

Registrar

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. 05 of 2012

[Charges: crimes against Humanity and Genocide as specified in section 3(2)(a) and 3(2)(c)(i) of the Act No. XIX of 1973]

The Chief Prosecutor

Vs.

Moulana Abul Kalam Azad @ Abul Kalam Azad @ Bachchu(Absconded)

Before Judges:

Justice Obaidul Hassan, Chairman

Justice Md. Mozibur Rahman Mia, Member

Judge Md. Shahinur Islam, Member

For the Prosecution:

Mr. Golam Arief Tipoo, Chief Prosecutor

Mr. Syed Haider Ali, Prosecutor

Mr. Shahidur Rahman, Prosecutor

For the Accused (Absconded):

Mr. Abdus Shukur Khan,

State Defence Counsel

Advocate, Bangladesh Supreme Court

Date of delivery of Judgment: 21 January 2013

SUMMARY JUDGEMENT

I. Opening words

In the judicial history of Bangladesh, it is indeed the historic occasion that today this Tribunal (ICT-2), a lawfully constituted domestic judicial forum, after dealing with the matter of prosecution and trial of internationally recognized crimes i.e. crimes against humanity, genocide which were perpetrated in 1971 in the territory of Bangladesh, during the War of Liberation is going to deliver its first verdict. At all stages of proceedings the prosecution and the defence have made laudable efforts extending their precious arguments on academic and legal aspects including citation

of the evolved jurisprudence. It inevitably has inspired us to address the legal issues closely involved in the case, together with the factual aspects as well. We take the privilege to appreciate their significant endeavor.

In delivering the verdict we have deemed it necessary in highlighting some issues, in addition to legal and factual aspects, relating to historical and contextual background, characterization of crimes, commencement of proceedings, procedural history reflecting the entire proceedings, charges framed, in brief, and the laws applicable to the case for the purpose of determining culpability of the accused. Next, together with the factual aspects we have made effort to address the legal issues involved and then discuss and evaluate evidence adduced in relation to charges independently and finally have penned our finding on culpability of accused.

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: hereinafter referred to as the 'Act of 1973'] this 'Tribunal' known as International Crimes Tribunal-2 (ICT-2) hereby renders and pronouncing the following judgment.

II. Commencement of proceedings

1. The Chief Prosecutor, on the basis of the report and documents submitted therewith by the Investigation Agency, after completion of investigation, submitted the 'Formal Charge' on 02.9.2012 under section 9(1) of the Act of 1973 before this Tribunal. Thereafter, the Tribunal, under Rule 29(1) of the Rules of procedure, took cognizance of offences as mentioned in section 3(2) (a)(b)(g)(h) of the Act of 1973 and issued warrant of arrest for causing appearance of the accused as required under Rule 30 of the ROP. But the warrant could not be executed as the accused remained absconded. Thereafter, in compliance of legal requirement for holding trial in *absentia* by appointing state defence counsel to defend the absconded accused, the Tribunal on hearing both sides on charge framing matter framed 08 charges against the accused Abul Kalam Azad @ Bachchu by its order dated 04 November 2012 and thus the trial commenced.

III. Historical Background

2. Atrocious and horrendous crimes were committed during the nine-month-long war of liberation, which resulted in the birth of Bangladesh, an independent state. Some three million people were killed, nearly half a million women were raped and over 10 million people were forced to flee to 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 wound on the country's political psyche and the whole nation. The impunity they enjoyed held back political stability, saw the ascend of militancy, and destroyed the nation's Constitution.
3. The massacres started with program called "**Operation Searchlight**," which 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, and students.
4. Jamat E Islami (JEI), as an organization, substantially contributed in creating the para-militias forces (auxiliary force) for combating the unarmed Bangalce civilians, in the name of protecting Pakistan. 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.

IV. Brief account of Accused

5. Accused Moulana Abul Kalam Azad @ Bachchu son of late Abdus Salam Mia & late Magfura Khatun of village-Barakhardia (Choi ani), Police Station- Saltha, District-Faridpur at present sector no. 07, road no. 33, house no. 06, Police Station-Uttara, DMP, Dhaka and 'Azad Villa', 279/6 Chan Para, Uttarkhan, Dhaka was born on 05.03.1947 in village 'Barakhardia'. He studied in Faridpur Rajendra College and was a close associate of Ali Ahsan Mohammad Mujahid, the then President of East Pakistan Islami Chatra Sangha (ICS). Till formal formation of Razaker force, Moulana Abul Kalam Azad @ Bachchu actively aided the Pakistani army as an armed member of volunteer Razakar Force formed in Faridpur in committing criminal acts alleged..

