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. 02 of 2012

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

The Chief Prosecutor
Vs.
Abdul Quader Molla

Before

Justice Obaidul Hassan, Chairman

Justice Md. Mozibur Rahman Miah, Member

Judge Md. Shahinur Islam, Member

For the Prosecution:

Mr. Golam Arief Tipoo, Chief Prosecutor

Mr. Mohammad Ali, Prosecutor

For the Accused :

Mr. Abdur Razzak, Senior Advocate, Bangladesh Supreme Court

Mr. Ekramul Haque, Advocate, Bangladesh Supreme Court

Mr. Abdus Sobhan Tarafder, Advocate, Bangladesh Supreme Court

Mr. Tajul Islam, Advocate, Bangladesh Supreme Court

Mr. Farid Uddin Khan, Advocate, Bangladesh Supreme Court

Mr. Sajjad Ali Chowdhury, Advocate

Date of delivery of Judgment: 05 February, 2013

JUDGEMENT

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

I. Opening words

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 perpetrated in 1971 in the territory of Bangladesh, during the War of Liberation is going to deliver its verdict in a case after holding trial in presence of the person accused of crimes alleged. From this point of view, delivering unanimous verdict in this case by the Tribunal-2 (ICT-2) is indeed a significant occasion. At all stages of proceedings the prosecution and the defence have made admirable hard work in advancing their valued arguments on academic and legal aspects including citations of the evolved jurisprudence. It predictably has stimulated us to address the legal issues intimately involved in the case, together with the factual aspects as well. We take the privilege to appreciate and value their significant venture.

In delivering the verdict we have deemed it indispensable 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 endeavor to address the legal issues involved and then discussed and evaluated evidence adduced in relation to charges independently and finally have penned our finding on culpability of the 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] this ‘Tribunal’ known as International Crimes Tribunal-2 (ICT-2) hereby renders and pronouncing the following unanimous judgment.

II. Commencement of proceedings

1. On 18 December 2011, the Prosecution filed the 'formal charge' in the form of petition as required under section 9(1) of the Act of 1973 against accused Abdul Quader Molla. After providing due opportunity of preparation to accused, the Tribunal, under Rule 29(1) of the Rules of Procedure **[hereinafter referred to as 'ROP'**], took cognizance of offences as mentioned in section **3(2) (a)(b)(g)(h)** of the Act of 1973. The Tribunal after hearing both sides and on perusal of the formal charge, documents and statement of witnesses framed six charges relating to the commission of 'crimes against humanity' as specified in section 3(2)(a) of the Act of 1973 or in the alternative for 'complicity in committing such crimes' as specified in section 3(2)(a)((g)(h) of the said Act . The charges so framed were read out and explained to the accused Abdul Qauder Molla in open court when he pleaded not guilty and claimed to be tried and thus the trial started.

III. Introductory Words

2. International Crimes (Tribunals) Act, 1973 (the Act XIX of 1973)[**hereinafter referred to as 'the Act 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 wishes such as, the long denial of justice to the victims of the atrocities committed during war of liberation 1971 and the nation as a whole.

3. There should be no ambiguity that even under retrospective legislation (Act XIX enacted in 1973) initiation to prosecute crimes against humanity, genocide and system crimes committed in violation of customary international law is fairly permitted. It is to be noted that the ICTY, ICTR and SCSL the judicial bodies backed by the United Nations (UN) have been constituted under their respective retrospective Statutes. Only the International Criminal Court (ICC) is founded on prospective Statute.

4. Bangladesh Government is a signatory to and has ratified the International Covenant for Civil and Political Rights (ICCPR), along with its Optional Protocol. It is necessary to state that the provisions of the ICTA 1973 [(International Crimes (Tribunals) Act, 1973] and the Rules framed there under offer adequate compatibility with the rights of the accused enshrined under Article 14 of the ICCPR. The 1973 Act of Bangladesh has the merit and mechanism of ensuring the standard of safeguards recognised universally to be provided to the person accused of crimes against humanity.

IV. Jurisdiction of the Tribunal

5. The Act of 1973 is meant to prosecute, try and punish not only the armed forces but also the perpetrators who belonged to **'auxiliary forces'**, or who committed the offence as an **'individual'** or a **'group of individuals'** 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 of 1973 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 Tribunal set up under the Act of 1973 are absolutely domestic Tribunal but meant to try internationally recognised crimes committed in violation of customary international law during the war of liberation in 1971 in the territory of Bangladesh. Merely for the reason that the Tribunal is preceded by the word "international" and possessed jurisdiction over crimes such as Crimes against Humanity, Crimes against Peace, Genocide, and War Crimes, it will be wrong to assume that the Tribunal must be treated as an ''International Tribunal''

V. Brief Historical Background

6. Atrocious and dreadful crimes were committed during the nine-month-long war of liberation in 1971, which resulted in the birth of Bangladesh, an independent state. Some three million people were killed, nearly quarter million women were raped and over 10 million people were forced to take refuge in India to escape brutal persecution at

home, during the nine-month battle and struggle of Bangalee nation. The perpetrators of the crimes could not be brought to book, and this left an unfathomable abrasion on the country's political awareness and the whole nation. The impunity they enjoyed held back political stability, saw the ascend of militancy, and destroyed the nation's Constitution.

7. A well-known researcher on genocide, **R.J. Rummel**, in his book **Statistics of Democide: Genocide and Mass Murder Since 1900**, states:

> "In East Pakistan [General Agha Mohammed Yahya Khan and his top generals] also planned to murder its Bengali intellectual, cultural, and political elite. They also planned to indiscriminately murder hundreds of thousands of its Hindus and drive the rest into India. And they planned to destroy its economic base to insure that it would be subordinate to West Pakistan for at least a generation to come."

8. Women were tortured, raped and killed. With the help of its local collaborators, the Pakistan military kept numerous Bengali women as sex slaves inside their camps and cantonments**. Susan Brownmiller**, who conducted a detailed study, has estimated the number of raped women at over 400,000.
[Source: http://bangladeshwatchdog1.wordpress.com/razakars/]

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

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

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

12. The massacres started with program called **"Operation Searchlight,"** which was designed to deactivate 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 **(Siddiq 1997 and Safiullah 1989).**

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, particularly Jamat E Islami (JEI) and its student wing Islami Chatra Sangha (ICS), Muslim League, Pakistan Democratic Party(PDP) Council Muslim League, Nejam E Islami joined and/or collaborated with the Pakistan occupation army to aggressively resist the conception of independent Bangladesh and most of them committed and facilitated the commission of atrocities in violation of customary international law in the territory of Bangladesh. **"The workers belonging to purely Islami Chatra Sangha were called Al-Badar, the general patriotic public belonging to Jamaat-e-Islami, Muslim League, Nizam-e-Islami etc were called Al-Shams and the Urdu-speaking generally known as Bihari were called al-Mujahid."**

[Source: 'Sunset at Midday' (Exhibit-2 written by Mohi Uddin Chowdhury]

13. 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 act as a team with the Pakistani occupation army in identifying and eliminating all those who were perceived to be pro-liberation, individuals belonging to minority religious groups especially the Hindus, political groups belonging to Awami League and Bangalee intellectuals and unarmed civilian population of Bangladesh. **"Bangladesh, formerly East Pakistan, became independent in December 1971 after a nine-month war against West Pakistan. The West's army had the support of many of East Pakistan's Islamist parties. They included Jamaat-e-Islami, still Bangladesh's largest Islamist party, which has a student wing that manned a pro-army paramilitary body, called Al Badr."**

[Source: The Economist : Jul 1st 2010: http://www.economist.com/node/16485517?zid=309&ah=80dcf288b8561b012f603b9fd9577f0e]

14. A report titled **'A Country Full of Corpses'** published in SUMMA Magazine, Caracas, October 1971 speaks that

> "The extermination of the Jewish people by the Nazi regime, the atomic crime of Hiroshima and Nagasaki, the massacre of Biafra, the napalm of Vietnam, all the great genocides of humanity have found a new equivalent: East Pakistan. Despite the world press having supplied a clear exposition of facts, the people do not appear to have raised that at this moment—and again in Asia—millions and millions of human beings face destruction of their life and mother land…….A pathetic view of the tragedy is given to us by the fact that in a single night in the city of Dacca were killed 50,000 persons by the invading army. Between 26 March—the date of invasion—and this moment, the dead reach more than a million, and every day 30,000 persons leave East Pakistan and take refuge in Indian territory. "
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> **[Source:** Bangladesh Documents- Volume II , page 76]

15. Jamat E Islami (JEI) and some other pro-Pakistan political organizations substantially contributed in creating these para-militias

forces (auxiliary force) for combating the unarmed Bangalee civilians, in the name of protecting Pakistan. Actions in concert with its local collaborator militias, Razakar, Al-Badar and Jamat E Islami (JEI) and other elements of pro-Pakistani political parties were intended to stamp out Bangalee national liberation movement and to mash the national feelings and aspirations of the Bangalee nation. **Fox Butterfield** wrote in the New York Times- January 3, 1972 that "**Al Badar is believed to have been the action section of Jamat-e-Islami, carefully organised after the Pakistani crackdown last March"**

[**Source:** Bangladesh Documents Vol. II page 577, Ministry of External Affairs, New Delhi].

16. Incontrovertibly the way to self-determination for the Bangalee nation was strenuous, swabbed with immense blood, strives and sacrifices. In the present-day world history, conceivably no nation paid as extremely as the Bangalee nation did for its self-determination. Despite the above historic truth as to antagonistic and atrocious role of JEI and other pro-Pakistan political organizations section 3(1) of the Act of 1973 remains silent as regards responsibility of any 'organisation' for the atrocities committed in the territory of Bangladesh in 1971 war of liberation.

VI. Brief account of the accused

17. Accused Abdul Quader Molla was born in the village Amirabad under Police Station Sadarpur District- Faridpur in 1948. While he was a student of BSC (Bachelor of Science) in Rajendra College, Faridpur in 1966, he joined the student wing of JEI known as 'Islami Chatra Sangha' (ICS) and he held the position of president of the organization. While he was student of the Dhaka University, he became the president of Islami Chatra Sangha of Shahidullah Hall unit. In 1971, according to the prosecution, he organized the formation of Al-Badar Bahini with the students belonging to Islami Chatra Sangha (ICS) which allegedly being in close alliance with the Pakistani occupation army and Jamat E Islami actively aided, abetted, facilitated and substantially assisted, contributed and provided moral support and encouragement in committing appalling atrocities in 1971 in the territory of Bangladesh.

VII. Procedural History

18. At pre-trial stage, the Chief Prosecutor submitted an application before the ICT-1 under Rule 9(1) of the Rules of Procedure seeking arrest of the accused Abdul Quader Molla for the purpose of effective and proper investigation. At the time of hearing it was learnt that the accused was already in custody in connection with some other case. Thereafter, pursuant to the production warrant 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 as an accused before the Tribunal. Accordingly, since 02.10.2010 the accused Abdul Quader Molla has been in custody.

19. The Tribunal (Tribunal-1), since his detention, has entertained a number of applications seeking bail filed on behalf of the accused and the same were disposed of in accordance with law and on hearing both sides. The Tribunal-2 also allowed the learned defence counsels to have privileged communication with the accused in custody, as and when they prayed for.

20. Finally, the Chief Prosecutor submitted the Formal Charge under section 9(1) of the Act on 18.12.2011, on the basis of the investigation report of the Investigating Agency, alleging that the accused as a member and a prominent organizer of the Al-Badar Bahini (i.e. auxiliary force) as well as a member of Islami Chatra Sangha(ICS) or member of a group of individuals had committed 'crimes against humanity', 'genocide' including abetting, aiding and for complicity to the commission of such crimes as specified in section 3(2)(a)(g)(h) of the Act of 1973 in different places in Mirpur area of Dhaka city during the period of Liberation War in 1971. The Tribunal (Tribunal-1) took cognizance of offences against the accused having found *prima facie* case in consideration of the documents together with the Formal Charge submitted by the prosecution. Prosecution was 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.

21. At this stage, 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 of 1973. This Tribunal-2 (ICT-2), thereafter, received the case record on 23.4.2012. Earlier, the case was at stage of hearing the charge framing matter. Thus, this Tribunal-2 had to hear the matter afresh as required under section 11A (2) of the Act. Accordingly, the hearing took place on 02 May, 07 May, 08 May, 09 May, 13 May, 14 May and 16 May 2012.

22. Before this Tribunal-2(ICT-2), in course of hearing the charge matter, the learned Prosecutor Mr. Mohammad Ali made his submissions showing his argument favourable to 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, advanced his detailed submission both on factual and legal aspects and finally emphasized to allow the prayer to discharge the accused.

23. On hearing both sides and on perusal of the formal charge, statement of witnesses and documents submitted therewith this Tribunal(ICT-2), finally, framed six charges by its order dated 28 May 2012 and then by providing due opportunity for getting preparation by the defence Tribunal-2 fixed 20.6.2012 for placing opening statement by the prosecution and with this the prosecution case commenced.

24. Defence preferred an application on 04.6.2012 seeking review of order framing charges on the grounds stated therein. On hearing both sides, the Tribunal modified its order framing charges by an order dated-14.6.2012 by inserting the words **"or in the alternative**" in place words **"and also for"** and before the words "**complicity to commit such offence"** in all counts of charges.

25. Defence however submitted a list of its witnesses containing name of 965 witnesses together with documents and materials upon which it intended to rely upon as required under section 9(5) of the Act.

26. Thereafter, the prosecution after placing its opening statement as required under section 10(1)(d) of the Act of 1973 started adducing

witnesses. However, prosecution adduced and examined in all 12 witnesses including two Investigating Officers. A total **04 exhibits** were admitted into evidence.

27. This Tribunal on hearing both sides on an application submitted by the prosecution seeking limitation of defence witnesses rendered an order dated 05 November 2012 limiting defence witnesses to only 06 witnesses, keeping the matter of 'defence case' and 'plea of alibi' into account. After passing the order dated 5.11.2012 limiting defence witnesses to six the defence however called 06 witnesses including the accused Abdul Qauder Molla who testified.

28. Defence however, started bringing frequent applications on similar matter i.e. seeking permission to adduce and examine more six witnesses. In this process, the defence filed an application seeking re-call of the order limiting defence witnesses. Tribunal rejected it, after hearing both sides by its order dated 12 November 2012. The defence again initiated a delayed application seeking review of order dated 12.11.2012. On hearing both sides Tribunal rejected it by giving a reasoned order dated 26.11.2012. Finally, the defence brought an application seeking permission to adduce and examine six more additional witnesses, after closure of examination of six defence witnesses. The Tribunal rejected it with cost as it appeared to be an application seeking same favour or relief, though in different form.

29. The Tribunal in its reasoned orders on this issue mainly focused on the matter that no specific defence case could have been extracted from the trend of cross-examination of prosecution witnesses excepting the '*plea of alibi'* and it considered appropriate to allow the defence to examine six witnesses from the list it submitted under section 9(5) of the Act and by a subsequent order Tribunal by relaxing condition permitted the defence to adduce and examine its witnesses *'preferably'* from the list it submitted by modifying its order dated 5.11.2012 *suo moto* in exercise of power given under Rule 46A of the ROP and thereby permitted to adduce and examine even one of listed prosecution witnesses. Prosecution duly cross-examined the DWs. Thus the trial concluded on 13.12.2012.

30. Thereafter, prosecution's summing up of case under section 10(1)(i) of the Act of 1973 was heard for 09 and half hours while the defence placed summing up of its own case by taking about 25 hours. At the stage of summing up of defence case, defence filed an application seeking direction to the museum of Miprur Jallad Khana for production of statement made and archived therein by 03 prosecution witnesses and one defence witness. The Tribunal disposed of the same with its observation that the matter would be taken into notice at the time of its final verdict. In this way on conclusion of summing up cases under section 10(1) (i) of the Act of 1973 the Tribunal-2 kept the matter of delivery and pronouncement of judgment under section 10(1)(j) read with section 20(1) of the Act under CAV.

VIII. Applicable laws

31. The proceedings before the Tribunal shall be guided by the International Crimes (Tribunals) Act 1973, the Rules of Procedure 2012 formulated by the Tribunal under the powers given in section 22 of the Act. Section 23 of the Act of 1973 prohibits the applicability of the Code of Criminal Procedure, 1898 and the Evidence Act 1872. Tribunal is authorized to take judicial notice of fact of common knowledge which is not needed to be proved by adducing evidence [**Section 19(4) of the Act]**. The Tribunal may admit any evidence [**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)].** Cross-examination is significant in confronting evidence.

32. The Act of 1973 provides right of accused to cross-examine the prosecution witnesses. The Tribunal may receive in evidence statement of witness recorded by Magistrate or Investigation Officer only when the witness who has subsequently died or whose attendance cannot be procured without an amount of delay or expense which the Tribunal considers unreasonable [**Section 19(2) of the Act].** But in the case in hand no such statement of witness has been received. The defence duly cross-examined all the prosecution witnesses.

33. Both the Act of 1973 and the Rules (ROP) have adequately ensured the universally recognised rights of the defence. Additionally, the Tribunal, in exercise of its discretion and inherent powers as contained in Rule 46A of the ROP, has adopted numerous practices for ensuring fair trial by providing all possible rights of the accused. The Tribunal however is not precluded from seeking guidance from international reference and relevant jurisprudence, if needed to resolve charges and culpability of the accused.

IX. Right to Disclosure

34. **Article 9(2) ICCPR contains-***"Anyone who is arrested shall be informed, at the time of arrest, of the reasons for his arrest and shall be promptly informed of any charges against him."* This provision compatibly reflects in the **Rule 9(3) of ROP** that provides**-"***At the time of executing the warrant of arrest under sub-rule (2) or later on, copy of allegations is to be served upon such person."*

35. Further, **Rule 18 (4) of ICT-BD provides "***The Chief prosecutor shall file extra copies of formal charge and copies of other documents for supplying the same to the accused(s) which the prosecution intends to rely upon in support of such charges so that the accused can prepare his defence."*

36. Thus, right to disclosure has been adequately ensured so that the suspect person can have fair opportunity to defend his own interest. The Tribunal has allowed privileged communications between the accused and his engaged counsels, in prison as and when prayed for. Defence has been allowed to inspect the 'Investigation Report' allowing its prayer. The Rules contain explicit provision as to right to know the allegation after arrest/detention, right to disclosure of charge(s) and to have assistance of interpreter, as contained in the Act of 1973 and as such liberty and rights of the accused have been ensured in consonance with Article 9(2) and 14(3)(a) ICCPR.

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

37. Fairness is the idea of doing what's best. It may not be perfect, but it's the good and decent thing to do. It requires being level-headed, uniform and customary. **Adequate time to get preparation of defense is one of key rights that signifies the fairness of the proceedings. Article 14(3)(b)** of the ICCPR states,

> "To have adequate time and facilities for the preparation of his defense and to communicate with counsel of his own choosing."

38. What we see in the Act of 1973? This provision has been attuned in **Section 16(2) of the Act of 1973** that reads,

> "A copy of the formal charge and a copy of each of the documents lodged with the formal charge shall be furnished to the accused person at a reasonable time before the trial; and in case of any difficulty in furnishing copies of the documents, reasonable opportunity for inspection shall be given to the accused person in such manner as the Tribunal may decide."

39. The '**three weeks'** time is given to the defense to prepare. **Section 9(3)** of the Act of 1973 explicitly provides that **'at least three weeks'** before the commencement of the trial, the Chief prosecutor shall have to furnish a list of witnesses along with the copies of recorded statement and documents upon which it intends to rely upon. Additionally, what time is considered adequate depends on the circumstances of the case. The ICT-BD is quite conscious ensuring this key right of defense. The Tribunal, through judicial practices, has already developed the notion that each party must have a reasonable opportunity to defend its interests. It is to be mentioned that there has been not a single instance that any of accused person has been denied any of his right to have time necessary for preparation of his defense or interest.

40. It is necessary to state that the provisions of the Act of 1973 [(International Crimes (Tribunals) Act,1973] and the Rules(ROP) framed there under offer adequate compatibility with the rights of the accused enshrined under Article 14 of the ICCPR. In trying the offences under the general law, the court of law in our country does not rely on our own standards only, it considers settled and recognised jurisprudence from around the world. So, even in absence of any explicit provision on this aspect the Tribunal , ethically, must see what happened in similar situations in other courts and what they have done, and take those decisions into account.

41. The ICT-2 guarantees the required procedural protections of the defendant's right to fair trial both in pre-trial phase and during trial The Act of 1973 and the Rules(ROP) framed there under explicitly compatible with the fair trial concept contained in the ICCPR. Let us have a glance to the comparison below:

(i) Fair and impartial Tribunal: [section 6 (2A) which is compatible with **Article 14(1) of ICCPR**] ;

(ii) Public trial [section 10(4)] ;

(iii)Accused to know of the charges against him and the evidence against him : [Rule 9(3) and Rule 18(4) of the ROP and section 9(3) and section 16(2) which are compatible with **Article 14(3)(a) ICCPR];**

(iv) Everyone charged with a criminal offence shall have the right to be presumed innocent until proved guilty according to law: [Rule 43(2) of ROP which is compatible with **Article 14(2) ICCPR**];

(v) Adequate time of getting preparation of defense: [section 9(3) and Rule 38(2) of the ROP which are compatible with **Article 14(3)(b) ICCPR];**

(vi) Services of a defense counsel and interpreter: [section 10(3) and section 17(2) which are compatible with **Article 14(3)(d) and 14(3)(f) ICCPR];**

(vii) Full opportunity to present his defense, including the right to call witnesses and produce evidence before the Tribunal: [section 10(1)(f) and section 17(3) which are compatible with **Article 14(3)(e) ICCPR**];

(viii) Right to cross-examine witnesses: [section 10(1)(e)];

(ix) To be tried without undue delay: [Section 11(3) which is compatible with Article **14(3)(c) ICCPR**];

(x) Not to be compelled to testify against himself or to confess guilt: [Rule 43(7) ROP which is compatible with **Article 14(3)(g) ICCPR**];

(xi) Right of appeal against final verdict: [section 21(1) which is compatible with **Article 14(5) ICCPR**].

42. The above rights of defense and procedure given in the Act of 1973 and the Rules of Procedure are the manifestations of the "due process of law" and "fair trial" which make the legislation of 1973 more compassionate, jurisprudentially significance and legally valid. In addition to ensuring the above recognised rights to accused the Tribunal-2 (ICT-2) has adopted the practice by ensuring it that at the time of interrogation defense counsel and a doctor shall be present in a room adjacent to that where the accused is interrogated and during break time they are allowed to consult the accused, despite the fact that statement made to investigation officer shall not be admissible in evidence. Privileged communications between the accused and his engaged counsels have been allowed as and when prayed for. What time is considered adequate depends on the circumstances of the case. The Tribunal-2 is quite conscious ensuring this key right of defense. The Tribunal-2, through judicial practices, has already developed the notion that each party must have a reasonable opportunity to defend its interests. It is to be mentioned that there has been not a single instance that any of accused person has been denied any of his right to have time necessary for preparation of his defense or interest.

43. Therefore it will be evident from comparison of the above procedural account with the ICCPR that the Act of 1973 does indeed

adhere to most of the rights of the accused enshrined under Article 14 of the ICCPR. However, from the aforementioned discussion it reveals that all the key rights have been adequately ensured under the International Crimes (Tribunals) Act, 1973 and we will find that those fairly correspond to the ICCPR.

XI. Universally Recognised Rights of Victims

44. The Tribunal notes that without fixing attention only to the rights of defence responsiveness also to be provided to the rights of victims of crimes as well. **Article 2(3) ICCPR** reads as below:

Article 2

3. Each State Party to the present Covenant undertakes:

> **(a)** To ensure that any person whose rights or freedoms as herein recognized are violated shall have an effective remedy, notwithstanding that the violation has been committed by persons acting in an official capacity;
>
> **(b)** To ensure that any person claiming such a remedy shall have his right thereto determined by competent judicial, administrative or legislative authorities, or by any other competent authority provided for by the legal system of the State, and to develop the possibilities of judicial remedy;
>
> **(c)** To ensure that the competent authorities shall enforce such remedies when granted.

45. The victims of atrocities committed in 1971 within the territory of Bangladesh in violation of customary international law need justice to heal. Bangladesh considers that the right to remedy should also belong to victims of war crimes. The State has an obligation to remedy serious human rights violations. Bangladesh recognizes Article 8 of the Universal Declaration of Human Rights and Article 2(3) of the International Covenant of Civil and Political Rights which ensure the right to an effective remedy for the violation of human rights.

XII. Summing up of Cases

(i) Summing up of the Prosecution Case

46. Mr. Mohammad Ali, the learned Prosecutor started summing up of its own case on 17 December 2012. At the outset, in his introductory submission, submitted that prosecution and trial of persons responsible for atrocities committed during the War of Liberation 1971 is the demand of nation to come out from the culture of impunity and also to provide redress the sufferings caused to the victims and their relatives. The learned Prosecutor paying tribute and homage to the Father of Nation Bangabandhu Sheikh Mujibur Rahman and millions of martyrs went on to place a brief portrayal of historical background that pushed the Bengali nation to the movement of self-determination which eventually got shape of War of Liberation. The then Pakistani government and the occupation troops' policy was to resist the War of Liberation in its embryo and as such 'operation search light' was executed in Dhaka causing thousands of killing and mass destruction, with the aid and organizational support mainly from Jamat-E-Islam (JEI), its student wing Islami Chatra Sangha (ICS) and pro-Pakistan political parties and individuals. Respecting the preamble of the International Crimes (Tribunals) Act 1973 (The Act XIX of 1073) the government has constituted this Tribunal for prosecution, trial and punishment of persons for genocide, crimes against humanity committed in the territory of Bangladesh in 1971.

47. Learned Prosecutor, further submitted that in furtherance of 'operation search light' atrocities had been committed in the locality of Mirpur and adjacent areas of Dhaka city as listed in the charges framed. In committing atrocities as have been charged were perpetrated by the armed gang led by accused Abdul Quader Molla, in furtherance of common design.

48. The case concerns events of crimes against humanity that took place on six different places and on different dates. Of six charges three speak of his physical participation in committing crimes and in respect of remaining charges he had aided and substantially contributed to the commission of crimes. Prosecution, out of 40 witnesses as cited by the Investigation Officer and 09 additional witnesses, as permitted by the Tribunal under section 9(4) of the Act produced and examined in all 12 witnesses including the IO. It has been submitted that not the number but

the quality of witnesses is to be considered and prosecution considered it sufficient to produce and examine such number of witnesses to prove the charges and it has been able to prove it beyond reasonable doubt.

