

**International Crimes Tribunal-1 (ICT-1)
Old High Court Building, Dhaka, Bangladesh**

ICT-BD [ICT-1] Case No.06 OF 2015

[Charges:- Participating, aiding, abetting, facilitating and complicity in the commission of offences constituting genocide and crimes against humanity as specified in section 3(2)(a)(c)(g)(h) of the Act No. XIX of 1973]

The Chief Prosecutor

Versus

- 1. Md. Idris Ali Sardar[absconded], and**
- 2. Md. Solaiman Mollah[died at the stage of summing up of the case]**

Present:

**Mr. Justice Anwarul Haque, Chairman
Mr. Justice Md. Shahinur Islam, Member
Mr. Justice Md. Shohrowardi, Member**

Prosecutors:

Mr. Golam Arif Tipu, Chief Prosecutor with
Mr. Syed Haider Ali
Mr. Rana Das Gupta
Mr. Zead-Al-Malum
Mr. Hrishikesh Saha
Mr. Md. Altab Uddin
Ms. Tureen Afroz
Mr. Abul Kalam
Ms. Rezia Sultana

Defence Counsel:

Mr. Gazi M. H. Tamim, Advocate
... For accused Idris Ali Sardar as State defence
counsel.

Date of delivery of Judgment: 05 December, 2016.

JUDGMENT

[Under section 20(1) of the Act No.XIX of 1973]

**Justice Anwarul Haque, Chairman
Justice Md. Shahinur Islam, Member**

I. Introductory Words

01. Accused (1) Idris Ali Sardar son of late Hazi Hakim Ali Sardar and late Maju Bibi of Village West Kashabhog, Police Station Palong, District-Shariatpur, and (2) Md. Solaiman Mollah [died on 26 October 2016 at the stage of summing up of the case] son of late Chand Mollah and late Shaharjan Bibi of Kashipur Muslim Para, Ward No. 5, Police Station Palong, District-Shariatpur, have been put on trial before this Tribunal-1 at the instance of the Chief Prosecutor to answer charges under section 3(2)(a)(c)(g)(h) read with section 4(1) of the International Crimes (Tribunals) Act, 1973.

02. This International Crimes Tribunal-1 [hereinafter referred to as the "**Tribunal**"] was established under the International Crimes (Tribunals) Act enacted in 1973 [hereinafter referred to as the '**Act of 1973**'] by Bangladesh Parliament to provide for the detention, prosecution and punishment of persons responsible for genocide, crimes against humanity, war crimes and other class crimes committed in the territory of Bangladesh, in violation of customary international law, particularly in between the period of 25 March and 16 December, 1971. However, no Tribunal was set up, and as such, no one could be brought to justice under the Act of 1973 until the government established the Tribunal on 25 March, 2010.

II. Jurisdiction of the Tribunal under ICT Act of 1973.

03. The International Crimes (Tribunals) Act, 1973 states about the jurisdiction of the Tribunal and crimes in section 3 which is as follows:

"(1) A Tribunal shall have the power to try and punish any individual or group of individuals, or organisation, 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).

(2) The following acts or any of them are crimes within the jurisdiction of a Tribunal for which there shall be individual responsibility, namely:-

(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 where perpetrated;

(b) *Crimes against Peace: namely, planning, preparation, initiation or waging of a war of aggression or a war in violation of international treaties, agreements or assurances;*

(c) *Genocide: meaning and including any of the following acts committed with intent to destroy, in whole or in part, a national, ethnic, racial, religious or political group, such as:*

(i) *killing members of the group;*

(ii) *causing serious bodily or mental harm to members of the group;*

(iii) *deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part;*

(iv) *imposing measures intended to prevent births within the group;*

(v) *forcibly transferring children of the group to another group;*

(d) *War Crimes: namely, violation of laws or customs of war which include but are not limited to murder, ill-treatment or deportation to slave labour or for any other*

purpose of civilian population in the territory of Bangladesh; murder or ill-treatment of prisoners of war or persons on the seas, killing of hostages and detainees, plunder of public or private property, wanton destruction of cities, towns or villages, or devastation not justified by military necessity;

(e) violation of any humanitarian rules applicable in armed conflicts laid down in the Geneva Conventions of 1949;

(f) any other crimes under international law;

(g) attempt, abetment or conspiracy to commit any such crimes;

(h) complicity in or failure to prevent commission of any such crimes."

To our understanding the proper construction of this section should be-

04. Crimes against humanity can be committed even in peace time; existence of armed conflict is, by definition, not mandatory. Neither in the preamble nor in the jurisdiction sections of the Act of 1973 was it mentioned that crime against humanity requires the existence of an armed conflict. Indiscriminate attack on civilian

population based on their political, racial, ethnic or religious identity can be termed as crimes against humanity even if it takes place after 1971. However, no one denies the fact that there was an armed conflict in 1971.

III. Consistency of the Act of 1973 with other Statutes on International Crimes

05. We have already quoted section 3 of the International Crimes (Tribunals) Act, 1973 where jurisdictions of the Tribunal and crimes have been stated. Now let us see the jurisdiction of other International Tribunals and definition of crimes against humanity provided in their Statutes on international crimes.

Article-7 of the Rome Statute

06. According to Article 7 of the Rome Statute, “crime against humanity” means any of the following acts when committed as part of a widespread or systematic attack directed against any civilian population, with knowledge of the attack:

- (a) Murder; (b) Extermination; (c) Enslavement; (d) Deportation or forcible transfer of population; (e) Imprisonment or other severe deprivation of physical liberty in violation of fundamental rules of international law; (f) Torture; (g) Rape, sexual slavery, enforced prostitution, forced pregnancy, enforced sterilization, or any other form of sexual violence of comparable gravity;

(h) Persecution against any identifiable group or collectivity on political, racial, national, ethnic, cultural, religious, gender as defined in paragraph 3, or other grounds that are universally recognized as impermissible under international law, in connection with any act referred to in this paragraph or any crime within the jurisdiction of the Court; (i) Enforced disappearance of persons; (j) The crime of apartheid; (k) Other inhumane acts of a similar character intentionally causing great suffering, or serious injury to body or to mental or physical health.

Article 3 of the ICTR

07. The International Criminal Tribunal for Rwanda [ICTR] shall have the power to prosecute persons responsible for the following crimes when committed as part of a widespread or systematic attack against any civilian population on national, political, ethnic, racial or religious grounds of (a) murder, (b) extermination, (c) enslavement, (d) deportation, (e) imprisonment, (f) torture, (g) rape, (h) persecutions on political, racial and religious grounds and (i) other inhumane acts.

Article 5 of the ICTY

08. The International Criminal Tribunal for former Yugoslavia [ICTY] shall have the power to prosecute persons responsible for

the (a) murder, (b) extermination, (c) enslavement, (d) deportation, (e) imprisonment, (f) torture, (g) rape, (h) persecutions on political, racial and religious grounds and (i) other inhumane acts when committed in armed conflict, whether international or internal in character, and directed against any civilian population.

09. Under the Rome Statute [Article 7] and Statute of the International Criminal Tribunal for Rwanda [Article 3] the jurisdiction of the Tribunals were given to try offences of 'crimes against humanity' such as murder, extermination, deportation, torture, rape etc. of the person/ persons when the offences committed as a widespread or systematic attack directed against any civilian population on national, ethnic, racial or religious grounds. According to ICTY [Article 5] existence of armed conflict is the key element to try offences of crimes against humanity, directed against the civilian population.

10. But the Appellate Division of our Supreme Court in the case of **Abdul Quader Molla Vs. Government of Bangladesh**, vis-a-vis has observed to the effect [majority view]:

"Whereas, under our Act, 1973 the tribunal has jurisdiction to prosecute and punish any person irrespective of his nationality who being a member of any armed, defence or auxiliary forces commits, whether before or after the

commencement of the Act, Crimes against Humanity, Crimes against Peace, Genocide and other crimes connected therewith during the period of war of liberation. The offences of murder, extermination, rape or other inhumane acts committed against civilian population or persecutions on political, racial, ethnic or religious grounds are included in the offence of crimes against Humanity. "

"For commission of the said offence [crimes against Humanity], the prosecution need not require to prove that while committing any of offences there must be 'widespread and systematic' attack against 'civilian population'. It is sufficient if it is proved that any person/ persons attack against 'civilian population'. It is sufficient if it is proved that any person/ persons committed such offence during the said period or participated or attempted or conspired to commit any such crime during operation search light in collaboration with the Pakistani Regime upon unarmed civilian with the aim of frustrating the result of 1970 National Assembly

election and to deprive the fruits of the election result." [Pages: 241-242].

11. In view of the above observation of the Appellate Division it is now well settled that in our jurisdiction for constituting the offence of crimes against humanity the element 'the attack must be widespread and systematic against civilian population' is not at all necessary or mandatory.

12. However, after making comparative analysis of the definitions provided for crimes against humanity, crimes against peace, genocide and war crimes under section 3(2)(a), (b), (c) and (d) of the Act of 1973 those are found to be fairly consistent with the manner in which these terms are defined under recent Statutes for the International Criminal Tribunal for the former Yugoslavia [ICTY], the International Criminal Tribunal for Rwanda [ICTR], the International Criminal Court [ICC] Rome Statute, and the Statute of the Special Court for Sierra Leone [SCSL], it can be safely said that the Act of 1973 legislation with its amendments upto 2013 provides a system which broadly and fairly compatible with the current international standards.

13. As per section 3(2) of the Act of 1973 to constitute an offence of crime against humanity, the element of attack directed against any civilian population is required. The "*population*" element is intended to imply crimes of a collective nature and thus

exclude single or isolated acts. Thus, the emphasis is not on the individual victim but rather on the collective, the individual being victimized not because of his individual attributes but rather because of his membership of a targeted civilian population. This has been interpreted to mean that the acts must occur on a large scale basis [widespread] or, that there must be some form of a governmental, organizational or group policy to commit these acts [systematic, targeted] and that the perpetrator must know the context within which his actions are taken [knowledge and intent], and finally that attack must be committed on discriminatory grounds in case of persecution.

14. The attack must be directed against any civilian population. The term “*civilian population*” must be interpreted broadly and refers to a population that is predominantly civilian in nature. A population may qualify as “*civilian*” even if non-civilians are among it, as long as it is predominantly civilian. The presence within a population of members of armed resistance groups, or former combatants, who have laid down their arms, does not as such alter its civilian nature.

15. However, for our better understanding it is needed to know the meaning and scope of 'widespread' and 'systematic' attack. '*Widespread*' refers to the large-scale nature of the attack which is primarily reflected in the number of victims. '*Systematic*' refers to

the organized nature of the acts of violence and the *'non-accidental repetition of similar criminal conduct on a regular basis.'*

Widespread is quantitative while systematic is qualitative.

IV. Salient features of ICT Act of 1973 and International Crimes (Tribunal-1) Rules of Procedure, 2010 [ROP, 2010] applicable to trial procedure.

16. The proceedings before the Tribunal shall be guided by the Act of 1973 and International Crimes (Tribunal-1) Rules of Procedure, 2010 [hereinafter referred to as the 'ROP, 2010']. Section 23 of the Act of 1973 prohibits the applicability of the Code of Criminal Procedure, 1898 and the Evidence Act, 1872. The Tribunal is authorized to take into its judicial notice of facts of common knowledge and some official documents which are not needed to be proved by adducing evidence [sub-sections (3) and (4) of section 19 of the Act of 1973]. The Tribunal may admit any evidence without observing formality, such as reports, photographs, newspapers, books, films, tape recordings and other materials which appear to have probative value [section 19(1) of the Act of 1973]. The Tribunal shall have discretion to consider hearsay evidence too by weighing its probative value as per rule-56(2) of the ROP, 2010. The defence shall have right to cross-examine prosecution witnesses on their credibility and to take contradiction of the evidence given by them before the Tribunal as per rule-53(2) of the ROP, 2010. Accused deserves right to conduct his own case or to have assistance of his counsel [section 17 of the

Act of 1973]. The Tribunal may release an accused on bail subject to conditions as imposed by it as per rule 34(3) of the ROP, 2010. The Tribunal may, as and when necessary, direct the concerned authorities of the government to ensure protection, privacy, and well-being of the witnesses and victims as per rule 58 A of the ROP, 2010.

17. The Act of 1973 is meant to prosecute and try the persons responsible for the offences of crimes against Humanity, genocide and other class crimes committed in violation of customary international law in accordance with the provisions of the said Act. However, the Tribunal is not precluded from borrowing those international references which are not found inconsistent with the provisions of the Act of 1973 in the interest of fair justice.

18. The Act of 1973 has ensured all the universally recognized rights to accused in order to make fair trial. The fundamental and key elements of fair trial are (i) right to disclosure, (ii) holding trial in public, (iii) presumption of innocence of the accused, (iv) adequate time for preparation of defence case, (v) expeditious trial, (vi) right to examine defence witness, and (vii) right to defend by engaging counsel.

19. All the aforesaid rights have been provided to the accused to ensure fair justice. In addition to observation of those elements of fair justice, the Tribunal has adopted a practice by passing an order

that while an accused in custody is interrogated by the investigation officer, at that time, the defence counsel and a doctor shall be present in the adjacent room of the interrogation room, and the defence counsel is permitted to meet the accused during break time and at the end of such interrogation. The doctor is also allowed to check-up the physical condition of the accused, if necessary. All these measures are being taken by the Tribunal to ensure fair investigation as well as trial.

20. Before going into discussion and evaluation of the evidence on record, it is needed to be mentioned here that this Tribunal has already resolved some common legal issues agitated by the defence in the following cases of the Chief Prosecutor vs. Allama Delwar Hossain Sayeedi [ICT-BD Case No. 01/2011], The Chief Prosecutor Vs. Professor Ghulam Azam [ICT-BD Case No. 06/2011], the Chief Prosecutor Vs. Salauddin Qader Chowdhury [ICT-BD Case No. 02/2011] and the Chief Prosecutor Vs. Motiur Rahman Nizami [ICT-BD Case No.03 of 2011]. Apart from this, the Appellate Division of our Supreme Court in the cases of Abdul Quader Molla Vs Government of the People's Republic of Bangladesh and vis-a-vis [Criminal Appeal Nos. 24-25 of 2013], Muhammad Kamaruzzaman vs. The Chief Prosecutor [Criminal Appeal No. 62 of 2013], Ali Ahsan Muhammad Mujahid vs. The Chief Prosecutor [Criminal Appeal No. 103 of 2013], Salauddin

Qader Chowdhury vs. The Chief Prosecutor [Criminal Appeal No. 122 of 2013], Allama Delwar Hossain Sayedee vs. The Government of the People's Republic of Bangladesh and vis-a-vis [Criminal Appeal Nos. 39-40 of 2013] and Motiur Rahman Nizami vs. The Government of Bangladesh [Criminal Appeal No. 143 of 2014] has also decided the legal issues involved in the cases under the Act of 1973.

V. The settled laws/ issues by the Appellate Division and the Tribunal are as follows:

- i. Customary International Law [CIL] shall not be applied if it is contrary to the Act of 1973;
- ii. There is no rule of CIL that prohibits our domestic Tribunal to proceed with the trial as per our domestic legislation;
- iii. Our domestic Tribunal has the jurisdiction to continue with the trial in any manner acting in derogation of rules of public international law;
- iv. There is nothing repugnant to CIL in the Act of 1973, rather it is consonant with the provisions of CIL;
- v. The inordinate delay in commencing any proceedings under the Act of 1973 *ipso facto* can not be a ground to doubt the truth or veracity of the prosecution case;
- vi. By the amendment of section 3(1) of the Act of 1973 through Act No.LV of 2009 the jurisdiction of the Tribunal

has been extended to try and punish 'any individual,' 'organization' or 'group of individuals' besides any member of any armed, defence or auxiliary forces, irrespective of his nationality who has committed crimes against Humanity mentioned in section 3(2) of the Act of 1973;

vii. The Act of 1973 is a protected law and the moment, sub-section (1) of section 3 was amended by way of substitution, it became part of the Statute and it got the protection of any legal challenge to be void or unlawful or even to have become void or unlawful in view of the provisions of Article 47(3) of our Constitution;

viii. The clemency given to the admitted prisoners of War, pursuant to the tripartite agreement of 1974, in no way, either match the Act of 1973 or any of its provisions ineffective, invalid or void;

ix. Mere failure of the successive governments to act in accordance with the Act of 1973 for last more than forty years, in no way, gave any right to the accused to be exonerated from being tried for the commission of crimes against Humanity as mentioned in section 3(2) of the Act of 1973;

x. In the Act of 1973, no limitation has been prescribed for initiating proceedings against any individual or group

of individuals or organization or any member of any armed, defence or auxiliary forces irrespective of his nationality for the commission of crimes mentioned in section 3(2) of the Act of 1973;

xi. The Collaborators Order, 1972, a different legislation aiming to prosecute the persons for the offences punishable under the Penal Code, were scheduled in the Collaborators Order, 1972, while the Act of 1973 has been enacted to prosecute and try the persons for crimes against Humanity, genocide and other crimes committed in violation of customary international law [CIL], and as such, there is no scope to characterize the offences indulging in the Collaborators Order, 1972 to be the same offences as specified in the Act of 1973;

xii. The Act of 1973 is a codified law, thus, it is not needed to travel to seek assistance from other trials held or is being held by the tribunals/ courts either under the charter of agreements of the nations or under other arrangements under the mandate of United Nations or other International body, such as Nuremburg trial and the Balkan trials.

VI. Historical Backdrop and Context

21. In August, 1947 the partition of British India based on two-nation theory, gave birth to two new States, one a secular State

named India and the other the Islamic Republic of Pakistan of which the western zone was eventually named as West Pakistan and the eastern zone as East Pakistan, which is now Bangladesh.

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

23. In the general election of 1970, the Awami League under the leadership of Bangabandhu Sheikh Mujibur Rahman became the majority party of Pakistan. Despite this overwhelming majority, Pakistan government did not hand over power to the leader of the majority party as democratic norms required. As a result, movement started in this part of Pakistan and Bangabandhu Sheikh Mujibur Rahman in his historic speech of 7 March, 1971, called on the Bangalee people of the eastern zone to strive for independence if people's verdict would not be respected and power was not handed over to the leader of the majority party. On 26 March, 1971 following the onslaught of "**Operation Search Light**" by the Pakistani Military on 25 March, Bangabandhu Sheikh Mujibur Rahman declared Bangladesh independent immediately before he was arrested by the Pakistani army.

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

25. The Pakistan government and the military with the help of some pro-Pakistani leaders set up a number of auxiliary forces, such as, the Razakar Bahini, the Al-Badar Bahini, the Al-Shams, the Peace Committee etc, essentially to collaborate with the Pakistani army in identifying and eliminating all those who were perceived to be sympathized with the liberation of Bangladesh, individuals belonging to minority religious groups especially the Hindus, political groups belonging to Awami League and other pro-independence political parties, Bangalee intellectuals and civilian population of Bangladesh. Undeniably the road to freedom for the

people of Bangladesh was arduous and torturous, smeared with blood, toil and sacrifices. In the contemporary world history, perhaps no nation paid as dearly as the Bangalees did for their emancipation.

26. Having regard to the fact that during the period of War of Liberation in 1971 parallel forces i.e Razakar Bahini, Al-Shams, Al-Badar Bahini and Peace Committee were formed as auxiliary forces of the Pakistani armed forces that provided moral support, assistance and substantially contributed and also physically participated in the commission of horrendous atrocities in the territory of Bangladesh. It is the fact of common knowledge that thousands of incidents happened through out the country as part of organized and planned attacks against the pro-liberation Bangalee civilian population, Hindu community, pro-liberation political group, freedom-fighters and finally the 'intellectuals'. We are to search for answers of all these crucial questions which will be of assistance in determining the culpability of the accused persons for the offences for which they have been charged.

VII. Brief Account of the Accused Persons:

(i) Acused Idris Ali Sardar [67] son of late Hazi Hakim Ali Sardar and late Maju Bibi of Village West Kashabhog, Police Station Palong, District-Shariatpur was born on 01.04.1948 [as per S.S.C certificate] and on 03.03.1957 [as per NID]. He passed S.S.C

Examination in 1966. He was an activist of Islami Chhatra Sangha [ICS] while he was a student of Rudrakar Ninmoni High School, Shariatpur in the year 1962-1966, prosecution alleges. In the year 1969 he was a leader of Islami Chhatra Sangha. During Liberation War he was an active leader of Islami Chhatra Sangha. He joined local Razakar Bahini to collaborate with the Pakistani occupation army, prosecution alleges. Since liberation of Bangladesh he was a leader of Jamaat-e-Islami [JEI].

(ii) Accused Md. Solaiman Mollah [died on 26 October 2016 at the stage of summing up of the case] son of late Chand Mollah and late Shaharjan Bibi of Kashipur Muslim Para, Ward No. 5, Police Station Palong, District-Shariatpur was born on 12.06.1931. He passed Dawra Examination. Since 1963 he joined Muslim League [Fazlul Quader group] and became Organizing Secretary of Palong Thana Muslim League, prosecution alleges. In the year 1970 he joined Jomiatul Ulama-e-Islami and contested the election to be member of the Provincial Assembly, but he was defeated. He formed local Peace Committee and Razakar Bahini and led them in aiding Pakistani occupation army in his locality i.e. Palong Thana area, prosecution alleges.

VIII. Brief Procedural History

27. The Chief Prosecutor submitted 'formal charge' against 02[two] accused persons on having considered the investigation

report and documents submitted therewith by the Investigating Agency. This Tribunal on 22.12.2015 took cognizance of offences against both the accused persons, namely Md. Solaiman Mollah [now dead] and Idris Ali Sardar [absconded]. Out of these two accused persons accused Md. Solaiman Mollah died at the stage of summing up of the case. Another accused Idris Ali Sardar neither could have been arrested nor did he surrender.

28. On 22.12.2016 this Tribunal took cognizance of offences, perpetration of which has been unveiled in course of investigation and on 08.02.2016 ordered publication of notice in two daily newspapers as required under Rule 31 of the International Crimes (Tribunal-1) Rules of Procedure, 2010 against the absconded accused Idris Ali Sardar as the execution of warrant of arrest issued against him earlier was found unserved.

29. Accordingly, despite publication of the notice in two daily newspapers namely 'Daily Janakantha' and 'The New Age' dated 10.02.2016 and 11.02.2016 respectively the absconded accused Idris Ali Sardar did not make him surrendered, and as such, this Tribunal ordered for holding trial *in absentia* against him and appointed Mr. Gazi M.H. Tamim, Advocate to defend him as State defence counsel at the cost of the State. This Tribunal also ordered the prosecution for furnishing documents it relies upon to the State defence counsel and fixed for hearing the charge framing matter.

On 19.04.2016 this Tribunal-1 heard the charge framing matter and fixed on 02.05.2016 for decision on it.

30. Having considered the submissions made by the learned Advocates of the parties and perused the formal charge and other materials on record we were inclined to frame charge against both the accused persons. Accordingly, on 02.05.2016 having rejected two separate applications for discharge we framed 04[four] charges in all against the accused persons.

IX. Witnesses adduced by the parties

31. The prosecution submitted a list of 28[twenty eight] witnesses along with formal charges and documents. But at the time of the trial, the prosecution examined in all 13[thirteen] witnesses including the investigation officer. The prosecution also adduced some documentary evidence which were duly marked as Exhibits 1-9 and Material Exhibits I-II.

32. On behalf of accused persons no list of witnesses was submitted under section 9(5) of the Act of 1973 nor any witness was examined on behalf of them. But the learned defence counsel for both the accused persons cross-examined all the prosecution witnesses.

X. Burden of the prosecution

33. The prosecution, in the light of the charges framed, is burdened to prove (a) the commission of crimes narrated in

charges, (b) mode of participation of the accused persons in committing the crimes for which they have been charged, (c) what was the status and role of the accused persons at the relevant time and how they had maintained association with the Pakistani occupation army, and (d) the context of carrying out of alleged atrocious crimes directed against civilian population and a particular group of population. In determining culpability of the accused persons prosecution is to establish too that (i) the perpetrators must know of the broader context in which the acts committed, and (ii) the acts must not have been carried out for purely personal motives of the perpetrators.

XI. Summing up of the prosecution case

34. Mr. Zead-Al-Malum, the learned prosecutor in portraying the objective of forming Peace Committee and Razakar Bahini in 1971 during the war of liberation submitted that the key objective of forming such organizations was to wipe out the Bengali nation by carrying out killing, looting, rape, torture by launching systematic attacks directed against civilian population which included pro-liberation people, non-combatant freedom-fighters, members of Hindu community, intellectuals and the accused persons being the potential members of locally formed Razakar Bahini actively collaborated with the Pakistani occupation army

stationed in Madaripur in conducting horrendous attacks in different places of the then Madaripur Sub-Division.

35. Next, in laying submission on this matter the learned prosecutor Mr. Zead-Al-Malum drew attention to the oral evidence and the documents relied upon. It has been submitted that the evidence of P.W.01, P.W.03 and P.W.04 cumulatively suggests that accused Md. Solaiman Mollah [now dead] and Idris Ali Sardar respectively were involved with the politics of Jamaat-e-Islami [JEI] and Muslim League, the pro-Pakistan political parties; that it has been affirmed in cross-examination of P.W.03 that in 1971, accused Md. Solaiman Mollah [now dead] and Idris Ali Sardar were the chairman and member respectively of the locally formed Peace Committee which gets corroboration from Exhibit-1, the list of local Razakars and that the local Razakar Bahini was formed under the guidance and coordination of the local Peace Committee and the accused Md. Solaiman Mollah [now dead] and Idris Ali Sardar were the potential members of the said Razakar Bahini.

36. The learned prosecutor further submitted that defence could not refute the fact of the accused persons' membership in locally formed Razakar Bahini and their significant affiliation with the Peace Committee and pro-Pakistan political parties. Mere denying the fact of their membership and affiliation with those two organizations does not turn down what has been testified in this

regard by the prosecution witnesses, the local residents, the learned prosecutor added.

37. The learned prosecutor went on to submit that Exhibit-1, the list of local Razakars shows the accused persons' membership in Razakar Bahini; that Material Exhibit-2, the book 'Al-Badar' at page 251, line 13 shall demonstrate that accused Idris Ali Sardar even prior to 1971 had been in position of General Secretary of Islami Chhatra Sangha [ICS], the student wing of JEI and it gets corroboration from Exhibit-5 'The Daily Ittefaq' dated 13.08.1969. Material Exhibit-2 and Exhibit-5 add assurance to the authoritativeness of Exhibit-1, the list of Razakars so far it relates to accused Idris Ali Sardar.

38. Ms. Rezia Sultana, the learned prosecutor assisting Mr. Zead-Al- Malum, the learned prosecutor next started placing argument on charges framed drawing attention to the evidence adduced. The submission made may be well addressed categorically while adjudicating the charges independently as we deem it convenient and appropriate.

XII. Suming up of the defence case

39. Mr. Gazi M.H. Tamim, the learned counsel defending the accused Idris Ali Sardar as State defence counsel, at the outset of his summing up submitted that prosecution failed to prove membership of this accused and accused Md. Solaiman Molla [died

at the stage of summing up of the case] either in Peace Committee or in Razakar Bahini formed locally. Exhibit-1, the alleged list of Razakars showing the name of the accused has been prepared during investigation and the same is not authoritative one. A list of Peace Committee members [Prosecution Documents Volume-5 at page 107] does not contain the name of accused Idris Ali Sardar. Thus, none of the accused persons was the member of Peace Committee and Razakar Bahini. Prosecution failed to prove their affiliation with those organizations. On query, the learned State defence counsel however conceded that even in the capacity of an individual a person can be prosecuted.

40. Next, the learned State defence counsel proceeded placing argument in respect of charges for which the accused persons stood trial. In placing submission, the learned counsel drew attention to the testimony of the prosecution witnesses presented. However, we deem it convenient and appropriate to address the argument placed on factual aspects while adjudicating the charges independently. The accused persons have been prosecuted long more than four decades after the commission of alleged crimes. Delayed prosecution remained unexplained, and as such, it may be presumed that the accused persons could have been prosecuted earlier if they really would have committed any of the alleged offences, the learned State defence counsel added.

XIII. Rebuttal by the prosecution

41. Mr. Hrishikesh Saha, the learned prosecutor assisting the learned prosecutor Mr. Zead-Al-Malum on placing rebuttal submission emphatically argued on some pertinent legal issues indisputably involved in this case. The learned prosecutor submitted that the attack directed against the civilians belonging to Hindu religious group [as narrated in charge nos. 01 and 02] was conducted with 'special intent' to destroy the group, in whole or in part.

42. In respect of the matter of 'special intent', an element to constitute the offence of 'genocide', can be well inferred from the facts and circumstances divulged from the evidence tendered, the learned prosecutor emphasized. Hindu religious group is a 'protected group' as mentioned in the Genocide Convention 1948. Violating the prohibition contained therein the perpetrators, the Pakistani occupation army being assisted, encouraged, abetted, and facilitated by the accused persons the offence of 'genocide' was committed.

43. Rape or sexual violence as narrated in charge no.02 constituted the offence of 'genocidal rape', the learned prosecutor argued. On this matter he further submitted that the rape or sexual violence committed upon the Hindu women in captivity constituted the offence of 'genocide' as it caused 'serious bodily and mental

harm' to the victims as enumerated in section 3(2) (c) (ii) of the Act of 1973.

44. In respect of the notion of 'participation' the learned prosecutor submitted that the accused persons too were the 'participants' to the crimes committed as they knowing the consequence of their act and conduct assisted, abetted, facilitated and substantially contributed in carrying out the horrific attacks directing the Hindu religious group.

XIV. Whether the accused persons can be prosecuted without prosecuting their accomplices

45. The learned defence counsel referring to the evidence on record and rule 36 of ROP, 2010 has raised a legal question that some Razakars and co-perpetrators, who are still alive, accompanied the accused persons at the crime sites in committing the crimes have not been brought to book by the prosecution as well as the investigation agency, and as such, initiation of the proceeding against the present accused persons on the basis of '**pick and choose**' policy is malafide one and it has vitiated the whole trial.

46. It is true that from the testimonies of some prosecution witnesses it is revealed that some Razakars and co-perpetrators accompanied the accused persons at the crime sites in committing the crimes. Excepting the present accused persons, none of their accomplices have been brought to justice, but that by itself does not

make the horrendous episode of atrocities directing attack on the civilian population constituting the offences of genocide and crimes against humanity untrue or give any immunity to the present accused person. If the accused person is found guilty and criminally liable beyond reasonable doubt for his culpable acts, inaction in prosecuting his accomplices cannot be the reason for holding the former innocent or relieved from liability. In this regard we may recall the provision as contained in section 4(1) of the Act of 1973 which states that when any crime as specified in section 3(2) of the said Act is committed by several persons each of such person is liable for that crime in the same manner as if it were done by him alone. Further, we have no hesitation to hold that rule 36 of ROP, 2010 is not mandatory but directory. Non compliance of the said rule *ipso-facto* does not vitiate the trial.

47. It may be mentioned here that we did not find any provision within the four corners of the Act of 1973 that all the perpetrators of an offence must be tried in one trial, failing which one of the perpetrators against whom if any proceeding is brought that would be vitiated. There is a basic principle of criminal jurisprudence that a man cannot be vexed twice for the same cause of action. But one of the perpetrators of an offence cannot be absolved *ipso facto* for non bringing the other perpetrators in the same trial with him. So, the submission made by the learned defence counsel in respect of

this issue has no leg to stand. In this regard we find support from the case of the **Prosecutor vs. Brdjanin [Case No. IT-99-36-T, September 1, 2004, para -728]** where the ICTY Trial Chamber observed –

“An individual can be prosecuted for complicity in genocide even when the perpetrator of genocide has not been tried or even identified.”

48. The ICTY Trial Chamber in the case of Prosecutor vs. Stakic [Case No. IT-97-24-T, July 31, 2003, para 533] also observed that –

“The trial Chamber is aware that an individual can be prosecuted for complicity even where the perpetrator has not been tried or even identified and that the perpetrator and accomplice need not know each other.”

XV. General Considerations Regarding the Evaluation of Evidence in a case of Crimes against Humanity

49. The accused persons who were allegedly the members of ‘auxiliary forces’ as defined in section 2(a) of the Act of 1973 have been charged for the offences enumerated in section 3(2) of the Act of 1973. The offences for which they have been indicted were ‘system crimes’ committed in violation of international humanitarian law in the territory of Bangladesh in 1971.

50. The accused persons have been brought to justice more than four decades after the barbaric offences occurred. The case so far as it relates to the alleged facts of criminal acts constituting the alleged offences is predominantly founded on oral evidence presented by the prosecution. Together with the circumstances to be divulged it would be expedient to have a look to the facts of common knowledge of which Tribunal has jurisdiction to take into its judicial notice [section 19(3) of the Act of 1973], for the purpose of unearthing the truth. Inevitably, determination of the related legal issues will be of assistance in arriving at decision on facts in issues.

51. Totality of its horrific profile of atrocities committed in 1971 naturally left little room for the people or civilians to witness the entire events of the criminal acts. Some times it also happens that due to the nature of international crimes, their chaotic circumstances, and post-conflict instability, these crimes usually may not be well-documented by post-conflict authorities.

52. We reiterate that section 23 of the Act of 1973 provides that the provisions of the Criminal Procedure Code, 1898 [V of 1898] and the Evidence Act, 1872 [I of 1872] shall not apply in any proceedings under this Act. Section 19(1) of the Act provides that the Tribunal shall not be bound by technical rules of evidence and it shall adopt and apply to the greatest possible extent non-

technical procedure and may admit any evidence which it deems to have probative value.

53. In adjudicating the atrocious events alleged and complicity of the accused persons therewith we have to keep the ‘context’ in mind in the process of assessment of evidence adduced. The reason is that the term ‘**context**’ refers to the events, organizational structure of the group of perpetrators, *para militia* forces, policies that furthered the alleged crimes perpetrated in 1971 during the war of liberation.

