



International Crimes Tribunal-2
Old High Court Building, Dhaka, Bangladesh
ICT BD Case No. 03 of 2012

Chief Prosecutor Vs. Muhammad Kamaruzzaman (Accused)

Present:

Justice A.T.M Fazle Kabir, Chairman

Justice Obaidul Hassan, Member

Judge Md. Shahinur Islam, Member

Order No. 08

Dated 04.06.2012

Mr. A.K.M. Saiful Islam

....For the Prosecution

Mr. Abdur Razzak

..... For the defence

Decision on Charge Framing Matter

Accused Muhammad Kamaruzzaman has been produced before this Tribunal today by the prison authority.

Today is fixed for passing decision on charge framing matter and as such the record is taken up for order. Before passing the order, we would like to provide a brief milieu and context of the case, its history and the arguments put forward by both prosecution and defence before this Tribunal.

1. Introduction and Formation of the Tribunal

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, particularly between the period of 25th March to 16th December 1971. However, no Tribunal was set up and as such no one could be brought to justice under the Act until the government established 'Tribunal' (Tribunal-1) on 25th of March 2010. 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 22.3.2012.

Authenticated to be True Copy

B. B. B.
4/6/12

Bench Officer, ICT-BD-2
Old High Court Building, Dhaka.

2. Historical Context:

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 eventually named West Pakistan and the eastern zone was named East Pakistan, which is now Bangladesh.

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 thus marking the beginning of language movement that eventually turned to the movement for greater autonomy and self-determination and eventually independence.

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

In the War of Liberation that ensued, all people of East Pakistan wholeheartedly supported and participated in the call to free Bangladesh but a small number of Bangalees, Biharis, other pro-Pakistanis, as well as members of a number of different religion-based political parties joined and/or collaborated with the Pakistan military to actively oppose the creation of independent Bangladesh and most of them committed and facilitated the commission of atrocities in the territory of Bangladesh. As a result, 3 million (thirty lac) people were killed, more than 2,00,000 (two lac) women raped, about 10 million (one crore) people deported to India as refugees and million others were internally displaced. It also experienced unprecedented destruction of properties all over Bangladesh.

The Pakistan government and the military setup number of auxiliary forces such as the Razakars, the Al-Badar, the Al-Shams, the Peace Committee etc, essentially to collaborate with the military in identifying and eliminating all those who were perceived to be sympathized with the liberation of Bangladesh, individuals belonging to minority religious groups especially the Hindus, political groups belonging to Awami League and

Authenticated to be True Copy
[Signature]
4/6/12
Bench Officer, ICT-BD-2
Old High Court Building, Dhaka.



other pro-independence political parties, Bangalee intellectuals and civilian population of Bangladesh. Undeniably the road to freedom for the people of Bangladesh was arduous and torturous, smeared with blood, toil and sacrifices. In the contemporary world history, perhaps no nation paid as dearly as the Bangalees did for their emancipation.

3. Brief account of the Accused

Accused Muhammad Kamaruzzaman son of late Insan Ali Sarker of village-Mudipara Police Station- Sherpur Sadar District- Sherpur was born on 04.07.1952. In 1967 while he was a student of class X of Sherpur GKM Institution he started student politics as a supporter of Islami Chatra Sangha. He was the secretary, Jamalpur Ashek Mahmud Degree College hall unit, while he was student of degree class. He contested in college student *sangsad* against the post of Assistant Cultural secretary but could not succeed. At the end of 1970 he was assigned with the charge of president, Islami Chatra Sangha of greater Mymensingh. During this period, Matiur Rahman Nizami was the President of Nikhil Paksitan, Islami Chatra Sangha. Accused Kamaruzzaman was holding the post of office secretary, of Islami Chatra Sangha of the then East-Pakistan while Ali Ahsan Muzahid was holding the responsibility of general secretary of the organization. Accused Kamaruzzaman, in 1971, as the president of Islami Chatra Sangha, greater Mymensingh played the role of a key organizer in formation of Al-Badar Bahini with the selected students of Ashek Mahmud College belonging to Islami Chatra Sangha. Within a month, under the leadership of Kamaruzzaman, all the students belonging to Islami Chatra Sangha of greater Mymensingh were absorbed to Al-Badar Bahini and they on receiving summary training, started committing atrocities targeting the Hindu community and unarmed Bangalee civilians in the region of Kishoreganj, Netrokona, Sherpur, Jamalpur and Mymensingh. He allegedly being in close association with the Pakistani army, actively aided, abetted, facilitated and substantially contributed in committing dreadful atrocities during the War of Liberation in 1971 in the territory of Bangladesh.

