



# THE INTERNATIONAL CRIMES TRIBUNAL OBSERVER

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Asian International Justice Initiative (AIJI), a project of East-West Center and UC Berkeley War Crimes Studies Center\*

## I. EXECUTIVE SUMMARY

### THE VERDICT

This special report provides a detailed summary of the International Crimes Tribunal's third verdict, the Judgment in *Chief Prosecutor vs. Delowar Hossain Sayedee*<sup>i</sup>. The verdict was issued on 28 February 2013 and was the first verdict to be issued by Tribunal 1. We have attempted to distill the major conclusions expressed by the Tribunal into a digestible format. This report does not contain critical analysis of the legal merits of the judgment. The report simply is meant to facilitate broader access to and understanding of the ICT's proceedings.

Sayedee was found guilty on 8 Charges, specifically Charges 6, 7, 8, 10, 11, 14, 16 and 19. He was acquitted of Charges 1, 2, 3, 4, 5, 9, 12, 13, 15, 17 and 18. Charge 20 was previously dropped by the Prosecution.

The Tribunal sentenced Sayedee to death based on his conviction on Charges 8 and 10. Under Charge 8 he was found guilty of directly participating in abduction, murder and persecution as Crimes against Humanity in conjunction with the 8 May 1971 attack on houses in Chitholia, an arson attack on the Hindu community at Parerhat Bandar, and instigation of the torture and murder of a civilian, Ibrahim. Under Charge 10, Sayedee was found guilty of direct participation in persecution and murder as Crimes against Humanity, in conjunction with the 2 June 1971 arson attack on the Hindu Para of Umedpur, as well as for ordering the killing of an individual, Bisabali.

### CURRENT EVENTS IN BANGLADESH

The *Sayedee* verdict was issued against a backdrop of increasing tension within Bangladesh. On 5 February 2013, the ICT had found Qader Molla guilty on 5 out of 6 charges of Crimes against Humanity.<sup>ii</sup> However, the verdict sparked controversy when

the Tribunal announced that they were sentencing the Accused to life imprisonment. As he was leaving the Tribunal, Qader Molla angered sections of the public by flashing a “victory” sign to the media. In response, a mass protest formed in Shahbagh square where activists and the general public gathered to demand that the death penalty be implemented against all “war criminals.” The demonstration has grown in power and protesters have expanded their demands to include amending the ICT Act of 1973<sup>iii</sup> to allow the Prosecution to appeal sentencing decisions as well as acquittals, and to allow for the prosecution of organizations such as Jamaat-e-Islami. The Shahbagh movement has also called for the government to ban Jamaat-e-Islami as a political party. Throughout Dhaka, one can see posters and billboards calling for the death sentence against the defendants. Political parties became involved as well, issuing statements and holding rallies to identify or separate themselves from the Shahbagh movement.

On 28 February 2013, the anxiety about the outcome of the *Sayedee* case was palpable. Jamaat-e-Islami called a hartal the day of the verdict and on Friday there was significant violence throughout the country. During the following week there were four days of hartals called by opposition parties. The combination of the Shahbagh movement, the political manoeuvring taking place around the court, the actions of legislators in amending the ICT Act of 1973, and the growing tension in the country all speak to the deep impact of these trials on Bangladeshi society in a year leading up to elections.

## **II. PROCEDURAL HISTORY AND METHOD**

### **PROCEDURAL HISTORY**

Delwar Hossain Sayedee was first defendant detained by order of the ICT on 2 November 2010. Tribunal 1 Issued the Charge Framing order on 3 October 2011. The Prosecution deposed a total of 28 witnesses, including the Investigating Officer assigned to the *Sayedee* case. The Tribunal also admitted into evidence the out-of-court statements of 16 other witnesses whom the Prosecution alleged were either dead or could not be produced without unreasonable delay or expenditure. This is allowed under Section 19(2) of the ICT Act. On 14 August 2011, after hearing an application from the Prosecution, the Tribunal limited the Defense to 20 witnesses. The Judges concluded that the proposed Defense list of 48 witnesses was excessive. The Defense ultimately called 17 witnesses before the Tribunal. Closing Arguments concluded on 29 January 2013.

### **TRIAL ADMINISTRATION AND CONTROVERSY**

The Trial was marked by a number of controversies. In particular, the Defense alleged that a number of witnesses who provided out-of-court statements under Section 19(2) had in fact been available to appear before the Tribunal, but were intentionally kept by the Prosecution at the Witness Safe House. Additionally, on November 5th the Defense reported that its witness, Shukharanjan Bali, was abducted from outside the tribunal gates

by plain-clothes police officers, reportedly identifying themselves as belonging to the Detective Branch. Bali was originally identified as a Prosecution witness, but later agreed to testify for the Defense. The Defense alleged that the Prosecution did not want him to appear and testify. The Tribunal claimed that it investigated the incident and found no evidence that such an event took place. Applications for a writ of habeas corpus were rejected by the Supreme Court of Bangladesh.

Finally, in early December, the trial was disrupted by controversy when the former Chairman of Tribunal 1 announced that his email and skype conversations had allegedly been hacked. The Economist and other media outlets went on to publish excerpts of alleged conversations between Chairman Nizamul Hoq and foreign legal expert Ahmed Ziauddin. The Defense alleged that these conversations showed collusion between the Judges, outside activists advocating for the conviction of the alleged war criminals, and the Prosecution. The former Chairman resigned on 11 December 2012 and was replaced by ATM Fazole Kabir, who had previously sat as a Judge in Tribunal 1 before being moved to head Tribunal 2. Under the reconstituted bench, the Tribunal rejected the Defense's application for retrial,<sup>iv</sup> stating that the contents of the alleged skype and email conversations were inadmissible as illegally obtained evidence, and that the independence of the Tribunal had in no way been compromised. The Tribunal ordered the parties to resubmit their closing arguments, so that all three presiding judges could hear the summation of the case. The resubmission of Closing Arguments was concluded on 29 January 2012, and has been awaiting judgment for the past month.

