up at Shaonlal Bajla's 'gadighar' in Joypurhat seems to be quite consistent to what she stated to the IO[P.W.35] on this material particular.

506. The version made by P.W.12 that one Siraj who used to cook at an army camp near the Peace Committee office [in Joypurhat] informed them that Razakars had gouged the eyes of her [P.W.12] father and broken the front teeth. Defence could not controvert this statement by cross-examining P.W.12.

507. The fact of taking the captured victim to accused Alim at the peace committee office in Joypurhat, making approach to accused Alim by the relatives of detained victim to which accused did not respond and being informed that Razakars had gouged the eyes of the detained victim and broken the front teeth on instruction of Abdul Alim [accused] and later he was taken to Kuthibari are sufficient and relevant facts inferring accused's active and conscious nexus with the entire event that needed in killing of the victim. Defence does not dispute the fact of killing the victim Dr. Kashem at Khanjanpur Kuthibari crime site.

508. There has been no indication even that after taking the victim to the peace committee office in Joypurhat he was again taken to somewhere else, before the group of perpetrators took him to Khanjanpur where he was killed. Thus, it stands proved beyond reasonable doubt that the victim was kept detained and tortured at the peace committee office in Joypurhat wherefrom he was finally taken to the killing site. Taking the fact of accused's position of authority and

status into account it is indisputably inferred that the activities carried out at the peace committee office, Joypurhat were carried out within accused's knowledge and it was the accused who had authority to regulate the activities of that office.

509. Therefore, and since the accused deliberately did not respond to the approach made by the relatives of victim for his[victim] release it is thus concluded that accused Alim consciously approved and endorsed the killing of victim and as such finally the victim was taken to Khanjanpur Kuthibari, the killing site. Prosecution is not required to prove that the accused was involved with all stages of the event, either physically or by his conduct or act or omission. Even a single act or conduct of accused, before, during or after the event, is sufficient to infer his culpability. In this regard the ICTY Appeal Chamber observed as below:

“All other conditions being met, a single or limited number of acts on [the accused's] part would qualify as a crime against humanity, unless those acts may be said to be isolated or random.” [Deronjic, (Appeals Chamber), July 20, 2005, para. 109]

510. The Tribunal notes that the victim could have been killed by the group who captured him from his house. But keeping him detained first at Teghore Razakar camp and then bringing him to the accused Alim at the peace committee office at the 'gadighar' unerringly demonstrates accused's nexus with the act of capture and detaining the victim. But total evaluation of series of activities found from evidence goes to show unerringly that the victim was so brought to the accused Alim at the peace committee office in Joypurhat for his [accused] 'decision' or 'assessment'. It is thus also clear that in relation to the fate of any civilian detained by peace committee members and army it was the accused Alim who used to play a substantial and decisive role. By virtue of his position of authority or domination he [accused] even could have played role in preventing crime. But he did not do it or failed to do it. Therefore, the Tribunal is not precluded from finding the accused responsible also under section 4(2) of the Act of 1973 and it may only be considered as an aggravating factor in awarding sentence.

511. In relation to charge no.12 it appears that the group perpetrators launched attack aiming to a single individual. But merely for this reason the crime committed cannot be considered to be an isolated one. The attack in capturing the victim Dr. Kashem was a part of systematic attack directing civilian. The offence of murder as crime against humanity may even involves a single victim, provided all other elements existed.

512. There has been no dispute that the criminal acts carried out by group of members of associate organization peace committee, Razakar and army in accomplishing the killing of Dr. Kashem took place under a 'context'. Therefore the murder of Dr. Kashem of course constituted the offence of crimes against humanity. It is immaterial as to how many civilians were targeted or killed by carrying out an attack. Context and, pattern of criminal acts, the group perpetrating the crime are to be considered to exclude the notion of isolated crime. In this regard the ICTR Appeal Chamber has observed as below:

“The Appeals Chamber considers that, except for extermination, a crime need not be carried out against a multiplicity of victims in order to constitute a crime against humanity. Thus an act directed against a limited number of victims, or even against a single victim, can constitute a crime against humanity, provided it forms part of a widespread or systematic attack against a civilian population.”[Nahimana, Barayagwiza and Ngeze may be recalled, (Appeals Chamber), November 28, 2007, para. 924].

513. Next, it is to be noted that object can be furthered not only by giving orders for, but by a diversity of other means and acts. The accused shall not have exoneration even if is found to have acted in any manner which eventually facilitated the actual carrying out of the criminal acts. Murder as a crime against humanity does not require the Prosecution to establish that the accused personally committed the killing. On evaluation of evidence and circumstances, finally we come to decision that the prosecution has been able to prove it beyond reasonable doubt that the victim Dr. Kashem was first brought to Teghore bridge

Razakar camp, on capture and then brought to accused Alim at the peace committee office set up at Shaonlal Bajla's '*gadighar*' in Joypurhat wherefrom finally the victim was taken to Khanjanpur Kuthibari killing site and was killed there. It stands proved too that despite appeal made by the relatives of the victim for victim's release, accused Alim did not respond. With this culpable conduct forming part of attack accused Alim is said to have shared the intent of the principals and also abetted and substantially contributed to the accomplishment of the actual commission of the killing. The accused Md. Abdul Alim had acted as the cog in the wheel of events leading up to the result which in fact happened. Therefore, the accused Md. Abdul Alim is found **guilty** for the offence of 'murder' as crimes against humanity enumerated in section 3(2) (a)(g) of the Act of 1973 and thus he incurs criminal liability under section 4(1) of the Act of 1973.

Adjudication of Charge No. 13

[Murder of 11 unarmed apprehended freedom fighters]

514. Summary Charge: In the first week of the month of September, during the period of War of Liberation in 1971, 11 youths were brought by the Pakistani troops. The detainees were brought by trucks to the government degree college where they were lined up at the place adjacent to '*Baraghati*'. Within a short while, the accused Md. Abdul Alim, being the local influential leader of Razakar Bahini as well as the chairman of local peace committee and or an 'individual' or member of 'group of individuals' arrived there (crime site) by a jeep and standing on it you uttered " 11 persons are the spies of India and enemies of Pakistan and they are freedom fighters. Let them be sent (এগারো আদমী ভারত কা চর হায়। পাকিস্তানী দুশমন। মুক্তিফৌজ হায়। ইসকো ভেস দো). Following this inciting instruction at about 11/12 am those 11 detained youths were pulled down from the truck and were brought to south part of '*bara ghati pukur*' and the Pakistani army gunned them down to death. Therefore, the accused Md. Abdul Alim has been charged for substantially abetting and contributing the actual commission of offence of 'murder as crime against humanity' caused to a pro-liberation unarmed civilians as specified in section 3(2) (a) (g) of the Act which are punishable under section 20(2) read with section 3(1) of the Act. And the accused is thus liable for the above offences under section 4(1) of the Act.

Witnesses

515. Prosecution claims that P.W.20 Sarder Md. Abdul Hafiz [54] and P.W.21 Md. Abdul Hamid Sakider [57] have testified to prove this charge. They are from Joypurhat Sadar. Both the witnesses claim to have witnessed the material fact relevant to the actual commission of the crimes committed.

Evidence

516. P.W.20 Sarder Md. Abdul Hafiz [54] was a student of Ramdeo Bajla government high school. On a day during the first week of September in 1971 at about 11:00-11:30 am he was at his school when their head master on hearing gun firing by the Pakistani army asked them to flee. With this he [P.W.20] came out of school and started moving towards his home. On the way he [P.W.20] found 11 youths having their face blackened on two trucks standing on the main road in front of their house. Pakistani army kept the trucks cordoned. Afterwards the army and some Bihari had moved through Khetlal road with those youths by trucks with gun firing. Defence did not cross-examine this P.W.20 presumably as he stated nothing incriminating the accused Alim with the alleged event narrated in charge no.13.

517. P.W.21 Md. Abdul Hamid Sakider [57] claims that in 1971 he was 15/16 years old. He is from village Sakider para under Joypurhat Sadar police station. He stated that one day [in 1971] Alim, Pakistani army and Razakars apprehended 11 youths and brought them to northern part of 'Baroghati' pond. The youths' faces were coloured with black paste. Pakistani army on order of Alim [accused] killed them and they were buried there under the mango tree and lichi tree.

518. Defence denied the above piece of evidence. On cross-examination, P.W.21 denied that he did not state it to the IO that accused Alim along with army and Razakars brought 11 youths and on Alim's order the army gunned them to death, while attention was drawn to this statement made in examination-in-chief.

Deliberations

519. The learned defence counsel has argued that the prosecution has failed to prove accused's complicity with the offence alleged in any manner. P.W.20 does not implicate the accused and the statement made by the P.W.21 is contradictory

on material particular and does not conform to the allegation relating to culpability of the accused Alim brought in the charge framed.

520. For holding the accused responsible for the offence with which he has been indicted [charge no. 13], prosecution is to prove **(i)** the fact of killing 11 youths by the army **(ii)** the fact that accused Alim by his inciting utterance substantially encouraged and contributed to the actual perpetration of the killing. Defence, as it appears, does not dispute the killing of 11 youths. But burden lies upon the prosecution to prove that the accused Alim by his act or conduct forming part of ‘attack’ substantially contributed to the actual commission of the crimes by the principals i.e the Pakistani army.

521. First, it reveals from evidence of P.W.20 that he merely saw the 11 youth detainees taking by trucks by the army and some Bihari on the road in front of their house and afterwards the trucks had gone towards Khetlal. P.W.20 did not say anything incriminating the accused Alim with such criminal activities. However, his testimony does not offer any indication that accused Alim either accompanied the group of army or somehow by his act or conduct facilitated or abetted the actual commission of the killing, although the fact of killing of 11 unarmed civilians at the alleged crime site remained undisputed.

522. Next, from the charge framed it will appear that the killing spot was a place adjacent to ‘Baroghati pukur’ where the apprehended 11 youths were brought by the army, according to the charge framed. The detained persons were first brought to the government degree college and within a short while, accused Alim is alleged to have arrived there by a jeep and standing on it he [accused] uttered the instigating statement that allegedly facilitated the commission of crime and following such statement the detained persons were brought to the killing site by the army by truck where they were gunned down. Thus, charge framed does not describe that the accused Alim accompanied the army towards the crime site where the detainees were taken by truck.

523. But according to P.W. 21 accused Alim accompanied the Pakistani army and Razakars in bringing the apprehended 11 youths to northern part of ‘Baroghati’ pond, the killing site, where on accused’s order the army killed the detainees there.

524. Next, P.W.21 did not state on which date or month the detained 11 youths were taken to Baroghati locality. His [P.W.21] unspecified statement does not suggest that he is a competent and reliable witness. Besides, it is not at all clear as to whether he himself witnessed the event of alleged killing and conducts of the accused or had heard of it. Thus, the version made by P.W.21 does not reflect reasonable reliability. P.W.21 rather has made a futile attempt to incriminate the accused Alim with the alleged killing by making a totally unreliable and untrue statement before the Tribunal.

525. Besides, the version made by P.W.21 that accused Alim along with army and Razakars brought 11 youths to 'Baroghati pukur' and on Alim's order the army gunned them down to death there appears to be subsequent embellishment on material particular and thus it does not inspire any amount of credence as well.

526. We have found that P.W.35 the IO stated that P.W.21 did not state the above statement to him. It is true that earlier statement made to IO is not evidence and mere omission in such statement *ipso facto* does not make it a 'contradiction'. But in the case in hand, the above omission seems to be extremely fatal omission which tantamount to glaring contradiction, on material particular. On this score too, we cannot place safe reliance upon the statement made by P.W.21 incriminating the accused Alim.

527. In view of above reasons eventually we conclude that although the defence does not dispute the incident of killing 11 youths by the Pakistani army prosecution has significantly failed to establish the involvement of the accused Alim with the commission of the event, in any manner. Accused Alim is not found to have participated to the perpetration of the offence alleged in any way and, therefore, he is found **not guilty** of the charge for substantially abetting and contributing the actual commission of offence of 'murder as crime against humanity' caused to 11 pro-liberation unarmed civilians as specified in section 3(2) (a) (g) of the Act.