49. As regards evidence made by the P.W.s, it has been submitted that charge nos. 1, 2 and 3 depend on hearsay witnesses. Testimony of P.W.2, and P.W.10 relates to charge no.1 (Pallab Killing); testimony of P.W.2, P.W.4 and P.W.10 relates to charge no.2 (Poet Meherunnesa & her inmates killing) and testimony of P.W.5 and P.W.10 relates to charge no.3 (Khondoker Abu Taleb Killing). Mirpur was chiefly Bihari populated locality and for the reason of horrific situation prevailing at that time it was not possible for a Bengali person to witness the events. It would reveal from evidence of P.W.9 Amir Hossain Molla that when they organized a volunteer force being inspired by the historic speech of Banga Bandhu on 07 March 1971 in Mirpur locality and had received training under supervision of 'Sadhin Bangla Chatra Sangram Parishad', the accused Abdul Quader Molla being accompanied by 70/80 members belonging to ICS was engaged in providing training to Biharis at Mirpur locality for protecting Pakistan.

50. Thus, the accused formed a 'force' consisting of local Biharis on his own initiation and naturally he had effective control on its members. When in furtherance of 'operation search light' the local Biharis started committing atrocities in the area of Mirpur, for obvious reason, the accused had conscious knowledge of it and he too aided, abetted and substantially facilitated to the commission of those crime. On the wake of sudden atrocious activities targeting Bengali population in Mirpur most of the local Bengali people who were very few in number, being frightened, had left the locality and as such there was no practical chance for them to remain present at the crime sites and to witness the events.

51. Therefore, it was natural to learn the incidents and involvement of perpetrators thereof. Rather learning the incidents and complicity of perpetrators from general people was natural. All these valid reasons lawfully justify to act on the hearsay evidence to determine complicity of accused Abdul Quader Molla who had led local Biharis to the accomplishment of the crimes described in charge nos. 1,2 and 3. The

learned prosecutor further added that the Tribunal is not bound by the technical rules of evidence and it shall accord in its discretion due consideration to hearsay evidence on weighing its probative value.[Rule 56(2) of the ROP].

52. Next, it has been argued that even evidence of a single witness is enough to prove a charge if it inspires credence. In relation to charge no.4 (Ghatarchar Killing) P.W.1, P.W.7 and P.W. 8 have testified and they are live witnesses who had described how the accused Abdul Quader Molla acted and participated to the commission of crimes. P.W.1, prior to the incident, when one day he was coming to Dhaka city's Mohammadpur area he found Abdul Quader Molla standing in front of Physical Training Institute which was known as 'torture cell' having a rifle in hand. It also strengthens the fact of his complicity with the incident of 'Gahtarchar mass killing'. Accused Abdul Quader Molla accompanied Pakistani occupation army and local accomplices with intent to participate and carry out the operation causing killing of 67 Bengali unarmed civilians.

53. The learned Prosecutor continued to argue, on factual aspect that with intent to annihilate the pro-liberation Bengali civilians the Pakistani occupation army and their local accomplices including accused Abdul Quader Molla launched attack to Alubdi village nearer to Mirpur locality and caused killing of about 400 Bengali unarmed civilians. It was 'genocide' as the perpetrators with intent to destroy the Bengali Population, in whole or in part, killed a significant number of members of Bengali Population of a particular village. The operation was destructive in nature and instantly after the massacre the remaining civilians were compelled to flee leaving their homes and property. They were internally displaced in consequence of destructive pattern of the organized attack. Thus, the incident truely falls within the definition of 'genocide' as specified in section 3(2)(c) (i) of the Act of 1973 instead of 'crimes against humanity'. P.W.6 and P.W.9, as live witnesses, have described how the incident took place and who the perpetrators were. They are quite natural and credible witnesses. Litigations might have been brought against P.W.9 out of political rivalry and land disputes. But merely for this reason his credibility cannot be questioned. Rather, it is

to be weighed as to how far truth has been demonstrated from his evidence. P.W.3 Momena Begum is a live witness (eye witness) who has testified the event alleged in charge no. 6. Merely for the reason that she is a single witness in support of this charge his sworn testimony cannot be excluded.

(ii) Summing up of the Defence Case

54. It has bee argued on this legal issue by the learned senior counsel for the defence Mr. Abdur Razzak that there has been no limitation in bringing criminal prosecution but inordinate delay of long 40 years must be explained. But the prosecution remained totally silent without offering any explanation on this issue in its formal charge submitted under section 9(1) of the Act which is the foundation of the case.

55. The Act of 1973 and first amendment of the constitution will go to show that intention of the framers of the legislation was to prosecute and try the 195 listed war criminals of Pakistan armed force and not the civilians as the phrase ‘including any person’ was replaced by the phrase ‘any person’ belonging to armed force or auxiliary force.

56. The phrase ‘individual’ or ‘group of individuals’ have been brought to the Act of 1973 by an amendment in 2009. It has been done with a malafide intention for bringing the local civilians within the jurisdiction of the Act of 1973. Such amendment itself indicates well that the Act of 1973 as enacted on 20.7.1973 was meant to prosecute 195 listed war criminals of Pakistani armed force and not ‘any person’ or ‘individual’.

57. Pursuant to the ‘tripartite agreement’ dated 09.4.1974 195 listed war criminals have been given clemency. Thus, the matter of prosecuting and trying them under the Act of 1973 ended with this agreement.

58. The cumulative effect of intention of enacting the Act of 1973, unexplained delay in bringing instant prosecution and bringing

amendment of the Act of 1973 in 2009 incorporating the phrase ‘individual’ or ‘group of individuals’ inevitably shows that bringing prosecution against the accused under the Act of 1973 is malafide and with political motive.

59. The learned senior counsel for the accused further submitted that the accused could have been prosecuted as aider and abettor only under the Collaborators Order 1972, if he actually had committed any offence of aiding and abetting the principals. But 40 years after without bringing the principal offender to justice the accused cannot be prosecuted and tried under the Act of 1973, particularly when the principals i.e. 195 listed war criminals belonging to the Pakistani armed force have been forgiven and immune.

60. The learned senior counsel Mr. Abdur Razzak has further submitted, apart from the above legal issue, that the testimony of witnesses in relation to charge nos. 1,2,3 is unattributable hearsay in nature and thus it cannot be relied upon. Prosecution has failed to establish the link of accused with the commission of crimes alleged in these charges. The telling evidence does not indicate anything as to the fact that the accused by his acts assisted or provided encouragement or moral support to the principal perpetrators of crimes alleged.

61. The learned counsel has advanced pertinent contention relating to elements of the offence of crimes against humanity. He has submitted that to characterize an offence as crimes against humanity it must have the elements ; (i) Attack for causing listed offences in the Act of 1973 (ii) victim must be civilian (iii) the attack must be part of systematic or widespread and (iv) *Mens rea* or knowledge. But prosecution has failed to establish that the presence of these elements in relation to the alleged killing of Pallab as listed in charge no.1. Evidence led by prosecution does not fit to description from which it can be inferred that the offence of killing Pallab was not an isolated crime but an offence of crimes against humanity. The learned counsel advanced similar argument so far it relates to legal points, in respect of charge no.2.

62. In relation to charge nos. 4,5 and 6, the learned senior counsel argued that the witnesses examined in support of these three charges are not credible. Prosecution has failed to show that they had reason to see the alleged event and know the accused since prior to the events alleged. Mere seeing the accused standing in front of Physical training center, Mohammadpur having a rifle in hand in the month of November, as narrated by P.W.1 Mozaffar Ahmed Khan does not link him with the commission of any of crimes alleged and that he was Al-Badar Commander. P.W.3 Momena Begum claims to have witnessed the event of killing of her father and atrocities as alleged in charge no.6 but according to her own version she heard about her father Hazrat Ali Laskar's killing. Besides, her statement made and archived in the museum of Mirpur Jallad Khana speaks something else. Defence has submitted photographed copy of her earlier statement made to the said museum before the Tribunal on 09.1.2013 which would show glaring inconsistencies between that and her testimony made before the Tribunal. Apart from this, Momena's version has not been corroborated by any other witnesses and as such relying on uncorroborated testimony of a single witness is not safe. The events alleged in four charges took place during the early part of the war of liberation and during that time Al-Badar was not formed and thus it cannot be said that the accused allegedly participated or acted to the perpetration of crimes alleged in the capacity of a member of Al-Badar.

63. As regards standard of proof it has been submitted by the learned senior defence counsel that three facts have to be considered for evaluating the standard of proof. These are (i) elements to constitute the offence of crimes against humanity (ii) mode of liability of the person accused of offence alleged and (iii) fact indispensable for convictions. Prosecution's burden is not in any way reduced if it lacks unassailable standard of proof which may only lead to a conclusion as to guilt of accused beyond reasonable doubt.

64. Mr. Abdur Razzak the learned defence counsel concluded his argument by making submission that the defence is not disputing the commission of crimes alleged but the prosecution has failed by adducing

materials and evidence that the accused either had complicity or aided or abetted to the accomplishment of such crimes. The telling evidence adduced does not suggest that any act on part of accused which assisted or provided encouragement or moral support and the same had substantial effect to the actual commission of crimes perpetrated by the principals.

65. The learned senior counsel went on to submit that the case of ***Akayesu*** so far it relates to corroboration of single sex victim testimony does not fit with the instant case and the observation made in paragraph 13-135 of this judgment does not help the prosecution at all. The learned counsel reiterated that the *mens rea* element is absent in this case as there has been no facts and circumstances that could validly lead to an inference that the accused acted knowing the consequence of the attack and context thereof.

66. Finally, the learned senior counsel, submitted that defence does not dispute the commission of crimes alleged but the accused who has been charged with was not in Dhaka during 1971 and he had been staying at her native village Amirabad, Faridpur where he was running business at 'Chowdda Rashi Bazar' and in support of this plea of *alibi* , defence has adduced and examined four witnesses including the accused himself. Merely for the reason that at the relevant time the accused belonged to Islami Chatra Sangha (ICS) he has been prosecuted with political motive and he deserves acquittal.

XIII. The way of adjudicating the charges

67. The evidence produced by both parties in support of their respective case was mainly testimonial. Some of prosecution witnesses allegedly directly experienced the dreadful events they have narrated in court and that such trauma could have an impact on their testimonies. However, their testimony seems to be invaluable to the Tribunal in its search for the truth on the alleged atrocious events that happened in 1971 war of liberation directing the Bangalee civilian population, after duly weighing value and credibility of such testimonies.

68. Despite the indisputable atrociousness of the crimes committed during the war of liberation in 1971 in collaboration with the local perpetrators, we require to examine the facts constituting offences alleged and complicity of the accused therewith in a most dispassionate manner, keeping in mind that the accused is presumed innocent. In this regard the Tribunal(ICT-2) recalls the provisions contained in section 6(2A) of the Act of 1973 together with the observation of **US Justice Frankfurter[[Dennis v. United States(341 US 494-592)para 525: page 208 of Final defence argument pack] ,** as cited by the learned senior defence counsel which is as below:

> **“ Courts are not representative bodies. They are not designed to be a good reflex of a democratic society. Their judgemnt is best informed, and therefore most dependable, within narrow limits. Their essential quality is detachment, founded on independence. History teaches that the independence of the judiciary is jeopardized when courts become embroiled in the passions of the day and assume primary responsibility in choosing between competing political, economic and social pressures.”**

69. It should be borne in mind that the alleged incidents took place 42 years back, in 1971 and as such memory of live witness may have been faded. Therefore, in case like one in our hand involving adjudication of charges for the offence of crimes against humanity we are to depend upon **(i)** facts of common knowledge **(ii)** documentary evidence **(iii)** reporting of news paper, books etc having probative value **(iv)** relevant facts **(v)** circumstantial evidence **(vi)** careful evaluation of witnesses’ version **(vii)** Political status of the accused at the relevant time and (viii) the jurisprudence evolved on these issues in the *adhoc* tribunals. In the prosecution of crimes against humanity, principally accused’s status, position, association, authority, conduct, activities, link with the state organization are pertinent issues even prior to the alleged events. In determining culpability of the accused, all these factors have to be addressed and resolved as well.

70. It is to be noted, in particular when the Tribunal acts on hearsay evidence, it is not bound to apply the technical rules of evidence. Rather the Tribunal is to determine the probative value of all relevant evidence

admitted. Hearsay evidence, in a trial under the Act of 1973, is not inadmissible *per se,* but that such evidence should be considered with caution and if it carries reasonable probative value.

71. Therefore, we have to resolve whether these crimes were committed and if so, whether the accused is guilty of those charges brought against him. The prosecution, in the light of the charges framed, is burdened to prove-(i) commission of the crimes alleged (ii) mode of participation of the accused in committing any of crimes alleged (ii) how he acted in aiding and abetting or providing encouragement or moral support to the commission of any of crimes (iii) How he had complicity to commission of any of crimes (iv) the elements necessary to constitute the offence of crimes against humanity (v) liability of the accused.

72. Admittedly, the accused has been indicted for the crimes committed in violation of customary international law and thus this Tribunal shall not be precluded from borrowing guidance from the jurisprudence evolved to characterize the offences alleged as crimes against humanity.

XIV. Backdrop and Context

73. 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.

74. What was the role of the accused during the period of nine months? What were his activities? What he did and for whom? Had he link, in any manner, with the Pakistani occupation force or pro-Pakistan political party Jamat E Islami (JEI) and the militia forces formed for implementing organizational policy or plan and if so, why?

75. We take the fact of common knowledge which not even reasonably disputed that, during that time parallel forces e.g Razaker Bahini, Al-Badar Bahini, Peace Committee were formed as accessory forces of the Pakistani occupation armed force who provided moral supports , assistance and substantially contributed to the commission of atrocities through out the country into our notice. Thousands of incidents happened through out the country as part of organized and planned attack. Target was the pro-liberation Bangalee population, Hindu community, political group, freedom fighters and finally the 'intellectuals'. We are to search answers of all these crucial questions which will be of assistance in determining the liability of the accused for the offence for which he has been charged. The charges against the accused arose from some particular events during the War of Liberation in 1971.

XV. Discussion

76. The case, as it transpires, is founded on oral evidence and documentary evidence as well. The evidence adduced by the prosecution is to be evaluated together with the circumstances revealed, relevant facts and facts of common knowledge. It would be expedient to have a look to the facts of common knowledge of which Tribunal has jurisdiction to take judicial notice [Section 19(3) of the Act of 1973]. However, before we address the above factual issues involved we prefer to resolve the legal issues agitated by the defence. Inevitably determination of these issues will be of assistance in arriving at decision on facts in issues.

XVI. Addressing legal issues agitated

77. 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.

Summary of Argument advanced by the defence Counsel on legal aspects

78. Mr. Abdur Razzak the senior defence counsel, in course of summing up of defence case has taken pain in raising some pertinent

legal issues. He argued that 40 years delay in prosecuting the accused remained unexplained and such inordinate and unexplained delay creates doubt and fairness of prosecuting the accused; that the phrase 'individual' and 'group of individuals' have been purposefully incorporated in the Act of 1973 by way of amendment in 2009 and as such the accused cannot be brought to jurisdiction of the Tribunal as an 'individual'; that the Act of 1973 was enacted to prosecute , try and punish 195 listed Pakistani war criminals who have been exonerated on the strength of 'tripartite agreement' of 1974 and as such without prosecuting those listed war criminals present accused cannot be brought to justice as merely aider and abettor; that the accused could have been prosecuted and tried under the Collaborator Order 1972 if he actually had committed any criminal acts constituting offences in concert with the Pakistani occupation army; that it is not claimed that the accused alone had committed the offences alleged and thus without bringing his accomplices to justice the accused alone cannot be prosecuted; that the crimes alleged are isolated in nature and not part of organized attack ; that the offences have not been adequately defined in the Act of 1973 and for characterizing the criminal acts alleged for constituting offence of crimes against humanity the Tribunal should borrow the elements as contained in the Rome Statute as well as from the jurisprudence evolved in *adhoc* Tribunals.

Summary of Reply of Prosecutor to argument advanced by the Defence on Legal Points

79. In reply to these legal contentions, Mr. Mohammad Ali, the learned Prosecutor submitted that there is no limitation in bringing criminal prosecution, particularly when it relates to 'international crimes' committed in violation of customary international law. Mr. Prosecutor went on to submit that the 'tripartite agreement' cannot bung up in bringing prosecution under the Act of 1973 against 'auxiliary force ' and 'individual' or 'group of individuals'. Besides, the 'tripartite agreement' which was a mere 'executive act' did not give immunity to listed 195 war criminals belonging to Pakistani occupation army from being prosecuted. The Collaborators Order 1972 was meant to prosecute and try the persons responsible for the penal offences and not for committing 'international crimes'; that the offences of crimes against humanity for

which the accused has been charged with were part of organised and planned attack. The offence of crimes against humanity is well defined in the Act of 1973. The phrase **'committed against civilian population'** as contained in section 3(2)(a) of the Act of 1973 itself patently signifies that acts constituting offences specified therein are perceived to have been committed as part of 'systematic attack'. The context of war of liberation is enough to qualify the acts as the offences of crimes against humanity. Our Tribunal which is a domestic Tribunal constituted under our own legislation enacted in the sovereign parliament meant to prosecute, try and punish the perpetrators of 'international crimes' taking the context and pattern of atrocities into account may arrive at decision whether the acts constituting the offences can be qualified as crimes against humanity.

XVII. Determination of Legal Aspects

(i) Does Unexplained Delay frustrates prosecution case

80. It has been argued on this legal issue by the senior learned counsel for the defence Mr. Abdur Razzak that there has been no limitation in bringing criminal prosecution but such inordinate delay of long 40 years must be explained. But the prosecution remained totally silent without offering any explanation on this issue in its formal charge submitted under section 9(1) of the Act which is the foundation of the case. The learned defence counsel, in support of his submission relating to unexplained inordinate delay in bringing prosecution has cited some decisions and has contended that unexplained delay makes the prosecution reasonably tainted and doubtful and offers an impression of malafide intention to prosecute the accused.

81. In support of his contention the learned senior counsel for the defence has cited some decisions and drew attention to the meaning of 'malafide' adding further that in every adhoc tribunals and tribunals set up for prosecuting and trying crimes against humanity and genocide the persons accused of such crimes have been brought to jurisdiction of tribunal within shortest possible of time and mostly instantly after the event of atrocities committed. No delay occurred in either tribunal in trying the offence of crimes against humanity. Thus prosecution is

obliged to offer an explanation of 40 years delay for dispelling doubt as to genuineness of prosecution.

82. Having regard to above submission, we are of view that 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.

83. 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 the1970s are now ongoing. 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.

84. It is a fact of common knowledge that in 1981, **Maurice Papon**, who has died aged 96, was the minister for the budget in the administration of Prime Minister Raymond Barre, when his role in the deportation of French Jews during the Second World War was uncovered. Papon had been charged in 1997 on the basis of his activities from 1942 to 1944. Eventually brought to trial, he was convicted in 1998 of complicity in crimes against humanity and sentenced to a 10-year prison sentence for ordering the arrest and deportation of 1,690 Jews, including 223 children, from the Bordeaux region to the Nazi death camps in Germany.

85. None of this would have been known if it had not been for the research of Michel Bergès, a young French historian working in the departmental archives of the Gironde. He was looking for documents concerning relations between local wine merchants and the Germans during the occupation. By chance he came across the archives of the department of Jewish affairs, which had been attached to the préfecture of Bordeaux at the time of Vichy, the puppet government set up by the Nazis. In these forgotten papers he found evidence concerning the forced deportation of Jews from Bordeaux to the transit camp at Drancy, near Paris (from where they were sent to the death camps), during the years 1942 to 1944.

86. Maurice Papon always claimed that he was the victim of a political trial that had caused him great suffering and the death of his wife, who died during the trial. Nevertheless, on April 2 1998, after the longest postwar trial, Maurice Papon was found guilty of the arrest and deportation of French Jews during the years 1942-1944. [http://www.guardian.co.uk/news/2007/feb/19/guardianobituaries.france

[Douglas Johnson :The Guardian, Monday 19 February 2007]

87. Taking the above instance into account and in view of 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.

88. Here, we cannot abstain from taking the historical context prompting such delay in prosecuting the 'individuals' responsible for atrocities in 1971 war of liberation. The Statute was enacted in 1973. But after the dark episode of assassination of Bangabandhu Sheikh Mujibur Rahman and his family on 15 August 1975 the process was

halted and even the Collaborators Order 1972 was repealed on 31.12.1975. The individuals and political organizations which played visibly a notorious and antagonistic role resisting the war of Liberation in 1971 were allowed of being rehabilitated and recognized in all spheres of state. Even some of potential individuals actively affiliated with the politics of Jamat E Islami (JEI) in 1971 and its student wing Islami Chatra Sangha (ICS) got fair opportunity of sharing state power. Unfortunately, the nation carrying enormous pains had to play the role of mere spectator. Because, the situation was not favourable for raising voice for prosecuting the perpetrators of serious crimes committed in violation of customary international law in 1971. Democracy too remained halted till 1991 and there was no favourable situation, strong political will and consensus till 2009 to prosecute the offenders under the Act of 1973. This history of common knowledge itself is explanatory for delayed prosecution and thus the accused cannot be said to have been prosecuted and tried under the Act of 1973 for political purpose.

89. Prolonged impunity and the related denial of the truth will allow old wounds to fester and may increase post-traumatic stress suffered by the victims of human rights crimes. [Special Rapporteur on the Right to Restitution, Comp. & Rehab. for Victims of Gross Violations of Human Rights & Fundamental Freedoms, *Study Concerning the Right to Restitution, Compensation and Rehabilitation for Victims of Gross Violations of Human Rights and Fundamental Freedoms*, 135, Common on Human Rights, Econ. & Soc. Council, U.N. Doc. E/CN.4/Sub.2/1993/8 (July 2, 1993) [hereinafter van Boven] (by Theo van Boven).]

90. In this respect, Cohen has observed that “after generations of denials, lies, cover-ups and evasions, there is a powerful, almost obsessive, desire to know exactly what happened.” [STANLEY COHEN, STATES OF DENIAL: KNOWING ABOUT ATROCITIES AND SUFFERING 225 (2001)]. 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 venture 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.

91. Crimes against humanity and genocide, the gravest crime never get old and that the perpetrators who are treated as the enemies of mankind 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. Considerations of material justice for the victims should prevail when prosecuting crimes of the extreme magnitude is on the process. Justice delayed is no longer justice denied, particularly when the perpetrators of core international crimes are brought to the process of justice. Again, what consequence would follow if no explanation regarding delay is made while prosecuting the accused for perpetrating crimes against humanity has not been elaborated by the learned defence counsel. However, there can be no recognised theory to insist that such a 'system crime' can only be pursued within a given number of years. Therefore, delayed prosecution does not rest as a clog in prosecuting and trying the accused and creates no mystification about the atrocities committed in 1971.

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

92. By drawing attention to the Parliamentary debate dated 13 July 1973 on the issue of passing the Bill for promulgating the International Crimes (Tribunals) Act 1973, the learned senior counsel for the defence has submitted that pursuant to the above debate eventually the Act of 1973 was enacted on 20 July 1973 after bringing first amendment of the Constitution on 15 July 1973.

93. It has been further submitted that the Act of 1973 and first amendment of the constitution will go to show that intention of the framers of the legislation was to prosecute and try the 195 listed war criminals of Pakistan armed force and not the civilians as the phrase 'including any person' was replaced by the phrase 'any person'

belonging to armed force or auxiliary force. The first amendment of the constitution was brought so that no ‘civilian person’ could be prosecuted and tried under the Act of 1973.

94. The learned senior counsel for the defence went on to submit further that a press release dated 17 April 1973 [Page 1 of the defence Argument pack] prior to first amendment of the constitution and thereby abatement of the Act of 1973 also goes to show that government’s intention was to prosecute and try only the 195 listed war criminals of Pakistani occupation armed force and their ‘auxiliary force’ which acted under its control.

95. The learned prosecutor Mr. Mohammad Ali, in reply, has argued that the Act of 1973 is meant to prosecute, try and punish any ‘individual’ or ‘group of individuals’ , or any member of armed, defence or auxiliary force for the offences specified in section 3(2) of the Act of 1973. If it is not proved that the accused belonged to ‘auxiliary force’ even then he may be brought to jurisdiction of the Tribunal if he is found to have perpetrated offences enumerated in the Act of 1973 in the capacity of an ‘individual’.

96. It is true that initially the Act of 1973 was enacted to prosecute try and punish the 195 listed war criminals of Pakistani occupation armed force and their ‘auxiliary force’. Till 2009 the Act of 1973 was dormant and no Tribunal was constituted under it. Pursuant to the tripartite agreement of 1974 195 listed war criminals of Pakistani armed force were allowed to walk free which was derogatory to *jus cogens* norm. The history says, for the reason of state obligation to bring the perpetrators of responsible for the crimes committed in violation of customary international law to justice and in the wake of nation’s demand the Act of 1973 has been amended for extending jurisdiction of the Tribunal for bringing the perpetrator to book if he is found involved with the commission of the criminal acts constituting offences as enumerated in the Act of 1973 even in the capacity of an ‘individual’ or member of ‘group of individuals’

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

98. 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.

99. 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.

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

101. Thus, we hold that the contention raised by the defence is of no consequence to the accused in consideration of his legal status and

accordingly the defence objection is not sustainable in law, particularly in the light of Article 47(3) and Article 47A(2) of the Constitution.

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

102. It has been argued by the learned senior defence counsel that pursuant to the 'tripartite agreement' dated 09.4.1974, 195 listed war criminals belonging to Pakistani armed force have been given clemency. Thus the matter of prosecuting and trying them under the Act of 1973 ended with this agreement. As regard local perpetrators who allegedly aided and abetted the Pakistani occupation armed force in committing atrocities including murder, rape, arson the government enacted the Collaborators Order 1972. Thus the Collaborator Order 1972 was the only legal instrument to bring the local perpetrators to book.