V. Introductory Words

6. International Crimes (Tribunals) Act, 1973 (the Act XIX of 1973) is an *ex-post facto* domestic legislation enacted in 1973 and after significant updating the ICTA

1973 through amendment in 2009, the present government has constituted the Tribunal (1st Tribunal) on 25 March 2010 . The 2nd Tribunal has been set up on 22 March 2012. The degree of fairness as has been contemplated in the Act and the Rules of Procedure (ROP) formulated by the Tribunals under the powers conferred in section 22 of the principal Act are to be assessed with reference to the national needs such as, the long denial of justice to the victims of the atrocities committed during 1971 independence war and the nation as a whole.

VI. Jurisdiction of the Tribunal

7. 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 a '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 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. Thus, the Tribunals set up under the Act of 1972 are absolutely domestic Tribunal but meant to try internationally recognised crimes committed in violation of customary international law.

VII. Procedural History

8. At pre-trial stage, the Investigation Agency constituted under section 8(1) of the Act of 1973, through the Chief Prosecutor prayed for causing arrest of the accused Abul Kalam Azad @ Bachchu by filing an application on 25 March 2012, for effective and proper investigation [Rule 9(1) of the ROP]. The Tribunal fixed 03 April 2012 for hearing and disposal of the application. The Tribunal on hearing application issued warrant of arrest against the accused. But the enforcement agency of the Dhaka Metropolitan Police could not execute it as the accused Abul Kalam Azad @ Bachchu, on sensing the matter of issuance of warrant of arrest had absconded.
9. However, after submission of the formal charge by the Chief Prosecutor, **under** section 9(1) of the Act of 1973 before this Tribunal cognizance of offences as mentioned in section 3(2) (a)(b)(g)(h) of the Act of 1973 was taken and warrant of arrest for causing appearance of the accused was issued as required under Rule 30 of the ROP.

10. Dhaka Metropolitan Police (DMP) submitted the execution report before the Tribunal stating that the accused Abul Kalam Azad @ Bachchu could not be arrested as he has already absconded and he is learnt to have left the country instantly before the earlier warrant for arrest issued by this Tribunal. In this circumstance, the Tribunal, as required under Rule 31 of the ROP, ordered to publish a notice in two daily news papers, one in Bangla and another in English asking the accused to appear before this Tribunal within ten (10) days from the date of publication of such notice. But despite publication of such notice the accused has not appeared before this Tribunal.
11. On 07 October, the Tribunal has observed in its order that there have been reasons to believe that the accused has absconded or has concealed himself so that he cannot be arrested and produced before the Tribunal and there is no immediate prospect for arresting him, and as such it ordered that the trial against the accused shall be held in his *absentia* under section 10A(1) of the International Crimes (Tribunals) Act 1973 (as amended up-to-date) together with the Rule 32 of the ROP and accordingly it appointed Mr. Abdus Shukur Khan, Advocate, Bangladesh Supreme Court, as state defence counsel to defend the absconded accused who will have remuneration to be determined by the Tribunal [Section 10A(2) of the Act]. On 11 October, the state defence counsel informed the Tribunal that he received the copy of formal charge, statement of witnesses and documents submitted therewith from the office of the Registrar. Thereafter, the Tribunal after hearing both sides, the Tribunal framed eight (08) independent charges including the charge of crimes against humanity and genocide against the accused Abul Kalam Azad @ Bachchu by its order dated 04 November 2012.

VIII. Applicable laws

12. The proceedings before the Tribunal shall be guided by the International Crimes (Tribunals) Act 1973, the Rules of Procedure 2012 (ROP) 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 into its 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 [Section 19(1) of the Act]. The Tribunal shall have discretion to consider hearsay evidence too 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)]. The defence shall have right to cross-examine prosecution witnesses. Accordingly the state defence counsel duly cross-examined all the prosecution witnesses.

13. The Act provides provision of holding trial in *absentia* [section 10A] after due compliance of necessary legal requirement as contemplated in the Act and the ROP. Both the Act and the Rules (ROP) have adequately ensured the universally recognised rights of the defence. The Tribunal however is not precluded even from seeking guidance from international reference and relevant jurisprudence, if needed to resolve any crucial and relevant issue revealed in course of proceedings.

IX. Witnesses adduced by parties

14. Prosecution adduced and examined in all 22 witnesses of whom P.W.21 is a seizure witness and P.W.22 is the Investigation Officer. It took 13 working days to complete examination and cross-examination of 22 P.W.s. After closing of P.W.s, the learned state defence counsel informed the Tribunal once again that he would not adduce and examine any witness in support of defence as he could not have been able to submit the list of witnesses, documents as required under section 9(5) of the Act as he failed to have instruction from relatives of the absconded accused, despite contact that he made to them. The Tribunal fixed date for summing up of prosecution case as required under section 10(10(i) of the Act of 1973. Accordingly the learned Prosecutor Mr. Syed Haider Ali and Mr. Shahidur Rahman have summed up prosecution case and thereafter the learned state defence counsel also presented summing up of defence case by agitating several crucial legal issues.