Adjudication of Charge No. 14

[Killing of Fazlul Karim and 02 other civilians]

528. Summary charge: On 07 October, during the period of War of Liberation in 1971 the group comprising of members of the local peace committee, Razakars and Pakistani army, captured Fazlul Karim son of late *Alhaj* Abdur Rahim and unknown two others and brought them in front of CO(Dev) Office, Joypurhat. On getting information, the accused Md. Abdul Alim, being the local influential leader of Razaker Bahini as well as the chairman of local peace committee and or member of 'group of individuals' came out from the CO (Dev) Office and then following his order, with intent to terrorize the unarmed Bangalees, the accused and Major Afzal with those detained civilians started moving around the town by truck. During the transaction of such unlawful acts, the accused made statement that -- "the freedom fighters are fighting against Pakistan. Fazlul Karim's father is friend of mine but he did not prevent his son from remaining in wrong track despite repeated asking. Therefore, his son is to pay in exchange of his life". Later on, following accused's instigating statement, the detained persons were brought to '*khanjan pur kuthibari ghat*' where they were gunned down to death. However, their dead bodies could not be traced even. Thus, the accused Md. Abdul Alim has been indicted for substantially abetting and contributing the actual commission of offence of 'murder as crime against humanity' as specified in section 3(2) (a) (g) of the Act which are punishable under section 20(2) read with section 3(1) of the Act. And the accused is thus liable for the above offences under section 4(1) of the Act.

Witnesses

529. Prosecution, to prove this charge, produced three witnesses who have been examined as P.W.2, P.W.4 and P.W.23. Of them P.W.2 is a hearsay witness. P.W.4 claims to have witnessed the event of bringing the captured victims in front of CO [Dev] office, Joypurhat and the culpable statement made by accused Alim. He did not see the actual commission of murder. P.W.23 is the brother of victim Fazlul Karim and does not claim to have seen the event of killing, although he testified some material and relevant facts.

Evidence

530. P.W.2 Saidur Rahman [67] stated that on 07 October 1971 there had been a front battle between freedom fighters and the Pakistani army at ‘Paharpur, northern part of Joypurhat. On October 8, 1971, under the directives of Abdul Alim, three youths were forced to disgracefully travel through Joypurhat town on a flatbed truck and it was announced that those who would dared to join the Liberation War would have to face the same consequence. On the next day, the detained youths were taken to Joypurhat Degree College for keeping the students of college aware and the statement was announced there. P.W.2 stated too that later on he came to know that the detained youths were killed at Khanjanpur Kuthibari that evening. As regards the source of knowledge of what he testified, P.W.2 stated that he witnessed part of the facts he testified and part he had heard.

531. In cross-examination it has been rather re-affirmed that Fazlul Karim and two others were captured during fight at ‘Paharpur by the army and Razakars. Defence however simply denied that on Alim’s order the detained persons were forced to move around Joypurhat town having their face painted with lime and ink on 8 October 1971. But the defence could not impeach the version on material particular.

532. P.W.4 Mollah Shamsul Alam[58] stated that during 1971 his father had his business in Joypurhat and thus he often used to go there. On 7 or 8 October 1971, at about 11-12 noon when he[P.W.4] was at the then court building of Joypurhat a truck of the Pakistani army came there. There were three freedom fighters on the truck and one of them was wounded condition. He[P.W.4] knew one of them whose name was Fazlu. P.W.4 also added that Major Afzal was there too with the group of army. On hearing it, .Alim [accused] rushed to the truck. Major Afzal and Alim [accused] made speech through a loudspeaker set up with the truck

533. P.W.4 further stated that Abdul Alim [accused] in his speech said, *'The father of Fazlu [detained victim] is my friend and I told him to bring his son back from the wrong path. Nevertheless, he [Fazlu] fought against my country Pakistan. He has to be punished for it.'*" After finishing the speech, when a journalist asked Alim about the torture on Bangalee women by the Pakistan

army, Alim said, *“Soldiers do such things in any war. We have to accept it for the sake of the country.”*

534. P.W.4 next stated that he had heard that the three captured freedom fighters were killed near Kuthibari on October 9, 1971, after they forced them to walk around the entire town with their faces painted black and white. Defence, as it appears, simply evasively denied the version so far as it relates to bringing the detainees including Fazlu in front of the CO[Dev] office, Joypurhat on the date alleged, presence of accused there and making speech by accused Alim. But testimony made on material particular including the reason of P.W.4’s being present at the CO [Dev] office where in fact the Magistrate court was housed in 1971 could not be shaken in any manner.

535. P.W.23 Mohammad Abdul Haye [62] the brother pf victim Fazlul Karim testified that his brother Fazlul Karim and Abdur Razzak went to India in June 1971 and they returned in August 1971. On 7 October [1971] the Pakistani army , Razakar and peace committee members by launching combined attack started killing, looting at the villages around ‘Paharpur’. On that day, he [P.W.23] was at village ‘Goyespur’, 4/5 Kilometers far from ‘Paharpur’. He heard this incident from people and he on the same day in evening went to ‘Paharpur’ and had heard that the Pakistani army Razakar and peace committee members brought his brother Fazlul Karim and two others, on capture, to Joypurhat army camp. On 8 October, 1971, in early morning he started for Joypurhat to have trace of his brother [Fazlul Karim]. This part of testimony of P.W.23 remained totally undenied and unimpeached.

536. P.W.23 went on to state, on some material facts, that in the mid of May[1971] Akkelpur peace committee was formed of Azim Uddin[now dead], Nur Bakht [now dead], Makbul Kabiraj and others in a meeting presided by Abdul Alim[accused]. Abdul Alim very often used to come to Akkelpur for attending meeting of peace committee. During one of such visits Alim had called his [P.W.23] father at the Akkelpur peace committee office set up at ‘gadighar’ of Mohanlal Agarwal. On arrival of his[P,W.23] father there, accused Alim asked him to ensure his[father of P.W.23] three sons’ back from freedom fight, on failure of which he would be handed over to the army and his house would be burnt. Alim [accused] in this way threatened his[P.W.23] father and Alim, Nur

Bakht, Azim Uddin demanded twenty five thousand rupee and they fixed a dateline for bringing his[father of P.W.23] sons back from freedom fight. In the mid of September [1971] his[P.W.23] father gave fifteen thousand rupee to Alim when he came to Akkelpur peace committee office, finding no alternative for saving life and house. Defence could not shake the above version on pertinent fact reflecting accused's attitude and act that he demonstrated to the father of victim Fazlul Karim, before the event.

537. P.W.23 stated that on 8 October in morning he arrived in Joypurhat and started to have trace of his captured brother Fazlul Karim and at about 11/12 noon while he was going through the sadar road of Joypurhat he found some people accompanied by Pakistani army coming by truck from the western end and then he remained in hiding inside a lane adjacent to the road and saw that the truck stopped in front of CO[Dev] office and there had been a loudspeaker's horn with the truck. He [P.W.23] saw his brother Fazlul Karim and two others detained on the truck. Some one was saying something by the loudspeaker which he tried to listen and then he moved nearer to the CO [Dev] office and had heard Major Afzal and Alim [accused] speaking by loudspeaker. Alim [accused] in his speech said **“freedom fighters and Awami League men have been trying to destroy the country, Captured Fazlu's father is friend of mine and I requested him repeatedly to get his sons back from wrong path[joining freedom fight]. But he did not and he did not prevent them [detainees] and thus they [detained persons] have to lay their lives”**.

538. From evidence of the IO the P.W.35 it appears that the above version does not contradict to what the P.W.23 stated to the IO, on material particular that proves accused's presence with army in front of CO[Dev] office and the fact of making such derogatory and inciting speech by the accused that eventually resulted in death of the three detained civilians

539. Afterwards, P.W.23 added, they [the group of attackers] insisted Fazlu to say against the war of liberation, but he [Fazlu] denied and with this they including the Pakistani army started torturing him[Fazlu] and on the same day they brought them[detained persons] to the army camp.

540. P.W.23 further stated that on the next day [9 October, 1971], the detained persons were forced to move around Joypurhat town till evening, having painted their face with lime and ink by a truck and the Pakistani army, peace committee members and Razakars were announcing by loudspeaker that “ those who join the war of liberation or cooperate will have to face this consequence[detention, torture, inhuman treatment]. Afterwards, major Afzal and Alim [accused] brought his [P.W.23] brother and two others to Khanjanpur Kuthibari and killed them there. Dead body of his brother could not be traced even [**P.W.23 became emotional and started crying on dock**]

Deliberations

541. The learned prosecutor submitted that from corroborating and consistent evidence of P.W.2 and P.W.4 and P.W.23 it has been proved that accused Alim made instigating and inciting speech when the captured detainees were brought by a truck by the army in front of CO [Dev] office in Joypurhat. Besides, accused’s behaviour and attitude that he demonstrated in the mid September i.e before the event also proves his mens rea and act of substantial instigation. Disgraceful treatment caused to the detained persons following accused Alim’s speech showing grave hatred to the pro-liberation people is another material fact that was a key constituent of abetment forming part of attack directing civilian population.

542. The learned defence counsel submitted that admittedly Aini Ilias is the younger brother of P.W.23. By circulating a ‘leaflet’ said Aini Ilias described the event of his elder brother Fazlul Karim’s capture and killing by the Pakistani army and he nowhere in the said ‘leaflet’ incriminated the accused Alim in any manner with the alleged event. P.W.23 admits the ‘leaflet’ circulated by his brother Aini Ilias while defence cross-examined him drawing attention to it. The ‘leaflet’ and contents therein negates accused Alim’s involvement with the event of killing of Fazlul Karim and two others and as such testimony of P.W.23 cannot be relied upon. It has been further submitted that none of the witness claims accused’s physical presence at the crime site or that he was with the army at the time of capturing the victims.

543. It appears that the charge framed describes that the victims were captured first by the Pakistani army led by Major Afzal from a place ‘Paharpur’ and then

were brought to in front of CO [Dev] office, Joypurhat by truck and only then the accused Alim joined the group and delivered inciting speech showing grave hatred to the pro-liberation people who were in favour of the war of liberation and announced that the detained victims had to face extreme consequence [death]. Later on the victims were brought to the army camp at Khanjanpur Kuthibari, Joypurhat and were killed. It is not alleged that the accused Alim accompanied the troop even to the killing site. Accused is thus alleged to have abetted and contributed substantially to the commission of the killing, by his act and conduct. Thus the prosecution requires proving accused's alleged conduct and whether it had substantial effect in carrying out the act of alleged killing.

544. In cross-examination, the version made by P.W.2 so far as it relates to bringing the captured victim in Joypurhat and on October 8, 1971, under the directives of Abdul Alim, they were forced to disgracefully travel through Joypurhat town on a flatbed truck and it was announced that those who would dared to join the Liberation War would have to face the same consequence and killing the victim Fazlul Karim [freedom fighter] at Khanjanpur Kuthibari has neither been denied nor dislodged, in any manner. Rather, the fact of capturing Fazlul Karim by the army during a front fight at Paharpur remained undisputed.

545. However, defence denied that on accused Alim's order the captured civilians were forced disgracefully around Joypurhat town on a truck, with intent to terrorize the people of Joypurhat. Defence did not put question to P.W.2 as to the source of his knowledge about what he testified. Thus, the version of P.W.2 that part of what he narrated had witnessed and part he had heard becomes credible and as such his testimony seems to be reliable.

546. Defence could not impeach the version made by P.W.4 in respect of presence of accused Alim with Major Afzal in front of CO[Dev] office where the accused made extremely culpable and inflammatory speech, keeping the three captured civilians [freedom fighters] detained on a truck [freedom fighters]. What the accused Alim said in his alleged speech? He [accused] said, with extreme vengeance that

“The father of Fazlu [detained victim] is my friend and I told him to bring his son back from the wrong

path. Nevertheless, he [Fazlu] fought against my country Pakistan. He has to be punished for it.”

547. The above saying reflects accused Alim’s calm but high degree of cruel and hostile attitude that he used to show to the pro-liberation Bangalee civilians, particularly who joined the freedom fight actively for achieving independence of Bangladesh. Victim Fazlul Karim was a freedom fighter. It is not denied. He was captured during a front fight [Paharpur battle] with the army remained undisputed and unshaken too. The Tribunal notes that capturing an armed fighter, during a fight, and disarming him inevitably brings a change in his status. He is then a civilian and does have all rights secured by the Geneva Convention and international humanitarian law. But, in the case in hand, it is seen that on capture, Fazlul Karim was not killed instantly or in conjunction with the battle. Rather keeping him detained with two others he was brought to Joypurhat town by a truck and forced to move around the town disgracefully, to let the people of the town realize that the Bangalee civilians who opted to join freedom fight actively would have to be ‘punished’.

548. It is significant to note that the defence did not cross-examine the P.W.4 to shake the claim of his [P.W.4] learning that the three captured freedom fighters were killed near Kuthibari on October 9, 1971, after they forced them to walk around the entire town with their faces painted black and white. Thus hearsay evidence made by P.W.4, on this matter, carries probative value and credible.

549. Defence could not refute the material version made by P.W.23, the brother of victim Fazlul Karim relating to accused’s act and conduct that he demonstrated to pro-liberation civilians and particularly the Bangalee people who joined freedom fight for achievement of independence. Such behaviour, act and culpable attitude of accused, before the capture and killing of victim Fazlul Karim, impel an unerring conclusion that the local collaborators actively facilitated the Pakistani occupation army in targeting the pro-liberation people, freedom fighters to liquidate them, on capture. As part of this common design accused Alim threatened the father of Fazlul Karim, in the mid of September 1971, to ensure his sons’ back from freedom fight, as stated by P.W.23.

