



THE INTERNATIONAL CRIMES TRIBUNAL OBSERVER

Special Issue No. 4 ■ Legal Conclusions from *Chief Prosecutor vs. Kamaruzzaman* ■ 15 August 2013

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

EXECUTIVE SUMMARY

THE VERDICT

This special report provides a detailed summary of the legal conclusions made by the International Crimes Tribunal in its fourth verdict, the Judgment in *Chief Prosecutor vs. Kamaruzzaman*.ⁱ The verdict was issued on 9 May 2013. All seven Charges levelled against Kamaruzzaman alleged direct involvement in Crimes Against Humanity, or in the alternative, complicity in Crimes Against Humanity. The Tribunal found Kamaruzzaman guilty of complicity in Crimes Against Humanity for Charges 1, 2, 3, 4, and 7. He was acquitted of Charges 5 and 6.ⁱⁱ This special report focuses on the legal conclusions within the Judgment, particularly on the Tribunal's decisions concerning evidentiary standards, the definition and elements of complicity in Crimes Against Humanity, and the doctrine of Command Responsibility. For more information on the procedural history of the case and the factual findings of the Tribunal please refer to our initial report on the case, *Special Issue #2: Kamaruzzaman Verdict*.ⁱⁱⁱ The legal conclusions expressed in this report are a summary and restatement of those found in the Tribunal's verdict, for the benefit of those interested in following the work of the ICT. The interpretations of law described herein do not necessarily reflect the institutional views of the Asian International Justice Initiative or its researchers.

PRELIMINARY LEGAL ISSUES

JURISDICTION

Before addressing the legal and factual matters that had been raised in each of the formal charges, the Tribunal's Judgment briefly addressed several general and preliminary legal issues that had arisen at trial. The Judgment began by emphasizing the legitimacy of the Tribunal, stating that retroactive legislation such as the 1973 Act is "fairly permitted."^{iv} They noted that the International Criminal Tribunal for the former Yugoslavia (ICTY), the International Criminal Tribunal for Rwanda (ICTR), and Special Court for Sierra Leone (SCSL) were all constituted under retrospective statutes, and that only the ICC

Statute is prospective. The Tribunal also stressed that the 1973 Act does not require the prosecution of the Pakistani armed forces before persons falling under 3(1) of the Act can be prosecuted. Although it has jurisdiction over crimes under international law, the Tribunal is an “absolutely domestic tribunal.”^v

STANDARDS OF FAIR TRIAL

The Judgment went on to discuss fair trial concerns, enumerating seven fundamental elements of a fair trial: “(i) right to disclosure (ii) public hearing (iii) presumption of innocence (iv) adequate time to prepare defence (v) expeditious trial (vi) right to examine witness (vii) right to defend by engaging counsel.”^{vi} After describing these elements in more detail,^{vii} the Tribunal concluded that the provisions of the 1973 Act and the Rules of Procedure met the obligations to protect the rights of the accused under Article 14 of the ICCPR.^{viii}

VICTIM RIGHTS

The Judgment also addressed the rights of victims of crimes, acknowledging that the State has an obligation under both ICCPR Article 2(3) and the UDHR to ensure an effective remedy for violations of human rights. The victims of the acts committed in Bangladesh in 1971 “need justice to heal,” and the Judgment stressed that this must be “kept in mind together with the rights of the accused, for rendering justice effectively.”^{ix}

LEGAL ISSUES RAISED BY THE DEFENSE

The Judgment also addressed the substantive legal arguments raised by the Defense throughout the trial, before turning to the specific charges against Kamaruzzaman. These Defense arguments were essentially a reiteration of those raised in *Chief Prosecutor vs. Qader Molla*.^x In fact, the Defense in Kamaruzzaman had asked the Tribunal to simply adopt the Defense’s earlier submissions from *Qader Molla* on the issues.

In its Judgment, the Tribunal summarized the Defense arguments as follows: i) The 40-year delay creates doubt about the fairness of the trial; ii) The Accused cannot be prosecuted under the “individual” and “group of individuals” terms added by the 2009 amendment; iii) The 1973 Act was enacted to prosecute the 195 Pakistani war criminals exonerated by the ‘tripartite agreement’ of 1974, and the Accused cannot be tried for aiding and abetting if the principals have not been tried; iv) If the Accused had committed offenses he could have been tried under the 1972 Collaborators Order; v) The Accused alone cannot be tried without his accomplices; vi) The crimes are not part of a widespread or systematic attack; and vii) The 1973 Act does not adequately define the offenses, so the Tribunal should base its definition of crimes against humanity on the Rome Statute and the jurisprudence of the ad hoc tribunals.^{xi}

The Prosecution requested that the Tribunal follow the precedent set in *Qader Molla* when deciding these issues. The Prosecution added that the phrase “committed against civilian population” in the 1973 Act’s definition of Crimes Against Humanity under

Section 3(2)(a) indicates that the offense must have been committed as part of a systematic attack, and that the context of the liberation war qualifies crimes committed in violation of international law as crimes against humanity.

HOLDING OF THE TRIBUNAL

The Tribunal, in considering and rejecting each of the Defense's arguments, largely confirmed its prior conclusions in *Qader Molla*.

Delay in Prosecution

The ICT reiterated that prosecution for crimes under international law is “always open and not barred by time limitation,” and that State inaction does not provide a bar or frustrate prosecution. They also stressed the importance of providing justice for the victims of the crimes.

Legislative Purpose of the ICT Act

In response to the contention that the 1973 Act was intended to exclude civilians, and that the 2009 amendment is therefore an invalid basis for prosecution, the Tribunal again noted that retrospective legislation concerning crimes under international law is permissible. The Tribunal also referred to Article 47(3) of the Bangladeshi Constitution, which states that no law which provides for the prosecution of an individual for a crime under international law shall be deemed inconsistent with the Constitution, as well as Article 47(A)(2), which provides that persons those subject to laws indicated in Article 47(3) do not have the right to challenge those laws in the Supreme Court. Because the Accused is being prosecuted for crimes under international law, as defined by the amended ICT Act, he does not have the right to challenge this law.

The Effect of the Tripartite Agreement

On the Defense's third argument, regarding the tripartite agreement, the Tribunal expressly reaffirmed its finding in *Qader Molla*. The Judgment stated that the tripartite agreement, as an “executive act,” is invalid and does not prevent prosecution of the Accused. Specifically, the Tribunal found that crimes against humanity and genocide are *jus cogens* crimes, and further that the tripartite agreement violated Bangladesh's “obligation to ensure and provide justice to victims and sufferers of those offences”^{xii} under the UDHR and the Geneva Conventions. The tripartite agreement thereby cannot serve as a legal bar to the prosecution of either the 195 exonerated criminals or other individuals.

Collaborators Order of 1972

The Tribunal similarly found that failure to try the Accused under the 1972 Collaborators Order did not preclude the current prosecution. They were persuaded by the argument that that the Collaborators Order concerned offenses punishable under the Bangladeshi Penal Code, whereas the 1973 Act concerns violations of international law.

Trial of an Accomplice Where the Principal was Not Charged

The Judgment did not address the Defense's argument that Kamaruzzaman could not be tried for aiding or abetting when the principal perpetrators had not been brought to trial. However, the Tribunal dealt with this question previously in *Qader Molla*, and rejected the Defense's argument. The *Qader Molla* Judgment had cited two international cases: (1) The Special Court for Sierra Leone's Trial Judgment against Charles Taylor, which held Taylor guilty for "aiding and abetting" Crimes Against Humanity although no other offender or principal actor was put on trial alongside Taylor; and (2) ICTR jurisprudence stating that an individual may be tried for complicity even where the principal has not been identified.^{xiii}

Widespread or Systematic Attack and the Definition of Crimes

On the final two arguments regarding the legal requirement of a "widespread or systematic attack" for Crimes Against Humanity, the Tribunal again closely followed its own precedent from *Qader Molla*. The Judgment stated that the 1973 ICT Act adequately defines the offenses, and that within the meaning of the Act, the context of the 1971 war is sufficient to prove the existence of a "systematic attack."^{xiv} First, the Tribunal found that whether an offense took place in furtherance of a "preconceived policy or plan" is only one factor in determining whether it constitutes a Crime Against Humanity, rather than an element of the offense.^{xv} The Tribunal noted that the ICTY's statute similarly does not refer to a "systematic attack," and that this requirement has been developed through jurisprudence.^{xvi} While the ICC's statute does explicitly require a systemic attack, the statute itself says that its definitions are only "for the purpose of the Statute," and thus they do not obligate the ICT, as a domestic judicial body, to adopt the same definitions of international crimes.^{xvii}