X. The way of adjudicating the charges

15. The evidence produced by the prosecution in support of its respective case is mainly testimonial. The Tribunal considered that most of prosecution witnesses directly experienced and witnessed the terrible events they have narrated and that such trauma could have an impact on their testimonies. However, despite this reality, their testimony seems to be invaluable to the Tribunal in its search for the truth on the horrendous and atrocious incidents that happened in 1971 war of liberation in different areas of Faridpur district directing the Bangalee Hindu community, after duly weighing value and credibility of such testimonies.

16. Therefore, in the case in hand, together with the testimony of prosecution witnesses of whom most are live witnesses, we shall have to depend upon too (i) facts of common knowledge (ii) context of the attack directed against unarmed Hindu civilians (iii) documentary evidence, if any (iv) relevant facts (v) circumstantial evidence (vi) Political status of the accused at the relevant time (vii) link of the accused with the local Pakistani armed force and (viii) the jurisprudence evolved on these issues in the *ad hoc* Tribunals, if it is considered essential to rely upon.

XI. Burden of the Prosecution

17. The prosecution, in the light of the charges framed, is burdened to prove (a) the commission of crimes narrated in charges (b) mode of participation of the accused in committing the crimes for which he has been charged (c) What was the status and role of the accused at the relevant time and how he had maintained association with the Pakistani army (d) the context of carrying out alleged atrocious crimes directed against civilian population and a particular group of population.

XII. Backdrop and Context

18. The backdrop and context of commission of untold barbaric atrocities in 1971 war of liberation is the conflict between the Bangalee nation and the Pakistani government that pushed the Bangalee nation for self determination and eventually for freedom and emancipation. War of Liberation started following the 'operation search light' in the night of 25 March 1971 and lasted till 16 December 1971 when the Pakistani occupation force surrendered. Ten millions (one crore) of total population took refuge in India under compelling situation and many of them were compelled to deport.
19. As we see in the case in hand, the crimes are alleged to have been committed between the period of May 1971 to July 1971 in furtherance of accomplishment of policy and plan of Pakistani army. Admittedly, during the period of War of Liberation in 1971 parallel forces e.g Razaker Bahini, Al-Badar Bahini, Peace Committee were formed as accessory forces of the Pakistani armed force who provided moral supports, assistance and substantially contributed and also physically participated to the commission of horrendous atrocities in the territory of Bangladesh.

20. It is the fact of common knowledge that thousands of incidents happened throughout the country as part of organized and planned attack. Target was the pro-liberation Bangalee civilian population, Hindu community, pro-liberation political group, freedom fighters and finally the 'intellectuals'. The charges against the accused Abul Kalam Azad @ Bachchu arise from some particular events allegedly constituting the offences of crimes against humanity and genocide, during the War of Liberation in 1971.

XIII. Points to be determined

21. In determining culpability of the accused for the perpetration of offences with which he has been charged we are to adjudicate the fundamental issues such as (i) Whether the accused was a potential member of Razakar (Volunteer) force at the relevant time (ii) whether the accused was substantially associated with Pakistani army and their activities for facilitating commission of offences (iii) whether the accused physically participated in the commission of crimes alleged and (iv) whether the allegations against the accused constitute a serious case of 'crimes against humanity' and 'genocide' within the Tribunal's jurisdiction.

XIV. Discussion

Addressing legal issues agitated

22. Before we enter into the segment of our discussion on adjudication of charges we consider it convenient to address and resolve the legal issues agitated during summing up of cases of both parties.

(i) Delay in bringing prosecution

23. 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.

24. 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 readily frustrated and barred by any law.
25. In Bangladesh, the efforts initiated under a lawful legislation to prosecute, try and punish the perpetrators of crimes committed in violation of customary international law is an *indicia* of valid and courageous endeavor to come out from the culture of impunity. Customary international law has finally progressed to a stage where States may not point to the passage of time to escape their duty to prosecute and punish perpetrators of genocide, crimes against humanity, and war crimes in their own courts. Crimes against humanity and genocide, the gravest crime never get old and that the perpetrators will face justice. We should not forget it that the millions of victims who deserve that their tormenters are held accountable; the passage of time does not diminish the guilt. Therefore, justice delayed is no longer justice denied, particularly when the perpetrators of core international crimes are brought to the process of justice.

(ii) *Validity of holding Absentia trial*

26. The Act of 1973 provides provision of holding trial in *absentia*, if the appearance of the accused could not be ensured for the reason of his absconsion [Section 10A (1) of the Act]. In the international context, the issue of trials *in absentia* arose with the first modern international criminal tribunal, the International Military Tribunal (IMT) at Nuremberg, which was established to try war criminals operating under the European Axis Powers during World War II. Article 12 of the Charter of the International Military Tribunal allowed for trials *in absentia* whenever the Tribunal found it necessary to do so in the interest of justice.
27. United Nations reversed its policy against trials *in absentia* with the Special Tribunal for Lebanon (STL or Lebanon Tribunal) in 2006. The STL allows trials "to commence and to end..... without an accused ever having showed up in court.