4. Procedural History

At pre-trial stage, an application under Rule 9(1) of the Rules of Procedure was initiated by the Chief Prosecutor seeking arrest of accused Muhammad Kamaruzzaman contending that his detention or arrest was indispensable for the purpose of effective and proper investigation. In course of hearing the matter, it was learnt that the accused was already in custody in connection with some other case. As a result, pursuant to the production warrant (PW) issued by the Tribunal (Tribunal-1) the accused was produced before the Tribunal (Tribunal-1) by the prison authority and then he was shown arrested /detained as an accused before the Tribunal. Accordingly, since 02.10.2010 the accused Muhammad Kamaruzzaman has been in custody.

Authenticated to be True Copy

Shah
416112

Officer, ICT-BD-2
Old High Court Building, Dhaka.

The Tribunal (Tribunal-1), since his detention, has entertained a number of applications seeking bail and the same were disposed of in accordance with law and on hearing both sides. The Tribunal also allowed the learned defence counsels to have privileged communication with the accused in custody. To prohibit coercion and torture of any kind, the Tribunal also ordered the presence of engaged counsel and a doctor at a room, adjacent to the room of the 'safe home' where the Investigation Agency was allowed to interrogate the accused.

Finally, the Chief Prosecutor submitted the Formal Charge under section 9(1) of the Act on 05.12.2011. But considering it the Tribunal directed the prosecution, in exercise of its inherent power, to submit it afresh in an arranged manner and thus the same was duly submitted on 12.01.2012 alleging that the accused as the chief organizer of the Al-Badar Bahini as well as a leading official of the Islami Chatra Sangha or member of a group of individuals had committed the offence of crimes against humanity, conspiracy to commit such crimes in different places of greater Mymensingh and also had conscious complicity to commit such crimes as specified in section 3(2) of the Act, during the period of War of Liberation in 1971. The Tribunal, considering the Formal Charge and documents submitted therewith, having found *prima facie* case, took cognizance of offences against the accused Muhammad Kamaruzzaman on 31.1.2012. Prosecution was, as next stage of proceedings, then directed to furnish copies of the Formal Charge and documents submitted there with which it intends to rely upon for supplying the same to the accused for preparation of defence.

The Tribunal-1, on application filed by the Chief Prosecutor ordered for transmission of the case record to this tribunal-2 under section 11A (1) of the Act, for expeditious trial and disposal of the case. This Tribunal, thereafter, received the case record on 29.04.2012. Earlier, the case was at stage of hearing the charge framing matter. Thus, this Tribunal had to hear the matter afresh as required under section 11A (2) of the Act. The hearing took place on 08 May, 13 May, 15 May, 16 May, 17 May and 20 May 2012.

Before this Tribunal, in course of hearing the charge matter, the learned prosecutor Mr. Saiful Islam placed his submissions insisting on framing charges against the accused, in the light of the Formal Charge together with the statement of witnesses and documents submitted therewith. While Mr. Abdur Razzak, the learned senior counsel appearing for the accused, refuting prosecution's submission, has extended his meticulous submission both on factual and legal aspects and finally stressed to allow the prayer to discharge the accused. Submissions advanced by both sides, on charge framing matter, may be summarized together with the views of the Tribunal on concerns raised, as below:

Authenticated to be True Copy.

Abul
416112

Bench Officer, ICT-BD-2
Old High Court Building, Dhaka.



5. Submission advanced by the Prosecutor

The learned Prosecutor, before drawing our attention to the facts narrated in the Formal Charge constituting the offences allegedly committed by the accused during 1971 War of Liberation, made a portrayal of the context that involved organizational plan and policy in execution of which the local pro-Pakistani fundamentalist Islamic political groups, auxiliary forces took part in committing the offences in the territory of Bangladesh and also substantially aided, abetted and provided moral support to the Pakistani occupation force in committing horrendous atrocities. It is thus submitted that commission of offence of crimes against humanity and genocide in 1971 War of Liberation of Bangladesh is an undeniable fact of common knowledge that deserves judicial notice.

It was further submitted that accused Muhammad Kamaruzzaman, as the chief organizer of Al-Badar Bahini and also as a member of group of individuals, conspired and aided the commission of numerous atrocities and had complicity to the commission thereof as well ; that the accused was also individually responsible for the attacks directed against unarmed civilian population constituting the offence of crimes against humanity and had direct and substantial complicity in committing killing of members of group with intent to destroy it, either whole or in part; that the accused had material ability and effective control on members of Al-Badar Bahini. The atrocious and unlawful acts depicted from statement of witnesses and documents fall within the purview of extermination, deportation, torture, rape, murder as crimes against humanity, genocide and other inhuman acts specified in section 3(2) of the Act, 1973. It was also submitted that the statement of witnesses, documents and materials collected during investigation amply establish the orchestration and commission of offences and complicity of the accused in the commission of crimes narrated in the Formal Charge. Arguing it further, the learned prosecutor finally insisted on framing of charges on collective consideration of the Formal Charge, statement of witnesses and documents which manifestly indicate that there are sufficient grounds of presuming that the accused was criminally culpable for the commission of offences as mentioned in section 3(2) of the Act.