#### **ADJUDICATION OF THE CHARGES**

The Tribunal states that, in adjudicating the charges, it relied on “1) facts of common knowledge; ii) context of the attack directed against unarmed Hindu Civilians; iii) Documentary and circumstantial evidence iv) political status of the accused, if any at the time of occurrences, v) Link of the accused with the local Pakistani armed forces and his participation in the commission of offences charged, vi) What was the status and role of the accused at the relevant time and now [sic] he used to maintain his relation with Pakistani occupation armed forces.” (*Sayedee*, Judgment, para 39).

The Tribunal reiterated that the regular Bangladeshi code of evidence do not apply in these proceedings, as per the rules of the ICT Act, and that they may consider any evidence including reports, photographs, newspapers, books, films, etc., that “appear to have probative value (section 19(1) of the Act).” (*Sayedee*, Judgment, para 35). Additionally the Tribunal may consider hearsay.

The Tribunal stated that, “the case before us depends mostly on narratives of live witnesses who claim to have witnessed the occurrences and sustained trauma as well.” (*Sayedee*, Judgment, para 38).

### **III. HISTORICAL BACKGROUND**

Before addressing the legal and factual issues of the case, the Tribunal's Judgment provides a brief historical background on the Liberation War. They stated that the war began after "operation search light" on 25 March 1971, and continued until 16 December 1971 when the Pakistani forces surrendered. Importantly the Tribunal states that, "it is the fact of common knowledge that thousands of incidents happened through out the country as part of organized and planned attack." While not explicitly stated, one might infer that the Tribunal effectively intended to take judicial notice of a "common fact" by making this observation. Existence of a "widespread or systematic attack" on a civilian population at the time of the Liberation War would be a key element of Crimes against Humanity (see more below).

### **IV. LEGAL ISSUES RAISED BY THE DEFENSE**

Before examining the specific charges against Sayedee, the Judgment first addresses the substantive legal questions raised by the Defense throughout the course of the trial.

#### **THE EFFECT OF THE TRIPARTITE AGREEMENT AND IMMUNITY GRANTED TO 195 PAKISTANI WAR CRIMINALS**

The Tribunal begins its evaluation of the Defense's legal arguments with the issue of the Tripartite Agreement. The *Sayedee* Judgment closely tracks the conclusions made by Tribunal 2 in the *Kalam Azad*<sup>v</sup> and *Qader Molla*<sup>vi</sup> cases; paragraphs 46 – 49 of *Sayedee* are nearly identical to paragraphs 61-64 of the *Kalam Azad* Judgment and paragraphs 104-108 of the *Qader Molla* Judgment.

Mirroring the previous verdicts, Tribunal 1 concludes that the Tripartite Agreement of 1974 does not present a bar to the prosecution of any "member of 'auxiliary force' or an 'individual' or member of 'group of individuals'" because the agreement was an executive act that derogated from Bangladesh's existing obligations under international law and customary law, particularly the Universal Declaration of Human Rights and the ICT Act itself. Furthermore the Tribunal states that the Act does not require the prosecution of Pakistani armed forces before members of auxiliary forces or groups of individuals may be prosecuted. They conclude that the ICT Act establishes jurisdiction for the prosecution of armed forces and "individuals" or "groups of individuals." (*Sayedee*, Judgment, para 46-51).

#### **AMENDMENT OF SECTION 3(1) OF THE ICT ACT IN 2009**

The words "individual" and "group of individuals" were added to the ICT Act by amendment in 2009. The Defense has argued, in *Sayedee* and in other cases, that the retroactive amendment is illegal, and the Accused cannot be prosecuted as an 'individual.' In the Judgment, the Tribunal dismisses this argument, stating that, as a whole, the ICT Act is retrospective, but that this is permissible under customary

international law. The Tribunal concludes that the terms “individual” and “group of individuals” have been incorporated both into the ICT Act and Article 47(3) of the Constitution. Furthermore, the Judgment states that, as a person charged with crimes against humanity and genocide, the Accused has no right to challenge any law relating to the prosecution because of Article 47(A) of the Constitution.

*Article 47(3)*

*Notwithstanding anything contained in this Constitution, no law nor any provision thereof providing for detention, prosecution or punishment of any person, who is a member of any armed or defence or auxiliary forces or who is a prisoner of war, for genocide, crimes against humanity or war crimes and other crimes under international law shall be deemed void or unlawful, or ever to have become void or unlawful, on the ground that such law or provision of any such law is inconsistent with, or repugnant to any of the provisions of this Constitution.*

*Article 47A.*

*In applicability of certain articles.*

*(1) The rights guaranteed under article 31. Clauses (1) and (3) of article 35 and article 44 shall not apply to any person to whom a law specified in clause (3) of article 47 applies.*

*(2) Notwithstanding anything contained in this Constitution, no person to whom a law specified in clause (3) of article 47 applies shall have the right to move the Supreme Court for any of the remedies under this Constitution.*

Therefore the Tribunal concludes that the Defense’s argument regarding the prospective or retrospective nature of the amendment to Section 3 of the ICT Act is “quite immaterial to [Sayedee] in consideration of his legal status and accordingly the defence objection is not sustainable in law.” (*Sayedee*, Judgment, para 54).