The STL (Special Tribunal for Lebanon) expressly allows for trials in the absence of the accused.

28. According to Professor William Schabas under section 22(1) (c) of the STL (Special Tribunal for Lebanon) Statute, the accused may be tried *in absentia* when he refuses to appear after an initial appearance (absconded) or is otherwise unable to be found after all reasonable steps have been taken to inform him of the proceedings including media publication and communication with his known state of residence.
29. Accused Abul Kalam Azad @ Bachchu could have had due opportunity of being properly informed of the proceedings in advance if the warrant of arrest could have been executed. But by remaining absconded and leaving the country the accused has willfully declined to exercise his right to be present for facing trial and as such under this circumstance, trial in his absence would be permissible "in the interest of the proper administration of justice." It is a patent *indicium* that the accused, by his conduct, has waived his right to be present, and as such on this score too trial in his absence is quite permissible.

(iii) Incorporating 'Individual or group of individuals' to the Act by amendment

30. At the outset, before we resolve the issue, 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 systemic crimes committed in violation of customary international law is quite permitted, as we have already observed.
31. 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 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.
32. 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.

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

33. It is 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 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.
34. 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 convincing view that the obligation imposed on the state by the UDHR (Universal Declaration of Human Rights) and the Act of 1973 is indispensable and inescapable and as such the 'tripartite agreement' which is mere an 'executive act' cannot liberate the state from the responsibility to bring the perpetrators of atrocities and system crimes into the process of justice.
35. 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..
36. 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.

(v) The accused could have been prosecuted and tried under the Collaborators Order 1972 and if prosecuted present prosecution for same offences is barred by the doctrine of Doctrine of Double Jeopardy

37. There has been no proof that the accused was prosecuted and tried under the Collaborators Order 1972. It is not correct to say that the accused could have been prosecuted if actually he had perpetrated any of crimes enumerated in the Act of 1973 for which he has been charged now. Next, even if the accused was really prosecuted and tried under the Collaborators Order 1972 the present prosecution under the Act of 1973 cannot be said to be barred by the doctrine of double jeopardy.
38. The Collaborators Order 1972 was a different legislation aiming to prosecute the persons responsible for the offences enumerated in the schedule thereof. It will appear that the offences punishable under the Penal Code were scheduled in the Collaborators Order 1972. While the 1973 Act was enacted to prosecute and try the crimes against humanity, genocide and other system crimes committed in violation of customary international law. There is no scope to characterize the offence underlying in the Collaborators Order 1972 to be the same offences as specified in the Act of 1973.
39. Therefore, we are disinclined to accept the argument that merely for the reason that since the accused was not brought to justice under the Collaborators Order 1972 now he is immune from being prosecuted under the Act of 1973.

(vi) Whether the accused can be prosecuted without prosecuting accomplices

40. According to the charges it will reveal that apart from the accused, some other armed Razakars and co-perpetrators accompanied the accused at the crime scene in committing the crimes. But excepting accused, none of his accomplices has been brought to justice. It is true. But that by itself does not make the horrendous episode of atrocities directing the civilian population belonging to Hindu community constituting crimes against humanity and genocide untrue or give any immunity to accused Abul Kalam Azad @ Bachchu. If the accused is found guilty and criminally liable beyond reasonable doubt for his culpable acts, inaction in prosecuting his accomplices cannot be the reason for holding the former innocent or relieved from

liability. In this regard we may recall the provision as contained in section 4(1) of the Act of 1973.

(vii) Definition and Elements of Crime

41. We are not agreed with the submission advanced by the learned defence counsel that Section 3(2) of the ICTA 1973 does not explicitly contain the 'systematic' element for constituting the crimes against humanity and in this regard this Tribunal may borrow the elements and definition of crimes as contained in the Rome Statute.
42. Section 3(2)(a) of the Act is self contained and fairly compatible with the international jurisprudence.
43. 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.
44. The phrase '**directed against any civilian population**' as contained in section 3(2) (a) of the Act of 1973 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 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.
45. Thus, our Tribunal (ICT) which is a domestic judicial body constituted under a legislation enacted by our 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 constitute the offence of crime against humanity.
46. The specific offences of 'Crimes against Humanity' which were committed during 1971 are tried under 1973 Act and thus it is obvious that they were committed in the 'context' of the war of liberation in 1971. This context itself is sufficient to prove

the existence of a 'systematic attack' on Bangladeshi self-determined population in 1971.

47. An "attack against a civilian population" means the perpetration against a civilian population of a series of acts of violence, or of the kind of mistreatment referred to in sub-section (a) of section 3(2). Conducts constituting 'Crimes' directed against 'civilian population' thus refers to organized and systemic nature of the attack causing acts of violence to the number of victims belonging to civilian population.
48. Therefore, the claim as to the non-existence of a consistent international standard for the definition of 'crimes against humanity' as enumerated in the 1973 Act is visibly baseless.