The 1973 Act does not expressly require a "widespread or systematic attack" element, but instead states that crimes against humanity are those "committed against any civilian population."^{xviii} While the Tribunal emphasized that it was not bound by the ICC's statutory definition, it found that the phrase "directed against civilian population" implies the "organized and systematic nature of the attack," and thus that the 1973 Act was consistent with the standard that had since evolved under international law.^{xix} The Tribunal explained that for offenses committed in 1971 being tried under the 1973 act, "it is obvious that they were committed in the 'context' of the 1971 war," and "this context itself is sufficient to prove the existence of a 'systematic attack' on Bangladeshi self-determined population in 1971."^{xx}

METHOD OF ADJUDICATION

Moving on from preliminary legal matters, the Judgment outlines the Court's approach to adjudicating charges of crimes against humanity, by explaining that the Tribunal would rely on, "(i) facts of common knowledge (ii) documentary evidence (iii) old reporting of news paper, books etc. hav 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 *ad hoc* tribunals, if deemed necessary to adjudicate any point of law.”^{xxi}

The Judgment then goes on to review the specific charges, render a brief verdict on each charge, and then survey the facts of the case relevant to the verdict, while addressing Prosecution and Defense arguments specific to each charge.

THE CHARGES

1. **Murder, Torture and Other Inhuman Acts as Crimes Against Humanity; or in the alternative Complicity in Such Crimes:** Sentenced to life imprisonment for leading a group of Al-Badr in abducting civilian Badiuzzaman who was tortured and then killed. Charged under Section 3(2)(a)(h) of the ICT Act.
2. **Inhuman Acts as Crimes Against Humanity; or in the alternative Complicity in Such Crimes:** Sentenced to 10 years imprisonment for attacking, forcibly shaving and whipping Syed Abdul Hannan, the Principal of Sherpur College. Charged under Section 3(2)(a)(h) of the ICT Act.
3. **Murder as a Crime Against Humanity; or in the alternative Complicity in Such a Crime:** Sentenced to death for advising and facilitating members of Al-Badr and Razakars in the massacre and rape of unarmed civilians in Shohagpur. Charged under Section 3(2)(a)(h) of the ICT Act. Some media sources have stated that Kamaruzzaman was convicted of Genocide under Charge 3, but such reports are incorrect. The Charge Framing Order alleges murder as a Crime Against Humanity and the Charge was not amended to Genocide.
4. **Murder as a Crime against Humanity; or in the alternative Complicity in Such a Crime:** Sentenced to death for the shooting of Golam Mostafa and Abul Kasem at Serih Bridge, causing the death of Golam Mostafa. Charged under Section 3(2)(a)(h) of the ICT Act.
5. **Murder as a Crime against Humanity; or in the alternative Complicity in Such a Crime:** Acquitted for the abduction and torture of Md. Liakat Ali and Mujibur Rahman Janu, and their ultimate murder behind the Ahammad Nagar UP office. Charged under Section 3(2)(a)(h) of the ICT Act.
6. **Murder as a Crime against Humanity; or in the alternative Complicity in Such a Crime:** Acquitted for the abduction of Tunu and Jahangir and subsequent torture and death of Tunu. Charged under Section 3(2)(a)(h) of the ICT Act.
7. **Murder as a Crime against Humanity; or in the alternative Complicity in Such a Crime:** Sentenced to life imprisonment for accompanying members of Al-Badr on a raid of the house of Tapa Mia in Golpajan Road the ultimate killing of six other unarmed civilians with a bayonet. Charged under Section 3(2)(a)(h) of the ICT Act.

While complicity is usually considered a mode of liability in criminal law, the ICT Act codifies complicity as an offense within Section 3 (the section of the Statute which defines the crimes over which the Tribunal has jurisdiction). The Charge Framing Order

in the *Kamaruzzaman* case appeared to allege a substantive offense of complicity via a mode of constructive liability, stating that the Accused was “thus liable for the above offences under section 4(1) of the Act.” Section 4 of the Act defines modes of liability applied by the tribunal. Section 4(1) provides for a type of joint criminal liability by which each individual who jointly assists in the commission of a crime will be held fully responsible for the ultimate crime.

According to the Court’s description of the burden of proof in the Judgment, for each of the above listed charges, the Prosecution was “burdened to prove-(**i**) commission of the crimes alleged (**ii**) mode of participation of the accused in committing any of crimes alleged (**iii**) how he acted in aiding or providing encouragement or moral support or approval to the commission of any of alleged crimes (**iv**) what was his complicity to commission of any of crimes alleged (**v**) context of committing the alleged crimes (**vi**) the elements necessary to constitute the offence of crimes against humanity (**vii**) liability of the accused.”^{xxii}

DEFENSE CASE AND ALIBI PLEA

The Defense team for Kamaruzzaman raised alibi arguments at trial, so the Court addressed these in the Judgment. The ICT affirmed that the Defense has the right to submit a plea of alibi and to submit evidence in support of that plea. The Tribunal explained that it only considers a plea of alibi if the Prosecution “succeeds in discharging its burden.”^{xxiii} If the Prosecution does so, then the Defense must prove a plea of alibi “with absolute certainty so as to exclude the possibility of his presence at the spot at the time of the commission of the offense.”^{xxiv} The ICT cited to jurisprudence of the Supreme Court of India in support of this standard of proof.^{xxv} The ICT stressed that a plea of alibi is not a defense to a crime, but instead is an attempt to deny that the Accused “was in a position to commit the crime.”^{xxvi} If a Defendant raises an alibi, this “does no more than require the Prosecution to eliminate the reasonable possibility that the alibi is true.”^{xxvii}

As evidence in support of the Defense case, the Accused originally submitted a list of 1,354 potential witnesses along with proposed documentary exhibits upon which the Defense planned to rely. However, the Prosecution submitted an application seeking to limit the number of Defense witnesses, and the Court granted the application. On February 20, 2013, the Tribunal issued an order limiting the Defense to 4 witnesses, noting that Section 9(5) does not require the Defense to provide a list of witnesses and that “the accused can do so only when it seems to him indispensable for establishing any specific defence case” The Defense does not have the right to provide a list of over one thousand witnesses, and doing so “demonstrates an ulterior intention”^{xxviii} to undermine the trial.

The Defense filed an application for review, requesting leave to examine 7 witnesses. The Tribunal allowed the Defense to add one more witness, reasoning that the Defense’s cross-examinations of the Prosecution’s witnesses did not indicate that the Defense had a

“distinct plea of alibi for each charge”^{xxxix} and that therefore 7 witnesses were unnecessary. Despite the apparently high burden of proof articulated in the Judgment by the Court for an alibi claim, at trial the Bench had stressed that the Defense was not obligated to disprove the Prosecution’s case by bringing evidence.^{xxx} While noting that neither the 1973 Act nor the Rules of Procedure explicitly give the ICT the ability to limit Defense witnesses, the Tribunal found that it nevertheless did have this power pursuant to Section 22, which states that the Tribunal “may regulate its own procedure.”^{xxxxi} In response to Defense arguments, the Tribunal concluded that the principle of “equality of arms” did not require that the Defense be allowed to examine the same number of witnesses as the Prosecution. The Court cited the ICTR’s *Musema* case as an example of this position.^{xxxii}

In the Judgment, the Tribunal noted that, of the five Defense witnesses called, only one (Defense witness 4, the older brother of the Accused) had offered support for the alibi claim. Defense witness 4 claimed that the Accused was not associated with student politics during the time of the charges, and that the Accused had been in their native village, and not in Sherpur town during the entire period of the war of liberation.^{xxxiii} Based on this one piece of testimony, the ICT held that the Defense had not adequately proven the alibi with certainty. The Tribunal stressed that no corroborating evidence or other circumstances led it to consider the alibi reasonable. Moreover, the Court found it “implausible” that the Accused had not visited Sherpur town during the war, when Defense witness 4 apparently regularly did so.^{xxxiv}