103. It would reveal even from the preamble of the Collaborators Order 1972 that it was promulgated and meant to prosecute and try the local civilians who aided and abetted the armed forces in committing crimes against humanity, genocide and or in waging war during 1971 within the territory of Bangladesh. If the accused in fact had committed any act of aiding or abetting to the perpetration of any offence of crimes against humanity or genocide he could have been prosecuted under the Collaborators Order 1972. Instead of initiating any such step long 40 years after, with *malafide* intention and for achieving political gain, the accused has been brought under the jurisdiction of the Tribunal constituted under the Act of 1973.

104. Having regard to above submission and careful look to the Act of 1973 and the Collaborators Order 1972 we are constrained to hold that 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.

105. 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.

106. 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.

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

108. 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.

109. Amnesty shown to 195 listed war criminals are opposed to peremptory norms of international law. It is to be noted that any agreement and treaty amongst states in derogation of this principle stands void as per the provisions of international treaty law convention [Article 53 of the Vienna Convention on the Law of the Treaties, 1969]

110. Despite the immunity given to 195 listed war criminals belonging to Pakistani armed force on the strength of 'tripartite agreement' the Act of 1973 still provides jurisdiction to bring them to the process of justice. Provisions as contained in section 3(1) of the Act of 1973 has kept the entrance unbolt to prosecute, try and punish them for shocking and barbaric atrocities committed in 1971 in the territory of Bangladesh. Of course in order to prosecute and try those 195 war criminal belonging to Pakistani army a unified, bold and national effort would be required. It is to be noted that the perpetrators of crimes against humanity and genocide are the enemies of mankind.

111. Therefore, the argument that since the main responsible persons (195 war criminals belonging to Pakistan Army) have escaped the trial, on the strength of the 'tripartite agreement' providing immunity to them, the next line collaborators or perpetrators cannot be tried is far-off to any canons of criminal jurisprudence. We are of the view that the 'tripartite agreement' is not at all a barrier to prosecute even a local civilian perpetrator under the Act of 1973.

(iv) The accused could have been prosecuted and tried under the Collaborators Order 1972 and prosecution under the Act of 1973 is malafide

112. The learned defence counsel has attempted to submit that the cumulative effect of intention of enacting the Act of 1973, unexplained delay in bringing instant prosecution and bringing amendment of the Act of 1973 in 2009 by incorporating the phrase 'individual' or 'group of

individuals' inevitably shows that bringing prosecution against the accused under the Act of 1973 is malafide and for political purpose. The accused could have been prosecuted, tried and punished under the Collaborators Order 1972, if actually he had committed any act of aiding or abetting to the commission of crimes alleged.

113. 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 offences underlying in the Collaborators Order 1972 to be the same offences as specified in the Act of 1973.

114. In the case in hand, we have found that the accused has been alleged to have committed or aided and abetted or had complicity to the perpetration of the offences enumerated in the 1973 Act. The elementary truth and message that we have got from the example of delayed prosecution of a Nazi war criminal Maurice Papon that a person whoever may be or whatever position he occupied he cannot be relieved from being prosecuted for the crimes committed in violation of customary international law even after long lapse of time and thus merely for the reason of delayed prosecution it cannot be readily branded as political and malafide prosecution

115. 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.

(v) Whether the accused can be prosecuted as an aider or abettor without prosecuting the Principals and his accomplices

116. Another question has been agitated by the defence. According to the charges it will reveal that apart from the accused, some other co-perpetrators accompanied the accused at the crime site in committing the

crimes. But excepting accused, none of his accomplices has been brought to justice.

117. The accused could have been prosecuted as aider and abettor only under the Collaborators Order 1972. But 40 years after without bringing the principal offender to justice the accused cannot be prosecuted and tried under the Act of 1973, particularly when the principals i.e. 195 listed war criminals belonging to the Pakistani armed force have been forgiven and immune. The tripartite agreement speaks that the government had decided not to proceed with the trial of those 195 war criminals.

118. The accused has been charged with for the offence of 'murder' the event of which will appear to be isolated and as such for such isolated crimes he could have been prosecuted and tried under the Collaborators Order 1972 which was meant to try the offences as scheduled therein i.e the offences punishable under the Penal Code. On this score as well the charges brought against the accused cannot be sustainable in law.

119. First, 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. 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 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). Therefore, we find that in law, either 'aiding' or 'abetting' alone is ample to render the perpetrator criminally liable.

120. On this legal issue we may recall the principle enunciated by the ICTR Trial Chamber that

> **"A person may be tried for complicity in genocide even where the principal perpetrator of the crime has not been identified, or where, for any other reasons, guilt could not be proven." [** ***Akayesu,*** (Trial Chamber), September 2, 1998, para. 531 and ***Musema*** (Trial Chamber), January 27, 2000, para.174]

121. 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 underlying in the statutes. The above international references also consistently supplement our own view that 'abetting' or 'aiding' or conspiracy' being distinct offence in the Act of 1973 the persons responsible for any of these unlawful acts that substantially facilitated the commission of offence enumerated in section 3(2)(a)(c) can lawfully be brought to justice.

(vi) Definition and Elements of Crime

122. The learned defence counsel has argued that the offences specified in section 3(2) are not well defined and the same lack of elements. Section 3(2) of the ICTA 1973 does not explicitly contain the 'widespread or systematic' element for constituting the crimes against humanity. In this regard this Tribunal may borrow the elements and definition of crimes as contained in the Rome Statute. It has been further argued that an 'attack' may be termed as 'systematic' or 'widespread' if it was in furtherance of policy and plan. But there has been evidence to show that the alleged offences were perpetrated in furtherance of any plan or policy and the accused was linked to the implementation of such policy and plan**.** Thus the offence if actually happened, in absence of context and policy and plan the same cannot be characterized as crimes against humanity.

123. Tribunal notes that 'policy' and 'plan' are not the elements to constitute the offence of crimes against humanity. It is true that the common denominator of a systematic attack is that it is carried out pursuant to a preconceived policy or plan. But these may be considered

as factors only and not as elements. This view finds support from the observation made in paragraph 98 of the judgment in the case of ***prosecutor v. Kunarac*** [Case No. IT-96-23/1-A: ICTY Appeal Chamber 12 June 2002] which is as below:

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

124. The learned senior counsel next argued that section 3(2)(a) provides that the acts must be committed 'against any civilian population' for constituting the offence of crimes against humanity. But the section does not contain the 'widespread' or 'systematic' element to exclude the probability that the offences were isolated and random in nature. The section 3(2)(a) of the Act resembles to Article 6(c) of the Nuremberg Charter. It is further submitted that the ICTY Statute does not contain the 'widespread' or ;'systematic' element but it has developed jurisprudence by its judgment in the case of *Tadic* (Appeal Chamber: ICTY) that for qualifying the offences as crimes against humanity it must be committed as part of 'widespread' or 'systematic' attack. But the prosecution has utterly failed to show by evidence that the offences for which the accused has been charged with were part of the 'widespread' or 'systematic' attack. In this regard the case of ***Prosecutor v. Tadic*** [Case No. IT-94-1-T: ICTY Trial Chamber, judgment 7 May 1997, para 646 (Page- 142 of the Final Argument Pack submitted by the defence)] has been cited which is as below**:**

> **"While this issue has been the subject of considerable debate, it is now well established that the requirement that the acts be directed against a civilian "population"**

> **can be fulfilled if the acts occur on either widespread basis or systematic manner. Either one of these is sufficient to exclude isolated or random acts."**

125. We are of view that section 3(2)(a) of the Act is self contained and fairly compatible with the international jurisprudence. Before coming to a finding as to whether the attack directed against civilian population, in 1971, on political, racial, ethnic or religious grounds was systematic let us have a look to the jurisprudence evolved on this issue.

126. **I**f we make a closer look to the contemporary standards of definition of 'Crimes against Humanity' in various Statutes, first 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.

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

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

128. It is now settled that the expression '**committed against any civilian population'** is an expression which specifies that in the context of a crime against humanity the civilian population is the primary object of the attack. The definition of 'Crimes against humanity' as contemplated in **Article 5** of the ICTY Statute 1993 neither requires the presence of 'Widespread and Systematic Attack' nor the presence of

'knowledge' thereto as conditions for establishing the liability for 'Crimes against Humanity'. It is the jurisprudence developed in ICTY that identified the ‘widespread’ or ‘systematic’ requirement.

129. True, the Rome Statute (a prospective 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. 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 crimes against humanity.

130. If the specific offences of 'Crimes against Humanity' which were committed during 1971 are tried under 1973 Act, it is obvious that they were committed in the ‘context’ of the 1971 war. This context itself is sufficient to prove the existence of a ‘systematic attack' on Bangladeshi self-determined population in 1971. It is the ‘context’ that transforms an individual’s act into a crime against humanity and the accused must be aware of this context in order to be culpable of crime alleged. The Tribunal, as per section 19(3) of the 1973 Act, shall not require proof of facts of common knowledge; it shall take judicial notice of such fact. The specific offences committed as 'Crimes against Humanity' during 1971 war, were very much a part of a ‘systematic attack’ of the ongoing atrocious activities.

131. The section 3(2)(a) of the Act states the 'acts' constituting the offences of crimes against humanity is required to have been **‘committed against any civilian population'** or **'persecution on political, racial, ethnic or religious grounds'.** To qualify as a crime against humanity, the acts enumerated in section 3(2)(a) of the Act must be committed against the ‘civilian population’ on national, political,

ethnic, racial or religious grounds. Thus, 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) of the Act of 1973. Conducts constituting 'Crimes' 'directed against civilian population' thus refers to organized and systematic nature of the attack causing acts of violence to the number of victims belonging to civilian population. Therefore, the claim as to the non-existence of a consistent international standard for the definition of 'crimes against humanity' as enumerated in the Act of 1973 is manifestly baseless.

(vii) *Mens rea* or Knowledge

132. The learned senior counsel reiterated that the mens rea element is absent in this case as there has been no facts and circumstances that could validly lead to inference that the accused acted knowing the consequence of the attack and context thereof.

133. It appears that only one paragraph in the ***Tadic*** judgment refers to this question, and it summarily considers existing case law on whether or not the perpetrator of crimes against humanity must have knowledge of the context within which the acts are committed. [***Prosecutor v. Tadic***, Case No. IT-94-1-T, opinion and judgment, 7 May 1997, para 657]. The *mens rea* of the offences was not considered, most likely because ***Dusko Tadic*** offered an *alibi* defence, which does not raise questions about intent, and simply denies that the accused was present or involved when the crime was committed. In the case before us, the accused has taken a plea of *alibi* contending that at the relevant time even during the entire period of war of liberation in 1971 the accused was not in Dhaka and had been staying at his native village Amirabad, Fairdpur which is far from the Dhaka city. Thus, significance of proving *mens rea* loses relevance, as an element.

134. It is not alleged that accused himself directly participated in the actual commission of the crimes alleged. In alternative, he has been charged for aiding or abetting or having complicity to the crimes committed. That is to say, the accused had acted as a 'secondary

perpetrator' or 'accomplice'. In such case the acts of assistance and providing encouragement and moral support to the principals is to be presumed from relevant facts and acts of accused either before or at the time of commission of crime or even after the commission thereof.

135. The *mens rea* of the accused for abetting or aiding need not be explicit, it may be inferred from the circumstances. Indeed, as *mens rea* is a state of mind, its proof is typically a matter of inference. The standard of proof dictates, of course, that it be the only reasonable inference from the evidence and relevant and surrounding circumstances. In the case in our hand, we are to perceive that the accused acted having 'awareness' coupled with his conscious decision to accompany the principals to the crime site.

136. However, in light of above observations and settled jurisprudence the matter of *mens rea* or knowledge or intent may be well determined while adjudicating the charges independently.

XVIII. Relevant and Decisive Factual Aspects

137. Who was Abdul Quader Molla? Where he used to live in 1971? What he used to do and what was his political ideology, if any. Who were his associates during immediate pre-liberation time? Findings on these matters will be of significance relevance in adjudicating culpability of the accused for the charges framed. Therefore, at the outset, let us arrive at decision on these aspects, on having discussion based on evidence before us.

138. For the purpose of determining culpability of accused Abdul Quader Molla, indispensably, at out set, it is needed to know his sketch that may lend assurance as to an unerring conclusion about his activities and association with organizations and political parties, particularly during the pre-25th March 1971 period. It will also be of significance in arriving at decision as regards the fact of his staying at Mirpur locality of Dhaka city when the offences are alleged to have committed for which he has been charged with.

(i) Facts relevant to establish the role and association of the accused with the gang of perpetrators consisting of local Biharis namely Aktar goonda, Hakka goonda, Abbas chairman, Hasib Hasmi, Nehal

139. P.W. 2 Syed Shahidul Huq Mama (59), a valiant freedom fighter and a resident of Mirpur locality at the relevant time stated that Abdul Quader Molla, Biharis, Aktar goonda, Hakka goonda, Abbas chairman, Hasib Hasmi, Nehal had participated the election campaign in favour of Ghulam Azam and they used to give anti Sheikh Mujib and anti-Bengali slogans. This pertinent fact relevant to pre-25 March 1971 role of the accused remains unimpeached in cross-examination.

140. Thus, from the above unshaken version we have found three facts: **(i)** since prior to 25 March 1971 the accused's position was predominantly against the movement of Bengali nation for its self-determination **(ii)** thereby the accused had cleared his position in favour of Jamat E Islami ideology and **(iii)** the accused was a close and active associate with the gang of local Bihari consisting of Aktar goonda, Hakka goonda, Abbas Chairman, Hasib Hasmi, Nehal .

141. On 26 March at about 08:00 morning, coming out from the shelter, P.W.2 found the houses of local Bangalee people in Mirpur on fire. He also saw the Bihari celebrating here and there on the street. On their way, Abdul Quader Molla and those (Aktar goonda, Nehal Hakka goonda, Abbas chairman, Hasib Hashmi) who participated the massacre started chasing them by shouting *" Shahid (P.W.2) has come, Shahid has come, apprehend him, apprehend him"*.

142. The above fact remains unshaken in cross-examination. Rather P.W.2, on cross-examination, has re-affirmed it that on 26 March, in the morning, he coming out from the club room nearer to Shah Ali *Majar*, Mirpur he saw the houses of Bangalees on fire and the Pakistani army, Bihari, jamat e Islami and accused Abdul Qauder Molla remained present at the time of such destructive massacre.

143. The unimpeached version describing the role of accused on 26 March 1971 unequivocally and patently demonstrates that in furtherance of his prior association with the local Biharis namely Akter goonda, Nehal, Hakka goonda, Abbas Chairman, Hasib Hashmi accused Abdul Quader Molla even at the early part of the war of liberation being accompanied by these notorious people visibly started playing antagonistic role in the area of Mirpur.

144. In narrating a brief account of situation prevailing immediate before 25th March 1971 P.W.2 Syed Shahidul Haque Mama stated that he faced attack and protest by a group lead by Convention Muslim League leader S.A Khalek, Khasru, son of Governor Monaem Khan and the attackers opened gun fire. Thereafter, accused Abdul Quader Molla who belonged to Jamat E Islami, Dr. T Ali, Aktar goonda Nehal, Hasib Hashmi, Abbas Chairman, Kana Hafej and others convened a meeting by bringing Khan Abdul Qayum Khan against six points movements and eleven points movement. This meeting was organized by Anjuma-e-Mahajerin being fueled by Jamat E Islami. In that meeting, Abdul Qayum Khan uttered that "*Sheikh Mujib is the traitor and enemy of Pakistan"*. Defence could not dislodge this version in cross-examination.

145. This unshaken relevant fact adds further assurance to the role of accused and his close and culpable association with the gang of local Biharis including Aktar goonda Nehal, Hasib Hashmi, Abbas Chairman.

146. **P.W.1 Mozaffar Ahmed Khan**, a valiant freedom fighter who was the President of Keraniganj thana Chatra League in 1969 stated that during the war of liberation in the month of November he came to Mohammadpur, Dhaka in disguise and on the way of his return to home he found accused Abdul Quader Molla being accompanied by his accomplices standing in front of Mohammadpur Physical Training center which was known as the 'torture cell' of Al-Badar having rifle in hand.

147. In cross-examination, in reply to question put to him by the defence P.W.1 has re-affirmed it by saying that he found the accused standing in front of Physical training Centre's gate having a Chinese rifle in hand.

148. We have also found from the **Exhibit-2** a book titled **'Sunset at Midday'** written by one Mohi Uddin , a member of Al-Badar wherein the seventh line of paragraph two at page 97 that **"The workers belonging to purely Islami Chatra Sangha were called Al-Badar".** Besides, from the above unshaken and re-affirmed version it is quite evident too that accused Abdul Qauder Molla was a potential member of armed Al-Badar force and had been in Dhaka during the period of war of liberation in 1971.

149. Besides, accused Abdul Quader Molla while deposing as D.W.1 has admitted in cross-examination that he was elected President of Islami Chatra Sangha (ICS) of Shahidullah Hall unit of the University of Dhaka and he in 1977 was appointed as the private secretary of Professor Ghulam Azam pursuant to decision of Jamat E Islami.

150. We have found from evidence of P.W.9 that the accused Abdul Quader Molla being accompanied by 70/80 members belonging to ICS was engaged in providing training to Biharis at Mirpur locality for protecting Pakistan. This fact remained uncontroverted in cross-examination. This relevant fact suggests that the accused formed a 'force' consisting of local Biharis on his own initiation and naturally he had effective control on its members.

151. For the reason of conduct , role and culpable association of the accused with the gang of local Bihari hooligans who were quite antagonistic to the local Bengali people particularly who were in favour of self-determination movement of Bengali nation it is validly inferred without any doubt that accused Abdul Qauder Molla had accompanied , encouraged, aided and provided moral support to them to the actual commission of atrocious activities perpetrated in the area of Mirpur that happened during the early part of the war of liberation, in furtherance of 'operation search light' on 25 march 1971. Accordingly, the hearsay evidence of prosecution witnesses have to be viewed, valued and weighed together with the above pertinent relevant facts.

XIX. Adjudication of Charges

152. With regard to the factual findings, the Tribunal is required only to make findings of those facts which are indispensable to the determination of guilt on a particular charge. The Tribunal, according to settled jurisprudence, is in no way obliged to refer to every phrase pronounced by a witness during his testimony but it may, where it deems appropriate, stress the main parts of the testimony relied upon in support of a finding. Keeping it in mind we are going to adjudicate the charges through providing 'reasoned opinion' on rigorous evaluation of the facts in question by referring the relevant piece of evidence.

Adjudication of Charge No.1
[Pallab Murder]

153. Summary Charge No.01: The anti liberation people in order to execute plan to eliminate the freedom loving people, apprehending one Pallab student of Bangla College from Nawabpur forcibly brought him to the accused Abdul Quader Molla who was one of prominent leaders of Islami Chatra Sangha and as well as significant member of Al-Badar or member of group of individuals at Mirpur section 12, during the period of War of Liberation in 1971, when on his order his accomplices dragged Pallab there from to Shah Ali *Majar* at section 1 and he was then dragged again to *Idgah* ground at section 12 where he was kept hanging with a tree and on 05 April 1971, on order of accused his notorious accomplice Aktar and others killed Pallab, a non-combatant civilian and thereby accused committed an offence of murder as crime against humanity as specified in section 3(2)(a) of the Act of 1973 or in the alternative he had 'complicity to commit such crime' as specified in section 3(2)(a)(h) of the said Act which are punishable under section 20(2) read with section 3(1) of the Act.

Witnesses

154. The charge alleges significant acts of accused Abdul Quader Molla including giving order by him to the main perpetrators, knowing their intent and consequence of his acts, which facilitated the murder of

Pallab. Thus the fact of bringing Pallab to the accused and that the accused ordered the main perpetrators to kill him are the facts in issue, relating to charge no.1, which need to be adjudicated. Prosecution adduced and examined P.W.2 and P.W.10 the residents of the crime locality Mirpur who have testified as to the commission of event of alleged killing and complicity of the accused therewith. Both the witnesses are hearsay witness so far their testimony relates to the event alleged.

155. Had there been any possibility to experience the event of alleged killing physically? Had the accused association with the main perpetrators of Pallab murder? What evidence the prosecution has been able to adduce to prove complicity of the accused with the commission of the incident of Pallab murder? Can the offence be characterized as an offence of murder as crimes against humanity?

156. All these questions may be well adjudicated mainly from the testimony of P.W.2 Shahidu Huq Mama. In addition to some significant relevant facts, this P.W.2 also deposed the fact of Pallab killing and complicity of the accused thereto. His statement before the Tribunal on principal fact in issue is 'hearsay evidence'.

157. Since the technical rules of evidence is not applicable to the proceeding before the Tribunal and any evidence may be admitted and the Tribunal shall have to weigh its probative value in arriving at a decision on any fact in issue. On plain construal of the provision of section 19(1) of the Act of 1973 hearsay evidence is not inadmissible *per se* and the Tribunal, in exercise of its discretion, may act on such hearsay evidence, after weighing its probative value together with other circumstances and relevant facts.

Discussion of Evidence

158. **P.W.2 Shahidu Huq Mama** does not claim to have witnessed the accused giving order to kill Pallab nor did he witness the fact of bringing Pallab to the accused. He (P.W.2) has stated that Hakka Goonda's '*akhra'* was in 'Thathari Bazar' wherefrom Akter Goonda and his

accomplices apprehending Pallab brought him to Mirpur Muslim Bazar area and chopped his(Pallab) fingers and then hanging him with a tree caused inhuman torture and then they killed him on 05 April. Accused Abdul Quader Molla, Aktar goonda and other Biharis i.e Hasib Hashmi, Hakka goonda, Nehal masterminded the event of killing.

159. The above hearsay version has not been denied in cross-examination. Rather, in reply to question put to him by the defence P.W.2 has stated that he had heard the incident of forcible bringing of Pallab from '*Thathari Bazar*' and causing torture and death to him at Mirpur Muslim Bazar area from person whom he knew and mass people of Mirpur.

160. In describing some crucial relevant facts P.W. 2 Syed Shahidul Huq Mama, a valiant freedom fighter and a resident of Mirpur locality at the relevant time stated that Abdul Quader Molla, Biharis, Aktar goonda, Hakka goonda, Abbas chairman, Hasim hasbi, Nehal had participated the election campaign in favour of Ghulam Azam and they used to give anti Sheikh Mujib and anti-Bengali slogans such as " গালি গালি মে শোর হ্যায়, শেখ মুজিব পাকিস্তান কা দুশমন , গাদ্দার হ্যায়" ;কাহা তেরা বাংলাদেশ, দেখ এবার তামাশা দেখ , ধামাকা দেখ"। This pertinent fact evidently portrays the pre-25 March 1971 role of the accused and it remains unimpeached in cross-examination.

161. The above unshaken version indubitably establishes that accused Abdul Quader Molla, despite the fact that he was a Bengali civilian, was an active and close associate of local Aktar Goonda and Bihari hooligans. This key relevant fact provides further assurance as to complicity with the atrocious activities perpetrated by Aktar goonda and Bihari accomplices, particularly during the early part of the war of liberation.

162. In narrating a brief account of situation prevailing immediate before 25th March 1971 P.W.2 Syed Shahidul Huq Mama stated that he faced attack and protest by a group lead by Convention Muslim League leader S.A Khalek, Khasru, son of Governor Monaem Khan and the

attackers opened gun fire. Thereafter, accused Abdul Quader Molla who belonged to Jamat E Islami, Dr. T Ali, Aktar goonda Nehal, Hasib Hashmi, Abbas Chairman, Kana Hafej and others convened a meeting by bringing Khan Abdul Qayum Khan against six points movements and eleven points movement. This meeting was organized by Anjuman-e-Mahajerin being fueled by Jamat E Islami. In that meeting, Abdul Qayum Khan uttered that "*Sheikh Mujib is the traitor and enemy of Pakistan"*. Defence could not dislodge this version in cross-examination.

163. This unshaken relevant fact adds further assurance to the hostile role of accused and the fact of his close and culpable association with the gang of local Biharis including Aktar goonda Nehal, Hasib Hashmi, Abbas Chairman.

164. We have found too from testimony of P.W. 2 Shahidul Huq Mama that Mirpur locality was not isolated from the 'operation search light' that was carried out by the Pakistani troops on 25 March 1971. It remains undisputed. In the dreadful night, he (P.W.2) and Majahar Hossain Mantu took refuge at a 'club' of Bangalee community situated nearby the 'Shah Ali Shrine'. In the following morning i.e on 26 March at about 08:00 morning, coming out from the shelter, he found the houses of local Bangalee people on fire, the Bihari celebrating here and there on the street. On their way, Quader Molla and those (Aktar goonda, Nehal Hakka goonda, Abbas chairman, Hasib Hashmi) who participated the massacre started chasing them by shouting " Shahid (P.W.2) has come, Shahid Has come, apprehend him, apprehend him" **(শহীদ আগিয়া, শহিদ আগিয়া, পাকড়াও, পাকড়াও).**

165. The above fact remains unshaken in cross-examination. Rather P.W.2, on cross-examination, has re-affirmed it that on 26 March, in the morning, he coming out from the club room nearer to Shah Ali *Majar,* Miprur he saw the houses of Bangalees on fire and the Pakistani army, Bihari, jamat e Islami and accused Abdul Qauder Molla remained present at the time of such destructive massacre.

166. It is also found from the narration made by the P.W.2 that he was associated with the ‘six points movement’ and ‘eleven points movement’ and during the time immediate before 25 March 1971 when he (P.W.2) participated a procession in favour the movement near the ‘Beauty Cinema hall’ at Mirpur locality, they faced attack and protest by a group lead by Convention Muslim League leader S.A Khalek, Khasru, son of Governor Monaem Khan and the attackers opened gun fire. Thereafter, accused Abdul Quader Molla who belonged to Jamat e Islami, Dr. T Ali, Aktar goonda Nehal, Hasib Hashmi, Abbas Chairman, Kana Hafej and others convened a meeting by bringing Kahn Abdul Qayum Khan against six points movements and eleven points movement. This meeting was organized by Anjuman-e-Mahajerin being fueled by Jamat E Islami . In that meeting, Abdul Qayum Khan uttered that *“Sheikh Mujib is the traitor and enemy of Pakistan”*. On hearing this P.W2 instantly raided the meeting stage and snatched the microphone and consequently he and his accomplices were mercilessly beaten and were thrown to a nearby dustbin.

167. The above narration realistically demonstrates that the accused Abdul Quader Molla was a man of pro-Pakistan ideology and he used to maintain active association with the organization of Jamat E Islami and its politics and the notorious Bihari people of Mirpur locality too.