6. Submission advanced by the defence side

The learned counsel for the defence by filing an application seeking discharge of the accused submitted that the allegations narrated in the Formal Charge do not disclose or state specificity of general particulars of facts and the required elements to constitute the offences of conspiracy, extermination, deportation, torture as crimes against humanity. The allegation of genocide is devoid of genocidal intent. Identification of group requirement does not appear to have been stated in the allegation of genocide. The activities of making statement and speech by the accused cannot be branded readily as

Authenticated to be True Copy

B. H. H.
4/6/12

Bench Officer, ICT-BD-2
Old High Court Building, Dhaka.

'hate speech' or the act of 'incitement' as the prosecution failed to show any causal relationship between such statement or speech and commission of any particular offence. The Formal Charge that stands on vague allegations even does not disclose the mode of participation of the accused with any of the alleged unlawful acts.

The learned counsel further submitted that the ICC Statute recognizes the need to define crimes with clarity, precision and specificity that many jurisdictions require for criminal prosecution. By referring international references the learned counsel continued to argue that the 'attack' must be 'widespread' or 'systematic' in relation to the required elements to constitute the offence of crimes against humanity. But the Formal Charge lacks of this requirement. The learned counsel further argued that the Formal Charge neither contains particulars of facts nor the particulars of crimes as is required under section 16(1) of the Act and this requirement is compatible with the ICC Statute (Rome Statute) and the ICCPR for ensuring due notice of the charge enabling the accused to understand and defend him properly.

On legal aspects, the learned Senior Counsel appearing for the accused further submitted that after enacting the International Crimes (Tribunals) Act 1973 there had been a 'tripartite agreement' executed in 1974 on the strength of which 195 Pakistani war criminals (member of armed forces) were shown clemency despite the fact that they were the principal perpetrators of atrocities committed in 1971 in the territory of Bangladesh and as such without bringing those principal offenders to justice the present accused cannot be prosecuted, merely on allegation of aiding and abetting the principal offenders. The Collaborators Order 1972 was meant to prosecute and try the local persons who allegedly collaborated and aided the Pakistani Army in committing serious crimes in 1971. Thus, the accused could have been prosecuted under the Collaborators Order 1972 if he actually collaborated and aided the Pak army, the principal offenders, in committing atrocities. There is nothing to show that the accused was listed in any manner as a perpetrator of atrocities committed in 1971, before constituting the Tribunal in 2010.

It is thus validly presumed that the 1973 Act was enacted only to prosecute those 195 Pakistani armed forces members and not the second line local perpetrators.

It was further argued that amendment brought in the Act by inserting the words 'individual' or 'group of individuals' qualifying even a person who did not belong to any 'auxiliary force' does not have any retrospective effect and as such the prosecution against the accused cannot go on even if he is qualified as an 'individual' as embodied in section 3(1) of the Act and as such the amendment does have prospective effect. Prosecution is politically motivated. Delay of long 40 years in bringing prosecution against the accused remains unexplained.

Authenticated to be True Copy

Abel
4/6/12

Bench Officer, ICT-BD-2
Old High Court Building, Dhaka.



7. Reply of the Prosecutor

In reply to the factual aspects agitated by the defence, the learned Prosecutor Mr. Saiful Islam submitted that the statement of witnesses and documents submitted sufficiently speak of the fact that the accused Muhammad Kamaruzzaman was the chief organiser of Al-Badar Bahini and he played vital role in organising the Bahini in the region of greater Mymensingh. As such he had substantial and effective control on its members who desperately and actively participated in actual commission of crimes but the accused failed to prevent them from committing the offence and accordingly he is criminally responsible under section 4(2). He further submitted that 'abetting' or 'aiding' being distinct offence under the Act can lawfully be prosecuted. In reply to argument on amendment through which the words 'individual' or 'group of individuals' have been inserted in section 3(1) of the Act the learned prosecutor mainly submitted that this Tribunal does not have jurisdiction to resolve the issue as it involves crucial constitutional interpretation and next, the intent of the Act and section 3(1) does not allow to infer that such amendment carries the 'prospective effect'. As regards the tripartite agreement providing immunity to 195 Pakistani war criminals, the learned prosecutor argued that the agreement was a mere 'executive act' which does not extinguish or derogate the *jus cogens* norms and the state obligation to prosecute the local perpetrators of atrocities and system crimes committed in 1971.