54. It is to be noted too that the testimony even of a single witness on a material fact does not, as a matter of law, require corroboration for a finding to be made. This jurisprudence as propounded by our own jurisdiction shall seem compatible to the principle enunciated by *ad hoc* tribunal [ICTR] wherein it has been observed as under -

“Corroboration of evidence is not necessarily required and a Chamber may rely on a single witness’ testimony as proof of a material fact. As such, a sole witness’ testimony could suffice to justify a conviction if the Chamber is convinced beyond all reasonable doubt.”
[Nchamihigo, (ICTR Trial Chamber), November 12, 2008, para. 14].

55. In the earlier cases disposed of by this Tribunal in exercise of its jurisdiction it has been settled that hearsay evidence is not readily inadmissible *per se* but it is to be evaluated in light of probability based on corroboration by ‘other evidence’. That is to

say, hearsay evidence is admissible and the court can act on it in arriving at decision on fact in issue, provided it carries reasonable probative value [rule 56(2) of the ROP, 2010]. We have already recorded our same view on this issue in different cases. This view finds support too from the principle enunciated in the case of *Muvunyi* which is as below:

"Hearsay evidence is not per se inadmissible before the Trial Chamber. However, in certain circumstances, there may be good reason for the Trial Chamber to consider whether hearsay evidence is supported by other credible and reliable evidence adduced by the Prosecution in order to support a finding of fact beyond reasonable doubt."
[Muvunyi, (ICTY Trial Chamber), September 12, 2006, para. 12]

56. Next, it has already been settled by the Tribunal and the Apex Court as well, in earlier cases, that an insignificant discrepancy does not tarnish witness's testimony in its entirety. Any such discrepancy, if found, needs to be contrasted with surrounding circumstances and testimony of other witnesses. In this regard, in the case of **Nchamihigo it has been observed by the Trial Chamber of ICTR** that --

"The events about which the witnesses testified occurred more than a decade before the trial. Discrepancies attributable to the lapse of time or the absence of record keeping, or other satisfactory explanation, do not

necessarily affect the credibility or reliability of the witnesses.....The Chamber will compare the testimony of each witness with the testimony of other witness and with the surrounding circumstances."

The Prosecutor v. Simeon Nchamihigo, ICTR-01-63-T, Judgment, 12 November 2008, para 15]

57. The alleged events of atrocities were committed not at times of normalcy. The offences for which the accused persons have been charged occurred during the war of liberation of Bangladesh in 1971. Requirement of production of dead body as proof to death does not apply in prosecuting crimes enumerated under the Act of 1973. A victim's death may be established even by circumstantial evidence provided that the only reasonable inference is that the victim is dead as a result of the acts or omissions of the accused constituting the offence.

58. In order to assess the culpability of accused persons, their act and conduct forming part of the attack have to be taken into account to see whether such act or conduct facilitated or substantially contributed to the commission of the crimes alleged. Physical participation to the actual commission of the principal offence is not always indispensable to incur culpable responsibility. The act and conduct of accused are sufficient to form part of the attack if it had a substantial link to the perpetration of the principal crime. It has been observed in the case of *Tadic*, [Trial Chamber: ICTY, May 7, 1997, para. 691] that:

"Actual physical presence when the crime is committed is not necessary . . . an accused can be considered to have participated in the commission of a crime . . . if he is found to be 'concerned with the killing.'"

59. However, according to universally recognised jurisprudence and the provisions as contained in the ROP, 2010 onus squarely lies upon the prosecution to establish accused persons' presence, acts or conducts, and omission forming part of attack that resulted in actual commission of the offences of genocide and crimes against humanity as enumerated in section 3(2) of the Act of 1973 for which they have been arraigned. Therefore, until and unless the accused persons are found guilty they shall be presumed innocent. Keeping this universally recognised principle in mind we shall go ahead with the task of evaluation of evidence provided.

60. In the case in hand, most of the prosecution witnesses have testified the acts, conducts of the accused persons which allegedly facilitated and substantially contributed to the commission of the principal events. Naturally, considerable lapse of time may affect the ability of witnesses to recall facts they heard and experienced with sufficient and detail precision. Thus, assessment of the evidence is to be made on the basis of the totality of the evidence presented in the case before us and also considering the context prevailing in 1971 in the territory of Bangladesh. Credibility of

evidence adduced is to be weighed in the context of its relevance and circumstances.

XVI. Affiliation and association of the accused persons with Pakistani army and the Peace Committee and Razakar Bahini formed locally and objective of forming such organizations

61. Two accused persons have been tried jointly in the case in hand. Accused Md. Solaiman Mollah who was detained in prison got all opportunities of being defended during trial, but he died on 26 October 2016 at the stage of summing up of the case, after closure of evidence. Despite this fact their affiliation with Pakistani occupation army and organizations like Peace Committee and Razakar Bahini need to be settled for the purpose of effective determination of commission of offences alleged of which they have been arraigned jointly. Besides, it is to be resolved whether the accused persons, tried jointly, were involved with the alleged commission of offences either in exercise of their membership in local Razakar Bahini and Peace Committee or in the capacity of ‘individual[s]’.

62. Accused Md. Solaiman Mollah [now dead] was the leader of local Peace Committee and later on he became a potential member of Razakar Bahini formed locally to which accused Idris Ali Sardar was a member and they participated in committing the atrocious activities directing civilian population belonging to Hindu religion, prosecution alleges. In order to substantiate it prosecution relied

upon oral testimony and documentary evidence as well. On contrary, defence denies the alleged membership of the accused persons either in the locally formed Peace Committee or Razakar Bahini.

63. Mr. Zead-Al-Malum, the learned prosecutor in course of summing up of the prosecution case submitted that both oral and documentary evidence presented shall adequately demonstrate that both the accused persons were the members of locally formed Razakar Bahini; that they were affiliated too with the local Peace Committee; that accused Idris Ali Sardar was a potential leader of ICS, the student wing of JEI since prior to the war of liberation ensued. The learned prosecutor further submitted that accused Md. Solaiman Mollah [now dead] was involved with the politics of pro-Pakistan political party and the political ideology. The accused persons used to cherish them to be engaged with the Razakar Bahini intending to collaborate with the Pakistani occupation army stationed in Madaripur in conducting the horrific atrocious activities around the localities of the then Madaripur Sub-Division.

64. On contrary, Mr. Gazi M.H.Tamim defending the absconding accused Idris Ali Sardar as State defence counsel submitted that neither this accused nor the accused Md. Solaiman Mollah, who died on 26 October 2016 at the stage of summing up of the case, was associated with Razakar Bahini or Peace

Committee formed locally in any manner. The Exhibit- 1, an alleged list showing names of Razakars is not an authoritative document. Prosecution failed to prove membership of the accused persons in Razakar Bahini or Peace Committee. The witnesses testified in this regard made inconsistent version which cannot be relied upon. On query the learned State defence counsel however conceded that even an individual can be prosecuted for the offences enumerated in the Act of 1973.

65. It is to be noted that accused Md. Solaiman Mollah, who died on 26 October 2016 at the stage of summing up of the case after closure of prosecution evidence, was duly defended by engaging counsel. Since two accused persons have been tried jointly evidence tendered by the prosecution accordingly will reasonably come forward while evaluating the same even for the purpose of determining the liability of another accused Idris Ali Sardar and we may have a look also on the matter whether accused Md. Solaiman Mollah [now dead] during the war of liberation in 1971 had affiliation with the Razakar Bahini and the Peace Committee.

66. At the out set we prefer to note that even an individual who got consciously engaged in committing prohibited acts directed against civilian population constituting the offences in violation of customary international law may be prosecuted and tried. Thus,

even failure to prove that accused persons were the members of Razakar Bahini formed locally does not absolve them of being prosecuted for the alleged crimes if they are alleged to have committed the same as associates of the principals, the Pakistani occupation army. In this regard the **ICTR Trial Chamber** observed in the case of **Musema** that --

"So it is well-established that the post-World War II Trials unequivocally support the imposition of individual criminal liability for war crimes on civilians where they have a link or connection with a Party to the conflict. The principle of holding civilians liable for breaches of the laws of war is, moreover, favoured by a consideration of the humanitarian object and purpose of the Geneva Conventions and the Additional Protocols, which is to protect war victims from atrocities. Therefore, the Chamber concludes that the Accused could fall in the class of individuals who may be held responsible for serious violations on international humanitarian law, in particular serious violations of Common Article 3 and Additional Protocol II. "

[Musema, ICTR Trial Chamber, January 27, 2000, paras. 274-275]

67. Thus, the accused persons could fall in the class of individuals who may also be prosecuted and tried for the offences as enumerated in the Act of 1973 committed in serious violations of international humanitarian law. The Act of 1973 permits it. However, now let us eye on what has been testified by the witnesses in respect of the accused persons' affiliation with and

membership in Peace Committee and Razakar Bahini formed locally in 1971.

68. At the same time in assessing the charges brought against the accused persons and their alleged culpability and also the motivation of their being associated with the Pakistani occupation army and local Razakar Bahini we must have a clear portrayal about the Peace Committee and Razakar Bahini and their activities carried out in 1971 in the territory of Bangladesh.

69. In relation to alleged affiliation of the accused persons with the locally formed Razakar Bahini and contribution of accused Md. Solaiman Mollah [died on 26 October 2016 at the stage of summing up] in forming the said Bahini, P.W.01, P.W.02, P.W.03, P.W.04, P.W.10 and P.W.12 testified what they knew about it. Those witnesses are the residents of the crime localities.

70. P.W.01 Abdul Aziz Sikder is a resident of village Dhanuka under Police Station Palang of Shariatpur is a freedom fighter. He stated that accused Md. Solaiman Mollah [now dead] and Idris Ali Sardar formed Peace Committee and Razakar Bahini in collaboration with the local Jamaat-e-Islami [JEI] and Muslim League[pro-Pakistan political parties] intending to assist the Pakistani occupation army. The Pakistani army had set up its camp at A.R. Howlader Jute Mills in Madaripur where the Razakars were

provided with training. Apart from this a Razakar camp was also set up at the Cinema Hall at Palang.

71. P.W.02 Jalilur Rahman stated that accused Md. Solaiman Mollah [now dead] participated in 1970's election and was defeated. P.W.03 Md. Abdul Jalil Howlader, a material witness stated how the accused persons got engaged in Razakar Bahini. He stated that at the end of April in 1971 accused Md. Solaiman Mollah [now dead] and Idris Ali Sardar formed Peace Committee in Palong Thana [Shariatpur Sadar] intending to collaborate with the Pakistani army and then formed local Razakar Bahini consisting of anti-liberation people and had set up its camp at a cinema hall in Palong Thana locality. P.W.03 further stated that accused Md. Solaiman Mollah [now dead] was the commander of the said Razakar camp. The Razakars including accused Idris Ali Sardar, Robiul Matobbor and Shamsu Molla and others were provided with training at the army camp set up at the A.R. Howlader Jute Mills in Madaripur Sub-Division headquarters.

72. In cross-examination P.W.03 stated that accused Md. Solaiman Mollah [now dead] was the Chairman of Peace Committee of Palong Thana and accused Idris Ali Sardar was its member; that the Pakistani army came at Palong Thana locality first on 22 May 1971 and prior to it they got stationed in Madaripur.

73. P.W.04 Nurul Islam Sardar also stated in cross-examination that accused Md. Solaiman Mollah [now dead] and Idris Ali Sardar were engaged in politics of Muslim League and Jamaat-e-Islami respectively.

74. P.W.10 Abul Kalam Howlader saw some pro-Pakistan people including accused Md. Solaiman Mollah [now dead], accused Idris Ali Sardar, Rabiulla Master [now dead], Aziz Mollah [now dead] moving towards the launch ghat to greet the group of Pakistani army by chanting slogan '*Naraye Takbir*'.

75. P.W.12 Md. Abdus Samad Talukder, a freedom-fighter stated that at the end of August 1971 he heard from his source that accused Md. Solaiman Mollah [now dead], Idris Ali Sardar and others formed Palong Thana Peace Committee and then they formed Razakar Bahini and got stationed at Palong Cinema Hall and the Razakars received their training at the army camp set up at A.R. Howlader Jute Mills, Madaripur.

76. Cumulative evaluation of the evidence of above witnesses depicts that accused Md. Solaiman Mollah [now dead] was a potential man in locally formed Peace Committee and he and his accomplice accused Idris Ali Sardar afterwards formed Palong Thana Razakar Bahini, got stationed at Palong Cinema Hall and the recruited Razakars received their training at the Pakistani army camp set up at A.R. Howlader Jute Mills, Madaripur.

77. It is also evinced that affiliation of accused Md. Solaiman Mollah [now dead] and Idris Ali Sardar with the Peace Committee has been re-affirmed as P.W.03, in cross-examination, in reply to question put to him by the defence stated that accused Md. Solaiman Mollah [now dead] was the Chairman of Peace Committee of Palong Thana and accused Idris Ali Sardar was its member. The fact that the accused persons were engaged in pro-Pakistan political parties as testified by the witnesses also tends to provide assurance to their active affiliation with the Peace Committee and later on in Razakar Bahini in 1971.

78. Now taking the above together with the documentary evidence adduced in this respect we deem it indispensable to have a look on the objective of forming 'Peace Committee' and 'Razakar Bahini' and in doing so we shall travel through some settled facts of common knowledge.

79. Greeting the group of Pakistani occupation army at the launch ghat by accused Md. Solaiman Mollah [now dead], accused Idris Ali Sardar, Rabiulla Master [now dead], Aziz Mollah [now dead] with chanting slogan '*Naraye Takbir*' as testified by P.W.10 leads to conclude the accused persons' pro-Pakistan mindset and conscious affiliation with the Pakistani occupation army and such conduct rather culpably encouraged the Pakistani occupation army to further its policy and plan.

80. It is now fact of common knowledge that on 25 March 1971, after the liberation war began, the Pakistani occupation army needed help from the local people to wipe out the pro-liberation civilians, members of Hindu religious group, to further its policy and plan. In accomplishing this aim they formed the 'Peace Committee', whose members were to help to identify areas of freedom-fighters and act as guides as well as accomplices in perpetrating the criminal acts by launching attack. Afterwards, it started acting together with the Razakar Bahini, an auxiliary force and para militia forces like Al-Badar and Al-Shams, it is now undisputed fact of common knowledge.

81. What was the objective of forming Peace Committee throughout the country in 1971? Providing support and assistance to the Pakistani occupation army in carrying out its activities with intent to combat and liquidate the 'anti-state elements', 'miscreants', was the key purpose of the 'Peace Committee'. The report titled '**Peace Committee formed**' by **Sydney H. Schanberg** speaks that-

“Throughout East Pakistan the Army is training new para-military home guards or simply arming “loyal” civilians, some of whom are formed into peace committees. Besides Biharis and other non-Bengali, Urdu-speaking Moslems, the recruits include the small minority of Bengali Moslems who have long supported the army----adherents of the right wing religious

parties such as the Moslem League Jamaat-e-Islami."

[Source: Sydney H. Schanberg, New York Times July 14 1971; see also Bangladesh Documents, Vol. I, Ministry of External Affairs, new Delhi, page 414]

82. The report titled *Ôkwiš@ Kigvli AnevqđKi veqđZ: mk ĩ; ewnbđK mrvh Kivi AvnevbŎ* published in "The Daily Dainik Pakistan" dated 23 April 1971 which is as below:

*Ômk ĩ; ewnbx thLvtbB hđte tmlvtb RvZıq cZvKv nđZ vbtq
Gıllđq Avmvi Ges ivŏveđivax e"vŎ I ĩyđZKvixđ i vbgđ Kivi
Avfhtb mk ĩ; ewnbđK mrvh Kđi AcđvZKi NUbv Govđbvi
Rb" kwiš@ Kigvli*

83. Thus, Peace Committee formed of pro-Pakistan Bengali Muslim people later on substantially contributed in forming Razakar Bahini and it continued its guidance on it. Purpose of both the Peace Committee and Razakar Bahini was same—to further policy and plan of the Pakistani occupation army. In other words member of Peace Committee and member of Razakar Bahini was synonym to each other as both sided with the Pakistani occupation army to collaborate with them in wiping out miscreants, pro-liberation civilians, Hindu civilians, in the name of preserving solidarity of Pakistan. The truth as unveiled is that the accused persons got themselves closely and culpably associated with the Pakistani occupation army and Razakar Bahini formed locally.

84. In a workers' meeting at Hotel Empire in Dhaka on September 25, 1971, Ghulam Azam said, "The purpose for which the Jamaat-e-Islami joined the Peace Committee and the Razakar Bahini was to keep Pakistan intact, in other words, to save Pakistan ... By embracing martyrdom, Jamaat workers have expounded the spirit that they would rather die than see Pakistan broken into pieces, disintegrated" (**The Dainik Pakistan, September 26, 1971**).

85. It is found from the book titled '*Muktijudhdhe Dhaka 1971*' that in 1971, Jamaat-e-Islami with intent to provide support and assistance to the Pakistani occupation army by forming armed Razakar and Al-Badar force obtained government's recognition for those *para militia* forces. The relevant narration is as below:

" RiqvqtZ Bmjvqx gyphtyxi ii" t_tK tkI chS@
 miguik RvS@vtK mg_0 Kti | Zvt`i mnuqZvi Rb` Ab`ib`
 agvE` j` ibtq c0gZ MVb Kti kwS@ Kigul | cieZxngtq
 mk`; ewnbx ivRiKvi I Avje`i MVb Kti Ges miKvix
 `KZx Av`vq eti | hytK aghy intmte cbviYv Puj tq DM0
 agx@ Dbv` bv mpo i tPov Kti | Avi Gi Avotj `mb`i
 mnuqZvq Pjvq ibvePti bksm MYnZ`v, j y, bvi x ibhiZb,
 AcniY I Piu Av`vq | meKl RuZi veteK eyRext` i
 nZ`v Kivnq |"

[Source: *Muktijudhdhe Dhaka 1971*: edited by Mohit Ul Alam, Abu Md. Delowar Hossain, Bangladesh Asiatic Society, page-289]

86. What the Razakars did after a short training they received? They used to go to the rural areas, started looting and committing wanton destruction, killing non-combatant civilians and causing abuse and torture to women. They were used as guides in the

largely unfamiliar, previously unknown areas and as advanced elements of the attacking army, they were very frequently praised by the Pakistani Generals, this picture is undisputed.

87. The Pakistani occupation army would not have been able to unleash dreadful atrocities without the active collaboration and assistance on part of pro-Pakistan political parties, namely Jamaat-e-Islami [JEI], Muslim League and Nezam-e-Islami. It remained undisputed that the accused Md. Solaiman Mollah [now dead] contested election in 1970 as a candidate of pro-Pakistani political party and got defeated. And thus it lends support to the fact of his being engaged in locally formed Razakar Bahini and Peace Committee.

88. Razakar force was formed in May 1971 with the aim of resisting the '*miscreants*' and to wipe out the '*anti state elements*' with the aid of army [**Source: 'The Daily Dainik Pakistan', 16 May 1971**]. Peace Committees were also formed with the identical plan. Ghulam Azam, the then Amir of Jamaat-e-Islami and member of Central Peace Committee almost since the beginning of the war of liberation started appealing the Pakistan government for arming the people who believed in solidarity of Pakistan and to combat the '*miscreants*' [**Source: The Daily Sangram, 21 June 1971, Press conference of Ghulam Azam; see also The daily Sangram 20 June 1971**].

89. The peace committees serve as the agent of army, informing on civil administration as well as on general populace. They are also in charge of confiscating and redistribution of shops and lands from Hindu and pro-independence Bengalis. The peace committee also recruits Razakars. Many of them are common criminals who have thrown their lots with the (Pakistan) army.-[Source: *The Wall Street Journal, July 27,1971*].

90. It is a fact of common knowledge as well that the Pakistani occupation army organized Razakar, Al-Badar for the purpose of their operational support in implementing its atrocious activities in furtherance of policy and organized plan and in doing so it first created Peace Committee and then with the active coordination of said Peace Committee another organization Razakar Bahini was formed intending to further identical policy and purpose.

91. In the case in hand, formation of Peace Committee and Razakar Bahini in Palong Thana remained undisputed. Defence simply denies the accused persons' affiliation with and membership in either of those two organizations. But the reason of being local mighty personality of pro-Pakistan political prominence and a potential leader of ICS[Islami Chhatra Sangha], the student wing of JEI the accused Md. Solaiman Mollah [now dead] and Idris Ali Sardar had respectively made them imbued to take stance against the war of liberation, in the name of preserving solidarity of

Pakistan, it may lawfully be inferred from the facts and circumstance unveiled.

92. Defence avers that the prosecution failed to prove accused parsons' membership either in Peace Committee or in Razakar Bahini; that the alleged lists prepared locally are not authoritative, and as such, their involvement with the commission of crimes alleged was not proved.

93. It is to be noted that position or status of an accused is not the sole determining factor of his complicity with the commission of crime alleged. It is to be seen whether he participated in the commission of crimes, sharing intent of the group and knowing consequence of his conduct and act forming part of attack. And therefore, even an 'individual' can be well prosecuted if it is not proved that he was a member of Razakar Bahini, an auxiliary force or member of Peace Committee, an organisation formed to collaborate with the Pakistani occupation army. The Act of 1973 permits it. Besides, the defence conceded it frankly.

94. The core thing is to be seen whether the accused collaborated with the group of attackers formed of Pakistani occupation army and Razakars in carrying out atrocious activities constituting the offenses as narrated in the charges framed and in such case, it is sufficient to prove that an accused, as an individual, actively collaborated the group of Razakars intending to participate,

abet and contribute to the commission of crimes alleged, by his act and conduct. Therefore, mere failure to prove accused's membership in local Razakar Bahini cannot make him absolved from liability if he is found by credible evidence to have had association with the Pakistani occupation army and local Razakars in carrying out atrocious activities.

95. More than four decades after the commission of atrocious activities in 1971 during the war of liberation it is challenging indeed to collect documents necessary to substantiate a particular fact. Despite such challenge prosecution relies upon some documents collected during investigation and the same which goes compatibly with the testimony of the witnesses inspires credence.

96. List of Razakars prepared locally by the local Muktijodhdha Sangsad Exhibit-1 also proves the accused persons' membership in local Razakar Bahini.

97. List of individuals affiliated with the locally formed Peace Committee prepared by the local Muktijodhdha Sangsad [**Prosecution Documents Volume 05, page 107**] proves accused Md. Solaiman Mollah's [now dead] association with Peace Committee.

98. The report titled *০কিংজ্জ্জি ক্বক্-@ব্ব্ embxió* published on 05.12.2007 in the Daily Bhorer Kagoj [**Prosecution Documents Volume 05, page 100**] demonstrates that accused Md. Solaiman

Mollah [now dead] was a potential and leading Razakar who contributed in forming Razakar Bahini by providing training to hundreds of Razakars in 1971 . The report further speaks of horrific atrocities carried out around the localities under Police Station Palong in collaboration with the Pakistani occupation army.

99. It was not that the persons belonging to Peace Committee were barred from being engaged in the Razakar Bahini as well. Besides, it is fact of common knowledge that Peace Committee was formed first to collaborate with the Pakistani occupation army and afterwards with its active assistance and guidance Razakar Bahini was formed of individuals of people having pro-Pakistan mind set.

100. The narrative made in the book titled 'Al-Badar' [Material Exhibit-II, relevant pages 249-251] on a meeting held on 12 August 1969 over the education policy in the TSC of Dhaka University shows that accused Idris Ali Sardar was the Secretary General of Islami Chhatra Sangha [ICS], the student wing of JEI which speaks a lot about his association with the Peace Committee and Razakar Bahini formed in Palong Thana in 1971. In absence of anything contrary, the evidence tendered tends to suggest accused Idris Ali Sardar's membership in the local Razakar Bahini and affiliation with the Peace Committee as well.

101. Accused Md. Solaiman Mollah [now dead] was an educated local elite and a local level leader of pro-Pakistan political party

and he had visible nexus with the local Peace Committee and Razakar Bahini as he himself organised formation of those two organizations. Accused Idris Ali Sardar too was a potential member of ICS, the student wing of JEI. Besides, in the case in hand we have found that there are sufficient grounds to presume *prima facie* that the accused persons were associated with the orchestration and perpetration of the offences enumerated in the Act of 1973, by their conscious act and conduct forming part of attack.

102. They consciously and devotedly accompanied the Pakistani occupation army stationed in Madaripur in carrying out atrocious activities around the Hindu dominated localities under Police Station Palong-it is alleged. Before we determine the commission of alleged crimes and the accused persons' involvement therewith it appears clear that accused Md. Solaiman Mollah [now dead] was a potential leader of local Peace Committee; that the local Razakar Bahini was formed under active guidance and coordination of the said Peace Committee; that accused Idris Ali Sardar was a member of locally formed Razakar Bahini. Both organizations were formed to further identical policy and plan of the Pakistani occupation army and thus, it is immaterial to ask for more proof that the accused persons belonged to Razakar Bahini. Principally it is to be looked into as to whether they participated, aided, abetted and

contributed to the commission of crimes alleged by their conduct or act.

103. We are to chiefly adjudicate whether the act and conduct of the accused persons forming part of attack facilitated and contributed to the commission of offences alleged. Owning mere membership in the Peace Committee or Razakar Bahini itself does not make an individual criminally liable for any of offences enumerated in the Act of 1973 if he is not found to have had participation in the commission of those offences alleged. Membership in any such organization formed to collaborate with the Pakistani occupation army may hardly be considered as a visible and strapping indication of the accused persons' mindset and the stance they took in 1971 during the war of liberation.

104. It is thus not imperative to prove accused persons' formal membership in Razakar Bahini by providing more and more documents for determining their criminal liability for the offences alleged. Besides, status and association of the accused persons who were allegedly engaged in the commission of horrific atrocious activities became an anecdote around the crime locality. Therefore, the testimony on the accused persons' engagement in locally formed Peace Committee and Razakar Bahini provided by the witnesses, the residents of the crime localities inspires credence. Thus, mere inadequacy of documentary evidence as averred by the

defence by itself does not turn down the fact of the accused persons' affiliation with the locally formed Razakar Bahini and the Peace Committee.

105. However, the documents as have been relied upon by the prosecution together with the oral testimony of competent witnesses cumulatively suggest the conclusion that the accused Md. Solaiman Mollah [died on 26 October 2016 at the stage of summing up of the case] and Idris Ali Sardar were the potential members of Razakar Bahini formed in Palong Thana locality and accused Md. Solaiman Mollah was a man of dominating position in the locally formed Peace Committee as well in exercise of which he contributed substantially in forming Razakar Bahini and guiding them, it stands proved. This fact may effectively be taken in adjudication of charges framed in order to determine the commission of offences alleged and liability of accused Idris Ali Sardar who has been tried jointly with the accused Md. Solaiman Mollah who died on 26 October 2016 at the stage of summing up of the case, after closure of prosecution evidence.

XVII. Adjudication of charges

Adjudication of charge no. 01

[Genocide, murder, plundering and arson committed on 22 May, 1971 in the locality of Palong Police Station]

106. Summary charge: That on 22 May, 1971 at about 03.00 P.M. 100/150 Pakistani army men accompanied by Razakars accused Md. Solaiman Mollah [died on 26 October 2016 at the stage of

summing up of the case] and Idris Ali Sardar and some other Razakars were going to village Kashabhog via Angaria bazaar launch ghat, adjacent to that bazaar, under Palong Police Station of the then Madaripur Sub-Division [at present District Shariatpur] and on the way on their [both accused] instigation one of the Pakistani army men fired gun shot to a farmer Abdus Samad Sikder who along with his son Ismail Hossain Sikder was chasing cow towards their home. Abdus Samad Sikder sustaining bullet hit injury rushed to their courtyard and after a while he succumbed to his injury. Thereafter, the accused persons and their accomplices having attacked the dwelling house of Abdus Samad Sikder looted valuables therefrom.

107. Then the accused persons and their accomplices began to proceed towards east and on the way they shot one ironsmith Shamvu Nath Karmakar working in his shop to death. Thereafter, the accused persons and their accompanied other Razakars and Pakistani army men having attacked Hindu populated village Madhyapara plundered houses and then set them on fire. At the same time the accused persons and their accomplices killed more than 200 [two hundred] Hindu people by firing shots with intent to destroy, in whole or in part, the Hindu religious group, and thereafter Pakistani army men came back to Madaripur army camp.

108. Thereby, accused (1) Md. Solaiman Mollah [now dead], and (2) Idris Ali Sardar are charged for participating, aiding, abetting, facilitating and complicity in the commission of offences of genocide, and murder, plundering and arson [other inhumane acts] as crimes against humanity as part of systematic attack directed against unarmed civilians as specified in section 3(2)(a)(c)(g)(h) of the Act of 1973 which are punishable under section 20(2) of the said Act for which the accused persons have incurred liability under section 4(1) of the said Act.

Evidence of Witnesses Presented

109. In order to prove this charge involving the offences of genocide, murder and other inhumane acts as crimes against humanity prosecution has adduced as many as 09[nine] witnesses who have been examined as P.W.01, P.W.02, P.W.03, P.W.04, P.W.07, P.W.08, P.W.09, P.W.10 and P.W.12.

110. Of those witnesses P.W.01, P.W.03, P.W.08 and P.W.10, four witnesses are allegedly direct witnesses to the facts relevant to the attack that resulted in the offences of genocide, murder and other criminal acts; P.W.07, P.W.09 and P.W.12 are the hearsay witnesses in respect of the event described in charge no.01. Many of these witnesses have testified also in respect of the event narrated in other charges including the charge no.02. However, now

let us see what the witnesses have deposed in respect of the event narrated in charge no.01.

111. P.W.01 Abdul Aziz Sikder [62] is a resident of village Dhanuka under Police Station Palang of district Shariatpur. In 1971, he was an SSC examinee and now he is the commander of local Mukti Jodhdha Sangsad. He was a freedom-fighter.

112. In narrating status and stance of the accused persons P.W.01 stated that he along with 50/60 youths started getting rifle training under leadership of Sultan Mahmud Simon[now Advocate] in the field of Palong Tulasar High School to prepare themselves intending to join the war of liberation, after the declaration of independence on 26th March 1971. Few days later he knew that accused Md. Solaiman Mollah [now dead] and Idris Ali Sardar formed Peace Committee and Razakar Bahini in collaboration with the local Jamaat-e-Islami [JEI], Muslim League[pro-Pakistan political parties] and others intending to assist the Pakistani occupation army. The Pakistani army had set up its camp at A.R Howlader Jute Mills in Madaripur where the Razakars were provided with training. Apart from this a Razakar camp was also set up at the Cinema Hall at Palong.

113. In respect of the attack launched P.W.01 stated that on 22 May 1971 he had been at Angaria bazaar when he saw the accused Md. Solaiman Mollah and Idris Ali Sardar and their cohorts

welcoming the group of Pakistani army men when they arrived at Angaria bazaar launch ghat. He[P.W.01] saw it remaining in hiding behind a shop at the bazaar. The Razakars and the Pakistani army men vandalized shops at the launch ghat and assaulted one shop - keeper Abul Kalam Hawlader and forced him to go with them carrying a sack on head when they started moving therefrom. With this he [P.W.01] started following the group as it left the site of lanch ghat.

114. Some half kilometre away, P.W.01 continued stating, he saw one of the Pakistani army men of the group firing gun shot directing a farmer Abdul Samad Sikder who was about to move towards his house as the accused Solaiman [now dead] and Idris identified him as a member of 'Mukti Bahini' and he eventually died on reaching his house.

115. P.W.01 Abdul Aziz Sikder also stated that the Pakistani army men, accused persons and their cohort Razakars then vandalized the house of Abdul Samad Sikder and then moved to the shop of Shamvu Nath Karmakar at village Kashabhog where the accused persons identified him as 'Malaun'[a member of Hindu community] following which one of the Pakistani army men of the group shot him to death. Then the group moved towards village Madhyapara and he [P.W.01] came back home.

116. P.W.01 further stated that the village Madhyapara was about one kilometre far from his [P.W.01] house, and as such, he could see fumes of fire and heard gun firing from the end of that village. On the following day, P.W.01 stated, at about 07:00 AM he along with some of his villagers visited the village Madhyapara when he found about 200/250 dead bodies lying scattered on road, garden, ditch and other places. On seeing this he came back home.

117. P.W.01 finally stated that the civilians belonging to Hindu community of villages Kashabhog, Madhyapara, Uttar Madhyapara, Dakkhin Madhyapara, Malopara, the Hindu dominated localities, were compelled to deport to India, and thus, the Razakars and the accused persons looted the belongings left by those Hindu civilians. A monument has been built to preserve the memoirs of martyrs who laid their lives during the event of attack happened at village Madhyapara.

118. In cross-examination it has been suggested on part of both the accused persons that they did not belong to Razakar Bahini and they were not affiliated with the local Peace Committee. P.W.01 denied it. Defence denied accused persons' complicity with the events alleged in any manner, by putting suggestion to P.W.01. It also transpires that by cross-examining P.W.01 defence could not bring anything to show that P.W.01 had no reason of knowing the accused persons beforehand. It has been suggested to P.W.01 that

in 1971 accused Idris Ali Sardar was a student of Dhaka University and he had not been in the locality. P.W.01 denied it. However, defence could not dislodge the act of launching attacks directing civilians predominantly belonging to Hindu community that resulted in killing, looting, confinement and sexual abuse on Hindu captives.