XV. Adjudication of Charges

49. Charge no.7 relates to the crime of 'genocide' as specified in section 3(2)(c)(i) of the Act while the remaining 07 charges relate to the criminal acts constituting the offences of 'crimes against humanity' as specified in section 3(2) (a) of the Act. For the sake of convenience of discussion we consider it expedient to adjudicate the charge no.7 first as the nature of crimes related to it differs from that as described in the latter ones.

Adjudication of Charge No 07: Genocide

[Charge relates to the horrific event of genocide committed at village Hasamdia and Moindia Bazar under police station Boalmari district Faridpur]

50. From evidence it is proved that Perpetration of the horrific event including murder of numerous civilians targeting the Hindu group including the father of P.W.19 on the date time and manner as narrated by a live witness P.W.19 has been proved. At the same time we have found from evidence of P.W.19 that the accused accompanied the gang of perpetrators and how he had directly participated to the commission of destructive crimes. All these facts remain totally undisputed in cross-examination of P.W.19. We have found that the prosecution has been able to prove culpability of the accused by the evidence of P.W.16, P.W.17, P.W.19 and P.W.20 of whom P.W.16 and P.W.19 are the live witnesses.
51. The massive atrocities and mass scale killing and destruction compelled the members of Hindu community of the crime village to deport. Displacement from

own residing place does not conform to the internationally recognised principle of human rights. the cumulative effect of the atrocities including killing, destruction and looting of properties, mental harms compelling the Hindu community of the crime village inevitably imprints an unmistakable notion that the aim and intent of the perpetrators was to destroy the 'Hindu group or community', in part. This notion is qualified as 'genocidal intent' as required to constitute the offence of 'genocide'. It remains totally uncontroversial.

52. Evidence, without a doubt, shows that the accused and his accomplices intended to destroy a substantial part of the local Hindu community. Considering the pattern of destructive atrocities together with the killing of about 10 members of Hindu community, number of persons killed becomes immaterial in arriving at a decision as to 'genocidal intent'. The alleged attack was perpetrated at a segment of the crime village which was dominantly Hindu populated and thus targeting and killing about 10 Hindu individuals is to be evaluated for inferring 'genocidal intent'.
53. It is inferred that , in addition to his direct participation of killing at the time of commission of the event of massacre, he substantially provided practical assistance, encouragement and moral support to the principals i.e co-perpetrators in perpetration of the offence of genocide that resulted in mass killing of individuals belonging to 'Hindu Community' which is a 'distinct religious group' and mass destruction and thereby he incurs liability under section 4(1) of the Act for the offence of genocide as specified in section 3(2)(c) (i) of the Act of 1973.

Adjudication of Charge No. 01: Crimes against humanity

[Abduction, confinement and torture of Ranjit Nath @ Babu Nath]

54. It has been proved beyond reasonable doubt that accused Abul Kalam Azad @ Bachchu a close associate of the Pakistani army and a member of Razakar force was not only much more pro-active in encouraging the wrongs caused to him (P.W.5) but he himself physically participated to the commission of offence of torture, confinement, and inhuman acts caused to Ranjit Nath (P.W.5). Why P.W.5 was targeted? The answer is simple. At the army camp at Faridpur circuit house, according to P.W.5, he found Mujahid (a potential leader and the President of the then East Pakistan Islami Chatra Sangha), on seeing him, had told "*he is a freedom*

fighter, he is a Hindu” and then handed him over to accused Abul Kalam Azad @ Bachchu.

55. Accused Abul Kalam Azad @ Bachchu is thus criminally liable under section 4(1) of the Act of 1973 for physical participation and also for providing substantial contribution to the commission of offence of **abduction, confinement and torture as crime against humanity as specified in section 3(2)(a)** of the Act which are punishable under section 20(2) read with section 3(1) of the Act.

Adjudication of Charge No. 02: Crimes against humanity

[Abduction, confinement and torture on Abu Yusuf Pakhi]

56. Since it could not be established that accused himself had involvement with the alleged act of abducting and handing him (P.W.18) over to the army camp the mere fact revealed from evidence of P.W.18 that the accused used to visit the camp and remained present while torture was caused to other detainees does not give rise to an irresistible inference that the accused himself was involved with the act of confining and causing torture to P.W.18, the victim.
57. We are thus, on careful evaluation of evidence adduced in support of the charge no.2, persuaded that the offence of abducting, keeping confined at the army camp and causing torture to P.W.18 has been believably proved. But prosecution, as we have found, has been failed to establish it beyond reasonable doubt that the accused Abul Kalam Azad @ Bachchu by his act or conduct contributed or facilitated to the commission of the offence of abduction, confinement and torture as crimes against humanity as specified in section 3(2) (a) of the Act and therefore, he is not found to have incurred criminally liability under section 4(1) of the Act for the offences as listed in the charge no.2.