550. It is to be borne in mind that a witness may recall only the core fragmented events, not details and it is court's duty to find out the reasonable hints as to truth on evaluation of such fragmented but material facts. From evidence of P.W.23 it is found that he saw his brother Fazlul Karim and two others brought near the CO [Dev] office, Joypurhat by a truck by the army where he also saw and had heard Major Afzal and Alim [accused] speaking by loudspeaker. And Alim [accused], according to P.W.23, in his speech said **“freedom fighters and Awami League men have been trying to destroy the country, Captured Fazlu's father is friend of mine and I requested him repeatedly to get his sons back from wrong path[joining freedom fight]. But he did not and he did not prevent them [detainees] and thus they [detained persons] have to lay their lives”**.

551. From evidence of the IO the P.W.35 it appears that the above version does not contradict to what the P.W.23 stated to the IO, on material particular. Thus evidence of P.W.23 made before the Tribunal proves accused's presence with army in front of CO [Dev] office and the fact of making such derogatory and inciting speech by the accused that eventually resulted in disgraceful inhuman treatment and death of the three detained civilians

552. In cross-examination, in reply to question put to him P.W.23 stated that accused Alim was not in position to command the Pakistani army but he used to provide consultation and assistance to them. It proves that the accused Alim used to carry out criminal activities on mutual agreement based on 'consultation'.

553. 'Consultation' is an act that takes between two or more persons for arriving at a decision and way of materializing the decision, in furtherance of common plan. It is to be inferred from circumstances and material facts. Culpable association of accused with the army and its Major Afzal, visible enthusiasm in making inciting speech with intent to terrorize the people offer adequate and fair indication as to the fact of 'consultation' or 'discussion' between Alim and Major Afzal.

554. It has been re-affirmed in cross-examination of P.W.23 that he and his two other brothers Fazlul Karim and Aini Ilias[younger brother] were in favour of war of liberation. The fact of making speech by accused Alim near the CO[Dev]

office has also been re-affirmed as the P.W.23, on cross-examination, stated that there had been 40-50 persons present at the Place near CO[Dev] office when such speech was made on 8 October 1971.

555. Thus the fact of making speech by accused Md. Abdul Alim on 8 October 1971 in front of CO[Dev] office, Joypurhat when he [accused] was with Major Afzal keeping Fazlu and two others detained on a truck stands proved beyond reasonable doubt. Alim [accused] in his speech said

“freedom fighters and Awami League men have been trying to destroy the country, Captured Fazlu’s father is friend of mine and I requested him repeatedly to get his sons back from wrong path [joining freedom fight]. But he did not and he did not prevent them [detainees] and thus they [detained persons] have to lay their lives”.

556. The above saying reflects substantial level of culpable and cruel attitude of accused Alim. This attitude seems to be consistent to what he [accused] Alim said to Fazlu’s father at Akkelpur peace committee office, in mid September 1971. Accused’s act and conduct as above inevitably instigated the principals to the accomplishment of killing the detained victims. It is to be noted that “instigation” implies an act of prompting another person to commit an offence. It is not necessary to prove that the crime would not have been perpetrated without the involvement of the accused. Instigating act of the accused Alim abetted and substantially contributed to the conduct of the principal perpetrators in committing the crime.

557. There can be no argument that the victims were not ‘civilians’ as they were captured during a fight and were linked to a particular side of the conflict. It is to be considered what their status was at the time of crimes committed. We have already observed, in adjudicating charge no.10, that even a non civilian [freedom fighters] may be considered part of the civilian population if at the time of the attack they were not participating in the hostilities. The three captured persons were no longer in position in taking part in hostilities and they were no longer bearing arms and thus had placed *hors de combat*, due to their being detained.

558. We are not convinced with what has been argued by the learned defence counsel on the basis of a ‘leaflet’ allegedly circulated by the younger brother of P.W.23. It is true that the defence cross-examined P.W.23 drawing attention to it and the said leaflet has been submitted at the stage of summing up of case. First, the alleged ‘leaflet’ which the defence intends to rely upon shows Major Afzal’s involvement with the event. Thus, in other words, it brushes aside the defence claim that in 1971 Major Afzal was not at all in Joypurhat. Next, The Tribunal notes that the said ‘leaflet’ has not been submitted as required under section 9(5) of the Act. However, since P.W.23 admits such leaflet the Tribunal permitted the defence to submit it at belated stage for keeping the same with the record.

559. It appears that the ‘leaflet’ was circulated in 2011 by P.W.23’s brother Aini Ilias who did not come on dock as witness for either party. It is true that P.W.23 admits the leaflet circulated by his brother. But his brother Aini Ilias could not be asked by giving an opportunity to explain the leaflet as he has not come before the Tribunal. Additionally, it appears that the purpose of such leaflet was making an urge to the government for preservation of memories of victim Fazlul Karim and it does not relate to seeking justice for the killing of Fazlul Karim. Obviously it was not necessary to project culpability of any local collaborator for the alleged killing. Thus merely on the basis of such unexplained leaflet testimony of P.W.23 cannot be discarded. Thus the testimony of P.W.23 cannot be branded as the result of recent contrivance or a bias.

560. It is now well settled that even a single or limited number of acts on part of accused would qualify as a crime against humanity, unless those acts may be said to be isolated or random. In context of 1971 which individual could exercise authority to make speech joining the group of army? It was only the position of an individual that could enable him making consultation and taking part in activities carried out by the occupation army.

561. On cautious evaluation of evidence led we arrive at decision that it stands proved beyond reasonable doubt that the accused Md. Abdul Alim in exercise of his potential authority and position joined the troops led by Major Afzal when they brought the three captured civilians in front of the CO[Dev] office in Joypurhat and started making ‘announcement’ by delivering ‘speech’ that the detained persons would not be spared and those who opted to favour the war of

liberation would have to face similar consequence. This act of accused obviously formed grave ‘abetment’ that substantially contributed to the killing of the captured civilians. Accused Md. Abdul Alim therefore consciously and knowing the consequence of his act substantially encouraged and provided moral support to the principals in carrying out the act of killing the detained persons. And thereby he[accused] participated to the event of killing, by his act and conduct forming part of attack, in furtherance of common object. Therefore, the accused Md. Abdul Alim is found **guilty** for the offence of ‘murder’ as crimes against humanity enumerated in section 3(2) (a)(g) of the Act of 1973 and thus he incurs criminal liability under section 4(1) of the Act of 1973.

Adjudication of Charge no.15

[Killing of 25 Civilian detainees at Officer’s Quarter, Joypurhat Sugar Mill]

562. Summary charge: During the period of War of Liberation in 1971 the accused Md. Abdul Alim, the local influential leader of Razaker Bahini as well as the chairman of local peace committee and or member of ‘group of individuals’ were closely associated with the army camp set up inside the Joypurhat sugar mill where in a room 25 civilians and Solaiman Ali Fakir, Abdul Khalek, Abdus Samad and Aftab Hossain of Panchbibi police station locality were kept detained from 25 October 1971 and following verdict of the accused and the Pakistani Colonel, during eight nights those 25 civilians detained inside the Mill premises, were killed. Therefore, the accused has been charged for substantially abetting and contributing the actual commission of offences of ‘**murder**’ as crimes against humanity by directing attack against the civilian population as specified in section 3(2) (a) (g) of the Act which are punishable under section 20(2) read with section 3(1) of the Act. And the accused is thus liable for the above offences under section 4(1) of the Act.

Witnesses

563. In order to prove the charge, prosecution relies upon two witnesses –P.W.5 Abdus Samad Mondol and P.W.6 Soleman Ali Fakir. Both of them were allegedly kept detained at the army camp set up at Joypurhat sugar mill for nine days. In the same room 25 civilians were also kept detained and during eight days of their detention there, 25 detainees were killed inside the mill premises. Accused Alim had close association with the army camp and thus he is alleged to

have abetted and contributed to the killing of those civilians, the co-detainees of P.W.5 and P.W.6. It is to be noted that P.W.5 and P.W.6 were eventually released, allegedly on decision of one army colonel at the camp defying Alim's [accused] protest, from the camp on ninth day of their confinement, as described in charge no.15.

Evidence

564. P.W.5 Abdus Samad Mondol [58] stated that he and his uncle Soleman Ali Fakir [P.W.6] were apprehended on 25 October 1971 by two security men of the Pakistani Army at Panchbibi bazaar while they were on the way to the local peace committee office for collecting identity card for enjoying free movement. On capture, they were brought to the army camp set up at Samiranessa better primary school where from they were taken to the army camp at Joypurhat Sugar Mill.

565. P.W.5 went on to state that they were kept detained in a room of officer's quarter, Joypurhat Sugar Mill where they were subjected to cruel torture by 8/10 army and thus they sustained severe blood injuries that led them to lie on the ground . P.W.5 also stated that apart from them, there had been another 25 detainees in the same room, prior to their detention.

566. P.W.5, as regards killing of those 25 co-detainees, stated that Abdul Alim[accused] along with a colonel of Pakistani army used to hold so-called 'trials' at the club of the sugar mill every afternoon and as per the "verdict of their trial" two or three detainees were brought out of their room around 10:00pm-11:00pm every night and they[detainees] were charged bayonets first and afterwards shot dead under a banyan tree, 10 yards far from their room. On ninth day of their detention, they [P.W.5 and P.W.6] and two others were produced before the so called 'court' consisting of accused Alim and army colonel.

567. On cross-examination, in reply to question put to him, P.W.5 stated that they were kept detained at the army camp set up at Joypurhat Sugar Mill for nine days and 25 other civilians were also kept confined with them of whom one was Abdul Khalek and another was Aftab. Thus, the fact of detaining the P.W.5 and P.W.6 is found to have been re-affirmed.

568. P.W.6 Soleman Ali Fakir [71] stated almost similar version in respect of the fact of apprehending him and Abdus Samad Mondol [P. W.5] and finally taking them to the army camp at Joypurhat Sugar Mill. He [P.W.6] also corroborates that they were kept detained in a room where they found 25 more persons confined there from earlier. Next, he also testified, corroborating the P.W.6, how 23 detainees out of 25 were successively killed bringing them under the banyan tree inside the mill premises by the army men.

Deliberations

569. Mr. Rana Das Gupta, the learned prosecutor argued that P.W.5 and P.W.6 were kept detained at the army camp set up in Joypurhat Sugar Mill for nine days with some more detainees in a room. P.W.5 and P.W.6 witnessed that their co-detainees were killed during the successive eight nights inside the mill premises by the army men. These two witnesses eventually got release on decision of Colonel of the army camp. Naturally, they had opportunity of being aware of the killing of their co-detainees. From the evidence of P.W.5 and P.W.6 it will reveal that accused Md. Abdul Alim @ M.A Alim was closely associated with the army camp as he participated the decision making process relating to release of the detainees there and thus he was concerned with the killing of 23 civilians kept detained. Accused's association with the army camp itself was an act forming part of attack that abetted and contributed to the actual commission of killing civilians who were kept confined at the camp.

570. Conversely, Mr. Ahsanul Haque Hena, the learned defence counsel argued that the evidence of P.W.5 and P.W.6 does not depict that either of them saw accused Alim sitting with Colonel of the army camp in rendering verdict as to the fate of their co-detainees. If it is taken to be true that these witnesses were kept detained in a room at the army camp how they became aware of the alleged event of their co-detainees' killing followed by decision to which accused Alim was a part. There has been no proof to show that accused Alim was involved with the act of keeping them [P.W.5 and P.W.6] and other civilians detained at the army camp. Accused Alim had no control and authority over the army camp and its activities and as such he cannot be held responsible for the alleged detention and killing of 23 civilians by the army men inside the army camp.

571. Tribunal notes that mere proving the event of alleged killing of 23 civilians detained at the army camp at Joypurhat Sugar Mill does not *ipso facto* connect the accused with its commission. Prosecution is to show that the accused, by his act or conduct, abetted or contributed to the perpetration of the crimes. Besides, mere seeing the accused Alim, if proved, at the camp does not establish that he had ‘close association’ with the army camp. More so, prosecution is required to prove that accused Alim had substantive authority and control over the camp and activities carried out by it, for holding him responsible.

572. On appraisal of evidence adduced before us it appears that it is proved that the P.W.5 and P.W.6 were brought to the army camp at Joypurhat Sugar Mill where in a room they were kept detained with 25 civilians, detained there from earlier. Prosecution does not aver that accused Alim was concerned with the act of keeping those 25 civilians confined at the camp. No proof whatsoever is found to show accused’s significant control and authority over the camp. Neither of P.W.s stated that he witnessed the event of killing that allegedly occurred inside the mill premises. Presumably, it was their speculation, for the reason of non return of their co-detainees taking from their room in each night, that they were killed.