## **DELAY IN BRINGING PROSECUTION**

The Tribunal next turns to the question of whether the span of 40 years between the alleged commission of the crimes and the initiation of prosecution presents a challenge to the legitimacy of the trial. Closely following the conclusions of Tribunal 2 in the *Qader Molla* and *Kalam Azad* cases, Tribunal 1 states that “time bar should not apply to the prosecution of human rights crimes.” (*Sayedee*, Judgment, para 55). They note that there is no statute of limitations is mentioned in either the Genocide Convention of 1948 or the Geneva Conventions of 1949. Additionally the Tribunal cites Article 1 of the Convention on the Non-Applicability of Statutory Limitations to War Crimes and Crimes against Humanity, as grounds for showing that these types of prosecutions cannot be barred by time limits.

The Tribunal also refers to examples of other prosecutions, including ongoing prosecution of Nazis, trials of crimes committed during Chile's 1973 revolution, trials at the Extraordinary Criminal Chambers of Cambodia dealing with issues from the Khmer Rouge era, and trials of heads of state like Slobodan Milosevic, Charles Taylor, and Augusto Pinochet. Therefore they find that "the delay itself does not preclude prosecutorial action to adjudicate the culpability of the perpetrator of core international crimes." (*Sayedee*, Judgment, para 57.)

## **DEFINITION OF CRIMES UNDER THE ICT ACT**

The Tribunal addresses the question of the definition of Crimes against Humanity in two places within the Judgment. Paragraphs 17-32 detail the definitions of international crimes under other Statutes and the Tribunal's own conclusions about the compatibility of the ICT Act with current international standards. In paragraphs 59-62 the Tribunal acknowledges and dismisses the Defense's contention that the definitions of the crimes under the ICT Act are inadequate because they are incongruent with international customary law.

### Consistency of ICT Act of 1973 and other Statutes for International Criminal Tribunals

The Tribunal notes that "many have expressed their concern" about differences between the definition under the ICT Act and international standards. The Tribunal dismisses these concerns by concluding that international standards are in fact not as clear or consistent as critics of the ICT claim: "looking at the contemporary standards of definition of 'Crimes against Humanity' in various statutes on international crimes, the first observation can be made is that there is no 'consistency' among definitions" (Judgment, para. 19). They then provide the text of the relevant statutes in the Rome Statute, International Criminal Tribunal for Rwanda (ICTR), International Criminal Tribunal for the former Yugoslavia (ICTY), and finally the text of the ICT Act. The first two of these Statutes expressly require that crimes against humanity be committed as part of "a widespread or systematic attack against any civilian population." (Rome Statute, Article 7; ICTR Statute, Article 3). The Rome Statute requires "knowledge of the attack," while the ICTR requires the attack be on "national, political, ethnic, racial or religious grounds." (*Ibid.*) On the other hand, the ICTY requires that the crimes be "committed in armed conflict, whether international or internal in character, and directed against any civilian population." (ICTY Statute, Article 5.) The ICT Act of 1973 does not explicitly state requirements of conflict or knowledge, but does state that the crimes are committed "against any civilian population."

*3. (1) A Tribunal shall have the power to try and punish any individual or group of individuals, or any member of any armed, defence or auxiliary forces, irrespective of his nationality, who commits or has committed, in the territory of Bangladesh, whether before or after the commencement of this Act, any of the crimes mentioned in sub-section (2).*

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

The Tribunal notes that Article 5 of the ICTY Statute requires that Crimes against Humanity be committed during an armed conflict, but states that “the statute doesn’t require the crime to be committed as part of widespread or systematic attack on the civilian population, neither it requires [sic] that the crime be perpetrated on discriminatory grounds.” (*Sayedee*, Judgment, para 24). Citing broadly to the *Tadic Decision on Interlocutory Appeal on Jurisdiction* from the ICTY Appeals Chamber and the *Tadic Judgment* from the ICTY Trial Chamber, the Tribunal also asserts that “although Article 5 of the ICTY statute required a nexus with armed conflict, such a requirement is unnecessary under international law” (*Sayedee* Judgment, para 25; no paragraph citation is provided to the *Tadic* decisions).

A review of the *Tadic Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction* shows that the ICTY did state that, although Article 5 of its governing statute may provide a narrower definition, “It is by now a settled rule of customary international law that crimes against humanity do not require a connection to international armed conflict. Indeed . . . customary international law may not require a connection between crimes against humanity and any conflict at all.” (*Tadic, Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction*, Appeals Chamber, 1995, para 141). The Trial Judgment cites to this same sentence. (*Tadic, Opinion and Judgment*, Trial Chamber, 1997, para 623.)

The Tribunal also refers to the *Tadic* case to note that, while the ICTY Statute does not explicitly require the elements of 1) a widespread or systematic attack or 2) discriminatory basis, the case law shows that they interpret “against any civilian population” to mean that the crimes must be committed against a specifically identified group – implying discriminatory intent. Additionally, the Tribunal concludes from the *Tadic* case that the ICTY further interpreted “against any civilian population” to implicitly mean that the crimes must be “organized and systematic” and “of a certain scale and gravity.” (Again, the *Sayedee* Judgment does not cite specific paragraphs of the *Tadic* case. A word search of the *Tadic Opinion and Judgment* of the Trial Chamber did not give any matches for these quotes).

The text of the *Tadic* Trial Chamber’s Judgment actually tracks more closely with the requirements of the other tribunals than the ICT states. For instance, in *Tadic*, the ICTY Trial Chamber Concluded that:

“‘directed against any civilian population’ is interpreted to include a broad definition of the term ‘civilian.’ It furthermore requires that the acts be undertaken on a **widespread or systematic basis and in furtherance of a policy**. The Report of the Secretary-General and the interpretation of several Security Council members reveal the additional requirement that all relevant acts must be **undertaken on discriminatory grounds**. Finally, the perpetrator must have **knowledge of the wider context** in which his act occurs.” (*Tadic Opinion and Judgment*, Trial Chamber, 1997, para 626; emphasis added).