The learned Prosecutor finally went on to argue that the Act does not prescribe provision of submitting any 'proposed charge'. The object of submitting the Formal Charge is to assist the Tribunal and according to Rule 37 on perusal of the Formal Charge and statement of the witnesses and the documents submitted therewith, if the Tribunal finds that there are sufficient grounds to presume that the accused had committed offences, then only the charges will be framed otherwise the accused shall be discharged. Therefore, it is not correct to say that the Tribunal is to peruse the Formal Charge only for resolving the matter of framing charges.

8. Discussion and Decision

Before we arrive at a decision on the matter we consider it expedient to resolve some of the pertinent legal issues upon which the learned counsel for the defence drew our notice. Succinctly, the defence raised the issue of inadequacy of the definition of crimes, the absence of elements of crimes like in ICC's Statute, the thresholds of the crimes against humanity, intent of enacting the Act of 1973, the tripartite agreement of 1974, legality of prosecuting the accused questioning the amendment of section 3(1) of the Act brought in 2009.

Authenticated to be True Copy

[Signature]
416112

Bench Officer, ICT-BD-2
Old High Court Building, Dhaka.

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

It is submitted by the learned counsel appearing on behalf of the accused that since the subsequent amendment brought in 2009 of the Act of 1973 by inserting the words 'individual;' or 'group of individuals' in section 3(1) carries 'prospective effect', in reality, the present accused cannot be prosecuted in the capacity of an 'individual' for the offences underlying in the Act which is admittedly 'retrospective'. Since such amendment has not been expressly given retrospective effect interpretation stands that the amendment is prospective. Prosecution could not show that the accused belonged to Al-Badar Bahini or an 'auxiliary force' and as such on this score too he cannot be prosecuted under the Act of 1973.

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

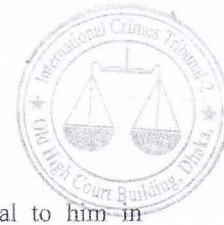
We are to perceive the intent of enacting the main Statute together with fortitude of section 3(1). At the same time we cannot deviate from extending attention to the protection provided by the Article 47(3) of the Constitution to the Act of 1973 which was enacted to prosecute, try and punish the perpetrators of atrocities committed in 1971 War of Liberation. The legislative modification that has been adopted by bringing amendment in 2009 has merely extended jurisdiction of the Tribunal for bringing the perpetrator to book if he is found involved with the commission of the criminal acts even in the capacity of an 'individual' or member of 'group of individuals'. It is thus validly understood that the rationale behind this amendment is to avoid letting those who committed the most heinous atrocities go unpunished. This is the intent of bringing such amendment.

It may be further mentioned here that the words 'individual' or 'group of individuals' have been incorporated both in section 3 of the Act of 1973 and in Article 47(3) of the Constitution by way of amendments in 2009 and 2011 respectively. The right to move the Supreme Court for calling any law relating to internationally recognised crimes in question by the persons charged with crimes against humanity and genocide, has been taken away by the provision of Article 47A(2) of the Constitution. Since the accused has been prosecuted for offences 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. Thus, we hold that the application of prospectiveness or retrospectivity as to amendment to

Authenticated to be True Copy

Shah
416/12

Bench Officer, ICT-BD-2
Old High Court Building, Dhaka.



section 3 of the Act of 1973 raised by the accused is quite immaterial to him in consideration of his legal status and accordingly the defence objection is not sustainable in law, particularly in the light of Article 47(3) and Article 47A of the Constitution.

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

It is not acceptable to say that no individual or member of auxiliary force as stated in section 3 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 Pak armed force were allowed to evade justice on the strength of 'tripartite agreement' of 1974. Such agreement was an 'executive act' and it cannot create any clog to prosecute member of 'auxiliary force' or an 'individual' or member of 'group of individuals' as the agreement showing forgiveness or immunity to the persons committing offences in breach of customary international law was derogatory to the existing law i.e the Act of 1973 enacted to prosecute those offences.

It is settled that the *jus cogens* principle refers to peremptory principles or norms from which no derogatory is permitted, and which may therefore operate a treaty or an agreement to the extent of inconsistency with any such principles or norms. We are thus inclined to pen our conclusive view that the obligation imposed on the state by the UDHR and the Act of 1973 is indispensable and inescapable and as such the tripartite agreement which is an 'executive act' cannot liberate the state from the responsibility to bring the perpetrators of atrocities and system crimes into the process of justice.