119. P.W.02 Jalilur Rahman [65] is a resident of village Rudrakar under Police Station Palong of district Shariatpur. In 1971, he was an SSC examinee. In testifying the event narrated in charge no.01, he stated that on 22 May 1971 he had been at their house. At about 06:00/06:30 P.M. he heard indiscriminate gun firing and saw flames of fire from the end of village Dakhkhin Madhyapara. 20/25 minutes later a boy named Pakhi Das having bullet hit injury on left side of his throat came running to their house from Dakhkhin Madhyapara. He [P.W.02] bandaged his injury and Pakhi Das told him that Razakars and Pakistani army by launching attack at their village destructed households and set the same on fire and fired gun shots. Few minutes later, he [P.W.02] saw many people running through the front of their house towards Burir Haat shouting 'save us, save us'. Pakhi Das stayed at their house during the night, P.W.02 added.

120. P.W.03 Md. Abdul Jalil Howlader [61] is a resident of village Chikondi under Police Station Palong [Shariatpur Sadar]. In

1971, he was an SSC examinee. In narrating the event of attack, P.W.03 stated that on 20 May in 1971 in the afternoon he along with his friend Khalilur Rahman [now dead] went to his[P.W.03] Phupu's[sister of father] house at village Monkola under Police Station Palong, adjacent west to Angaria bazaar. During his staying there, on 22 May 1971 at about 03:30 P.M. when he and his friend Khalilur Rahman had been at Angaria bazaar, they heard about movement of Pakistani army to Angaria bazaar from Madaripur and few minutes later they saw them arriving at Angaria bazaar launch ghat when accused Md. Solaiman Mollah [now dead], Idris Ali Sardar and other Razakars were seen stayed at the ghat. The group of Pakistani army on getting down from the launch detained one Abul Kalam Hawlader from the place nearby the launch ghat and on beating forced him to go with them towards Monohor bazaar by carrying a bag of ammunitions on head. The accused persons and their accomplices then guided the group of Pakistani army in moving forward and he [P.W.03] and his friend Khalilur Rahman started following them by moving through a diverse road. When the army men, accused persons and their cohort Razakars arrived at the locality of village Kasabhog, they saw the army men firing gunshot directing a farmer Abdus Samad Sikder working in the field as identified by the accused Md. Solaiman Mollah [now dead] and Idris Ali Sardar who termed him as a freedom-fighter. Bullet

injured Abdus Samad Sikder succumbed to injuries at the courtyard of his house after reaching at the house from the field. They [P.W.03 and his friend] also could see the Pakistani army men and Razakars moving towards east after looting Abdus Samad's house and then the Pakistani army men gunned down Shamvu Nath Karmakar staying at his shop as the accused Md. Solaiman Mollah [now dead] and Idris Ali Sardar told that he [Shamvu Nath Karmakar] was a Malaun [Hindu] and they [P.W.03 and his friend] observed it from a place about 100 feet far, P.W.03 added.

121. P.W.03 went on to state that after accomplishing the above killing the group of Pakistani army men and Razakars moved to Hindu dominated Monohor bazaar where they [P.W.03 and his friend] found them looting and torching shops of the bazaar. Therefrom the group moved to Hindu dominated village Dakhkhin Madhyapara and at that time they [P.W.03 and his friend] had been at a place southern part of Monohor bazaar wherefrom they could see the village Dakhkhin Madhyapara, and thus, they saw the Pakistani army and Razakars looting and plundering the houses of that village, and as such, the villagers started running away with screaming, but the army gunned them down to death. After the dusk the group of Pakistani army and Razakars had left the village Dakhkhin Madhyapara on foot and went back from Angaria bazaar

launch ghat by launch. Then he [P.W.03] and his friend returned back to his Phupu's house.

122. P.W.03 finally stated that for the mass killing, looting and torching properties committed at Malopara, Dakhkhin Madhyapara, etc. the rest of Hindu civilians of the localities being panicked were thus forced to get deported to India and then their households they left were taken away by accused Md. Solaiman Mollah [now dead], Idris Ali Sardar and their cohort Razakars.

123. In cross-examination P.W.03 stated that accused Md. Solaiman Mollah [now dead] was the Chairman of Peace Committee of Palong Thana and accused Idris Ali Sardar was its member; that the Pakistani army came at Palong Thana locality first on 22 May 1971 and prior to it they got stationed in Madaripur and that on 22 May, 1971 at about 04:00/04:15 P.M. they knew that a group of Pakistani army was on move towards Angaria bazaar.

124. P.W.04 Nurul Islam Sarder [69] is a resident of village Kashabhog under Police Station Palong of district Shariatpur. In 1971, he was 23/24 years old and used to carry out a tea stall at Angaria bazaar.

125. In narrating the facts relevant to the event of attack described in charge no.01, P.W.04 stated that on 22 May 1971 at about 03:00/03:30 PM he had been at his tea stall at Angaria bazaar when he saw 150/200 Pakistani army men getting down from a launch

anchored at Angaria bazaar ghat who were welcomed by accused Md. Solaiman Mollah [now dead], Idris Ali Sardar and their cohort 10/12 Razakars. Seeing it he [P.W.04] rushed towards villages Kashabhog, Madhyapara and Rudrakar and made the villagers aware about the movement of Pakistani army and Razakars towards the villages by shouting and urged them to flee way.

126. P.W.04 next stated that on 23 May 1971 in the morning he went to village Madhyapara where he found about 200/250 dead bodies lying scattered. Therefrom he moved to village Kashabhog where he saw the dead body of Shamvu Karmakar lying in front of his shop and the dead body of Samad Sikder lying at the courtyard of his house.

127. Thus, the P.W.04 testified arrival of a group of Pakistani army at Angaria bazaar and the accused persons and their accomplices welcomed them and on the following morning P.W.04 discovered hundreds of dead bodies of villagers including Shamvu Nath Karmakar and Abdus Samad Sikder. P.W.04 does not claim to have seen the commission of actual killings.

128. P.W.04 finally stated that the events he testified the Hindu civilians of villages Kashabhog, Madhyapara, Malopara and Rudrakar opted to deport to India. He [P.W.04] knew accused Razakar Md. Solaiman Mollah [now dead] since prior to 1971 as he contested 1970's election of Provincial Assembly and he had a shop

at Angaria bazaar. He [P.W.04] also knew accused Idris Ali Sardar beforehand as he was a resident of village west Kashabhog and used to come at Angaria bazaar very often.

129. In cross-examination, P.W.04 stated in reply to defence question put to him that his shop at Angaria bazaar was at only three minutes distance from Angaria launch ghat. The fact of arrival of the group of Pakistani army at Angaria bazaar as testified by P.W.04 has been re-affirmed as P.W.04 stated in reply to defence question that the people present at bazaar got dispersed by running away on getting information about arrival of Pakistani army.

130. P.W.04 also stated in cross-examination that accused Md. Solaiman Mollah [now dead] and Idris Ali Sardar were engaged in politics of Muslim League and Jamaat-e-Islami respectively. P.W.04 denied the defence suggestions that he [P.W.04] did not visit the crime site on 23 May 1971; that accused Idris Ali Sardar was a student of Dhaka University and he was not at the locality at the relevant time and what he testified implicating the accused persons was untrue and tutored.

131. Defence however, as it appears, does not deny the fact of seeing the hundreds of dead bodies lying at villages Madhyapara and Kashabhog on the following day. It has also not been denied that the Hindu civilians of those crime villages pursuant to such horrific attacks had to deport to India as testified by the P.W.04.

132. P.W.07 Anil Chandra Das [61] is a resident of village Dhanuka under Police Station Palong of district Shariatpur. In 1971, he was a student of class VIII. He is a hearsay witness in relation to the event narrated in charge nos.01.

133. P.W.07 stated that in 1971, Palong Thana locality was Hindu dominated. In respect of the event narrated in charge no.01, P.W.07 stated that on 22 May 1971 at about 03:00 P.M. a group of Razakars and Pakistani army accompanied by accused Md. Solaiman Mollah [now dead] and Idris Ali Sardar by launching attack at villages Kashabhog and Madhyapara under Police Station Palong had killed about 200 villagers. After the said event, many residents of these two villages being panicked got sheltered at their village [Dhanuka] when he [P.W.07] heard the event from them.

134. In cross-examination, the defence simply denied what the P.W.07 testified and suggested that the same was untrue and tutored. Hearing the event narrated in charge no.01 as testified by the P.W.07 remained uncontroverted as well.

135. P.W.08 Md. Ismail Hossain Sikder [65] is a resident of village Charkashabhog under Police Station Palong, district Shariatpur. He is the son of Abdus Samad Sikder, one of the victims of the event of attack as narrated in charge no.01. He is a direct witness to the fact if gunning down his father.

136. P.W.08 stated that on 22May 1971 at about 03:00 P.M. he along with his father were on the way of returning home taking cattle with them from the field when they saw accused Razakar Md. Solaiman Mollah [now dead], accused Razakar Idris Ali Sardar, their cohort Razakars and some Pakistani army men coming through the road from western end. Accused Md. Solaiman Mollah [now dead] then indicating his [P.W.08] father Abdus Samad Sikder told –‘freedom-fighter is going, freedom-fighter is going’. With this the Pakistani army fired a gun shot directing his [P.W.08] father. Afterwards, he [P.W.08] took his bullet injured father to home and gave him water to drink. At a stage he saw the Pakistani army men coming towards their house, and as such, he ran away towards south of their house wherefrom he heard gun firing from the end of Hindu Para at village Kashabhog. On the same day, after dusk he came back home and found his father dead. On the following day they buried his father’s dead body. He [P.W.08] finally stated that he knew the accused Md. Solaiman Mollah [now dead] and Idris Ali Sardar beforehand as they and he belonged to same locality and used to go to bazaar very often.

137. In cross- examination, P.W.08 stated that Gani Maulavi and Mujibur Talukder of their village were also with the Pakistani army and Razakars when the event [gunning down his father] happened; that there had been none at their house when his bullet injured

father came to house; that the inmates of their family meanwhile fled away to south being panicked; that on the day of event after dusk coming back home he found his father's dead body at the veranda of their house. Defence suggested that the accused persons were not Razakars and were not involved with the killing of his father and that what he testified implicating the accused persons were untrue and tortured. P.W.08 denied it blatantly.

138. P.W.09 Sambhu Nath Das [76], a resident of village Dhanuka under Police Station Palong [Shariatpur Sadar], District Shariatpur, is a hearsay witness in respect of the event narrated in charge no. 01.

139. In testifying the event narrated in charge no.01, P.W.09 stated that on 22 May 1971 at about 03:00 P.M. a group of Pakistani army and Razakars being accompanied by Razakars accused Md. Solaiman Mollah [now dead] and Idris Ali Sardar had launched attack at villages Kashabhog and Madhyapara under Palong Police Station that resulted in killing of about 200 civilians. He [P.W.09] heard this event from people.

140. P.W.09 then stated that the residents of villages Dhanuka and Madhyapara got deported to India following the events of attacks happened on 22 and 23 May in 1971.

141. In cross-examination, defence chiefly suggested that what the P.W.09 testified implicating the accused persons in relation to the

alleged events narrated in charge nos. 01, 02 and 03 was untrue and tutored and that he did not hear the event as he claimed. P.W.09 denied it.

142. P.W.10 Abul Kalam Hawlader [61] is a resident of village Kashipur under Police Station Palong of District Shariatpur. In 1971, he used to operate a tea stall at the launch ghat of Angaria bazaar jointly with his uncle Raham Ali Hawlader and cousin brother Shamsul Haque Hawlader. He was a student of class VII in Rudrakar High School as well in 1971. P.W.10 testified the facts relevant to the events narrated in charge nos. 01.

143. P.W.10 in respect of the event arraigned in charge no.01 stated that on 22 May 1971 at about 03:00 PM he had been at Angaria bazaar when he knew about arrival of a group of Pakistani army at the launch ghat of Angaria bazaar. He [P.W.10] then saw some pro-Pakistani people including accused Md. Solaiman Mollah [now dead], accused Idris Ali Sardar, Rabiullah Master [now dead] and Aziz Mollah [now dead] moving towards the launch ghat to greet the group by chanting slogan '*Naraye Takbir*'. The group of Pakistani army on getting down from the launch started searching shops including their tea stall and then one Pakistani army man dragged him [P.W.10] out of the tea stall and the group started moving towards the east of Angaria bazaar along with him [P.W. 10]. On the way Mujibur Rahman Talukder [now dead], a shop

keeper of Angaria bazaar joined the group of Pakistani army and Razakars and had talked with them in Urdu. At a stage while the group was headed towards east from Angaria bazaar along with him [P.W. 10] accused Md. Solaiman Mollah [now dead] indicating two persons going towards south along with cattle told that they were 'Mukti'[freedom-fighters] and with this one Pakistani army man fired gun shot directing them and those two persons escaped by running to their house.

144. P.W.10 continued stating that next Abdul Mazid Talukder and Nurul Alam Talukder, two pro-Pakistani people came from their houses and joined the group of Pakistani army and Razakars. Of them Nurul Alam Talukder was a Razakar. At that time Pakistani army asked him [P.W. 10] to bring water to drink and thus he by crossing the canal went to the house of Samad Sikder directing whom the Pakistani army fired gun shot for bringing water. Samad Sikder's house was nearer to said Abdul Mazid Talukder and Nurul Alam Talukder. Arriving at Samad Sikder's house he [P.W.10] saw dead body of Samad Sikder lying at the veranda and then being panicked he went into hid inside a bush , west to Samad Sikder's house wherefrom he could hear indiscriminate gun firing from the end of villages Kashabhog and Madhyapara. He [P.W.10] came out of the bush when the group of Pakistani army had left the site and rushed to the road wherefrom

he came to bring water for the Pakistani army to drink, P.W.10 added. He [P.W.10] heard from the people present there that Pakistani army and Razakars had gunned down about 200 civilians of villages Kashabhog and Madhyapara to death. He [P.W.10] also knew that Shamvu Nath Karmakar was also killed at his shop by the Pakistani army in conjunction with the attack.

145. In cross-examination P.W.10 stated in reply to defence question that about 150/200 Pakistani army men forming part of the group came on the day of the event and he [P.W.10] did not know about their coming earlier; that his parents knew the fact of his being detained on the following day; that he did not see any body else excepting the dead body of Samad Sikder at his house. In this way the facts of detaining P.W.10 and seeing the dead body of Samad Sikder at his house have been affirmed by the defence. However, defence suggested P.W.10 that the accused persons did not belong to Razakar Bahini; that they were not with the group of attackers and were not involved with the event he testified. P.W.10 denied it.

146. P.W.12 Md. Abdus Samad Talukder [61] is a resident of Swarnaghosh, Ward No.08, Shariatpur Municipality under Police Station Palong of District Shariatpur. He is a freedom-fighter. In 1971, he was a first year student of Madaripur Najim Uddin College and used to stay at his elder brother's house in Madaripur

town. He is a hearsay witness in respect of the event narrated in charge no.01.

147. P.W.12 stated, in respect of the event as arraigned in charge no.01, that in the mid of September 1971 he learnt from his source that on 22 May 1971 at about 03:00 P.M. a group of 30/35 Razakars accompanied by accused Md. Solaiman Mollah [now dead] and Idris Ali Sardar guided about 100/150 Pakistani army men stationed at the camp set up at A.R Howlader Jute Mills, Madaripur in launching attack at Hindu dominated villages Madhyapara and Kashabhog and had annihilated about more than 200 Hindu civilians including one Muslim. P.W.12 also stated that there has been a mausoleum at village Madhyapara in memory of the civilians killed.

Finding with Reasoning on Evaluation of Evidence

148. Ms. Rezia Sultana, the learned prosecutor in advancing argument on this charge submitted that in all 09 prosecution witnesses have been examined to substantiate the arraignment and of those witnesses 05 are eye-witnesses to the facts materially relevant to the attack that resulted in murder and indiscriminate killing civilians belonging to Hindu religious group of village Madhyapara under Police Station Palong constituting the offence of genocide. The learned prosecutor further submitted that the Hindu religious group was targeted in order to further 'special intent' to

destroy it, either in whole or in part. Defence does not dispute the event of attack. It simply denies the accused persons' participation to the enterprise, in carrying out the attack.

149. The learned prosecutor further submitted that uncontroverted evidence presented shall demonstrate that since receiving the group of Pakistani occupation army on its arrival at Angaria bazaar launch ghat, the accused Md. Solaiman Mollah [died at the stage of summing up of the case] and Idris Ali Sardar and their accomplice Razakars remained present with them till conducting the attack at the prime crime village. Testimony of the witnesses examined cumulatively proves the accused persons' participation in launching the attack and the testimony tendered in this regard remained unshaken and no material inconsistency in the testimony of witnesses examined could be brought by the defence, the learned prosecutor added.

150. On contrary, Mr. Gazi M.H. Tamim, the learned State defence counsel appointed to defend the absconding accused Idris Ali Sardar submitted that the accused person was not at all with the group of Pakistani occupation army while it allegedly attacked the villages; that the testimony of witnesses suffers from material inconsistencies, and as such, what they testified implicating the accused person creates doubt. The witnesses examined in support of this charge are interested witnesses. The learned State defence

counsel went on to submit that what the P.W.08 stated in respect of age of his brothers and sisters shall appear to be untrue, and as such, what he testified implicating the accused with the commission of alleged crimes becomes untruthful.

151. The charge framed arraigns that a group formed of Pakistani army and Razakars including the accused persons arrived at Angaria bazaar by launch on 22 May 1971 and therefrom they started moving towards Madhyapara, a Hindu dominated village where they carried out alleged genocide directing the civilians of Hindu religious group causing death of hundreds of Hindus. And in accomplishing the said attack the group of perpetrators on their way to Madhyapara had allegedly gunned down Abdus Samad Sikder and then Shamvu Nath Karmakar to death.

152. Accused Md. Solaiman Mollah, who died on 26 October, 2016 at the stage of summing up of the case, after closure of evidence on part of the prosecution, was charged and tried jointly with accused Idris Ali Sardar and prosecution presented evidence to establish liability of both the accused persons for the offences for which they were charged with. Thus, act and conduct even of accused Md. Solaiman Mollah, who is now dead, relevant to the commission of the alleged offences may come forward inevitably for the purpose of effective evaluation of evidence tendered. But however, in any case he cannot be held liable even if he is proved

to have had complicity and participation to the commission of the offences alleged. Keeping it in mind, we should go ahead with the task of evaluation of evidence adduced to determine liability of another accused Idris Ali Sardar.

153. In view of above we are to determine-

- (i) the fact of launching organised attack directing the village Madhyapara;
- (ii) the crime village was Hindu dominated locality;
- (iii) the group of attackers formed of Pakistani army and members of Razakar Bahini including the accused persons;
- (iv) two civilians were killed on substantial facilitation of the accused persons, before the principal attack was launched directing the village Madhyapara;
- (v) accused persons took '*consenting*' and '*active*' part in the commission of the crime, by launching attack by targeting the Hindu religious group;
- (vi) the attack resulted in killing hundreds of Hindu civilians; and
- (vii) the atrocity was intended to destroy the Hindu religious group, either in whole or in part.

154. Naturally, it was not probable for an individual to witness the entire attack or all phases thereof that happened at village Madhyapara in accomplishing the mass killing of hundreds of Hindu civilians. Prosecution requires proving that the crime village was attacked with intent to destroy the Hindu religious group, either in whole or in part, and to show how the accused persons were concerned and contributed to the commission of alleged organised and systematic attack.

155. Who were the accused persons? What identity they had in 1971 during the war of liberation. In this regard let us eye first on what has been testified by P.W.01 on this matter.

156. Evidence of P.W.01 Abdul Aziz Sikder [62], a resident of village Dhanuka under Police Station Palong of District Shariatpur and a freedom-fighter, demonstrates that accused Md. Solaiman Mollah [now dead] and Idris Ali Sardar were engaged in forming local Peace Committee and Razakar Bahini in collaboration with the local Jamaat-e-Islami [JEI] and Muslim League [pro-Pakistan political parties] intending to assist the Pakistani occupation army stationed at A.R Howlader Jute Mills in Madaripur where the Razakars were provided with training and apart from the said army camp a Razakar camp was also set up at the Cinema Hall at Palong.

157. The above version remained unimpeached. Defence simply denied it but it could not controvert it in any manner. It thus proves the accused persons' culpable association with the Pakistani occupation army and they took stance to further their policy and plan. This proved fact shall add assurance to the evidence tendered showing the accused persons' participation in carrying out the criminal acts forming part of attack.

158. Now let us see how the accused persons joined the group of Pakistani army allegedly arrived at Angaria bazaar on the day and time alleged and the successive activities carried out by the group

of perpetrators and how the accused persons got culpably concerned with the criminal acts.

159. It transpires that some of the witnesses made first-hand account of facts relevant to the attack as they saw the criminal activities of the group up to a stage when it was on move towards the crime village Madhyapara. Those witnesses also observed the act of gunning down two civilians as well before the group headed towards the Hindu dominated village Madhyapara. Thus, the charge framed alleges killing of two civilians when the group was on move towards the crime village Madhyapara with intention to annihilate the civilians belonging to Hindu religious group.

160. P.W.01 who had been at Angaria bazaar at the relevant time saw the group formed of Pakistani army arriving at Angaria bazaar launch ghat when the accused Md. Solaiman Mollah [now dead] and Idris Ali Sardar and their cohorts greeted the group, and thus, they joined the group. It remained unimpeached.

161. Besides, it has been corroborated by P.W.03, P.W.04 and P.W.10 who had been at Angaria bazaar at the relevant time. This uncontroverted pertinent fact as unveiled demonstrates the accused persons' prior knowledge about the coming of the group of Pakistani army and the act of welcoming the group of Pakistani army by the accused persons indisputably made them culpable part of the mission of accomplishing atrocious activities. It is to be

noted further that the fact of arrival of the group of Pakistani army at Angaria bazaar as testified by P.W.04 Nurul Islam Sarder has been re-affirmed as P.W.04 stated in reply to defence question that the people present at the bazaar got dispersed by running away on getting information about arrival of Pakistani army.

162. What happened next? To which locality the group of Pakistani army being accompanied and guided by the accused persons and their cohorts started moving and what happened before they attacked the village Madhyapara?

163. It transpires from the testimony of P.W.01 Abdul Aziz Sikder that the group after arriving at Angaria bazaar, Razakars and the Pakistani army men vandalized shops at launch ghat presumably intending to create horror and also forced one shop keeper Abul Kalam Howlader [P.W.10] to go with them carrying a sack on head when they started moving therefrom. It gets corroboration from another direct witness P.W.03 Md. Abdul Jalil Howlader as he testified that the group of Pakistani army on getting down from the launch detained one Abul Kalam Howlader [P.W.10] from the place nearby the launch ghat and on beating forced him to go with them towards Monohor bazaar by carrying a bag of ammunitions on head.

164. Now let us eye on the testimony adduced so far it relates to killing Abdus Samad Sikder and Shamvu Nath Karmakar which

allegedly happened by the Pakistani army on substantial culpable provocation and instigation rendered by the accused persons when the group was headed towards the principal crime site, the village Madhyapara.

165. P.W.01 Abdul Aziz Sikder is a direct witness to the event of killing two civilians namely, Abdus Samad Sikder and Shamvu Nath Karmakar by the group of attackers on their way to the crime village Madhyapara as he [P.W.01] started following the group as it left the site of Angaria bazaar launch ghat. It transpires that some half kilometre away from Angaria bazaar launch ghat P.W.01 saw one of the Pakistani army men of the group firing gun shot directing a farmer Abdul Samad Sikder [Abdus Samad Sikder] who was about to move towards his house as the accused Solaiman [now dead] and Idris identified him as a member of 'Mukti Bahini'[freedom fighter] and he eventually died on reaching his house.

166. His[P.W.01] evidence also demonstrates that a shop-keeper Shamvu Nath Karmakar at village Kashabhog was also gunned down to death by the Pakistani army as where the accused persons identified him as 'Malaun'[a member of Hindu community] and then the group moved towards village Madhyapara and he [P.W.01] came back home.

167. The above testimony of P.W.01 patently makes it obvious how Abdus Samad Sikder and Shamvu Nath Karmakar were gunned down to death and the event of their killing happened on substantial facilitation of the accused persons as they provoked the Pakistani army men terming those victims freedom-fighter and Malaun[Hindu].

168. It is also found from the testimony of P.W.03 Md. Abdul Jalil Howlader, another direct witness that the group of Pakistani army was on being guided by the accused persons and their accomplice Razakars and at a stage at the locality of village Kashabhog he [P.W.03] saw the Pakistani army men firing gunshot directing a farmer Abdus Samad Sikder working in the field as identified by the accused Md. Solaiman Mollah [now dead] and Idris Ali Sardar who termed him as a freedom-fighter. P.W.03 also could see the Pakistani army men gunning down Shamvu Nath Karmakar staying at his shop as the accused Md. Solaiman Mollah [now dead] and Idris Ali Sardar told that he [Shamvu Nath Karmakar] was a 'Malaun' [Hindu] as he [P.W.03] continued following the group secretly.

169. P.W.10 Abul Kalam Hawlader is a vital witness who had occasion of observing the activities of the group accompanied by the accused persons as he was forced to remain with the group of perpetrators from Angaria bazaar. It is found from the testimony of

P.W.10 that at a stage while the group was headed towards east from Angaria bazaar along with him [P.W.10] accused Md. Solaiman Mollah [now dead] indicating two persons going towards south along with cattle told that they were 'Mukti' [freedom - fighters] and with this one Pakistani army man fired gun shot directing them and those two persons escaped by running to their house. Thus, this criminal act happened on conscious, culpable and substantial contribution and abetment of accused Md. Solaiman Mollah [now dead].

170. It is further evinced that on getting detached from the group he [P.W.10] went to Abdus Samad Sikder's houses as he was asked by the Pakistani army to bring water to drink and found dead body of Abdus Samad Sikder lying at the veranda and then being panicked he [P.W.10] went into hid inside a bush, west to Abdus Samad Sikder's house and thus P.W.10 had no occasion of seeing the act of killing Shamvu Nath Karmakar which happened subsequent to killing Abdus Samad Sikder.

171. In reply to defence question put to him P.W.10 stated that he did not see any body else excepting the dead body of Abdus Samad Sikder at his house. In this way the facts of detaining P.W.10 and seeing the dead body of Abdus Samad Sikder at his house have been affirmed by the defence. Besides, defence could not refute the

crucial fact that P.W.10 was forced to accompany the group of attackers since it started moving from Angaria bazaar.

172. It stands proved that P.W.10 was with the group of attackers till the act of killing Abdus Samad Sikder, and thus, had opportunity of observing their criminal activities up to this stage. Therefore, the testimony of P.W.10 inspires credence. Additionally, his testimony gets corroboration even from what has been testified by P.W.01 and P.W.03 who as well had opportunity of observing the criminal acts of causing death of two civilians by gun shot, as identified by the accused persons who termed them 'freedom-fighter' and 'Malaun' [Hindu].

173. Defence could not bring anything by cross-examining those three witnesses, namely P.W.01, P.W.03 and P.W.10 that can reasonably taint the truthfulness of what they testified in respect of conduct and act of the accused persons in accomplishing the killing. Besides, defence does not dispute the killing of those two civilians before the group of perpetrators had attacked the Hindu civilians of village Madhyapara. It simply denied the presence of the accused persons with the group. But there has been nothing to make it believable that after welcoming the Pakistani army arrived at Angaria bazaar ghat the accused persons remained distanced from the group. Rather, it has been proved that they being potential members of Razakar Bahini, an auxiliary force, culpably

accompanied the group intending to provide effective guidance and assistance to the Pakistani army men to further its policy and plan, and thus, the accused persons made them part to the designed plan even of the atrocious attack carried out at village Madhyapara.

174. P.W.08 Md. Ismail Hossain Sikder is the son of victim Abdus Samad Sikder. He is a direct witness to the fact of gunning down his father. At the relevant time he and his father were on the way of returning home taking cattle with them from the field when they saw Razakar accused Md. Solaiman Mollah [now dead] and Idris Ali Sardar, their cohort Razakars and some Pakistani army men coming through the road from western end. Accused Md. Solaiman Mollah [now dead] then indicating his [P.W.08] father told –‘freedom-fighter is going, freedom-fighter is going’. With this the Pakistani army fired a gun shot directing his [P.W.08] father. He [P.W.08] took his bullet injured father to home and gave him water to drink. At a stage he saw the Pakistani army men coming towards their house, and as such, he ran away towards south of their house.

175. In cross- examination P.W.08 stated that Gani Maulavi and Mujibur Talukder of their village were also with the Pakistani army and Razakars when the event [gunning down his father] happened. With this the event of gunning down his [P.W.08] father to death as testified by him remained affirmed.

176. In respect of reason of recognizing the accused persons P.W.08 stated that he knew the accused Md. Solaiman Mollah [now dead] and Idris Ali Sardar beforehand as they and he[P.W.08] belonged to same locality and used to go to bazaar very often. Defence could not refute it. Thus, and since P.W.08 was with his victim father he[P.W.08] had fair opportunity of observing the event of attack that happened being substantially provoked by the accused persons' culpable conduct and act.

177. The testimony of P.W.08 so far it relates to the attack that resulted in killing Abdus Samad Sikder gets corroboration from the evidence of P.W.01 and P.W.03 who followed the group since it started moving from Angaria bazaar being accompanied by accused Md. Solaiman Mollah [now dead] and Idris Ali Sardar till the killing Abdus Samad Sikder and Shamvu Nath Karmakar was accomplished.

178. Additionally, the testimony of P.W.10 who was forced to accompany the group from Angaria bazaar carrying a bag of ammunitions provides consistent corroboration to what has been testified by P.W.08 in respect of killing Abdus Samad Sikder and participation of the accused persons therewith by their culpable conduct and act.

179. Naturally, the Pakistani occupation army had no knowledge as to which locality or village was Hindu populated, and thus, they

had to take guidance and effective assistance in accomplishing its criminal mission and the accused persons and their accomplice Razakars consciously took part to the mission intending to further policy and plan.

180. On totality of evidence of P.W.01, P.W.03, P.W.08 and P.W.10 as evaluated above it stands proved that the accused Md. Solaiman Mollah [now dead], Idris Ali Sardar and their accomplice Razakars enthusiastically welcomed the group of Pakistani army arrived at Angaria bazaar and consciously accompanied them towards the Hindu populated crime village Madhyapara, knowing the consequence intending to further policy and plan. And before the group accompanied by the accused persons had attacked their target village killing of two civilians was perpetrated and it happened on being substantially provoked by the accused persons.

181. It is also evinced that on the way to village Madhyapara the group at a locality of village Kashabhog had gunned down Abdus Samad Sikder and Shamvu Nath Karmakar and then had carried out plundering and torching Monohor bazaar as testified by P.W.03. Defence could not impeach it. Rather, it is evinced that on the accused persons' substantial facilitation and culpable instigation the Pakistani army men gunned those two noncombatant civilians down to death. The killing of those two civilians remained undisputed. The act of indicating the victims terming them as

freedom-fighter and civilian of Hindu community irresistibly forces to conclude that the accused persons' such act and conduct forming part of attack substantially fuelled the Pakistani army men in accomplishing the killing.

182. The act and conduct of the accused Md. Solaiman Mollah [now dead] and Idris Ali Sardar forming part of attack involved the commission of prohibited acts constituting the offence of murder as crime against humanity directed against a civilian population. The act of abetment as appears in the Act of 1973 is punishable. And the act of abetment encompasses 'approval', 'encouragement', 'assistance' or support' that contributes substantially to the accomplishment of the actual crime. The act of the accused persons was "part of"-and not simply coincide with the attack [systematic] directed against a civilian population that resulted in killing two non-combatant civilians. The accused persons' act was thus significantly related to the attack that resulted in murder of two protected civilians.

183. It transpires from the evidence that the Pakistani army men gunned down two civilians to death. But it however stands proved that the accused persons were physically present with the group of Pakistani army at the phase of killing Abdus Samad Sikder and Shamvu Nath Karmakar and the killing happened on their active and culpable instigation, assistance and provocation.

184. On rational appraisal of the evidence, the acts done on part of accused persons are not found to be isolated. These rather formed part of 'attack'. Thus, there can be no room to argue that the accused persons did not physically participate to the killing and as such they cannot be held responsible. It is to be noted that even a single act constituting the offence makes an accused culpable for the offence of crimes against humanity. In this regard the **ICTY Appeals Chamber** has observed in the case of **Deronjic** that -

"..... other conditions being met, a single or limited number of acts on his or her part would qualify as a crime against humanity, unless those acts may be said to be isolated or random."

[Deronjic, (Appeals Chamber), July 20, 2005, para. 109]

185. According to settled jurisprudence any act or conduct of an individual amid commission of the principal offence connects him responsible, if such act or conduct had substantially facilitated the commission of the principal offence, and thus, an individual need not be shown to have physical participation in accomplishing the principal crime. Besides, seeing the accused persons' approving and encouraging the Pakistani army men they accompanied, by their culpable conduct and act, also adds assurance to the accused persons' conscious concern and participation in committing the principal offence of murder. Such culpable instruction consisted of

moral support or encouragement was provided to the principals in the commission of the crime of killing two protected civilians.

186. The above fact also proves that the accused persons remained stayed with the group of Pakistani army consciously and knowing the consequence since beginning of the move of the group from Angaria bazaar.

187. It is to be noted that without being locally collaborated, guided and abetted, the Pakistani occupation army could not get it identified as to who were the civilians to be targeted and the locality to be attacked. Before the group had attacked the village Madhyapara, the principal crime site it had carried out plundering and torching at Monohor bazaar as found proved from the evidence of P.W.03.

188. Presumably such criminal conduct was carried out to reigning terror and panic amongst the civilians around the locality. It is immaterial to ask for proving who physically participated to such criminal acts. It is now settled that an accused may take part to the commission of an offence even by remaining distanced from the crime site, by providing instruction or by any culpable act. In the case in hand it stands proved that the accused persons started accompanying the group of Pakistani army since it arrived at Angaria bazaar, and thus, they may be lawfully considered to be part of the enterprise in carrying out such criminal activities.

189. Now let us adjudicate whether an organised attack was launched by the same group accompanied by the accused persons and whether the attack was carried out targeting a particular religious group that resulted in killing hundreds of civilians and whether the intent of the attack was to destroy the said religious group.