Beyond ICTY jurisprudence, the ICT Judgment looks to its own statute for guidance on defining crimes against humanity. The ICT Act of 1973 does not contain a requirement of a discriminatory element, except in the case of persecution. The Tribunal claims that “law in this area is mixed” and so determines that the discriminatory element is only required for persecution, and does not apply to the other crimes specified in Section 3(2)(a). (*Sayedee*, Judgment, para 30(2).) The Tribunal also states that the ICT Act does not require a widespread or systematic attack, but refers to *Tadic* by way of defining “civilian population” to indicate such an attack. They then conclude, without detailed discussion, “It is now well-settled that the attack in 1971 was widespread and systematic in nature.” (*Sayedee*, Judgment, para 30(3).)

The Tribunal opines that the proper construction of Section 3(2)(a) of the ICT Act, defining crimes against humanity, should be understood as follows. First, the Tribunal states that the existence of an armed conflict is “by definition, not mandatory.” (*Sayedee*, Judgment, para 32(1).) Interestingly, the Tribunal states that an “indiscriminate attack on civilian population” could be termed as Crimes against Humanity, even if it took place after 1971. It is unclear if this statement means that the Tribunal sees its jurisdiction as extending beyond atrocities committed in conjunction with the Liberation War. The ICT Act of 1973 does not limit the Tribunal to a particular time. Additionally, the Tribunal states “for example, minority oppression in 2001 was a pure example of crime against humanity.” Assuming that this statement is referring to the history of Bangladesh, there was violence in 2001 leading up to elections at the end of the year when a BNP-led (a party in opposition to the Awami League) coalition swept, winning 216 of 300 seats in the Jatiya Sangshad. The Awami League accused the BNP of rigging the elections, though the AL had faced increasing public distrust because of a rise in criminal activity and violence that year. The critical point is that no violence committed during 2001 in Bangladesh has been litigated as a Crime Against Humanity. To cite to it as a “pure example” of crime against humanity is unprecedented.

Next, the Tribunal states that, even though the ICT Act of 1973 does not explicitly require a widespread or systematic attack, the term “any civilian population” indicates that the attack is directed against more than one person and – relying on the *Tadic* case – should be understood to imply a systematic or widespread attack against civilians. Finally, the Tribunal concludes that the term “civilian population” indicates a predominately civilian target for the attack. Nonetheless, they note that, “a population



may be considered as ‘civilian’ even if non-civilians are among it, as long as it is predominantly civilian.” (*Sayedee*, Judgment, para 32(5)).

#### Definitions of Crimes as Addressed in “Legal Issues”

The Tribunal returns to the question of the definition of crimes at paragraphs 59-62. They state that the ICTY statute does not require widespread or systematic attack as elements of crimes against humanity, and additionally does not require knowledge. They acknowledge that this differs from the definition under the Rome Statute, but reiterate that there is “no actual consistency in the definition of ‘Crimes against Humanity.’” (*Sayedee*, Judgment, para 61.) The Tribunal concludes that the definition of Crimes against Humanity and Genocide under the ICT Act of 1973 comport with the international standard. They also state that, “the Tribunal shall not be precluded in seeking guidance from international references and evolved jurisprudence, if it is so indispensably required in the interest of fair justice.” (*Sayedee*, Judgment, para 62.)

#### **V. PROCEDURAL ISSUES AND ALLEGED PREJUDICE TO THE ACCUSED**

At the end of its section on legal issues, the Tribunal briefly addresses Defense claims that procedural irregularities prejudiced Sayedee, and should prevent the trial from moving forward.

##### **DOUBLE JEOPARDY**

First, the Tribunal acknowledges that the Defense had objected that the case at the ICT went forward when two criminal cases based on the same alleged incidents are pending against the Accused in magistrate court. The Defense has alleged that these proceedings are duplicative, and therefore constitute double jeopardy. The Tribunal dismisses this objection in the Judgment, stating that the ICT Act of 1973 is a special law and that “ordinary criminal offence shall not stand as a barrier on the way of holding trial of those special crimes mentioned above.” (*Sayedee*, Judgment, para 63).

##### **ALLEGED SKYPE CONTROVERSY**

Finally, the Tribunal briefly addresses the Defense’s objections regarding the alleged Skype controversy. In early December the Economist and national media published alleged conversations between the then Chairman of Tribunal 1 and Ahmed Ziauddin, a Belgium-based legal expert and activist in favor of the prosecution of alleged war criminals. The Defense contend that these conversations show collusion between the Prosecution, Judges, and outside advocates, and that Ziauddin was involved in drafting as many as five judicial orders, including the Charge Framing Order against Sayedee. The

Defense argued that these procedural irregularities have prejudiced the Defense and cast doubt on the independence of the Tribunal.

The Tribunal stated that this issue had already been disposed of in their previous order on 3 January 2013, “with the observation that the act of recording any private skype conversation and hacking E-mail communications are nationally and internationally recognized as crime ... this Tribunal cannot take cognizance of such hacked documents which are inadmissible in [sic] evidence.” (*Sayedee*, Judgment, para 65). The Tribunal stated that the Chairman was only one of three judges, and that all orders were passed with the support of the other two judges, meaning that they remain valid even if one excludes the Chairman’s vote. Furthermore, the Tribunal dismissed the Defense’s objection that the Charge Framing Order was written by someone other than the judges, by stating the Order is “nothing but a concise form of the formal charge as submitted by the prosecution.” (*Sayedee*, Judgment, para 65.)

## **VI. FACTUAL FINDINGS OF THE COURT**

After disposing of the Defense’s legal arguments, the Tribunal turns to the factual findings in the case.