168. This fact gets potency form the further narration of P.W.2 that during 1970’s election accused Abdul Quader Molla , Aktar goonda and his other associates were actively involved with the campaigning in favour of Ghulam Azam , a candidate of Jamat E Islami and accused Abdul Quader Molla used to chant slogan that “ *gali gali me shor hai Sheikh Mujib Pakistan ka dushman hai”*.

169. Thus, it stands fairly established that the role of accused Abdul Quader Molla was absolutely against the movement of self determination of Bangalee nation which was in active movement demanding freedom

and emancipation under the leadership of Bangabandhu Sheikh Mujibur Rahman.

170. Additionally, it is already proved that the accused had close culpable association with local *Bihari* hooligan Aktar goonda who is admittedly the key perpetrator of the event of killing Pallab.

171. P.W.10 Syed Abdul Qayum principally testified the incident of killing of Khandoker Abu Taleb at 'Mirpur Zallad Khana'. He also incriminated Aktar goonda, local Biharis and accused Abdul Quader Molla with the incident of attacking him causing injuries. Version of P.W.2 relating to the event of killing Pallab appears to have been corroborated by P.W.10 Syed Abdul Qayum who was a teacher of a local school by profession and an inhabitant of Mirpur locality, at the relevant time.

172. P.W.10 Syed Abdul Qayum has also corroborated that he had heard that Abdul Quader Molla (accused) had killed Pallab a student of Bangla College. In cross-examination, the above hearsay version has been simply denied but the defence could not shake credibility of such hearsay evidence by cross-examining P.W.10.

173. Despite the fact that P.W.2 is a hearsay witness of the incident, he seems to be a quite natural witness; otherwise he could make exaggeration by saying that he witnessed the accused ordering his *bihari* accomplices to kill Pallab, while he testified before the Tribunal. But he did not do it. Rather he stated, in this regard, what he learnt about orchestration and masterminding of the incident of Pallab killing. It could not be dislodged by the defence. Rather, in his cross-examination P.W.2 stated that he learnt the incident of killing Pallab from the mass people and people whom he knew.

Evaluation of Evidence and Finding

174. Mr. Abdur Razzak the leaned senior Counsel for the defence has submitted that the charge no.1 is based on unattributable hearsay evidence. The event of Pallab killling is admitted. But in absence of any

other corroborative evidence merely on the basis of unattributable hearsay evidence the involvement of the accused cannot be concluded. In support of his contention he has cited a decision on the confirmation of charges in the case of the ***Prosecutor v. Germain Katanga and Mathieu Ngudjolo Chui*** [(ICCC: Pre-trial Chamber I: 30 September 2008): Page 225 of the Final Argument Pack submitted by the defence]. The learned defence counsel added that anonymous hearsay evidence does not carry probative value, by citing another decision in the case of the ***Prosecutor v. Kajelijeli*** [(ICTR Trial Chamber : case no. ICTR-98-44A-T 01 December 2003): Page 230 of the Final Argument Pack submitted by the defence].

175. In reply, the learned Prosecutor has argued that hearsay evidence is admissible under the Act of 1973 and its probative value is to be weighed in light of other facts and circumstances. Thus the hearsay evidence cannot be excluded straight way. The hearsay evidence of P.W.2 so far it relates to charge no.1 appears to have been corroborated by some unimpeached relevant facts and circumstances. Under section 19(1) of the Act of 1973 the tribunal may admit any evidence tendered before it, which it deems to have probative value. Weighing and determining the probative value of hearsay evidence lies with the discretion of the Tribunal [Rule 56(2) of the ROP].

176. Charge no.1 is based on hearsay evidence. With regard to hearsay evidence, it should be pointed out first that this is not *per se* inadmissible. The Tribunal has the discretion to cautiously consider this kind of evidence and, depending on the circumstances of each case together with relevant facts.

177. First, it appears that the decision on the confirmation of charges in the case of the ***Prosecutor v. Germain Katanga and Mathieu Ngudjolo Chui*** [(ICCC: Pre-trial Chamber I: 30 September 2008): Page 225 of the Final Argument Pack submitted by the defence] relates to admissibility of hearsay evidence and it was found that anonymous evidence can be used to corroborate other evidence. Anonymous hearsay does not affect the admissibility of the evidence but could affect its probative value. In the above case the matter of probative value of hearsay evidence was

questioned at pre-trial stage. According to the provisions contained in the Act of 1973 and ROP it is the Tribunal's discretion which is to weigh the probative value of hearsay evidence in light of 'other evidence' relating to relevant facts and circumstances.

178. Second, we have found from the decision of the ICTR Trial Chamber given in the case of the ***Prosecutor v. Kajelijeli*** [(ICTR Trial Chamber: case no. ICTR-98-44A-T 01 December 2003): Page 230 para, 45 of the Final Argument Pack submitted by the defence] as cited by the defence that

> "….decision as to the weight to be given to the testimony based on tests of 'relevance, probative value and reliability." Accordingly, the Chamber notes that evidence, which appears to be "second hand", is not, in and of itself, inadmissible, rather it is assessed, like all other evidence, on the basis of its **credibility** and its **relevance**."

179. That is to say hearsay evidence is to be assessed like all other evidence, on the basis of its 'credibility' and its 'relevance'. In the case in hand, hearsay evidence of P.W.2 is quite relevant to the material particular of facts relating to the event of killing and involvement of the accused therewith and as such not inadmissible. Such hearsay evidence is to be weighed now in light of 'other evidence' relating to relevant facts and circumstances.

180. From the unshaken version of P.W.2 as discussed above we have found three facts proved: **(i)** since prior to 25 March 1971 the accused's position was predominantly against the movement of Bengali nation for its self-determination **(ii)** thereby the accused had cleared his position in favour of Jamat E Islami ideology and **(iii)** the accused was a close and active associate with the gang of local Bihari consisting of Aktar goonda, Hakka goonda, Abbas Chairman, Hasib Hasmi, Nehal .

181. The unimpeached version of P.W.2 describing the role of accused on 26 March 1971 unequivocally and patently demonstrates that in furtherance of his prior association with the local Biharis namely Aktar goonda, Nehal, Hakka goonda, Abbas Chairman, Hasib Hashmi accused

Abdul Quader Molla even at the early part of the war of liberation being accompanied by these notorious people visibly started playing antagonistic role in the area of Mirpur.

182. Pallab was murdered during the war of liberation and on the date, place and in the manner as alleged remains unshaken, as revealed from evidence of P.W.2 Syed Shahidul Huq Mama. Besides, D.W.4 Sahera , wife of Pallab's brother is one of listed prosecution witnesses. But finally she has deposed as a defence witness. She has also admitted the event of Pallab murder at the place and in the manner by the local hooligans i.e Aktar goonda and his accomplices. However D.W.4 remained silent as to complicity of the accused with the commission of the offence of murder. Presumably, defence has been able to bring her to depose in favour of the accused simply for disproving the complicity of the accused with the commission of the defence alleged. Thus, the commission of offence of murder as listed in charge no.1 remains undisputed. Now, we are to see how far the prosecution has been able to prove complicity of accused with it.

183. Why Most. Sahera (D.W.4) one of listed prosecution witnesses preferred to testify as a defence witness, instead of coming to testify as a prosecution witness? This is a very crucial question to be resolved, in light of circumstances revealed. Because, fundamentally she was a listed prosecution witness. It is true that prosecution is burdened to prove the charge by adducing evidence and not by taking advantage of flaws found in defence. Despite this legal position, in order to find out the truth let us have a look to what has been deposed by D.W.4 Most Sahera.

184. D.W.4 Most Sahera is also a hearsay witness as to the fact of alleged killing of Pallab. Re-affirming the fact that Palllab was forcibly brought from Nawabpur and then Aktar goonda and his Bihari accomplices had killed him during the war of liberation in 1971 at a place known as '*Idgah* field of Muslim Bazar' she stated in cross-examination that son of accused Abdul Quader Molla 3-4 days back, meeting her asked to depose 'in favour of his father' (accused) and thus she came to depose as brought by him (son of Abdul Quader Molla). This version does not indicate that D.W.4 has preferred to testify as a

defence witness to tell the ‘truth’. Rather it is legitimately inferred that purpose of deposing in court was to ‘favour the accused’.

185. Deposing before the Tribunal as asked and brought by the son of accused Abdul Quader Molla ‘in favour’ of the accused was simply a mechanism to ‘disprove’ prosecution case and not to disclose the truth. But it is to be reiterated that the defence is not burdened to disprove prosecution case. Therefore, she seems to have been a ‘managed’ witness.

186. D.W.4 has claimed in cross-examination that she never heard the name of Abdul Quader Molla. She reiterated by saying *‘till today I have not ever heard the name of Quader Molla in my life’*. If it is taken to be true, she (D.W.4) is not competent to know whether the accused had any complicity to the commission of the event of Pallab killing. Next, this version cannot be relied upon as not only at the relevant time but since prior to the operation search light on 25 March 1971 accused Abdul Quader Molla was known to mass people of the locality for the reason of his anti-liberation movement activities and culpable association with the local antagonistic Biharis including pro-Pakistan organization Jamat E Islami (JEI) and its student wing Islami Chatra Sangha (ICS). Thus, the claim of not having heard the name of accused Abdul Quader Molla even for once in life is not at all believable and as a result this version turns into a lie.

187. D.W.4 denied to have made statement to the Investigation officer, although she has admitted the fact that she knew Nasir uddin of Mirpur ‘Jallad Khana’ pump house and about one year before she visited it and had talked with Nasir. Why she (D.W.4) visited ‘Jallad Khana’ and had talked with Nasiruddin? No explanation has been offered by her.

188. It appears that the Investigation officer(P.W.12) has re-affirmed in his cross-examination , in reply to question put to him, that he recorded statement of Sahera, wife of Tuntuni’s brother at Mirpur Jallad Khana’ and before recording her statement he asked Nasiruddin, in-charge of ‘Mirpur Jallad Kahan Smriti Biddyapith’ to send her (Sahera:

D.W.4) message for coming there. Thus, it is quite evident that D.W.4 Sahera made statement to the IO at Miprur Jallad Khana which now she is denying with ulterior motive of suppressing the truth.

189. It may thus be legitimately concluded that since she has deposed favouring the accused with a view to suppress the truth and that is why she has denied even the matter of making statement to the IO. Undoubtedly D.W.4 has suppressed the truth so far it relates to complicity of accused with the offence alleged. Therefore, her testimony, in other words, lends further assurance to the probative value of hearsay evidence of P.W.2.

190. Now the question is whether the hearsay evidence of P.W.2 carries reasonable probative value to connect the accused with the incident. Weighing probative value of hearsay evidence depends upon relevant facts and circumstances, as has already been observed. Since the technical rule of evidence shall not be applicable to the trial before this Tribunal, the hearsay evidence of P.W.2 in respect of complicity of the accused, an active associate of Aktar goonda, with the killing of Pallab inspires reasonable credence, under the circumstances as discussed above, and as such hearsay evidence as to complicity of the accused with the commission of the crime, of course, carries significant probative value.

191. The horrendous situation existing at that time was not encouraging for any Bengali civilian to witness the incident of killing including the fact of forcible bringing of Pallab to accused Abdul Quader Molla and giving order to kill him. We have found from evidence of P.W.2 that at the relevant time 90% of the residents of Mirpur was Biharis. Thus the small segment of Bangalee population of Mirpur was naturally in a grave frightened condition for the cause of sudden systematic atrocities committed by the local bihari hooligans in collaboration with anti-liberation Bengali people belonging to ideology of Jamat E Islami and its student wing Islami Chatra Sangha (ICS) and Pakistani army, particularly during the early part of war of liberation.

192. The fact of learning the complicity of the accused with the commission of Pallab murder from mass people, as testified by P.W.2, thus cannot be brushed aside, merely in absence of any eye witness, particularly when the attempt made by the defence to bring and examine a listed prosecution witness (D.W.4) appears to have been a futile one to exclude complicity of accused, for the reasons discussed above.

193. The reality is that long 41 years after the incident took place live witness may not be available and also the incident might not have been witnessed by any person for valid reason of frightened situation existing at that time, as has been already observed and this is the intent of provision of non applicability of the technical rules of evidence that excludes the hearsay evidence and provision of adopting non-technical procedure by the Tribunal and also admitting any evidence which deems to have probative value.

194. P.W.2 was, undeniably, an inhabitant of Mirpur locality. In 1971 the locality was not so densely populated. Thus and for the reason of own active involvement with pro-liberation movement P.W.2 had fair opportunity to know the accused Abdul Quader Molla and experience his pro-Pakistan political activities we are convinced to believe that P.W.2 knew the accused and he was quite familiar with the anti-liberation activities of the accused in Mirpur locality.

195. Therefore, the narration of P.W2 fairly demonstrates the status, position and antagonistic role of accused Abdul Quader Molla in 1971 war of liberation. In this regard, we have already found too that accused Abdul Quader Molla was a close associate and used to accompany the gang of local notorious Biharis who actually perpetrated the atrocious activities that took place in Mirpur locality particularly at the early part of the war of liberation in furtherance of ‘operation search light’ on 25 march 1971.

196. It is to be noted that instead of focusing on the substantial contribution of an accused's criminal conduct to the perpetration of a crime, focus should also be put on the accused's culpable association

with the perpetrators, as a manifestation of willingness to be associated with a crime and his support to the principal perpetrator of the crime. This notion needs to be inferred from relevant facts and circumstances that may offer fair assurance to the credibility of hearsay evidence.

197. It has been established beyond any doubt that accused Abdul Quader Molla had vigorous and culpable association with the local Bihari and anti-liberation political organization Jamat E Islami. The conduct of the accused that has been revealed from discussion and evaluation of evidence of P.W.2 and P.W.10 was extremely antagonistic to the independence loving local Bangalee population. It is also proved as well that the atrocities that took place in Mirpur area instantly after 25 March 1971 was part of the 'operation search light', generated to execute plan and policy of the Pakistani ruler and occupation army targeting the unarmed Bangalee civilians.

198. The defence could not dislodge the facts relevant to conduct and culpable association of the accused with the Bihari perpetrators. Rather, it appears that on cross-examination, P.W.2 has re-affirmed the fact that on 26 March morning 1971, Pakistani army, Bihari, Jamat-e-Islami and accused Abdul Quader Molla were present at the time of committing mass destruction in Mirpur locality.

199. In reality, it was not likely for any Bangalee resident of Mirpur locality, excepting a very few to witness atrocious acts including killing, destruction, rape. Therefore, naturally, P.W.2 also could not have opportunity to witness the incidents of killings, although, for inevitable and legitimate reason he had occasion to learn about the incident and complicity of the accused therewith. On this score and since the defence had adequate opportunity to cross-examine the P.W.2 , the hearsay evidence as to link and culpable association of the accused Abdul Quader Molla with the incident of Pallab Killing carries sufficient probative value, in the backdrop of above relevant circumstances and facts as discussed above.

200. It is argued by the defence that the event of killing of Pallab was an isolated crime; even it is admitted to have taken place at the relevant time. This argument does not fit to the context prevailing at the relevant time. Besides, even a single murder or killing constitutes an offence of crime against humanity if it is found to have been perpetrated as a part of attack targeting unarmed 'civilian population'. It is now settled jurisprudence that even a single or limited number of acts on the accused's part would qualify as a crime against humanity, unless those acts may be said to be isolated or random, provided all other conditions being met.

201. The appeal Chamber of ICTR has observed in the case of ***Nahimana, Barayagwiza and Ngeze***, [November 28, 2007, para. 924] that –

> ***"A crime need not be carried out against a multiplicity of victims in order to constitute a crime against humanity. Thus an act directed against a limited number of victims, or even against a single victim, can constitute a crime against humanity, provided it forms part of a 'widespread' or 'systematic' attack against a civilian population."***

202. Next, section 3(2)(a) of the Act of 1973 describes that the attack must be committed 'against any civilian population'. This requirement is consistent to the jurisprudence that the acts must be 'directed against' the population i.e. it must be 'the primary object of the attack'.

203. The context of war of liberation in 1971 and pattern of launching attack causing murder of Pallab for which the accused has been charged (**Charge No.01)** with by itself suggests that the murder was not an isolated crime.

204. The learned defence counsel, by drawing attention to the CD (Material Exhibit-I series) argued that P.W.2 Syed Shahidul Huq Mama in an interview with the BTV, in narrating the atrocious events committed in Mirpur in 1971 has not made any account involving the

present accused Abdul Quader Molla with any of events for which he has been charged with. Thus, his testimony made in Tribunal is not credible and it suffers from contradiction.

205. It appears that P.W.2 Syed Shahidul Huq Mama admitted, on cross-examination, that he on 20 April 2012 made an interview in a program titled 'Ekattore Ranangoner Din guli' in Bangladesh Television (BTV) wherein he described the events committed in the locality of Mirpur-Mohammadpur during the war of liberation in 1971 and he attempted to portray the correct account. But the journalists are in practice to exclude part of his narration, even add new words to it for which he is not responsible.

206. First, earlier statement or any account made to any non judicial forum is not evidence and it may simply be used to see inconsistencies or omissions with the evidence made in court. The explanation offered by P.W.2 is reasonable and thus if such prior interview is found to have not contained any narration hinting involvement of the accused with any of atrocities alleged committed in Miprur his sworn testimony made in Tribunal is not liable to be brushed aside, provided if his evidence in its entirety inspires sufficient weight in light of attending circumstances. Second, P.W.2 does not claim to have witnessed the accused in committing the event of killing Pallab. If really he had any motive he could testify falsely by claiming that he saw the accused committing the crime alleged. But he did not do it. This demeanor is appositely relevant in assessing his sworn testimony made in Tribunal.

207. Therefore, the Tribunal, in particular taking into account the demeanor of the P.W.2 and the explanation offered for the difference, if any, notes that his oral evidence made before us is not rendered to be contrived in nature and any of his prior account made in TV interview, for the reason agitated by the defence, cannot be the lone index in rejecting the evidence of P.W.2, whether in whole or in part.

208. Defence failed to refute the incident of murder of Pallab on the date time and in the manner as have been alleged. It is the fact of

common knowledge that such pattern and systemized atrocities were committed through out the period of nine months in the land of Bangladesh and as such merely considering the number of victim of crime or the fact that an event related to single murder it is not correct to infer that the event of murder of Pallab was an isolated crime. The context in its entirety itself legitimately establishes that murder of Pallab was the outcome of a part of 'systematic attack' directed against member of 'civilian population'.

209. From the unimpeached version of P.W.2 we have found that accused Abdul Quader Molla was culpably associated with Aktar Goonda and local *Bihari* extremists who during the early part of war of liberation committed serious crimes targeting the Bangalee and pro-liberation people residing around the Mirpur locality. It is to be noted that ccircumstantial evidence is evidence of circumstances surrounding an event or an offence from which a fact at issue may be reasonably inferred. Circumstantial evidence may be necessary in order to establish an alleged fact.

210. Proof of all forms of criminal responsibility can be given by direct or circumstantial evidence. Although it is proved that the local Bihari extremists and Aktar Goonda were the main offenders, yet it is proved beyond reasonable doubt that accused Abdul Quader Molla, for the reason of his continuing culpable association with the principals, had 'complicity' to the criminal acts constituting the offence of Pallab killing as he 'consciously' used to maintain such culpable association with the perpetrators in materializing the design of Pakistani occupation forces and Jamat E Islami the potential pro-Pakistan political organisation to extinguish the unarmed Bangalee and pro-liberation people and Awami league the political party which had leading role in encouraging the Bangalee nation for its self determination and independence.

211. The accused himself need not have participated in all aspects of the alleged criminal conduct. [***Stakic,*** (Trial Chamber), July 31, 2003, para. 439]. The *actus reus* of aiding and abetting a crime may occur before, during, or after the principal crime has been perpetrated [***Blaskic,***

(Appeals Chamber), July 29, 2004, para. 48]. Accordingly, participation may occur before, during or after the act is committed.

212. We have got in the case on hand that the accused Abdul Quader Molla is not alleged to have committed any of crimes individually. It is proved that the accused used to maintain 'culpable association' with the local group of Bihari goons who were extremely antagonistic to pro-liberation civilians of Mirpur even just before commission of the crime alleged. His prior conduct and 'culpable association' is sufficient to connect him with the actual accomplishment of the attack constituting the offence of murder of Pallab as crimes against humanity perpetrated by his accomplices, the local Bihari goons. Committing a crime enumerated in the Act of 1973 may be done individually or jointly with others. Committing such crime may also be said to have been participated by the accused if he is found to have provided moral support or encouragement by his act or acts to the principals, even if he was not present at the crime scene. In light of this established facts and conduct of the accused, the above principles enunciated in the case of ICTY, as regards participation and conduct of accused forming attack provides support in holding the accused Abdul Quader Molla responsible particularly for the crimes alleged as listed in charge no. 1.

213. On cumulative evaluation of testimony and relevant facts and circumstances we have found that accused Abdul Qauder Molla and his Bihari accomplices masterminded and executed the killing of Pallab, a civilian, as a part of attack.

214. It is thus validly inferred that the accused having 'awareness' as to the consequences of acts and conduct of those Bihari perpetrators continued his association with them. It was not necessary that the accused must remain present at the crime site when the murder of Pallab was actually committed. In this regard the Tribunal also notes that *"actual physical presence when the crime is committed is not necessary . . . an accused can be considered to have participated in the commission of a crime . . . if he is found to be 'concerned with the killing."* **[*Tadic*,** (Trial Chamber), May 7, 1997, para. 691]

215. The accused Abdul Quader Molla is thus found to have had ‘complicity’ to the actual commission of killing Pallab in the manner by bringing him forcibly from Nawabpur. The reason of targeting Pallab was that he was in favour of pro-liberation activities and as such it may be unambiguously presumed that killing him was in furtherance of systematic attack directed against civilian population. As a result, the accused incurs criminal liability for having his ‘complicity’ to the commission of the murder of Pallab constituting the offence of crime against humanity as specified in section 3(2)(a)(h) of the Act of 1973 which is punishable under section 20(2) of the Act.

Adjudication of Charge No.02

[Meherunnesa and her Family Inmates Killing]

216. Summary Charge No.02: During the period of War of Liberation, on 27 March 1971, at any time, accused Abdul Quader Molla , one of leaders of Islami Chatra Sangha as well as a prominent member of Al-Badar or member of group of individuals, being accompanied by his accomplices, with common intention, brutally murdered the pro-liberation poet Meherun Nesa , her mother and two brothers when they had been in their house located at section 6, Mirpur, Dhaka. And thereby the accused had actively participated and substantially facilitated and contributed to the attack for accomplishment of the offence of murder as crimes against humanity as specified in section 3(2)(a) of the Act of 1973 or in the alternative he had 'complicity to commit such crime' as specified in section 3(2)(a)(h) of the said Act which are punishable under section 20(2) read with section 3(1) of the Act.

Witnesses

217. Prosecution relies upon hearsay evidence in proving the charge nos. 2 relating to the event of horrendous killing of Meherun Nessa and her inmates. It is found that P.W.2, P.W.4 and P.W.10 have merely testified in Tribunal that they had learnt that accused Abdul Quader Molla and his Bihari accomplices Aktar goonda and others committed the offence of those murders. They do not claim to have witnessed the alleged horrific events. Now let us see what they have testified.

Discussion of Evidence

218. P.W.2 Syed Shahidul Huq Mama has stated that on 27 March Quader Molla(accused), Hasib Hashmi, Abbas Chairman, Aktar goonda, Hakka goonda, Nehal and their accomplices slaughtered poetess Meherunnesa, her brothers and mother. In cross-examination it has been simply denied. P.W.2 however, reaffirmed in cross-examination that he learnt about the killing of poetess Mehereunnesa and her brothers and mother from mass people. Defence could not dislodge it.

219. P.W. 4 Kazi Rosy, another hearsay witness on the charge of murdering Meherun Nesa, stated that on 27th March evening she became aware that Abdul Quader Molla and his accomplices slaughtered Meherunnesa and her two brothers and mother to death by entering inside Meher's house. In the next breath P.W.4 however, stated that the gang of perpetrators led by Abdul Quader Molla launched the attack but she could not say whether Abdul Quader Molla himself entered into the crime site i.e the house of Meher. Two days later she (P.W,4) learnt the incident from one Gulzar a non-Bengali and another Bihari who are not in this country now.

220. The above version has not been specifically denied in cross-examination. Rather, in reply to question put by the defence P.W.4 stated that she learnt the incident when she was in her auntie's house at Kalabagan from a person coming from Mirpur. It was natural in the frightened circumstances prevailing at the relevant time.

221. From the above hearsay evidence we have got one thing that the gang of perpetrators led by the accused Abdul Quader Molla had launched attack to the house of poetess Meherunnesa. This part of version of P.W.4 could not be impeached by the defence. Thus, if the next part of the version that the accused himself did not enter into the crime house is taken to be true, it reveals that the accused had not physically participated to the actual commission of the event of horrific murders although he accompanied the gang to the crime site as stated by P.W.4.

222. Why poetess Meherunnesa and her family were targeted? We have found from evidence of P.W.4 that they organized an 'action committee' to which poetess Meherunnesa was a member to resist the disgraces caused to Bengalis of Mirpur area. In the morning of 25 March they hold a meeting and after returning home she got information that an attack would have been launched to her and Meherunnesa's house. She informed it to Meher and advised to leave home. But Meher remained at her home and she (P.W.4) left Mirpur.

223. This fact remains totally unimpeached in cross-examination. Thus, it is quite clear that for the reason that Meherunnnesa was a civilian of progressive and pro-liberation ideology who was active to resist disgrace and disparity shown to the Bengali residents of Mirpur the gang led by Abdul Quader Molla instantly after the 'operation search light' on 25 march 1971 had launched horrific attack to her and her family. Who were the accomplices of accused Abdul Quader Molla at the relevant time?

224.]From evidence of P.W.2 we have found that on 27 March 1971 Quader Molla(accused), Hasib Hashmi, Abbas chairman, Aktar goonda, Hakka goonda, Nehal slaughtered Meherunnesa and her brothers and mother at their house. From the further narration of P.W.2 it is established that during 1970's election accused Abdul Quader Molla , Aktar goonda and other associates were actively involved with campaigning in favour of Ghulam Azam , a candidate of Jamat e Islami and accused Quader Molla used to chanting slogan that " *gali gali me shor hai Sheikh Mujib Pakistan ka dushman hai"*

225. Therefore, we arrive at an unerring conclusion that local Bihari Aktar goonda, Nehal goonda, Hakka Goonda and Bihari hooligans were 'full time accomplices' of the accused Abdul Quader Molla.