190. It transpires from the evidence of P.W.01 Abdul Aziz Sikder that on the day of the event, after coming back home after witnessing the killing two civilians by the group on their way to the principal crime site the village Madhyapara, P.W.01 saw fumes of fire, heard gun firing from the end of village Madhyapara which was about one kilometre far from his [P.W.01] house. On the following morning P.W.01 along with some of his villagers visited the village Madhyapara when he found about 200/250 dead bodies lying scattered on road, garden, ditch and other places.

191. Setting the houses of civilians of village Madhyapara on fire and launching attack by indiscriminate gun firing as stated by P.W.01 gets corroboration from P.W.02 as he [P.W.02] as well heard indiscriminate gun firing and saw flames of fire from the end of village Dakhkhin Madhyapara.

192. Testimony of P.W.02 Jalilur Rahman also demonstrates horrific destructive and organised attack as in conjunction with the attack, a boy named Pakhi Das having bullet hit injury on left side

of his throat came running to their [P.W.02] house from Dakhkhin Madhyapara and told him [P.W. 02] that Razakars and Pakistani army by launching attack at their village destructed households and set the same on fire and fired gun shots. At this stage P.W.02 also observed many people running through the front of their house towards Burir Haat shouting 'save us, save us'. It remained uncontroverted. This piece of portrayal of the attack suggests inferring the scale and extent of the attack directed against the civilians of village Madhyapara.

193. P.W.03 Md. Abdul Jalil Howlader at the relevant time had been at a place southern part of Monohor bazaar wherefrom he could see the Pakistani army and Razakars looting and torching the houses of village Dakhkhin Madhyapara and the horrific situation compelled the villagers started running away with screaming, but the Pakistani army gunned them down to death. Defence could not refute it. This piece of version on material particular lends further assurance to what has been testified by P.W.01 and P.W.02.

194. It is found from the testimony of P.W.04 Nurul Islam Sarder that on the following morning he went to village Madhyapara where he found about 200/250 dead bodies lying scattered. Defence, as it appears, does not deny the fact of seeing the hundreds of dead bodies lying at villages Madhyapara and Kashabhog on the following day.

195. We do not find anything to distrust their testimony made in this regard. Defence even could not dislodge this material fact in any manner. Rather, it remained totally undenied and unshaken in cross-examination.

196. Testimony of P.W.07 Anil Chandra Das and P.W.09 Sambho Nath Das are hearsay witnesses in respect of the attack that resulted in massive killing of Hindu civilians of village Madhyapara carries probative value as it gets corroboration from the evidence of P.W.01 and P.W.04 who on the following day found hundreds of dead bodies lying scattered at that village. Two days later many residents of the crime village being panicked got sheltered at their village [Dhanuka] when P.W.07 heard the event from them.

197. P.W.09 also heard the event from people. It was quite natural to hear and know the event of attack later on from the people of the crime village. Besides, this version which remained unshaken speaks of gravity and scale of the attack. It has also been divulged from the testimony of P.W.09 that the residents of village Dhanuka and Madhyapara got deported to India following the events of attacks happened on 22 May in 1971.

198. P.W.10 Abul Kalam Hawlader who was forced to accompany the group of Pakistani army and Razakars carrying a bag on head after the Pakistani army men arrived at Angaria bazaar had occasion to observe the activities of the group up to stage of

gunning down one farmer Abdus Samad Sikder and also later on heard from the people present there that Pakistani army and Razakars had gunned down about 200 civilians of villages Kashabhog and Madhyapara to death.

199. P.W.12 Md. Abdus Samad Talukder, a freedom-fighter also learnt from his source that on 22 May 1971 at about 03:00 PM a group of 30/35 Razakars accompanied by accused Md. Solaiman Mollah [now dead] and Idris Ali Sardar guided about 100/150 Pakistani army men stationed at the camp set up at A.R Howlader Jute Mills, Madaripur in launching attack at Hindu dominated village Madhyapara, Kashabhog and had annihilated about more than 200 Hindu civilians including one Muslim.

200. A massive organised large scale killing naturally became an anecdote and the people of the locality surrounding the crime village including the freedom-fighters stationed around the geographical area under Police Station Palong of District [now] Shariatpur had natural opportunity of learning the attack. Thus, and since it gets corroboration from the evidence of other witnesses his hearsay evidence tendered in this regard carries probative value. Besides, defence could not refute that he [P.W.12] had no reason of being aware of the attack.

201. On totality of evidence as discussed above it appears that defence does not dispute the event of killing about 200 Hindu

civilians by carrying out organised and horrendous attack. Besides, finding dead bodies of hundreds of Hindu civilians lying scattered at the crime village as unveiled from the evidence of P.W.01 and P.W.04 together with the fact of seeing the Pakistani army and Razakars looting and torching the houses of village Dakhkhin Madhyapara and the horrific situation compelled the villagers started running away with screaming when the Pakistani army gunned them down to death as testified by P.W.03 conclusively prove the perpetration of the diabolic massacre intending to destroy the Hindu religious group residing within the geographical area of village Madhyapara. It also stands proved that this attacked happened on 22 May 1971 after accomplishing the killing of two other civilians by the group when it was on the way to the targeted village Madhyapara.

202. Thus, it stands proved that the atrocious attack was carried out at village Madhyapara directing the Hindu civilians by the group of Pakistani army in collaboration with local thugs including the accused persons belonging to Razakar Bahini.

203. It is true that none had occasion to see which civilian was killed by which member of the group. It was rather impracticable, considering the pattern and scale of the attack. It however stands proved that about 200 Hindu civilians were killed following such attack. We may thus safely conclude that all the members forming

the group of attackers were thus responsible for the atrocious attack that resulted in killing hundreds of Hindu civilians. The outcome of the attack eventually forced the survived civilians to deport leaving their households. Presumably target was the Hindu religious group residing at village Madhyapara. It is undisputed that the said village was Hindu dominated.

204. It is pertinent to note that the accused persons accompanied the group of Pakistani army and Razakars and on their way to crime village Madhyapara two civilians were gunned down to death on provocation and substantial instigation of the accused persons. There has been nothing to show that the accused persons afterwards got distanced from the group. Thus, and since the attack directing the village Madhyapara was launched by the same group of Pakistani army it may be fairly deduced that the accused persons continued accompanying the group.

205. Besides, the accused persons opted to remain with the group intending to provide active and culpable assistance in launching such attack, we may presume fairly. It has been proved that the accused persons were with the group at the crime site when the principals committed the crimes, and thus, it is not indispensable to ask whether the commission of the mass killing would have occurred if the accused had acted differently. It is to be seen whether in acting, the accused persons provided assistance to (be it

of a practical or moral nature) or encouraged the principals to commit the alleged crimes.

206. How can we deduce the intention of the accused persons and the group they accompanied? In most cases it is hard to show the specific intent to destroy a group as it is required to constitute the offence of genocide by direct evidence. However, intent is a mental factor, and thus, it may reasonably be inferred from a number of presumptions of facts together with the context. In this regard we need to eye on the scale and nature of atrocities committed and the fact of deliberately and systematically targeting the civilians on account of their membership of the religious group which was attacked.

207. Commission of killing targeting specific class of population or group [Hindu religion] perceivably was the outcome of common plan and purpose of the perpetrators. Inherent nature and extent of killing and the class the victims belonged to Hindu community suggest the conclusion that the crimes were perpetrated by a collective enterprise or group to which the accused persons were consenting party and connected.

208. The pattern extent of attack reflects that it was carried out with knowledge of the consequence and intention of the perpetrators was to destroy the local Hindu community, even in part, to further policy and organised plan of the Pakistani army. Following the

mass killing the Hindu residents of their village deported to India. Displacement from own residing place does not conform to the internationally recognised principle of human rights.

209. The basic principle of the concept of 'genocide' is: indiscriminate and systematic destruction of members of a group because they belong to that group. Thus, merely the number of individuals of Hindu religious group killed cannot be the only objective for an inference as to constitution of the offence of genocide. Destruction as transpired from the evidence tendered was patently indiscriminate targeting the members of a 'group' i.e. Hindu community because they belong to Hindu religion.

210. The cumulative effect of the horrific atrocities including killing, destruction and looting of properties, mental harms compelling the Hindu community of the crime village inevitably imprints an unmistakable notion that the aim and intent of the perpetrators was to destroy the 'Hindu religious' group, in part. This notion is qualified as 'genocidal intent' as required to constitute the offence of 'genocide'.

211. The evidence tendered forces to deduce that the perpetrators targeted a significant section of Hindu community of village Madhyapara and in conjunction with the event they committed wanton destruction of properties, looting, burning houses and shops together with killing hundreds of members of Hindu religion. The

intent to destroy a 'protected group' may, in principle, be established if the destruction is related to a significant section of the group. It remained undisputed that the attack resulted in killing about 200 civilians belonging to Hindu religion residing at a particular village, Madhyapara. In the case of **Jelusic**, it has been observed that-

".... the geographical zone in which an attempt to eliminate the group is made may be limited to the size of a region or even a municipality. it is accepted that genocide may be perpetrated in a limited geographic zone."

[Trial Chamber: ICTY), December 14, 1999, para. 83]

212. A report titled '**Hindus Are Targets Of Army Terror In An East Pakistani Town**' by Sydney H. Schanberg published in New York Times, July 04 1971 speaks that-

"FARIDPUR, PAKISTAN. - The Pakistani Army has painted big yellow "H's" on the Hindu shops still standing in this town to identify the property of the minority eighth of the population that it has made its special targets."

[New York Times, July 04 1971 link: http://www.bdesh.com/1971/show_article.php?id=300]

213. The above indisputably suggests concluding that in 1971 during the period of the war of liberation, the Pakistani occupation army and their local collaborators made the Hindu religious group

as 'special target' with intent to further their policy and plan. The policy was to annihilate this protected group, either in whole or in part -- it is now settled history too. Hundreds of civilians killed following an organised and planned attack belonged to Hindu religion as they used to share the same religion, denomination or mode of worship and thus they were the members of a 'religious group' which is protected in the Act of 1973 and the Genocide Convention 1948 as well.

214. We have found it proved that the group of Pakistani army stationed in Madaripur first came to Angaria bazaar launch ghat by launch on 22 May 1971 when the accused persons and their cohort Razakars greeted them and joined the group and then started moving towards the crime village Madhyapara. The criminal mission ended with the planned attack launched at the said village which was Hindu dominated.

215. It is not easy to carry out genocide without a plan, or organisation. The existence of such a genocidal plan adds assurance to the 'specific intent' requirement for the crime of genocide. Plan may not be tangible and it may be well inferred from facts and circumstances divulged.

216. In the case in hand, the proved crucial facts and circumstances lead to valid inference that the entire activities starting from arrival of the group of Pakistani army at Angaria bazaar launch ghat and

going back after task, after accomplishing its criminal mission with the aid, active assistance and guidance of the accused persons were planned and the accused persons sharing the common intent enthusiastically joined the group at Angaria bazaar which started heading towards the crime village under their [accused persons] guidance and assistance in accomplishing specific intent by attacking the Hindu civilians to destroy the group they belonged. Thus, the mass killing happened pursuant to *mens rea* of the group of which the accused Md. Solaiman Mollah [died on 26 October, 2016 at the stage of summing up of the case] and Idris Ali Sardar as well were quite aware, and thus, the attack was conducted to further genocidal intent, we conclude. It has been observed by the **ICTR Trial Chamber** in the case of **Kayishema and Ruzindana** that -

".....the mens rea must be formed prior to the commission of the genocidal acts. The individual acts themselves, however, do not require premeditation; the only consideration is that the act should be done in furtherance of the genocidal intent."

[Kayishema and Ruzindana, (Trial Chamber), May 21, 1999, para. 91]

217. Already we have found it evinced that in conjunction with the attack one shop keeper Shamvu Nath Karmakar of village Kashabhog was gunned down to death as identified by the accused persons who termed him as 'Malaun'[Hindu]. Such aggressive conduct reflects that the special intent of the perpetrators was aimed

to annihilate civilians belonging to a particular group i.e 'Hindu religious group', by accomplishing the underlying criminal acts intending to cause physical and biological destruction of this group.

218. The version of P.W.01 which remained unimpeached also demonstrates that the civilians belonging to Hindu community of villages Kashabhog, Madhyapara, Uttar Madhyapara, Dakhkhin Madhyapara, Malopara -- the Hindu dominated localities were compelled to deport to India, and thus, the Razakars and the accused persons looted the belongings left by those Hindu civilians. It portrays 'special intent' which was aimed to destroy the Hindu community of those villages, by causing grave mental harm as well.

219. The criminal acts conducted by the group formed of huge number of Pakistani occupation army men in active collaboration with the accused Md. Solaiman Mollah [now dead], Idris Ali Sardar and their cohorts indisputably lead to infer that their intent was not only to accomplish large scale killing of civilians. Rather, their ulterior intent was aimed to cause destruction of the Hindu religious group of village Madhyapara.

220. The fact of killing hundreds of Hindu civilians of village Madhyapara by launching organised attack on 22 May 1971 seems to have been corroborated even by the narratives made in the book titled "GKvĒ†i i ea"fig I MbKei "authored by Sukumar Biswas, page - 422 of the book [Material Exhibit-I] reads as below:

"71 - Gi 22 tk tg t_†K cvKewnbx kixqZc†i Zv†`i G †`kxq
 †`vmi†`i mnvqZvq G†Ki ci GK vbh†Zb vbcxob, bvi xal†, nZ`v
 I Nievno Ges nvUevRv†i AvMmsthvM `ii" K†i | H w`bB
 cvKewnbxi GKwU `j kixqZc†i cvjs _vbvi ga`cvoV M†tg Avµgb
 Pvj vq | "

221. It remains undisputed that a mausoleum has been built at the crime village in memoirs of the numerous Hindu civilians who laid their lives being victims of the barbaric attack launched on 22 May 1971. In support of this matter picture of the mausoleum displaying names of the victims [Exhibit-9] demonstrates that the victims were Hindus.

222. It has been argued on part of the defence that the accused persons were not with the group of Pakistani army in carrying out the attack even if it is said to be true on the basis of the narrative made in the book titled "GKvĒ†i i ea`f†g I MbKei " [Material Exhibit-I] as it does not spell complicity of the accused Md. Solaiman Mollah [now dead] and Idris Ali Sardar or Razakars or members of any other organisation with the commission of the killing.

223. It transpires that the narrative made in the book titled "GKvĒ†i i ea`f†g I MbKei " [Material Exhibit-I] does not state that the group of Pakistani army was accompanied by the accused persons or members of Razakar Bahini or members of Peace Committee, true. The narration made in the book titled "GKvĒ†i i ea`f†g I MbKei " [Material Exhibit-I] relied upon by the prosecution

does not narrate in detail, as has been made in the charge framed and unveiled in the evidence presented by the prosecution though it reflects the event of killing hundreds of Hindu civilians of village Madhyapara constituting the offence of genocide. However, it is the author of the book who can explain why the narrative he made does not speak of complicity of the accused persons and members of Razakar Bahini.

224. It is to be noted that the book [Material Exhibit-I] does not describe the event of killing [as narrated in charge no.01] with specificity, as regards manner and perpetrators. But it however narrates the commission of the event by the Pakistani occupation army on 22 May 1971 at village Madhyapara. The author of the book might have limitations or any other reason in portraying the detail exactitude in respect of the event of killing together with accused persons' complicity. And thus the narration made in this book cannot be treated as the whole truth. Merely for this inadequacy the respective narrative made in the book relied upon cannot be kept aside in its entirety, we conclude. Rather, the narration, on the core event, made therein however provides strong corroboration to the commission of the deliberate large scale killing of hundreds of Hindu civilians of village Madhyapara. Therefore, mere absence of the accused persons' name in the narrative made in

this book cannot turn down what has been testified by the direct witnesses.

225. Was it likely for the Pakistani occupation army men stationed in Madaripur Sadar who were on their first move to the rural locality to get the Hindu dominated village and Hindu civilians identified? Of course it was impracticable. This reality provides strong assurance to the fact of prior knowledge and concern of the accused Md. Solaiman Mollah [now dead] and Idris Ali Sardar about the plan of the group of Pakistani occupation army men arrived at Angaria bazaar starting wherefrom the accused persons and their cohort Razakars remained associated with them till the criminal mission ended with the killing of hundreds of Hindu civilians of village Madhyapara, with special intent.

226. Of course, by choosing to be present with the Pakistani troops, the accused Md. Solaiman Mollah [now dead] and Idris Ali Sardar took an encouraging step which contributed to the commission of crimes. The act of accompanying the group of perpetrators and remaining present at the crime site made the accused Md. Solaiman Mollah [now dead] and Idris Ali Sardar consciously 'concerned' with the horrendous killing mission which was aimed not only to kill the Hindu civilians but to tremble their very existence and livelihood by conducting such deliberate criminal acts, on account of their membership in Hindu religion.

227. Therefore, the accused Md. Solaiman Mollah [now dead] and Idris Ali Sardar who took a consenting part in the commission of crimes or were connected with the enterprises abetted the crimes committed as well as they belonged to the group of Pakistani occupation army men engaged in the commission of crime, in furtherance of common purpose and with special intent to destroy the Hindu religious group of the crime village and its surrounding locality. Now, it is agreed by all legal authorities that where a common design of a group of attackers exists and the group has carried out its purpose, then no distinction can be drawn between the ‘finger man’ and the ‘trigger man’. This view finds support from the observation made by the **ICTY Appeals Chamber**, in the case of **Tadic**, that –

"Although only some members of the group may physically perpetrate the criminal act (murder, extermination, wanton destruction of cities, towns or villages, etc.), the participation and contribution of the other members of the group is often vital in facilitating the commission of the offence in question. It follows that the moral gravity of such participation is often no less – or indeed no different – from that of those actually carrying out the acts in question."

[**ICTY Appeals Chamber, Tadic Case No.: IT-94-1-A, Judgment: 15.7.1999, para- 191**]

228. On integrated evaluation of evidence as discussed above it stands proved beyond reasonable doubt that active and culpable

assistance, provocation, guidance and abetment that the accused Md. Solaiman Mollah [now dead] and Idris Ali Sardar provided to the perpetrators, the members of Pakistani occupation army made the criminal purpose of the attack possible to be carried out. Accused persons' conduct of guiding the Pakistani troop, encouraging them to kill huge number of Hindu civilians and remaining present at the crime sites till the mission ended were thus manifestation of a culpable mindset of being associated with a crime, sharing common and special intent of the group of attackers.

229. Therefore, we are forced to conclude that accused Md. Solaiman Mollah [now dead] and Idris Ali Sardar not only accompanied the attackers or remained present with them at the crime site but they had played crucial, culpable and active role as 'participants' as well as they abetted, substantially induced and facilitated the Pakistani army men, the principals in killing two civilians by gun shot and also in conducting the criminal mission that resulted in killing of huge number of civilians belonging to Hindu religious group with intent to destroy it in part.

230. It is to be noted that accused Md. Solaiman Mollah died on 26 October, 2016 at the stage of summing up of the case. He was charged and tried jointly with accused Idris Ali Sardar for participating, aiding, abetting, facilitating and complicity in the commission of offences of genocide and crimes against humanity

including murder targeting the local Hindu religious group around the crime localities under Police Station Palong of the then Madaripur Sub-Division as narrated in this charge. The witnesses and victims came on dock and testified accused Md. Solaiman Mollah's [now dead] involvement and complicity with the offences for which he was charged.

231. Accused Md. Solaiman Mollah's sudden death has surely deprived not only him but the victims and sufferers who with the aspiration of getting justice narrated the enormous pains and horror they sustained resulting from serious system crimes, coming on dock.

232. With the death of accused Md. Solaiman Mollah at the stage of summing up of the case the rest of proceedings so far it relates to him has become abated vide Tribunal's order no.28 dated 01.11.2016, and as such, we refrain from rendering any decision on his liability for the offences proved, in light of the evidence tendered.

233. However, finally we arrive at a decision, on evaluation of evidence presented that prosecution has been able to prove beyond reasonable doubt that by acts and conducts as unveiled accused Idris Ali Sardar committed the offence of '**murder**', '**other inhumane acts**' as crimes against humanity and the offence of '**genocide**' and thus he incurred liability accordingly.

234. Therefore, accused Idris Ali Sardar [absconded] by his acts and activities participated, abetted, facilitated and had complicity in the commission of offences of '**murder**' , '**other inhumane acts**' as crimes against humanity and '**genocide**', as specified in section 3(2)(a)(c)(i)(ii)(g)(h) read with section 4(1) of the Act of 1973 which are punishable under section 20(2) of the said Act.

Adjudication of charge no.02

[Genocide, murder, rape, persecution, abduction, confinement, torture, plundering and arson committed on between 23 and 26 July, 1971 in the localities of Palong and the then Madaripur Sadar Police Stations]

235. Summary charge: That on 23 May, 1971 at about 11.00 A.M. a group of about 100[one hundred] Pakistani army men accompanied by Razakars accused Md. Solaiman Mollah [died on 26 October 2016 at the stage of summing up of the case] and Idris Ali Sardar and some other Razakars captured Abul Kalam Hawlader from his shop at launch ghat near Angaria bazaar and tortured him and forced him to go with them carrying a bag containing ammunitions. Thereafter, the accused persons and their accomplices having attacked Hindu populated village Malopara [fishermen village] under Palong Police Station of the then Madaripur Sub-Division [at present District Shariatpur] persecuted 15/20 innocent men and 14/15 women after confining them in front of the house of Jogomaya and also plundered houses and then set them on fire.

236. Then the accused persons and their accompanied Razakars and Pakistani army men were divided into two groups, one group remained at village Malopara to guard and torture the confined men and women and the other group including accused persons having attacked village Rudrakar under Palong Police Station confined and tortured Jalilur Rahman and forced him to go with them and went to the house of former Zaminder Promod Chakraborty and tried to vandalize a Hindu temple by firing shots and killed ailing priest Chandra Mohan Chakraborty by gun-shot and then came back to village Malopara.

237. Thereafter, the accused persons and their accomplice Razakars and Pakistani army men taking the detained 30/35 men and women with them came to Pakistani army camp at A. R. Howlader Jute Mills, Madaripur and having confined them there raped the women of different ages for 3(three) days in turn. Thereafter, the accused persons and their accomplice Razakars and Pakistani army men released the detained women and killed all the detained male members of Hindu Community by firing shots, with intent to destroy, in whole or in part, the Hindu religious group, and threw their dead bodies into the Arial Kha river.

238. Thereby, the accused (1) Md. Solaiman Mollah [now dead], and (2) Idris Ali Sardar are charged for participating, aiding , abetting, facilitating and complicity in the commission of offences

of genocide, and murder, rape, abduction, confinement, torture, and plundering and arson [other inhumane acts] as crimes against humanity as part of systematic attack directed against unarmed civilians as specified in section 3(2)(a)(c)(g) (h) of the Act of 1973 which are punishable under section 20(2) of the said Act for which the accused persons have incurred liability under section 4(1) of the said Act.

Evidence of Witnesses Presented

239. Prosecution for the purpose of proving the arraignment leveled against the accused persons in this charge no.02 has adduced in all 10[ten] witnesses who have been examined as P.W.01, P.W.02, P.W.03, P.W.04, P.W.05, P.W.06, P.W.07, P.W.9, P.W.10 and P.W.12. Of them, P.W.05 and P.W.06 are the victims of sexual violence allegedly committed upon them keeping in captivity; P.W.02, P.W.03, P.W.04 and P.W.10 are direct witnesses to the facts materially related to the alleged attack and the principal offence, and P.W. 01, P.W.07, P.W.09 and P.W.12 are the hearsay witnesses. Before we move to evaluate, weigh and analyse the testimony tendered by them let us see what they have narrated before the Tribunal.

240. P.W.01 Abdul Aziz Sikder [62] is a resident of village Dhanuka under Police Station Palong of District Shariatpur. In 1971, he was an SSC examinee and now he is the commander of

local Mukti Jodhdha Sangsad. He was a freedom-fighter. His [P.W.01] testimony relates to the events constituting the offences as enumerated in the Act of 1973 as narrated in three charges.

241. In respect of the event narrated in charge no.02, P.W.01 is a hearsay witness. P.W.01 stated that at about 11:00 AM on the same day [23 May 1971] he heard screams from the end of Malopara [community of fishermen] and could see flames arise therefrom. He later on heard the event from villagers and went to Malopara where he heard from Molu Das that about 30/35 civilians including women were first kept detained and guarded at the house of Jogomaya and the accused persons and their cohort Razakars and some other Pakistani army men moved to the house of Promod Chakrobarty at village Rudrakar where they killed a priest Chandra Mohan Chakraborty. P.W.01 stated too that he also heard that later on the group took the captives including women and minors away to an army camp set up at AR Howlader Jute Mills in Madaripur.

242. P.W.01 further stated that three days later thirteen women and two minors were set at liberty from the captivity, and thus, he [P.W.01] heard from Jogomaya and Arati that they had been recurrently raped during their captivity by the army men, the accused persons and their cohort Razakars and the male captives were killed.

243. P.W.01 finally stated that the civilians belonging to Hindu community of villages Kashabhog, Madhyapara, Uttar Madhyapara, Dakhkhin Madhyapara, Malopara, the Hindu dominated localities, were compelled to deport to India, and thus, the Razakars and the accused persons looted the belongings left by those Hindu civilians.

244. In cross-examination it has been suggested on part of both the accused persons that they did not belong to Razakar Bahini and they were not affiliated with the local Peace Committee. P.W.01 denied it. Defence denied the accused persons' complicity with the events alleged in any manner, by putting suggestion to P.W.01. It also transpires that by cross-examining P.W.01 defence could not bring anything to show that P.W.01 had no reason of knowing the accused persons beforehand. However, defence could not dislodge the act of launching attacks directing civilians predominantly belonging to Hindu community that resulted in mass killing, confinement and sexual abuse on Hindu women captives.

245. P.W.02 Jalilur Rahman [65] is a resident of village Rudrakar under Police Station Palong of District Shariatpur. In 1971, he was an SSC examinee. In respect of the event narrated in charge no.02, P.W.02 stated that on 23 May 1971 at about 11:30 A.M. Pakistani army and Razakars came to their house and detained him [P.W.02] and took him away to the house of

Zaminder Promod Lal Chakraborty when he could identify the accused Md. Solaiman Mollah [now dead], Idris Ali Sardar, Yusuf Mia, Yunus Mia, Arshed Ali Chowkider, Aziz Molla accompanying the group. Excepting the two accused persons the others are not alive now. On arriving at the house of Promod Lal Chakraborty the group destructed a Moth [temple] by gun firing and looting and started searching of inmates for causing their capture. At a stage, accused Razakars Idris Ali Sardar and Md. Solaiman Mollah[now dead] and their accomplices detained priest Chandra Mohan Chakraborty and handed him over to the Pakistani army men and then he was shot to death on the bank of the pond. Therefrom the group started moving towards Angaria bazaar along with him [P.W.02] and another detainee Abul Kalam Howlader forcing them to carry a bag of ammunitions on head. On their way to Angaria bazaar the group also took 30/35 Hindu males and women already detained from village Malopara with them including his [P.W.02] teacher Sukh Dev Chandra Saha to the launch ghat and took them to the army camp set up at A.R. Howlader Jute Mills by launch and they two [P.W.02 and Abul Kalam Howlader] were set at liberty as they were Muslims and thus they returned back home.

246. P.W.02 also stated that three days later he knew that twenty Hindu women who were taken away to the army camp with Hindu

males were set at liberty. Then he [P.W.02] went to Malopara to meet those Hindu women when Jogomaya Malo [P.W.05], Anjali, Radhika, Bina Rani disclosed that they the women detainees were kept segregated at the army camp and brutal physical invasion was done upon 5/6 detained women and the male detainees were shot to death taking them at the jetty behind the camp. With this event of attack the Hindu residents of Malopara became panicked, and thus, they deported to India.

247. In respect of knowing the reason of accused persons, P.W.02 stated that accused Idris Ali Sardar and he [P.W.02] studied in the same school and accused Md. Solaiman Mollah [now dead] participated in 1970's election and was defeated. At that time he [P.W.02] was a worker of Chhatra League [student wing of Awami League] and had participated election campaign in support of Awami League candidate. These were the reasons of knowing the accused persons beforehand, P.W.02 added.

248. In cross-examination it has been re-affirmed that on 23 May in 1971 at about 11:30 A.M. he was detained by the Pakistani army men and Razakars from their house; that he was forced to accompany them to Angaria bazaar taking a bag of ammunitions on head. Defence however does not appear to have made effort refuting the material facts as testified by P.W.02 by cross-examining him.

249. P.W.03 Md. Abdul Jalil Howlader [61] is a resident of village Chikondi under Police Station Palong [Shariatpur Sadar]. In 1971, he was an SSC examinee. P.W.03 stated that on 23 May in 1971 at about 08:00 AM he and his friend Khalilur Rahman went to village Dakhkhin Madhyapara where they found countless dead bodies lying scattered here and there. On that day on the way of returning back therefrom at about 11:00/11:30 A.M. they found Razakars and Pakistani army men moving towards village Malopara when they remained in hiding inside a garden, south to Malopara village wherefrom they saw the Razakars and the accused persons looting and torching houses of civilians with indiscriminate gun firing that resulted in death of 30/35 civilians. They also detained 30/35 male and women from Malopara and keeping them under guard of some Pakistani army men and Razakars the other Pakistani army men and Razakars moved to village Rudrakar and few minutes later they came back to Malopara bringing his [P.W.03] friend Jalilur Rahman [P.W.02] carrying a bag of ammunitions on head with them. Then the detained 30/35 civilians along with Jalilur Rahman were taken to Angaria bazaar launch ghat wherefrom Jalilur Rahman and Abul Kalam Hawlader [now dead] were set at liberty as they were Muslims. The detained 30/35 civilians were then taken away to Pakistani army camp set up in Madaripur. Three days later seven women of those detained

civilians taken to Pakistani army camp came back to Angaria bazaar by launch. Those women were in distressed condition, they observed it as at that time they had been at a tea stall besides the ghat.

250. Later on P.W.03 knew from those seven women that fifteen males of detained persons were killed by gun shots taking them behind the camp and the other detained women excepting those seven could not be traced. Those women disclosed that Pakistani army men and Razakars committed recurrent sexual abuse upon them in captivity at the army camp.

251. P.W.03 finally stated that for the mass killing ,looting and torching committed at Malopara, Dakhkhin Madhyapara the rest of Hindu civilians of the localities being panicked were thus forced to get deported to India and then their households they left were taken away by accused Md. Solaiman Mollah[now dead], Idris Ali Sardar and their cohort Razakars.

252. In cross-examination P.W.03 stated that accused Md. Solaiman Mollah [now dead], was the Chairman of Peace Committee of Palong Thana and accused Idris Ali Sardar was its member; that the Pakistani army came at Palong Thana locality first on 22 May 1971 and prior to it they got stationed in Madaripur.

253. P.W.03 however denied the defence suggestions that he was not present around the crime sites and the detained women coming

back from Pakistani army camp did not disclose anything and what he testified implicating the accused persons was untrue, false and tutored. Defence does not appear to have made effort to controvert the material facts testified by the P.W.03 by cross-examining him.

254. P.W.04 Nurul Islam Sarder [69] is a resident of village Kashabhog under Police Station Palong of District Shariatpur. In 1971, he was 23/24 years old and used to carry out a tea stall at Angaria bazaar.

255. In respect of charge no.02, P.W.04 testified that on 23 May 1971 at about 11:00/11:30 AM he had been at his shop at Angaria bazaar when he saw the group of Pakistani army being accompanied by accused Md. Solaiman Mollah[now dead], Idris Sardar and other Razakars arriving at Angaria bazaar and with this he [P.W.04] went into hid behind his shop wherefrom he could see them moving towards Malopara. One/one and half hours later he saw those Pakistani army men and Razakars coming back bringing 15/20 detained male villagers and 15/16 women with them at the launch ghat wherefrom they took them[detained persons] away to the Pakistani army camp at A.R. Howlader Jute Mills in Madaripur town.

256. P.W.04 continued stating that three days later when he had been at his shop at Angaria bazaar he saw 15/16 women who were taken away three days back moving through bazaar and then he

[P.W.04] asked them about whereabouts of the male detainees. Those women then told that they were subjected to rape in captivity at the camp by the Pakistani army men and the 15/20 male detainees were shot to death. He observed those women in distressed condition, P.W.04 added.

257. P.W.04 finally stated that the events he testified the Hindu civilians of villages Kashabhog, Madhyapara, Malopara, Rudrakar opted to deport to India. He [P.W.04] knew accused Razakar Md. Solaiman Mollah[now dead] since prior to 1971 as he contested 1970's election of Provincial Assembly and at that time he had a shop at Angaria bazaar. He [P.W.04] also knew accused Idris Ali Sardar beforehand as he was a resident of village Kashabhog and used to come at Angaria bazaar very often.

258. In cross-examination P.W.04 stated in reply to defence question put to him that his shop at Angaria bazaar was at only three minutes distance from Angaria launch ghat. The fact of arrival of the group of Pakistani army at Angaria bazaar as testified by P.W.04 has been re-affirmed as P.W.04 stated in reply to defence question that the people present at bazaar got dispersed by running away on getting information about arrival of Pakistani army and that even on 23 May 1971 the people present at the bazaar also did it when the group of Pakistani army and Razakars came at the bazaar, but the shop keepers there remained stayed at their shops.

259. P.W.04 denied the defence suggestion that he [P.W.04] did not visit the crime site on 23 May 1971; that accused Idris Ali Sardar was a student of Dhaka University and he was not at the locality at the relevant time and what he testified implicating the accused persons was untrue and tutored.

260. Defence however, as it appears, does not deny the fact of taking away the civilians detained from village Malopara as narrated by the P.W.04. It has also not been denied that the Hindu civilians of those crime villages pursuant to such horrific attacks had to deport to India as testified by the P.W.04.