573. From the testimony of P.W.5 and P.W.6 it reveals that Pakistani army used to drag 2/3 civilian detainees who were kept confined with them in a room and killed in every night during their eight days’ detention and in this way the number of killing of detainees stood at 23. According to P.W.5 and P.W.6 they were kept confined in a room of the camp. If it is so, how they became aware that killing of their co-detainees was followed by the decision taken by accused Alim and one army Colonel? Naturally the witnesses had no occasion and opportunity of being aware of it, as they were kept confined in a room. Be that as it may, the version made by prosecution witnesses implicating the accused Alim does not inspire credence, although the event of alleged killing could not be shaken by cross-examining them.

574. P.W.5 and P.W.6, by making statement before the Tribunal, have incriminated the accused Alim by saying that Alim [accused] along with an army colonel of the camp used to sit for ‘trial’ in the club room of the mill for taking decision following which the 23 detained civilians were killed in 8 consecutive

nights by lifting 2/3 detainees every night. The witnesses, according to them, were kept detained in a room and as such they could at best be aware of the fact of lifting 2/3 co-detainees in each night from their room. But witnessing the event of successive killing of their 23 co-detainees and being aware of Alim's complicity or 'participation' remaining confined in a room does not seem to be probable at all. It was impracticable indeed.

575. It is not clear too as to how the P.Ws became confident about the rank of army official whom they claim to be a colonel who allegedly headed the 'trial' at the camp. There is no proof that the P.W.s had any previous occasion to see the army colonel and if it is so, how they now can state that the army official at the camp was a colonel? Thus, the statement made by them in respect of holding 'trial' by an army colonel and accused Alim becomes reasonably doubtful. Further, there is nothing in their testimony whether the murderer who allegedly used to come to their room at the camp and take away 2/3 civilian detainee every night for killing belonged to Pakistani army or the cohorts of accused Md. Abdul Alim.

576. According to testimony of P.W.6 it has been revealed that the killing had been accomplished near a banyan tree within the vicinity of the sugar mill and he himself had witnessed the dreadful murder. There is no assertion that the room where he was kept detained was open and killing spot was within the range of his eye sight and there was sufficient light during night that enabled him seeing the act of committing murder. In absence of such assertion his testimony appears to be nothing but a flagrant untrue version.

577. The P.W.s were kept confined in the same room where 25 other detainees were also kept detained and as such surely they were supposed to have recognized the killer. But the P.W.s stated nothing on it. According to narration made in the charge framed, accused Md. Abdul Alim is not alleged to have directly participated to the commission of the killing. Careful evaluation of evidence of P.W.s does not impel us to conclude that they were in position to be aware that accused Abdul Alim had been in the alleged 'trial' and thus took part in decisive role for the purpose of liquidating the detained civilians at the camp. Therefore, accused Alim cannot be found to have assisted or aided the army at the camp on which he had no authority and control.

578. The defence has failed to shake what has been testified by the P.W.5 and P.W.6, on material particular, by cross examining them. Rather, the fact of keeping these witnesses detained at the army camp at Joypurhat Sugar Mill has been re-affirmed. But however, such failure of the defence will never go in aid to the prosecution case particularly when in view of foregoing discussion made on total appraisal of evidence prosecution does not appear to have been able to prove accused Alim's participation through the act of 'abetment' and providing moral support beyond reasonable doubt.

579. The alleged killing that took place at the army camp at Joypurhat Sugar Mill, as described in the charge, remains undisputed. But the culpable conduct of accused Alim of being associated with that camp could not be proved by the prosecution, even if it is accepted to be true that the P.W.5 and P.W.6 were, on the ninth day of their detention, produced before the accused Alim and one army colonel for electing their destiny. This fact alone cannot prove that accused Alim had also been involved in all the previous successive decisions taken by the army to kill the other 23 detainees. At best it establishes accused's association with army camp. But it does not offer any conclusive indication that he [accused] had effective control, influence and authority over the camp and activities carried out there and he[accused] played a decisive role that had substantial effect in taking decision of killing the detainees. However since accused's alleged involvement with the killing of 23 civilians detained at the army camp at Joypurhat sugar mill suffers from reasonable doubt, due to paucity of reliable evidence, and also for the reasons above the benefit of such doubt goes in favour of the accused. Therefore, the accused Md. Abdul Alim is found **not guilty** of the offence of 'murder' as crime against humanity' as specified in section 3(2) (a) (g) of the Act.

Adjudication of Charge No. 16

[Confinement as crime against humanity]

580. Summary charge: This charge involves confining four civilians at the army camp set up at Joypurhat sugar mill for nine days since 25 October 1971. They were allegedly captured by the accomplice of accused Alim. On the 9th day of their confinement they were produced before a 'court' presided by an army colonel and on interrogation two of them were set free by the colonel, ignoring

the protest and opinion of accused Md. Abdul Alim. Thereby, accused Alim abetted and contributed to the offence of confinement as crimes against humanity as specified in section 3(2)(a)(g) and incurs liability under section 4(1) of the Act of 1973.

Witnesses

581. P.W.5 Abdus Samad Mondol and P.W.6 Soleman Ali Fakir, two of detainees testified how they were captured and kept confined at the army camp and eventually how they were released. The accused is not alleged to have physically participated to the criminal act of their capture. The charge itself narrate that they were so captured by the army security men and eventually brought to the army camp.

Evidence

582. P.W.5 and P.W.6 have testified that they were apprehended on 25 October 1971 by two security men of the Pakistani Army at Panchbibi bazaar while they were on the way to the local peace committee office for collecting identity card for enjoying free movement. On capture, they were first brought to the army camp set up at Samiranessa better primary school where from they were taken to the army camp at Joypurhat Sugar Mill. This version relating to their capture and bringing to the army camp where they kept captive remained undisputed and unimpeached.

583. Next, both the P.W.s have testified that on 9th day of their confinement they were produced before a ‘court’ presided by an army colonel with whom accused Alim was also there. They were interrogated and accused Alim protested their release. But the colonel, on listening them, finally set them free by saying ‘Azad’ [freed] and thus they returned their home.

Deliberations

584. The learned prosecutor Mr. Rana Das Gupta submitted that the fact of capture and detaining the P.W.5 and P.W.6 at the army camp for 9 days could not be refuted by the defence. The evidence of the detainee witnesses carries much credibility. Their evidence shows that accused Alim was closely associated with the army camp and activities carried out there. Accused’s role presumably

suggests that he had acted culpably in keeping these witnesses confined at the army camp.

585. Conversely, the learned defence counsel argued that the accused being a civilian had no influence, control or domination over the army camp; that he is not alleged to have had acted culpably in capturing these witnesses and bringing them to the camp. If the accused really had any degree of control or authority over the army camp the detained persons would not have been released there from.

586. The Tribunal notes that the accused Alim has been arraigned for abetting and contributing to the commission of offence of ‘confinement’ of 04 civilians at the army camp set up at Joypurhat sugar mill. The civilians were allegedly detained there for 09 days. On the 09th day of their confinement a ‘court’ took its seat inside the sugar mill club room. Accused Alim was there along with one army colonel. According to the charge framed, accused Alim on interrogating them opined not to release them. But the colonel eventually freed the detainees, by his ‘verdict’ and thus the detainees came back to their home.

587. The fact of keeping the P.W.5, P.W.6 and two others confined at the army camp for 9 days remained undisputed. But there has been no indication or even circumstantial proof to show that the accused abetted the persons who brought them to the army camp, on capture. They were kept confined in a room at the camp and thus naturally they had no occasion of seeing the accused and his activities inside the camp, till they were produced before the ‘court’ that allegedly taken its sit at club room of the mill. They found accused Alim first inside the camp when they were produced before a ‘court’ set up at the club room of the mill. The evidence of P.W.5 and P.W.6 goes to show that finally they were set at liberty.

588. The above fact, even if taken to be true, depicts that the four civilians detained at the camp for 09 days were freed daring accused Alim’s ‘opinion’. That is to say, accused Alim was not in position of domination or authority that could have decisive effect on the fate of the persons detained at the army camp. The charge framed describes that the civilians were brought to the camp by the accomplices of accused Alim. But it does not *ipso facto* suggest a reasonable

conclusion that they were so brought on instruction or instigation or order of accused Alim, particularly in absence of any reasonable hint reflected from any circumstance.

589. Accused Alim has been arraigned for abetting and contributing to the commission of offence of ‘confinement’ of 04 civilians at the army camp set up at Joypurhat sugar mill. The civilians were allegedly kept detained there for 09 days. On the 09th day of their confinement a ‘court’ took its seat inside the sugar mill club room. Accused Alim was there along with one army colonel, as stated by the P.W.s. Evidence adduced shows that the accused Alim, on interrogation, opined not to release them. But the colonel eventually freed the detainees, by his verdict ‘*azad*’ [freed] and thus the detainees came back to their home.

590. The above fact evidently depicts that the four civilians detained at the camp for 09 days were freed confronting accused Alim’s ‘opinion’. That is to say, accused Alim was not in effective position of domination that could have had decisive effect on the fate of the detainees at the army camp. Besides, with the decision of the army colonel, flouting accused Alim’s opinion, the chapter of confinement of four civilians ended. This act of accused did not fuel to their confinement; rather it came to an end on their release. Thus, the act of protesting detainees’ release did not form part of attack.

591. How the accused Alim abetted and contributed to their confinement at the army camp? This crucial question remained unanswered. In absence of any proof as to accused’s involvement in keeping those civilians confined at the army camp mere conduct of accused Alim he had shown by protesting release of the detainees does not *ipso facto* suggest a reasonable conclusion that they were so brought and kept confined at the army camp on instruction or instigation or order of accused Alim.

592. It is found from evidence that P.W.5 and P.W.6 that they[witnesses] were captured by the security men of army who brought them to the army camp at Joypurhat Sugar Mill. There has been no fair indication that accused Alim had culpably acted, in any manner, in carrying out the act of capturing, bringing and keeping them confined there. Additionally, in absence of any circumstantial proof, the accused Alim cannot be considered to have had effective influence and

position of authority over the principals who brought the civilians to the army camp and he, by his act or conduct forming part of attack, abetted to the accomplishment of their picking up to the army camp where they kept confined for 09 days. It cannot be thus safely concluded that accused Alim substantially contributed or abetted to keep them detained, merely on the basis of fact that accused Alim took sit for decision with the army colonel when defying his [accused] disapproval the colonel ordered their release. As a result, it cannot be said that the accused incurred liability for the criminal act of confining those civilians. Therefore, the accused Md. Abdul Alim is found **not guilty** of the offence of ‘**confinement**’ as crime against humanity’ as specified in section 3(2) (a) (g) of the Act.

Adjudication of Charge No.17 [Killing of Subedar major Jabbal Hossain]

593. Summary charge: This charge involves the event of capturing injured Subedar Major[of the then EPR] Jabbal Hossain on the day of Eid-ul-Fitre in 1971[corresponds to 20 November 1971] by the group comprising of army , local peace committee members and Razakars accompanied by the accused Alim from village Dhuroil under Panchbibi Police station where he took shelter. The captured victim was then brought to Joypurhat. The accused Alim is alleged to have participated abetted and contributed to the offence of killing the captured victim as he [accused] did not respond to the repeated approach made to him by the relatives for release of the captured victim. Later on, the relatives of the victim came to know that the accused had killed the captured Jabbal Hossain. Therefore, the accused has been indicted to have incurred liability under section 4(1) of the Act of 1973 for the offence of murder as crimes against humanity as specified in section 3(2)(a) of the Act.

Witnesses

594. Prosecution, in order to prove the charge, relies upon P.W.7 and P.W.8. The deceased victim was the father of P.W.8. Victim Jabbal Hossain was a personnel of the then East Pakistan Rifles [EPR] and he had been working in Chittagong as Subedar-Major. The charge narrates that owing to injuries sustained when he joined a front fight in favour of liberation war of Bangladesh, he [victim] somehow came to Panchbibi. The charge further alleges that at a stage, the

victim took shelter at the house of one Nizamuddin at village Dhuroil wherefrom he was captured and forcibly taken to Joypurhat.

Evidence

595. P.W.7 the husband of P.W.8 is a hearsay witness. He narrates what he heard about abducting his father-in-law from his wife [P.W.8]. According to P.W.7 on 20 November 1071 a group comprising of Pakistani army, peace committee members and Razakars, on order of accused Alim, by launching attack apprehended Jabbal Hossain from the house of Nizamuddin at village Dhuroil. His father-in-law was so captured on information provided by Razakar Alamuddin of Fiska village.