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

Next, the Act of 1973 is meant to prosecute and punish not only the armed forces but also the perpetrators who belonged to 'auxiliary forces', or who committed the offence as an 'individual' or member of 'group of individuals' and nowhere the Act says that without prosecuting the armed forces (Pakistani) the person or persons having any other capacity specified in section 3(1) of the Act cannot be prosecuted. Rather, it is manifested from section 3(1) of the Act of 1973 that even any person (individual or member of group of individuals), if he is *prima facie* found individually criminally responsible for the offence(s), can be brought to justice under the Act of 1973. Therefore, the argument that since the main responsible persons (Pakistan Army) have escaped the

Authenticated to be True Copy

Abul
416112

Bench Officer, ICT-BD-2
Old High Court Building, Dhaka.

trial, on the strength of the tripartite agreement providing immunity to them, the next line collaborators cannot be tried is far-off to any canons of criminal jurisprudence. Therefore, we are of the view that the 'tripartite agreement' is not at all a barrier to prosecute civilian perpetrator under the Act of 1973.

(iii) Prosecuting 'abettor' and 'aider'

We are not with the emphatic argument advanced by Mr. Abdur Razzak, the learned senior counsel appearing for the accused, on permissibility of prosecuting a person only as 'abettor' or 'aider' without bringing the principal offender to book.

The Act of 1973 has enumerated abetting and aiding as distinct offence and punishable there under. From the jurisprudence evolved in the ICTR and SCSL it is now settled that even only the abettor and aider to perpetration of crimes(s) underlying in the statutes can be prosecuted.

Let us have a look to the case of Charles Taylor (SCSL). On 26 April 2012, a Trial Chamber of the Special Court for Sierra Leone (SCSL), with Justice Richard Lussick presiding, convicted former Liberian President Charles Taylor for '**aiding and abetting**' war crimes and crimes against humanity and has been sentenced to suffer imprisonment for 50 years by the sentencing order dated 30 May 2012. Charles Taylor was indicted by the Prosecutor in 2003 when he was a sitting president and Head of State of Liberia. He was not prosecuted and tried together with any other offender or principal or actual perpetrator. He was however acquitted of ordering the commission of the crimes – a more serious mode of participation than aiding and abetting. Taylor was also acquitted of superior/command responsibility and joint criminal enterprise (JCE). Abetting implies facilitating, encouraging, or advising the commission of a crime. Therefore we find that in law, either 'aiding' or 'abetting' alone is ample to render the perpetrator criminally liable.

The above international references also consistently supplement our own view that 'abetting', 'aiding', 'conspiracy' are distinct offences specified in the Act of 1973 and the persons responsible for any of these unlawful acts that substantially contributed the commission of offences enumerated in section 3(2)(a)(c) can lawfully be brought to justice.

(iv) The Collaborators Order 1972

The Collaborators Order 1972 was a distinct legislation aiming to prosecute only the local persons responsible for the offences scheduled therein. The offences punishable under the Penal Code were scheduled in the Collaborators Order 1972. While the 1973

Authenticated to be True Copy

Abdullah
4/6/12

Bench Officer, ICT-BD-2
Old High Court Building, Dhaka.



Act was enacted to prosecute and try the crimes against humanity, genocide and other system crimes committed in violation of customary international law. In the case in hand we have found that there are sufficient grounds to presume *prima facie* that the accused was substantially associated with the orchestration and perpetration of the offences enumerated in the 1973 Act. Therefore, we are disinclined to accept the proposition that non prosecution of the accused under the Collaborators Order 1972 *ipso facto* immune him from being prosecuted under the Act of 1973.

(v) Delay in bringing prosecution

From the point of morality and sound legal dogma, time bar should not apply to the prosecution of human rights crimes. Neither the Genocide Convention of 1948, nor the Geneva 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.

Still the Nazi war criminals of the Second World War are being prosecuted. Trials of genocides committed during the 1973 Chilean revolution and the Pol Pot regime of Cambodia in the 1970s are now ongoing. It is to be noted that internationally recognised crimes were committed in Cambodia during 1975-1978 but its government waited for 25 years for attaining favourable situation in prosecuting the perpetrators till 2003. The sovereign immunity of Slobodan Milosevic of Serbia, Charles Taylor of Liberia, and Augusta Pinochet of Chile (with the Chilean Senate's life-long immunity) as the head of state could not protect them from being detained and prosecuted for committing genocides, crimes against humanity, and war crimes.

In view of above settled position and in the absence of any statutory limitation, as a procedural bar, only the delay itself does not preclude prosecutorial action to adjudicate the culpability of the perpetrator of core international crimes. Indubitably, a prompt and indisputable justice process cannot be motorized solely by the painful memories and aspirations of the victims. It requires strong public and political will together with favourable and stable political situation. Mere state inaction, for whatever reasons, does not render the delayed prosecution barred by any law.