### **SAYEDEE AS A MEMBER OF RAZAKAR BAHINI/ PEACE COMMITTEE**

In the Judgment, the Tribunal appears to take judicial notice of the involvement of the Razakar, Al-Bador, Al-Shams and Peace Committee groups in the commission of atrocities during the Liberation War. (*Sayedee*, Judgment, para 66). The court assesses the evidence produced by the Prosecution supporting the allegation that Sayedee was in fact a member of the local Razakar Bahini and Peace Committee in 1971. The Tribunal summarizes that Prosecution witnesses 1, 2, 4, 5, 6, 7, 8, 9, and 11 testified that Sayedee helped to form and participated in both the Razakar Bahini and the Peace Committee. Prosecution witnesses 3 and 10 provided testimony supporting the allegation that Sayedee was a Razakar. The Tribunal also noted that Sayedee is named as a member of one or both of these groups in a several exhibited newspaper articles and reports: the 10 February 2007 issue of the *Dainik Samokal*; Exhibit 35, findings of the War Crimes Facts Finding Committee, Truth Commission for Genocide in Bangladesh; book by Dr. M.A Hasan [Title in Bengali]; Exhibit FV, “*Santi Committee 1971*, exhibited by the Defense in the Gholam Azam case; Exhibit 8, the 5 March 2001 issue of the *Bengali Daily Janakantha*; and Exhibit 11, the 4 November 2007 issue of the Bengali Daily Bhorer Kagaj.

Noting in particular the oral evidence of Prosecution witness 5 and the documentary evidence, the Tribunal concludes that “it is well-proved that the accused was a prominent member of Razakar Bahini of Parerhat area during the War of Liberation and he actively participated in different atrocious activities committed by local Razakar Bahini in association with Pakistani occupation forces.” (*Sayedee*, Judgment, para 84.) Therefore

the Tribunal holds that Sayedee may be considered a member of an auxiliary force under Section 2(a) of the ICT Act. However, they also note that he would be subject to liability as an individual or member of a group of individuals even if this had not been proven.

## **VII. ASSESSMENT OF THE CHARGES**

### **CHARGES 1-4, AND 13: CRIMES AGAINST HUMANITY AND GENOCIDE**

The Tribunal groups together its discussion of Charges 1-4 and 13, in which the Prosecution relied solely on the out-of-court witness statements made to the Investigation Officer under section 19(2) of the ICT Act. Section 19(2) provides that such witness statements are admissible where the witness cannot be produced at trial. The Defense challenged the admission of these statements, and alleged that the witnesses in question were not actually dead or unavailable. As such, Defense argued, their statements should not be relied on. The court concludes that, “It is undisputed that not a single maker of those statements has been examined to prove the occurrences [sic] and as such it is undeniable that the defence did not get an opportunity to cross-examine those makers of statements to find out the truth ... if the maker of such statement is not confronted during trial, such unsafe statement [sic] loses its credibility.” (*Sayedee, Judgment*, para 95). Therefore the Tribunal found that these out-of-court statements could not, by themselves, form the basis for conviction. The Tribunal ultimately found Sayedee not guilty of these charges.

### **CHARGE 5: ABDUCTION AND MURDER AS CRIMES AGAINST HUMANITY**

Sayedee is charged with helping to plan and carry out the abduction and murder of three police officers in Pirojpur on 5 May 1971. The Judgment notes that the Prosecution only presented one witness, Prosecution witness 27, in support of Charge 5. The Court acknowledges that his testimony was entirely based on hearsay, and “has not been corroborated by any local witness or by any documentary evidence.” (*Sayedee, Judgment*, para 101). Therefore, they hold that “the uncorroborated hearsay evidence adduced by P.W. 27 has got no provative [sic] value and as such charge No. 5 has not been proved beyond reasonable shadow of doubt.” (*Ibid.*)

### **CHARGE 6: PERSECUTION AS CRIME AGAINST HUMANITY - LOOTING OF GOLD AND GOODS FROM PARERHAT AREA**

Sayedee is charged with the crime of persecution as a Crime against Humanity under Charge 6. It is alleged that he led a team of Peace Committee members to the Parerhat Bazar, where he identified the homes and businesses of Awami League supporters, Hindus, and supporters of the Liberation War to the Pakistani Army, and assisted in looting those homes and shops. The Prosecution relied on the testimony of Prosecution witnesses 1, 2, 3, 4, 8, 9, 12, and 13, who stated that Sayedee was present at Parerhat, and participated in the looting of homes and businesses. The Tribunal summarized the

testimony of Defense witnesses 1, 3, 13, 14 and 16. They observed that these statements “corroborated the barbarous atrocities such as genocide, rape, looting, arson, etc. committed by Pakistani Army and local members of Peace Committee and Razakar Bahini, but they intentionally did not utter the name of the accused as a perpetrator.” (*Sayedee*, Judgment, para126). Nonetheless, the Tribunal concluded that the Accused “substantially contributed and facilitated to [sic] the crimes against Humanity with full knowledge.” (*Ibid.*)

#### **CHARGE 7: TORTURE OF SHAHIDUL ISLAM SELIM, LOOTING OF GOODS, ARSON<sup>vii</sup>**

Sayedee is charged with leading a team of armed accomplices and Pakistani Army members in a raid on the house of Shahidul Islam Selim, abetting the torture of Nurul Islam Khan, and destroying Selim’s house by arson. The Prosecution relied on testimony from Prosecution witnesses 1, 8, and 12, who claimed to have seen the house set on fire. (It is unclear from the summary whether these witnesses personally saw Sayedee at the scene, and/or witnessed him identify Nurul Islam Khan to the Pakistani Army who later tortured him.) Prosecution witness 8 saw the house set on fire.