596. P.W.7 further stated that they moved to the peace committee office at Panchbibi wherefrom they became aware that the captured victim was brought to Joypurhat and handed over to the members of peace committee there. According to P.W.7 they made efforts to get Jabbal Hossain released by making approach to Alim [accused] who sent them to one Rafique Kahn Bihari in Bogra with a letter for release of victim as he [victim] was under surveillance of intelligence team there. Finally, Jabbal Hossain could not be traced and at a stage Alim told that he might have been killed as he [victim] fought in Chittagong against Pakistani army favouring the war of liberation. Later on, they came to know that Jabbal Hossain was killed. P.W.7 however does not claim that the group of abductors was accompanied by accused Alim when Jabbal Hossain was captured and forcibly taken from the house of Nizamuddin of village Dhuroil.

597. P.W.8 the daughter of the deceased victim Jabbal Hossain had been at the place where from her father was so captured and taken away. She claims to have witnessed the event of abduction and in addition to this fact, she has testified some other material facts. According to her a group comprising of army, peace committee members and Razakars, on order of accused Alim, raided the house of Nizamuddin where her father, mother and she herself took shelter and captured her father and forcibly took away first to Panchbibi peace committee office.

598. P.W.8 has not stated that accused Alim accompanied the gang of attackers while it abducted Jabbal Hossain. Defence could not refute the above version

relating to abduction of Jabbal Hossain from the place alleged and in the manner. Rather, it has been re-affirmed in cross-examination

599. P.W.8 further stated that a local Razakar Alamuddin was also with the group of attackers who in conjunction with the event of capture uttered that he had been rewarded as he conveyed the fact of Jabbal Hossain's staying there [Dhuroil village] to the accused Alim in Joypurhat and for this he was rewarded. Defence, drawing attention to this version, for the purpose of contradicting it by the IO, suggests P.W.8 that she did not state it to IO. P.W.8 however denied it.

600. P.W.8 stated too as to how they made approach to accused Alim in Joypurhat peace committee office which was in vain even moving to one Rafique Khan Bihari in Bogra with a letter given by accused Alim. This version corroborates what has been stated by P.W.7 on this particular fact.

Deliberations

601. Mr. Rana Das Gupta the learned prosecutor submitted that the event of capturing the victim from village Dhuroil on the date and in the manner has been proved by evidence of witnesses. The hearsay evidence of P.W.7 seems to have been corroborated by P.W.8. According to both of them, repeated approach was made to the accused Alim for release of captured victim to which he did not respond and it indicates his involvement and approval to the commission of the killing of Jabbal Hossain.

602. Accused Alim is alleged to have participated to the commission of the act of abduction of Jabbal Hossain as he allegedly accompanied the gang of attackers. But on evaluation of evidence of P.W.7 and P.W.8 it reveals that none of them claims that accused Alim accompanied the gang of perpetrators who abducted Jabbal Hossain from his shelter at the house of one Nizamuddin.

603. Utterance of Razakar Alamuddin made in conjunction with the event of abduction, as stated by P.W.8 the eye witness is a piece of evidence on material particular. According to P.W.8 Alamuddin was also with the group of attackers who in conjunction with the event uttered that he had been rewarded as he conveyed the fact of Jabbal Hossain's staying there [Nizamuddin's house] to accused Alim in Joypurhat.

604. Defence, drawing attention to the above piece of version, for the purpose of contradicting it by the IO, suggested P.W.8 that she did not state it to IO. P.W.8 however denied it. But it appears that while contradicting the above statement so made by P.W.8 before the Tribunal the IO [P.W.35] stated that the P.W.8 did not state it to him during investigation.

605. It is true that it is not necessary to narrate every detail in earlier statement made to IO. Earlier statement is not evidence. The Trier of facts is to concentrate its judicial attention to what the witness has stated on dock. Inconsistency between sworn testimony and earlier statement does not affect credibility of the witness and tarnish the evidence made before court of law in its entirety. It is also true that mere inconsistency is not considered as a contradiction. But if such inconsistency relates to material particular, omission to narrate it in earlier statement made to IO is taken into account and is considered as ‘glaring contradiction’ and thus such version is treated as intelligent improvement.

606. P.W.7 claims to have heard the event of Jabbal Hossain’s abduction from his wife P.W.8. But surprisingly he remained silent as to the alleged utterance of Razakar Alamuddin who accompanied the group of attackers, implicating the accused Alim with the attack. It may reasonably be said that if really Alamuddin remained present at the time of capturing Jabbal Hossain and made such utterance linking the accused, P.W.8 would have told it to her husband P.W.7 and in that case P.W.7 also would have narrated it before the Tribunal. But P.W.7 stated nothing in this regard. Therefore, the statement made by P.W.8 so far as it relates to seeing Alamuddin uttering that he conveyed the information about Jabbal Hossain’s staying at Nizamuddin’s house to accused Alim for which he [Alamuddin] was rewarded inspires no credence.

607. Detained victim Jabbal Hossain was taken to the peace committee office in Joypurhat. But there has been no evidence whatsoever that till the victim’s relatives’ going to Bogra with a letter given to one Rafique bihari by accused Alim, on their request, and coming there from victim Jabbal Hossain was kept captive either at the peace committee office, Joypurhat or any where else under effective supervision and knowledge of the accused Alim.

608. Next, if accused Alim had culpable intention to further the object of the principal perpetrators of committing the killing of Jabbal Hossain he [accused] would not have sent the relatives of the victim to one Rafique Bihari in Bogra for having trace of the abducted victim. Mere utterance of Alamuddin which is found to be subsequent embellishment on material particular, as already found, thus cannot reasonably prove accused Alim's participation with the event, at any stage of its perpetration.

609. There has been no evidence, direct or circumstantial to rationally indicate that accused Alim, by his act or conduct, facilitated and abetted the capture, detention, torture and killing of Jabbal Hossain. True that accused Alim was a potential leader of Joypurhat peace committee and used to maintain a close and culpable affiliation with the army even and provide tangible and tacit assistance and approval in carrying out criminal activities. But merely for this reason accused Alim cannot be held criminally responsible for the offence of Jabbal Hossain's abduction, detention and killing too, in absence of any lawful evidence. We should keep in mind that mere perception cannot take the place of 'proof'.

610. It is true too that in relation to some other charges, civilians detained were eventually killed and accused Alim has been found to have abetted and substantially contributed to the actual commission of those offences. But that cannot be considered as a set format of holding Alim liable even in relation to the offence narrated in charge no.17. Here, we see that there has been no evidence or circumstantial proof that can reasonably prompt a man of normal human prudence to hold Alim responsible for the crime alleged in charge no.17.

611. It is found that the accused in response to the approach made to him by the relatives of the victim sent them to one Rafique Bihari in Bogra with a letter. Merely this fact, in absence of any culpable act or conduct on part of the accused Alim forming part of attack, does not *ipso facto* proves that Alim was 'concerned' with the killing of Jabbal Hossain.

612. The statement made by P.W.8 shows that the accused Alim told that he [victim] might have been killed as he [victim] fought in Chittagong against Pakistani army favouring the war of liberation. It was a mere premonition in

respect of the destiny of the victim so captured by the army that he [accused] expressed, on failing of the victim's relatives of having any trace of Jabbal Hossain in Bogra. It does not force to a logical conclusion that accused Alim was 'concerned' with the killing or he himself too abetted and facilitated its perpetration.

613. On thoughtful appraisal of totality of evidence, it appears that the prosecution has failed to prove that the accused Md. Abdul Alim accompanied the group of attackers while it captured the victim Jabbal Hossain. Either of witnesses does not claim that accused Alim accompanied the group comprising of army, peace committee members and Razakars. However, it has been proved that the victim was so captured from village Dhuroil by the said group of perpetrators. But it remained unearthed as to finally where the victim was taken and how he was killed and by whom or by which group. There, has been no convincing evidence or circumstantial proof to show that the accused Alim, after capture of the victim, had acted culpably that eventually abetted and facilitated the commission of the actual offence of killing the victim. Dead body of the victim could not be traced even. Abduction and killing of Subedar Major Jabbal Hossain is indeed a heartrending event. But in view of foregoing discussion and reasons we are forced to conclude that the prosecution has failed to prove that the accused Md. Abdul Alim participated, abetted and substantially contributed to its commission and therefore, he is found **not found** guilty of the offence of 'murder' as crime against humanity' as specified in section 3(2) (a) (g) of the Act.

XIX. Contextual requirement: Context prevailing in 1971 in the territory of Bangladesh

614. It is now settled that the offence of crimes against humanity is considered as '**group crime**' and it is not perpetrated by a single individual. But however, an individual may participate to the actual commission of the principal crime by his act or conduct, before or midst or after the crime committed. In this regard, the Tribunal notes that in adjudicating culpability of the person accused of criminal acts, context and situations prevailing at the relevant time i.e the period of war of liberation in 1971[March 25 to December 16 1971] together with acts, conducts of the accused is to be considered.

615. It is reasonably undisputed that the local collaborators had substantially assisted and aided the Pakistani occupation army in carrying out horrendous criminal activities in furtherance of policy and plan. Policy and plan requirement is not an element to qualify the criminal act as the offence of crimes against humanity. It simply comes forward to understand the context of committing such atrocities. In this regard, we deem it relevant to reiterate our reasoned finding given in the case of *Muhammad Kamaruzzaman [ICT-2]* that the Pakistani occupation army with the aid of its auxiliary forces, pro-Pakistan political organizations implemented the commission of atrocities in 1971 in the territory of Bangladesh in furtherance of following policies:

- (i) Policy was to target the self-determined Bangladeshi civilian population
- (ii) High level political or military authorities, resources military or other were involved to implement the policy
- (iii) Auxiliary forces were established in aiding the implementation of the policy
- (iv) The regular and continuous horrific pattern of atrocities perpetrated against the targeted non combatant civilian population.

[Muhammad Kamaruzzaman, Judgment 09 May 2013, para, 513]

616. The above facts in relation to policies are beyond reasonable dispute. Thus the context reflected from above policies unerringly suggests that the offences of crimes against humanity as specified in section 3(2)(a) of the Act of 1973 were the predictable effect of part of ‘*systematic attack*’ ‘*committed against civilian population*’. It is a fact of common knowledge which is reasonably undisputed that the Pakistani occupation armed force, after the ‘operation search light on 25 March 1971, rolled into different parts of the territory of Bangladesh and started carrying out horrific criminal activities in execution of government’s plan and policy in collaboration with the local anti liberation section as a ‘part of a regular pattern basis’ and it continued through out the long nine months of war of liberation in 1971.

617. Therefore, the crimes for which the accused Alim has been found guilty were not isolated crimes. Those were part of ‘*systematic*’ and ‘*planned*’ ‘*attack*’

intended to the accomplishment of offence of crimes against humanity and ‘genocide’ as enumerated in section 3(2) of the Act, in furtherance of policy and plan. It is thus quite evident that the atrocious criminal acts proved were ‘committed against civilian population’ within a context forming part of ‘systematic attack’.

618. The notion of ‘attack’ thus embodies the notion of acting purposefully to the detriment of the interest or well being of a civilian population and the ‘population’ need not be the entire population of a state, city, or town or village. Thus even a single act of an accused forming part of attack committed against even a single unarmed civilian causing criminal act constituting the offence enumerated in the Act of 1973 is sufficient for holding him criminally responsible.

619. The phrase ‘**acts committed against any civilian population**’ as occurred in section 3(2)(a) clearly signifies that the acts forming attack must be directed against the target population to the accomplishment of the crimes against humanity and the accused need only know his acts are part thereof. Therefore, the facts and circumstances unveiled before us unambiguously have proved the ‘contextual requirement’ to qualify the offences for which the accused Md. Abdul Alim has been charged and found guilty.

XX. Had the Accused position of Authority or Superior Position over the local peace committee and Razakars.

Prosecution Argument

620. Ms. Tureen Afroz, the learned prosecutor argued on how accused Md. Abdul Alim incurred “superior responsibility” for the crimes committed by the notorious members of peace committee and Razakars as he, as it appears, had acted as the ‘crime compass’. It is true that the accused has not been alleged to have incurred liability under the theory of ‘civilian superior responsibility’ in respect of all the charges. But it would not resist the Tribunal in finding him liable also as a ‘civilian superior’ and such position may be taken into account as an aggravating factor. It has been further argued that in order to show one’s “superior responsibility” there should be a superior-subordinate relationship even informal in nature, and the superior should have “effective control” over the subordinates, the principal perpetrators. In the case in hand, it would reveal that

in relation to some events, the accused, instead of preventing the commission of crime, rather endorsed and approved, by his acts and conduct, the perpetration of the crimes, by exercising his position of significant authority.