EVIDENTIARY ISSUES

USE OF JUDICIAL NOTICE

The Judgment contained a number of instances where the Court took judicial notice of facts. Articulating a standard for judicial notice at the outset, the Tribunal stated that it “is authorized to take judicial notice of fact of common knowledge which is not needed to be proved by adducing evidence.”^{xxxv} In this case, the Tribunal made use of judicial notice to establish the required *chapeau* element for crimes against humanity—that the crimes in question were part of a widespread and systematic attack against a civilian population. Considering the backdrop and context of the charges against Kamaruzzaman, the Tribunal took into judicial notice that the “Razaker Bahini, Al-Badar Bahini, Peace Committee, Al-Shams were formed as accessories to the Pakistani occupation armed force for providing moral supports, assistance and they substantially contributed to the commission of atrocities throughout the country.”^{xxxvi} The Tribunal noted that thousands of such incidents took place as part of an “organized or systematic and planned attack,” which targeted “the pro-liberation Bangalee population, Hindu community, political group, freedom fighters, civilians who provided support to freedom fighters and finally the ‘intellectuals.’”^{xxxvii} After stating that it was a “fact of common knowledge” that Al-Badar was an armed paramilitary force which acted in furtherance of the plan of the Pakistani occupation army,^{xxxviii} the Tribunal held that “the facts and circumstances

unveiled before us unmistakably have proved the contextual requirement to qualify the offences for which the accused has been charged with as crimes against humanity.^{xxxix} The Tribunal emphasized that, because of the “pattern” of atrocities committed in greater Mymensingh by the Al-Badar, Razakar, and Pakistani army forces, the Court could infer that “the acts of the accused forming part of ‘attack’ comprise part of a pattern of ‘systematic’ crimes directed against civilian population.”^{xl}

The Tribunal further articulated that had taken judicial notice of certain “facts” while evaluating witness testimony. For example under Charge 6, Prosecution Witness 1 testified that the Accused was associated with the Al-Badr camp and was involved in designing plans “of carrying out ‘operations’ at night.”^{xli} The ICT noted that it was a “fact of common knowledge that apart from members of auxiliary forces, Pakistani occupation troops also had killed numerous civilians by carrying out operation,” though without further evidence that the Accused brought the specific victim to the camp and tortured him, the witness’s testimony was insufficient to hold the Accused liable.^{xlii} In considering the credibility of Defense Witness 5, the Tribunal found the witness unreliable after he claimed he had been a freedom fighter, but “could not say whether Razakar or Al-Badar force [sic] were created during the period of war of liberation.”^{xliii} The Judgment explained that “existence of Razakar and Al-Badr forces in 1971 is a fact of common knowledge,” so the Court found it particularly unbelievable that a purported freedom fighter could not recount this, holding that “on total evaluation, his testimony suffers from intense fragility and lack of credence.”^{xliv}

WITNESS TESTIMONY

When evaluating the credibility of witness testimony The Tribunal had to contend with procedural questions about how it should handle hearsay testimony and so-called “old evidence.” In articulating a procedural standard for such matters, the Tribunal noted that the Bangladeshi Criminal Procedure Code and the Evidence Act do not apply to proceedings under the 1973 Act. Accordingly, the Tribunal emphasized that the ICT’s own more limited internal Rules of Procedure would be the sole guiding criteria for the Tribunal.

The majority of the evidence produced by both the Prosecution and the Defense in the *Kamaruzzaman* case was eyewitness and hearsay testimony. The Tribunal, considering evidentiary issues in general, held that “the testimony even of a single witness on a material fact does not, as a matter of law, require corroboration.”^{xlv} The ICT cited the ICTR’s holding that “a sole witness’ testimony could suffice to justify a conviction if the Chamber is convinced beyond all reasonable doubt,”^{xlvi} as well as the ICTY’s conclusion that “corroboration of evidence is not a legal requirement, but rather concerns the weight to be attached to evidence.”^{xlvii}

Evaluating Hearsay Testimony

Under Rule 56(2) of the Rules of Procedure of the ICT, relevant hearsay evidence is admissible, and may be relied upon by the Court if it “carries reasonable probative

value.”^{xlvi} The Tribunal stressed that admission of a hearsay statement alone does not mean that it has probative value, but instead that “hearsay evidence is to be weighted in context of its credibility, relevance, and circumstances.”^{xli} Under this standard, the Tribunal takes into account the impact of the 40-year delay on witness memories and the “context” of the events in question, namely the structure of the paramilitary forces, the general chaos in 1971, and the post-conflict instability.¹ In such a context, there was “little room for the people or civilians to witness the events of the criminal acts,”^{li} the Judgment observed, and the crimes were “usually not well-documented by post-conflict authorities.”^{lii}

The Tribunal considered whether or not hearsay evidence should require corroboration. Citing jurisprudence from the ICTR, ICTY, ICC, and Special Panels for Serious Crimes in East Timor, the Defense, had argued at trial that hearsay evidence must be corroborated by other evidence, and had only limited probative weight standing by itself.^{liii} The Prosecution refuted this argument, citing different case law from the ICTR, ICTY, and ICC, in support of the proposition that the Tribunal could rely on hearsay evidence without corroboration.^{liv} Although the ICT clearly determined that hearsay evidence is admissible without corroboration, its conclusions regarding the reliability of uncorroborated hearsay evidence were somewhat unclear in the Judgment. In its consideration of Charge 6, the Tribunal noted “that ‘corroboration’ is not a matter of legal requirement,” but that other evidence that could serve as corroboration “includes circumstantial proof and relevant material facts.”^{lv} However, in its consideration of Charge 7, the Tribunal reiterated that hearsay testimony is admissible, but then stated that the “hearsay statement of witness is to be corroborated by other evidence.”^{lvi}

The Tribunal noted that corroboration did not have to take the form of witness testimony or documentary evidence, as hearsay evidence could be corroborated by “circumstantial proof or even a single relevant fact,”^{lvii} In considering the first charge, the Tribunal held that the statements of both prosecution witnesses “inspires sufficient credence as it gets reasonable corroboration from circumstances and other relevant facts proved together with the context.”^{lviii} In particular, the Prosecution had already established that Kamaruzzaman was in a leadership position in the Al-Badr of greater Mymensingh. Similarly, considering Charge 7, the Tribunal found that although Prosecution witness 9 had not stated anything about the abduction of Dara and Tapa Mia to the camp, Prosecution witness 9’s statement that they were detained at the camp “by itself seems sufficient to prove it inevitably that they were brought there by way of abduction,” and that “the perpetrators were the Al-Badar men of the camp,” as in the circumstances of 1971 “no unarmed civilian was expected to go or visit a notorious Al-Badar camp on his own accord.”^{lix} Under the “totality of evidence” test established in Rule 56(2) of the Tribunal’s Rules of Procedure, the Tribunal could not “infer any other reasonable hypothesis excepting the ‘complicity’ of the accused.”^{lx}

The Tribunal also took the degree of specificity into account in assessing hearsay testimony. In Charge 6, the Tribunal noted that Prosecution witness 1’s testimony was

not specific, and asked why, if Prosecution witness 1 heard about Tunu's death from someone, the witness "could not narrate what he had heard, in detail," including who had told him of the death or where Tunu was killed, or other evidence placing Tunu at the District Council Dak Bangalow.^{lxi} The Tribunal noted that hearsay testimony provided by Prosecution witness 1 was both "anonymous and unspecified," and was found insufficient to tie Kamaruzzaman to the murder of Tunu.^{lxii}

The Tribunal held that hearsay testimony could be used to corroborate other evidence. In its deliberation on Charge 2, the Tribunal held that "as a general rule, the Tribunal can safely act even on anonymous hearsay evidence only to corroborate other evidence."^{lxiii} The Tribunal noted that there was "no rationale to exclude [Prosecution witness 3's testimony] merely on the ground that it is hearsay in nature," but stressed that the Accused's guilt had been "proved beyond reasonable doubt" by the two eyewitnesses, and thus that Prosecution witness 3's testimony served only as corroboration.^{lxiv} However, in relation to the particular events under Charge 2, the ICT noted that "the nature of the event of the offence alleged prompts us to infer that the event became an anecdote," such that "even without witnessing it the people had reason to become aware of it," and that as a result, hearsay evidence "cannot be brushed aside readily."^{lxv} Although the Tribunal indicated that such an anecdote could have additional weight, it did not clarify whether any form of anonymous hearsay evidence alone could be sufficient to establish guilt.