Adjudication of Charge No.03 : Crimes against humanity

[Sudhansu Mohon Roy Killing]

58. We have found from the corroborative and unimpeachable evidence of P.W.1 and P.W.3 that at the time of commission of the crime alleged the accused having fire arms with him led the armed gang of 10-12 accomplices. It may be validly inferred too that the accused on having training received rifle for the purpose of accomplishment of attack in furtherance of policy of Pakistani army and the pro-

Pakistani political organization collaborating them in 1971. Both the P.W.1 and P.W.3 are the live witnesses and we do not see any reasonable ground to discard their testimony made before us.

59. The killing of Sudhangshu Mohan Roy and the criminal acts committed in conjunction of the event by the accused and his accomplices were not isolated for which the accused Abul Kalam Azad @ Bachchu is found criminally responsible under section 4(1) of the Act of 1973. The criminal acts on part of the accused and his accomplices was certainly a part of attack against civilian population which qualifies the offence alleged as murder as crime against humanity as specified in section 3(2) (a) of the Act of 1973 which are punishable under section 20(2) read with section 3(1) of the Act.

Adjudication of Charge 04: Crimes against humanity

[Madhab Chandra killing]

60. Concatenation of incriminating facts narrated by the P.W.6, P.W.8 and P.W.10 coupled with relevant facts are suffice to prove the commission of the event of the offence of murder of Madhab Chandra Biswas and Gyannedra Mondol as crimes against humanity and mode of participation of the accused therewith. We have found that it has been established beyond reasonable doubt from the evidence of P.W.6 and P.W.8 and P.W.10 the residents of the crime village and live witnesses that on the date, time and in the manner an armed gang of Razakars led by accused Abul Kalam Azad @ Bachchu had launched attack to the house of Madhab Chandra Biswas who was a supporter of Awami League and after looting the ornaments and households etc., they dragged Madhab Chandra Biswas out of his house and took him to east bank of a pond of P.W.10 where accused Abul Kalam Azad @ Bachchu himself gunned down him to death and afterwards the accused also killed Gyanendra Mondol at the same spot. Attack targeting the Hindu village and killing of Awami League supporter indicates that the criminal acts of looting and murders were part of 'systematic attack' in furtherance of policy and plan directed against civilian population.

61. The accused, as has been proved, had directly participated to the commission of offence of murder as described in the charge no.4 and thus he incurs individual criminal liability under section 4(1) of the Act and he is found guilty for

perpetration of the offence as listed in charge no. 04 which is punishable under section 20(2) read with section 3(1) of the Act.

Adjudication of Charge No.05: Crimes against humanity

[Committing Rape upon Devi Rani and Shova Rani]

62. The act of accompanying the gang of armed perpetrators in attacking the house of the victims and keeping them detained in the room of Shova Rani are sufficient to qualify the constitution of the offence of rape as crime against humanity. It is to be borne in mind that in certain circumstances even a single act comprises a crime against humanity when it occurs within the necessary context.
63. The context speaks that it was not possible for civilians to resist the armed perpetrators led by the accused who were actually meant to execute the policy and plan of the Pakistani army and the pro-Pakistan political organization which had acted as its key auxiliary organisation. The pattern of the attack and acts indicates that the gang targeted the house of the victims belonging to Hindu community, a part of civilian population and the accused and his co-perpetrators finding no male inmates at the crime site, approached to cause harm to female members of the family in furtherance of which accused Abul Kalam Azad @ Bachchu and some of his accomplices dragged the victims to Shova Rani's room where they were kept detained and at that time the other female members were kept guarded by other accomplices outside the room. We thus inescapably consider it just to pen our view that the victims were sexually ravished and the accused cannot be exonerated from criminal liability of committing the offence of rape as crime against humanity as specified in section 3(2) (a) of the Act.

64. The accused Abul Kalam Azad @ Bachchu, as has been proved, had directly participated to the commission of the offence of rape as described in the charge no.4 and thus he incurs individual criminal liability under section 4(1) of the Act and is found guilty for perpetration of the offence listed in charge no.05 which is punishable under section 20(2) read with section 3(1) of the Act.

Adjudication of Charge No 06: Crimes against humanity

[Killing of Chitta Ranjan Das]

65. Having regard to the evidence of P.W.2, P.W.4 and P.W.9 we are thus convinced in arriving at decision that the atrocious event of attack launched directing the crime

village Phulbaria by the gang of armed Razakars led by accused Abul Kalam Azad @ Bachchu on the date time and in the manner has been proved beyond reasonable doubt. It is inferred unerringly too that intent of acts forming such attack was to cause destructive wrongs to the civilian population. It has also been established that the destructive and atrocious acts that resulted in killing of Chitta Ranjan and Badal Debnath and looting of numerous houses eventually compelled the victims and sufferers of the crime village including the P.W.2 to depart to India leaving their houses and properties. We have found how as a leader of the armed gang of Razakars the accused acted directly in committing the crimes. The event was simply horrific and was done in grave breaches of Humanitarian law and Geneva Convention too.