Defence Argument

621. Conversely, the learned defence counsel submitted that since it has not been proved by any authoritative documentary evidence that the accused Alim was the chairman of local peace committee he cannot be held liable as ‘superior’ of the principal perpetrators. There has been no proof to establish his ‘superior position’ over the peace committee and Razakars. Even the accused cannot be branded as the ‘commander’ of Razakars. It was the Pakistani army who committed the crimes alleged with the aid of local collaborators over whom the accused had no effective control at all. Prosecution has failed to prove too that the accused ‘had reason to know’ about the perpetration of crimes alleged. In case of failure to prove that the accused had ‘duty to know’ he cannot be held liable as ‘*superior*’.

Deliberations on the issue of Position of Authority of Accused Alim and liability

622. The accused Md. Abdul Alim has been indicted to have incurred liability as the chairman/influential leader of local peace committee and Razakars’ commander, in respect of the crimes narrated in all the charges framed. It appears that the accused Alim has been found to have incurred liability also under section 4(2) of the Act of 1973 which corresponds to the notion of ‘civilian superior responsibility’ only in respect of charge nos. 7 and 8. Incurring liability cumulatively under the theory of civilian superior responsibility may simply act as an aggravating factor for the purpose of awarding sentence, if inflicted.

623. Next, as per the amendment of section 3 of the Act of 1973, the Tribunal now has jurisdiction to try and punish any non-military person [civilian], whether superior or subordinate, who has direct or indirect involvement with the relevant crimes. In other words, the Tribunal now has jurisdiction to try any accused who is a non-military person, including a civilian superior.

624. The Tribunal is not precluded in finding the accused liable also under the theory of ‘civilian superior responsibility, if it is adequately reflected from the

evidence presented that he was a person of 'position of authority' having effective control on the principals. It has been found proved that the Accused Alim, by virtue of his position in the peace committee had provided 'navigational services' to the principals who were peace committee members and Razakars in carrying out criminal activities and actual commission of horrific crimes. It is now settled that the prosecution does not require proving any formal 'superior-subordinate relationship'. 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.

625. 'Peace Committee' was an 'associate organization' of the Pakistani occupation army and it was formed aiming to provide active assistance to liquidate the 'miscreants'[freedom fighters] , pro-liberation Bangalee people, Hindu community, in furtherance of policy , plan and design. We prefer to pen our view that the doctrine of superior responsibility is applicable even to civilian superiors of any such 'associate organization'. Thus, as a matter of policy, civilians should also be subject to the doctrine.

626. Defence does not dispute that the group comprising of peace committee members, Razakars and army carried out the actual perpetration of crimes proved. Thus, the accused Alim, being the chairman/ influential leader of peace committee, was naturally conscious and aware of activities of peace committee members and he had reason and duty to know his subordinates' [principal offenders] activities. We are not convinced with the defence argument that in absence of any documentary evidence the accused cannot be termed as a 'commander' or 'superior' of local peace committee and Razakars. It is now settled that for establishing *de facto* superior position no formal letter of appointment or any such related document is needed.

627. The Tribunal notes that considering the circumstances of the case, it stands proved that the accused Alim was in a position of authority and his 'commanding' position is not needed to be proved strictly. Such position of authority can be well perceived from circumstances revealed. In this regard we may recall the decision of the ICTR Trial Chamber in the case of **Zigiranyirazo** which is as below:

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

628. What is position of authority? It is the power to act. Position of authority is meant to enable its holder to effectively carry out his aim and intention and position of authority includes a right to command, suggest or pursue a situation by act or conduct. The word authority is used to give orders, support, and encouragement and influence people what to do. If one has authority, he or she is in control and able to make others listen. Synonyms of the expression ‘authority’ include ‘command’, ‘domination’, ‘influence’, ‘permit’ etc. The notion of ‘power or authority’ of an accused is to be assessed on a case-by-case basis considering the cumulative effect of accused’s conduct and attitude and activities together with his affiliation with the group or organisation. No formal designation as a commander or a superior is required in order to trigger the responsibility under the theory of ‘civilian superior responsibility’. It is to be inferred from the role and pattern of activities of the accused.

629. Tribunal further notes that an individual is termed as a ‘leader’ when his activity involves establishing a goal and common purpose by sharing the vision with others so that they will follow or obey him willingly or seek his final decision to be executed. Leadership is a process by which a person influences others to accomplish an organizational objective. The ‘knowledge’ requirement is not needed to prove accused’s superior position within the ambit of the Act of 1973. However an individual’s superior position *per se* is a significant *indicium* that he had knowledge of the crimes committed by his subordinates [principal offenders]. Additionally, ‘*knowledge*’ may be proved through either direct or circumstantial evidence.

630. We have already recorded our reasoned finding that the accused Alim, the local leader of Convention Muslim League, was the chairman/ influential leader of Joypurhat peace committee which was presumably formed during the first half

of April 1971. We have further observed that the oral evidence coupled with authoritative information prompts us to the conclusion that the position of accused Alim in the peace committee of Joypurhat 1971 became an anecdote to the locals, victims and the sufferers of atrocities. And the accused, in committing all the criminal acts proved, had facilitated, abetted the principals, by his acts and conduct; in exercise of his substantial position of authority and domination that tantamount his 'superior' position.

XXI. Investigation Procedure

631. Defence does not attack the investigation procedure substantially. It has been simply argued that the Investigation Officer failed to carry out its task effectively as he did not examine the people surrounding the 'Shaonlal Bajla's *'gadighar'* and the officials working in police administration in 1971 in Joypurhat and Bogra. The IO did not prefer to examine the record of the case lodged against accused Alim under the Collaborators Order 1972. And he failed to collect any documentary evidence to establish that the accused was the chairman of peace committee in Joypurhat and commander of local Razakars.

632. The Tribunal notes that the IO is a mere formal witness. Four decades after the events occurred it was really a challenging job for the IO in collecting evidence, especially documentary evidence. It appears that the IO chiefly examined the victims, sufferers of the atrocious events and made them witnesses to the case. Any procedural flaw even if found in the task of investigation does not necessarily impair the entire investigation and in no way affects the merit of the case. Besides, it is to be remembered that the investigation under the Act of 1973 is a quite unique and challenging job for the officer assigned with it. The 'report' submitted by the Investigator arraigning the accused does not relate to the offence under the normal Penal Law. In fact the Investigation Officer had to deal with the alleged offence of crimes against humanity committed in violation of customary international law and *prima facie* involvement of the accused therewith.

633. It will appear that P.W.35 the IO during his investigation visited the crime sites; examined the witnesses and recorded their statement; seized documents and materials from different organisations and on conclusion of investigation he [P.W.35] submitted report in the office of the Chief Prosecutor.

634. Admittedly accused Alim was prosecuted under the Collaborators Order 1972 and we have discussed this matter and recorded our finding with reference to this matter. Thus failure to perusal of the record of any such case does not affect the present prosecution brought under the Act of 1973, a quite different legislation. The offence of murder tried in that case was punishable under Penal Code. Section 8 and Rule 4 contemplate the procedure of holding investigation and it appears that the IO (P.W.35) accordingly has done the task of investigation. The 'report' submitted by the Investigation Agency before the Chief Prosecutor under Rule 11 of the ROP, in true sense, is the foundation of the case. On receipt of such 'report' the Chief Prosecutor is authorized to examine it and documents, materials submitted therewith and to decide whether 'Formal Charge' is to be submitted under section 9(1) of the Act of 1973.

635. On total appraisal, we do not find anything flawed in the investigation task. Fundamentally, investigation under the Act of 1973 on information obtained relates to the process of procuring documentary evidence, recording statement of witnesses if found available and identifying the event[s], crime site[s] and casualty caused by the alleged criminal acts and also to identify whether the criminal acts alleged fall within the definition as enumerated in section 3(2) of the Act of 1973. The Tribunal notes that the Investigation Officer [P.W.35], in compliance with the norms and provisions contemplated in the Act of 1973 and the ROP, carried out its investigation on completion of which he duly submitted 'report' before the Chief Prosecutor.

XXII. Defence witnesses: Defence Case and Plea of Alibi

636. Defence produced and examined D.W.1 Mamun Uddin Chowdhury in order to dispel the fact that peace committee office and Razakars office were not set up at 'gadighar' of Shaonlal Bajla in Joypurhat as Shaonlal Bajla continued to carry out his own business there during 1971.

637. D.W.1 Mamun Uddin Chowdhury came on dock to depose chiefly to disprove the fact that Shaonlal Bajla a reputed jute trader in Joypurhat had deported to India leaving his business and 'gadighar' [trading office] capturing which the office of peace committee and Razakars were set up by accused Alim, as alleged by the prosecution.

638. Defence relies upon the above testimony of D.W.1 to show that no office of peace committee and Razakars were set up at the said 'gadighar'. In disproving this fact D.W.1 stated that in 1971 Shaonlal Bajla had been in Joypurhat and had carried his business there. But it appears that it has not been suggested to either of prosecution witnesses as a 'defence case'. Thus, the testimony of D.W.1, in this regard, does not inspire credence that could reasonably shake prosecution's assertion, on this material particular.

639. D.W.1 further stated that Abbas Ali Khan was the leader of local peace committee and had authority to release the civilians detained by the Pakistani army. This version seems to be a futile attempt to negate accused's position and authority as a leader of local peace committee. However, one thing appears to have been rather admitted that it was the 'peace committee' which had substantial authority and control over the matter of release of civilians detained even by the army. However, another crucial fact has been admitted by the D.W.1. He stated that the Pakistani army rolled into Joypurhat at the last part of April, 1971 and started carrying out indiscriminate killing and atrocious destruction directing civilians.

640. On cross-examination, in reply to question put to him, D.W.1 further admitted that their native village was at *Bakila* under '*Amdoi*' union of Joypurhat police station which was about 12 miles far from Joypurhat town. If it is taken to be true, D.W.1 was naturally supposed to remain aware of the fact of accused Alim's staying there for months together, according to the plea of alibi taken. But D.W.1 remained silent in this regard. Rather, he claims that he did not even hear the name of Alim till he became Minister. Admittedly, accused Alim was an elite resident of Joypurhat town and before being a member of Ziaur Rahman's cabinet he became the chairman of Joypurhat municipality for twice.

641. Thus, remaining totally ignorant about Alim, as claimed, is simply a deliberate attempt to keep accused Alim aside from the charges involving atrocious activities committed in Joypurhat in 1971. Such effort of calculated suppression of truth inevitably makes D.W.1 unreliable. It is quite unnatural of not hearing of him [Alim] till he became Minister and also particularly when it is proved that the accused had been all along in Joypurhat during the entire period of war of liberation in 1971.

642. However, on total evaluation of statement made by D.W.1 we conclude that he came on dock as he was asked by the son of accused Alim 4/5 days before to depose in favour of the accused and for the reasons stated above he seems to have made an untrue account intending to favour the accused Alim.

643. Defence submitted documents as required under section 9(5) of the Act of 1973 some of which have been proved by D.W.3, the son of accused Alim. Those have been duly marked as Exhibits. It transpires that most of those documents have been so proved and marked simply as an attempt to negate accused's involvement and complicity with the offences alleged. Understandably, the alleged books and paper cuttings have been submitted and exhibited in support of 'negative assertion' 'The accused was not so involved with the commission of any of crimes' -- this is a negative assertion which need not be proved by adducing evidence.

644. Mere non narrating accused's name in any of these documents is not conclusive proof as to his non-involvement with the alleged crimes. The Tribunal reiterates its earlier observation[in the case of *Ali Ahsan Muhammad Mujahid*] that mere non-describing the name of the accused involving him with the commission of the event in the books and reports published in news papers does not *ipso facto* helps the defence to disprove prosecution case. An assertion relating to 'innocence' shall have to be adjudicated on weighing prosecution evidence.

Plea of alibi

645. No specific defence case could be attributed from the trend of cross-examination of prosecution witnesses by the defence. Rather we have found that contradictory suggestions have been put to prosecution witnesses, in order to prove the plea of *alibi*. Defence however relies upon D.W.2 and D.W.3 to prove the plea of *alibi*. D.W.3 has also proved some documents which have been marked as Exhibits.

646. It is now settled jurisprudence that where an accused raises the *plea of alibi* he is merely denying that he was in a position to commit the crime with which he has been charged, specifically that he was elsewhere than at the scene of the crime and at the time of its commission. Prosecution's burden never lessens for

the reason of success or failure to prove the plea of alibi. It has been observed by the ICTR Appeal Chamber that

“The only purpose of an alibi is to cast reasonable doubt on the Prosecutor’s allegations, which must be proven beyond reasonable doubt. In alleging an alibi, the accused merely obliges the Prosecution to demonstrate that there is no reasonable likelihood that the alibi is true[” *Nahimana, Barayagwiza and Ngeze, (Appeals Chamber), November 28, 2007, para. 417]*

Keeping this settled notion, let us see what evidence has been adduced by the defence to make the plea of alibi ‘reasonable’ and to what extent.