Prosecution's Argument on the "Old Evidence Doctrine" and Inconsistencies in Witness Testimony

When dealing with witness testimony about events many decades in the past, inconsistencies were not uncommon at trial. The Judgment states that the Court considered inconsistencies in witness testimony in light of "the totality of the evidence presented in the case."^{lxvi} The Tribunal did not expressly adopt the "Old Evidence Doctrine," but did appear to endorse the Prosecution's general arguments and apply them to witness testimony in the case. The Tribunal noted that witnesses might naturally be unable to recall certain facts or details from over 40 years ago with precision, and that a discrepancy in a witness's testimony does not necessarily discredit the witness, but "needs to be contrasted with surrounding circumstances and testimony of other witnesses."^{lxvii} The ICT explained that, on cross-examination, the Defense must "shake" a witness's testimony concerning specific facts, and that immaterial inconsistencies between a witness's statement in an investigation and testimony in court would not necessarily discredit the witness or undermine the veracity of specific points proven through his testimony. Likewise, the Court opined that inconsequential inconsistencies would not invalidate the whole of a witness's testimony. When a witness testified in relation to multiple charges, the Court determined that the reliability of his testimony should be considered with regard to each specific charge, and the Tribunal may evaluate and separate out truthful statements from other parts of the testimony.

The Tribunal reiterated its conclusion on immaterial inconsistencies in its deliberations on several of the charges. In relation to Charge 1, the Defense challenged Prosecution witness 6's testimony, arguing that the witness had given different accounts in his examination-in chief and in his cross examination about how he had learned of the relevant events. The ICT rejected this contention, explaining that the purpose of cross-examining a Prosecution witness "is to shake and deny what he or she states during examination by the prosecution," and that the Defense was unable to meet this standard.^{lxxviii} Any "immaterial discrepancies" could "be due to the fallibility of perception and memory and the operation of the passage of time."^{lxxix} Likewise, inconsistencies between a witness's statement to the Investigation Officer and testimony before the Tribunal are attributable to "the time lapse between the two," and "it would be wrong and unjust to treat forgetfulness as being synonymous with giving false testimony."^{lxxx} An omission in a witness's statement presumably reflects the Investigation Officer's failure to question on that point, rather than that the witness was "making intelligent improvements" to his testimony before the tribunal.^{lxxxi} In its consideration of Charge 3, the Tribunal further noted that a witness's "failure to describe precise detail about an event that took place four decades back rather makes witness' testimony more reliable," instead of less credible.^{lxxxii}

The Tribunal distinguished between immaterial and glaring inconsistencies, holding that glaring inconsistencies do discredit a witness's testimony. However, the Tribunal emphasized that this assessment must take place charge by charge, and that a witness could offer reliability testimony in relation to some charges and not to others. Prosecution Witness 14 gave testimony related to charges 2, 4, and 5. While Prosecution witness 14 testified that he had been detained at Ahammednagar army camp for a few days in May 1971, and witnessed the events described in Charge 2 after his release, the related events in Charge 5 allegedly occurred during November of 1971. The Defense argued that if the events in Charge 5 had actually taken place in November, Prosecution witness 14's testimony must be false and should be disregarded. The Defense further argued that Prosecution witness 14 provided inconsistent testimony, which alone should discredit the witness, even if specific facts were not "impeached" through cross-examination.^{lxxxiii} In response, the Prosecution argued that the evidence provided by Prosecution witness 14, who was deposed relating to Charges 2, 4, and 5, should be evaluated separately in relation to each charge.^{lxxxiv}

The Tribunal agreed with the Prosecution, and held that the Tribunal must look at the evidence as it related to each charge individually, by assessing whether it was "credible, relevant and consistent with the event narrated in the charge."^{lxxxv} Declining to exclude Prosecution witness 14's testimony as a whole, the Tribunal explained that "the existence of reasonable doubt as to the truth of a statement on any particular fact by a witness is not evidence that the witness lied with respect to that aspect of his testimony, nor that the witness is not credible with respect to other aspects."^{lxxxvi} In support of this approach, the ICT cited the ICTR Appeals Chamber in *Muvunyi*, where the ICTR had held that "it is not unreasonable for a trier of fact to accept some, but reject other parts of a witness's

testimony.^{»lxxvii} Under this standard, the Tribunal found it unnecessary to determine, at this point, whether Prosecution witness 14 had been detained during Ramadan, because he had testified that he witnessed the event alleged in Charge 2 in May, which was consistent with the testimony of Prosecution witness 2, who also testified regarding Charge 2.

In its consideration of Charges 4 and 5, however, the Tribunal found that the time discrepancy in Prosecution witness 14's testimony was not merely immaterial, but glaring, so the Court held that this part of the witness's testimony should be excluded. With regard to Charge 4, Prosecution witness 14 stated that he had been apprehended, detained, and released from an army camp at Ahmmednagar in the month of May 1971, and had learned about the killing of Golam Mostafa after his release at the end of May. Charge 4, in the Charge Framing Order, alleged that Golam Mostafa was killed on August 23, 1971. Concluding that this "glaring and fatal inconsistency" cast doubt on the witness's testimony concerning Golam Mostafa, the ICT stressed that "reliance thus cannot be placed on his statement made in relation to charge no.4."^{»lxxviii} Notwithstanding, the Tribunal concluded that Prosecution witness 14's claim to have been detained at the Ahammednagar army camp "remained unshaken and proved," and thus the Tribunal could rely on his testimony with regard to Kamaruzzaman's presence and acts at the army camp.^{lxxix}

Similarly, Charge 5 alleged that the killing of multiple civilians at the Ahammednagar camp occurred during the month of Ramadan in 1991. The Tribunal held that Prosecution witness 14's testimony was thus "glaringly contradictory, not merely inconsistent."^{»lxxx} While a discrepancy of a few days may reflect the lapse in time, a "deviation of six months, as found from Prosecution witness statement, cannot be considered as mere 'memory failure', particularly when Prosecution witness 7, on cross-examination, stated that the event of their detention took place one month before the independence."^{»lxxxii} Because Prosecution witness 14's testimony regarding learning about the killings after his release from the camp "stems from the very fact of his and Prosecution witness 7's detention at the camp," the date cannot be considered a "mere inconsistency."^{»lxxxiii} The Tribunal found that Prosecution witness 14's entire testimony "appears to be unrealistic and tainted by reasonable doubt."^{»lxxxiii}

The Tribunal noted that the murder of civilians at Ahammednagar camp "remains undisputed," but that the Prosecution had not proved Kamaruzzaman's involvement in the event.^{lxxxiv} Prosecution witness 7 described how he and ten other detainees had been brought to a ditch, but right before they were to be shot, he, Prosecution witness 14, and another detainee were released. However, he did not narrate "anything as to the fate of the other detainees."^{»lxxxv} The Tribunal held that, because of the "glaring lack of credibility" of Prosecution witness 14's statement on the material fact of the date, it would be "precarious to act on rest of his statement made involving the alleged act or conduct on part of accused constituting his link to the actual commission of the principal event of criminal acts of murder of detainees at Ahammednagar camp."^{»lxxxvi} Since

Prosecution witness 7's testimony did not provide this link, and Prosecution witness 14's testimony was unreliable, the Tribunal held that the Prosecution had not proved the charge.

DOCUMENTARY EVIDENCE

Although the majority of evidence in the *Kamaruzzaman* trial was witness testimony, the Tribunal did also rely on some documentary evidence. Before addressing the charges individually, the Court held that the documentary evidence showed that Kamaruzzaman had been “in a potential position” of leadership in of Islami Chatra Sangha, the student wing of Jaamat-e-Islami, and was a “‘chief organizer’ of Al-Badar in greater Mymensingh,” where he “actively coordinated its formation including providing armed training to members of Al-Badar.”^{lxxxvii} While several Prosecution witnesses testified about Kamaruzzaman's involvement in these organizations, the ICT reached this factual conclusion “predominantly from relevant documentary evidence.”^{lxxxviii} The Tribunal looked to newspaper articles, books, and reports, as permitted under §19(1) of the 1973 Act.

In particular, the Judgment referenced a report describing the Accused as the “chief organizer of Al-Badar force” in Mymensingh, noting that this claim had significant probative value because it had been published in a known “party journal” of Jamaat-e-Islami.^{lxxxix} Likewise, the Tribunal found that a book published by an author who had “full acquaintance with the history of our war of liberation,”^{xc} and a book that was “an edited work”^{xci} were both authoritative sources. Other articles and books served as corroborating evidence. While the Court emphasized that it would still consider the Defense's plea of alibi later in the Judgment, based on the Defense's evidence, the Tribunal reiterated its finding that the Defense had been unable to discredit any of the proffered Prosecution evidence. The Judgment therefore concluded that Kamaruzzaman was involved in ICS and Al-Badr.