226. In cross-examination, P.W.4 denied the defence suggestion put to her by the defence that not the accused Abdul Quader Molla but one Qauder Molla who was a butcher by profession had committed the atrocities in 1971. From this suggestion it is proved that a person named

Quader Molla was a perpetrator of the crime alleged. But the defence has failed to establish this particular defence case that perpetrator 'Quader Molla' was another person, not the present accused. It therefore lends reasonable assurance to the hearsay evidence of P.W.4 and P.W.2 in proving complicity of the accused Abdul Quader Molla in the commission of the crimes alleged.

227. P.W.10 Syed Abdul Qayum a resident of Mirpur locality has stated that he learnt that the non-Bengalis had killed Meherunnesa and her family at her house at section no.6, Mirpur. P.W.10 has simply corroborated the fact of the commission of the event of killing at the house of Meherunnesa.

Evaluation of Evidence and Finding

228. On factual aspect including the matter of probative value of hearsay evidence, Mr. Abdur Razzak, the learned senior defence counsel reiterated his argument which he has pressed relating to the charge no.1.

229. Mr. Abdur Razzak, the learned senior defence counsel went on to submit further that Islami Chatra Sangha (ICS) and Al-Badar were not 'auxiliary forces' as defined in section 2(a) of the Act of 1973 and as such it cannot be said that, even if he really belonged to either of these organizations, he was a member of 'auxiliary force'. During 1971, only the Razakar force was placed under control and command of armed forces pursuant to gazette notification dated 07 September 1971. But the prosecution does not claim that the accused, at the relevant time, was a member of Razakars. The accused however can be brought to jurisdiction of the Tribunal as an 'individual'**.** The learned counsel went on to submit that the offence alleged cannot be characterized as the offence of crimes against humanity as it lacks necessary elements, although the event of killing as listed in charge no.2 is not disputed. The threshold of argument placed by the learned defence counsel is that the involvement of the accused with the commission of alleged event of killing could not be proved by evidence.

230. Mr. Abdus Sobhan Tarafder, the learned defence counsel has submitted that P.W.2, P.W.4 and P.W.10 are the hearsay witnesses who have testified in support of this charge. But prosecution has been failed to establish complicity of the accused with the offence as listed in charge no.2. In fact, due to previous hostilities between Biharis and Bangalee residents of the locality the Biharis committed the crime of killing of Meherunnesa. P.W.4 Kazi Rosy in a book **(Exhibit-B-Page-25-26)** written by her titled 'Shahid Kabi Meherunnesa' published in June 2011, in narrating the event, she has not incriminated the accused with the alleged killing. P.W.4 even in her earlier statement made to IO has not stated anything incriminating the accused.

231. It is further argued by the learned defence counsel that the hearsay version as to complicity of the accused does not carry value. Besides, P.W.10 another hearsay witness has stated that he learnt that non-Bangalees of the Mirpur locality killed Meherunnesa. Therefore, there has been no credible evidence to connect the accused with the perpetration of the crime alleged in charge no. 2.

232. Conversely, the learned prosecutor has submitted that P.W.2 and P.W.4 are quite reliable witnesses and their hearsay evidence coupled with other proved relevant facts and circumstances carries reasonable probative value. Even an 'individual', apart from member of 'auxiliary force' , may be brought to justice under the Act of 1973 and he can be held guilty even if he is found to have committed offence specified in section 3(2) of the Act of 1973. Context of war of liberation in 1971, extent of atrocities committed in furtherance of 'operation search light' and the pattern of criminal acts forming attack directed against civilians constituting the offence of murder itself proves that the offence was not isolated crime but those were committed in violation of customary international law.

233. The Tribunal notes that hearsay evidence, under the International Crimes (Tribunals) Act 1973 is admissible and we do have jurisdiction to act on it if it is found to have reasonable probative value. It is found from evidence that immediately after the 'operation search light' on 25

March, 1971 the perpetrators had launched horrific attack on 27 Match 1971 to Meherunnesa and her family inmates and it is not disputed that they were brutally slaughtered at their own house.

234. The defence has not been able to offer even a hint, by cross-examining the prosecution witnesses, that the murder was not a part of planned or systematic attack and it was an isolated crime. Therefore, the context, facts and circumstances revealed inevitably have proved the elements to constitute the alleged offence of murder as crime against humanity.

235. From the hearsay evidence of P.W.2 Syed Shahidul Huq Mama it has been proved that on 27 March accused Abdul Quader Molla, Hasib Hashmi, Abbas Chairman, Aktar Goonda, Hakka Goonda, Nehal and their accomplices slaughtered poetess Meherunnesa, her brothers and mother. In cross-examination it has been simply denied but could not be shaken. P.W.2 had learnt the event of horrific killing of Meherunnesa and her family inmates from mass people. Defence could not dislodge it. Besides, in view of frightened situation prevailing at that time it was not natural and probable for particular Bengali resident of the locality to witness such atrocious event of killing. Rather learning the incident from mass people was natural and probable. Thus, hearsay evidence of P.W.2, if viewed together with the facts relevant to the role and continuous culpable association of the accused with the local Bihari perpetrators, inspires reasonable degree of credence.

236. Next, hearsay evidence of P.W.4 goes to show that she had sensed that an attack would have been directed to her and Meherunnesa for the reason that they were actively involved with the ‘action committee’ organized to resist the disgrace caused to Bengali residents of Mirpur locality by the Biharis. This fact remains unshaken. Next, it has been already proved that local Bihari Aktar Goonda, Nehal goonda, Hakka goonda and Bihari hooligans were accomplices of the accused Abdul Quader Molla who led the gang to the crime site. We have also found from evidence of P.W.4 that accused himself did not enter into the house of Meherunnesa.

237. We are convinced to pen our unambiguous view that leading the gang to the crime site is a significant act to establish culpable link of accused to the actual commission of the crime. In the case in hand we have found that accused Abdul Quader Molla led the gang of perpetrators to the house of the unarmed civilian victims, although the evidence does not show that the accused himself had directly participated to the actual commission of the crime alleged. As a result hearsay evidence of P.W.4 together with the relevant facts as to close culpable association of accused with the gang of Bihari perpetrators inevitably goes to adequately indicate his conduct as a link to the perpetration of the brutal killing.

238. Murder as a crime against humanity under section 3(2) of the Act does not require the Prosecution to establish that the accused personally committed the killing. Personal commission is only one of the modes of responsibilities identified under section 4(1) of the Act. The accused shall be considered to have incurred criminal responsibility for the commission of murder as crime against humanity if it is established that his act in any way proves his complicity to the commission of such crime.

239. It is the 'attack', not the acts of the accused, which must be directed against the target population, and the accused need only know that his acts are part thereof. The context prevailing at the relevant time (27 March 1971) together with the pattern and extent of attack signifies that intent of launching attack was to cause wrongs and criminal acts directing Meherunnesa and her family inmates, the unarmed civilians.

240. The learned defence counsel has argued that P.W.4 is not a credible witness as her testimony made before the Tribunal is contradictory to the account she made in the book (Exhibit-B) titled " Shahid Kabi Meherunnesa' written by her.

241. P.W.4 Kazi Rosy admitted that she did not mention anybody's name in her book titled 'Shahid Kabi Meherunnesa' as there had been no

judicial mechanism of prosecuting the perpetrators. She further explained that for the reason of fear she could not name any perpetrator responsible for the killing of Meherunnesa and her family. Since a judicial forum has been set up she is now testifying implicating accused Abdul Quader Molla.

242. First, the oral evidence of a witness may not be identical to the account given in a prior statement. A witness may be asked different questions at trial than he/she was asked in prior interviews and that he/she may remember additional details when specifically asked in court. Second, presumably a predictable fear might have prevented P.W.4 in mentioning name of perpetrators in her book. Undeniably, for the reason of lack of a favourable situation and well-built consensus the issue of prosecuting and trying the perpetrators of dreadful crimes committed during the war of liberation in 1971 remained halted for several decades. Third, in the intervening time the pro-Pakistan political organisation has been able to revitalize its position in the independent Bangladesh, without any substantial impediment.

243. For the rationales as stated above, a pro-liberation individual like P.W.4 usually is not likely to come forward with all details in narrating the account in the book written by her prior to making testimony before the Tribunal, for the reason of apprehended fear and risk. Explanation offered for the differences by the P.W.4 seems to be attuned to circumstances prevailing till setting up of a judicial mechanism under the Act of 1973. On contrary, defence could not suggest or establish any motive whatsoever for testifying such version which differs from her earlier account. Therefore, mere lack of specificity of perpetrator(s) or any omission in the book written by her earlier does not turn down her sworn testimony made before the Tribunal branding it to be a glaring contradiction, provided if it inspires credence in light of other relevant facts and circumstance.

244. The act of leading the gang of actual perpetrators is indeed an act forming part of the attack that substantially contributed and provided ‘moral support’ and ‘encouragement’ to the actual commission of the

crime. Merely for the reason that the accused had no physical participation to the perpetration he cannot be relieved from liability as his act of leading the gang of course provided substantial moral support and encouragement to the principals.

245. Complicity encompasses ‘culpable association’ with the principals, and providing ‘moral support’, ‘encouragement’ to them. An accused can be considered to have participated in the commission of a crime if he is found to be ‘concerned with the killing’. By the act of leading the gang of perpetrators the accused is thus found to have provided moral support and encouragement to the principals to the actual commission of the crime. It is to be noted that a single or relatively limited number of acts on part of the accused would qualify as a crime against humanity, unless those acts may be said to be isolated. Leading the gang of perpetrators to the crime site was of course not an isolated act.

246. It has been observed by the Appeal Chamber (ICTY) in the case of ***Deronjic,*** [July 20, 2005, para. 109] that

> “All other conditions being met, a single or limited number of acts on the accused’s part would qualify as a crime against humanity, unless those acts may be said to be isolated or random.”

247. Also in the case of ***Kupreskic,*** the Trial Chamber of ICTY [January 14, 2000, para. 550] has observed that

> “In certain circumstances, a single act has comprised a crime against humanity when it occurred within the necessary context.”

248. Therefore, it is now settled that even a single act on part of accused constitutes part of attack for committing the offence of murder as ‘crime against humanity’. But the acts or conducts of accused must have been shown to have ‘link’ with the commission of the crime. ‘Leading the gang of perpetrators’ to the crime site is such a conduct that

establishes a sufficient 'link' of the accused Abdul Quader Molla with the actual commission of the offence alleged.

249. Merely for the reason of absence of direct evidence the hearsay evidence, as discussed above, as to the complicity and conduct of the accused Abdul Quader Molla to the accomplishment of actual commission of the offence alleged cannot be brushed aside, particularly when it gets strength from some proved pertinent relevant facts and circumstances as to his patent culpable association with the gang of principal perpetrators.

250. The intent or mental element of complicity implies in general that, at the moment he acted, the accomplice knew of the assistance he was providing in the commission of the principal offence. In other words, the accomplice must have acted knowingly. Leading the gang of perpetrators in launching an attack directed against Meherunnesa and her family inmates who were unarmed civilians itself indicates that the accused acted so knowingly and he was aware of the consequence of his act. Attack directed to Mehernnusa and her family inmates on 27 March 1971, in view of context of the war of liberation in 1971 and circumstances prevailing particularly in Dhaka, in furtherance of 'operation search light' on 25 March, 1971, was of course launched with knowledge and with criminal intent.

251. It may be lawfully inferred that the accused knew or had reason to know that the principals were acting with intent to commit the offence of murder. The circumstances and facts insist to believe that the accused, as he led the gang of perpetrators, knew the intent of the principals. Thus, it has been proved that the accused Abdul Quader Molla had, with knowledge and *mens rea*, conscious complicity to the commission of the offence murder as crimes against humanity as listed in charge no.2 and thereby he incurs criminal liability for 'complicity' in commission of the murder of Meherunnesa and her inmates constituting the offence of crimes against humanity as specified in section 3(2)(a)(h) of the Act of 1973 which are punishable under section 20(2) read with section 3(1) of the said Act.

Adjudication of Charge No. 03
[Khandaker Abu Taleb Killing]

252. Summary Charge No.03: During the period of War of Liberation, on 29.3.1971 in between 04:00 to 04:30 evening, victim Khandoker Abu Taleb while returning from his house located at section-10, Block-B, Road-2, Plot-13, Mirpur, Dhaka to Arambag the accused Abdul Quader Molla one of leaders of Islami Chatra Sangha and as well as prominent member of Al-Badar, being accompanied by other members of Al-Badars, Razakars, accomplices and non-Bengalese apprehended him from a place at Mirpur-10 Bus Stoppage, tied him up by a rope and brought him to the place known as 'Mirpur Jallad Khana Pump House' and slaughtered him to death and thereby the accused had participated, and substantially contributed to the execution of the attack upon the victim, an unarmed civilian, causing commission of his horrific murder as crime against humanity' as specified in section 3(2)(a) of the Act of 1973 or in the alternative had 'complicity to commit such crime' as specified in section 3(2)(a)(h) of the said Act which are punishable under section 20(2) read with section 3(1) of the Act.

Witnesses

253. Prosecution adduced and examined two witnesses in support of the charge no.2. Of them P.W.5 Khandoker Abul Ahsan(55) is the survived son of victim Khandoker Abu Taleb and P.W.10 Syed Abdul Qayum was a friend of the victim. They at the relevant time used to reside in Mirpur locality of Dhaka city. Both of them are hearsay witnesses as to the actual event of killing, as they had no opportunity to see the event. They have also testified facts relevant to the event of killing.

Discussion of Evidence

254. P.W.5 Khandoker Abul Ahsan is the survived son of Khandoker Abu Taleb. At the relevant time he was student of class IX of Mirpur Shah Ali Academy High School. His father was an eminent journalist and lawyer and had been residing in the house situated in plot 13 road no. 2 block-B sections 10 of Mirpur locality.

255. P.W.5 Khandoker Abul Ahsan stated that on 23 March 1971, while Syed Qayum (P.W.10), Head Master of Mirpur Bangla School had been staying at his house at Mirpur 10, block-C, at 02:30-03:00 am 3-4 persons entering inside the house by breaking door attacked said Qayum and started him scolding for hoisting the flag of 'Swadhin Bangla' at his school and then they stabbed him by repeated dagger blow causing bleeding injuries. Qayum attempted to flee there from but fell down on the street and then one Bangalee people somehow brought him to their (P.W.5) house wherefrom after giving him first aid, on the following morning, he was brought to Dhaka Medical College Hospital for having treatment and then his (P.W.5) father rushed to Bangabandhu and informed him of the incident. His father (victim) became mentally upset seeing the condition of Qayum and then on 24 March they came to the place of his '*phupu'* at Shantinagar' area leaving his father at Mirpur house. His father was, at the relevant time, a part time feature editor of the 'Daily Paigam' and also was associated with a law firm.

256. P.W.5 further stated that on 25 March, on getting information of demolishing the Ittefaque office his father (victim) rushed there for seeing condition of his colleagues but on arriving there he found some dead bodies there. On 29 March, his father(victim) was about to go to their Mirpur residence for bringing his car and money there from but on his way to Mirpur he had occasion to meet one non Bengali Abdul Halim, the chief accountant of the 'Daily Ittefaque' who in the name of taking him to Mirpur by his own car brought him(victim) to the accused Abdul Quader Molla and then his father was slaughtered by the accused to death by repeated dagger blows at Mirpur 10 'Jallad Khana' and at that time Aktar Goonda and some non Bangalee were with Abdul Quader Molla(accused) .

257. In cross-examination, P.W.5 stated that he cane to know from Advocate Khalil of BNR (Law Firm) that one non Bengali Abdul Halim, the chief accountant of the 'Daily Ittefaque' brought his father by his car and Abdul Halim handed his (P.W.5) father over to Abdul Quader Molla and his accomplices at Mirpur. He also re-affirmed, on

cross-examination, that he heard from their non-Bangalee driver Nizam that Abdul Halim handed his father over to Abdul Qauder Molla and his accomplices and his father was slaughtered at ‘Jallad Khana’. At the revenant time Abdul Qauder Molla was a resident of Duari para, Mirpur and most people knew it.

258. If we consider the narration made by P.W.5 in examination-in-chief and that he has re-affirmed on cross-examination together it is amply found that his hearsay testimony as to the fact of taking his farther the victim to Mirpur by Abdul Halim by his car and handing him over to Abdul Qauder Molla and his accomplices inspires credence. The sources of knowledge about the taking away of his father to Mirpur and handing him over to the accused and his accomplices were Advocate Khalil and their (P.W.5) non Bengali driver Nizam and both of them are not alive now.

259. P.W.5 stated that he himself did not witness the horrific incidents happened in 1971 and it was not possible for any Bangalee excepting a very few to witness it. This version reflects the horrifying reality and situation prevailing at the relevant time and as such availability of direct witness to prove the fact of actual commission of killing Khandaker Abu Taleb naturally may not be possible.

260. P.W.5 further stated that subsequently he came to know from Nizam, their (P.W.5) non-Bangalee driver that the people who embraced defeat in 1970 national election i.e. Aktar Goonda, Abdullah and some other Biharis, on order of Abdul Quader Molla, committed extensive killings in the locality of Muslim Bazar, Shialbari, Jallad Khana. This version remains totally unshaken and rather it appears to have been re-affirmed on cross-examination.

261. P.W.10 Syed Abdul Qayum a resident of Mirpur and friend of victim Khandoker Abu Taleb stated that Faruk Khan came to meet him in the month of June 1971 when he had been at his native village Nasirnagar after he had left Dhaka Medical College on 27 March 1971

wherein he was undergoing treatment for injuries he sustained resulting from the attack launched directing him in the night of 23 March 1971.

262. From Faruk Khan he (P.W.10) came to know that local Aktar Goonda, Biharis and Abdul Quader Molla had killed Taleb Saheb at Mirpur 10 'Jallad Khana'. He (P.W.10) returned home on 3 January 1972 after the independence and afterwards, he learnt from Nizam the non Bangalee driver of Abu Taleb(victim) that Abu Taleb was coming his home at Mirpur with non-Bengali accountant Halim but Halim handed him (Abu Taleb) over to the Biharis who slaughtered him at 'Jallad khana'. In cross-examination, defence simply denied this version instead of shaking its credibility.

Evaluation of Evidence and Finding

263. Slaughtering Kahndaker Abu Taleb to death at Mirpur 'Jallad Khana' is not disputed. From evidence of P.W.5 it has been proved that on 29 March 1971 victim was coming to his Mirpur home with non-Bengali accountant Abdul Halim by his (Halim) car. The fact of handing the victim over to accused Abdul Qauder Molla is denied by the defence. But the involvement of Aktar Goonda and local Bihari in slaughtering the victim to death remains also unshaken.

264. The Defence attacked the credibility of hearsay evidence of P.W.5 mainly on the ground of inconsistencies between his narration in court and that made to the investigation officer. The learned defence counsel has argued that P.W.12 the Investigation officer has stated in his cross-examination P.W.5 did not state to him that non Bengali Abdul Halim, the chief accountant of the 'Daily Ittefaque' brought his father by his car and Abdul Halim handed his (P.W.5) father over to Abdul Quader Molla and his accomplices at Mirpur.

265. The learned defence counsel has argued that both the P.W.5 and P.10 are hearsay witnesses who have been examined by the prosecution in support of charge no.3. P.W.5 claims to have heard from their non-Bangalee driver Nizam that non-Bangalee Abdul Halim handed his father over to the accused Abdul Quader Molla. But he did not state it earlier to the IO. Besides, the book **(Exhibit-B-Page 24, 2nd paragraph)**

speaks that said Abdul Halim handed the victim to non-Bangalees. Thus the defence does not dispute the fact of taking the victim by Abdul Halim by his car to Miprur and then he was slaughtered by Biharis. But the hearsay evidence of P.W.5 as to the fact of handing the victim over to accused is inconsistent with his earlier statement made to IO. Thus, the accused cannot be linked or said to have acted in any manner to the perpetration of killing Khandoker Abu Taleb.

266. The learned defence counsel went on to argue further that hearsay evidence of P.W.10 has stated that he learnt the event alleged first from one Faruk Khan during 1971 and then in January 1972 from Bihari Nizam , the driver of victim Khandoker Abu Taleb. Faruk Khan told P.W.10 that Biharis, Aktar goonda and Abdul Quader Molla slaughtered Khandoker Abu Taleb to death at Muslim Bazar. But Driver Nizam disclosed to P.W.10 that Bihari Aktar goonda and other Bihari people killed Khandoker Abu Taleb which is consistent with the narration made in the book Exhibit-B. Which one is true? Inconsistent hearsay evidence thus cannot be relied upon for finding the accused guilty.

267. The Tribunal notes that P.W.12 the IO has stated that P.W.5 stated to him that he learnt from Khalil that Halim brought his (P.W.5) father (victim) to Mirpur by his (Halim) car. Therefore, this cannot be a contradiction or subsequent embellishment, particularly when the P.W.5, in reply to question elicited to him by the defence stated that he came to know from Advocate Khalil of BNR (Law Firm) that one non Bengali Abdul Halim, the chief accountant of the ‘Daily Ittefaque’ brought his father by his car and Abdul Halim handed his (P.W.5) father over to Abdul Quader Molla and his accomplices at Mirpur.

268. It would be only an omission presumably due to his not being questioned on the point [Abdul Halim handed his (P.W.5) father over to Abdul Quader Molla and his accomplices at Mirpur] by the IO, during investigation. Therefore, that cannot be of any benefit to the defence to suggest that the witness is now making intelligent improvements.

269. In all criminal cases, normal discrepancies are bound to occur in the depositions of witnesses due to normal errors of observation, namely, errors of memory due to lapse of time or due to mental disposition such as shock and horror at the time of occurrence. Thus, exaggerations *per se* do not render the evidence brittle. However, minor contradictions, inconsistencies, embellishments or improvements on trivial matters which do not affect the core of the prosecution case, should not be made a ground on which the evidence can be rejected in its entirety.

270. The fact of coming the victim on the date at his Mirpur home with Abdul Halim by his car, handing him over to the Bihari perpetrators and then slaughtering him to death at Mirpur 'Jallad Khana' remain quite unshaken. The hearsay evidence of P.W.5 and P.W.10 seems to be credible and relevant and thus carries probative value.

271. Having appraisal of evidence of P.W.2, we have already found as to who the accomplices of accused Abdul Quader Molla were and his culpable association with them, particularly during the early part of war of liberation 1971. It is proved that the local Biharis namely Aktar Goonda, Nehal, Hakka goonda, Abbas Chairman, Hasib Hashmi were close accomplices of accused Abdul Qauder Molla in all antagonistic activities during pre-25 March time and also during the early part of war of liberation in perpetrating atrocities in Mirpur locality. The event of killing as listed in charge no.3 took place on 29 March 1971 i.e within four days of the 'operation search light' on 25 March 1971. We have got a clear depiction as to role, conduct and culpable association of the accused with the local Bihari hooligans that he had shown on 26 March 1971, as described by P.W.2. It is significantly relevant to lend assurance as to complicity of accused with the commission of the event of killing Khandoker Abu Taleb, an unarmed civilian.

272. The above proved facts together with the evidence of P.W.5 that Abdul Qauder Molla, Aktar Goonda and some non-Bengali were at the Miprur 'Jallad khana' when his father (Khandoker Abu Taleb) was slaughtered to death sufficiently proves the complicity of the accused Abdul Quader Molla with the event of killing. Therefore, we are

convinced that the hearsay evidence of P.W.5 carries probative value as it is found reliable and relevant.

273. Complicity encompasses assistance, encouragement, or moral supports which are mostly possible to provide if culpable association is maintained with the principals. Amongst 10% of Bangalee residents of Mirpur locality why accused Abdul Quader Molla opted to be associated for almost all the time with the local Bihari hooligans namely Aktar goonda, Nehal, Hakka Goonda, Hasib Hashmi who were extremely antagonistic to Bangalees of the locality, instead of saving fellow Bangalee residents? Of course such association of the accused fueled the principals targeting the local pro-liberation Bangalee civilians in furtherance of 'operation search light on 25 March 1971.

274. Cumulative effect of evidence and relevant facts and circumstances may have a decisive role in determining the culpability of the accused. Circumstantial evidence is not considered to be of less probative value than direct evidence. The act of culpable association of the accused with the principals and the evidence as discussed above inevitably proves that the accused Abdul Quader Molla was involved with the commission of the alleged brutal killing. Considering the context and pattern of attack we are satisfied that the aforementioned killing formed part of a systematic or organised attack against the civilian population. The victim of the alleged killing was a member of pro-liberation civilian population. The Tribunal is thus satisfied that the aforementioned killing constitutes the offence of murder as a crime against humanity committed in violation of customary international law.

275. We have already observed that actual physical participation when the crime is committed is not necessary and an accused can be considered to have participated 'in the commission of a crime' if he is found to be 'concerned' with the killing. Since the testimony of P.W.5 as to the fact of bringing the victim to Mirpur by Non-Bangalee accountant Abdul Halim by his car who handed him over to accused Abdul Quader Molla and at the time of slaughtering the victim accused was present at the crime site carries sufficient probative value the accused is considered to have acted so intending to provide moral support and encouragement

to the principals with whom he maintained continuous and culpable association accused Abdul Quader Molla incurs criminal liability for ‘complicity’ in commission of the murder of Khandoker Abu Taleb constituting the offence of crimes against humanity as specified in section 3(2)(a)(h) of the Act of 1973 which are punishable under section 20(2) read with section 3(1) of the said Act.