The Judgment concludes that the testimony of Defense witnesses 3, 7 and 15 supported the Prosecution’s claim that, on the specified date, the Pakistani Army and some other people destroyed Nurul Islam Khan’s house in Baduria and other houses in Chitholia. They further opine that the testimony of the Prosecution witnesses supports the conclusion that Sayedee “substantially contributed and facilitated the crime against Humanity with full knowledge as he was present at the crime sites.” (*Sayedee*, Judgment, para 139).

#### **CHARGE 8: ABDUCTION, MURDER AND PERSECUTION AS CRIMES AGAINST HUMANITY**

Under Charge 8 Sayedee is accused of leading his “accomplices” with the Pakistani Army on a raid of Manik Posari’s house, as well as committing arson and looting in the Hindu Community at Parerhat Bandar. He is additionally charged with abducting one Mofizuddin, who was later tortured at the Army Camp, and instigating the murder of Ibrahim, alias Kutti, by the Pakistani Army.

The Judgment notes that Prosecution witnesses 2, 4, 6, 7, 8, 9, 10, 11, and 12 testified in support of the charges against Sayedee, all stating that they had witnessed the attacks and that Sayedee had been present. In particular, Prosecution witness 7 testified as an eye-witness to the killing of Ibrahim, alias Kutti, and testified that Sayedee was part of the Razakar Bahini group that caught him and the deceased. The Tribunal also references the testimony of Defense witnesses 13, 15, and 17, but notes that they corroborated the fact that killing, rape, looting etc. were committed by the Pakistani Army, Peace Committee and Razakars, and that they were specifically involved in burning the house of Nuru Khan and other homes in Chitholia. The Tribunal does not discuss issues of credibility or contradictions between the Defense and Prosecution cases.

### **CHARGE 9: PERSECUTION AS A CRIME AGAINST HUMANITY**

Under Charge 9, Sayedee is accused of leading an armed group, along with the Pakistani Army, to raid the house of Abdul Halim Babul in Nalbunia, loot its valuables, and burn it down. The Judgment refers to the testimony of Prosecution witnesses 14, and notes that, at the time of the alleged crime, he was 12 or 13 years of age. The age of the witness, combined with the fact that he claims to have seen Sayedee from a far distance, leads the Tribunal to conclude that the Prosecution failed to prove the charge. No other witness was deposed to corroborate Prosecution witness 14's statements.

### **CHARGE 10: PERSECUTION AND MURDER AS CRIMES AGAINST HUMANITY**

Under Charge 10 Sayedee is accused of leading an arson attack against the Hindu Para of Umedpur on 2 June 1971, along with associates and the Pakistani Army. He is also accused of commanding the death of Bisabali. The Judgment discusses the testimony of Prosecution witness 1, 5 and 9, and concludes that Sayedee did in fact participate in the attack on the Hindu para, burning about 25 homes, and ordering the death of Basabali. They note that Prosecution witnesses 5 and 9 were eye-witnesses to the occurrences. The Court therefore concludes that "it is well proved that the accused was involved with the commission of murder and persecution within the purview of crimes against Humanity." (*Sayedee*, Judgment, para 175).

It should be noted that Shukharanjan Bali, the Defense witness who was allegedly abducted outside of the tribunal on 5 November 2012, was scheduled to testify regarding Charge 10. The Tribunal does not mention Bali in the Judgment, nor the alleged disappearance. In fact, none of the Defense's counter arguments are mentioned at all on this Charge.

### **CHARGE 11: TORTURE AND PERSECUTION AS CRIMES AGAINST HUMANITY**

Sayedee is accused under Charge 11 of leading a team of Peace Committee members and the Pakistani Army on a raid of the house of freedom-fighter Mahbulul Alam Howlader, and of detaining and torturing his brother Abdul Mazid Howlader. The Judgment summarizes the testimony of Prosecution witnesses 1 and 5, eye-witnesses to the 2 June 1971 events. They state, "the Defence cross-examined P.W.1 and 5 elaborately but the version [sic] as to presence of accused Delowar Hossain Sayeedi at crime site remains unshakened [sic]." (*Sayedee*, Judgment, para 181). The Tribunal found that Sayedee "knowingly contributed and facilitated in the commission of looting valuables from the house of civilian population which is considered as persecution within the purview of crimes against Humanity." (*Ibid.*).

## **CHARGE 12: GENOCIDE**

Under Charge 12 Sayedee is accused of leading 15-20 armed accomplices to the Hindu Para of Parerhat Bazar, capturing and killing 14 Hindus with the intent to destroy in whole or in part, their religious group. However, the Tribunal found that no Prosecution witness provided testimony connecting Sayedee to this charge.

## **CHARGE 14: PERSECUTION AND RAPE AS CRIMES AGAINST HUMANITY**

The Prosecution alleged that towards the end of the Liberation War, Sayedee led a team of Razakar Bahini in an attack on the Hindu para of Hoglabunia. As part of the attack, members under Sayedee's control allegedly raped Shefali Gharami. The Tribunal Judgment summarized the testimony of Prosecution witnesses 1, 3, 4 and 23. The first three testified that Razakars were responsible for rape, arson, and killing in general throughout the Pirojpur District. They also testified that Delowar Hossain Sayedee was involved with the Razakars and the Peace Committee. It does not appear that these witnesses claimed to have been eye-witnesses. Prosecution witness 23 testified that his wife told him she was raped by the same person who forced him to convert to Islam, Delowar Sikder. He also testified that, 4 or 5 months after the event, his wife gave birth to a daughter, but was stigmatized by the community, and ultimately moved to India. The Tribunal concludes that, even though Shefali Gharami herself could not be examined, the testimony of Prosecution witness 23 "cannot be disbelieved." (*Sayedee*, Judgment, para 190).