Justice delayed is no longer justice denied, particularly when the perpetrators of core international crimes are brought to the process of justice. Considerations of material

Authenticated to be True Copy

[Signature]
4/6/12

Bench Officer, ICT-2
Old High Court Building, Dhaka.

justice for the victims should prevail when prosecuting crimes of the extreme magnitude is on the process. However, there can be no room to insist that such a system crime can only be pursued within a given number of years. However, delay may create a doubt which can be well adjudicated at trial stage only. At this stage, we are to examine whether there have been sufficient reasons to presume that the accused had committed the offence(s) under the Act.


(vi) Offences: Whether well characterized

It is emphatically submitted that the offences enumerated in the Act are not well defined and as such it will cause prejudice the accused in preparing its own defence. The Rome Statute embodies elements required to constitute crimes underlying in the Statute. On the basis of flawed definition of crimes lawful prosecution cannot be initiated. The learned Counsel also drew our attention to the Statute of ICC (Rome Statute).

It is to be noted that looking at the contemporary standards of definition of 'Crimes against Humanity' in various Statutes, this observation can be made that there is no 'consistency' among definitions. The definition of 'Crimes against humanity' as contemplated in Article 5 of the ICTY Statute 1993 neither requires the presence of 'Widespread and Systematic Attack' nor the presence of 'knowledge' thereto as conditions for establishing the liability for 'Crimes against Humanity'. True, the Rome Statute definition differs from that of both ICTY and ICTR Statutes.

But, 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. In establishing the 'Crimes against Humanity' in the Sierra Leon Court, there is no need to prove that the relevant crimes were committed with the knowledge of attack. We see that there is no actual consistency in the definition of 'Crimes against Humanity' as per the ICTY Statute, the ICTR Statute, the Rome Statute and the Sierra Leone Statute.

The section 3(2)(a) of the Act states the 'attack' constituting the offences of crimes against humanity is required to have been directed against '**any civilian population**' or '**persecution on political, racial, ethnic or religious grounds**'. Similarly, genocide requires, as stated in section 3(2)(c) of the Act, that the unlawful acts to constitute the offence of genocide are to be committed '**with intent to destroy**', in **whole or in part**', a '**national, ethnic, racial, religious or political group**'. Therefore, the claim as to the non-existence of a consistent international standard for the definition of 'Crimes against Humanity' in the 1973 Act is baseless. However, in this regard, the

Authenticated to be True Copy

 4/6/12
 Bench Officer, ICT-BD-2
 Old High Court Building, Dhaka.



Tribunal shall not be precluded in seeking guidance from international references and evolved jurisprudence, if it is so indispensably required, at the stage of trial.

Concluding view

In view of discussion as made above and considering the submissions advanced by both sides we are of the view that the application seeking discharge of the accused, having no substantial merit, is hereby rejected.

Now we proceed to read out the charges. We have perused the Formal Charge, statement of witnesses along with other documents submitted by the prosecution. We are of the view that there are sufficient materials before this Tribunal to presume that accused Muhammad Kamaruzzaman has committed offences specified under section 3(2) of the Act for which he is criminally liable under section 4(1) of the Act. Since we find that there are *prima facie* allegations against the accused, the charges are thus framed against him in the following manner.

Charges

We,

Justice A.T.M Fazle Kabir, Chairman

Justice Obaidul Hassan, Member and

Judge Md. Shahinur Islam, Member

of the International Crimes Tribunal -2

hereby charge you, Muhammad Kamaruzzaman son of late Insan Ali Sarker of village- Mudipara Police Station- Sherpur Sadar District- Sherpur at present House No.105, Road No. 4, Block No. F, Section 11, Journalists Residential Area, Pallabi, Dhaka as follows:-

Charge 01

that during the period of War of Liberation, on 29 June 1971 at about 11:00 pm you, being the chief organiser of Al-Badar Bahini as well as leader of Islami Chatra Sangha and or member of group of individuals led a group of members of Al-Badar Bahini, in apprehending and abducting a civilian Badiuzzaman son of Md. Fazlul Haque from the house of one Ahammad Member of village Ramnagar under Jhenigati Police Station, with common intention, and brought him to Ahammed Nagar army camp wherein he was tortured through out whole night and on the following day he was gunned down to death on the street and then his dead body was thrown to water beneath an wooden bridge.

Therefore, you Muhammad Kamaruzzaman are being charged for joining and substantially facilitating and contributing to the commission of offences of 'murder,

Authenticated to be True Copy

Abel
4/6/12

Bench Officer, ICT-BD-2
Old High Court Building, Dhaka.

torture and other inhuman act as crimes against humanity' caused to unarmed civilian, and also for 'complicity to commit such crimes' as specified in section 3(2)(a)(h) of the Act which are punishable under section 20(2) read with section 3(1) of the Act.