Adjudication of Charge No.4

[Ghatar Char and Bhawal Khan Bari killing]

276. Summary Charge No.04: During the period of War of Liberation ,on 25.11.1971 at about 07:30 am to 11:00 am the accused Abdul Quader Molla one of leaders of Islami Chatra Sangha and as well as prominent member of Al-Badar, being accompanied by his 60-70 accomplices belonging to Razaker Bahini went to the village Khanbari and Ghatar Char (Shaheed Nagar) under police station Keraniganj, Dhaka and in concert with his accomplices, raided the house of Mozaffar Ahmed Khan and apprehended two unarmed freedom fighters named Osman Gani and Golam Mostafa there from and thereafter, they were brutally murdered by charging bayonet in broad day light. In conjunction of the event of attack the accused and his accomplices attacking two villages known as Bhawal Khan Bari and Ghatar Chaar (Shaheed Nagar) , as part of systematic attack, opened indiscriminate gun firing causing death of hundreds of unarmed civilian village dwellers including the civilians named in the charge no.04 and thereby the accused had actively participated, facilitated, aided and substantially contributed to cause murder of two unarmed freedom fighters including large scale killing of hundreds of unarmed civilians and thereby committed the offence of murder as ‘crimes against humanity’, 'aiding and abetting’ the commission of the offence of murder as ‘crime against humanity' or in the alternative he had 'complicity in committing such offence' as mentioned in section 3(2)(a)(g)(h) of the International Crimes(Tribunals) Act,1973 which are punishable under section 20(2) read with section 3(1) of the Act.

Witnesses

277. Prosecution, in support of the charge no.4, has adduced as many as three witness who have been examined as P.W.1, P.W.7 and P.W.8.Of them P.W.7 claims to have witnessed the event of killing. P.W.1 and P.W.8 are hearsay witnesses.

278. The commission of the crime causing mass killing as narrated in charge no.4 is however not disputed. Defence has argued that the accused was not involved with it in any manner as the prosecution has been totally failed to prove involvement of the accused either as a physical perpetrator or as an abettor or as an accomplice of the principals. Hearsay evidence of P.W.1 and P.W.8 does not carry any reliability and as such recognised standard of proof does not allow depending on it.

Discussion of Evidence

279. P.W.1 Mozaffar Ahmed Khan is a valiant freedom fighter who is from the crime village. It is found from evidence of P.W.1 that he knew the accused even since 1969 as he while attending meetings at ‘Madhur canteen’; Dhaka University saw the accused who was a leader of Islami Chatra Sangha. But P.W.1 does not claim to have witnessed the accused committing any criminal act. However, he had learnt the incident from Abdul Mazid Palwan (P.W.7). P.W.1 testified the commission of the event and killing of two freedom fighters Osman Gani and Golam Mostafa. But he however has not claimed to have witnessed the involvement of accused with the commission of the massacre.

280. P.W.1 however, has stated that prior to the alleged event he saw the accused standing in front of Mohammadpur Physical Training center, Dhaka having rifle in hand while he was coming back home from Mohammadpur.

281. P.W.1 Mozaffar Ahmed Khan lodged a complaint against accused bringing accusation relating the alleged event of killing in the court of Magistrate, Keraniganj. It is admitted. P.W.12 the IO has admitted that for the purpose of initiating investigation he obtained information from

the complaint petition after the same was sent to the Investigation Agency through the office of the Registrar, ICT.

282. P.W.7 Abdul Mazid Palwan claims to have witnessed the event of massacre and the accused Abdul Quader Molla accompanying the gang of perpetrators to the crime site. P.W.8 claims to have heard that accused was with the gang with a rifle in hand who killed her father.

283. We are to determine, was P.W.7 able to observe what he alleges to have witnessed? Does the witness have any reason to say something different from what he actually observed? It is not necessarily due to the bad faith of the witness. It may be that the witness was really present and that he saw the commission of the crime.

284. Let us see what the P.W.7 has stated. P.W.7 Abdul Mazid Palwan, a resident of crime site Ghatar Char at the relevant time, stated that on 25 November 1971 in the early morning on hearing gun firing from northern end of the village he started approaching towards that end and found, remaining in hiding into a bush, Pakistani army, Abdul Qauder Molla and Biharis killing civilians. Abdul Quader Molla also fired by the rifle in his hand.

285. P.W.7 in the next breath has stated that after the gang of perpetrators had left the crime site at about 11:00 am he learnt that the person accompanying the gang wearing Pajama-Panjabi was Abdul Qauder Molla and some Bangalee having their body covered by *'borkha'* also accompanied the Pakistani army to the crime site.

286. P.W.8 Nurjahan is the wife of victim Nabi Hossain. At the relevant time she was 13 years old and used to reside at village Ghatar Char with her husband and she was pregnant at that time. On 25 November 1971 in the early morning on hearing heavy gun firing they remained in hiding under a cot. After gun firing had ceased her husband came out of house to see what was happening and he saw the Pakistani army coming toward their house and then her husband moved to his uncle Mozammel's house and then she again heard gun firing. Afterwards her mother-in-law came and told that her husband was no

more and with this she started running to the house of Mozammel and found her husband lying dead there. She also found there some Pakistani army and a Bangalee person of black complexion and dwarf height who by a rifle in his hand asked her to leave the place and with this being frightened she went inside the dwelling hut.

287. The event of attack causing murder of husband of P.W.8 remains undisputed and defence could not shake it by cross-examining her.

288. P.W.8 stated that afterwards she , at about 10:30-11:00 am found her husband dead receiving bullet injury on forehead and chest.P.W.8 also stated that she learnt that in conjunction of the event about 50-60 civilians of Ghatar Char were killed. She heard from her father-in-law Luddu Mia and Mazid Palwan (P.W.7) of their village that a person named Qauder Molla belonging to Jamat had killed her husband.

Evaluation and Findings

289. The learned defence counsel argued that two victims of Ghatarchar event(as listed in charge no.4) were freedom fighters who were not 'civilians' as they were volunteer corps and a party to conflict and hostility and thus the acts resulted in their death cannot be considered as 'directing any civilian population'.

290. We cannot agree with the argument that merely for the reason that two out of numerous civilian victims were freedom fighters the crimes committed resulting death of civilians cannot be characterized as the offence of crimes against humanity. The Tribunal notes that specific situation of the victim at the moment of the crimes committed, rather than his status, at the time of event of the attack is to be considered. In the case of ***Prosecutor v. Blaskic*** para 214 it has been observed that

> **" a civilian is everyone who is no longer an active combatant in the 'specific situation' at the time of the commission of the crime. Besides, broad definition of civilian adopted by the adhoc tribunals implies that the character of a predominantly civilian population is not**

> **altered by the presence of certain non-civilians in their midst"**

291. The ICTY and ICTR Statutes as well as jurisprudence state that the attack must be committed against *any* civilian population. This qualification has been interpreted to mean that the inclusion of non-civilians (military forces or those who have previously borne arms in a conflict) does not necessarily deprive the population of its civilian character. **[** ***Tadic*** Trial Judgment, 638; ***Blaskic*** Trial Judgment, 209] .

292. However, the targeted population must remain predominantly civilian in nature. But according to ICTR and ICTY jurisprudence, it is the situation of the victim at the time of the attack, and not the victim's status, that should be the focus of the inquiry. Therefore, we are of view that the attack as narrated in charge no.4 was directed against civilian population that resulted in numerous deaths of civilians and thus the offence of such murder is characterized as crimes against humanity as specified in section 3(2) of the Act.

293. The learned defence counsel also advanced his submission on definition of 'murder' by citing decision dated 26 July 2010 in the case No.001/18-07-2007/ECCC/TC of the Extraordinary Chambers in the Courts of Cambodia(ECCC), para, 331 [Page- 156 of the Final Argument Pack submitted by the defence)]. Paragraph 331 of the judgment reads as below:

> **"Murder, a well established crime under customary international law, requires the death of the victim resulting from an unlawful act or omission by the perpetrator. The conduct of the perpetrator must have contributed substantially to the death of the victims."**

294. The fact of death of victims resulting from the attack launched in the locality of Ghatarchar and Bhawal Kahnbari is not disputed. The accused is alleged to have accompanied the principals in perpetrating the crimes (as listed in charge no.4). Of course the burden is on prosecution

to establish first the presence of accused at the crime site and then his conduct or act that provided encouragement or moral support to the principals in committing the offence of crimes against humanity. Only after proving the presence of accused at the crime site, it is to be adjudicated whether the death of victims was a result of act or conduct of the accused and it must be the only reasonable inference that can be drawn from the evidence and circumstances. 'Awareness' as to consequence of act or conduct on part of the accused is sufficient to prove contribution of accused to the commission of the murder of victims.

295. However, now let us evaluate what the P.W.1, P.W.7 and P.W.8 have testified in relation to charge no.4 . Of them P.W.7 and P.W.8 claim to have witnessed the event that allegedly continued from early morning to about 11:00 am of 25 November 1971. The attack was allegedly launched directing the civilian population of village 'Ghatarchar' and 'Khan Bhawalbari' under keraniganj police station district Dhaka. A gang of Pakistani army, Biharis and Al-Badar allegedly perpetrated the crime while accused Abdul Quader Molla is also alleged to have accompanied them.

296. First, we find that P.W.7 has made conflicting version as to the fact that accused accompanied the Pakistani army having rifle in his hand. Because, once he claims to have witnessed the accused at the crime site having rifle in hand and then claims to have learnt that a person named Abdul Quader Molla accompanied the gang after they had left the crime site. Which one is true version?

297. P.W.7 has not even disclosed the source of his knowledge as to presence of accused at the crime site. Next, according to him, he on hearing frequent gun firing from the end of northern part of village started approaching to that end and then he saw the accused Abdul Quader Molla with the Pakistani army. This version does not seem to be natural. Because, normal human prudence suggests that, particularly in circumstances prevailing through out the country, it was not natural for a Bangalee civilian to come forward to a place from which direction the

perpetrators were moving with frequent gun firing. Rather in such a horrific situation non combatant civilians were supposed to escape. But P.W.7 claims that he rather moved forward to see what was happening. It is not believable as well.

298. Next, P.W.7 denied that he did not state what he has narrated here in Tribunal incriminating the accused with event alleged. But it appears that the I.O P.W.12 has stated that P.W.7 did not state all these to him implicating the accused, during investigation. Earlier statement made to IO is not evidence, true. But it is used to contradict what the witness deposes in court. Thus, it appears that there has been a fatal omission in earlier statement made to IO as to pertinent fact relating to culpability of the accused with the alleged event of attack causing mass killing of unarmed civilians which is a 'glaring contradiction' in evidence made before the Tribunal by P.W.7 on material particular which has created serious doubt as to credibility and truthfulness of his testimony.

299. This being the situation, naturally the hearsay evidence as to the fact of learning the event by P.W.1 from Abdul Mazid Palwan (P.W.7) loses weight and thus does not inspire any amount of credence.

300. Admittedly P.W.8 does not claim that she knew accused Abdul Qauder Molla even since prior to the alleged event. Her version goes to show that she learnt from P.W.7 that a person named Qauder Molla had killed her husband. But already we have found that P.W.7 Abdul Mazid Palwan has made seriously contradictory testimony as to seeing the accused at the crime site accompanying the principals carrying rifle in hand. His evidence has been rather found to be subsequent embellishment which is a glaring contradiction on material particular. Thus, the claim that P.W.7 learnt about the complicity of accused from P.W.8 does not carry any value and it adds no corroboration to what has been testified by P.W.7.

301. Next, the version as made by P.W.8 that she also found, at the place where her husband was killed, some army men and a Bangalee of black complexion and dwarf height who by a rifle in his hand asked her

to leave the place does not prove that the said person was nobody but accused Abdul Qauder Molla. Therefore, identification of accused on dock 40/41 years after she had seen the said 'Bangalee person' at the crime site cannot be relied upon at all as it is not even possible to keep one's face memorized particularly for a traumatized wife of victim.

302. Drawing attention to the above version defence suggested that she did not state it to the IO. P.W.8 denied it. But the IO (P.W.12), while contradicting P.W.8's evidence made before the Tribunal, has stated that P.W.8 did not state it to him during investigation. That is to say, there has been crucial omission in her earlier statement on material particular. Indeed such omission in her earlier statement turns her testimony made here in Tribunal as subsequent embellishment which is a glaring contradiction that makes testimony of P.W.8 significantly unbelievable and perverted.

303. Like all elements of a crime, the identification of the Accused must be proved by the Prosecution beyond reasonable doubt. In assessing identification evidence, it is to be taken into account a number of relevant factors, including: the circumstances in which each witness claimed to have observed the accused; the length of the observation; the familiarity of the witness with the Accused prior to the identification; and the description given by the witness of his or her identification of the accused. But as we see, the evidence does not inspire us to believe that the P.W.7 and P.W.8 were familiar as to identity of the accused even since prior to the alleged event. None of these two witnesses claim so.

304. In view of above discussion and reasons the Tribunal notes unanimously that it has not been proved beyond reasonable doubt that the accused Abdul Quader Molla accompanied the Pakistani perpetrators to the crime site having rifle in hand and that the person whom P.W.8 claims to have seen at the crime site was none but the accused. It is not plausible too that P.W.8 had learnt from P.W.7 that accused Abdul Qauder Molla accompanied the principals to the crime site to the accomplishment of the offence of mass killing. Because. Testimony of

P.W.7, in this regard, has been found to be disgustingly conflicting and contradictory inspiring no credence.

305. Mere fact that P.W.1 saw the accused standing in front of Physical Training center, Dhaka having rifle in hand, on one day prior to the alleged event, does not connect the accused with the commission of the event of massacre as listed in charge no.4. Although form this relevant fact it can be validly inferred that during the war of liberation the accused had complicity with the Pakistani occupation army as an armed member of Al-Badar. Therefore, we are persuaded to note that the commission of the event of mass killing by launching attack directing the civilians as crimes against humanity on the date time and in the manner causing deaths of numerous civilians has been proved. Besides, commission of crimes alleged is not disputed. But for the reasons as stated above we are not convinced to arrive at decision that the guilt of accused has been proved. Prosecution has failed to prove participation or complicity or act on part of the accused to the commission of the offence of crimes against humanity by adducing lawful and credible evidence. As a result accused Abdul Quader Molla is not found to have incurred criminal liability for the commission of offence of mass killing as crimes against humanity as listed in charge no.4.

Adjudication of Charge No.05

[Alubdi Mass Killing]

306. Summary Charge No.05: During the period of War of Liberation ,on 24.4.1971 at about 04:30 am, the members of the accused Abdul Quader Molla one of leaders of Islami Chatra Sangha and as well as prominent member of Al-Badar or member of group of individuals accompanied the Pakistani armed forces in launching the attack directed against civilian population of the village Alubdi (Pallabi, Mirpur) and suddenly by opening indiscriminate gun firing caused mass killing of 344 civilians including the persons listed in the charge no.05 constituting the offence of their murder and thereby the accused had committed the offence of 'murder as crime against humanity', 'aiding and abetting' to the commission of such offences or in the alternative he committed the offence of 'complicity in committing such offence' as mentioned in

section 3(2)(a)(g)(h) of the International Crimes (Tribunals) Act,1973 which are punishable under section 20(2) read with section 3(1) of the Act.

Witnesses

307. Prosecution has adduced and examined two witnesses in relation to this charge. The witnesses are P.W.6 Shafiuddin Mulla and P.W.9 Md. Amir Hossain Molla. They claim to have witnessed the atrocious event of mass killing participated by the accused Abdul Qauder Molla with the principal perpetrators. At the relevant time they were residents of the crime village Alubdi under police station Mirpur, Dhaka.

Discussion of Evidence

308. P.W.6 Shafiuddin Mulla(60) , at the relevant time , was an inhabitant of Alubdi village. He was 19 years of age at the time of the alleged event of mass killing happened at their village. He narrated that on 24 April 1971 in the early morning, on hearing sound of helicopter, he came out of the house and found a helicopter landing at a place near the bank of river which was western part of the village and he instantly heard sound of indiscriminate gun firing and then being frightened they started running within the village. At a stage, he found dead bodies of some persons here and there. He then remained in hiding beneath a bush at the northern side of the village and there from had witnessed, from western side, the Pakistani army bringing the villagers and the paddy harvesting laborers. There after, he also found that the accused Abdul Quader Molla, his Bihari accomplices and Pakistani army brought the villagers and the paddy harvesting laborers from eastern side and made all of them assembled at the same place.

309. P.W.6 further stated that after a short while he saw the accused Abdul Quader Molla talking with the officers of Pakistani force in Urdu, although he could not exactly hear it from far and then gun shooting was started targeting the apprehended civilians and Quader Molla (accused) also had fired by the rifle in his hand and thus, in this way, they had killed 360/370 Bangalee civilians including 70/80 paddy harvesting laborers and his own uncle Nabiullah. The massacre continued till 11:00

am and the perpetrators also committed looting and burnt houses of civilians.

310. Defence, however, could not dislodge the fact of the incident of atrocious and planned mass killing in Alubdi village, in any manner. From cross-examination of P.W.6 it has been revealed that since 24 April 1971, the date of the incident of mass killing, they had been in the locality of Savar, leaving their own village Alubdi. This fact is a corroborative indication to the commission of the horrific massacre. Because, they would not have preferred their shelter elsewhere leaving their own place if actually no such horrific incident would not happen. We do not find any reason that the P.W.6 has testified falsely as to witnessing the incident and presence of the accused Abdul Quader Mollah with the Pakistani army with a rifle in his hand at the crime site.

311. Now the question may validly come forward as to how the P.W.6 could recognize the accused at the crime site? Had he any opportunity to know the accused from earlier? P.W.6 blatantly denied the suggestion put to him by the defence that he did not know the accused Quader Mollah in 1970-71. Rather, P.W.6 stated that he was associated with the 'Chatra League' (student wing of Awami League) and during 1970 election he had participated in the campaign in favour of the Awami league candidate Advocate Zahir Uddin(Mirpur constituency) while accused Abdul Qauder Molla, the then leader of Islami Chatra Sangha (ICS) and the Biharis were engaged in campaign in support of the candidate having symbol of '*dari palla'*.

312. Thus we see that the P.W.6 was actively associated with the student wing of the Awami League, a pro-liberation political party, while accused Abdul Quader Molla had worked actively for the opponent in 1970 general election in favour of the Jamat-E-Islami candidate, in the locality of Mirpur. It has been corroborated by P.W.2 Syed Shahidul Huq Mama. Admittedly, in 1971 the Alubdi village was under Mirpur Police Station and we have found from evidence of P.W.5 Khandoker Abul Ahsan that the accused Abdul Quader Molla was also a resident of this locality (Duaripara, Mirpur). Therefore, we may legitimately

presume that the P.W.6 had enough reason and occasion to know the accused Quader Molla since prior to the incident of Alubdi and thus he could recognize him even at the crime site accompanying the Pakistani army to the accomplishment of the crimes alleged.

313. Another live witness **P.W.9 Amir Hossain Molla** testified that Abdul Quader Molla had directly participated in the killing of around 400 people at Alubdi of Pallabi in Dhaka on April 24, 1971during the Liberation War. It is seen that the above version of P.W.9 has been corroborated by P.W.5 Shafiuddin Molla, another live witness of the incident who has also stated that Abdul Quader Molla directly took part in the killing of 360-370 Bangalees in Alubdi.

314. Freedom fighter P.W.9 Amir Hossain Molla, (66), used to reside at Duaripara the neighboring locality of Alubdi, at the relevant time. P.W.9 stated that Abdul Quader Molla along with 70-80 members of Islami Chatra Sangha, the then student wing of Jamat E Islami, had trained non-Bangalee Biharis to “protect Pakistan” ahead of the Liberation War. This unshaken piece of evidence sufficiently indicates that P.W.9 knew the accused Abdul Quader Molla even since prior to the event alleged.

315. In narrating the horrific event, P.W.9 stated that around the time of Fajr prayers on April 24, 1971, a helicopter landed on the bank of the Turag river on the west side of his village. From the east, 100-150 Biharis and Bangalees led by Abdul Quader Molla entered the village and opened fire indiscriminately causing killing of many people. Thereafter, they picked 64-65 villagers from their homes and lined them up in the north side of the village and 300-350 people who had come to the village for harvesting paddy were also lined up on the same place and then they opened fire on them.

316. P.W. 9 further stated he saw Abdul Quader Molla standing there (crime site) having rifle in his hand and there was also a rifle in Aktar Goonda's (Quader's associate) hand. They along with Panjabi people (Pakistan army) opened fire, said the P.W.9, adding, approximately 400

people were killed there. On cross-examination P.W.9 stated that he knew Aktar goonda who was sent to jail after 31 January 1972. He lost his 21 relatives who were killed during the event. P.W.9 has re-affirmed, in his cross-examination that he and his father witnessed the event remaining in hiding at the west-north side of the village Alubdi.

Evaluation of Evidence and Finding

317. Mr. Abdus Sobhan Tarafder , an associate of Mr. Abdur Razzak, the learned senior counsel for the defence argued that P.W.6 and P.W.9 had not been at the crime village at the relevant time and as such they had no opportunity to see the event. Their version as to seeing the accused accompanying the gang of perpetrators is not believable as they made inconsistent statement. P.W.6 just in the early morning when the attack was launched was sent to Birulia village, Savar by his uncle Nabiulla, as stated by D.W.5 Altab Uddin Molla, the younger brother of P.W.6. P.W.9 is not a credible witness as he is closely affiliated to the party in power and had faced numerous civil and criminal cases.

318. Conversely, the learned prosecutor argued that both the witnesses are live witnesses and they have made corroborating testimony as to the commission of event and involvement of accused thereto. Mere discrepancies cannot *ipso facto* make the sworn testimony untrue in its entirety. Involvement with civil and criminal case does not indicate one's ill character and merely for this reason his sworn testimony cannot go on air. Besides, defence has made a futile attempt to exclude the culpability of accused with the commission of the event of massacre by examining the younger brother of P.W.6-- Altab Uddin Molla (D.W.5) who was merely a boy of 7 years and he had not been at the crime village at the relevant time.

319. The incident took place only about one month after the 'crack down' in the night of 25 march 1971 and thus the Pakistani troops who were here coming thousand of miles far from Pakistan naturally did not have any idea and knowledge about the location of any particular place and when, how and which group of population would be targeted of their attack, in execution of the policy and plan of the Pakistani government

and armed forces. Logically only the local pro-Pakistani people, at that time, were considered as right persons to assist, guide and to collaborate them to implement the operation by committing atrocity. We may take this fact of common knowledge, considering the context of war of liberation 1971 into notice.

320. It is thus validly inferred that the Pakistani troops had to take effective assistance and collaboration of the local people who were perfectly pro-Pakistani and affiliated with the politics of Jamat E Islami. Admittedly, accused Abdul Quader Molla was a leader of Islami Chatra Sangha, the student wing of the JEI. It has been established even from the **Exhibit-2 and 4**, the two books one of which **(Exhibit-4: Jibone Ja Dekhlam)** is written by Ghulam Azam who contested 1970 election from Mirpur locality as a candidate of JEI.

321. Context, activities and political affiliation of the accused, just prior to 1971 war of liberation, as has already been discussed reasonably and unambiguously inspire us to believe the testimony of P.W.6 in respect of presence of the accused at the crime site of Alubdi and the fact that he himself also fired from the rifle in his hand while principally the Pakistani army perpetrated the mass killing of civilians.

322. It is to be noted that defence adduced and examined Altab Uddin Molla, the younger brother of P.W.6 as D.W.5. As it appears, D.W.5 has testified mainly to exclude complicity of the accused with event of massacre (as listed in charge no.5). At the relevant time he was only about 7 years old. He does not dispute the commission of the massacre. Although the burden squarely lies upon the prosecution to prove involvement or complicity of the accused with the crime committed we consider it relevant to have look to what has been testified by the D.W.5 to determine the weight of testimony of P.W.6.

323. D.W.5 Altab Uddin Molla has corroborated that his family members took refuge to village Birulia under Savar police station after the gang of 4/5 thousand Bihari lead by the Pakistani army along with Aktar Goonda, Doma, Gul Mohammad had attacked their village Alubdi

in the night of 25 March. D.W.5 also stated that his brother Shafiuddin Molla (P.W.6) had been at village Alubdi at the time of the event and in the morning of 24 April when the Pakistani army's helicopter had landed at their village his uncle Nabiullah Molla had sent him (P.W.6) to Birulia, Savar. How D.W.5 became aware of this fact? It remains unexplained.

324. The Tribunal notes it with surprise that how D.W.5 came to know that his uncle Nabiullah had sent his brother Shafiuddin Molla to Birulia, Savar, particularly when it is admitted that Nabiullah Molla was also killed in conjunction of the massacre? D.W.5 remained silent in this regard. Admittedly D.W.5 since prior to the alleged event had been at village Birulia, Savar with his family. If it is so, he is not a competent person to say whether accused Abdul Qauder Molla accompanied the perpetrators at the crime site.

325. It appears too that D.W.5 has stated that accused Abdul Qauder Molla was not at the crime site and he did not see him there. D.W.5 in next breath stated that he had not heard the name of Abdul Qauder Molla prior to initiation of this case. If it so, he is not at all able to say whether accused Abdul Quader Molla accompanied the perpetrators to the crime site and the version that he did not see the accused at the crime site is patently an untrue version aiming to exclude involvement of the accused with the commission of massacre alleged.

326. Drawing attention to the testimony defence suggested to P.W.9 that he did not state to IO that Abdul Quader Molla had accompanied the perpetrators having rifle in hand and participated the commission of mass killing of 400 civilians by gun firing. P.W.9 denied it. The Investigation officer P.W.12 stated that this witness stated to him that "140-150 persons including Asim, Aktar goonda, Newaj, Latif, Doma led by accused Abdul Quader Molla encircled the village Alubdi approaching from the east part of village." Besides, the Tribunal notes that minor discrepancies, if any, could be due to the fallibility of perception and memory and the operation of the passage of time and it does not corrode the credibility of testimony made here before the

Tribunal. Hence it would be wrong and unjust to treat forgetfulness as being synonymous with giving false testimony.

327. We are not agreed with what has been submitted by the learned defence counsel in respect of credibility of P.W.9 on ground of his 'character'. Merely involving in civil litigations and involving with a criminal prosecution cannot brand one's character questionable and makes him incompetent to testify in a court of law. Chiefly we are to see whether and to what extent it affects the truthfulness of that witness's testimony. Even we are not required to reject the testimony of a witness who has been convicted of a crime or has engaged in criminal conduct. We may however consider whether a witness's criminal conviction or conduct has affected the truthfulness of the witness's testimony. But the defence could not satisfy as to how such conduct has affected the testimony P.W.9 has made before the Tribunal.

328. There is no reasonable ground that could prompt us to hold that P.W.9 is an interested witness or is not credible as well. It is thus proved beyond reasonable doubt that the accused was present at the crime site, assisted the Pakistani troops and thereby participated, aided and substantially provided moral support to the commission of horrific mass killing of unarmed civilians of village Alubdi. Even we accept the only fact that the accused was merely present at the crime site to be true, he incurs criminal liability for encouraging and providing moral support to the commission of the crime.