261. P.W.05 Jogomaya Malo [75] is a resident of village Dakhkhin Madhyapara under Police Station Palong [Shariatpur Sadar] of District Shariatpur. She is one of the victims of the event narrated in charge no.02. She testified how she along with other Hindu civilians were got captured and taken away to the Pakistani army camp and what happened to them.

262. P.W.05 stated that in 1971 she had been at her conjugal home along with the wives of her husband's brothers namely Usha, Anjali and Bijoya. In one afternoon of the first part of Bangla month Jaistha in 1971 army and Razakars raided their village Dakhkhin Madhyapara which was mostly Hindu dominated. The army being accompanied by accused Md. Solaiman Mollah[now dead], Idris Ali Sardar and their cohort Razakars detained

15[fifteen] women and 20[twenty] males including her and made them assembled at the courtyard of their house and then they set the houses on fire. Then the Pakistani army and Razakars took them the detainees to Angaria bazaar launch ghat wherefrom they were taken to Madaripur Jute Mills by launch where made the women detainees and male detainees segregated and kept detained there. Some women detainees had their kids with them. The detained women included Josna, Arati, Anju and Kamala apart from wives of her husband's brothers and the detained males included Parsha Nath, Mohadeb, Adari Malo. The Pakistani army and Razakars committed rape upon them the detained women keeping them in three days' captivity at the said jute Mills and then they were sent back to Angaria by launch, but the male detainees were not freed. Later on she heard that they the male detainees were killed.

263. P.W.05 also stated that on returning at Angaria bazaar by launch [being released from the army camp] on asking of the people present at the bazaar they disclosed the commission of sexual invasion upon them. Coming back, they took shelter at the house of one of their Muslim neighbours as they found their own houses burnt down and few days later they deported to India and returned back after independence, P.W.05 added.

264. In reply to defence question put to her P.W.05 stated that she was physically distressed when she returned back from Jute Mills;

that it was Wahab Ali Gharami in whose house they took shelter; that the shops at Angaria bazaar remained closed and movement of people there was limited; that she heard that Razakars accompanied the Pakistani army when they were taken away to the Jute Mills by launch. Thus the fact of taking the P.W.05 and others away to the Pakistani army camp set up at the Jute Mills in Madaripur on forcible capture as testified by the P.W.05 becomes affirmed.

265. P.W.06 Bijoya Malo [80], a resident of village Dakhkhin Madhyapara under Police Station Palong [Shariatpur Sadar], District Shariatpur is another victim of the event narrated in charge no. 02 involving the attack that allegedly resulted in taking away Hindu civilians of village Malopara to the Pakistani army camp in Madaripur on forcible capture where the women detainees were subjected to sexual invasion and the male detainees were annihilated. She is the wife of P.W.05's husband's brother.

266. P.W.06 stated that in 1971 she had been at her conjugal home along with Usha, Anjali and Jogomaya [P.W.05], the wives of her husband's brothers. P.W.06 stated that in the first part of Bangla month Jhaista in the afternoon a group of Pakistani army and Razakars came to their village, detained 20/22 males and 15/16 women including her and made them assembled at the courtyard of their house. Many of them [detainees] had kids with them. Then the Pakistani army and Razakars set their houses on fire and then took

them to Angaria bazaar launch ghat. The male detainees included Radhika, Mohadeb Malo and Parsha Nath Malo, and the women detainees included herself, Usha Rani, Anjali, Jogomaya[P.W.05], Sumitra and Arati Malo. Then they the detainees were taken away to Madaripur Jute Mills by launch where they the women were kept detained segregating from the male detainees.

267. P.W.06 also stated that Razakars and Pakistani army committed rape upon the women detainees including herself in three days' captivity at the camp and afterwards they were set released therefrom, and thus, they the women detainees came back Angaria bazaar by launch, but the male detainees were not set at liberty and they never returned back home. On arriving at Angaria bazaar on asking of the people present at the bazaar they disclosed what happened to them. Coming back to their village they found their houses burnt down, and thus, they took shelter at the house of Wahab Ali Gharami, one of their villagers, and 3/4 days later they went to her paternal home at Bajitpur in Madaripur and therefrom they deported to India. After independence they came back home and then became aware that accused Razakar Md. Solaiman Mollah [now dead] and Idris Ali Sardar were also with the group of Pakistani army while they took them at Madaripur Jute Mills on forcible capture.

268. In cross-examination, defence put suggestion to the P.W.06 that she never heard the names of accused persons accompanying the Pakistani army; that she did not talk to any body at Angaria bazaar after returning back from Madaripur Jute Mills and that what she testified was untrue. P.W.06 denied it.

269. P.W.07 Anil Chandra Das [61] is a resident of village Dhanuka under Police Station Palong of District Shariatpur. In 1971, he was a student of class VIII. He is a hearsay witness. In respect of the event of attack as narrated in charge no.02, P.W.07 stated that on 23 May, 1971 at about 11:00 A.M. a group of Pakistani army and Razakars accompanied by accused Md. Solaiman Mollah and Idris Ali Sardar by launching attack at village Malopara detained 30/35 Hindu civilians including women and took them away to the Pakistani army camp set up at the A.R. Howlader Jute Mills in Madaripur. The women detainees were subjected to sexual invasion keeping them in three days' captivity and the male detainees were killed. Few days later he [P.W.07] went to village Malopara when he learnt the event from Jogomaya Malo [P.W.05], Bijoya Malo [P.W.06] and their relatives. Those events resulted in deportation of most of Hindu civilians of their locality to India, P.W.07 added.

270. In cross-examination, P.W.07 stated in reply to defence question put to him that he went to the house of ravished Jogomaya

Malo [P.W.05] and Bijoya Malo [P.W.06] 3/4 days after they came back home on release from the Pakistani army camp. In this way the fact of meeting the two victims as testified by the P.W.07 has been affirmed.

271. P.W.09 Sambho Nath Das [76], a resident of village Dhanuka under Police Station Palong [Shariatpur Sadar], District Shariatpur is a hearsay witness. In respect of the event of attack as narrated in charge no.02, P.W.09 stated that on 23 May 1971 at about 11:00 A.M. a group of Pakistani army and Razakars being accompanied by accused Md. Solaiman Mollah [now dead] and Idris Ali Sardar by launching attack at Malopara of village Madhyapara detained 20 males and 15 women and took them away to the Pakistani army camp set up at A.R. Howlader Jute Mills, Madaripur. The women detainees were subjected to recurrent sexual invasion during three days' captivity at the army camp and then they were set released therefrom and the male detainees were killed. Later on he [P.W.09] heard this event from people. P.W.09 then stated that the residents of villages Dhanuka and Madhyapara got deported to India following the events of attacks happened on 22 and 23 May in 1971.

272. In cross-examination defence chiefly suggested that what the P.W.09 testified implicating the accused persons in relation to the

alleged events narrated in charge no.02 was untrue and tutored and that he did not hear the events as he claimed. P.W.09 denied it.

273. P.W.10 Abul Kalam Hawlader [61] is a resident of village Kashipur under Police Station Palong of Shariatpur District. In 1971, he used to operate a tea stall at the launch ghat of Angaria bazaar jointly with his uncle Raham Ali Hawlader and cousin brother Shamsul Haque Hawlader. He was a student of Class VII in Rudrakar High School as well in 1971.

274. In respect of the event of attack as narrated in charge no.02, P.W.10 stated that on 23 May 1971 at about 11:00 A.M. he discovered accused Idris Ali Sardar and his cohort Razakars at the Angaria launch ghat, in front of his[P.W.10] shop when there arrived a launch when he[P.W.10] saw Pakistani army men accompanied by accused Md. Solaiman Mollah [now dead] getting down of the launch and had talk with accused Idris Ali Sardar and his cohort Razakars and started searching the shops as was done on the preceding day and at a stage one Pakistani army man dragged him [P.W.10] out and forced him to move to Angaria bazaar with them by carrying a weighty bag on shoulder. The group then had launched attack on the village Malopara when he [P.W.10] was with them. Then the Pakistani army men and Razakars detaining 35 males and women from village Malopara and made them assembled at Bijoya Malo's house where they were subjected to beating. At

that time he [P.W.10] saw an elderly man coming there who told the Pakistani army men –‘ there has been a big temple, move on , you will get many Malaun[Hindus]’. Then the Pakistani army men got divided into two groups, one group moved towards Angaria launch ghat along with the detained 35 villagers and another group including Razakars and himself [P.W.10] started moving towards the house of Zaminder Promod Chakraborty. Arriving there the Pakistani army and Razakars fired gun shot to a temple, looted the households of Promod Chakraborty’s house finding none available there and when they came out of the house the accused Md. Solaiman Mollah [now dead], Idris Ali Sardar and Aziz Mollah [now dead] brought a detained Hindu cleric Chandra Mohan Chakraborty to them when he was shot to death by the Pakistani army. Therefrom they [the group] started going back to Angaria launch ghat along with him [P.W.10] and on the way at Monohor bazaar Daroga Abdul Khalek [now dead] of Palong Police Station along with some other police men joined them. When they arrived near the Tahshil Office at Angaria bazaar the Pakistani army took back the bag they gave him [P.W.10] to carry and then he [P.W.10] went to a tea stall, 50 yards far from the Tahshil Office and as signaled by the Daroga he[P.W.10] managed to escape therefrom.

275. Defence suggested P.W.10 that the accused persons did not belong to Razakar Bahini; that they were not with the group of

attackers and were not involved with the event he testified. P.W.10 denied it.

276. P.W.12 Md. Abdus Samad Talukder [61] is a resident of Swarnaghosh, Ward No.08, Shariatpur Municipality under Police Station Palong of District Shariatpur. He is a freedom-fighter. P.W.12 stated that on receiving training in India he came back to Bangladesh in the last part of July 1971 and started participating in the freedom-fight along with his co-freedom-fighters around the locality of Madaripur.

277. In respect of the event as narrated in charge no.02, P.W.12 next stated that he heard from his source that on 23 May, 1971 a group of 18/20 Razakars and about 100 Pakistani army men accompanied by accused Md. Solaiman Mollah [now dead] and Idris Ali Sardar had launched attack at Hindu populated village Malopara and detained 35 Hindu civilians including women and made them assembled in front of Jogomaya's house. In conjunction with the attack, keeping those detainees under guard of a group, another group moved to village Rudrakar where accused Md. Solaiman Mollah [now dead] and Idris Ali Sardar and Razakar Abdul Aziz Mollah [now dead] handed the priest Chandra Mohan Chakraborty over to the Pakistani army men on capture when he was shot to death and then the group came back to the house of Jogomaya at Malopara and then took away 35 Hindu detainees to

the Pakistani army camp at A.R. Howlader Jute Mills set up at Madaripur by launch. 15 of the detained persons were Hindu women of different age who were subjected to torture in captivity at the Pakistani army camp for three days and then they were set freed. But the 20 detained male Hindu civilians were killed by gun shot and charging bayonets taking them on the bank of river Arial Kha behind the army camp.

278. In cross-examination, P.W.12 denied the suggestion put to him on part of the defence that accused Idris Ali Sardar was a student of Dhaka University in 1971 and thus he used to stay in Dhaka; that the accused persons were not associated with Peace Committee or Razakar Bahini and what he testified implicating the accused persons was untrue and tutored. Defence does not appear to have cross-examined to shake what has been testified by P.W.12 on material particulars.

Finding with Reasoning on Evaluation of Evidence

279. Ms. Rezia Sultana, the learned prosecutor in placing argument in relation to the event as narrated in charge no.02, submitted that the event of attack happened in day time and to substantiate the event in all 10 prosecution witnesses have been examined and of them P.W.05 and P.W.06 are rape victims and eye- witnesses to the event of attack that resulted in taking away 35 Hindu civilians including women on forcible capture to the

Pakistani army camp where the male detainees were killed and the women detainees were subjected to rape. P.W.02 and P.W.03 saw the group accompanied by the accused persons arriving at Angaria bazaar launch ghat and afterwards taking the detained Hindu civilians away. P.W.10 also testified that he saw the group accompanied by the accused persons taking away the Hindu detainees at the relevant time.

280. The learned prosecutor further submitted that the event happened in day time, and as such, it was practicable for the witnesses of seeing the group to carry out its activities. Target of the attack was Hindu religious group, on discriminatory ground and it happened just on the following day of the event of indiscriminate killing of hundreds of Hindu civilians as narrated in charge no.01. The fact of actively accompanying the group by the accused Md. Solaiman Mollah [died at the stage of summing up of the case] and Idris Ali Sardar as testified by the witnesses sufficiently proves their participation to the attack and also to the upshot of such forcible taking away of 35 Hindu civilians and thus the accused persons are equally responsible for the criminal acts committed at all phases of the event. Defence does not dispute the event. It simply questioned the accused persons' complicity and participation in the commission of crimes by launching attack.

281. Mr. Gazi M.H. Tamim, the learned counsel defending the accused Idris Ali Sardar as State defence counsel chiefly submitted that the accused had no nexus with the locally formed Razakar Bahini or Peace Committee; that he was not with the group in launching the attack alleged. P.W.02, P.W.03 and P.W.04 are not trustworthy witnesses as what they have testified in respect of going behind the group of hundreds of Pakistani army from Angaria bazaar launch ghat was impracticable indeed. Testimony of P.W.01 shall appear to be inconsistent with what has been testified by P.W.10 on material particular. The learned counsel further submitted that P.W.01, P.W.07, P.W.09 and P.W. 12 are hearsay witnesses in respect of the alleged fact of accompanying the group of Pakistani occupation army by the accused person.

282. The learned State defence counsel finally agitated that Material Exhibit-II, the book titled 'Al-Badar' relied upon by the prosecution is not authoritative one, and as such, cannot be considered for showing that accused Idris Ali Sardar was a potential leader of ICS since prior to the war of liberation ensued and the information narrated in that book does not prove that accused Idris Ali Sardar was a student of Dhaka University.

283. The arraignment brought in the charge framed consists of the following phases:

- (i) On 23 May 1971 at about 11.00 A.M. a group of about 100[one hundred] Pakistani army men accompanied by Razakars accused Md. Solaiman Mollah [now dead] and

Idris Ali Sardar and their accomplice Razakars arrived at launch ghat near Angaria bazaar and started moving to the crime sites;

(ii) Detaining 15/20 men and 14/15 women of village Malopara [fishermen village] under Palong Police Station of the then Madaripur Sub-Division [at present District Shariatpur] by launching attack;

(iii) Plundering and burning down the houses on fire;

(iv) Detaining a civilian Jalilur Rahman and killing priest Chandra Mohan Chakraborty by gun-shot together with the act of vandalizing Hindu temple by launching attack at Rudrakar, a neighbouring village of Malopara;

(v) Taking away the detained 30/35 men and women on forcible capture from village Malopara to Pakistani army camp at A. R. Howlader Jute Mills, Madaripur;

(vi) Committing rape upon the women keeping them in three days' captivity at the said army camp for three days; and

(vii) Killing the male detainees kept in captivity at the army camp.

284. The criminal acts as allegedly happened had nexus to each other as the same were carried out in conjunction with the same attack and by the same group of perpetrators. Thus, collectivity of those criminal acts is to be reckoned in characterizing the offences committed. At the same time, mode of the accused persons' participation to the commission of the attack is to be determined.

285. The first phase of the attack at village Malopara and Rudrakar happened in day time when it resulted in forcible capture of Hindu civilians, killing Hindu priest and plundering and burning down houses on fire. The village Malopara and Rudrakar were Hindu dominated localities. The civilians detained from village Malopara

belonged to Hindu religious group. Naturally, some of witnesses including the victims [P.W.05 and P.W.06] had opportunity to observe the criminal activities conducted in course of this phase of the attack at Malopara and Rudrakar.

286. Next phase of the attack consisted of taking away 35 detained Hindu civilians including women at the Pakistani army camp at A.R. Howlader Jute Mills, Madaripur; committing rape upon detained women keeping in captivity for three days and killing of detained Hindu males. None excepting the victims [P.W.05 and P.W.06] had occasion to see or know what happened to the women and men detained at the army camp.

287. Accused Md. Solaiman Mollah, who died on 26 October 2016 at the stage of summing up of the case after closure of evidence on part of the prosecution, was charged and tried jointly with another accused Idris Ali Sardar and prosecution presented evidence to establish liability of both the accused persons for the offences for which they were charged with. Thus, act and conduct even of accused Md. Solaiman Mollah, who is now dead, relevant to the commission of the alleged offences may come forward inevitably for the purpose of effective evaluation of evidence tendered. But however, in any case he cannot be held liable even if he is proved to have had complicity and participation to the commission of the offences alleged. Keeping it in mind, we should

go ahead with the task of evaluation of evidence adduced to determine liability of another accused Idris Ali Sardar.

288. However, prosecution requires proving that-

- a. A systematic attack was launched by a group of Pakistani army stationed in Madaripur at villages Malopara and Rudrakar in collaboration with the local Razakars including the accused persons;
- b. The attack was calculated to destroy the civilians of Hindu community of those villages by causing destruction, serious bodily and mental harm, killing, confinement and rape;
- c. Taking away the detained Hindu men and women at the Pakistani army camp;
- d. The accused persons substantially contributed and facilitated the group of Pakistani army in carrying out criminal activities in accomplishing those crimes to further policy and plan;
- e. Act and conduct of the accused persons formed part of attack;
- f. The accused persons were conscious part of the group of the criminal enterprise;
- g. Committing sexual violence upon the Hindu women detained at the army camp;
- h. Killing the detained Hindu males taken at the army camp on forcible capture from village Malopara; and
- i. Intention of the perpetrators of launching such attack.

289. Let us first determine the first phase of the attack that resulted in detaining Hindu civilians, killing Hindu priest and causing destructive activities at villages Malopara and Rudrakar. The event happened in day time and some of the witnesses had occasion of observing the facts relevant to the attack.

290. It appears that P.W.01 Abdul Aziz Sikder at about 11:00 A.M. on 23 May 1971 heard screams from the end of Malopara [community of fishermen] and could see flames of fire therefrom. This version demonstrates the pattern and extent of horrific situation spread around the locality under attack.

291. It transpires too that a group of Pakistani army, accused Md. Solaiman Mollah [now dead], Idris Ali Sardar and their accomplices, in conjunction with the attack, detained P.W.02 Jalilur Rahman, a resident of village Rudrakar and taking him with them the group attacked the house of Promod Lal Chakraborty, destroyed a Moth [temple] by gun firing and with the act of looting started searching of inmates for causing their capture and at a stage accused Razakars Idris Ali Sardar and Md. Solaiman Mollah [now dead] and their accomplices detained priest Chandra Mohan Chakraborty and handed him over to the Pakistani army men when he was shot to death on the bank of the pond.

292. The fact of arrival of the group of Pakistani army accompanied by the accused persons at Angaria bazaar launch ghat and going back after carrying out the attack at village Malopara keeping the detained Hindu civilians with them seems to have been corroborated by the P.W.04 Nurul Islam Sardar, a shop keeper at Angaria bazaar. P.W.04 had been at the said bazaar, and as such, had occasion of seeing arrival and exit of the group of aggressors.

It may thus be inferred that the accused Md. Solaiman Mollah [now dead] and Idris Ali Sardar were with the group of Pakistani army and Razakars sharing common intent and their target was Hindu religious group at village Malopara.

293. In conjunction with the attack at village Rudrakar accused Razakar Idris Ali Sardar and Md. Solaiman Mollah [now dead] and their accomplices detained Chandra Mohan Chakraborty, a priest and handed him over to the Pakistani army men and then he was shot to death on the bank of the pond, P.W.02 could observe it as he was kept detained with the group .

294. The above piece of evidence seems to have been consistently corroborated by P.W.10 Abul Kalam Hawlader who was kept detained with the group since it arrived at Angaria bazaar launch ghat forcing him to carry a bag of ammunitions. It thus stands proved from the evidence of P.W.02 and P.W.10 that Chandra Mohan Chakraborty, a Hindu priest was detained by the accused persons and their accomplices and the perpetrators made him target on account of his membership in Hindu religious group and special intent of such target was to destroy the Hindu community, it may be inferred. Showing aggression on the Hindu temple as testified by P.W.02 and P.W.10 also fairly reflects it.

295. It is found proved too that P.W.02 Jalilur Rahman was kept detained with the group even when it was moving back towards

Angaria bazaar launch ghat along with 30/35 Hindu males and women already detained from village Malopara including his [P.W.02] teacher Sukh Dev Chandra Saha wherefrom the detainees were taken away to the Pakistani army camp set up at A.R Howlader Jute Mills, Madaripur by launch and they two [P.W.02 and P.W.10 Abul Kalam Hawlader] were set at liberty as they were Muslims, and thus, they returned back home.

296. In respect of knowing the reason of the accused persons, P.W.02 stated that accused Idris Ali Sardar and he [P.W.02] studied in the same school and accused Md. Solaiman Mollah [now dead] participated in 1970's election and was defeated. At that time he [P.W.02] was a worker of Chhatra League [student wing of Awami League] and had participated election campaign in support of Awami League candidate. These were the reasons of knowing the accused persons beforehand, P.W.02 stated.

297. The fact of detaining P.W.02 as testified and forcing P.W.10 to remain with the group carrying a bag of ammunitions on head from Angaria bazaar till coming back to Angaria bazaar from the crime site could not be impeached in any manner by the defence. Defence however does not appear to have made effort refuting the material facts as testified by P.W.02 by cross-examining him. Thus, P.W.02 had natural opportunity of observing the activities carried out till the 35 Hindu civilians were taken away by launch from

Angaria bazaar launch ghat. P.W.02 stated why he knew the accused persons beforehand and it seems to be practicable. Therefore, what the P.W.02 testified as a direct witness inspires credence.

298. The evidence presented by P.W.02, a direct witness to activities carried out during the attack speaks a lot about the ‘special intent’ of the aggressors. P.W.02 who was a Muslim was forced to remain with the group presumably to locate the target and it has been unveiled indisputably that Hindu civilians and their properties were the target of the attackers that resulted in killing of Hindu priest Chandra Mohan Chakraborty to which the accused Md. Solaiman Mollah [now dead] and Idris Ali Sardar took active and culpable part.

299. P.W.02 Jalilur Rahman witnessed the group of aggressors taking 35 Hindu civilians detained forcibly from village Malopara away with them to Angaria launch ghat wherefrom he [P.W.02] was set at liberty as he was a Muslim. Defence could not impeach it. Thus, it leads to valid inference that the group was extremely antagonistic to Hindu community, and as such, their target was only the civilians of the Hindu community of the locality under attack.

300. The fact of initiation of attack at village Malopara appears to have been corroborated by P.W.03 Md. Abdul Jalil Hawlader as well who is a direct witness. His[P.W.03] testimony divulges that

on the way of returning back from village Dakhkhin Madhyapara after seeing the countless dead bodies of Hindu civilians who were killed on the preceding day by the group of Pakistani army accompanied by Razakars and accused persons and their accomplices [event of genocide narrated in charge no.01] at about 11:00/11:30 A.M. [on 23 May 1971] he[P.W.03] and his friend Khalilur Rahman accompanying him found Razakars and Pakistani army men moving towards village Malopara and with this they went into hid inside a garden , south to Malopara village where from they saw the Razakars and Pakistani army looting and torching houses of civilians with indiscriminate gun firing that resulted in death of 30/35 civilians and detaining 30/35 male and women from Malopara.

301. Detaining 30/35 Hindu civilians from village Malopara remained undisputed. Defence simply denied the accused persons' complicity with the attack carried out. We may arrive at irresistible conclusion that the attack directed against the Hindu civilians of village Malopara was indeed a continuation of the attack occurred on the preceding day i.e on 22 May 1971 at village Madhyapara that resulted in indiscriminate killing of hundreds of Hindu civilians [as narrated in charge no.01] constituting the offence of 'genocide' for which the accused persons have already been found criminally responsible. It may thus safely be concluded that the attack

launched at village Malopara on 23 May was continuation of materializing the 'special intent' of the perpetrators accompanied by the accused Md. Solaiman Mollah and Idris Ali Sardar.

302. P.W.03 also saw keeping the detainees under guard of some Pakistani army men and also saw Razakars and some other Pakistani army men moving to village Rudrakar wherefrom they came back few minutes later bringing his [P.W.03] friend Jalilur Rahman [P.W.02] detained with them.

303. Defence could not controvert the above version which is materially related to the event of attack. It thus stands proved that Jalilur Rahman[P.W.02] was forcibly kept with the group when it had carried out criminal activities at neighbouring locality of village Rudrakar, and as such, P.W.02 had fair opportunity of seeing what happened there, and as such, his[P.W.02] testimony inspires credence.

304. Testimony of P.W.04 Nurul Islam Sarder, a direct witness to the fact of arrival of the group at Angaria bazaar launch ghat on 23 May 1971 at about 11:00/11:30 A.M. also demonstrates that the group of Pakistani army was accompanied by accused Md. Solaiman Mollah [now dead], Idris Ali Sardar and other Razakars who on arrival there started moving towards village Malopara and one/one and half hours later he[P.W.04] saw those Pakistani army men and Razakars coming back bringing 15/20 detained male

villagers and 15/16 women at the launch ghat wherefrom they took them [detained persons] away to the army camp at A.R. Howlader Jute Mills in Madaripur town.

305. The fact of arrival of the group of Pakistani army at Angaria bazaar as testified by P.W.04 has been re-affirmed in cross-examination. Besides, defence, as it appears, does not deny the fact of taking away the civilians detained from village Malopara as narrated by the P.W.04. Therefore, seeing arrival of the group moving towards the crime site being accompanied by the accused persons and afterwards their exit taking away detained Hindu civilians with them by launch from Angaria bazaar launch ghat as testified adequately proves the fact of launching organised and deliberate attack at village Malopara.

306. P.W.10 Abul Kalam Hawlader is a key witness in relation to the event narrated in charge no.02. He, a resident of village Kashipur under Police Station Palong of District Shariatpur used to run a shop at Angaria bazaar in 1971. The launch ghat was adjacent to Angaria bazaar. It is undisputed. P.W.10 described, corroborating P.W.02, P.W.03 and P.W.04, how and when on 23 May 1971 the group of Pakistani army accompanied by the accused persons and Razakars arrived at Angaria bazaar launch ghat and moved to village Malopara. He [P.W.10] had opportunity of seeing the criminal activities carried out by the group as it forced him to

remain with them by carrying a weighty bag on shoulder till their coming back to Angaria bazaar launch ghat. Defence could not dislodge the fact of keeping him forcibly with the group.

307. Thus, testimony of P.W.10 relating to launching attack the village Malopara, detaining 35 Hindu males and women from village Malopara and made them assembled at Bijoya Malo's [P.W.06] house, attacking temple and the house of Zaminder Promod Chakroborty, committing looting, killing Hindu cleric Chandra Mohan Chakroborty by gun shot as detained by the accused Md. Solaiman Mollah [now dead] and Idris Ali Sardar inspires much credence.

308. What the P.W.10 has narrated in relation to criminal acts conducted by the group of Pakistani army being accompanied by the accused Md. Solaiman Mollah and Idris Ali Sardar also gets consistent corroboration from P.W.05 and P.W.06, the two victims who were detained and taken away to the Pakistani army camp at A.R. Howlader Jute Mills in Madaripur where they were subjected to recurrent sexual violence in captivity.

309. On the way of coming back to Angaria bazaar at a place near the Tahshil Office, the Pakistani army took back the bag they gave P.W.10 to carry and then he [P.W.10] somehow managed to escape. It too remained unimpeached, and as such, it was quite practicable for P.W.10 of observing the criminal activities carried out by the

group of aggressors who were accompanied by the accused persons belonging to Razakar Bahini. There has been no reason of disbelieving him [P.W.10]. Defence does not appear to have made any effective effort to discredit what he [P.W.10] testified.

310. Facts relevant to the attack as has been narrated by the above witnesses get significant corroboration from the testimony of P.W.05 and P.W.06 who were also detained in conjunction with the attack and were forcibly taken away along with other detainees of Hindu community of village Malopara to the Pakistani army camp in Madaripur.

311. P.W.05 Jogomaya Malo is one of the victims of the event narrated in charge no.02. She testified that the Pakistani army being accompanied by accused Md. Solaiman Mollah[now dead], Idris Ali Sardar and their cohort Razakars detained 15 women and 20 males including her and made them assembled at the courtyard of their house and then they set the houses on fire. Then the Pakistani army and Razakars took them the detainees including Josna, Arati, Anju, Kamala, wives of her[P.W.05] husband's brothers, Parsha Nath, Mohadeb, Adari Malo to Angaria bazaar launch ghat wherefrom they were taken to Madaripur Jute Mills by launch where they made the women detainees and male detainees segregated and kept them detained there. Some women detainees had their kids with them.

312. Version of P.W.06 Bijoya Malo, another victim provides corroboration to the fact of launching attack, detaining them forcibly, taking them away to the Pakistani army camp in Madaripur. According to P.W.06 the male detainees included Radhika, Mohadeb Malo and Parsha Nath Malo, and the women detainees included herself, Usha Rani, Anjali, Jogomaya[P.W.05], Sumitra and Arati Malo.

313. It is also found from the evidence of P.W.05 and P.W.06 that after taking the detainees at the Pakistani army camp the women detainees were kept segregated from the male detainees. It is evinced too that after three days' captivity the women detainees including P.W.05 and P.W.06 were set at liberty, and thus, they came back to their village. What happened to the women detainees in captivity? What fate the male detainees had to embrace? In this respect P.W.05 and P.W.06 are the best witnesses as naturally none others had opportunity to see how the detainees were dealt with in captivity.

314. P.W.05 Jogomaya Malo, a victim testified that the Pakistani army and Razakars committed rape upon them the detained women keeping in three days' captivity at the Pakistani army camp set up at the Jute Mills[in Madaripur] and then they were sent back to Angaria by launch, but the male detainees were not freed. Later on she [P.W.05] heard that they the male detainees were killed.

315. On returning at Angaria bazaar by launch [being released from the Pakistani army camp] on asking of the people present at the bazaar they [released women detainees] disclosed the commission of sexual invasion done upon them.

316. P.W.06 Bijoya Malo, another victim also stated that Razakars and Pakistani army committed rape upon the women detainees in three days' captivity at the Pakistani army camp [in Madaripur] and afterwards they were set released therefrom, and thus, they the women detainees came back Angaria bazaar by launch, but the male detainees were not set at liberty and they never returned back home. On arriving at Angaria bazaar, on asking of the people present there they disclosed what happened to them at the Pakistani army camp.

317. Defence however does not appear to have denied the fact of attack that resulted in forcible capture of numerous Hindu civilians from village Malopara, taking the detainees at A.R. Howlader Jute Mills, Madaripur and that the women detainees were subjected to sexual invasion in captivity at the said Pakistani army camp. Rather, by putting suggestion to P.W.06 it has been re-affirmed that the P.W.06 and other civilians were kept detained at Madaripur Jute Mills army camp taking them there on forcible capture.

318. Thus, from the above consistent testimony of the two victims [P.W.05 and P.W.06] indisputably demonstrates that they and other

Hindu women detainees were subjected to rape or sexual violence in three days' captivity at the Pakistani army camp. The Hindu women including the P.W.05 and P.W.06 were systematically captured, detained and sexually violated and the male detainees could not have been traced as they were killed after taking at the Pakistani army camp on capture, testimony of P.W.05 and P.W.06 demonstrates it patently.

319. It is immaterial to ask for proof as to who committed rape upon whom. The act of such sexual violence or rape committed upon women detainees was the upshot of the attack that resulted in detaining the Hindu civilians including Hindu women of village Malopara. It already stands proved that the accused Md. Solaiman Mollah[now dead], Idris Ali Sardar and their accomplice Razakars were with the group of Pakistani army at all phases of the attack and never got distanced from the group of Pakistani army till the detainees were taken away to the Pakistani army camp in Madaripur. Therefore, the accused persons are equally responsible for all the acts or mistreatment done to the detainees in captivity.

320. The fact of coming back of Hindu women three days later from the Pakistani army camp in Madaripur stands proved from the evidence of P.W.03 and P.W.04. We have found that three days later P.W.03 saw 07[seven] women who were taken away to Pakistani army camp coming back to Angaria bazaar by launch

when he found them in distressed condition. Corroborating this version P.W.04 stated that three days later when he had been at his shop at Angaria bazaar he saw 15/16 women, in distressed condition, who were taken away three days back moving through bazaar and then on his [P.W.04] asking those women told that they were subjected to rape in captivity at the army camp by the Pakistani army men and the 15/20 male detainees were shot to death.

321. It was natural to disclose the violence committed upon them to the people who found them in extremely distressed condition when they the women detainees including the P.W.05 and P.W.06 arrived at Angaria bazaar, on being released three days later.

322. Knowing the fact of coming back of Hindu women who were taken away to the Pakistani army camp, P.W.02 Jalilur Rahman went to Malopara to meet them when Jogomaya Malo [P.W.05], Anjali, Radhika, Bina Rani disclosed that they the women detainees were kept segregated at the army camp and brutal physical invasion was done upon 5/6 detained women and the male detainees were shot to death taking them at the jetty behind the camp. P.W.07 Anil Chandra Das also later on went to village Malopara when he learnt the event from Jogomaya [P.W.05], Bijoya Malo [P.W.06] and their relatives. P.W.12 Md. Abdus Samad Talukder, a freedom-fighter is a hearsay witness who also heard the event from their

source and defence does not appear to have cross-examined to shake what he testified on material particular.

323. Hearsay testimony is not inadmissible *per se* if it is corroborated by some other evidence. Source of hearsay testimony of P.W.02 Jalilur Rahman and P.W.07 Anil Chandra Das in respect of severe mistreatment and sexual violence upon the detained Hindu women at the Pakistani army camp and killing the male detainees is the disclosure, the two victims [P.W.05 and P.W.06] made after they came back home from captivity. Thus, their testimony carries probative value. Besides, defence could not shake it in any manner.