Under this count, the Tribunal cites to the ICTR case of *Akayesu* and its definition of "sexual violence as a constituent act of genocide." They briefly discuss how the *Akayesu* case differentiated between rape and sexual violence more broadly. It is unclear why the Tribunal relies on this case law, as the charge against Sayedee is for rape only and does not concern genocide or a broader definition of sexual violence. The Tribunal concludes that "the accused as a member of Razakar bahini was present in [sic] the crime site having full knowledge about the said crime of rape and he substantially contributed and facilitated in the commission of said crime." (*Sayedee*, Judgment, para 192).

## **CHARGE 15: GENOCIDE**

Sayedee is accused of leading 15-20 Razakars in an attack on the village of Hoglabunia, and abducting ten Hindu civilians. He allegedly delivered these abductees to the Pakistani Army, who ultimately killed them. Prosecution witness 23 testified that 9 persons were abducted from his village, but that he did not see who abducted them. Prosecution witness 12 testified that he heard that someone by the name of Sayeedi Saheb was the treasurer for a fund created with looted valuables from crimes committed in the area. The Tribunal also acknowledged that the Prosecution had produced two out-of-court witness statements made to the Investigating Officer, and admitted under Section 19(2) of the ICT Act as Exhibits 259 and 264. These statements claim that Sayedee, alias Delu,

was a member of the Peace Committee, and spoke Urdu well. They claim that he was also a member of the Razakar Bahini, killed people in Hoglabunia and Umedpur, and looted the homes of Hindus and freedom-fighters.

The Judgment assesses the evidence in support of Charge 15, and notes that only one direct witness was examined. Because that witness did not identify Sayedee in conjunction with the crime, and because the Section 19(2) statements did not identify Sayedee with the events either, the Tribunal concludes that the charge was not proven.

#### **CHARGE 16: ABETTING ABDUCTION, CONFINEMENT AND RAPE AS CRIMES AGAINST HUMANITY**

Prosecution witness 13, the brother of the three victims, testified that Sayedee and other Razakars looted his house and abducted his sisters. He further stated that his sisters were handed over to the Pakistani Army camp, where they were held and raped. Prosecution witnesses 3 and 4 testified in support of the general allegations that Sayedee was a Razakar, and committed atrocities during the Liberation War. Additionally, the Prosecution submitted a statement under Section 19(2) of the Act from Ajit Kumar Sheel, who claimed that Sayedee and his associates abducted the three victims and turned them over to the Pakistani Army. The Judgment finds that this out-of-court statement corroborated the evidence provided by Prosecution witness 13. Therefore, the Tribunal concludes, “the accused knowingly contributed and facilitated the commission of abduction of three women and paving the way in causing sexual violence upon them.” (*Sayedee*, Judgment, para 205).

#### **CHARGE 17: RAPE AS A CRIME AGAINST HUMANITY**

Under Charge 17 Sayedee is accused of confining and raping Vanu Shaha in Parerhat, with the help of other Razakars. The Tribunal acknowledges the testimony of Prosecution witness 4, but states that he did not disclose the source of his knowledge regarding events, and that the victim and other near relatives did not come forward to corroborate the accusations. Therefore, the Tribunal concludes that the Charge was not sufficiently proven by the Prosecution.

#### **CHARGE 18: ABETTING OF MURDER AND TORTURE**

Under Charge 18 Sayedee is accused of instigating and abetting the arrest, torture and murder of Bhagiroti. The Tribunal heard testimony in support of the charge from Prosecution witness 12, and also accepted the statement of Gonesh Chandra Saha, the son of the victim under section 19(2) of the Act as exhibit 268. The Prosecution also submitted two newspaper articles, one from 4 July 2007 (exhibit 11), and one from 3 February 1972 (exhibit 48) in support of the charge. The Tribunal notes that neither Prosecution witness 12, nor Gonesh Chandra Saha’s statement implicate the Accused in the murder of Bhagiroti.

### **CHARGE 19: FORCED CONVERSION OF HINDUS TO ISLAM AS A CRIME AGAINST HUMANITY**

It is alleged under Charge 19 that Sayedee and his group of Razakars forcibly converted Hindus to Islam in the Pirojpur District. The Tribunal heard testimony from Prosecution witnesses 2, 3, 4, 13 and 23 regarding Sayedee's participation in the forced conversion of Hindus. The Prosecution also submitted the section 19(2) statement of Ajit Kumar Sheel as exhibit 264 as support for the allegations. On the basis of this testimony, the Tribunal finds that the Accused did in fact forcibly convert Hindus to Islam as alleged under Charge 19.

### **CHARGE 20: ABDUCTION, TORTURE AND ABETTING RAPE AS CRIMES AGAINST HUMANITY**

Originally, Sayedee was charged with launching an attack on civilians who were fleeing to India, detaining around 85 persons, looting valuables, and assisting the Pakistani Army in committing rape. However, the Prosecution did not present evidence in support of this charge. The Tribunal mentions the charge in its Judgment and concludes that it has not been proven.

### **VIII. TRIBUNAL'S EVALUATION OF THE DEFENSE CASE AND PLEA OF ALIBI**

The Judgment's charge-by-charge evaluation contains little discussion of the Defense's key arguments, or of the Defense witness testimony and other evidence presented to challenge the Prosecution's case. The Tribunal frequently makes statements such as "This witness has denied the defence suggestion that he has given false evidence in a false case." (*Sayedee*, Judgment, para 220). After completing the evaluation of each of the charges the Tribunal turns to the "Plea of Alibi of the defence" in Section XXXIV.