329. Keeping the context of 'operation search light' in the night of 25 March 1971 followed by the war of Liberation and the fact of overall atrocious activities of the accused in the locality and also in 1970 general election in mind, a person of normal prudence would not hesitate to infer that the presence of accused with the Pakistani troops having rifle in hand, at the crime site, itself establishes his potential anti-liberation position in Mirpur locality and it conveys approval for those crimes which amounts to aiding and abetting .

330. Thus, his physical presence having rifle in hand is adequate *indicia* that he aided and assisted the Pakistani troops, the main

perpetrators, to the commission of the crime at Alubdi village nearby Mirpur causing mass killing of unarmed civilians, as part of systematic attack. In the case of ***Furundziia***, the ICTY held that-

> ***"mere presence or inaction may be sufficient to constitute the actus reus of aiding and abetting'. Therefore, at a minimum, there must be some connection between the accused's presence or inaction and the commission of the offence [Synagogue case, cited in Furundzija, note 55, para. 20S.]"***

331. On final evaluation of evidence and relevant facts and circumstances, we are convinced to arrive at decision that the prosecution has been able to prove it beyond reasonable doubt by lawful and credible evidence of live witnesses that the accused knowing the intent of the main perpetrators accompanied the gang and remained physically present at the crime site having rifle in hand. Prosecution has been able to show that the accused Abdul Quader Molla, his Bihari accomplices and the Pakistani army, acting pursuant to a common design possessed the same criminal intention in accomplishment of the massacre.

332. It is validly inferred that the accused Abdul Quader Molla with full 'awareness' of the consequence of the attack accompanied the principals with intent to assist and encourage the execution of the 'operation'. Such acts forming attack are sufficient to characterize the outcome of the attack causing mass killing of unarmed civilians as crimes against humanity.

333. Section 4(1) of the Act of 1973 contains provision as to liability of crimes. It reads as below:

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

334. It has been proved that the horrific event of mass killing of 300-350 unarmed civilians of Alubdi village was perpetrated by a gang of local Bihari hooligans and their accomplice accused Abdul Quader Molla and Pakistani army. Accused Abdul Quader Molla physically accompanied the gang to the crime site having rifle in hand and therefore he is liable for the atrocious event of massacre in the same manner as if it was done by him alone. Therefore, accused Abdul Quader Molla incurs criminal liability under section 4(1) of the Act of 1973 for the offence of mass killing as crimes 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 said Act.

Adjudication of Charge No.06

[Killing of Hazrat Ali and his family and Rape]

335. Summary Charge No.06: During the period of War of Liberation , on 26.3.1971 at about 06:00 pm the accused Abdul Quader Molla one of leaders of Islami Chatra Sangha and as well as prominent member of Al-Badar or member of group of individuals being accompanied by some *biharis* and Pakistani army went to the house of Hajrat Ali at 21, Kalapani Lane No. 5 at Mirpur Section-12 and entering inside the house forcibly, with intent to kill Bangalee civilians, his accomplices under his leadership and on his order killed Hazrat Ali by gun fire, his wife Amina was gunned down and then slaughtered to death, their two minor daughters named Khatija and Tahmina were also slaughtered to death, their son Babu aged 02 years was also killed by dashing him to the ground violently. During the same transaction of the attack 12 accomplices of the accused committed gang rape upon a minor Amela aged 11 years but another minor daughter Momena who remained into hiding, on seeing the atrocious acts, eventually escaped herself from the clutches of the perpetrators. By such acts and conduct the accused had actively participated, facilitated, aided and substantially contributed to the attack directed upon the unarmed civilians, causing commission of the horrific murders and rape by launching planned attack directing the non-combatant civilians and thereby committed the offence of ‘murder’ as ‘crime against humanity', ‘rape’ as ‘crime against humanity’, 'aiding

and abetting the commission of such crimes' or in the alternative the offence of 'complicity in committing such offences' as mentioned in section 3(2)(a)(g)(h) of the International Crimes(Tribunals) Act,1973 which are punishable under section 20(2) read with section 3(1) of the Act.

Witness

336. Prosecution adduced and examined only one witness in support of this charge. It examined Momena Begum as P.W.3. She is the only survived member of victim family and daughter of Hazrat Ali. She witnessed the horrendous event of killing and rape. The event happened inside their house and thus naturally none else had occasion to see the event committed. P.W.3 Momena Begum testified in camera as permitted by the Tribunal. She made heartrending narration of the atrocious event that she witnessed with choked voice. At the relevant time she was 13 years old and newly wedded.

Discussion of Evidence

337. P.W.3 Momena Begum has testified that she is the only survived member of their family. The event took place on 26th March 1971. According to P.W.3 at the relevant time they had been living in the house no. 21 of no. 5 Kalapani lane of Mirpur 12. It remains unshaken and undisputed too.

338. P.W.3 while narrating the incident on witness box stated that on 26th March 1971 just immediate before the dusk her father hastily came back to home and was telling frightened that Qauder Molla would kill him. Aktar goonda and his *Bihari* accomplices and Pakistani army were chasing her father to kill him. Her father entering inside house closed the door and at that time her parents and brothers and sisters were inside the room. On being asked by her father she and her sister Amena kept themselves in hiding under the cot. She heard that Quader Molla and *bihari*s coming in front of the door started telling- *"son of a bitch, open the door, otherwise we will throw bomb"*. They threw a bomb as her father did not open the door and thereafter, her mother having a *'dao'* in hand opened the door and instantly they gunned down her mother. Her father attempted to hold her mother and then accused Quader Molla

holding collar of wearing shirt of her father was telling- *" son of a pig, would you not do now Awami league? Would you not follow Bangabandhu? Would you not utter the slogan 'Joy Bangla'?"* Then her father folded hands begged Quader Molla and Aktar goonda to spare him. But the accused Abdul Quader Molla dragged her father outside the room. His accomplices slaughtered her mother with a *'dao'*, also slaughtered her sisters Khodeja and Taslima with a '*chapati*' (at this stage, P.W.3 on dock started crying shedding tears).

339. P.W.3 further stated, by memorizing the horrendous event that her two years old brother Babu started crying but he was also killed by dashing him to the ground violently. On hearing cry of Babu, her sister Amena started howling and then they dragged Amena from under the cot and tortured her by ragging her wearing clothes. Amena had raised cry to save her and at a stage her cry came to an end. Thereafter, they also had dragged her out from under the cot by causing injury with some sharpen object and then she raised cry and lost her sense. When she regained her sense she felt severe pain at abdomen and she could not walk and found her wearing pant in ragged condition. She somehow, there from, came to one house at 'Fakirbari' where its inmates found her in bleeding condition wearing ragged pant and then they made arrangement of her treatment by calling a doctor on the following day and then on being informed by them her father-in-law came there and brought her to his house where she was given necessary treatment.

340. P.W.3 further stated that in 1971 she could not forget the scene of killing of her parents, brother and sisters which she herself witnessed and being traumatized she was almost mentally imbalanced and now she is in fact dead although still alive. At the time of identifying the accused on dock P.W.3 carrying immense heartache stated that she wanted to ask the accused—'where is my father'?

341. The above narration as to the commission of horrific event could not be dislodged by the defence in any manner. Rather, P.W.3, on cross-examination has re-affirmed that at the time of event they all were inside one room of their house. She could not see who killed her father but she,

remaining in hiding under a cot, saw Quader Molla dragging her father out.

342. P.W.3 , in cross-examination, in reply to question elicited to her by defence stated that the Bangalee person accompanying the Biharis and Pakistani army who was speaking in Bangla and dragged her father out holding his shirt's collar was Quader Molla and she saw it remaining in hiding under the cot. Thus, the presence of accused Abdul Qauder Molla at the crime site has been re-affirmed by P.W.3.

343. On cross-examination, P.W.3 has reaffirmed the horrific incident of killing and torture. She stated that her mother was slaughtered inside the room when her father was forcibly dragged out and she did not see her father's killing. Thereafter, Biharis slaughtered her sisters Khodeja and Taslima inside the room. The Pakistani army and Biharis killed her brother by dashing him to the ground violently. They dragged out her sister Amena and caused successive torture.

344. As regards father's killing P.W.3 stated in cross-examination that after independence Akkas member informed her that Quader Molla had killed her father. She also stated that gang of 10-12 persons attacked their house and of them only one person wearing Pajama-Panjabi who was speaking in Bangla was Quader Molla.

Evaluation of Evidence and Finding

345. Defence does not deny an orgy of atrocities that took place on the date time and in the manner. But it refutes the charge that the accused was at the very centre of the web of these crimes as have been brought in charge number 6. It has been argued by the learned defence counsel that P.W.3 Momena Begum is not the daughter of victim Hazrat Ali Laskar. Prosecution has failed to bring any corroborative evidence to substantiate the charge. There has been no evidence to show that accused Abdul Quader Molla has overt act to the commission of alleged crimes.

346. First, the argument that P.W.3 Momena Begum is not a daughter of victim Hazrat Ali Laskar is deprecated one. Without any evidence or

putting suggestion to P.W.3 on the basis of any tangible evidence no such argument stands lawful and correct. Besides, on cross-examination, in reply to question put to her, P.W.3 stated that her father was running a tailoring shop at Mirpur 01 in front of *Majar* and she also used to work there prior to her marriage.

347. It appears that the charge does not allege that the accused himself personally committed the crime of murder of inmates of P.W.3. But 'murder' as a crime against humanity does not require the prosecution to establish that the accused personally committed the killing. The crimes alleged are not isolated crimes. We are not agreed with the argument advanced by the learned defence counsel Mr. Abdus Sobhan Tarafder that the accused cannot be held responsible for the offence of murder as listed in charge no.6 as the prosecution has failed to establish the overt act of the accused. The case in hand involves the offences enumerated in the Act of 1973 which are also considered as system crimes committed in violation of customary international law. Overt act of accused Abdul Quader Molla is immaterial as he has not been charged for committing any isolated crime. He is alleged to have accompanied the gang of perpetrators to the crime site. Jurisprudence evolved suggests that even a single act on part of accused may lawfully be characterized as the offence of crimes against humanity.

348. In the case in hand, we are just to adjudicate how the accused incurs responsibility for the accomplishment of the crime. What of his conducts or acts has made him responsible? It is to be noted that even a single or limited number of acts on the accused's part would qualify an offence as crime against humanity. In addition, in certain circumstances, a single act of the accused has comprised a crime against humanity when it occurred within the necessary context.

349. It has been proved beyond reasonable doubt that P.W.3 had witnessed the incident of killing her parents, sisters and minor brother committed at their own house. Miraculously she escaped. She is a traumatized witness and a survived victim. At the time of incident she was a girl of 13 years of age. One can say that how she can memorize the

incident long 41 years after the incident took place? It is true that with the passage of time human memory becomes faded. But it is also the reality that human memory is quite capable of reserving some significant moment or incident in the hard disc of his or her memory which is considered as long term memory (LTM) and it is never erased from human memory.

350. We have found that the following version of P.W.3 remains unshaken:

> "the accused Quader Molla holding collar of wearing shirt of her father was telling- "*son of a pig, would you do now Awami league? Would you not follow Bangabandhu? Would you not utter the slogan 'Joi Bangla'?*" Then her father folded hands begged Quader Molla and Aktar *goonda (terrorist)* to leave him. But the accused Abdul Quader Molla dragged her father outside the room and since then he could not be traced. His accomplices slaughtered her mother with a '*dao';* slaughtered her sisters Khodeja and Taslima with a '*chapati*'."

351. It is need less to say that the horrific event that the P.W.3 herself experienced is inevitably still retained in her memory. There has been no earthly reason to disbelieve this witness. Rather, she seems to be a natural live witness who sustained severe mental trauma experiencing the horrific killing of her parents, sisters and minor brother in front of herself.

352. We do not find any reason to view that P.W.3 had no reason or scope to know the accused Quader Molla, particularly when statement of P.W.3 demonstrates that according to her father, Abdul Quader Molla was chasing him and her father begged life from Abdul Quader Molla and Aktar goonda. It is found that on the following day of 'crack down' in Dhaka the incident of brutal killing of parents and other inmates of P.W.3 Momena took place, in violation of customary international law.

353. Already it has been found that the crimes for which the accused has been charged were not isolated in pattern and the same were the

outcome of organized and systematic attack directed against the civilian population. Now, let us find what were the conducts on part of the accused prior to the commission of the crime and whether he accompanied the principal perpetrators who were local notorious Bihari and hooligans.

354. The incident of killing of parents, two sisters and one minor brother on the day time and in the manner remains unshaken. It is a fact of common knowledge that Mirpur is a locality of the then Dhaka city having mostly bihari population and accused Abdul Quader Molla used to maintain close and culpable affiliation with the local bihari goonda and pro-Pakistani people and already we have found from evidence of P.W.2 that Abdul Quader Molla was closely associated with the Jamat E Islami (JEI) politics and was a potential leader of ICS. Admittedly, at the relevant time he was a leader of ICS of Shahidullah Hall, Dhaka University.

355. Evidence of P.W.3 amply demonstrates that Abdul Quader Molla by accompanying the gang consisting of *Biharis*, local Aktar goonda and Pakistani army to the crime site, in other words, substantially facilitated and aided the commission of the horrendous killings. Why the accused, being a Bangalee civilian accompanied the local Bihari hooligans? Why he used to maintain culpable association with them even since prior to 25 march 1971?

356. It is to be noted that now it is settled that even mere presence at the scene of the crime may, under certain circumstances, be sufficient to qualify as complicity. From the evidence of P.W. 3 , a live witness, it is found that the accused by his presence in the crime site and by his culpable acts substantially encouraged and facilitated the main perpetrators in committing the crime and also he shared the intent similar to that of the main perpetrators and thus obviously he knew the consequence of his acts which provided moral support and assistance to the principal perpetrators. Therefore, the accused cannot be relieved from criminal responsibility. In the case of ***Prosecutor Vs. Charles***

Ghankay Taylor : Trial Chamber II SCSL: Judgment 26 April 2012 Paragraph 166 it has been observed that-

> ***"The essential mental element required for aiding and abetting is that the accused knew that his acts would assist the commission of the crime by the perpetrator or that he was aware of the substantial likelihood that his acts would assist the commission of a crime by the perpetrator. In cases of specific intent crimes, such as acts of terrorism, the accused must also be aware of the specific intent of the perpetrator."***

357. Acts and conduct of accused Abdul Quader Molla at the crime site adequately suggest inferring his intent and knowledge. It is proved that he at the launch of the event dragged Hazrat Ali Laskar out of his house and before it the gang gunned down his wife. It is patent that the accused was sufficiently aware of likelihood that his acts would assist the principals in committing crimes. Thus, the accused is found to have actively and substantially encouraged and abetted the gang of perpetrators in committing the crime of killing of family inmates of Hazrat Ali Laskar.

358. The Tribunal notes that accused Abdul Quader Molla had physically participated in the attack targeting the father and family members of the P.W.3 as her father belonged to Awami League politics and was a pro-liberation civilian. Testimony of P.W3 demonstrates evidently that the accused, by his acts of **'accompanying'** the gang of *Bihari* and local Aktar goonda and also by an act of forcibly dragging Hazrat Ali Laskar out of house, Abdul Quader Molla's presence in the crime site made him criminally linked with the commission of the offence of killing of Bangalee civilians. Thus, it is lawfully presumed that the accused had *actus reus* in providing moral support and aid to the commission of offence. The *actus reus* of abetting requires assistance, encouragement or moral support which has a substantial effect on the perpetration of the crimes.

359. Now the question has been raised by the defence that the principal offenders have not been identified and brought to the process of justice and thus the accused cannot be held responsible as aider and abettor. It has been held by the Appeal Chamber of ICTY, in the case of ***Kristic*** **t**hat –

> ***"A defendant may be convicted for having aided and abetted a crime which requires specific intent even where the principal perpetrators have not been tried or identified (April 19, 2004 para 143 of the judgement) ."***

360. No person of normal human prudence will come to a conclusion that at the time of incident of part of systematic attack, the accused who accompanied the principal perpetrators had a different or innocent intent. Rather, the evidence of P.W.3 demonstrates that the accused and the principals made the attack with common intent to accomplish their explicit and similar intent of killing.

361. Mr. Abdur Razzak the learned senior counsel for defence argued by citing the decision of Appeal Chamber: ICTR in the case of ***Sylvetre Gacumbitsh*** [Case No. ICTR-2001-64-A] that according to causation standard for aiding and abetting that the acts must have a **'substantial effect'** on the commission of the crime. The learned counsel also drew attention to the following paragraph [Page-199-Para 688 of Prosecutor v. DU[KO TADI] ICTY Trial Chamber: Case No. IT-94-I-]:

> **"The ILC Draft Code draws on these cases from the Nuremberg war crimes trials and other customary law, and concludes that an accused may be found culpable if it is proved that he "intentionally commits such a crime" or, inter alia, if he knowingly aids, abets or otherwise assists, directly and substantially, in the commission of such a crime. "**

362. Presence of an accused alone in the crime site may not always be sufficient to infer his contribution and assistance of the accused in the commission of crime committed by the principals. But we have found

too in the case of ***Prosecutor v. Tadic*** **[**ICTY Trial Chamber: Case No. IT-94-I-T] wherein it has been observed as below:

> **"…….However, if the presence can be shown or inferred, by circumstantial or other evidence, to be knowing and to have a direct and substantial effect on the commission of the illegal act, then it is sufficient on which to base a finding of participation and assign the criminal culpability that accompanies it ."**

363. In the case in hand, evidence of P,W.3 inescapably shows that the accused actively and knowing the consequence of his acts accompanied the gang of perpetrators to the crime site and by his illegal act of forcibly dragging Hazrat Ali Laskar out of house he substantially facilitated the commission of crimes committed by the principals. Therefore it cannot be said at all that the accused's presence at the crime site and accompanying the principals were devoid of guilty intent.

364. Accompanying the perpetrators while attacking the inmates of the P.W.3 is a significant *indicia* that the accused provided substantial assistance and moral support for accomplishment of the crime, although his acts had not actually caused the commission of the crime of killing in the crime site. In this regard, we may rely upon the decision of the Trial Chamber of ICTR in the case of ***Kamubanda*** **[** January 22, 2004, para 597] which runs as below:

> ***"Such acts of assistance……. Need not have actually caused the commission of the crime by the actual perpetrator, but must have had a substantial effect on the commission of the crime by the actual perpetrator".***

365. Thus, we find that the accused Abdul Quader Molla physically and having 'awareness' as to his acts participated and substantially abetted and encouraged to the commission of the crime. The manner time and pattern of conduct of the accused Abdul Quader Molla at the crime site and also prior to the commission of the crime is the best

indication of his conscious option to commit a crime. Intent, coupled with affirmative action, is evidence of the highest degree of imputative responsibility. Acts on part of the accused at the crime site are thus qualified as crimes against humanity as the same formed part of attack directing the unarmed civilian population. His acts were of course culpable in nature which contributed to the commission of murder of Hazrat Ali Laskar and also to the commission of murder and rape committed in conjunction of the event at the crime site.

366. The testimony of a single witness on a material fact does not, as a matter of law, require corroboration. In such situations, the Tribunal has carefully scrutinized the evidence of P.W.3 the live witness before relying upon it to a decisive extent. Since the horrific event was committed in a dwelling house, the inmates of the house are natural witnesses. If murder is committed in a street, only passerby will be witnesses. P.W.3 is the only survived member of victim family and thus her evidence cannot be brushed aside or viewed with suspicion. Besides, it is to be noted that the testimony of a single witness on a material fact does not, as a matter of law, require corroboration. The established jurisprudence is clear that corroboration is not a legal requirement for a finding to be made. “Corroboration of evidence is not necessarily required and a Chamber may rely on a single witness’ testimony as proof of a material fact. As such, a sole witness’ testimony could suffice to justify a conviction if the Chamber is convinced beyond all reasonable doubt.” [***Nchamihigo***, (ICTR Trial Chamber), November 12, 2008, para. 14].

367. Indeed, within a single attack, there may exist a combination of the enumerated crimes, for example murder, rape etc. In view of discussion as made above and taking the settled jurisprudence into account eventually we are persuaded that the acts of accused Abdul Quader Molla , as has been testified by the P.W.3, in the course of implementation of the actual crime of killings and rape, render him criminally responsible for the commission of the crime that has been established to have taken place as a part of systematic attack and as such the accused Abdul Quader Molla is found to have incurred criminal

liability under section 4(1) of the Act for the offence as mentioned in section 3(2)(a) of the Act of 1973 which are punishable under section 20(2) read with section 3(1) of the said Act.

XX. Contextual requirement to qualify the offences proved as crimes against humanity

368. Defence argued that crimes as narrated in charge 1 and 3 were isolated in nature apart from the fact that accused had no involvement with the commission of any of alleged crimes, in any manner.

369. From the segment of our discussion on adjudication of charges we have found the events of atrocities constituting crimes against humanity were perpetrated directing the unarmed civilians belonging to pro-liberation ideology. The offences narrated in charge nos. 1,2,3,5 and 6 took place between 26th March 1971 to 24th April 1971 i.e within the period of one month of 'operation search light' on 25 March 1971. Only the event narrated in charge no.4 allegedly took place on 25.11.1971.

370. Admittedly. Accused was the President of Islami Chatra Sangha (ICS), Shahidullah Hall Unit, University of Dhaka, at the relevant time.We have also found from the **Exhibit-2** a book titled **'Sunset at Midday'** written by Mohi Uddin Chowdhury , a leader of Peace committee , Noakhali district in 1971 who left Bangladesh for Pakistan in May 1972 [(Publisher's note): Qirtas Publications, 1998, Karachi, Pakistan] , wherein the paragraph two at page 97 speaks that

> **"To face the situation Razakar Force, consisting of Pro-Pakistani elements was formed. This was the first experiment in East Pakistan, which was a successful experiment. Following this strategy Razakar Force was being organized throughout East Pakistan. This force was, later on Named Al-Badr and Al-Shams and Al-Mujahid. The workers belonging to purely Islami Chatra Sangha were called Al-Badar, the general patriotic public belonging to Jamaat-e-Islami, Muslim League, Nizam-e-Islami etc were called Al-Shams and**

the Urdu-speaking generally known as Bihari were called al-Mujahid."

371. But in absence of any other evidence it would be rather confusing to infer that the accused acted during the period of 26th March 1971 to 24th April 1971 as a member of Al-Badar to the commission of offences narrated in charge nos. 1,2,3,5 and 6. Rather, it is found that the accused acted and participated by accompanying the principals as an 'individual' and a member of 'group of individuals' to the actual commission of crimes alleged.

372. However, We have also found it proved from evidence as discussed above that the accused Abdul Quader Molla physically accompanied the principals and acted with knowledge and common intent or had complicity to the commission of those atrocities and he (accused) committed criminal acts in the capacity of a member of 'group of individuals' (relating to charge nos. 1,2,3, and 6) and in the capacity of an 'armed member' of 'group of individuals' (relating to charge no.5) Under what context the accused committed such acts forming part of attack directed against civilian population? We need to have look to the contextual backdrop of perpetration of such crimes in furtherance of 'operation search light 'on 25 March 1971.

373. It is essential to be established that the crimes for which the accused has been found criminally liable and guilty, as discussed above, were not isolated in nature and the same were committed under a different context and pattern in implementation of organizational policy and plan, although policy or plan are not considered as elements of the offence of crime against humanity which has already been discussed and resolved in the preceding paragraphs.

374. Thus, crime must not, however, be an isolated act. A crime would be regarded as an "isolated act" when it is so far removed from that attack. The expression 'directed against civilian population' is an expression which specifies that in the context of a crime against humanity the civilian population is the primary object of the attack.

375. In determining the fact as to whether the atrocious acts which are already proved to have been committed were directed against Bengali civilian population constituting the crimes against humanity in 1971 during the War of Liberation, it is to be considered that the criminal acts committed in violation of customary international law constituting the offences enumerated in section 3(2)(a) of the Act of 1973 were connected to some policy of the government or an organization. It is to be noted too that such policy and plan are not the required elements to constitute the offence of crimes against humanity. These may be taken into consideration as factors for the purpose of deciding the context upon which the offences were committed.

376. As regards elements to qualify the 'attack' as a 'systematic character' the Trial Chamber of ICTY in the case of ***Blaskic*** **[(Trial Chamber) , March 3, 2000, para 203]** has observed as below:

> "The systematic character refers to four elements which……may be expressed as follows: **[1]** the existence of a political objective, a plan pursuant to which the attack is perpetrated or an ideology, in the broad sense of the word, that is, to destroy, persecute or weaken a community; **[2]** the perpetration of a criminal act on a very large scale against a group of civilians or the repeated and continuous commission of inhuman acts linked to one another; **[3]** the perpetration and use of significant public or private resources, whether military or other; **[4]** the implementation of high-level political and/or military authorities in the definition and establishment of the methodical plan'"

Context prevailing in 1971 in the territory of Bangladesh

377. 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.

378. 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*** as mentioned above.

379. It is quite coherent from the facts of common knowledge involving the backdrop of our war of liberation for the cause of self determination that the Pakistani armed force, in execution of government's plan and policy in collaboration with the local anti liberation section belonging to JEI and its student wing ICS, Muslim League and other pro-Pakistan political parties namely Pakistan Democratic Party(PDP), Nejam E Islami etc. and auxiliary forces, had to deploy public and private resources. The target of such policy and plan was the unarmed civilian Bangalee population, pro-liberation people, and Hindu community and pursuant to such plan and policy, atrocities were committed to them as a 'part of a regular pattern basis' through out the long nine months of war of liberation. It may be legitimately inferred from the phrase **"committed 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.

380. The basis for planning of the 'operation search light' master plan, which was carried out with brute force by Pakistan army to annihilate the Bengalis reads as below:

OPERATION SEARCH LIGHT

BASIS FOR PLANNING

1. A.L [Awami League action and reactions to be treated as rebellion and those who support or defy M.L[Martial Law] action be dealt with as hostile elements.

2. As A.L has widespread support even amongst the E.P[East Pakistan] elements in the Army the operation has to be launched with great cunningness, surprise, deception and speed combined with shock action.