324. It has been unveiled from the evidence presented that on coming back P.W.05 and P.W.06, the victims took shelter at the house of one of their Muslim neighbours as they found their own houses burnt down and few days later they deported to India and returned back after independence. Presumably, Hindu residents including the survived victims of Malopara became gravely panicked, and thus, they were compelled to deport to India. After independence they the victims came back home and became aware that accused Razakar Md. Solaiman Mollah and Idris Ali Sardar were also with the group of Pakistani army while they took them at Madaripur Jute Mills on forcible capture.

325. Victims [P.W.05 and P.W.06] were rural women, and thus, they might not have had opportunity of knowing the accused persons beforehand. The other witnesses especially P.W.02 and P.W.04 were acquainted with the identity of the accused persons and had occasion of seeing them participating in accomplishing criminal acts in conjunction with the attack, it has already been proved. Therefore, ignorance of P.W.05 and P.W.06, the victims about the accused persons' identity beforehand does not diminish their testimony. In 1971, horrific atrocious activities committed and perpetrators thereof finally became anecdote particularly around the locality of crimes committed. It was thus quite natural of hearing, even later on, accused persons' complicity with the crimes and association with the group of Pakistani army in conducting the attack as testified by P.W.05 and P.W.06.

326. On integrated evaluation of evidence presented it has been proved beyond reasonable doubt that the group formed of Pakistani army, accused Md. Solaiman Mollah[now dead], Idris Ali Sardar and their accomplice Razakars had launched a planned and deliberate attack directing a particular group i.e Hindu religious group and intending to materialize their 'special intent' to destroy the group they committed devastating activities, looting, killing and committing rape or sexual violence upon the women in captivity at the Pakistani army camp. Killing Hindu male civilians and

committing rape upon detained Hindu women were chained together and those were the collective upshot of the attack conducted targeting the village Malopara which constituted the offence of 'genocide'.

327. Genocide is a crime which is committed with a double mental element. First, a general intent relates to perpetration of the underlying criminal acts and second, an ulterior intent with the aim of the destruction of the group. The latter one is to be inferred from the scale, pattern of the attack and other materially relevant facts together with the context. Thus, the physical result of the attack and the mental state of the perpetrator[s] forming a chained relationship may well demonstrate the 'genocidal intent'.

328. The accused Md. Solaiman Mollah and Idris Ali Sardar obviously knew the likely consequence of the acts committed directing the Hindu civilians of village Malopara and they knowing it well consciously accompanied the group of about 100 Pakistani army men in launching attack intending to destroy a group i.e. Hindu religious group, in whole or in part, and, we conclude it.

329. Already it has been proved that the accused persons consciously made them part to the criminal mission which was calculated to cause physical destruction by killing hundreds of Hindu civilians of village Madhyapara by launching an organised attack on the preceding day i.e. on 22 May 1971[charge no.01] and

they have been found guilty for committing the offence of 'genocide'.

330. Presumably, in continuation of the event of attack [happened on 22 May 1971] the group of Pakistani army accompanied by the accused persons had again conducted the destructive and organised attack at another village Malopara which was Hindu populated and the victims of the attack were the civilians belonging to Hindu religious group. We may thus safely conclude that the recurrent and similar pattern of attack was conducted with a deliberate and conscious aim. What was the aim? It was intended to destroy the Hindu religious group, either in part or in whole.

331. Deporting to India of Hindu residents of the crime locality after the events happened is an unerring indication of the scale and extent of the recurrent attacks conducted directing the Hindu religious group and it inevitably suggests to infer the 'special intent' of the group of aggressors in targeting the Hindu community.

332. The acts of forcible capture of Hindu civilians, keeping them detained, committing sexual violence upon the women detainees in captivity, killing a Hindu cleric, devastation of properties of Hindu civilians, killing detained Hindu male civilians collectively demonstrate that the 'special intent' of the group of perpetrators was to destroy the Hindu religious group. Carrying out such

deliberate and planned criminal activities the perpetrators had not only killed the members of the Hindu religious group but it had caused 'serious bodily and mental harm' to members of the group as well which are the elements of the offence of 'genocide' as defined in section 3(2) (c)(i)(ii) of the Act of 1973.

333. The sworn testimony of P.W.05 and P.W.06, the two victims also demonstrates that the male detainees taken forcibly together with them on capture at the Pakistani army camp in Madaripur were killed and could not have been traced. Besides, since the male detainees never returned back it may be validly deduced that they were wiped out and purpose of taking them at the Pakistani army camp on forcible capture was to kill them on account of their membership in Hindu religion.

334. No woman would prefer to come forward making false and unfounded accusation of robbing her supreme wealth which may likely to stamp stigma on her life, and make her social and family life shattered. In absence of anything contrary we are in firm belief that P.W.05 and P.W.06 even long more than four decades after the severe bodily and mental harm and trauma they sustained have come forward to portray the truth only and no interest lies behind it. Two victims P.W.05 and P.W.06 are the best witnesses to substantiate how they were gravely mistreated in captivity and what happened to the male detainees.

335. Rape is an offence which is more than murder. The trauma the victim sustains kills her endlessly. Bodily harm the victim sustains gets healed but psychological and mental harms are never erased. Rape or sexual violence causes serious bodily and mental harm not to the victim only but to her family, the society and the community she belongs. **Lisa Sharlach** in an article titled '**Rape as Genocide: Bangladesh, the Former Yugoslavia, and Rwanda**' rightly observed that –

“They are the invisible living casualties of the genocide that must live with the physical, psychological, and emotional aftermath of the sexual violence—in addition to the “second rape” of them by a society hostile to rape survivors”

[**Lisa Sharlach (2000) Rape as Genocide: Bangladesh, the Former Yugoslavia, and Rwanda, *New Political Science*, 22:1, 89-102, DOI:10.1080/713687893**]

336. The author of the said article further narrates [at page 95 of the journal] that-

"A newspaper columnist in Calcutta, India, Amita Malik, describes the surrender of West Pakistani troops to the Indian army, which intervened in the conflict. Malik writes that a West Pakistani soldier said:

“Hum ja rahe hain. Lekin beej chhor kar ja rahe hain.” (“We are going. But we are leaving our Seed behind.”)He accompanied it with an appropriately coarse gesture. Behind that bald statement lies the story of one of the most savage, organized and indiscriminate orgies of rape in human history: rape by a professional army, backed by local armed collaborators. It spared no one, from elderly widows to schoolgirls not yet in their

teens, from wives of high-ranking civil officers to daughters of the poorest villagers and slum dwellers. Senior officers allowed, and presumably encouraged, the forced confinement of innocent girls for months inside regimental barracks, bunks and even tanks.”

337. The above information portrays an appalling extent of atrocious activities leading to mass rape on women irrespective of community they belonged may be termed as 'genocidal rape', committed in 1971 during the war of liberation in the territory of Bangladesh. Members of the Pakistani occupation armed forces were the principal perpetrators who had carried out such untold barbaric organised activities, violating international humanitarian law, with the substantive aid and assistance of local collaborators. In the case in hand too we find that the criminal acts constituting the offence of causing serious bodily and mental harm was carried out with the active contribution of the accused persons, the local collaborators.

338. We also emphatically reiterate that the act of rape in war time itself is a deliberate act of causing destruction as it is calculated to diminish the victim's normal life and will to live. Rape or sexual violence committed upon the Hindu women detaining at Pakistani army camp, indiscriminate killing Hindu civilians and devastation of properties belonged to Hindu civilians cumulatively force to conclude that the aggressors' 'special intent' was to destroy the

Hindu religious group which amounted to the offence of 'genocide'.

339. How the jurisprudence evolved construe the offence of rape or sexual violence committed in war time situation when the same is directed against woman not for her individual identity but on account of her membership on a group protected in the genocide convention 1948? In the case of **Jean Paul Akayesu the ICTR Trial Chamber** observed that -

“Indeed, rape and sexual violence certainly constitute infliction of serious bodily and mental harm on the victims 181 and are even, according to the Chamber, one of the worst ways of inflict harm on the victim as he or she suffers both bodily and mental harm..... These rapes resulted in physical and psychological destruction of Tutsi women, their families and their communities. Sexual violence was an integral part of the process of destruction, specifically targeting Tutsi women and specifically contributing to their destruction and to the destruction of the Tutsi group as a whole.”

[Jean Paul Akayesu, ICTR(Trial Chamber), Judgment 02 September 1998, para- 731]

340. According to the Convention on the Prevention and Punishment of the Crime of Genocide, Article II Genocide means any of the following acts committed with intent to destroy, in whole or in part, a national, ethnic, racial or religious group, as such:

- (a) killing members of the group;
- (b) causing serious bodily or mental harm to members of the group;
- (c) deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part;

- (d) imposing measures intended to prevent births within the group;
- (e) forcibly transferring children of the group to another group.

341. What we see in the case in hand? An organised attack was launched at village Malopara, a predominantly Hindu populated locality and the attack resulted in forcible capture of 35 Hindu civilians including a number of women with their kids. Then the detainees were taken away to the Pakistani army camp at A.R. Howlader Jute Millis, Madaripur where the women detainees including P.W.05 Jogomaya Malo and P.W.06 Bijoya Malo were subjected to sexual violence or rape in captivity for three days and the male Hindu detainees were killed. In conjunction with the attack devastating activities were also carried out and collectivity of all the criminal acts eventually forced the survived victims and Hindu residents of the crime locality to deport to India. All these do not appear to have been controverted in any manner. Defence however simply denied the accused persons' presence with the group of Pakistani army. Cumulative effect of all those criminal activities unerringly speaks about the special intent of the perpetrators and it was the special intent to destroy the Hindu religious group, in whole or in part.

342. In view of above we arrive in an unerring conclusion that the victims were chosen not because of their individual identity, but rather on account of their membership of a 'religious group'. The

women victims who were subjected to sexual violence or rape in captivity causing serious bodily and mental harm on them were therefore members of a group, chosen as such, which, hence, means that the victim of the crime of genocide is the group itself and not only the individual.

343. Therefore, the criminal acts done on Hindu women was aimed also to cause physical and psychological destruction of Hindu women, their families and the community they belonged and in accomplishing it the perpetrators opted the act of sexual violence as an integral tool of destruction, specifically targeting Hindu religious group, we conclude .

344. Killing of male Hindu civilians detained together with the Hindu women, in conjunction with the same attack, was also not for victims' individual identity, but for membership to Hindu religious group of village Malopara. It has been found proved that the accused Md. Solaiman Mollah[now dead] and Idris Ali Sardar were with the group of Pakistani army who started its move towards the crime village on getting down of launch arrived at Angaria bazaar launch ghat as it did on the preceding day i.e 22 May 1971[charge no.01].

345. It is now jurisprudentially settled that genocide is distinct from other crimes inasmuch as it embodies a special intent or *dolus specialis*. Special intent of a crime is the specific intention, required

as a constitutive element of the crime, which demands that the perpetrator clearly seeks to produce the act charged. Thus, the special intent in the crime of genocide lies in "the intent to destroy, in whole or in part, a national, ethnic, racial or religious group."

346. Recurrent deliberate and organised attack directing the Hindu population residing at crime village and the villages surrounding it leads to irresistible inference that the group and their collaborators the accused persons were extremely antagonistic to the Hindu religious group and their special intent was to cause physical , psychological and biological destruction of this group , by killing, by committing rape and sexual violence, looting, torturing detaining significant number of members of Hindu community. All these cumulatively force to conclude that the special intent of the group of perpetrators accompanied and guided by the accused persons was to wipe out or destroy the Hindu community, either in whole or in part.

347. The Hindu male detainees who were also taken away to the Pakistani army camp in Madaripur could not have been traced. P.W.05 and P.W.06, two of co-detainees the victims of rape or sexual violence at the said Pakistani army camp on returning home disclosed that the Hindu male detainees were killed by gun shots. Defence does not dispute it.

348. True that there has been no evidence who, when and how had killed the male Hindus kept detained at the Pakistani army camp. It is in fact impracticable to expect direct evidence in this regard. Keeping the Hindu men detained at the Pakistani army camp and killing them later on were the upshots of their forcible capture by launching attack at their village Malopara on 23 May 1971.

349. The accused persons by their culpable act and conduct actively participated, abetted and contributed to the accomplishment of forcible capture of 35 Hindu civilians including Hindu women. It stands proved too that the forcibly captured Hindu civilians were taken away to the Pakistani army camp with the active assistance, guidance and support of the accused persons and their accomplice Razakars.

350. Since the act of detaining the captured civilians at the Pakistani army camp was followed by rape upon women detainees and killing the male detainees was chained to the act of their forcible capture by launching attack to which the accused persons were conscious, active and culpable part it may legitimately be concluded that the accused persons substantially contributed, abetted and facilitated the Pakistani army men even in perpetrating the principal offence of 'genocide' by killing, committing rape and causing serious bodily and mental harm to members of Hindu religious group, and the accused persons did it sharing common and

special intent of the principal perpetrators, the Pakistani army men stationed at A.R. Howlader Jute Mills, Madaripur, knowing the consequence of their act and conduct.

351. The accused persons' culpable act was thus significantly related to the attack that resulted in confinement of Hindu civilians including P.W.05 and P.W.06 at the Pakistani army camp where the women detainees were subjected to rape or sexual violence and the male detainees were killed .Thus, the accused persons cannot absolve of responsibility of the crimes committed upon the Hindu civilians after taking them at the Pakistani army camp on forcible capture. In this regard **ICTY Trial Chamber** observed in the case of **Tadic** that:

“In sum, the accused will be found criminally culpable for any conduct where it is determined that he knowingly participated in the commission of an offence that violates international humanitarian law and his participation directly and substantially affected the commission of that offence through supporting the actual commission before, during, or after the incident. He will also be responsible for all that naturally results from the commission of the act in question.”

[The Prosecutor v. Dusko Tadic , Case No. IT-94-1-T, Judgment: 7 May 1997, Para- 692.]

352. It is now settled that indiscriminate killing of non combatant civilians belonging to a 'protected group' constitutes the offence of 'genocide', if it is intended to wipe out the group, either in whole or

in part. But what about the rape committed upon numerous women belonging to the said group occurred as a result of the same attack?

353. In the case in hand the rape or sexual violence committed upon the numerous women in captivity who were taken at the Pakistani army camp on forcible capture by launching attack happened in war time situation and on account of the victims' membership in Hindu religious group which obviously inflicted serious bodily and mental harm to the victims the constituent elements of the offence of genocide as mentioned in section 3(2) (c) (ii) of the Act of 1973. Committing sexual violence or rape in captivity at the Pakistani army camp by taking the Hindu women there on forcible capture along with Hindu male detainees from their village was an attempt to dilute a religious community's bloodline.

354. A precedent has been propounded by the **ICTR** in the case of **Jean Paul Akayesu** that rape committed upon women of a protected group was a component of genocide. Mass rape or sexual abuse on a protected group during war time situation in fact results in mass trauma, and as such, is a form of destruction of a group. The devastation that follows rape makes it a particularly effective tool of genocide as it destroys the morale of the victim woman, her family and the entire community she belongs as well.

355. The perpetrators used the act of rape as a weapon instead of a bullet intending to exert its effect beyond the primary victim and

eventually to outrage the civility, society and the community the victims belonged. Family honour and religious group identity are enmeshed with female chastity. Women who endured the genocidal rape had to cope not only with their physical injuries and trauma they sustained, but with a society and community they belong.

356. Systematic crimes directed against men and women on account of their membership in a particular religious group may thus be characterised as an offence of 'genocide'. Rape committed upon the Hindu women including the P.W.05 Jogomaya Malo and P.W.06 Bijoya Malo was thus '**genocidal rape**' indeed.

357. We opt to pen the observation that war time rape victims cannot be viewed as a mere women who lost their supreme wealth. In fact P.W.05 Jogomaya Malo and P.W.06 Bijoya Malo fought by laying their highest self-worth, for the cause of our independence. Thus, they deserve to be recognised and honoured as our great mothers and sisters, the war heroines.

358. At the same time killing numerous civilians on account of their membership in Hindu religion by taking them at the Pakistani army camp on forcible capture with the active aid and substantial contribution of the accused Md. Solaiman Mollah[now dead] and Idris Ali Sardar together with the facts and circumstances and extent and pattern of the attack leads to the conclusion that it was intended to destroy the Hindu religious group of village Malopara,

and thus, the killing of those Hindus constituted the offence of 'genocide' as defined in section 3(2) (c) (i) of the Act of 1973. Indisputably the intent of taking away the Hindu civilians on forcible capture by launching attack at village Malopara just one day after the event of genocide happened at neighbouring village Modhyapara by the same group of perpetrators[as narrated in charge no.01] was to wipe them out as they belonged to a particular group-Hindu religious group.

359. Complicity 'consists of practical assistance, encouragement or moral support which has a substantial effect on the perpetration of the crime. An accomplice shall mean a person or persons who knowingly aid(s) or abet(s) the perpetrator or perpetrators of such action in the acts carried out in preparing or planning such action or in effectively committing it-- it is now well settled. As far as genocide is concerned, the intent of the accomplice is thus to knowingly aid or abet one or more persons to commit the crime of genocide.

360. Therefore, an accused is liable as an accomplice to genocide if he knowingly aided or abetted or instigated one or more persons in the commission of genocide, while knowing that such a person or persons were committing genocide, even though the accused himself did not have the specific intent to destroy, in whole or in

part, a religious group or any of protected groups. What we see in the case in hand?

361. The evidence and facts unveiled demonstrate it unerringly that the accused persons provided aid and active assistance sharing the specific intent to destroy a protected group, and as such, they are held liable also for complicity. It is now settled that complicity to commit genocide refers to all acts of assistance or encouragement that have substantially contributed to, or have had a substantial effect on, the completion of the crime of genocide. The accused persons knowing the intent behind the crime committed accompanied, aided, facilitated by their culpable act and conduct. The accused persons by their act of conscious moral support accompanying, assisting and guiding the group of perpetrators made them responsible also for complicity for the offences committed.

362. In view of above deliberation based on evaluation of evidence presented and backed by settled legal proposition we come to the conclusion that it has been proved beyond reasonable doubt that the act and conduct of the accused Md. Solaiman Mollah [now dead] and Idris Ali Sardar and their conscious and culpable presence with the principal perpetrators leading to the main action to the commission of the principal crime was part of a vast murderous enterprise in which numerous Hindu civilians were killed, Hindu

women were raped in detention, properties of Hindus were devastated and deportation of Hindu civilians occurred and all those were aimed to further the intent to destroy the Hindu religious group, either in whole or in part.

363. It is to be noted that accused Md. Solaiman Mollah faced trial remaining present. But he died on 26 October 2016 at the stage of summing up of the case. He was charged and tried jointly with accused Idris Ali Sardar for participating, aiding, abetting, facilitating and complicity in the commission of offences of genocide, and murder, rape, abduction, confinement, torture, and plundering and arson [other inhumane acts] as crimes against humanity targeting the local Hindu religious group around the crime localities under the then Madaripur Sub-Division as narrated in this charge.

364. The witnesses and two rape victims came on dock and testified accused Md. Solaiman Mollah's [now dead] involvement and complicity with the offences for which he was charged. We regret that accused Md. Solaiman Mollah's sudden death has surely deprived not only him but the victims and sufferers who with the aspiration of getting justice narrated the enormous pains and horror they sustained resulting from serious system crimes, coming on dock.

365. With the death of accused Md. Solaiman Mollah at the stage of summing up of the case the rest of proceedings so far it relates to him has become abated vide Tribunal's order no. 28 dated 01.11.2016, and as such, we refrain from rendering any decision on his liability for the offences proved, in light of the evidence tendered.

366. In view of above, accused Idris Ali Sardar by his acts, conducts and act of common 'understanding' abetted, facilitated, participated and had complicity in the commission of killing numerous Hindu civilians and committing rape upon Hindu women in captivity at the Pakistani army camp, being part of collective criminality, has incurred liability under section 4(1) of the Act of 1973 for the offence of '**genocide**' as enumerated in section 3(2)(c)(i)(ii)(g)(h) of the Act of 1973 which are punishable under section 20(2) of the said Act.

Adjudication of charge no.03

[Murder, confinement, torture and plundering committed in the house of Shailendra Krishna Paul situated at the then Madaripur Sub-Divisional town]

367. Summary charge : That one day of mid June, 1971 in the afternoon Razakars accused Md. Solaiman Mollah [died on 26 October 2016 at the stage of summing up of the case] and Idris Ali Sardar accompanied by some other Razakars and 8/10 Pakistani army men attacked the house, situated at the then Madaripur Sub-

Divisional town [at present Deputy Commissioner's Official Bungalow, Shariatpur], of Shailendra Krishna Paul [now dead], a leader of Awami League , while he had been taking shelter at a refugee camp in India with his family members, and captured Lalit Mohan Kundu and Shuresh Goon alias Shukrai Goon, who were employed by Shailendra Krishna Paul to guard his said house, and having confined in the said house tortured them first and then killed them by stabbing with bayonet, and also plundered that house.

368. Thereby, accused (1) Md. Solaiman Mollah [now dead], and (2) Idris Ali Sardar are charged for participating, aiding, abetting, facilitating and complicity in the commission of offences of murder, confinement, torture and other inhumane act [plundering] as crimes against humanity as part of systematic attack directed against unarmed civilians as specified in section 3(2)(a)(g)(h) of the Act of 1973 which are punishable under section 20(2) of the said Act for which the accused persons have incurred liability under section 4(1) of the said Act.

Evidence of Witnesses Presented

369. The charge involves the act of killing two Hindu civilians -- Lalit Mohan Kundu and Shuresh Goon alias Shukrai Goon, who were deployed by Shailendra Krishna Paul to keep his house guarded as of Shailendra Krishna Paul [now dead], and his family members took refuge in India in 1971. The group of attackers was

formed of Razakars accused Md. Solaiman Mollah [died on 26 October, 2016 at the stage of summing up of the case after closure of evidence], Idris Ali Sardar, some of their accomplice Razakars and 8/10 Pakistani occupation army men, the charge framed alleges.

370. Prosecution in order to prove the arraignment brought in this charge adduced 05 witnesses who have been examined as P.W.01, P.W.03, P.W.07, P.W.09 and P.W.12. Of them, P.W.01, P.W.03 and P.W.07 allegedly observed the facts materially related to the commission of the offence by launching attack and P.W.09 and P.W.12 are hearsay witnesses. Now aiming to determine the commission of the alleged killing and the accused persons' complicity and participation therewith let us first see what the witnesses have testified before the Tribunal.

371. P.W.01 Abdul Aziz Sikder [62] is a resident of village Dhanuka under Police Station Palong of District Shariatpur. In 1971, he was an SSC examinee and now he is the commander of local Mukti Jodhdha Sangsad. He was a freedom fighter.

372. In respect of the event narrated in charge no.03, P.W.01 is a direct witness. He stated that in the mid of June 1971 at about 12:00 P.M. while he coming out of his house he could see the group of Pakistani army and Razakars accompanied by accused Md. Solaiman Mollah [now dead] and Idris Ali Sardar moving towards

the house of Jibon Paul. Seeing this he [P.W.01] went into hid inside the house of Anil Chandra nearer to that of Jibon Paul wherefrom he saw the Pakistani army men and Razakars detaining Shukrai, the caretaker of Jibon Paul. The group then taking the detainee Shukrai with them went to the Veranda of up stair of that house wherefrom they also detained Lalit Mohan and then battered both of them by charging bayonet and then pushed them down from the first floor that resulted in their death. After the group had left the site he [P.W.01] and the locals went to Jibon Paul's house and found the dead bodies of Lalit Mohan and Shukrai and then they buried the dead bodies of the two victims. P.W.01 further stated that the place where he remained in hiding was about 50 yards far from Jibon Paul's house and thus he could saw the event he narrated.

373. In cross-examination defence simply denied the accused persons' complicity with the events alleged in any manner, by putting suggestion to P.W.01. It also transpires that by cross-examining P.W.01 defence could not bring anything to show that P.W.01 had no reason of knowing the accused persons beforehand. However, defence could not dislodge the act of launching attack directing civilians predominantly belonging to Hindu community that resulted in killing.

374. P.W.03 Md. Abdul Jalil Howlader [61] is a resident of village Chikondi under Police Station Palong [Shariatpur Sadar]. In 1971 he was an SSC examinee. He is a direct witness to the facts materially relevant to the event of attack.

375. In respect of the event as narrated in charge no.03, P.W.03 stated that in the mid of June 1971 at about 10:00 AM he and his friend Khalilur Rahman went to his friend Anil Paul's house at village Dhanuka, adjacent north to the house of Jaminder Jibon Paul. During their staying at Anil Paul's house at about 11:00/11:30 AM they saw the Pakistani army men and Razakars accompanied by accused Md. Solaiman Mollah [now dead] and Idris Ali Sardar arriving in front of Jibon Paul's house wherefrom they detained a man seeing him there and took him to the up stair of Jibon Paul's house where an old man had been staying there at that time. The army men then bayoneted him and the man detained earlier to death. After the Pakistani army and Razakars had left the site they [P.W.03 and his friend] along with locals buried the two dead bodies nearby Jibon Paul's house.

376. In cross-examination, P.W.03 stated that accused Md. Solaiman Mollah [now dead] was the Chairman of Peace Committee of Palong Thana and accused Idris Ali Sardar was its member. P.W.03 also stated that at the time of the event of attack at Jibon Paul's house happened 4/5 people were also present there

apart from him [P.W.03] and his friend. Defence does not appear to have made effort to controvert the material facts testified by the P.W.03 by cross-examining him.

377. P.W.07 Anil Chandra Das [61] is a resident of village Dhanuka under Police Station Palong of District Shariatpur. In 1971, he was a student of class VIII. In respect of the event described in charge no.03 he is a direct witness to facts materially relevant to the attack.

378. P.W.07 also stated that in 1971 the house of Mukundo Lal Paul [now the official residence of Deputy Commissioner, Shariatpur] was adjacent to their house. In 1971, Mukundo Lal Paul was not alive and four of his six sons deported to India and two others namely Jibon Krishna Paul and Neel Krishna Paul used to stay at their home, but they also deported to India being panicked following the event happened in Madhyapara [event of indiscriminate killing of Hindu civilians as narrated in charge no.01] keeping their home under lookout of Lalit Mohan Kundu and Shukrai Goon [victims].

379. P.W.07 next testified the event of killing those two i.e. Lalit Mohan Kundu and Shukrai Goon as narrated in charge no.03. He stated that in the mid of June 1971 in the afternoon he had been at their house when he saw a group of 8/10 Razakars and 10/15 Pakistani army men accompanied by accused Md. Solaiman Mollah

[now dead] and Idris Ali Sardar coming towards the house of Mukundo Lal Paul. With this he, Aziz Sikder and others went into hid inside a jungle nearby their house wherefrom he saw the Pakistani army men detaining Shukrai Goon from the front of Mukundo Lal Paul's house and taking him to the up stair where they also detained Lalit Mohan Kundu and then they bayoneted the two detainees to death and threw down their dead bodies. At that time the two accused persons were with the Pakistani army men. After the Pakistani army men and Razakars had left the site they came out of the hiding place and found Shukrai Goon and Lalit Mohan Kundu dead. They buried the two dead bodies in front of the house of Mukundo Lal Paul. He knew accused Md. Solaiman Mollah [now dead] and Idris Ali Sardar before hand as they and he [P.W.07] used to come at the same bazaar very often, P.W.07 added.

380. Defence does not appear to have made effort to controvert what the P.W.07 observed in relation to the event narrated in charge no.03 by cross-examining him. Defence simply denied what the P.W.07 testified and suggested was untrue and tutored.

381. P.W.09 Sambho Nath Das [76], a resident of village Dhanuka under Police Station Palong [Shariatpur Sadar], District Shariatpur is a hearsay witness in respect of the event narrated in

charge no. 03. In 1971, he was a teacher of Palong Tulashar Government Primary School.

382. In testifying the event as described in charge no.03, P.W.09 stated that in the mid of June 1971, a group of Pakistani army men and Razakars being accompanied by accused Md. Solaiman Mollah [now dead] and Idris Ali Sardar had launched attack at Mukundo Lal Paul's house[now the official residence of the Deputy Commissioner of Shariatpur] of village Dhanuka and they detaining the two caretakers Lalit Mohan Kundu and Suresh Goon alias Shukrai Goon therefrom took them to the up stair of the house where they were bayoneted to death and then were thrown down from the up stair. After the Pakistani army and Razakars had left the site he [P.W.09] came to that house where he found Anil Chandra Das and Aziz Sikder present from whom he knew the event and then they together moved to the east side of the house where they found the dead bodies of Lalit Mohan Kundu and Suresh Goon alias Shukrai Goon and they then buried the dead bodies in front of the house.

383. In cross-examination defence chiefly suggested that what the P.W.09 testified implicating the accused persons in relation to the alleged events narrated in charge no. 03 was untrue and tutored and that he did not hear the event as he claimed. P.W.09 denied it.

384. P.W.12 Md. Abdus Samad Talukder [61] is a resident of Swarnaghosh, Ward No.08, Shariatpur Municipality under Police Station Palong of District Shariatpur. He is a freedom-fighter. On receiving training in India he came back to Bangladesh in the last part of July 1971 and started participating in the freedom fight along with his co-freedom-fighters around the locality of Madaripur.

385. P.W.12 testified what he heard about the event as narrated in charge no.03. He stated that at the end of September 1971 he learnt from a source that in the mid of June 1971 at about 02:00 P.M. a group of Razakars and Pakistani army men led by accused Md. Solaiman Mollah [now dead] had attacked the house of Zaminder Jibon Krishna Paul and Neel Krishna Paul [now the official residence of Deputy Commissioner, Shariatpur] and on the way to the said house they detained one Shukrai along with whom they arrived at the house of Zaminder Jibon Krishna Paul wherefrom they also detained Lalit Mohan Kundu. The detained persons were then taken to the first floor of the house and then the Pakistani army men and Razakars bayoneted them to death and threw their bodies to ground.

386. In cross-examination, P.W.12 denied the suggestion put to him on part of the defence that what he testified implicating the accused persons was untrue and tutored. Defence however does not appear

to have cross-examined to shake what has been testified by P.W.12 on material particular.

Finding with Reasoning on Evaluation of Evidence

387. Ms. Rezia Sultana, the learned prosecutor submitted that this charge involves the event of killing two Hindu civilians by launching systematic attack. In order to substantiate this charge in all 05 witnesses have been examined. Of them, P.W.01 and P.W.03 saw the group of Pakistani army and Razakars accompanied by the accused persons detaining the victim Shukrai and later on they saw the dead bodies of two including Shukrai. P.W.07, a resident of the crime site too had occasion of seeing the accused persons accompanying the group at the crime site, remaining in hiding. P.W.09 found the dead bodies of the two victims after the group had left the site. P.W. 12 is a hearsay witness.

388. The learned prosecutor further submitted that defence could not shake what has been testified by the above witnesses in any manner. Remaining present at the crime site with the group of Pakistani army, the principal perpetrators indicates that the accused Md. Solaiman Mollah [now dead] and Idris Ali Sardar substantially contributed and facilitated the commission of the killing two unarmed Hindu civilians constituting the offence of murder as crime against humanity, the learned prosecutor added.

389. Mr. Gazi M.H. Tamim, the learned counsel defending the absconding accused Idris Ali Sardar as State defence counsel submitted that the witnesses examined intending to substantiate this charge are interested witnesses and their version does not carry any credibility. They have made exaggeration as it was not practicable of seeing what happened in the up stair of the house of Jibon Krishna Paul where two civilians were allegedly bayoneted to death. The learned counsel further submitted that the accused persons were not with the group at the crime site.

390. Two Hindu civilians who were deployed to guard the house of Mukundo Lal Paul's house were killed by launching attack which happened in day time, the charge alleges. The group of perpetrators formed of Pakistani army men and Razakars was accompanied by the accused persons who have been indicted for participating, abetting, facilitating and complicity principally in the commission of the offence of 'murder' as crime against humanity, the charge framed alleges.

391. It transpires that out of five witnesses examined to substantiate this charge three are direct witnesses [P.Ws. 01, 03 and 07] to the facts crucially relevant to the attack that resulted in commission of the principal offence and other two are hearsay witnesses. It is now well settled that not the quantity but the quality of witnesses is to be taken into account for determining fact in issue. Besides, hearsay

evidence, in a case under the Act of 1973, is not inadmissible *per se*. It may be said to carry probative value if it is found to have been corroborated by some other evidence.

392. Before we start evaluating the evidence as adduced above we deem it necessary to note that accused Md. Solaiman Mollah died on 26 October 2016 at the stage of summing up of the case, after closure of evidence presented on part of the prosecution. He has been tried jointly with accused Idris Ali Sardar and prosecution presented evidence to establish liability of both the accused persons for the offences of which they were charged with. Thus, act and conduct even of accused Md. Solaiman Mollah [now dead] relevant to the commission of the alleged offence may come forward inevitably for the purpose of effective evaluation of evidence tendered.

393. But however, in any case finally accused Md. Solaiman Mollah [now dead] cannot be held liable even if he is proved to have had complicity and participation to the commission of the offence alleged, for the reason of his death at the summing up stage of the case. Keeping it in mind, we should now go ahead with the task of evaluation of evidence adduced chiefly to determine liability of another accused Idris Ali Sardar.

394. However, in view of indictment prosecution principally requires proving the commission of the offence; that the offence

committed was the upshot of 'attack' which was systematic and that the accused Md. Soliaman Mollah [died on 26 October 2016 at the stage of summing up of the case] and Idris Ali Sardar were part of the common design of the group of perpetrators.

395. At the same time we are to evaluate whether act or conduct of the accused persons formed part of 'attack' and it substantially facilitated, encouraged, abetted or approved the actual commission of offences by the principals. It has to be demonstrated further that the accused persons, by their act or conduct, intended to provoke or induce the commission of the crime, or was aware of the substantial likelihood that the commission of a crime would be a probable consequence of their act or conduct.