LEGAL STANDARDS AND DEFINITION OF CRIMES

Kamaruzzaman faced 6 charges of Murder as a Crime Against Humanity and 1 charge of Other Inhumane Acts as a Crime Against Humanity.^{xcii} All charges argued in the alternative that Kamaruzzaman was complicit under section 3(2)(h) of the ICT Act. The Tribunal found Kamaruzzaman guilty of complicity only, rather than direct commission, in each of the 5 charges for which he was convicted.

DIRECT COMMISSION OF A CRIME AGAINST HUMANITY

The Tribunal did not articulate a rule for which type of conduct constituted direct commission of crimes against humanity, and which was mere complicity in crimes against humanity. The Tribunal's reasoning in the various charges did seem to indicate, however, that that they wished to distinguish between “direct” or “physical” participation in a crime, and other forms of participation.

It should be noted that the ICT Act lists “complicity” in Section 3(2) of the ICT Act, which defines substantive crimes within the Tribunal’s jurisdiction. Where most courts deal with complicity as a mode of liability, the structure of the ICT Act leaves some confusion as to whether the Tribunal considers complicity an actual offense, or whether it is a mode of liability such as those described under Sections 4(1) and 4(2).

In the Judgment, the Tribunal appears to equate commission (as opposed to complicity in commission) with direct participation. In Charge 1, the ICT found that Kamaruzzaman had led a group in abducting victim Badiuzzaman, who was later murdered. The Judgment reasoned that the “accused cannot be relieved from culpability even if he is not found to have physically participated to the actual perpetration of the offence of murder.”^{xciii} The Tribunal noted that “the accused is not alleged to have been directly responsible for the murder of Badiuzzaman.” This would seem to indicate that the Court defined direct responsibility as physical participation in the commission of the crime in question.^{xciv} Similarly, under Charge 3, the ICT explained that the “charge framed does not allege that the accused directly or physically had participated to the commission of the crimes.”^{xcv}

However, confusion between direct commission and complicity arises in the Judgment’s discussion of Charges 3 and 4. The Tribunal states that “Kamaruzzaman, for his substantial act and conduct of providing advices and approval, is equally accountable for the crimes as listed in charge no. 3 in the same manner as if it were done by him alone,” and is thus “held responsible for the actual commission of the offence mass killing of hundreds of unarmed civilians constituting the offence of murders as crimes against humanity as enumerated in section 3(2)(a)(h) of the Act of 1973.”^{xcvi} Despite the wording of this holding, Kamaruzzaman was found guilty of complicity in crimes against humanity under Charge 3. The Tribunal used the same wording in its holding on the allegations under Charge 4, finding that the Accused “encouraged, approved and provided moral supports to the actual commission”^{xcvii} and was “equally liable for the crimes as listed in charge no.4 in the same manner as if it were done by him alone,” and therefore “held to have ‘participated’ in the actual commission of the offence murder of Golam Mostafa, an unarmed civilian constituting the offence of murder as ‘crimes against humanity’ as enumerated in section 3(2)(a)(h).”^{xcviii}

COMPLICITY IN A CRIME AGAINST HUMANITY

The 1973 ICT Act does not define “complicity,” and it incorporates “aiding and abetting” and “conspiracy” as a separate provision under section 3(2)(h). The ICT did not explicitly define “complicity,” but appeared to adopt a broad definition of the term. It appears that the Tribunal sees complicity as an umbrella term, encompassing aiding and abetting as well as joint criminal enterprise. When finding Kamaruzzaman guilty of complicity, the Tribunal cites to ICTY and ICTR jurisprudence concerning both aiding and abetting and joint criminal enterprise. The Judgment notes that “the terms ‘complicity’ and ‘accomplice’ even may encompass conduct broader than ‘aiding’ and ‘abetting,’” and

thus that “the ‘accomplice’ will also be held responsible for all that naturally results from the commission of the act in question.”^{xcix}

Mens Rea of Complicity

The Tribunal did not expressly define the requisite mens rea for liability under complicity, but required that the Accused had acted with “intent” in its assessment of the various charges. The Tribunal found that knowledge was sufficient to fulfil the intent requirement. In relation to Charge 1, the Defense argued that, even if Kamaruzzaman had accompanied the Al-Badr forces in abducting Badiuzzaman, the Prosecution had failed to prove, and the Tribunal could not otherwise infer, that Kamaruzzaman had done so with the knowledge that the abducted would then be tortured and killed. The Tribunal rejected this argument, explaining that “the mens rea or intent requirement is to be inferred from circumstances and relevant material facts,”^c including “the mode of ‘participation’, by act or conduct of the accused forming part of the ‘attack’,” including “providing assistance to commit the crime or certain acts once the crime has been committed.” In relation to Charge 2, the Tribunal “validly inferred from total evaluation of evidence presented” that the alleged events occurred “within full knowledge and with assistance of the accused,” and that this alone established his complicity.^{ci}

In assessing Charge 1, the Tribunal articulated the rule that an individual is liable for participation in a murder if he was “concerned with the killing.” The Court apparently relied upon ICTY jurisprudence and the Nuremberg judgment in support of this interpretation.^{cii} Elaborating on the standard, which was not defined in depth by the ICTY or the Nuremberg Tribunal, the ICT cited the ICTY Appeals Chamber’s holding in *Tadic*. That case established that all participants in a common enterprise could be held liable for a crime stemming from that enterprise if it was a foreseeable consequence of the “common design” and the individual was “either reckless or indifferent to that risk.”^{ciii} The ICT did not state whether it considered “recklessness” to be a sufficient *mens rea* for liability based on complicity outside of a joint criminal enterprise. More generally, although the ICT cited to multiple ICTY decisions on joint criminal enterprise, the ICT did not expressly state that it had adopted JCE as a concept, although the Court used the reasoning concerning joint criminal enterprise to explain what could constitute “complicity,” rather than adopting the ICTY’s finding that JCE could be considered a form of commission of a crime.

The Tribunal mentioned recklessness again under Charge 7, where it noted that liability “may be imputed to all the Al-Badar men of the camp,” and found that Kamaruzzaman, as a leader at the camp, “predictably knowing the consequence of the criminal acts of fellow Al-Badars, in execution of the common design the accused was either reckless or approved or provided moral support to the actual accomplishment of the principal crimes.”^{civ} The Tribunal then found that Kamaruzzaman’s failure to prevent commission of the crime constituted “‘approval’ or ‘moral support’ or ‘encouragement,’” and did not discuss recklessness further.^{cv}

Actus Reus of Complicity

The Judgment does not specifically define or identify the elements of the *actus reus* of complicity, but it seems to emphasize that a wide range of acts or omissions could constitute complicity. As in its discussion of the *mens rea* of complicity, the ICT cited to ICTY jurisprudence concerning aiding and abetting and joint criminal enterprise, and seemingly found that complicity encompassed both of these modes of liability and the acts sufficient to incur liability under them. The Tribunal emphasized that the standard for complicity, seemingly for both the *mens rea* and *actus reus* elements, was whether the Accused was “concerned with the killing.”^{cvii} The Tribunal did not expressly adopt the ICTY’s holding that the Accused must “substantially contribute” to the commission of the crime in order to be complicit, although this standard had been raised by the Defense. However, the Tribunal repeatedly used the word “substantial” in characterizing Kamaruzzaman’s actions in its discussion of the charges. Citing to the ICTY Trial Chamber judgment in *Stakic*, the ICT concluded that the Accused did not need to have participated in all aspects of the alleged criminal conduct in order to incur criminal liability. The Accused’s participation may occur before, during, or after the principal crime was committed. The Tribunal repeatedly cited the ICTY Appeals Chamber’s holding in *Blaskic* that “the *actus reus* of aiding and abetting a crime may occur before, during, or after the principal crime has been perpetrated.”^{cvii}

The Tribunal seemed to use ‘participation’ as a general term for an act or omission sufficient to give rise to liability under any mode of liability, noting at different places in the Judgment that “‘participation’ encompasses providing advices, encouragement, and moral support to commit the crime,”^{cviii} and that “‘participation’ encompasses ‘approval’ or ‘instigation’ or ‘encouragement’ or ‘aiding’ or ‘abetment’.” The Tribunal held that “participation includes both direct participation and indirect participation.”^{cxix} The Court reiterated the standard from the ICTY’s Appeals Chamber in *Kvočka*, a case based on Joint Criminal Enterprise, that “it is sufficient for the accused to have committed an act or an omission which contributes to the common criminal purpose.”^{cx} Discussing Kamaruzzaman’s liability in general, the Tribunal found that Kamaruzzaman was “related to a scheme or system which had a criminal outcome” as he “consciously and being aware of the consequence of his acts and conducts aided, encouraged, and provided moral supports and approval to the commission of the crimes alleged.”^{cxii}