66. The accused Abul Kalam Azad @ Bachchu being accompanied by his armed accomplices, as has been proved, had directly participated to the commission of the offence of murder and the gang of co-perpetrators led by the accused, indubitably had committed the criminal acts as part of the attack directing the civilians belonging to Hindu community and thereby the accused Abul Kalam Azad @ Bachchu is found to have incurred individual criminal liability under section 4(1) of the Act and found guilty for committing the offence of murder as crime against humanity as specified in section 3(2) (a) of the Act which is punishable under section 20(2) read with section 3(1) of the Act .

Adjudication of Charge No. 08: Crimes against humanity

[Anjali Das abduction and torture]

67. From evidence of P.W.11 and P.W. 12 we have found it proved that on the date time and in the manner accused Abul Kalam Azad @ Bachchu being accompanied by armed accomplices launched attack to the house of Anjali Das and defying oral confrontation they forcibly took away Anjali Das with them. That is to say, the accused is found to have directly participated to the act of abduction alleged. It remains unshaken too.
68. It sufficiently indicates that the accused had substantially contributed and facilitated to the act of confinement of the victim Anjali Das with full knowledge.
69. At the same time it may also be validly presumed that the purpose of keeping the victim under such confinement for 7-8 days was not of course anything lawful and

certainly mental and physical harm including sexual abuse was caused to her that resulted in her severe sickness as stated by P.W.12.

70. The accused, in furtherance of policy and plan of the Pakistani army and the organization collaborating it launched such attack directing the Hindu community, a part of civilian population and the criminal acts were done in context of the war of liberation in 1971. Therefore, the accused Abul Kalam Azad @ Bachchu is found to have incurred criminal liability under section 4(1) of the Act and found guilty for committing the offence of abduction, confinement and torture as crimes against humanity as specified in section 3(2) (a) of the Act which is punishable under section 20(2) read with section 3(1) of the Act .

XVI. Context prevailing in 1971 in the territory of Bangladesh

71. It is indeed a history now that the Pakistani 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:

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

72. The above facts in relation to policies are not only widely known but also beyond reasonable dispute. The context itself reflected from above policies is sufficient to prove that the offences of crimes against humanity as specified in section 3(2)(a) of the Act of 1973 were the inevitable effect of part of systematic attack directed against civilian population. This view finds support from the observation made by the Trial Chamber of ICTY in the case of *Blaskic (ICTY)*.

73. It may be legitimately inferred from the phrase “**directed against any civilian population**” as contained in the Act of 1973 that the acts of the accused comprise part of a pattern of ‘systematic’ crimes directed against civilian population.

74. *Anthony Mascarenhas* in a report titled ‘**Genocide**’ published in **The Sunday Times**, **June 13, 1971** found as below:

“SO THE ARMY is not going to pull out. The Government’s policy for East Bengal was spelled out to me in the Eastern Command headquarters at Dacca. It has three elements:-

- (1) The Bengalis have proved themselves “unreliable” and must be ruled by West Pakistanis;
- (2) The Bengalis will have to be re-educated along proper Islamic lines. The “Islamisation of the masses” – this is the official jargon – is intended to eliminate secessionist tendencies and provide a strong religious bond with West Pakistan;
- (3) When the Hindus have been eliminated by death and flight, their property will be used as a golden carrot to win over the under-privileged Muslim.”

[Source: http://www.docstrangelove.com/uploads/1971/foreign/19710613_tst_genocide_center_page.pdf]

XVII. Conclusion

75. It has been proved from testimony of witnesses that the accused had directly participated to the commission of crimes as an armed member of Razakar force. Besides, we have found that for the reason of his atrocious acts in the locality the accused was widely known as ‘Razaker’. According to Section 3(1) of the Act of 1973 it is manifested that even any person (**individual or a member of group of individuals**) is liable to be prosecuted if he is found to have committed the offences specified in section 3(2) of the Act. That is to say, accused Abul Kalam Azad @ Bachchu, even in the capacity of an ‘individual’ or member of ‘group of individuals’ comes within the jurisdiction of the Tribunal if he is alleged to have committed crimes specified in section 3(1) of the Act.

76. According to section 4(1) of the Act of 1973 an individual incurs criminal liability for the direct commission of a crime, whether as an individual or jointly. In the case in hand, in dealing with the charges we have found that the accused Abul Kalam Azad @ Bachchu himself had physically participated being accompanied by his

armed accomplices to the commission of crimes and as such he held criminally responsible for the direct commission of crimes proved.

77. The accused cannot be considered merely as an *absentee* accused. He is an absconded accused. Evading trial for the offences of which he has been charged with signifies his culpability too. The accused deliberately waived his right to be present at trial. This conduct adds further to his culpability.