396. The event alleged happened in day time. Defence does not dispute it. It simply denies the truthfulness of what has been testified by the witnesses implicating the accused Md. Solaiman Mollah [died on 26 October 2016 at the stage of summing up of the case] and Idris Ali Sardar. Testimony of P.W.01 and P.W.03 so far it relates to moving the group of perpetrators being accompanied by the accused Md. Soliman Mollah [now dead] and Idris Ali Sardar towards the crime site inspires credence as they were direct witnesses to this fact.

397. It depicts from the testimony of P.W.01, a key direct witness to the event under adjudication that in the mid of June 1971 at

about 12:00 P.M. while P.W.01 came out of his house, saw the group of Pakistani army men and Razakars accompanied by the accused persons moving towards the house of Jibon Paul. And with this he [P.W.01] went into hid inside the house of Anil Chandra nearer to that of Jibon Paul wherefrom he saw the Pakistani army men and Razakars detaining Shukrai, the caretaker of Jibon Paul. The group then taking the detainee Shukrai with them went to the veranda of up stair of that house wherefrom they also detained Lalit Mohan and then battered both of them by charging bayonet followed by pushing them down from the first floor that resulted in their death. After the group had left the site he [P.W.01] and the locals went to Jibon Paul's house and found the dead bodies of Shukrai and Lalit Mohan.

398. The place where he [P.W.01] remained in hiding, at the time of launching attack, was about 50 yards far from Jibon Paul's house and thus he could see the event, P.W.01 testified. Defence could not controvert it. The event happened in day time. There is nothing to show that killing charging bayonet happened inside any room in the up stair. Pushing the two victims down from the first floor after charging bayonet that resulted in their death suggests inference that the act of charging bayonet upon the two victims happened at open space of the first floor, and as such, it was possible for P.W.01 to observe it.

399. Defence could not dislodge the act of launching attack that resulted in killing two Hindu civilians. Besides, by cross-examining P.W.01 defence could not bring anything to show that P.W.01 had no reason of knowing the accused persons beforehand. We do not find any earthly reason of disbelieving the P.W.01. Thus, rational evaluation of the testimony of P.W.01 forces to an unerring conclusion that it was practicable of seeing the criminal acts committed upon two Hindu civilians including Shukrai, the caretaker of the house who was detained first and then taken to the up stair, even from a distance of 50 yards.

400. Seeing the group formed of Pakistani army men and Razakars accompanied by the accused Md. Solaiman Mollah [died on 26 October 2016 at the stage of summing up of the case] and Idris Ali Sardar moving towards Jibon Krishna Paul's house P.W.03 went into hid wherefrom he observed the act of detaining a man and taking him to the up stair of Jibon Paul's house. Defence could not impeach it in any manner. It provides corroboration to what has been testified by the P.W.01, a crucial direct witness to the event.

401. The detained man Shuresh Goon alias Shukrai Goon and Lalit Mohon Kundu, the man staying on the first floor, were bayoneted to death and were pushed down to ground floor-- P.W.03 and others later on buried the dead bodies of the two victims of the attack. Defence could not refute it in any manner. We find no reason to

disbelieve P.W.03. It remained uncontroverted that accused Md. Solaiman Mollah [now dead] and Idris Ali Sardar were with the group formed of Pakistani army and Razakars at the crime site.

402. It depicts from the testimony of P.W.07, a direct witness that it was Shukrai who was apprehended from the place in front of Jibon Krishna Paul's house and the other one was Lalit Mohan Kundu staying on the up stair of the house of Jibon Krishna Paul at the relevant time.

403. The facts of arriving the group accompanied by the accused Md. Solaiman Mollah [died on 26 October 2016 at the stage of summing up of the case] and Idris Ali Sardar at the house of Shailendra Krishna Paul on the date and time, detaining Shuresh Goon alias Shukrai Goon, the caretaker therefrom, taking him on the first floor of the house where he and Lalit Mohan Kundu were bayoneted to death and were pushed down to ground floor have been found proved from the testimony of P.W.01, P.W.03 and P.W.07. Of these three witnesses, P.W.01, remaining in hiding, observed the actual commission of the crime conducted in the first floor of the house attacked which is believed to be practicable.

404. Why the accused persons accompanied the group in launching attack? Why the house and its residents were targeted? Was it possible to locate the house of Shailendra Krishna Paul [now dead] for a group of Pakistani army alone? We have already found that

the accused persons and their cohort Razakars actively and culpably accommodated the group of Pakistani army and by their act and conduct participated in committing horrendous crimes directing Hindu civilians as narrated in charge nos. 01 and 02.

405. In 1971, during the war of liberation the Pakistani occupation army needed effective guidance, assistance and collaboration on part of the organizations they created to further their policy and plan. Pro-Pakistani people antagonistic to the pro-liberation Bengali nation, Awami League, freedom-fighters, intellectuals and people of Hindu religious group collaborated actively with the Pakistani occupying army. It is now settled fact of common knowledge.

406. In the case before us, we may presume it lawfully that the attack at Shailendra Krishna Paul's house was systematic and premeditated and this was executed with the active and effective guidance and assistance of the accused persons, the potential members of Razakar Bahini formed locally as the Pakistani army men naturally were not acquainted with the locality, the Hindu residents thereof and the houses to be targeted. Obviously intention of the perpetrators was to attack Hindu civilians. The accused persons sharing this intent made them conscious part to the Enterprise, we conclude.

407. P.W.09 is a hearsay witness. But what he testified in relation to the event of attack by the group of Pakistani army and Razakars

accompanied by the accused persons that resulted in brutal killing two Hindu civilians who were on deployment of taking care of Jibon Krishna Paul's house gets corroboration on material particular from the evidence of P.W.03 and P.W.07, and thus, his hearsay testimony carries probative value.

408. We reiterate that the case relates to trial of internationally recognised crimes committed in violation of customary international law. The offences are alleged to have been committed in the context of war of liberation in 1971. Section 23 of the Act of 1973 provides that provisions of the Criminal Procedure Code, 1898(V of 1898), and the Evidence Act, 1872(I of 1872), shall not apply in any proceedings under the Act of 1973.

409. It is now settled that the offence of crimes against humanity is considered as 'group crime' and it is not perpetrated by a single individual. But however, an individual may participate to the actual commission of the principal crime by his act or conduct, before or midst or after the crime committed

410. Thus, in the case in hand, if we keep the provision of section 23 together with section 19 of the Act of 1973 in mind it would be clear that the task of determination of culpability of a person accused of offences enumerated in section 3 of the Act of 1973 involves a quite different jurisprudence. Proof of all forms of criminal responsibility, through participation in any manner can be

given by direct or circumstantial evidence. It is now settled jurisprudence.

411. Mere denial of what has been testified by a witness in examination-in-chief does not cast any doubt in it. Objective of cross-examination is to shake credibility of what has been testified. The fact of launching attack at the relevant time directing the house of Jibon Krishna Paul, detaining one Shuresh Goon alias Shukrai Goon from the place in front of the said house, taking the detainee to up stair and later on finding bayonet injured dead bodies of Shukrai and Lalit Mohan Kundu, after the group had left the site as testified by P.W.03 and P.W.07 remained totally unshaken, and thus, it rather proves that Shukrai and Lalit Mohan Kundu were bayoneted to death on upstairs of the house by the group of perpetrators. There has been no indication whatsoever to show that the accused persons were not with the group.

412. It is to be noted that proof must mean such evidence as would induce a reasonable man to come to a definite conclusion. Seeing the accused persons accompanying the group which was engaged in perpetrating the crime is sufficient to conclude the accused persons' participation and complicity to its commission as well. For the accused persons did not remain with the group as mere spectators, we presume it validly.

413. It was not likely for the P.W.03 and P.W.07 to see how the actual commission of the crime happened and who actually participated in accomplishing the crime, remaining in hiding place. But the intrinsic essence of evidence presented by P.W.03 and P.W.07 demonstrates it patently that death of two Hindu civilians was caused on the upstairs of Jibon Krishna Paul's houses by the group accompanied by accused Md. Solaiman Mollah [now dead] and Idris Ali Sardar. Bayonet injured dead bodies were found there afterwards, the evidence depicts it.

414. Due to the context prevailing in 1971 during the war of liberation, it was not practicable for an individual to experience or observe the entire phase of an event of atrocious mission carried out by the Pakistani army and their collaborators belonging to Razakar Bahini and Peace Committee. However, it has been found that P.W.01, a key direct witness had occasion of observing the actual commission of the offence that happened on the first floor of the house attacked.

415. It is not required to show that the accused persons personally committed the killing by charging bayonets to the victims, the two Hindu civilians. Their presence with the group in accomplishing the mission and conduct of sharing common intent are sufficient for holding them liable for the crimes committed. In this regard we

recall the observation of the **ICTR Appeals Chamber** made in the case of **Ntakirutimana and Ntakirutimana** which is as below:

" Murder as a crime against humanity under Article 3(a) does not require the Prosecution to establish that the accused personally committed the killing. Personal commission is only one of the modes of liability....."

[Ntakirutimana and Ntakirutimana, (Appeals Chamber), December 13, 2004, para. 546].

416. It is immaterial to argue that the accused was not the actual perpetrator or he himself did not physically participate to the commission of the criminal acts. It is to be noted that the alleged crimes as enumerated in section 3(2)(a) of the Act of 1973 were committed in furtherance of attack directed against the civilian population. It is not the 'act' but the 'attack' is to be systematic in nature and even a single act forms part of the 'attack'. Thus, we are to see how the accused acted or conducted forming part of 'attack' that resulted in commission of the principal criminal acts directing the non-combatant civilians. Prosecution even is not required to identify the actual perpetrator.

417. The event as narrated in this charge involving killing two innocent Hindu civilians by launching planned and systematic attack at the house of Jibon Krishna Paul happened about three weeks subsequent to the recurrent attacks occurred directed against the civilians on account of their membership in Hindu religious

group, on discriminatory ground that resulted in commission of killing civilians, committing rape, causing serious bodily and mental injury constituting the offence of genocide for which the accused persons have already been found criminally liable[charge nos. 01 and 02].

418. This charge relates to killing two civilians belonging to Hindu community. It was not an isolated crime. It was conducted by launching attack and the group of attackers formed of Pakistani occupation army accompanied by the accused persons and their accomplice Razakars. It has been divulged from the evidence presented that the accused persons were with the group of attackers.

52. Why the accused persons accompanied the group to the crime site? Why they opted to remain closely associated with the group in launching the attack? The answer is quite clear. By act of accompanying the group at the crime site in launching attack the accused persons continued remaining with the group of Pakistani occupation army to further its policy and plan as they did it in conducting attacks directed against Hindu civilians[as narrated in charge nos.01 and 02].

419. In respect of the events of attacks launched directed against the Hindu civilians on discriminatory grounds as narrated in charge nos. 01 and 02, the accused Md. Solaiman Mollah [died on 26 October 2016 at the stage of summing up of the case] and Idris Ali

Sardar sharing intent of the group and knowing the consequence of their act and conduct substantially facilitated, aided, abetted and contributed in the commission of the principal crimes, already it stands proved. Thus, we see that no exception occurred even in case of the attack conducted at the house of Jibon Krishna Paul.

420. It is now settled jurisprudence that culpability for crimes against humanity requires that the accused had the relevant knowledge of the underlying attack. That is, the accused must be aware that his actions formed part of the systematic attack against the civilian population. It transpires too from totality of facts that despite being aware of the consequence of their act and conduct the accused persons facilitated the commission of the killing by accompanying the group. And they did it sharing common intent of the group.

421. It was impracticable indeed for the Pakistani occupation army men to get the houses to be attacked and the civilians belonging to Hindu religion identified. Indisputably the accused persons and their accomplice Razakars made it easier and possible by providing aid and culpable assistance to the Pakistani occupation army men. We may safely conclude too that the accused Md. Solaiman Mollah [died on 26 October 2016 at the stage of summing up of the case] and Idris Ali Sardar consciously and knowingly accompanied the group of Pakistani occupation army men and remained with them at

the crime site with their support and assistance and thus they incurred equal liability for the offence committed.

422. Essence of section 4(1) of the Act of 1973 is simultaneous consensus of the mind of persons participating in the criminal action to bring about a particular result. For application of section 4(1) common intention or purpose of all the members of the group of attackers and no overt act of any of member who was part of the group is necessary.

423. In the case in hand, conscious conduct, culpable act, behaviour or omission to act on part of the accused persons knowing the foreseeable consequence of their act or conduct or behaviour, which have been convincingly proved, are thus qualified to be the constituent of 'participation' too to the actual accomplishment of the crimes as it substantially contributed to, or have had a substantial effect on the perpetration of the crimes for which the accused persons have been charged with.

424. Prosecution is not required to adduce direct evidence as regards formation of common purpose. It may reasonably be inferred from circumstances surrounding to the attack launched. It stands proved that the accused persons being the members of local Razakar Bahini were present at the crime site with the group. Obviously they remained there not as mere spectators. Rather, it is inferred irresistibly that they did it intending to

facilitate the accomplishment of the crime, sharing common intent, to further policy and plan.

425. Evidence tendered demonstrates that the upshot of the attack was detaining two non combatant Hindu civilians and causing their brutal death by charging bayonet on religious grounds. Status and culpable affiliation of accused Md. Solaiman Mollah [died on 26 October 2016 at the stage of summing up of the case] and Idris Ali Sardar with the Pakistani occupation army stationed in Madaripur as already found proved leads to conclude that obviously the accused persons were aware about the consequence of the execution of the common design, and as such, they were part to it.

426. The first category of Joint Criminal Enterprise [**JCE**] constitutes the basis of the doctrine, as the participants in the enterprise may be held criminally liable for acts they did not commit but they agreed to commit in a collective sense. In the case of **JCE**, it is sufficient for the participant to perform acts that in some way are directed to the furthering of the common plan or purpose. In the case in hand, the accused persons by sharing the intent of the Joint Criminal Enterprise, had acted as co-perpetrators as they aided and abetted the accomplishment of the common design.

427. 'Participation' encompasses 'approval' or 'instigation' or 'encouragement' or as 'practical'. They had acted pursuant to a

common design, sharing 'aiding' or 'abetment'. Act of assistance of the accused persons was the same criminal intention or *mens rea* to perpetrate a crime and at the same time the accused persons were aware about the predictable consequence of the execution of the common design.

428. Culpable presence of accused Md. Solaiman Mollah [died on 26 October 2016 at the stage of summing up of the case] and Idris Ali Sarder at the crime site with the group of Pakistani occupation army men had an encouraging effect in perpetrating the principal crime which made them participants in the deliberate killing of two Hindu civilians. This view finds support from the principle enunciated in the observation of the **ICTY Trial Chamber** rendered in the case of **Tadic** which is as below:

".....when an accused is present and participates in the beating of one person and remains with the group when it moves on to beat another person, his presence would have an encouraging effect, even if he does not physically take part in this second beating, and he should be viewed as participating in this second beating as well. This is assuming that the accused has not actively withdrawn from the group or spoken out against the conduct of the group."

[Tadic, (Trial Chamber), May 7, 1997, para. 690]

429. At the same time the accused Md. Solaiman Mollah [died on 26 October 2016 at the stage of summing up of the case] and Idris Ali Sardar had acted as ‘accomplices’ as they shared the intent of the group in perpetrating the crime. It has been propounded by the **ICTR Trial Chamber** in the case of *Bagilishema* that-

"An accomplice must knowingly provide assistance to the perpetrator of the crime, that is, he or she must know that it will contribute to the criminal act of the principal. Additionally, the accomplice must have intended to provide assistance, or as a minimum, accepted that such assistance would be a possible and foreseeable consequence of his conduct."

[Bagilishema, ICTR Trial Chamber, June 7, 2001, para. 32]

430. It is now settled that even a single or limited number of acts on the accused’s part would qualify as a crime against humanity, unless those acts may be said to be isolated or random. The accused can be held criminally responsible for the crime alleged if he is found that he , by his acts or conducts, was ‘concerned with the killing’.

431. In the case in hand, it stands proved that (i) the accused Md. Solaiman Mollah [died on 26 October 2016 at the stage of summing up of the case] and Idris Ali Sardar took ‘consenting part’ in the commission of the crime, (ii) the accused persons were ‘connected’

with plan or enterprise, and (iii) the accused persons belonged to group of the perpetrators.

432. The accused Md. Solaiman Mollah [died on 26 October 2016 at the stage of summing up of the case] and Idris Ali Sardar were culpably associated with the scheme or system and concerted plan which had a criminal outcome, totality of the evidence presented impels it unerringly. **JCE** is a mode of participation in a criminal offence that consists of an understanding or arrangement amounting to an agreement between two or more persons that they will commit a crime. It is now well settled.

433. Existence of an agreement may reasonably be inferred from circumstances and the act and conduct of the accused. It is evinced that the accused persons accompanied the Pakistani occupation army to the crime site. Why they so accompanied the troops? What was the intention behind it? It was rather well known to the accused persons what activities the Pakistani occupation army was about to carry out. Such knowledge of the accused persons indicates sufficiently that agreeing with the plan and policy of the principals the accused persons opted to accompany the principals, and thus, it may rightly be said that there had been an agreement between them and the principals, in carrying out atrocious activities directing civilians.

434. Criminal responsibility may be imputed to all participants within the common enterprise where the risk of death occurring was a predictable consequence of the execution of the common design. In order for responsibility for the deaths to be imputable to the others, however, everyone in the group must have been able to predict this result. In view of this settled proposition together with the evidence as discussed above, it is found proved that accused Md. Solaiman Mollah [died on 26 October 2016 at the stage of summing up of the case] and Idris Ali Sardar were part of common design that eventually resulted in killing two non combatant civilians belonging to Hindu community and the acts and conduct of the accused persons formed part of systematic attack.

435. It is to be noted again that accused Md. Solaiman Mollah died on 26 October 2016 at the stage of summing up of the case. He was charged and tried jointly with accused Idris Ali Sardar for participating, abetting, facilitating and substantially contributing to the commission of offence of murder as crime against humanity as narrated in this charge.

436. The direct and natural witnesses came on dock and testified the accused Md. Solaiman Mollah's involvement and complicity with the offences for which he was charged. But we regret that accused Md. Solaiman Mollah's sudden death has surely deprived not only him but also the victims and sufferers who with the

aspiration of getting justice narrated the enormous pains and horror they sustained resulting from serious system crimes, coming on dock.

437. With the death of accused Md. Solaiman Mollah at the stage of summing up of the case the rest of proceedings so far it relates to him has become abated vide Tribunal's order no.28 dated 01.11.2016, and as such, we refrain from rendering any decision on his liability for the offences proved, in light of the evidence evaluated above.

438. Accordingly, on totality of evidence discussed above we find that the prosecution has been able to prove beyond reasonable doubt that the accused Idris Ali Sardar by his act and conduct forming part of attack sharing the intent of the group of perpetrators participated, abetted, facilitated, contributed and had complicity in the accomplishment of the actual commission of the killing of two unarmed civilians. Therefore, the accused Idris Ali Sardar is found criminally liable for the offence of '**murder**' as crime against humanity as enumerated in section 3(2) (a)(g)(h) of the Act of 1973 which is punishable under section 20(2) the said Act, and thus, he incurred liability under section 4(1) of the said Act, for the above offences.

Adjudication of charge no. 04

[Offence of deportation of Hindu religious people of Palong Police Station of the then Madaripur Sub-Division to India]

439. Summary charge: That during the War of Liberation in 1971, Razakars accused Md. Solaiman Mollah [died on 26 October 2016 at the stage of summing up of the case] and Idris Ali Sardar and other Razakars in collaboration with Pakistani occupation army committed wide spread and systematic killing and destruction of Hindu religious people in the localities of Palong Police Station of the then Madaripur Sub-Division, and thereby the accused persons and their accomplice Razakars and Pakistani army created panic and horror in the said localities in committing genocide and murder, rape, torture, confinement, persecutions, etc. as crimes against humanity which forced so that Hindu religious people to leave the country facing ineffable harassment . Due to commission of these offences, thousands of Hindu religious people of different localities of the then Madaripur Sub-Division being frightened were thus compelled to be deported to India.

440. Thereby, accused (1) Md. Solaiman Mollah [now dead], and (2) Idris Ali Sardar are charged for participating, aiding, abetting , facilitating and complicity in the commission of offence of deportation as crime against humanity as part of systematic attack directed against unarmed civilians as specified in section 3(2)(a)(g)(h) of the Act of 1973 which is punishable under section 20(2) of the Act of 1973 for which the accused persons have incurred liability under section 4(1) of the said Act.

Evidence of Witnesses Presented

441. Prosecution relies upon P.W.01, P.W.02, P.W.03, P.W.05, P.W.06, P.W.07 and P.W.09 who have testified the fact of deportation of Hindu civilians of the Hindu populated villages Madhyapara, Kashabhog, Rudrakar and Malopara attacking which numerous Hindu civilians were killed, raped together with the act destructing civilians' properties were conducted by the group of Pakistani army accompanied by the accused persons and their accomplice Razakars, the charge framed alleges.

442. The witnesses in addition to narrating the facts relevant to those attacks [as narrated in charge nos. 01, 02 and 03] testified the fact of deportation of Hindu civilians. However, let us see what the witnesses testified as to the post attacks consequence the Hindu civilians had to face.

443. P.W.01 Abdul Aziz Sikder[62] stated that the civilians belonging to Hindu community of villages Kashabhog, Madhyapara, Uttar Madhyapara, Dakhkhin Madhyapara, Malopara, the Hindu dominated localities were compelled to deport to India, and thus, the Razakars and the accused persons looted the belongings left by those Hindu civilians.

444. P.W.02 Jalilur Rahman [65] stated that with this event of attack [narrated in charge no.02] the Hindu residents of Malopara and Madhyapara became panicked and thus they deported to India.

445. P.W.03 Md. Abdul Jalil Howlader [61] stated that after the mass killing ,looting and arson committed at Malopara and Dakhkhin Madhyapara the rest of Hindu civilians of the localities being panicked were thus forced to get deported to India and then their households they left were taken away by accused Md. Solaiman Mollah [now dead], Idris Ali Sardar and their cohort Razakars.

446. P.W.05 Jogomaya Malo [75] stated, in addition to describing the event of attack that resulted in detaining them on capture at the Pakistani army camp in Madaripur, that on coming back [being released from the Pakistani army camp] they took shelter at the house of one of their Muslim neighbours as they found their own houses burnt down and few days later they deported to India and returned back after independence.

447. P.W.06 Bijoya Malo [80], another victim also stated that on coming back to their village [on being released from Pakistani army camp] they found their houses burnt down and thus they took shelter at the house of Wahab Ali Gharami, one of their villagers and 3/4 days later they went to her paternal home at Bajitpur in Madaripur and therefrom they deported to India. After independence they came back home.

448. P.W.07 Anil Chandra Das [61] stated that the events [as narrated in charge nos. 01, 02, and 03] resulted in deportation of most of Hindu civilians of their locality to India.

449. P.W.09 Sambho Nath Das [76] stated that the residents of villages Dhanuka and Madhyapara got deported to India following the events of attacks happened on 22 and 23 May in 1971[as narrated in charge nos. 01 and 02].

Finding with Reasoning on Evaluation of Evidence

450. Ms. Rezia Sultana, the learned prosecutor submitted that prosecution relies upon 07 prosecution witnesses including P.W.05 and P.W.06 [the rape victims of the event narrated in charge no.02] to prove this charge which relates to 'deportation' as crime against humanity. It has been submitted that after the events of attacks happened on 22 May and 23 May 1971[as narrated in charge nos. 01 and 02] most of the rest of Hindu residents of the crime localities became panicked and criminal acts of looting and burning down the houses by the accused persons and their cohorts added further coercive situation which eventually forced the Hindu civilians of the crime localities to deport beyond the border of Bangladesh. The act and conduct the accused Md. Solaiman Mollah [now dead], Idris Ali Sardar and their cohorts done by launching attacks on 22 and 23 May, 1971 contributed and facilitated such

forced displacement which constituted the offence of 'deportation' as crime against humanity.

451. Mr. Gazi M.H. Tamim, the learned counsel defending the accused Idris Ali Sardar as State defence counsel submitted that since prosecution failed to prove the accused person's nexus with the events narrated in charge nos. 01, 02 and 03 and since the accused did not belong to locally formed Razakar Bahini he cannot be held liable for the displacement of Hindu civilians of the crime localities. The alleged deportation or displacement was voluntary and not under compulsion; that the civilians including the civilians of Hindu community as well had to deport voluntarily due to panicking situation created in the territory of Bangladesh in 1971 by the Pakistani occupation army, and thus, the accused persons cannot be held liable for the arraignment brought in this charge.

452. This charge involves the offence of 'deportation' as crime against humanity as enumerated in section 3(2)(a) of the Act of 1973 which was allegedly resulted from the coercive and horrific upshot of the dreadful events as narrated in charge nos.01, 02 and 03.

453. Already on due adjudication of those charges on integrated evaluation of evidence tendered the accused Md. Solaiman Mollah [now dead] and Idris Ali Sardar have been found criminally responsible and to have incurred liability under section 4(1) of the

Act of 1973 for the offences of 'genocide', 'murder' and other offences as crimes against humanity committed directing Hindu civilian population, on discriminatory ground.

454. For causing deportation no physical force is needed to be applied and it is to be seen whether any coercive climate was created by the destructive acts directing civilians happened. Prosecution thus requires proving the fact of deportation of most of Hindu civilians of villages Madhyapara, Kashabhog, Rudrakar and Malopara and what forced them to get deported and how the accused persons were criminally responsible for the act of deportation.

455. In addition to testifying the facts materially related to the events as narrated in charge nos.01, 02 and 03, some of the witnesses i.e. P.W.01, P.W.02, P.W.03, P.W.05, P.W.06, P.W.07 and P.W.09 testified the fact of deportation of Hindu civilians to India after the events narrated in charge nos.01,02 and 03 happened. Of those witnesses P.W.05 and P.W.06 are the victims of sexual violence in captivity.

456. Accused Md. Solaiman Mollah, who died on 26 October, 2016 at the stage of summing up of the case, after closure of evidence on part of the prosecution, was charged and tried jointly with another accused Idris Ali Sardar and prosecution presented evidence to establish liability of both the accused persons for the offences of

which they were charged with. But however, in any case accused Md. Solaiman Mollah [now dead] cannot be held liable even if he is proved to have had complicity and participation to the commission of the offence alleged, on the strength of evidence so adduced. Keeping it in mind, we should go ahead with the task of evaluation of evidence adduced to determine liability of only another accused Idris Ali Sardar.

457. Defence does not appear to have controverted the fact of deportation of Hindu civilians. Thus, we require seeing whether such deportation was the cumulative upshot of the criminal activities constituting the offences already proved [as narrated in charge nos. 01, 02 and 03].

458. It depicts from the testimony of P.W.01 Abdul Aziz Sikder that the accused Md. Solaiman Mollah, Idris Ali Sardar and their accomplice Razakars looted the belongings left by the Hindu civilians, after their deportation. P.W.03 Md. Abdul Jalil Howlader consistently corroborates it. That is to say, aggression of the accused persons did not come to an end even after the Hindu civilians deported to India.

459. After the attack conducted on 23 May 1971[as narrated in charge no.02] the Hindu residents of villages Malopara and Dakhkhin Madhyapara became panicked. It gets corroboration from P.W.03 who testified that after the mass killing, looting and

arson committed at Malopara and Dakhkhin Madhyapara the rest of Hindu civilians of the localities being panicked deported to India.

460. Testimony of P.W.05 and P.W.06, the two victims who were subjected to recurrent sexual violence along with other women detainees in captivity at the Pakistani army camp in Madaripur also demonstrates that on coming back to their village being released from captivity they took shelter at the house of Wahab Ali Gharami, one of their Muslim villagers as they found their houses burnt down. Few days later they deported to India

461. It also depicts from the testimony of P.W.07 and P.W.09 that the deportation of most of Hindu civilians of their locality to India was the upshot of the grave terror, coercion and panic that resulted from recurrent and organised criminal activities [as narrated in charge nos. 01, 02 and 03] carried out on discriminatory intent.

462. The unimpeached version of the above witnesses including two rape victims P.W.05 and P.W.06 demonstrates that the Hindu residents of the crime localities were compelled to deport to India and it happened after occurring the events of attack that resulted in genocide, rape, killing and other destructive activities on 'discriminatory ground' as narrated in charge nos. 01,02 and 03.

463. It is significant to note that it already stands proved that the target of the perpetrators of their attacks as narrated in those three charges was the Hindu civilians, the residents of villages

Madhyapara, Kashabhog, Malopara and Rudrakar. Only one Muslim civilian was killed terming him as a freedom-fighter [as narrated in charge no.01] when the group was on move towards the main crime site, the Hindu populated village Madhyapara.

464. It is also to be noted that the group of attackers in carrying out all the attacks [as narrated in charge nos. 01, 02 and 03] formed of Pakistani army and it was accompanied by the accused persons and their accomplice Razakars. It has already found proved that the Pakistani army men engaged in those attacks were stationed in A.R. Howlader Jute Mills, Madaripur. It remained undisputed.

465. The crime sites were rural area. Naturally the Pakistani army men stationed in Madaripur town were not familiar with the locality to be targeted to further their policy and plan. Razakars including the accused Md. Solaiman Mollah [now dead] and Idris Ali Sardar, the two potential collaborators of the Pakistani occupation army have already been found to have had participation by substantial contribution, facilitation and abetment in the commission of crimes accomplished by launching those attacks.

466. We have already rendered our reasoned finding in adjudicating charge nos. 01,02 and 03 that act of forcible capture, detention, killing, sexual violence, etc. were committed on account of the victims' membership in Hindu religious group i.e on discriminatory ground. It inevitably leads to the conclusion that criminal activities

carried out in conjunction with those attacks were on discriminatory ground. This view finds support from the observation of the ICTY made in the case of *Blagojevic and Jokic* which is as below:

"An act is discriminatory when a victim is targeted because of his or her membership in a group defined by the perpetrator on a political, racial or religious basis."

[Blagojevic and Jokic, (Trial Chamber), Judgment: January 17, 2005, para. 583]

467. Recurrent and deliberate attacks were conducted on 22 May and 23 May 1971 by the same group of perpetrators directing Hindu civilian population. About three weeks later in the mid of June 1971 two Hindu civilians were deliberately killed by launching systematic attack and it was done by a group of Pakistani army and Razakars accommodated by the accused persons. The accused persons have already been found guilty of the offences of genocide and murder as arraigned in charge nos. 01 and 02.

468. Physical abuse or sexual violence committed upon Hindu women keeping them in captivity at the Pakistani army camp as narrated in charge no.02 has been found to be 'genocidal rape' constituting the offence of 'genocide'. Two victims P.W.05 and P.W.06 on returning back home being released from the Pakistani army camp found their homes destructed and burned down, and

thus, they took their initial shelter at the house of one of their Muslim neighbours and then deported to India.

469. The requirement of ‘forced displacement’ constituting the offence of deportation has been interpreted to refer not only to acts of physical violence but also to other forms of coercion that resulted from prohibited acts. The term ‘forced’ is not limited to physical force; it may also include the threat of force or coercion, creating fear of violence and panicking situation detrimental to normal livelihood. **The ICTY Trial Chamber in the case of *Krstic*** observed that -

" The term ‘forcibly’ is not restricted to physical force, but may include threat of force or coercion, such as that caused by fear of violence, duress, detention, psychological oppression or abuse of power against such person or persons or another person, or by taking advantage of a coercive environment."

[*Krstic*, (Trial Chamber), Judgment: August 2, 2001, para. 529]

470. It is now settled that for the crime of deportation the persons deported be displaced across a national border. Under customary international law, ‘deportation’ consists of the forced displacement of individuals *beyond* internationally recognised state borders. In contrast, ‘forcible transfer’ may consist of forced displacement

within state borders. It has been observed by the **ICTY in the case of Stakic** that-

"Yet, the two are not synonymous in customary international law. Deportation presumes transfer beyond State borders, whereas forcible transfer relates to displacements within a State."

[Stakic, (Trial Chamber), July 31, 2003, para. 671]

471. What happened in the case in hand? It already stands proved that the horrific situation, coercion and intimidation to their usual livelihood made the Hindu civilians of crime localities gravely panicked. This situation resulted from the criminal activities already proved [charge nos. 01, 02 and 03] eventually made the Hindu civilians forced to deport to India, beyond the state border of Bangladesh, we conclude.

472. Therefore, displacement of Hindu civilians who became the target on discriminatory ground was under compulsion due to coercive acts and horror created constituted the offence of deportation beyond the territory of Bangladesh leaving own homes.

31. Creating horror and coercion by carrying out deliberate attacks that resulted in killing huge number of Hindu civilians, sexual violence and causing serious bodily and mental harm was intended to infringe an individual's enjoyment of a basic right which was gross or blatant denial, on discriminatory grounds, of a fundamental right, laid down in international customary law.

473. The cumulative effect of those grave criminal acts together with destruction of the livelihood of a certain population resulted from crimes proved [as narrated in charge nos.01 and 02] resulted in inhumane consequences and coercive situation which forced the members of Hindu community to deport. Deportation thus occurred on discriminatory intent, amounts to an attack on the very religious identity of people.

474. In adjudicating charge no.01 involving the offence of killing huge number of Hindu civilians on discriminatory ground and murder we have recorded our finding that –active and culpable assistance, provocation, guidance and abetment that the accused Md. Solaiman Mollah [now dead] and Idris Ali Sardar provided to the perpetrators, the members of Pakistan occupation army made the criminal purpose of the attack possible to be carried out. Accused persons’ conduct of guiding the Pakistani troop, encouraging them to kill huge number of Hindu civilians and remaining present at the crime sites till the mission ended were thus manifestation of a culpable mindset of being associated with a crime, sharing common and special intent of the group of attackers.