The Tribunal emphasized that the act of providing encouragement or advice was sufficient to establish liability for complicity, particularly where the Accused held a leadership position. They noted that “assistance and encouragement may consist of physical acts, verbal statements, or even mere presence” of a person in a position of authority at the time a crime is committed.^{cxii} Under Charge 2, the ICT held that Kamaruzzaman, having a “significant level of influence and authority,” had “substantial complicity and contribution [sic], by providing encouragement and approval to the actual perpetration of the offence of ‘inhuman acts’ as crime against humanity.”^{cxiii} In support of this finding, the ICT cited the ICTY Trial Chamber’s finding in *Limaj* that “the presence of a superior may operate as an encouragement or support” and thereby constitute aiding

and abetting.^{cxiv} The ICT used similar logic under Charge 7, where it found that Kamaruzzaman, “having significant level of authority and control over the camp was related to a scheme or system which had a criminal outcome,” and that a civilian was abducted and killed in furtherance of this scheme or system.^{cxv} The Accused’s “failure to prevent commission” of the offense thus provided “‘approval’ or ‘moral support’ or ‘encouragement’” to the Al-Badr who killed the civilian.^{cxvi}

The ICT likewise found that providing advice could be sufficient to incur liability under complicity. In relation to Charge 3, the Defense argued that the Accused’s advice did not substantially contribute to the commission of the crime, and that “the act of providing ‘advice’ akin to ‘ordering,’” could “only be made by a superior,” and thus such an act could only give rise to superior liability.^{cxvii} The ICT rejected this argument, reiterating that participation could take place before, during, or after the crime itself, and stating that “the notion of complicity encompasses ‘designing plan’ or ‘advising’ the accomplices and aiding encompasses ‘instigation’ or ‘encouragement’ or ‘moral support.’”^{cxviii} The Tribunal found that, in addition to the provision of advice beforehand, the “declaration of accused Muhammad Kamaruzzaman that they had killed victims by carrying out ‘operation’ and Razakars had also taken part in the operation” after the massacre had occurred was “an unequivocal demonstration of his [Kamaruzzaman’s] complicity to the actual commission of the massacre.”^{cxix} The ICT held that “cumulative effect” of the Accused’s conduct before and after the event conclusively proved that he had “participated” in the commission of the crimes.^{cxx}

“OTHER INHUMANE ACTS”^{cxxi} AS CRIMES AGAINST HUMANITY – CHARGE 2

The Judgment acknowledged that the 1973 Act does not define ‘other inhuman acts’ under Section 3(2)(a). The Prosecution had argued at trial that the term ‘other inhuman acts’ encompassed a wide range of actions. Prosecutors cited to the Rome Statute, which criminalizes “other inhumane acts of a similar character intentionally causing great suffering, or serious injury to body or to mental or physical health.”^{cxxii} Noting that ‘other inhuman acts’ are included in addition to the listed acts constituting crimes against humanity, the ICT concluded that, “‘other inhuman acts’ reasonably and logically encompasses the ‘coercive acts’ which are injurious for one’s physical or mental wellbeing.”^{cxxiii}

Although the Tribunal did not formally adopt the ICC’s definition, or further explain the meaning of ‘coercive acts’ under its own standard, the Tribunal “[found] substance in what has been submitted by the learned prosecutor,” and appeared to apply the ICC standard in relation to Charge 2.^{cxxiv} The Tribunal recognized the “element of ‘similar seriousness,’” and held that this element “is to be evaluated in light of all factual circumstances, including the nature of the act or omission, the context within which it occurred, and individual circumstances of the victim as well as the physical and mental health effects on the victim.”^{cxxv} While such effects do not have to last for a long time, any long-term effects will factor into the determination of whether the crime is of ‘similar seriousness.’ Considering the events alleged under Charge 2, the ICT held that “the act of

compelling a non combatant civilian who was an esteemed member belonging to the teachers' community under coercion to walk through town with lime and ink on his face and his head shaved and tying rope around his waist is a grave and deliberate act of physical and mental violence that caused intense physical distress and mental anguish to the victim.^{»cxxvi}

The Judgment further emphasized that 'other inhumane acts' are crimes against humanity, and are defined under customary international law. The term "functions as a residual category for serious crimes that are not otherwise enumerated in section 3(2) of the Act of 1973, but which require proof of the same recognised elements."^{»cxxvii} The ICT then stressed that the acts committed against Syed Abdul Hannan "formed an 'attack' to 'human dignity' and offensive to the community of the victim as well."^{»cxxviii}

DEFINITION OF GENOCIDE AND RAPE AS AN ACT OF GENOCIDE – CHARGE 3

Although Kamaruzzaman was not charged with rape as a crime against humanity, the Charge Framing Order did allege that the massacre at Sohagpur had resulted in numerous deaths and multiple rapes. Three of the Prosecution witnesses testified at trial that they had been raped in connection with the event. During trial, the Prosecution had argued that the destructive nature of the operation in conjunction with the rape of numerous women meant that "the event truly falls within the definition of 'genocide' as specified in section 3(2)(c) (i) of the Act of 1973 instead of 'crimes against humanity.'^{»cxxix} The Prosecution asserted that the "indiscriminate sexual invasion" both "increases the gravity of the entire event" and "reflects that the serious bodily or mental harm caused to them was with intent to destroy, either whole or in part, the women community or group of Sohagpur village which constituted the offence of 'genocide.'^{»cxxx}

The ICT rejected the Prosecution's argument concerning genocide. The Tribunal stressed that "mere multiplicity of victims of murder cannot term the event 'genocide' and that the Prosecution "could not bring the elements necessary for constituting the offense of 'genocide' at the stage of charge matter hearing," including the "'genocidal requirement' and 'group requirement.'^{»cxxxii} Additionally, the Tribunal noted that even if the argument were well-founded, the Court could not lawfully alter the charge at judgment stage "without giving the matter of alteration of charge to the notice of the accused."^{»cxxxii}

The Tribunal found that it could consider the incidents of rape, because the commission of rape had been described in the Charge Framing Order. The Tribunal concluded that a "finding on commission of a distinct offence under the same set of facts narrated in the charge framed is permissible."^{»cxxxiii} In relation to Charge 3, the ICT found that "indiscriminate sexual invasion under coercive circumstances,"^{»cxxxiv} had taken place in conjunction with the massacre, and that Kamaruzzaman was "aware of" and "thus responsible" for both the mass killings and sexual abuses.^{cxxxv} However while noting that the sexual violence made the event "more shocking and graver," the Tribunal only found Kamaruzzaman guilty of the offense of "mass killing of hundreds of unarmed civilians

constituting the offence of murders as crimes against humanity” under Charge 3, and did not separately convict him of the offense of rape as a crime against humanity.^{cxxxvi}

MODE OF LIABILITY

DOCTRINE OF SUPERIOR RESPONSIBILITY

In addition to asserting that Kamaruzzaman was complicit in crimes against humanity through his acts and omissions, the Prosecution argued throughout the trial that he could be held guilty under Section 4(2) of the ICT Act based on his superior responsibility. The Prosecution submitted that Kamaruzzaman “acted as the commander of two camps” located in Mymensingh and in Sherpur, and thereby “actively assisted the members of Al-Badar in carrying out criminal activities.” Furthermore, “being ‘superior’ of the perpetrator Al-Badars, the accused also incurred ‘civilian superior responsibility.’”^{cxxxvii} The Tribunal distinguished civilian superior liability from complicity based on the act of a superior offering encouragement or advice, and specifically considered Kamaruzzaman’s civilian superior liability under Charges 1 and 2.