You are thus liable for the above offences under section 4(1) of the Act.

Charge 02

that during the period of War of Liberation, in the afternoon of mid-May, you, being the chief organiser of Al-Badar Bahini as well as leader of Islami Chatra Sangha or member of group of individuals and your accomplices caused inhuman acts to distinguished pro-liberation intellectual Syed Abdul Hannan the then Principal of Sherpur College, by compelling him walking throughout the town making him almost undressed and by constant whipping, as he was a gallant supporter of War of Liberation.

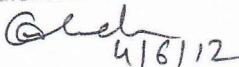
Therefore, you Muhammad Kamaruzzaman are being charged for participating and substantially facilitating and contributing to the commission of offence of 'inhuman acts as crime against humanity' caused to Syed Abdul Hannan and also for 'complicity to commit such crime' as specified in section 3(2)(a)(h) of the Act which are punishable under section 20(2) read with section 3(1) of the Act.

You are thus liable for the above offences under section 4(1) of the Act.

Charge 3

that during the period of War of Liberation, on 25.7.1971 in the early morning, you being the chief organiser of Al-Badar Bahini as well as leader of Islami Chatra Sangha and or member of group of individuals advised your accomplices belonging to Al-Badar and Razaker Bahini who accompanied the Pak army in contemplating and taking steps towards commission of 'large scale massacre', by raiding the village *Sohagpur* and accordingly they launched a planned attack and causing murder of unarmed civilians namely (1) Niamot Ali (2) Komedi Ali (3) Raham Ali (4) Montaj Ali (5) Abul Bashar (6) Shahed Ali (7) Qari Hasen Ali (8) Iman Ali (9) Ibrahim (10) Safar Uddin (11) Beyahat Ali (12) Rahimuddin (13) Babar Ali (14) Kutumuddin (15) Kitab Ali (16) Mohammad Ali (17) Momin Ali (18) Munnas Ali (19) Safiruddin (20) Rejat Ali (21) Abdul Quddus (22) Hafejuddin (23) Malek Fakir (24) Khejur Ali (25) Ali Hossain (26) Jamiruddin (27) Ansar Ali (28) Latif Ali (29) Hassan Ali (30) Bashira (31) Akber (32) Sahuruddin (33) Jahur Uddin (34) Seraj Ali (35) Moyej Uddin (36) Nekbar Ali (37) Harun Ali (38) Dudu (39) Abdul Majid (40) Salam (41) Nur Mohammad (42) Kancha Sheikh (43) Abdur Rahman (44) Sahar Talukder and 120 others and committed rape upon women. Since the havoc, the village is known as '*Bidhoba Palli*' (Widows village).

Authenticated to be True Copy


4/6/12
Bench Officer, ICT-BD-2
Old High Court Building, Dhaka.



Therefore, you Muhammad Kamaruzzaman are being charged for participating, substantially facilitating and contributing to the commission of offences of 'murder as crime against humanity' and also for 'complicity to commit such crime' as specified in section 3(2)(a)(h) of the Act, 1973 which are punishable under section 20(2) read with section 3(1) of the Act.

You are thus liable for the above offences under section 4(1) of the Act.

Charge 4

that during the period of War of Liberation, on 23.8.1971 at the time of *Magrib* prayer you being the chief organiser of Al-Badar Bahini as well as leader of Islami Chatra Sangha and or member of group of individuals instructed the members of Al-Badar Bahini to apprehend Golam Mostafa, a civilian, son of late Asir Uddin of village Gridda Narayanpur, Mostafabag thana road, Police Station and District- Sherpur and accordingly, from the place known as '*college morh*' at about 07:30 to 11:00 am he was brought to the Al-Badar Camp which was set up in the house of one Surendra Mohan Saha. Thereafter, Tofael Ahmed, uncle of the apprehended person came to you and requested to set him at large. **But in the night, you and your Al-Badar Bahini brought Golam Mostafa and one Abul Kasem to the '*Serih Bridge*' and gunned them down that caused death of Golam Mostafa** but Abul Kasem survived as he could jump to the river even having gunshot injury on his fingers.

Therefore, you Muhammad Kamaruzzaman are being charged for substantially participating, facilitating and contributing to the commission of offence of 'murder as crime against humanity' and also for 'complicity to commit such crime' as specified in section 3(2)(a)(h) of the Act which are punishable under section 20(2) read with section 3(1) of the Act.

You are thus liable for the above offences under section 4(1) of the Act.