[**Source:** *'Songram Theke Swadhinata'*: Published in December 2010' Published By ; Ministry of Liberation War Affairs, Bangladesh; Page 182]

381. *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 : See also: Bangladesh Documents, page 371: Ministry of External Affairs, New Delhi]

382. Therefore, the crimes for which the accused Abdul Quader Molla has been found guilty were not isolated crimes, rather these were part of

organized and planned attack intended to commit the offence of crimes against humanity as enumerated in section 3(2) of the Act, in furtherance of policy and plan.

383. From the backdrop and context it is thus quite evident that the existence of factors, as discussed above, lends assurance that the atrocious criminal acts 'directed against civilian population' formed part of 'systematic attack'. Section 3(2) (a) of the Act of 1973 enumerates which acts are categorized as the offence of crimes against humanity. Any of such acts is committed 'against any civilian population' shall fall within the offence of crimes against humanity. The notion of 'attack' thus embodies the notion of acting purposefully to the detriment of the interest or well being of a civilian population and the 'population' need not be the entire population of a state, city, or town or village.

384. Thus, the phrase 'acts committed against any civilian population' as occurred in section 3(2)(a) clearly signifies that the acts forming attack must be directed against the target population to the accomplishment of the crimes against humanity and the accused need only know his acts are part thereof .

385. On the other hand, defence has not been able to establish even a hint that the murder was not a part of planned and systematic attack and the crimes for which the accused has been charged and found criminally liable were isolated crimes. Therefore, the facts and circumstances inevitably have proved the elements to constitute the offences of murder, rape, abduction, confinement and torture as crimes against humanity.

XXI. Some other issues agitated by the defence

(i) Investigation procedure

386. On Investigation procedure, Mr. Abdus Sobhan Tarafder, the learned defence counsel, at the very outset, has submitted that the basis of institution of the case is not clear. The Act does not provide provision as to how a case is to be instituted under the Act. But the Rule 2(6) of the ROP defines; 'complaint' on the basis of which investigation is to be done. However the IO has not disclosed the basis of initiating

investigation. The IO has considered the compliant petitions of two cases of Pallabi police station and Keraniganj police station. There has been no provision of transferring these two cases to the ICT by the Magistrate Court. Thus investigation into information obtained from the said complaint petition under the Act done by the P.W.12 is not founded on any legal basis and as such it is flawed and thereby submission of report on conclusion of investigation becomes doubted and flawed too. According to the IO the investigation was done by a 'team' which is not permitted by the Act and the ROP.

387. Under Rule 2(6) of the ROP a 'compliant' is defined as "any information oral or in writing obtained by the Investigation Agency including its own knowledge relating to the commission of a crime under section 3(2) of the Act". That is to say, the Investigation Agency is authorized to initiate investigation predominantly on information it obtains. It might have obtained information even from the compliant petitions of Pallabi and Keraniganj police stations cases. But that does not mean that those compliant petitions were the sole basis of initiating investigation into the alleged criminal acts of the accused allegedly committed during the war of liberation in 1971. For the reason of absence of any legal sanction of transferring those two cases to ICT the same, after receiving by the Registry, were in fact simply sent to the Investigation Agency of the ICT as the information relating to allegations brought therein falls within the jurisdiction of the Act of 1973, as observed by the Magistrate Court.

388. Rule 5 speaks of procedure of maintaining 'complaint register' and not the procedure of initiating investigation. Rather Section 8 and Rule 4 contemplate the procedure of holding investigation and it appears that the IO (P.W.12) accordingly has done the task of investigation. Investigating into the criminal acts allegedly committed by the accused was done not merely on the basis of above mentioned two compliant petitions lodged before the Magistrate Courts but also on the basis of necessary information which were required to be obtained and in doing so, working as 'team' does not appear to be materially fatal and has caused any prejudice to the accused.

(ii) Application praying direction to Mirpur Zallad Khana for production of statement of four witnesses for showing inconsistencies with that made before the Tribunal (filed at the stage of summing up of case by the defence)

389. After conclusion of trial and at the stage of summing up case defence filed an application together with 'photographed copy' of some documents allegedly the statement of P.W.3 Momena Begum, P.W.4 Kazi Rosy , P.W.5 Khandoker Abu Taleb which are claimed to have obtained from the museum of Mirpur Jallad Khana praying direction to the museum authority for production of the originals archived therein for showing contradiction and inconsistencies between the earlier narration and the testimony made in court in relation to fact described in charges. Admittedly, the same have been procured pursuant to a report published in a local daily 'The Daily Naya Diganta' on 13 December 2012.

390. The learned defence counsel has submitted that the above statement needs to be considered for assessing credibility of testimony of the P.W.s relating to the martial fact. Because narration made therein earlier is inconsistent with what has been testified before the Tribunal. The Tribunal is authorized to make comparison of sworn testimony of witnesses with their earlier statement and after such comparison it would reveal that the witnesses have made untrue version relating to pertinent fact.

391. First, the 'photographed copy' of alleged statement submitted before this Tribunal is not authenticated. Defence failed to satisfy how it obtained the same and when. Second, 'photographed copy of statement' does not form part of documents submitted by the defence under section 9(5) of the Act and thus the same cannot be taken into account. Third, the alleged statements were not made under solemn declaration and were not taken in course of any judicial proceedings. In the circumstances, the value attached to the said statements is, in our view, considerably less than direct sworn testimony before the Tribunal, the truth of which has been subjected to the test of cross-examination. Without going through the test said statement cannot be taken into consideration for determining inconsistencies of statement of witnesses with their earlier statement.

392. We are to consider whether a witness testified to a fact here at trial that the witness omitted to state, at a prior time, when it would have been reasonable and logical for the witness to have stated the fact. In determining whether it would have been reasonable and logical for the witness to have stated the omitted fact, we may consider whether the witness's attention was called to the matter and whether the witness was specifically asked about it. The contents of a prior alleged inconsistent statement are not proof of what happened.

393. Besides, Inaccuracies or inconsistencies between the content of testimony made under solemn declaration to the Tribunal and their earlier statement made to any person, non-judicial body or organisation alone is not a ground for believing that the witnesses have given false testimony. Additionally, false testimony requires the necessary *mens rea* and not a mere wrongful statement. We do not find any indication that the witnesses with *mens rea* have deposed before the Tribunal by making exaggeration.

394. For the reasons above, the Tribunal refrains from taking the account made to a non-judicial body into consideration for the purpose of determining credibility of testimony of witnesses made before the tribunal**.**

XXII. Plea of *Alibi*

395. No specific defence case could be attributed from the trend of cross-examination of prosecution witnesses by the defence. Rather we have found that contradictory suggestions have been put to prosecution witnesses, in order to prove the plea of *alibi.* The evidence adduced at trial demonstrated that for the most part, the accused did not dispute the facts alleged. He disputes by examining himself as D.W.1 that **(i)** since mid-March 1971 to November-December 1972, he was not in the locality of Mirpur, Dhaka **(ii)** he used to stay in Shahidullah hall of the University of Dhaka and on 12 March 1971 leaving Dhaka he went to his native home at Amirabad in Faridpur where he stayed till November-December 1972 **(iii)** he was not associated with the election campaign in

1970 and **(iv)** he had no link with the Jamat-e-Islami and Bihari hooligans of Mirpur locality namely Aktar goonda, Nehal goonda, Hakka goonda, etc. However, the defence case for the accused amounts to a complete denial of the responsibility of the accused for the crimes alleged against him and defence also took the specific plea of *alibi* in support of which it examined as many as 06 witnesses.

396. The accused has adduced and examined 06 witnesses including the accused himself, understandably to prove the plea of *alibi* and the assertion that accused was not at all concerned with the crimes for which he has been charged. 'I myself was not concerned with the commission of crimes'—it is a negative assertion and thus need not be proved by evidence. Such assertion relates to 'innocence' which shall have to be adjudicated on weighing prosecution evidence. However, defence shall have right to take plea of *alibi* and to adduce evidence to substantiate it, although adjudication of guilt or innocence cannot be based solely either on success or failure of such plea. Of six(06) witnesses examined by the defence 04 have been examined to establish the plea of *alibi* and 02 i.e D.W.4 and D.W.5 have been examined, as perceived, to exclude complicity of accused with the crimes as listed in charge nos. 3 and 5. We have already discussed the testimony of D.W.4 and D.W.5 as relevant to find out the truth. Now we will remain confined to the adjudication of the plea of *alibi* only.

XXIII. Finding on the Plea of *alibi* on evaluation of Evidence adduced by the defence

397. D.W.1 Abdul Quader Molla (accused) claims that he had stayed at his native village Amirabad, Faridpur since middle of March 1971 to November-December 1972 and he used to run business at a shop of Peer Saheb at Chowddarshi Bazar, during the entire time of his staying there. Presumably, running business is claimed to make the plea of *alibi* strengthened.

398. But D.W.3 Moslem Uddin Ahmed a resident of village 'Baish Rashi' under sadarpur police station, Fairdpur stated that he saw Abdul Quader Molla (D.W.1) running business at Chowdda Rashi Bazar for a

period of total one year i.e up to March 1972. While according to accused, he used to run business till November-December 1972.

399. Above contradictory version of D.W.1 and D.W.3 thus patently makes the claim of staying of accused at own native village and running business there becomes untrue causing reasonable taint to the plea of *alibi* .

400. D.W1. Abdul Quader Molla claims that in November-December 1972 he was brought back to Shahidullah Hall of university of Dhaka by Shajahan Talukder, the then Sadarpur thana Awami League President. But it has not been corroborated by any other evidence. Why he (accused) could not be able to come Dhaka even one year after the independence alone? Besides, this claim seems to be gravely unconvinced if the testimony of D.W.3 is considered simultaneously.

401. D.W.1 Abdul Quader Molla claims that at the end of July 1971 he came to Shahidullah Hall, Dhaka University and had stayed there for more than three weeks for the purpose of appearing in practical examination and again he returned back to his native village Amirabad, Fairdpur.D.W.2 and D.W 3 are from the village Amirabad, Faridpur. But none of them has corroborated D.W.1 on this fact. Additionally, accused could allegedly come to Dhaka University Hall alone even during the war of liberation but he had to come in December 1972 with the help of alleged local Awami League leader. Why? In absence of any explanation the above story does not inspire any credence at all.

402. Besides, D.W. 6 who claims to have maintained closeness with the accused when he was a resident student of Shahidullah Hall, Dhaka University stated that accused leaving Hall on 12 March 1971 had moved to his native village in Faridpur. D.W.6 was in job of Imam of the mosque at Shahidullah Hall where the accused too used to say prayer regularly. According to D.W.6 he remained at Hall throughout the period of war of liberation in 1971 and continued performing the job of Imam of the Hall mosque. If it is so, D.W.6 would have corroborated the fact of accused’s coming to Hall at the end of July 1971. Accused had stayed

for more than three weeks in the Hall but D.W.6 was unaware of it. Normal human prudence never suggests believing it. Thus the story of accused's coming to Dhaka from Amirabad, Faridpur at the end of July 1971 becomes fallacious. Consequently, the story of remaining at native village Amirabad, Faridpur does not carry any credence too. At the same time cumulative evaluation of their evidence, rather, has clearly corroded the plea of *alibi.*

403. Defence case is meant to confront the prosecution case for removing or shaking the truthfulness of complicity of accused with the commission of offence with which he is charged. A person accused of a criminal charge is presumed to be innocent until he is proven guilty. Therefore, the defence is not obligated to plead any case of his own to prove his innocence until he is found guilty through trial and the burden squarely lies upon the prosecution to prove the accused guilty of the charges. However, defence suggested specific defence case to P.W.4 Kazi Rosy that not the accused Abdul Quader Molla but one Qauder Molla who was a butcher by profession had committed the atrocities in 1971. P.W.4 denied it. However, defence, to substantiate this specific defence case has not adduced any evidence. Even the accused as D.W.1 does not aver so. Thus this suggestion too, in other words, offers an admission that accused Abdul Quader Molla was a co-perpetrator of the crime alleged in charge no.2.

404. However, despite the above legal position, in course of trial the defence shall have right to put his defence case or plea of *alibi,* while cross-examining the prosecution witnesses. But the Tribunal notes that no specific defence case can be attributed from the trend of cross-examination of prosecution excepting the plea of *alibi*. Even it has not been suggested as defence case that to any of prosecution witnesses that during the war of liberation accused Abdul Quader Molla had been at his native village Amirabad under Sadarpur police station, Faridpur and used to run business at Chowddarashi Bazar till he returned back to Dhaka in November-December 1972, and that he came to Dhaka University hall at the end of July 1971 and had stayed for more than three weeks for appearing in practical examination. That is to say,

without eliciting or disclosing any specific defence case earlier suddenly the defence has come up with a story of his staying and running business at native village by examining witnesses.

405. As has been held by the Appeals Chamber in the ***Celibici Case,*** the submission of an *alibi* by the Defence does not constitute a defence in its proper sense. It has been observed in the judgment that

> **"It is a common misuse of the word to describe an alibi as a "Defence". If a defendant raises an alibi, he is merely denying that he was in a position to commit the crime with which he is charged. That is not a Defence in its true sense at all. By raising this issue, the defendant does no more [than] require the Prosecution to eliminate the reasonable possibility that the alibi is true."**

406. However, in order to establish the plea of *alibi*, defence has come up with another story. D.W.1 Abdul Quader Molla stated that on 23 March 1971 in the locality of his native village one Mafizur Rahman started organizing training for freedom fighters locally and accordingly he and 30-40 others received training till the Pakistani army entered into Faridpur on 30 April 1971.

407. But the above defence cases do not appear to have confronted the prosecution case for excluding complicity of the accused. Besides, how far the claim of receiving training at own native village for joining freedom fight is believable? Admittedly, the accused was the president of Islami Chatra Sangha, Shahidulla Hall Unit, Dhaka University and prior to it he was the president of this student wing of Jamat E Islami (JEI) when he was student of Faridpur Rajendra College. We do not find any rationale to believe that being a potential leader of the student wing of a regimented political organisation Jamat E Islami accused Abdul Quader Molla was inspired to receive such training to join as freedom fighter.

408. Though the burden on the prosecution is not lessened because of plea of *alibi* taken by the accused and such a plea is to be considered

only when the prosecution has discharged the onus placed on it, once it is done, it is then for the accused to prove *alibi* with absolute certainty so as to exclude the possibility of his presence at the spot at the time of commission of the offence (**AIR 1997 SC 322, Rajesh Kumar v Dharambir and others**). It was held in **Mohan Lal Vs. State of H.P**. that plea of alibi must be proved with absolute certainty.

409. But it appears that the defence has failed to prove the plea of *alibi* with certainty to exclude the possibility of presence of the accused at the crime sites. On contrary, prosecution by adducing credible and relevant evidence has been successful in discharging its onus to prove complicity of the accused with the crimes committed. Besides, we have found from evidence of P.W.9 that in the month of March 1971, accused Abdul Quader Molla provided training to local Biharis of Mirpur being accompanied by 70-80 members belonging to Islami Chatra Sangha. In remains unshaken in cross-examination.

410. P.W.9 further stated that even after 16 December 1971 when the locality of Mirpur remained occupied, 7-8 hundred members of Al-Badar force led by accused Abdul Quader Molla and some Panjabi coming from Mohammadpur Physical Institute assembled with Biharis in Mirpur, hoisted Pakistani flag and intended to convert Bangladesh to Pakistan. Defence neither denied nor contradicted this version.

411. We have also found from testimony of P.W.1 Mozaffar Ahmed Khan that during the war of liberation in the month of November 1971 he came to Mohammadpur, Dhaka in disguise and on the way of his return to home he found accused Abdul Quader Molla being accompanied by his accomplices standing in front of Mohammadpur Physical Training Center which was known as the ‘torture cell’ of Al-Badar having rifle in hand. Tribunal notes that this version has been re-affirmed in cross-examination.

412. We have found that defence put contradictory suggestions to prosecution witnesses, in order to prove the plea of alibi which are**: (a)** Suggested to P.W.2 Syed Shahidul Huq Mama: **since 07 March to 31**

January 1972 Abdul Quader Molla had not been in Dhaka **(b)** Suggested to P.W.3 Momena Begum: **at the relevant time** Abdul Quader Molla did not reside in Mirpur **(c)** Suggested to P.W.4 Kazi Rosy: **since first part of 1971 to March 1972** Abdul Quader Molla had not been in Dhaka city **(d)** Suggested to P.W.5 Khandokar Abul Ahsan: Abdul Quader Molla had not been in Dhaka city **during 1971 and first part of 1972.**

413. The plea of alibi is to be proved by the defence, true. But the above contradictory suggestions put to prosecution witnesses do not appear to be compatible in composing the plea of *alibi* believable with absolute certainty.

414. The above relevant facts as well sufficiently and beyond reasonable doubt prove that **(i)** accused Abdul Quader Molla who was admittedly a potential leader of Islami Chatra Sangha (ICS), the student wing of jamat E Islami (JEI) became an armed member of Al-Badar and **(ii)** he had been staying in Dhaka during the war of liberation in 1971.

415. Exhibit-2 a book titled **'Sunset at Midday'** wherein the seventh line of paragraph two at page 97 that **"The workers belonging to purely Islami Chatra Sangha were called Al-Badar". Fox Butterfield** wrote in the New York Times, January 3, 1972 that**—" Al Badar is believed to have been the action section of Jamat-e-Islami, carefully organised after the Pakistani crackdown last March."** Therefore, story of receiving training by accused Abdul Quader Molla at own native village, in the month of March 1971, to join freedom fight is nothing but a cock and bull story.

416. The accused while examining himself as D.W.1 appears to have suppressed deliberately that he was associated with ICS while he was student of Dhaka University. We have found from **Exhibit-4** (*Jibone Ja Dekhlam*-Vol-5, page 153) a book written by Professor Ghulam Azam that the accused was a leader of ICS of Dhaka University. Thus, the plea of *alibi* and statement of D.W.1 in this regard does not inspire any amount of credence and appears to be a futile effort with intent to evade the charges brought against him.

417. In view of reasons enumerated above we are thus persuaded to conclude that the accused herein has miserably failed to bring on record any credible facts or circumstances which would make the plea of his absence even probable, let alone, being proved beyond reasonable doubt. But it could not be proved with absolute certainty so as to completely exclude the possibility of the presence of the accused in the locality of Mirpur, Dhaka at the relevant time.

XXIV. Conclusion

418. Despite lapse of long 40 years time the testimony of P.W.s of whom three are live witnesses to the incidents of atrocities narrated in the charges does not appear to have been suffered from any material infirmity. Besides, no significant inconsistencies between their testimony made before the Tribunal and their earlier statement made to the Investigation Officer could be found.

419. Now, another question comes forward as to whether the accused can be brought within the jurisdiction of the Tribunal if we consider that the prosecution has not been able to prove that the accused committed the crimes proved as a member of Al-Badar force? The answer is 'yes'. Section 3(1) provides jurisdiction of trying and punishing even any 'individual' or 'group of individuals' who commits or has committed, in the territory of Bangladesh any of crimes mentioned in section 3(2) of the Act. We have resolved the issue on the phrase 'individual' or 'group of individuals', as contained in section 3(1) of the Act of 1973, by way of amending the statute in 2009 together with the relevant Article of our Constitution. On this score as well, the accused cannot be relieved from being prosecuted and tried under the Act of 1973.

420. 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 Abdul Quader Molla, 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.

421. We are convinced from the evidence, oral and documentary, led by the prosecution that the accused, at the relevant time of commission of alleged crimes proved, acted as an atrocious member of 'group of individuals' in perpetrating the crimes. Accused's culpable association and conduct---antecedent, contemporaneous and subsequent, as have been found---all point to his guilt and are well consistent with his 'complicity' and 'participation' in the commission of crimes proved. As a result, we conclude that the accused Abdul Quader Molla had 'complicity' to the commission of the offences in relation to charge nos. 1, 2 and 3 for which he has been charged in the capacity of an 'individual' and a member of atrocious 'group of individuals'.

422. 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 charge nos. 5 and 6 we have found that the accused Abdul Quader Molla himself had participated and accompanied the armed gang of perpetrators to the accomplishment of crimes and as such he is held criminally responsible under section 4(1) of the Act of 1973 for the commission of crimes proved as listed in charge nos. 5 and 6.

423. **C.L. Sulzberger** wrote in the **New York Times, June 16, 1971** describing the horrific nature and untold extent of atrocities committed in the territory of Bangladesh. It shakes the conscious of mankind. It imprints colossal pains to the Bangalee nation. **C.L. Sulzberger** wrote that-

> "Hiroshima and Nagasaki are vividly remembered by the mind's eye primarily because of the novel means that brought holocaust to those cities. Statistically comparable disasters in Hamburg and Dresden are more easily forgotten; they were produced by what we already then conceived of as "conventional" methods.

> Against this background one must view the appalling catastrophe of East Pakistan whose scale is so immense that it exceeds the dolorimeter capacity by which human sympathy is measured. No one can hope to count the dead, wounded, missing, homeless or stricken whose number grows each day. “

[Source: Bangladesh Documents: Volume, page 442: Ministry of External Affairs, New Delhi]

424. The above observation made on 16 June 1971 gives an impression as to the scale and dreadful nature of atrocities which were carried out through out the war of liberation in 1971. The offences for which the accused Abdul Quader Molla has been found responsible are the part of such atrocities committed in context of the war of liberation,1971 in collaboration of anti-liberation and antagonistic political organisations namely Jamat E Islami, Muslim League, Nejam E Islami, group of pro-Pakistan people and the occupation Pakistani army with intent to annihilate the Bengali nation by resisting in achieving its independence.

425. Therefore, it must be borne in mind too that no guilty man should be allowed to go unpunished, merely for any faint doubt, particularly in a case involving prosecution of crimes against humanity and genocide committed in 1971 in violation of customary international law during the War of Liberation. Because, wrong acquittal has its chain reactions, the law breakers would continue to break the law with impunity.

426. ‘No innocent person be convicted, let hundreds guilty be acquitted’—the principle has been changed in the present time. In this regard it has been observed by the Indian Supreme Court that

> “A judge does not preside over a criminal trial, merely to see that no innocent man is punished. A Judge also presides to see that a guilty man does not escape. Both are public duties.” **[Per Viscount Simon in Stirland vs. Director of Public Prosecution: 1944 AC(PC) 315: quoted in State of U.P Vs. Anil Singh : AIR 1988 SC 1998]**

XXIV. VERDICT ON CONVICTION

427. For the reasons set out in this Judgement and having considered all evidence, materials on record and arguments advanced by the learned counsels in course of summing up of their respective cases , the Tribunal **unanimously** finds the accused **Abdul Quader Molla**

Charge No.1: **GUILTY** of the offence of 'complicity' to commit murder as **'crimes against humanity'** as specified in section 3(2)(a)(h) of the Act of 1973 and he be convicted and sentenced under section 20(2) of the said Act.

Charge No.2: GUILTY of the offence of 'complicity' to commit murder as **'crimes against humanity'** as specified in section 3(2)(a)(h) of the Act of 1973 and he be convicted and sentenced under section 20(2) of the said Act.

Charge No.3: GUILTY of the offence of 'complicity' to commit murder as **'crimes against humanity'** as specified in section 3(2)(a)(h) of the Act of 1973 and he be convicted and sentenced under section 20(2) of the said Act.

Charge No.4: NOT GUILTY of the offence of 'abetting' or in the alternative 'complicity' to commit murders as **'crimes against humanity'**as specified in section 3(2)(a)(g)(h) of the Act of 1973 and he be acquitted thereof accordingly.

Charge No.5: GUILTY of the offence of murders as **'crimes against humanity'** as specified in section 3(2)(a) of the Act of 1973 and he be convicted and sentenced under section 20(2) of the said Act.

Charge No.6: GUILTY of the offences of murder and rape as **'crimes against humanity'**as specified in section 3(2)(a) of the Act 1973 he be convicted and sentenced under section 20(2) of the said Act.

XXV. VERDICT ON SENTENCE

428. We have taken due notice of the intrinsic magnitude of the offence of murders as 'crimes against humanity' being offences which are predominantly shocking to the conscience of mankind. We have carefully considered the mode of participation of the accused to the commission of crimes proved and the proportionate to the gravity of offences. The principle of proportionality implies that sentences must reflect the predominant standard of proportionality between the gravity of the offence and the degree of responsibility of the offender. In assessing the gravity of the offence, we have taken the form and degree of the Accused's participation in the crimes into account.

429. We are of agreed view that justice be met if for the crimes as listed in **charge nos. 5 and 6** the accused Abdul Quader Molla who has been found guilty beyond reasonable doubt is condemned to a single sentence of **'imprisonment for life' And** for the crimes as listed in **charge nos. 1, 2 and 3** to a single sentence of **'imprisonment for fifteen (15) years'** under section 20(2) of the Act of 1973. Accordingly, we do hereby render the following unanimous ORDER on SENTENCE.

Hence, it is

ORDERED

That the accused **Abdul Quader Molla** son of late Sanaullah Molla of village Amirabad Police Station Sadarpur District-Faridpur at present Flat No. 8/A, Green Valley Apartment, 493, Boro Moghbazar PS. Ramna, Dhaka is found guilty of the offences of **'crimes against humanity'** enumerated in section 3(2) of the International Crimes (Tribunals) Act, 1973 as **listed in charge no.s 1, 2, 3, 5 and 6** and he be convicted and condemned to a single sentence of **' imprisonment for life'** for **charge nos. 5 and 6 And** also for the crimes as listed in **charge nos. 1, 2 and 3** to a single sentence of **'imprisonment for fifteen (15) years'** under section 20(2) of the Act of 1973. The accused Abdul Quader Molla is however found not guilty of offence of crimes against humanity as listed in **charge no.4** and he be acquitted thereof.

However, as the convict Abdul Quader Molla is sentenced to ‘imprisonment for life’, the sentence of ‘imprisonment for 15 years’ will naturally get merged into the sentence of ‘imprisonment for life’. This sentence shall be carried out under section 20(3) of the Act of 1973.

The sentence so awarded shall commence forthwith from the date of this judgment as required under Rule 46(2) of the Rules of Procedure, 2012 (ROP) of the Tribunal-2(ICT-2) and the convict be sent to the prison with a conviction warrant to serve out the sentence accordingly.

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

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

Justice Obaidul Hassan, Chairman

Justice Md. Mozibur Rahman Miah, Member

Judge Md. Shahinur Islam, Member