The Judgment concluded that an individual could be liable based on either an act or omission “if he is found to have exercised, in specific context, authority and ability to lead and control the members of an organized group.” To this end, the Court focused on Kamaruzzaman’s role as a regional Al-Badr leader.^{cxxxviii} Although the Tribunal referred to Kamaruzzaman as an Al-Badr “commander,” it assessed Kamaruzzaman’s guilt on a theory of civilian superior liability, rather than command responsibility as a member of a military group. The Tribunal found that Kamaruzzaman could be held liable for both Charges 1 and 2 based on superior responsibility under Section 4(2). In relation to Charge 1, the Tribunal stressed that Kamaruzzaman had been the leader of Al-Badr in greater Mymensingh and was thus responsible for the conduct of members of the Al-Badr force in the region, such that he would still be guilty even if he had not intended to facilitate Badiuzzaman’s murder, based solely on his control over the army camp and failure to prevent the crime.^{cxxxix} Under Charge 2, the Tribunal reiterated that Kamaruzzaman was a leader of Al-Badr, and that “even inaction” would render him liable for the criminal acts of members of the Al-Badr force over whom he had authority.^{cxl}

Elements of Superior Liability

The Judgment articulated four elements of superior responsibility for a crime: that the “(1) crime has been perpetrated (2) crime has been perpetrated by someone other than the accused (3) the accused had material ability or influence or authority over the activities of the perpetrators (4) the accused failed to prevent the perpetrators in committing the offence.”^{cxli} The Tribunal noted that superior liability is not limited to military superiors, but “also may extend to *de jure* or *de facto* civilian superiors.”^{cxlii} The Tribunal recognized that section 4(2) could be read to only provide for liability for military commanders and superiors, but held that the amendment of Section 3 of the Act gave the Tribunal jurisdiction “to try and punish any non-military person, whether superior or

subordinate.”^{cxliii} Citing ICTY jurisprudence, the ICT adopted the “effective control” standard, explaining that, “the ability to exercise effective control is necessary for the establishment of de facto superior responsibility, in civil setting.”^{cxliv}

The ICTY Appeals Chamber held, in *Celibici*, that “the concept of effective control over a subordinate - in the sense of a material ability to prevent or punish criminal conduct, however that control is exercised - is the threshold to be reached in establishing a superior-subordinate relationship.”^{cxlv} Although the ICT did not expressly establish this definition as the standard for “effective control,” the Tribunal cited to this paragraph in the *Celibici* decision, and held that “the accused need not have a formal position in relation to the perpetrator, but rather that he has the ‘**material ability**’ to prevent the crime.”^{cxlvi} explicitly make the connection between “material ability” and “effective control,” although it uses both terms. The ICTY defines “effective control” as “the material ability to prevent or punish criminal conduct”^{cxlvii} The ICT cites to this specific paragraph, and appears to be applying the ICTY’s definition.

The ICT Judgment concluded that “the indicators of ‘effective control’ are more a matter of evidence than of substantive law,” and a superior’s level of control “must be determined on the basis of the evidence presented in each case.” A formal document demonstrating a superior’s command position is not required.^{cxlviii} The Tribunal can infer a superior-subordinate relationship from evidence presented regarding the Accused’s acts and behavior as well as the relevant circumstances.^{cxlix} With regard to Kamaruzzman, the Tribunal found that “the conducts, acts, behaviour, activities and significant attachment of the accused Muhammad Kamaruzzaman to the camps of Al-Badar sufficiently establish that the accused had such a level of authority and control over the members of Al-Badar,” that “he was in position to prevent Al-Badar members from committing the horrific criminal acts proved,” and therefore is liable under superior responsibility.^{cl}

Considering *mens rea*, the Judgment again cites to the ICTY case of *Celibici*, seeming to acknowledge the ICTY/ICTR standard requiring at least ‘constructive knowledge’ on the part of a superior in order for liability to apply. The Judgment states, “*Celibici* held that in the absence of direct evidence, circumstantial evidence may be used to establish the superior’s actual knowledge of the offences committed, or about to be committed, by his subordinates.”^{cli} However, The Tribunal agreed with the Prosecution’s arguments, holding that a “‘knowledge’ requirement is not needed to prove the accused’s liability because of his superior position within the Ambit of the Act of 1973.”^{clii} Despite this, the Tribunal then noted that “an individual’s superior position per se is a significant indicium that he had knowledge of the crimes committed by his subordinates,”^{cliii} and that “‘knowledge may be proved through either direct or circumstantial evidence.’”^{cliv} Applied to Kamaruzzaman, the Tribunal emphasized that “material relevant facts” about Kamaruzzaman’s role at the two Al-Badr camps “are considerable indicium to prove accused’s knowledge.”^{clv} The Judgment notes that, “naturally the information was available to him about the offences committed or to be committed by the members of Al-Badars of the camps, although the accused may not have specific details of the

crimes.”^{clvi} The Tribunal did not require knowledge as an element of superior liability, but appeared to find that Kamaruzzaman did have sufficient knowledge to incur liability, despite not knowing full details of the crimes.

Superior Responsibility as a Mode of Liability and an Aggregating Factor

Following the assessment of the individual charges, the Tribunal discussed civilian superior liability under Section 4(2) of the ICT Act as a general matter, and held that a Defendant may be held responsible under a mode of liability even if it was not described in the Charge Framing Order. The Prosecution submitted that the Accused could be held responsible under Section 4(2) of the ICT Act on a theory of superior liability, even though he had only been charged under 4(1). The Prosecution argued that the charges framed do not have to allege the ‘mode of liability,’ in order to provide sufficient notice to a Defendant. The Defense, meanwhile, argued that the formal charge must be altered in order to provide notice to the Accused, and that a defendant could not be held liable under a different mode of liability than that described in the in the charge.

In the final Judgment, the ICT sided with the Prosecution, stressing that the mode of liability did not have to appear in the Charge Framing Order in order to provide a Defendant adequate notice. The Court reasoned that the, “particulars of the alleged crimes in the charges framed is sufficient to give notice of the matter with which the accused has been charged.” The Tribunal emphasized that the mode of liability could not be determined before the trial begins, because it could only be determined by a court on the basis of evidence and other circumstances revealed at trial.^{clvii} They further noted that a defendant might be liable simultaneously under both 4(1) and 4(2).^{clviii} The Tribunal can find that he is guilty under both, the Court reasoned, but he cannot be convicted cumulatively for the same conduct or act under both modes of liability.^{clix} When a defendant is liable under both modes, his liability under 4(2) as a “superior” may be taken into account as an “aggravating factor”, for the purpose of determining the degree of accused’s culpability and awarding sentence.”^{clx} The Tribunal did not explain further how such an aggravating factor would be taken into account.

III. Broader Conclusions of the Tribunal

After adjudicating the individual charges, the Tribunal discussed the role of Jamaat-e-Islami in general. The Tribunal explained that it was both “indispensable to get a scenario on the role and stand of Jamaat-e-Islami” as a point of fact, and that “the victims and sufferers of the diabolical atrocities do have right to know the role Jamaat-e-Islami played in 1971.”^{clxi} Although the Tribunal did not mention either the 2009 or 2013 amendments to the ICT Act in connection with its discussion of Jamaat-e-Islami, it is notable that the amendments extended the Tribunal’s jurisdiction to individuals, groups of individuals, and organizations. There was significant speculation that the Tribunal might use these provisions to categorize Jamaat-e-Islami as a criminal organization, or to charge the political party as a whole with crimes under the ICT Act. This in fact occurred subsequent to the Tribunal’s Judgment in the *Kamaruzzaman* case. In the Tribunal’s Judgment for *Chief Prosecutor vs. Professor Gholam Azam* the Tribunal included a

conclusion that “Jamaat-e-Islami as a political party under the leadership of accused Prof. Ghulam Azam intentionally functioned as a ‘Criminal Organisation’ especially during the War of Liberation of Bangladesh in 1971.”^{clxii} Additionally, on 18 August 2013 the Tribunal began an official investigation into the party, indicating the strong possibility that Jamaat-e-Islami will be prosecuted for crimes under the ICT Act of 1973.

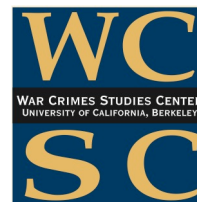
ROLE OF JAMAAT-E-ISLAMI

The Tribunal considered the general role of Jamaat–e-Islami as an organization in 1971. Citing to scholarly books and news reports, the Tribunal concluded that Jamaat-e-Islami played a key role in the formation of the Al-Badr, Razakar, Al-Shams, and Peace Committee groups; had an alliance with the Pakistani military; and “stood against the whole Bengali nation and its war of liberation.”^{clxiii} Regarding the evidence, the Tribunal explained that “the profile and credential [sic] of the author may be considered as a key indicator for determination of authoritativeness of narration made in a book,” and that an author’s previous membership in Jamaat-e-Islami could make him particularly authoritative.^{clxiv}

After finding that Jamaat-e-Islami helped to form auxiliary forces, the Judgment concludes that these “para-militia forces actively collaborated [with] the occupation armed forces to the accomplishment of their barbaric atrocities directed against the unarmed Bengali civilians in the territory of Bangladesh in 1971.”^{clxv} Noting that Al-Badr was composed of students from Jamaat-e-Islami, the *Kamaruzzaman* Judgment held that the party “acted as the think tank and colluded as key architect of the crimes against humanity committed, in territory of Bangladesh in 1971, in violation of customary international law.”^{clxvi} While the political party could have prevented atrocities by exercising control over Al-Badr, it instead “substantially and consciously contributed to Al-Badr, its ‘facist armed wing,’ in carrying out dreadful criminal activities.”^{clxvii} The Tribunal emphasized that Jamaat-e-Islami was responsible for allowing “their creation Al-Badar and Razakars” to commit atrocities in Bangladesh.^{clxviii}

* 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 Program is funded through the East-West Center, thanks to generous grants from the Open Society Foundation and private donors.