Charge 5

that during the period of War of Liberation, in the middle of *Ramadan* at about 07:30 pm you being the chief organiser of Al-Badar Bahini as well as leader of Islami Chatra Sangha or member of group of individuals and your 4/5 accomplices apprehended Md. Liakat Ali and Mujibur Rahman Janu from their houses located in the area of '*Chakbazar*' under police station and district Sherpur and brought them to the Rajaker camp housed **in the '*banthia building*' at Raghunathpur Bazar wherein confining them they were subjected to torture.** Thereafter, they were sent to police station wherein they kept detained for 04 days and then **on your order they and 11 other civilians were shifted to '*Jhinaigati Ahammad Nagar Army Camp*'**. Thereafter, they were brought to a ditch

Authenticated to be True Copy

Abul
4/6/12

Bench Officer, ICT-BD-2
Old High Court Building, Dhaka.

behind the Ahammad Nagar UP office and then segregating three from the line the rest were gunned down to death and at the time of causing death by gun shot you and your accomplice one Kamran were present there.

Therefore, you Muhammad Kamaruzzaman are being charged for substantially participating, facilitating and contributing to the commission of offence of 'murder as crime against humanity' and also for 'complicity to commit such crime' as specified in section 3(2)(a)(h) of the Act which are punishable under section 20(2) read with section 3(1) of the Act.

You are thus liable for the above offences under section 4(1) of the Act.

Charge 06

that during the period of War of Liberation in 1971, in the month of November you being the chief organiser of Al-Badar Bahini as well as leader of Islami Chatra Sangha or member of group of individuals instructed one Didar who along with some members of Al-Badar Bahini abducted Tunu and one Jahangir from Golki Bari and took them to the District Council Dak Banglow, Mymensingh. Subsequently Tunu was tortured to death there. Another abductee Jahangir was detained in the camp but he was let-off later on.

Therefore, you Muhammad Kamaruzzaman are being charged for substantially participating, facilitating and contributing to the commission of offence of 'murder as crime against humanity' and also for 'complicity to commit such crime' as specified in section 3(2) (a) (h) of the Act which are punishable under section 20(2) read with section 3(1) of the Act .

You are thus liable for the above offences under section 4(1) of the Act.

Charge 07

that during the period of War of Liberation, on 27 Ramadan at about 01:00pm you being chief organiser of Al-Badar Bahini as well as leader of Islami Chatra Sangha or member of group of individuals being accompanied by 15-20 armed Al-Badar members raided the house of one Tapa Mia of village Golpajan Road, Kachijhuli, police station-Kotwali under district Mymensingh abducted Tapa Mia and his elder son Zahurul Islam Dara and took them to Al-Badar camp situated at District Council Dak Bangalow. On the next early morning the Al-Badars took Them along with five others to the bank of river Brahmaputra . After tying their hands they were lined up and at first Tapa Mia was attempted to be charged with bayonet but he escaped by jumping to river. The Al-Badars fired gun shots in the result Tapa Mia received injury on the leg and he managed to escape. But the rest 06 unarmed civilians were charged with bayonet to death.

Authenticated to be True Copy
Red
 4/6/12
 Bench Officer, ICT-BD-2
 Old High Court Building, Dhaka.



Therefore, you Muhammad Kamaruzzaman are being charged for substantially participating, facilitating and contributing to the commission of offence of 'murder as crime against humanity' and also for 'complicity to commit such crime' as specified in section 3(2)(a)(h) of the Act which are punishable under section 20(2) read with section 3(1) of the Act.

You are thus liable for the above offences under section 4(1) of the Act.

Thus you have committed the offences under section 3(2)(a)(h) which are punishable under section 20(2) read with section 3(1) of the Act.

The aforesaid charges of crimes against humanity and also complicity to the commission of such crimes described under section 3(2)(a)(h) of the Act are punishable under the provisions of section 20(2) read with section 3(1) of the Act which are within the cognizance and jurisdiction of this Tribunal. And we hereby direct you to be tried by this Tribunal on the said charges. You have heard and understood the aforesaid charges.

Question: Do you plead guilty or not.

Answer: *আমি দায়িত্ব নেই।*

The charges read over and explained to the accused who pleaded not guilty and claimed to be tried.

Let 02.07.2012 be fixed for opening statement and examination of prosecution witnesses. The trial shall be continuing on every working day until further order. The defence counsel is directed to submit a list of witnesses along with documents which the defence intends to rely upon, as required under section 9(5) of the Act by the date fixed.

Justice A.T.M Fazle Kabir, Chairman

Justice Obaidul Hassan, Member

Judge Md. Shahinur Islam, Member

Authenticated to be True Copy
Obaid
 4/6/12
 Bench Officer, ICT-BD-2
 Old High Court Building, Dhaka.