647. D.W.2 Md. Mozaffar Hossain from village Hanail mainly testified that at the end of July or first part of August he saw Alim at the house of Moulana Musa, the Imam of ‘*Machoa Bazaar mosque*’ in Joypurhat town, while he was on the way to ‘*Shahpara*’ for procuring cooking oil . According to him [Musa Moulana] Alim being feared took refuge at that house.

648. But D.W.2 did not say since when Alim had been there. It will however appear that the defence did not suggest specific and uniform ‘defence case’ to the P.W.s. The statement made by D.W.2 does not offer any reasonable indication that since 20 April 1971 Alim had been at village ‘Amdoi’ till the month July, 1971, after the Pakistani army rolled into Joypurhat town, prior to his[accused] taking refuge at the house of Musa Moulana, as claimed by him.

649. It will appear that only P.W.7 Golam Rasul has been suggested that the accused Alim since 20 April to 30 July 1971 had been at the house of Mofiz member of ‘*Amdoi*’ union and afterwards he [accused] remained in hiding at the house of Musa Moulana of ‘Hanail’ union. P.W.2, P.W.3, P.W.4 and P.W.12 have been merely suggested that since 20 April accused Alim went in hiding at the house of Mofiz member of ‘*Amdoi*’ union. But they have not been suggested any specific case as to where the accused Alim remained in hiding afterwards.

650. P.W.4 Molla Shamsul Alam admits that accused Alim remained in hiding at ‘*Amdoi*’ union but he could not say whether he had stayed there for 3-4 months. Thus, it does not demonstrate conclusively that accused Alim had been there till July 1971 and then he [accused] changed his shelter. Besides, it is the defence who is burdened to prove the credence of the *plea of alibi*, although prosecution case does not depend upon success or failure of proving such plea.

651. D.W.3 Md. Sazzad Bin Alim, the son of accused Md. Abdul Alim @ M.A Alim mainly deposed portraying their family and his father’s education and political profile since 1952. He also narrated how and why they had to take refuge to neighbouring village with their ailing mother and when his father also joined them, mainly to establish the *plea of alibi*. He also deposed that his father Alim was not involved with any atrocity committed in Joypurhat in 1971 and had no involvement with the local peace committee and Razakar force in Joypurhat.

652. The Tribunal notes that the statement made by D.W.3, so far as it relates to the *plea of alibi*, does not conform to what has been suggested to P.W.s. Rather a different story appears to have been depicted from his testimony, in respect of *plea of alibi*. According to him [D.W.3] his father along with them came to Joypurhat from Bogra on 29/30 March in 1971. Afterwards, apprehending the probable attack by the Pakistani army his father[accused Alim] sent them to a neighbouring village ‘*Ausgara*’ on 16/17 April 1971 and few days later his father[Alim] too went in hiding elsewhere.

653. D.W.3 further stated that some days later they moved to village ‘Dhuroil’ under Dhamoirhat police station and afterwards they came to the house of Musa Moulana at village ‘*Bambu*’ under ‘Hanail’ union and some days after they took shelter there his father[Alim] also joined them and had stayed there till the independence.

654. Surprisingly, D.W.3 did not say as to where his father Alim remained in hiding till he came to the house of Musa Moulana at ‘Hanail’ union. Defence suggested some of the prosecution witnesses that since 20 April 1971 accused Alim went in hiding at the house of Mofiz members at ‘*Amdoi*’ union. But D.W.3, the son of accused Alim remained quiet of it. Apart from this, D.W.3 did not say specifically as on which date they took refuge at the house of Musa Moulana and on which date his father Alim [accused] joined them there.

655. The Tribunal further notes that with intent to negate involvement of accused Alim with public activities and his presence in Joypurhat during the war of liberation in 1971, D.W.3 denied the fact suggested to him by the prosecution that his father [Alim] did not participate the by-election held in 1971. D.W.3 seems to have suppressed this fact for obvious reason. Naturally, a son must opt to save his father from accusation for which he has been arraigned.

656. But the authoritative documentary evidence adduced by the prosecution patently proves that accused Alim participated in the by-election held in October 1971 being nominated by the Convention Muslim League. Additionally, the photograph [**Material Exhibit-I**] which has been proved by the photographer Motasim Billah [P.W.22] also impels an unerring conclusion of accused's activities and affiliation with the army in Joypurhat in 1971. According to P.W.22, at the end of June 1971, the said photograph was shoot by him as he was brought by accused Alim to the place where the youths [freedom fighters] were kept detained demonstrating arms in front of them and accused Alim was standing beside Major Afzal.

657. Therefore, first no specific and consistent defence case has been suggested to the prosecution witnesses, in support of the *plea of alibi* taken. Evidence adduced by the defence, on plea of alibi, does not appear to be compatible with the material facts proved by prosecution evidence. Testimony of D.W.3 seems to be imperfect and insufficient to prove the fact that accused Alim was not in Joypurhat during the entire period of war of liberation since 20 April 1971. His evidence does not stimulate to conclude it reasonably that at the time of commission of crimes alleged the accused Alim was away from the crime sites or Joypurhat.

658. Though the burden on the prosecution is not lessened because of plea of *alibi* taken by the accused and such a plea is to be considered only when the prosecution has discharged the onus placed on it, once it is done, it is then for the accused to prove *alibi* with absolute certainty so as to exclude the possibility of his presence at the spot at the time of commission of the offence (**AIR 1997 SC 322, Rajesh Kumar v Dharambir and others**). It was also held in **Mohan Lal Vs. State of H.P.** that plea of alibi must be proved with absolute certainty.

659. In the case in hand, it appears, in view of above, that the defence has failed to prove the *plea of alibi* with certainty to exclude the possibility of presence of the accused at the crime sites and in Joypurhat. On contrary, prosecution by adducing credible, relevant and authoritative evidence has been successful in discharging its onus to prove that accused Alim was visibly associated with active public affairs remaining present in Joypurhat , provided contribution and active support to the army in carrying out criminal activities, participated by-election held in October 1971. Therefore, claim of remaining elsewhere during the entire period of war of liberation does not come into play, in any manner, to negate the prosecution case.

XXIII. Conclusion

660. In the case in hand, the evidence led by the prosecution depicts that the group of perpetrators formed of peace committee members , Razakars and army, in relation to some events narrated in some charges, accused Alim is also alleged to have physically accompanied the group. In relation to some other charges proved, the accused is found to have abetted and substantially contributed, by his act or conduct, to the commission of the crimes.

661. Despite lapse of long 40 years' time the testimony of P.W.s of whom some had fair occasion to see and experience actual commission of criminal event including the acts and conducts of accused, and the activities carried out by the principal perpetrators. Some of P.Ws have also testified on substantial facts relevant and material to the event of atrocities and culpability of the accused and their testimony does not appear to have been suffered from any material infirmity. Besides, no significant inconsistencies between their testimony made before the Tribunal and their earlier statement made to the Investigation Officer could be found that may smash their credibility.

662. Section 3(1) provides jurisdiction of trying and punishing even any 'individual' or 'group of individuals' including any 'member of auxiliary force' who commits or has committed, in the territory of Bangladesh any of crimes mentioned in section 3(2) of the Act, apart from member of armed or defence forces. We have already resolved in our foregoing deliberations that 'accused Abdul Alim was a potential leader/chairman of local peace committee having position of authority on it and also on local Razakars which makes him

criminally liable also under the theory of superior responsibility as contemplated in section 4(2) of the Act of 1973, particularly in relation to charge nos. 7 and 8. Although the accused has been held liable only under section 4(1) of the Act, cumulative conviction, under both liabilities for the same conduct and act, is not considered appropriate.

663. We are convinced from the evidence, oral, documentary and circumstantial, led by the prosecution and the sourced documents that the accused Md. Abdul Alim, at the relevant time had acted as an atrocious and potential leader of Joypurhat peace committee to the actual accomplishment of the crimes proved and he was visibly associated with the army which is a fair indicative of his high level of culpability. Accused's conscious and culpable conduct---antecedent, contemporaneous and subsequent, as have been found---all point to his unerring guilt which is well consistent with his 'complicity' and 'participation' in the commission of the crimes proved. As a result, we conclude that the accused Ali Md. Abdul Alim was substantially 'concerned' with the commission of the offences in relation to **charge nos. 1, 2, 6,7,8,9,10,12, and 14** for which he has been indicted in the capacity of potential leader/chairman of Joypurhat peace committee which was truly an 'associate organization' of the Pakistani occupation army.

664. The offences for which the accused Md. Abdul Alim has been found responsible are the part of horrendous atrocities against the civilian population committed in context of the war of liberation 1971 in the territory of Bangladesh, in collaboration with anti-liberation and antagonistic political organisations namely Jamat E Islami, Muslim League, Convention Muslim League, Nejam E Islami, group of pro-Pakistan people with objective to annihilate the Bengali nation by resisting in achieving its independence.

665. According to section 4(1) of the Act of 1973 the accused Md. Abdul Alim, being equally responsible, has incurred individual criminal liability for the commission of crimes proved. It also stands proved that the accused, by his acts and conduct, also incurs superior responsibility under section 4(2) of the Act of 1973 for the crimes described in the charge nos. 7 and 8. In this regard, it is to be noted that the Tribunal [ICT-2] is not precluded from considering both forms of responsibility in order to get a full reflection of culpability of the accused, in light of the facts revealed from evidence and materials. But however, we

consider that ‘cumulative convictions’ under section 4(1) and 4(2) of the Act of 1973 is inappropriate for the same conduct or act forming part of attack that resulted in actual commission of the crimes alleged.

666. However, we refrain from convicting him cumulatively for both mode of liability, in relation to charge nos. 7 and 8, excepting taking it into account as an aggravating factor. Accordingly, the accused is held criminally responsible under section 4(1) of the Act of 1973 for the commission of crimes proved as listed in charge nos. **charge nos. 1, 2, 6, 7,8,9,10,12, and 14.**

XXIV. VERDICT ON CONVICTION

667. For the reasons set out in this Judgement and having considered all evidence and arguments, the Tribunal unanimously finds the accused **Md. Abdul Alim**

Charge No.1: GUILTY of the offence of ‘participating’, ‘abetting’ and ‘substantially contributing’ the commission of the offence of ‘**deportation**’ as ‘**crime against humanity**’ as specified in section 3(2)(a)(g) of the Act of 1973 and he be convicted and sentenced under section 20(2) of the said Act.

Charge No.2: GUILTY of the offence of ‘abetting’ and ‘substantially contributing’ the commission of the offence of ‘**genocide**’ as specified in section 3(2)(c)(g) of the Act of 1973 and he be convicted and sentenced under section 20(2) of the said Act.

Charge No. 3: NOT GUILTY of the offence of ‘abetting’ and substantially contributing to commit ‘**murder**’ as **crime against humanity** specified in section 3(2)(a)(g) of the Act of 1973 and he be acquitted thereof accordingly.

Charge No.4 : NOT GUILTY of the offence of ‘abetting’ and substantially contributing to commit ‘**murder**’ as **crime against humanity** specified in section 3(2)(a)(g) of the Act of 1973 and he be acquitted thereof accordingly.

Charge No.5: NOT GUILTY of the offence of ‘abetting’ and substantially contributing to commit ‘**murder**’ as **crime against humanity** specified in section 3(2)(a)(g) of the Act of 1973 and he be acquitted thereof accordingly.

Charge No.6: GUILTY of the offence of ‘abetting’ and facilitating the commission of offence of ‘**murder**’ as ‘**crime against humanity**’ as specified in section 3(2)(a)(g) of the Act of 1973 and he be convicted and sentenced under section 20(2) of the said Act.

Charge No.7: GUILTY of the offence of ‘abetting’ and facilitating the commission of offence of ‘**murder**’ as ‘**crime against humanity**’ as specified in section 3(2)(a)(g) of the Act of 1973 and he be convicted and sentenced under section 20(2) of the said Act.

Charge No.8: GUILTY of the offence of ‘abetting’ and facilitating the commission of offence of ‘**genocide**’ as specified in section 3(2)(c)(g) of the Act of 1973 and he be convicted and sentenced under section 20(2) of the said Act.

Charge No.9: GUILTY of the offence of ‘abetting’ and facilitating the commission of offence of ‘**murder**’ as ‘**crime against humanity**’ as specified in section 3(2)(a)(g) of the Act of 1973 and he be convicted and sentenced under section 20(2) of the said Act.

Charge No.10: GUILTY of the offence of ‘participating’, ‘abetting’ and facilitating the commission of offence of ‘**murder**’ as ‘**crime against humanity**’ as specified in section 3(2)(a)(g) of the Act of 1973 and he be convicted and sentenced under section 20(2) of the said Act.