78. Therefore, the fact of absconding of the accused can also be taken as an adverse and material incriminating circumstance to reinforce the evidence and circumstances available in the case.

XVIII. VERDICT ON CONVICTION

79. For the reasons set out in this Judgement and having considered all evidence and arguments, the Tribunal unanimously finds the accused Abul Kalam Azad @ Bachchu

Charge No.1: GUILTY of the offence of abduction, confinement and torture as 'crimes against humanity' as specified in section 3(2)(a) of the Act and he be convicted and sentenced under section 20(2) of the Act.

Charge No.2: NOT GUILTY of the offence of abduction, confinement and torture as 'crimes against humanity' as specified in section 3(2)(a) of the Act and thus he be acquitted.

Charge No.3: GUILTY of offence of murder as 'crimes against humanity' as specified in section 3(2)(a) of the Act he be convicted and sentenced under section 20(2) of the Act.

Charge No.4: GUILTY of offence of murder as 'crimes against humanity' as specified in section 3(2)(a) of the Act he be convicted and sentenced under section 20(2) of the Act.

Charge No.5: GUILTY of offence of rape as 'crimes against humanity' as specified in section 3(2)(a) of the Act he be convicted and sentenced under section 20(2) of the Act.

Charge No.6: GUILTY of offence of murder as ‘**crimes against humanity**’ as specified in section 3(2)(a) of the Act he be convicted and sentenced under section 20(2) of the Act.

Charge No.7: GUILTY of offence of ‘genocide’ for ‘killing the members of Hindu community as specified in section 3(2)(c)(i) of the Act he be convicted and sentenced under section 20(2) of the Act.

Charge No.8: GUILTY of offence of abduction, confinement and torture as ‘**crimes against humanity**’ as specified in section 3(2)(a) of the Act he be convicted and sentenced under section 20(2) of the Act.

XIX. VERDICT ON SENTENCE

80. We have taken due notice of the intrinsic gravity of the offence of ‘genocide’ and murders as ‘crimes against humanity’ being offences which are particularly shocking to the conscience of mankind. We are of agreed view that justice be met with if a single ‘sentence of death’ under section 20(2) of the Act of 1973 is awarded to accused Abul Kalam Azad @ Bachchu for convictions relating to the offences of murder as ‘crimes against humanity’ (**listed in charge no.s 3, 4 and 6**) and for the offence of ‘genocide’ (**listed in charge no.7**) of which he has been found guilty beyond reasonable doubt.
81. However, we are of further view that considering the proportionate to the gravity of offences the accused Abul Kalam Azad @ Bachchu deserves imprisonment i.e. lesser punishment for convictions relating to the remaining offences as crimes against humanity (**listed in charge no.s 1, 5 and 8**). Accordingly, we do hereby render the following ORDER on SENTENCE.

Hence, it is

ORDERED

That the accused **Abul Kalam Azad @ Bachchu** son of late Abdus Salam Mia & late Magfura Khatun of village-*Barakhardia (Choi ani)*, Police Station- Saltha, District-Faridpur at present sector no. 07, road no. 33, house no. 06, Police Station-

Uttara, DMP, Dhaka and 'Azad Villa', 279/6 Chan Para, Uttarkhan, Dhaka is found guilty of the offences of 'crimes against humanity' (listed in charge no.s 3,4 and 6) and for the offence of 'genocide'(listed in charge no.7) and he be convicted and sentenced to death and be hanged by the neck till he is dead under section 20(2) of the International Crimes (Tribunals) Act, 1973.

No separate sentence of imprisonment is being awarded to the accused Abul Kalam Azad @ Bachchu for convictions relating to the offences of crimes against humanity as listed in charge nos. 1, 5 and 8 of which too he has been found guilty as the 'sentence of death' has been awarded to him in respect of four other charges as mentioned above.

The accused Abul Kalam Azad @ Bachchu is however found not guilty of offence of crimes against humanity as listed in charge no.2 and he be acquitted thereof.

Since the convicted accused has been absconding the 'sentence of death' as awarded above shall be executed after causing his arrest or when he surrenders before the Tribunal, whichever is earlier. The sentence of death awarded as above under section 20(2) of the International Crimes (Tribunals) Act , 1973 [The Act No.XIX of 1973] shall be carried out and executed in accordance with the order of the government as required under section 20(3) of the said Act.

Issue conviction warrant. Let a copy of the Judgment be transmitted together with the conviction warrant to the Inspector General of Police, Bangladesh Police, Police Directorate, Dhaka for information and necessary action and compliance. Let a copy of the judgement be transmitted also to the District Magistrate, Dhaka for information and necessary compliance.

Justice Obaidul Hassan, Chairman

Justice Md. Mozibur Rahman Miah, Member

Judge Md. Shahinur Islam, Member