This issue of ICT TRIAL OBSERVER was authored by Carolyn Forstein, with contributions from Cole Taylor, Nuzhat Hossain, Suhan Khan, and Penelope Van Tuyl, as a product of AIJI’s Trial Observation Program in Bangladesh. A complete archive of daily summaries and weekly digests covering the progress of all cases pending before the ICT are available at www.bangladeshtrialobserver.org, and are cross-posted on the East-West Center’s AIJI portal (<http://www.eastwestcenter.org/research/asian-international-justice-initiative/>) as well as the War Crimes Studies Center homepage (<http://wcsc.berkeley.edu>).



- ⁱ *Chief Prosecutor vs. Kamaruzzaman*, Judgment, available at <http://bangladeshtribunalobserver.org/chart-2/>
- ⁱⁱ For a summary of the factual findings of the Tribunal and a charge specific analysis of the case, please view Special Report, Issue 2, Kamaruzzaman Verdict, available at: <http://bangladeshtribunalobserver.org/2013/06/11/special-report-issue-2-detailed-summary-of-kamaruzzaman-case-and-verdict/>
- ⁱⁱⁱ *Special Issue 2: Kamaruzzaman Verdict*: <http://bangladeshtribunalobserver.org/2013/06/11/special-report-issue-2-detailed-summary-of-kamaruzzaman-case-and-verdict/>
- ^{iv} *Chief Prosecutor vs. Kamaruzzaman*, Judgment, para 3.
- ^v *Ibid.*, para 5
- ^{vi} *Ibid.*, para 49.
- ^{vii} *Ibid.*, para 50-61
- ^{viii} *Ibid.*, para 62.
- ^{ix} *Ibid.*, para 67.
- ^x *Chief Prosecutor v. Abdul Quader Molla* (Judgment of 5 February 2013)
- ^{xi} *Kamaruzzaman*, Judgment, para 97.
- ^{xii} *Ibid.*, para 119.
- ^{xiii} *Qader Molla* *Ibid.*, para 120, citing *Akayesu*, ICTR Trial Chamber *Ibid.*, para 531 and *Musema*, ICTR Trial Chamber *Ibid.*, para 174
- ^{xiv} *Kamaruzzaman*, Judgment, para 133.
- ^{xv} *Ibid.*, para 128.
- ^{xvi} *Ibid.*, para 131.
- ^{xvii} *Ibid.*, para 132.
- ^{xviii} § 3(2)(a) of the 1973 ICT Act
- ^{xix} *Kamaruzzaman*, Judgment, para 135.
- ^{xx} *Ibid.*, para 133.
- ^{xxi} *Ibid.*, para 88.
- ^{xxii} *Ibid.*, para 91.
- ^{xxiii} *Ibid.*, para 565.
- ^{xxiv} *Ibid.*, para 572.
- ^{xxv} *Ibid.*, para 572, citing to “[AIR 1997 SC 322, Rajesh Kumar v Dharambir and others].”
- ^{xxvi} *Ibid.*, para 566.
- ^{xxvii} *Ibid.*, para 566.
- ^{xxviii} *Ibid.*, para 35, citing the Order of February 20, 2013
- ^{xxix} *Ibid.*, *Ibid.*, para 36, citing the Order of March 3, 2013
- ^{xxx} See *infra* regarding the ICT’s discussion of burdens of proof and alibi.
- ^{xxxi} ICT Act of 1973, Section 22
- ^{xxxii} *Kamaruzzaman*, Judgment, para 36, referencing *Alfred Musema* (ICTR Trial Chamber)
- ^{xxxiii} *Ibid.*, para 559.
- ^{xxxiv} *Ibid.*, para 568.
- ^{xxxv} *Ibid.*, para 45, citing Section 19(4) of the ICT Act.
- ^{xxxvi} *Ibid.*, para 95
- ^{xxxvii} *Ibid.*, para 95.
- ^{xxxviii} *Ibid.*, para 490.
- ^{xxxix} *Ibid.*, para 521.
- ^{xl} *Ibid.*, para 516.
- ^{xli} *Ibid.*, para 426.

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- xlii *Ibid.*, para 426.
xliiii *Ibid.*, para 555.
xliv *Ibid.*, para 556.
xlv *Ibid.*, para 140.
xlvi *Nchamihigo*, ICTR Trial Chamber (2008) para 14; cited in para 140 of *Kamaruzzaman*
xlvii *Kordic and Cerkez*, ICTY Appeal Chamber (2004) para 274; cited in para 140 of *Kamaruzzaman*
xlviii *Kamaruzzaman*, Judgment, para 145.
xlix *Ibid.*, para 148.
l *Ibid.*, para 179.
li *Ibid.*, para 179.
lii *Ibid.*, para 180.
liii *Ibid.*, para 79, *Ibid.*, para *Ibid.*, para 165-168
liv *Ibid.*, para 79; *Ibid.*, para *Ibid.*, para 170-171.
lv *Ibid.*, para 371.
lvi *Ibid.*, para 448.
lvii *Ibid.*, para 448.
lviii *Ibid.*, para 215.
lix *Ibid.*, para 449.
lx *Ibid.*, para 451.
lxi *Ibid.*, para 424.
lxii *Ibid.*, para 427.
lxiii *Ibid.*, para 178
lxiv *Ibid.*, para 277.
lxv *Ibid.*, para 276.
lxvi *Ibid.*, para 143.
lxvii *Ibid.*, para 144.
lxviii *Ibid.*, para 208.
lxix *Ibid.*, para 209.
lxx *Ibid.*, para 210.
lxxi *Ibid.*, para 210.
lxxii *Ibid.*, para 339.
lxxiii *Ibid.*, para 267.
lxxiv *Ibid.*, para 269.
lxxv *Ibid.*, para 270.
lxxvi *Ibid.*, para 270.
lxxvii *Muvunyi Appeals Chamber* *Ibid.*, para 128; cited in *Ibid.*, para 270.
lxxviii *Kamaruzzaman*, Judgment, para 384.
lxxix *Ibid.*, para 384.
lxxx *Ibid.*, para 409.
lxxxi *Ibid.*, para 410.
lxxxii *Ibid.*, para 411.
lxxxiii *Ibid.*, para 413.
lxxxiv *Ibid.*, para 415.
lxxxv *Ibid.*, para 413.
lxxxvi *Ibid.*, para 415.
lxxxvii *Ibid.*, para 161.
lxxxviii *Ibid.*, para 153.
lxxxix *Ibid.*, para 155.
xc *Ibid.*, para 156.
xci *Ibid.*, para 157.
xcii Charge 1 was for Murder, Torture and Other Inhumane Acts as Crimes Against Humanity.
xciii *Ibid.*, para 218.
xciv *Ibid.*, para 244.
xcv *Ibid.*, para 312.
xcvi *Ibid.*, para 350.
xcvii *Ibid.*, para 394.
xcviii *Ibid.*, para 395.

cli *Ibid.*, para 611, citing **Celibici** Trial Chamber, ICTY, Judgment 16 November 1998, para 386.

clii *Ibid.*, para 624.

cliii *Ibid.*, para 624.

cliv *Ibid.*, para 625.

clv *Ibid.*, para 625.

clvi *Ibid.*, para 626.

clvii *Ibid.*, para 498.

clviii *Ibid.*, para 499.

clix *Ibid.*, para 500.

clx *Ibid.*, para 631

clxi *Ibid.*, para 574

clxii *Chief Prosecutor vs. Professor Gholam Azam*, Judgment, 15 July 2013, para 375.

clxiii *Kamaruzzaman*, Judgment, para 595.

clxiv *Ibid.*, para 585.

clxv *Ibid.*, para 596.

clxvi *Ibid.*, para 600.

clxvii *Ibid.*, para 606.

clxviii *Ibid.*, para 606.