The Defense claimed that, before the Liberation War, Sayedee lived in Jessore, and that he returned to his village home in Pirojpur in mid-July, 1971. The Tribunal notes that the Defense produced witnesses 4, 6, 8, 12 and 14 in support of the claim that Sayedee was in Jessore until that time. Defense witness 4 testified that he and Sayedee both lived in Jessore during the Liberation War, and that they sought shelter together in early April in the house of a Muslim saint, Mohiron, in Bagharpara. He also testified on cross-examination that Sayedee had two children at that time. Defense witness 6 corroborated the testimony of DW 4, and also stated that the Accused left Mohiron for his village home (Pirojpur) in mid July. Defense witness 8, 12 and 14 also corroborated the Defense's plea that the Accused was not present in the Parerhat area until mid-July 1971 with the same story.

The Prosecution claimed that the Defense failed to prove their claim of alibi, because they did not produce any documents showing that Sayedee lived in Jessore until mid-July



of 1971. The Prosecution also alleged that, according to a Nomination paper filed by Sayedee for a National Assembly election (in which he detailed the date of birth for each of his children), the Accused only appeared to have one son during the Liberation War. The Nomination paper further suggested that Sayedee had fled from Pirojpur after liberation, and may have lived in Jessore afterward, at which point his second child was born.

The Tribunal relies on the Nomination paper and the testimony by Prosecution witnesses 1, 2, 4, 5, 6, 8, 9, 10, 12 and 13 about Sayedee's whereabouts to conclude that the Accused was not hiding in Jessore at the time of the crimes. The Judgment concludes, "in consideration of both oral and documentary evidence, we are inclined to hold that the defence could not prove the plea of alibi." (*Sayedee*, Judgment, para 239).

#### **IX. ADDITIONAL ISSUES RAISED BY THE DEFENSE**

The Judgment addressed a few additional issues that had been raised by the Defense during the trial. In particular, the Defense alleged that the Investigation Officer conducted an inadequate investigation, and that his report created a flawed basis for the trial. The Tribunal dismisses this accusation by stating, "we ... are all new in the trial process of the International crimes Tribunal [sic], therefore, we hold that if any blunder is committed by the investigation officer in the process of investigation in that event the prosecution case will be more prejudiced than that of defence case." (*Sayedee*, Judgment, para 240.) The Tribunal also dismisses allegations that the Prosecution witnesses were biased because they were receiving government benefits, which made them interested witnesses. The Judgment concludes that it is the right of citizens to receive those allowances appropriate for their classification

#### **X. CONCLUSION AND SENTENCING**

The Tribunal concludes that the "Prosecution has successfully proved 8(eight) charges of 20 against accused Delowar Hossain Sayeedi beyond reasonable doubt." (*Sayedee*, Judgment, para, 249). He was found not guilty of Charges 1-5, 9, 12, 13, 15, 17, 18, and 20. He was found guilty of Charges 6, 7, 8, 10, 11, 14, 16, and 19.

According to the Judgment, "in consideration of the gravity and magnitude of the offences committed particularly in charge Nos. 8 and 10, we unanimously hold that the accused deserves the highest punishment as provided under section 10(2) of ICT Act of 1973." (*Sayedee*, Judgment, para 252.) Therefore Sayedee is sentenced to death by hanging.

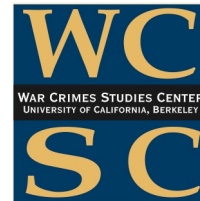
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\* AIJI is a collaborative project between the East-West Center, in Honolulu, and the War Crimes Studies Center, at the University of California, Berkeley. Since 2003, the two Centers have been collaborating on projects relating to the establishment of justice initiatives and capacity-building programs in the human rights sector in South-East Asia. The

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<sup>i</sup> *Chief Prosecutor vs. Sayedee*, Judgment, available at

<sup>ii</sup> See our coverage of the Qader Molla case at: <http://bangladeshtribunalobserver.org/2013/02/06/5-feb-2013-ict-2-daily-summary-qader-molla-guilty-verdict/>, and in Weekly Digest, Issue 3: <http://bangladeshtribunalobserver.org/2013/02/23/weekly-digest-issue-3-february-3-7-2013/>

<sup>iii</sup> See our coverage of the ICT Amendments at:

<sup>iv</sup> See our coverage of the rejection of the Defense Application for Retrial here: <http://bangladeshtribunalobserver.org/2013/01/04/3-january-2012-tribunal-1-daily-summary-rejects-application-for-retrial-in-sayedee-golam-azam-and-nizami-cases/>

<sup>v</sup> See discussion of verdict in the Kalam Azad case here: <http://bangladeshtribunalobserver.org/2013/01/21/abul-kalam-azad-guilty-verdict/> and in Weekly Digest Issue 1: <http://bangladeshtribunalobserver.org/2013/02/19/weekly-digest-issue-no-1-january-20-24-2013/>

<sup>vi</sup> <http://bangladeshtribunalobserver.org/2013/02/06/5-feb-2013-ict-2-daily-summary-qader-molla-guilty-verdict/>, and in Weekly Digest, Issue 3: <http://bangladeshtribunalobserver.org/2013/02/23/weekly-digest-issue-3-february-3-7-2013/>

<sup>vii</sup> The Charge Framing Order (available at: <http://bangladeshtribunalobserver.files.wordpress.com/2012/12/sayedee-indictment.pdf>) describes Charge 7 as leading a raid on the home of Shahidul Islam Selim, arson of Selim's house, and abetting torture of Nurul Islam Khan, father of Shahidul Islam Selim. In the Judgment the subtitle under "Adjudication of charge No. 7" mistakenly states "Torture on Shahidul Islam Selim" though the body of the paragraph identifies Nurul Islam Khan as the victim. (*Sayedee*, Judgment, para 127).