Charge No.11: NOT GUILTY of the offence of ‘abetting’ and substantially contributing to commit ‘**murder**’ as **crime against humanity** specified in section 3(2)(a)(g) of the Act of 1973 and he be acquitted thereof accordingly.

Charge No.12: GUILTY of the offence of ‘abetting’ and facilitating the commission of offence of ‘**murder**’ as ‘**crime against humanity**’ as specified in section 3(2)(a)(g) of the Act of 1973 and he be convicted and sentenced under section 20(2) of the said Act.

Charge No. 13: NOT GUILTY of the offence of ‘abetting’ and substantially contributing to commit ‘**murder**’ as **crime against humanity** specified in section 3(2)(a)(g) of the Act of 1973 and he be acquitted thereof accordingly.

Charge No.14: GUILTY of the offence of ‘abetting’ and facilitating the commission of offence of ‘**murder**’ as ‘**crime against humanity**’ as specified in section 3(2)(a)(g) of the Act of 1973 and he be convicted and sentenced under section 20(2) of the said Act.

Charge No.15: NOT GUILTY of the offence of ‘abetting’ and substantially contributing to commit ‘**murder**’ as **crime against humanity** specified in section 3(2)(a)(g) of the Act of 1973 and he be acquitted thereof accordingly.

Charge No.16: NOT GUILTY of the offence of ‘abetting’ and substantially contributing to commit ‘**confinement**’ as **crime against humanity** specified in section 3(2)(a)(g) of the Act of 1973 and he be acquitted thereof accordingly.

Charge No.17: NOT GUILTY of the offence of ‘abetting’ and substantially contributing to commit ‘**murder**’ as **crime**

against humanity specified in section 3(2)(a)(g) of the Act of 1973 and he be acquitted thereof accordingly.

XXV. VERDICT ON SENTENCE

668. Mr. Rana Das Gupta and Ms. Tureen Afroz, the learned prosecutors finally submitted that the accused Alim was an elite, well educated man of the locality and naturally he was quite aware of human dignity and human civilization. But he had acted as the ‘crime compass’ and provided substantial navigational services to the principals belonging to peace committee and Razakars on whom he had significant authority and domination. Even mentally insane person and 90 years old civilian could not have escaped from the attack that resulted in their death. What was their fault? The accused Alim by his act and conduct actively facilitated numerous killing and atrocious activities as narrated in the charges proved. He thus deserves highest punishment as he deliberately attacked not only the unarmed civilians but also the entire human civilization.

669. It has been further submitted that the accused Alim should face the highest sentence, being a sentence of death, as he is proved to have participated to the commission of barbaric criminal acts with fanaticism and sadism constituting the offence of genocide and crimes against humanity. Accused’s position of substantial authority together with the intrinsic gravity, extent and pattern of criminal acts constituting the offences proved also deserves to be considered as an ‘aggravating factor’ in awarding the highest sentence.

670. The Tribunal notes that 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.

671. The sentence to be imposed must reflect the inherent gravity of the accused's criminal conduct. Gravity of offences proved and mode of participation and degree of his culpability the convicted accused indisputably deserves the highest punishment, the sentence of death. The dreadful and systematic planned crimes committed by a high ranking and well educated perpetrator do not allow for a sentence other than capital punishment, we do not disagree.

672. The Tribunal notes that instead of being involved with the horrendous atrocities by collaborating with the Pakistani occupation army, the accused Alim who was a highly educated local elite belonging to noble legal profession could have contributed to uphold the human dignity. But he deliberately and consciously opted to be with the perpetrators facilitating the commission of crimes by them and in this way he perceptibly acted against human civilization. No doubt it aggravates his blameworthiness and evil intent.

673. We, considering the gravity of offence and mode of accused's participation, deem it apposite to render our agreed decision that justice would be met if for the crimes as listed in **charge no. 1 [deportation as CAH]** the accused Md. Abdul Alim who has been found guilty beyond reasonable doubt is condemned to the sentence of **imprisonment for ten [10] years** under section 20(2) of the Act of 1973.

674. The Tribunal takes note of the culpable act of accused Alim in committing the crimes as narrated in **charge nos. 6, 7,9 and 12**. Evidence adduced impels the conclusion that accused Alim was in a position of authority even to assess and decide the fate of the civilians detained. Thus and also considering the gravity of offence and mode of participation of the accused for the offences narrated in **charge nos. 6,7, 9 and 12** the accused Md. Abdul Alim deserves to be condemned to a **single sentence** of '**imprisonment for twenty[20] years**' under section 20(2) of the Act of 1973

675. Now let us have a glance to the gravity of the crimes proved under **charge nos. charge nos. 2, 8, 10 and 14** together with the mode of participation of the accused therewith. We have already deduced that the accused has incurred criminal liability also under the 'theory of civilian superior responsibility', in respect of charge no. 8 which is covered by section 4(2) of the Act of 1973 and it may legitimately be taken into account as an 'aggravating factor', for the purpose of determining the degree of accused's culpability and awarding sentence. Number of victims and their age and the group the perpetrators targeted to annihilate with the conscious abetment and substantial contribution and assistance of the accused Alim inexorably increase the magnitude of crimes proved for which the accused has been found guilty as listed in **charge nos. 2, 8, 10 and 14]**..

676. In view of discussion made in this judgment, it appears that the accused Md. Abdul Alim knowingly and deliberately participated to the commission of the offence of genocide, as narrated in **charge no.2**. His act and conduct, as proved, was in furtherance of common intent and object aiming to destroy the Hindu community, in part.

677. In relation to **charge no.8**, it appears from the evidence adduced that the accused by his act of making commanding speech had acted as an individual in commanding position that substantially encouraged the principals in committing the offence of killing the Hindu civilians.

678. Similarly, the evidence led by the prosecution in respect of **charge no. 10** shows that 26 unarmed freedom fighters, on capture, were taken to a place near Joypurhat College by the group of perpetrators whom the accused Md. Abdul Alim also accompanied consciously and by remaining present with Major Afzal at the crime site he[accused] not only participated the criminal acts, he rather provided substantial contribution and moral support and approval too, by virtue of his position of authority, to the commission of tragic killing of 26 unarmed civilians who were no longer in position in taking part in hostilities

679. The criminal acts constituting the offence of killing of 3 civilians including Fazlul Karim , as narrated in **charge no. 14**, were carried out pursuant to ‘inciting speech’ made by accused Alim, as proved by evidence placed by the prosecution. The mode of participation of accused in committing the killing unequivocally proves that the accused had substantial contribution to the actual commission of crime, by his conduct and act he had shown by virtue of his significant position of authority.

680. Active abuse of a position of authority, which would presumably include participation in the crimes of subordinates, can aggravate liability arising from superior authority. Together with the above factors accused’s position of authority or domination over the principal perpetrators belonging to local peace committee and Razakars is also considered as a dominant factor that too aggravates accused’s blameworthiness. The accused Md. Abdul Alim thus deserves highest punishment, considering magnitude of offences proved and mode of his participation [**charge nos. 2, 8, 10 and 14**].

681. Despite the above view, it is to be noted that neither the Act of 1973 nor the Rules specify a concrete range of punishment for offences enumerated in the Act.

The accused Md. Abdul Alim is now 83 and in a poor physical condition. He cannot walk by his own and needs an escort to walk. He is to move by wheel chair and has been suffering from old age complications, as evinced visibly and also from the medical papers submitted in trial. Such conditions clearly warrant some mitigation of the sentence which this Tribunal considers otherwise appropriate.

682. It is to be noted too that since its establishment, this Tribunal [ICT-2] has rendered four judgments, of which one [Abdul Quader Molla] has been recently disposed of by the Appellate Division of Bangladesh Supreme Court affirming the sentence[lesser] of imprisonment awarded for four charges. It thus establishes that the Tribunal is authorized to award any sentence, instead of capital punishment, if it considers appropriate in light of proportionate to the gravity of offence and degree of culpability to the convicted person who has been found guilty beyond reasonable doubt. However, the scale of sentences has been very broad as each case has its own merits and deserves to be considered individually

683. Therefore, in exceptional circumstances or ‘rare’ cases, such old age, ill health and physical disability should be considered in mitigation. Issues concerning the physical impairment and severe old age complications of the convicted person of course will appear to be a matter for consideration in the execution of the sentence of death, if awarded. No physically and mentally unfit person should face the gallows. Accused Md. Abdul Alim has been found guilty for his calculated brutal activities forming part of attack that resulted in death of hundreds of civilians. But the letters of law cannot be unkind in awarding sentence, ignoring his perceptible physical impairment.

684. The gravity of the offences proved [**as listed in charge nos. 2, 8, 10 and 14**] undeniably requires the imposition of the maximum sentence provided for. But we cannot remain blind to the physical impairment and old age complications of the convict accused. This circumstance is considered as a mitigating circumstance which certainly does not directly related to the offence proved and its gravity. We need to pen our view emphatically that any mitigating circumstance must not in any way diminish the gravity of the offence. A finding of mitigating circumstance merely relates to ‘assessment of sentence’ and in no way derogates the gravity of the crime. It mitigates punishment, not the crime.

685. However, keeping the factors as conversed above in mind we are of agreed view that justice would be met if mitigated sentence is awarded, instead of capital punishment.

686. Accused Md. Abdul Alim never opted to articulate remorse in any manner, either during or before the trial, for his acts forming part of attack that resulted commission of horrendous atrocities constituting the offence of crimes against humanity and genocide during 1971. The Act of 1973 does not exclude in principle that a sentence of imprisonment for life be served in full. Imprisonment for remainder of the convict accused's natural life refers to shutting the 'outside world' out and bringing his focus into the world within the fences or walls.

687. This Tribunal thus perceives that his being at liberty shall be rather pained for human civilization and humanity. Being confined in within the fences till remaining part of life may let the convict to sense what extreme deliberate criminal acts he committed directing the unarmed civilians, by taking culpable stand against the birth of Bangladesh. Therefore, for the crimes as listed in **charge nos. 2, 8, 10 and 14** the convict accused Md. Abdul Alim @ M.A Alim who has been found guilty beyond reasonable doubt is condemned to a single sentence of '**imprisonment for remaining part of life**' i.e, **he shall suffer the sentence of imprisonment awarded till his natural death** under section 20(2) of the Act of 1973.

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

Hence, it is

ORDERED

That the accused Md. Abdul Alim @ M.A. Alim son of late Abdul Wahed of Ismailia Rice Mill, thana road police station Joypurhat under district Joypurhat at present at present 2/A and 2/D, House No. 81, Road No. 03, Block-F, Banani Residential Area, Dhaka-1213 [house of Faysal Alim, son of accused], Dhaka is found **guilty** of the offences of '**genocide**' [as listed in **charge nos. 2 and 8**] and '**crimes against humanity**' [as listed in **charge nos. 1,6,7,,9,10,12 and 14**] enumerated in section 3(2) of the International Crimes (Tribunals) Act, 1973.

Accordingly, the accused Md. Abdul Alim @ M.A. Alim be convicted and condemned to the sentence of **imprisonment for ten[10] years for** the crimes as listed in **charge no. 1** under section 20(2) of the Act of 1973.

The accused Md. Abdul Alim @ M.A Alim be convicted and condemned to a single sentence of **imprisonment for twenty[20] years for** the crimes as listed in **charge no. 6,7,9 and 12** under section 20(2) of the Act of 1973.

The accused Md. Abdul Alim @ M.A Alim also be convicted and condemned to a single sentence of **‘imprisonment for remaining part of life’ i.e the sentence awarded shall be served in full , till his natural death** for the crimes as listed in **charge nos. 2, 8, 10 and 14** under section 20(2) of the Act of 1973.

However, as the convict Md. Abdul Alim @ M.A. Alim is condemned to a single sentence of **‘imprisonment for remaining part of life’** , the sentence of **‘imprisonment for ten [10] years’** and the single sentence of **‘imprisonment for twenty [20] years’** will naturally get merged into the **sentence of ‘imprisonment for remaining part of life’**. This sentence shall be carried out under section 20(3) of the Act of 1973.

Accused Md. Abdul Alim @ M.A Alim is found not guilty of offences as listed in **charge nos. 3,4,5,11,13,15,16 and 17** and thus he be acquitted thereof.

The sentence awarded shall commence from the date of this judgment as required under Rule 46(2) of the Rules of Procedure, 2012(ROP) of the Tribunal-2(ICT-2) and the convict be sent to the prison with a conviction warrant accordingly.

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

Let certified copy of the judgment also be furnished to the prosecution and the accused at once.

Justice Obaidul Hassan, Chairman

Justice Md. Mozibur Rahman Miah, Member

Justice Md. Shahinur Islam, Member