475. Similarly, we have rendered our finding, in adjudicating charge no.02 involving the offence of killing, rape and causing serious bodily and mental harm on Hindu civilians, on discriminatory ground that – the act and conduct of the accused

Md. Solaiman Mollah [now dead] and Idris Ali Sardar and their conscious and culpable presence with the principal perpetrators leading to the main action to the commission of the principal crime was part of a vast murderous enterprise in which a numerous Hindu civilians were killed, Hindu women were raped in detention, properties of Hindus were devastated and deportation of Hindu civilians occurred and all these were aimed to further the intent to destroy the Hindu religious group, either in part or in whole.

476. Creating horror and coercion by carrying out deliberate attacks that resulted in killing huge number of Hindu civilians, sexual violence and causing serious bodily and mental harm was intended to infringe an individual's enjoyment of a basic right which was gross or blatant denial, on discriminatory grounds, of a fundamental right, laid down in international customary law.

477. The cumulative effect of those grave criminal acts together with destruction of the livelihood of a certain population resulted from crimes proved [as narrated in charge nos.01 and 02] resulted in inhumane consequences and coercive situation which forced the members of Hindu community to deport. Deportation thus occurred on discriminatory intent, amounts to an attack on the very religious identity of people.

478. It is now settled jurisprudence that the prohibition against forcible displacements aims at safeguarding the right and aspiration

of individuals to live in their own communities and homes without outside interference. But in the case in hand it depicts that the criminal acts forming attack as already found proved [charge nos. 01 and 02] created a climate of terror and coercion that validly suggests that the intention of the attackers was to displace the Hindu civilians from their own place, on discriminatory ground. Of course a criminal act with such intention is considered as an attack directed against unarmed civilian population constitutes the offence of 'deportation' as crime against humanity as enumerated in section 3(2)(a) of the Act of 1973.

479. Forced displacements within a state or across a national border, for reasons not permitted under international law, are crimes punishable under customary international law. Deportation and forcible displacement constitute crimes of equal gravity to other crimes listed in section 3(2) of the Act of 1973. In this regard it has been observed by the **ICTY Trial Chamber** in the case of *Blagojevic and Jokic* that-

" It is well established that displacements within a state or across national borders, for reasons not permitted under international law, are crimes punishable under customary international law."

[ICTY Trial Chamber, Judgment: January 17, 2005, para. 595]

480. Therefore, crimes as found proved indisputably terrified the Hindu population and made them forced to flee the area with no

hope of return. However, after the independence achieved the victims P.W.05 and P.W.06 returned back in Bangladesh as testified by them. But such return of individuals deported to another country does not impact on criminal liability of the person or persons responsible for causing and facilitating deportation. The **ICTY Trial Chamber** in this regard finds that –

".....the fact that victims subsequently return to the area by their own volition does not have an impact on the criminal responsibility."

[Blagojevic and Jokic, Judgment: January 17, 2005, para. 601]

481. Returning back to Bangladesh after independence as testified by P.W.05 and P.W.06 rather suggests concluding that the Hindu civilians, the residents of the crime villages might not have opted to deport leaving their home and households if they were not really forced by panicking and coercive situation created by attacking them on discriminatory ground.

482. Therefore, it was horrific situation indeed that resulted from the detention, killing, rape, causing serious bodily and mental harm, indiscriminate destruction of properties forced them to deport. The perpetrators engaged in conducting those attacks cannot absolve of responsibility in creating such horrifying and coercive situation. Accused Md. Solaiman Mollah [now dead] and Idris Ali Sardar, the potential associates of the Pakistani occupation army, the principal

perpetrators have already been found to have had their conscious concern, participation in the commission of those criminal activities and have incurred liability under section 4(1) of the Act of 1973 as we rendered our decision in adjudicating the charge nos. 01, 02 and 03.

483. On totality of evidence adduced together with that tendered in respect of the event of attacks happened on 22 May and 23 May 1971[as narrated in charge nos.01 and 02] it has been found proved beyond reasonable doubt that accused Md. Solaiman Mollah [now dead] and Idris Ali Sardar, consciously sharing the intent of the perpetrators[Pakistani army], accompanied them and participated, provided assistance in carrying out criminal activities including looting, setting houses on fire, detaining civilians, killing huge number of Hindu civilians, rape and sexual violence causing serious bodily and mental harm that created a horrific and coercive climate around the crime localities compelling the rest of Hindu civilians to deport across the national border. Accused persons' act and conduct formed part of attack directing the unarmed civilian population, on discriminatory ground.

484. It is to be noted that accused Md. Solaiman Mollah died on 26 October 2016 at the stage of summing up of the case. He was charged and tried jointly with accused Idris Ali Sardar for participating, aiding, abetting, facilitating and complicity in the

commission of offence of 'deportation' as crime against humanity targeting the local Hindu religious group around the crime localities under the then Madaripur Sub-Division as narrated in this charge.

485. The witnesses and victims came on dock and testified the role, contribution and complicity of both the accused persons in creating coercive situation intending to force the Hindu civilians to deport beyond the territory of Bangladesh. Accused Md. Solaiman Mollah's sudden death, at the fag end of trial, has surely deprived not only him but the victims and sufferers who with the aspiration of getting justice narrated the enormous pains and horror they sustained resulting from serious system crimes, coming on dock.

486. With the death of accused Md. Solaiman Mollah at the stage of summing up of the case, the rest of proceedings so far it relates to him has become abated vide Tribunal's order No. 28 dated 01.11.2016, and as such, we refrain from rendering any decision on his liability for the offence proved, in light of integrated evaluation of evidence made above.

487. Thus, in view of discussion made above on the basis of evidence presented we arrive at a decision that it has been proved beyond reasonable doubt that accused Idris Ali Sardar participated, abetted, contributed, facilitated and also had complicity in the commission of the offence '**deportation**' as crime against humanity as enumerated in section 3(2)(a)(g)(h) of the Act of 1973 which is

punishable under section 20(2) of the Act of 1973, and therefore, he is held criminally liable under section 4(1) of the said Act.

XVIII. Conclusion

488. In 1971, thousands of atrocious incidents happened within the territory of Bangladesh as part of organized or systematic and planned attack. In the case in hand, it has been proved that target of organized or systematic and planned attack as proved was the Hindu community, the residents under the Police Station Palong. The four charges framed against the accused persons arose from some particular events during the War of Liberation in 1971 occurred in different places of the then Madaripur Sub-Division and the accused persons arraigned of those charges have been found to have had participation to the accomplishment of alleged crimes in different manner, by their act and conduct and also in exercise of their membership in and affiliation with the locally formed Peace Committee and Razakar Bahini.

489. The case in hand carries some distinguishing pattern, nature and extent. All the events involving the offences of genocide and murder as crimes against humanity happened in day time. Perpetration of the offences happened in extreme diabolical way. The accused persons were conscious and culpable part of the common design. Their acts and conduct as have been found proved

formed part of attack which was intended to wipe out the Hindu civilians.

490. Group formed of Pakistani occupation army stationed in Madaripur A.R. Howlader Jute Mills, Razakars and accused persons had conducted the attacks pursuant to common design and plan. Target of the perpetrators was the Hindu religious group of the locality under Police Station Palong of the then Sub-Division Madaripur. To further the policy and plan of wiping out the civilians on account of their membership in Hindu religious group the perpetrators had killed numerous civilians, committed rape and sexual violence upon women in captivity, caused serious bodily and mental harm. These criminal acts constituting the offence of genocide [as narrated in charge nos.01 and 02] eventually forced the rest of Hindu civilians of the crime localities to deport to India [as narrated in charge no.04].

491. Only one non-Hindu Abdus Samad Sikder, a farmer was killed by the Pakistani army when the group being accompanied by the accused persons was on move towards the prime crime site, the village Madhyapara intending to attack the Hindu civilians and it was perpetrated on culpable encouragement of accused Md. Solaiman Mollah [died at the stage of summing up of the case] and Idris Ali Sardar as they termed the victim as a freedom-fighter.

492. It has also been proved that within two weeks of committing genocide [as narrated in charge nos. 01 and 02] two Hindu civilians were deliberately killed by launching attack at Shailendra Krishna Paul's house [as narrated in charge no.03] and the accused persons have been proved to have had substantial contribution, facilitation in accomplishing the crime.

493. Criminal acts constituting the offences of genocide and crimes against humanity remind once again how horrendous atrocities were committed directing non-combatant civilians, on discriminatory grounds by the Pakistani occupation army and their local collaborators during the war of liberation in 1971 in the territory of Bangladesh.

494. In the case in hand, the events of attacks were carried out around the rural area under Police Station Palong of the then Sub-Division Madaripur and conducting such planned attacks would not have been possible without active and enthusiastic support and assistance of the accused persons belonging to locally formed Razakar Bahini who knowingly participated in the enterprise.

495. In the judgment of **Criminal Appeal Nos. 24-25 of 2013** [*Abdul Quader Molla Case*] **Mr. Justice Surendra Kumar Sinha**, at the very outset, narrates the following sourced observation -

“The birth of Bangladesh has been preceded by injustice; false promise and economic and social abuse suspending the session of the elected National

Assembly of 1970 sine die followed by the persecution of the legally elected people entitled to form the Government and frame the Constitution, by resorting to commit mass killing, rape and arson by an illegal regime headed by a usurper. These atrocities were perpetrated by the Pakistan's occupation army with their cohorts, i.e., the Rajakar, Al-Badr, Al-shams and various other local killing squads in 1971. Although the killing of unarmed civilians during late March seemed abrupt and sporadic, it soon became a planned act of violence with operation 'Search Light' enforced at midnight, on 25th March, 1971 as part of the central planning and conspiracy hatched at Larkana.....”

[Source: S.A. Karim, Triumph and Tragedy: The University Press Limited 2009 p.172-176., quoted Mohammed Asghar Khan, Generals in Politics: Pakistan 1958-1982, p.28)]

496. The offences proved for which both the accused persons are found to have had complicity and participation were not divisible from the horrendous atrocities committed in the territory of Bangladesh in 1971 during the war of liberation as reflected from the above sourced information.

497. It is to be noted that after closure of evidence prosecution started placing its summing up on 25 October 2016 as the defence did not furnish any list of witnesses nor submitted any document in compliance of section 9(5) of the Act of 1973. The summing up of

prosecution got started in presence of accused Md. Solaiman Mollah as he was produced before the Tribunal on that date from prison. But on the next date fixed i.e on 26 October 2016 the learned prosecutor informed the Tribunal unofficially that accused Md. Solaiman Mollah detained in prison died at the first hour of 26 October 2016 in Dhaka Medical College Hospital.

498. Afterwards on getting death certificate along with necessary papers showing the death of accused Md. Solaiman Mollah on 26 October 2016, the Tribunal ordered the further proceeding so far it relates to accused Md. Solaiman Mollah stood abated by its order no.28 dated 01.11.2016 and at the same time the Tribunal directed to conclude the summing up the case as the other accused Idris Ali Sardar has been tried *in abesntia* jointly with the accused Md. Solaiman Mollah [died at the stage of summing up].

499. The case involved joint trial of two accused Md. Solaiman Mollah [died at the stage of summing up of the case] and absconding accused Idris Ali Sardar. On evaluation of evidence presented both the accused persons are found to have had participation and complicity to the offences as narrated in all the 04 [four]charges.

500. For the reason of death of accused Md. Solaiman Mollah who had been detained in prison the Tribunal refrained from giving decision in respect of incurring liability by him in relation to

offences proved [as narrated in all the 04 charges] although the trial took place in his presence till its commencement when the witnesses adduced have testified complicity and role of both the accused persons which has been duly appraised for the sake of arriving at a decision on the matter of commission of the offences and participation and complicity of both the accused persons.

501. But finally, due to his sudden death [died on 26 October 2016 at the stage of summing up of the case] accused Md. Solaiman Mollah now cannot be held liable and convicted for any of charges. And accordingly the Tribunal rendered its decision, on adjudication of all the 04 charges, holding only the absconding accused Idris Ali Sardar criminally liable under section 4(1) of the Act of 1973 for the commission of crimes proved as listed in all the 04 charges [offence of genocide, murder and deportation as crimes against humanity] and only he be convicted for the offences proved.

XIX. Verdict on conviction

502. For the reasons set out in our judgement and having considered all evidence, both oral and documentary, and arguments advanced by both the parties, we find the accused Idris Ali Sardar [absconding] in,

Charge No.01: GUILTY of the offences of participating, abetting, facilitating and complicity in the commission of offences of 'genocide', 'murder' and ' other inhumane acts' [plundering and

arson] as crimes against humanity as enumerated in section 3(2)(a)(c)(i)(ii)(g)(h) read with section 4(1) of the Act of 1973 and he be convicted and sentenced under section 20(2) of the said Act.

Charge No.02: GUILTY of the offences of participating, abetting, facilitating and complicity in the commission of the offence of 'genocide' as enumerated in section 3(2)(c)(i)(ii)(g)(h) read with section 4(1) of the Act of 1973 and he be convicted and sentenced under section 20(2) of the said Act.

Charge No.03: GUILTY of the offences of participating, abetting, facilitating, contributing and complicity in the commission of offence of 'murder' as crime against humanity as enumerated in section 3(2)(a)(g)(h) read with section 4(1) of the Act of 1973 and he be convicted and sentenced under section 20(2) of the said Act.

Charge No.04: GUILTY of the offences of participating, abetting, contributing, facilitating and complicity in the commission of offence of 'deportation' as crime against humanity as enumerated in section 3(2)(a)(g)(h) read with section 4(1) of the Act of 1973 and he be convicted and sentenced under section 20(2) of the said Act.

XX. Verdict on sentence

503. Mr. Hrishikesh Saha, the learned prosecutor assisting the team of learned prosecutors conducting the prosecution submitted that

accused Idris Ali Sardar should face the highest sentence, being a sentence of death, as he is proved to have abetted, contributed, substantially facilitated and participated to the commission of diabolical criminal acts constituting the offences of 'genocide', 'genocidal rape', 'murder' and 'deportation' as crimes against humanity directing civilians on account of their membership in Hindu religious group. Intent of the group of Pakistani occupation army accompanied by the accused persons and their cohorts was to destroy the protected group, in whole or in part. The facts and circumstances appeared from the evidence presented demonstrate it unerringly.

504. The learned prosecutor went on to submit that it has been proved that the civilians belonging to Hindu community including many women were kept detained at the Pakistani army camp set up at A.R. Howlader Jute Mills in Madaripur and the Hindu women were subjected to recurrent sexual violence and the male detainees taken there on forcible capture were killed. All these criminal acts were conducted with the active and culpable assistance and aid of the accused persons forming part of attack, and as such, they were conscious part of the criminal enterprise.

505. The offences proved were committed by launching systematic attack in furtherance of common purpose and design that resulted in indiscriminate killing of hundreds of Hindu civilians, causing

sexual violence and serious bodily and mental harm to numerous Hindu women which together with the conscious participation of accused Idris Ali Sardar, sharing intent of the group deserve to be considered as an 'aggravating factor' in awarding the highest sentence, the learned prosecutor added. Only the heaviest sentence would be just and appropriate to punish those horrendous crimes causing untold torment to the victims and dear ones of the victims that justifiably corresponds to their overall magnitude. The learned prosecutor however abstained from making submission in respect of awarding sentence to accused Md. Solaiman Mollah as he could not be held liable and convicted for the offences proved as he died on 26 October 2016 at the stage of summing up of the case.

506. On contrary, Mr. Gazi M.H. Tamim defending the absconding accused Idris Ali Sardar as State defence counsel submitted that the accused Idris Ali Sardar was not with any such criminal activities for which he has been indicted as the same were carried out by the group of Pakistani occupation army and he had no nexus with the local Razakar Bahini, an auxiliary force. Prosecution failed to prove the arraignment brought against him and thus he deserves acquittal.

507. In assessing the aggravating factors, we must eye on the nature and extent of the offences committed, their scale, the role of the accused he played in providing contribution and assistance to

the accomplishment of crimes, and the trauma and harm sustained by the victims and their families.

508. In Criminal Review Petition No. 62 of 2015 [Ali Ahsan Muhammad Mujahid case], the Appellate Division of the Supreme Court of Bangladesh has observed that Lord Justice Denning, Master of the Rolls of the Court of Appeal in England, appearing before the British Royal Commission on Capital Punishment, stated his views on this point as under:

" Punishment is the way in which society expresses its denunciation of wrong-doing ; and in order to maintain respect for law; it is essential that the punishment inflicted for grave crimes should adequately reflect the revulsion felt by the great majority of citizens for them. It is a mistake to consider the objects of punishment as being deterrent or reformatory or preventive and nothing else The truth is that some crimes are so outrageous that society insists on adequate punishment, because the wrong doer deserves it, irrespective of whether it is a deterrent or not. "

509. The Appellate Division has also observed in the said **Criminal Review Petition No. 62 of 2015** that-

"While awarding the sentence, the Court must take into consideration the unbearable pains, tears rolling down the cheeks and sufferings of the widows and children of the victims who cried for getting justice for about 43 years. "

510. In the case in hand, it stands proved that accused Idris Ali Sardar had played role as fellow perpetrator and had conscious and culpable affiliation with the Pakistani occupation army in conducting the attacks that resulted killing of hundreds of Hindu civilians and causing sexual violence and serious bodily and mental harm to numerous Hindu women. Number of victims and pattern and extent of recurrent attacks targeting the Hindu religious group obviously aggravate the magnitude of the crimes and mode of participation of accused Idris Ali Sardar who has been found to have had conscious, active and culpable part to the designed criminal mission carried out with ‘special intent’, one of the elements to constitute the offence of ‘genocide’.

511. The preamble of the Act of 1973 reflects that the offences enumerated in this Statute are not isolated crimes and the offences proved in the case before us for which accused Idris Ali Sardar has been found guilty and is liable to be convicted speak a lot about gravity and diabolical nature of the crimes.

512. The term “crimes,” in the expression “crimes against humanity,” clearly refers to the grave acts committed which require penal sanction. The meaning of the term “humanity,” however, is not as straightforward. “Humanity” may be understood as referring to either all human beings – humankind – or to the characteristic of being “human” – humanness.

513. In addition to ‘murder’ as crime against humanity the accused Idris Ali Sardar has been found guilty also for the rape. The rape victims [P.W.05 and P.W.06] appeared on the dock ignoring social ostracism to unfold the never-ending trauma they sustained. Their pitiful testimony reminded us once again how brutal the Pakistani occupation army and their local collaborators were in slaughtering the supreme honour of countless women in 1971 during the war of liberation, by using the rape as a tool to further their policy and plan.

514. The settled history says that thousands of women were raped during the Bangladesh Liberation War in 1971. Many of them are still alive carrying immense trauma with them. Very few women prefer to come forward with their untold tormenting stories due to social ostracism. But in the case in hand, two victims [**P.W.05 Jogomaya Malo** and **P.W.06 Bijoya Malo**] of ‘genocidal rape’ and sexual violence committed upon them in captivity [**as narrated in charge no.02**] came on dock and described the trauma they sustained and it may be taken into account as an aggravating factor. This view finds support from the observation made by **ICTY** in the case of **Blaskic** which is as below:

"The physical and mental effects of the bodily harm meted out to the victims were also seen as aggravating circumstances.victims' suffering is one factor to be taken into account when determining the sentence."

[Blaskic, (Trial Chamber), March 3, 2000, Para. 787]

515. In the case before us, the victims of sexual violence [**P.W.05 Jogomaya Malo and P.W. 06 Bijoya Malo**] are 'war heroines' indeed as they sacrificed their supreme honour for the cause of our independence. Nothing is enough to heal their untold pains and give back what they lost. The sacrifice they laid has become part of our great war of liberation. Nobody will dispute it. Thus, the society and the nation should recognize them with due honour which will rather make the rest of their lives filled with enormous grace.

516. Coercive situation and horror spread around the crime localities eventually forced the survivors and rest of Hindu civilians to deport to India, beyond the territory of Bangladesh. All these cumulatively increase the magnitude of atrocious acts committed targeting the Hindu religious group of the localities under the then Madaripur Sub-Division.

517. The evidence presented proves it beyond reasonable doubt that the accused Idris Ali Sardar was consciously engaged , knowing consequence of his act and conduct, in committing the diabolical crimes with 'special intent' to wipe out or destroy the Hindu religious group, in whole or in part. In a climate of terror that resulted from recurrent organized attacks made the rest of Hindu civilians compelled to deport, it stands proved.

518. According to section 4(1) of the Act of 1973 the accused Idris Ali Sardar, being equally responsible, has incurred individual criminal liability for the commission of crimes proved as brought in all the four charges framed.

519. The pattern and extent of horrific criminal acts constituting the offence of ‘**murder**’ as crime against humanity and ‘**genocide**’ proved indisputably shock the humankind. The events of killings [as narrated in charge nos. 01 and 02] were enormously appalling indeed. We deem it appropriate to award sentence, considering the gravity and magnitude of each of the offences narrated in these charges together with the mode of participation of accused Idris Ali Sardar.

520. The event of killing two Hindu civilians [as narrated in charge no.03] too was brutal indeed. However, mode of participation of the accused, as has been found in respect of this charge, deserves justifiable consideration, in awarding sentence in respect of the offence of murder as listed in **charge no. 03.**

521. Finally, **charge no. 04** relates to the offence of ‘**deportation**’ as crime against humanity which the upshot of the events was in fact of attacks that resulted in ‘genocide’ and ‘murder’. Keeping it in mind we consider it appropriate to award sentence proportionate to the gravity of the offence.

522. It is to be noted that accused Md. Solaiman Mollah faced trial jointly till he died on 26 October 2016, at the stage of summing up of the case. Prosecution adduced evidence aiming to establish both the accused persons liable for the offences of which they were charged with. On evaluation of the evidence presented it has been found too that accused Md. Solaiman Mollah too had participation, contribution, facilitation in and complicity with the commission of all the offences proved. But his sudden death made the rest of proceedings so far it relates to him halted, and thus, he could not be held guilty and convicted. Accordingly, only the accused Idris Ali Sardar tried jointly has been found guilty and we render our decision to convict him.

523. The offences as listed in **charge nos.01 and 02** indubitably fall within the kind of such gravest crimes which tremble the collective conscience of mankind. In view of above discussion and considering the nature and gravity of offences and also keeping the factors as discussed above into account we are of the view that justice would be met if the accused Idris Ali Sardar who has been found guilty beyond reasonable doubt for the crimes proved be condemned and sentenced under the provision of section 20(2) of the Act of 1973. Accordingly, we do hereby render the following **ORDER ON SENTENCE.**

Hence it is

ORDERED

That accused Idris Ali Sardar [absconded] son of late Hazi Hakim Ali Sardar and late Maju Bibi of Village West Kashabhog, Police Station Palong, District Shariatpur is held guilty of the offences of '**genocide**', '**murder**' and '**other inhumane acts**' [plundering and arson] as '**crimes against humanity**' as enumerated in section 3(2)(a)(c)(i)(ii)(g)(h) of the International Crimes (Tribunals) Act, 1973 as listed in **charge No. 01** and he be convicted accordingly and sentenced thereunder to death under section 20(2) of the said Act.

Accused Idris Ali Sardar is held guilty of the offence of '**genocide**' as enumerated in section 3(2)(c)(i)(ii)(g)(h) of the International Crimes (Tribunals) Act, 1973 as listed in **charge no. 02** and he be convicted accordingly and sentenced thereunder to death under section 20(2) of the said Act.

Accused Idris Ali Sardar is held guilty of the offence of '**murder**' as '**crime against humanity**' as enumerated in section 3(2)(a)(g)(h) of the International Crimes (Tribunals) Act, 1973 as listed in **charge no. 03** and he be convicted accordingly and sentenced thereunder to suffer imprisonment for life i.e. rest of his natural life under section 20(2) of the said Act.

Accused Idris Ali Sardar is held guilty of the offence of '**deportation**' as '**crime against humanity**' as enumerated in

section 3(2)(a)(g)(h) of the the International Crimes (Tribunals) Act, 1973 as listed in **charge no. 04** and he be convicted accordingly and sentenced thereunder to suffer rigorous imprisonment for 07[seven] years under section 20(2) of the said Act.

The sentence of death awarded as above in respect of **charge nos. 01 and 02** be executed by hanging the convict accused Idris Ali Sardar by the neck or by shooting him till he is dead, as decided by the government.

The sentence of imprisonment awarded to the convict Idris Ali Sardar as above shall run concurrently.

However, as and when any sentence of death awarded to convict Idris Ali Sardar as above will be executed, the other sentence of death and sentence of imprisonment awarded to him as above would naturally get merged into sentence of death executed.

The sentence of death and sentence of imprisonment awarded as above under section 20(2) of the International Crimes (Trubunals) Act, 1973 shall be carried out and executed in accordance with the order of the government as required under section 20(3) of the said Act.

Since the convict Idris Ali Sardar has been absconding, the sentence of death and sentence of imprisonment awarded to him as

above shall be executed after causing his arrest or when he surrenders before the Tribunal, whichever is earlier.

The convict Idris Ali Sardar is at liberty to prefer appeal before the Appellate Division of the Supreme Court of Bangladesh against his conviction and sentence within 30[thirty] days of the date of order of conviction and sentence as per provisions of section 21 of the International Crimes (Tribunals) Act, 1973.

Issue conviction warrant against the convict accused Idris Ali Sardar.

The Secretary, Ministry of Home Affairs and the Inspector General of Police [IGP] are hereby directed to ensure the apprehension of the convict accused Idris Ali Sardar, if necessary with the help of Inter-Pol.

Let certified copy of this judgment be provided to the prosecution free of cost, at once.

If the absconding convict accused Idris Ali Sardar is arrested or surrenders within 30[thirty] days of the date of order of conviction and sentence he will be provided with certified copy of this judgment free of cost.

Let a copy of this judgment together with the conviction warrant of the convict accused Idris Ali Sardar be sent to the District Magistrate, Dhaka for information and necessary action.

Let a copy of this order be sent together with the conviction warrant of the convict accused Idris Ali Sardar to the (1) Secretary, Ministry of Home Affairs, Bangladesh Secretariat, Dhaka , and (2) Inspector General of Police [IGP], Police Head Quarters, Dhaka for information and compliance.

Justice Md Shohrwardi, Member

524. This Tribunal was created under the authority of International Crimes (Tribunals) Act, 1973 and Sub-section 1 of Section 20 of the said Act empowers each member of this Tribunal to deliver a judgment of his own for which I am inclined to deliver a judgment of my own in the following terms.

525. Accused Md. Solaiman Mollah (84)[now dead], son of late Chand Mollah and late Shaharjan Bibi of Kashipur Muslim Para, Ward No.5, Police Station-Palong, District- Shariatpur and accused Idris Ali Sardar [67], son of late Hazi Hakim Ali Sardar and late Maju Bibi of village West Kashabhog, Police Station- Palong, District- Shariatpur have been put on trial before this Tribunal at the instance of the Chief Prosecutor to answer the charges framed against them under section 3(2)(a)(c)(g)(h) of the International Crimes (Tribunals) Act, 1973 for which they incurred the liability under section 4(1) of the said Act which is punishable under section 20(2) of the said Act.

526. This International Crimes Tribunal-1 [herein after referred to as “the Tribunal”] was created under Section 3 of the International Crimes (Tribunals) Act, 1973[hereinafter referred to as the “Act of 1973”] which is an ex-post-facto legislation for detention, prosecution and punishment of any individual or group of individuals, organization or any member of any armed, defence or auxiliary forces, irrespective of his nationality who commits or has committed crimes against humanity, crimes against peace, genocide, war crime and other class crimes in violation of customary international law particularly during the War of Liberation in 1971 in the territory of Bangladesh, whether before or after the commencement of this Act. However, no Tribunal has been set up under section 3 of the Act of 1973 for which no one could be brought to justice under the Act of 1973 until created this Tribunal on 25th March 2010.

527. Jurisdiction of the Tribunal under the Act of 1973.

Section 3 of the International Crimes (Tribunals) Act, 1973 gives this Tribunal the jurisdiction for trial of the international crimes as specified in Sub-Section 2 of Section 3 of the Act of 1973 and Section 3 of the Act of 1973 is quoted below;

Section 3

“3 (1) A Tribunal shall have the power to try and punish any individual or group of individuals, [or organisation], 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).

(2) The following acts or any of them are crimes within the jurisdiction of a Tribunal for which there shall be individual responsibility, namely:-

(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 where perpetrated;

(b) Crimes against Peace: namely, planning, preparation, initiation or waging of a war of aggression or a war in violation of international treaties, agreements or assurances;

(c) Genocide: meaning and including any of the following acts committed with intent to destroy, in whole or in part, a national, ethnic, racial, religious or political group, such as:

(i) killing members of the group;

(ii) causing serious bodily or mental harm to members of the group;

(iii) deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part;

- (iv) imposing measures intended to prevent births within the group;
- (v) forcibly transferring children of the group to another group;
- (d) War Crimes: namely, violation of laws or customs of war which include but are not limited to murder, ill-treatment or deportation to slave labour or for any other purpose of civilian population in the territory of Bangladesh; murder or ill-treatment of prisoners of war or persons on the seas, killing of hostages and detainees, plunder of public or private property, wanton destruction of cities, towns or villages, or devastation not justified by military necessity;
- (e) violation of any humanitarian rules applicable in armed conflicts laid down in the Geneva Conventions of 1949;
- (f) any other crimes under international law;
- (g) attempt, abetment or conspiracy to commit any such crimes;
- (h) complicity in or failure to prevent the commission of any such crimes;”

528. This Tribunal was created under the authority of the Act of 1973 and in the meantime our Hon’ble Appellate Division in several judgments interpreted the provisions of the Act of 1973 and in view of the provision of Article 111 of the Constitution of the People’s Republic of Bangladesh all Courts including this Tribunal is legally bound to follow the law declared by our Apex Court. In the case of the Chief Prosecutor vs. Abdul Quader Mollah

reported in 22 BLT(AD) 8, on behalf of convict Abdul Quader Mollah it was vehemently urged before the Hon'ble Appellate Division that "the Tribunal failed to consider that Customary International Law (CIL) applies to the appellant's case and as the constituents of CIL are absent in the case, it committed fundamental error in convicting the appellant for Crimes against Humanity" and our Apex Court considering the submissions advanced on behalf of the appellant, at para 151 [Majority view, judgment delivered by Mr. Justice Surendra Kumar Sinha, as his Lordship was then], held that "So there is no doubt that the Act of 1973 has primacy over CIL and CIL will be applicable, so far as it is not inconsistent with the Act." Therefore, at the time of adjudication of the charges framed against the accused person, this Tribunal is not legally permitted to travel beyond the Act of 1973 and in view of the above decision made by our Apex Court, this Tribunal may look at the jurisprudence evolved by the ICTY, ICTR, and ICC but cannot arrogate the jurisdiction of those Tribunals, as if, this Tribunal delivers its judgment relying on the provisions as contained in the Statutes of ICTY, ICTR, and ICC and the Rules made thereunder.

529. In the case of the Chief Prosecutor vs Abdul Quader Molla, reported in 22 BLT (AD) 8, at page 83, Para 150 Mr. J Surendra Kumar Sinha, as his Lordship was then, made an observation

regarding applicability of the Customary International Law in the proceedings of this Tribunal [Majority view] and observed that;

“In the backdrop of above legal position, the words “International law” is a misnomer unless the said international obligations/responsibility /norms/ practices / undertakings are incorporated within the framework of the domestic law. In the absence of such legislative action, the said International laws are mere state international obligations/ responsibilities. Further, even states cannot be compelled to honour such international obligations/responsibilities, because at international level there is no mechanism to enforce such international obligations/responsibilities. Therefore, when states cannot be compelled to honour such international obligations/ responsibilities, a citizen of the State can not, in any event, be subjected to the said international obligations/ responsibilities of the State. But the world community having experienced two great wars felt the necessity to keep harmony amongst the international communities, which led the international community’s to harmonize their interactions and practices in various fields. This tendency of the international community’s by elapses of time formulated various practices and norms, which are often termed as “Customary International Law.”

530. In the case of the Chief Prosecutor –vs Abdul Quader Mollah reported in 22 BLT(AD) at page 308 para- 285 Mr. J. A.H.M. Shamsuddin Chowdhury who also concurring with the Majority view, similarly held that;

“It is true that the Act borrowed words from the UN created tribunals, but because of that, it cannot be said that the Tribunals created by the Act stand on the same footing with those UN tribunals, or are bound to follow the laws those tribunals did or do. Some of our post-1947 statutes contain phrases similar to Indian statutes, but that does not mean they are Indian Laws. They are, nevertheless, very much our laws passed by our legislators. Similarly, many of our pre-1947 statutes are a replica of English Common Law, but that does not mean they are British Laws. We do, however, not too infrequently, take in aid, Indian, Pakistan, and UK decisions as well as decisions emanating from other Common Law following countries as persuasive authority, because of similarity of provisions. In the same way, we can take in aid decisions of the UN created tribunal as persuasive authority, as I have done in determining this appeal.”

531. The Act of 1973 is the first domestic legislation enacted by the Bangladesh Parliament for the trial of the international crimes as specified in Section 3(2) of the said Act and the Statutes of the ICTY, ICTR and ICC are the subsequent Statutes made at the instance of the United Nation. Although the Act of 1973, Statutes of ICTY and ICTR are ex-post-facto legislation, but the Rome Statute of ICC is the only prospective Statute.

532. The charge Nos.1 and 2 relates to commission of the offences of genocide and other international crimes alleged to have been committed at the time of War of Liberation in 1971 in different areas of Palong Thana of the then Madaripur Subdivision (now

Shariatpur District) and it is very pertinent to look at the jurisprudence and the development of the law connected therewith.

[The Origins of the Term “Genocide”

533. Polish law professor Raphael Lemkin, a refugee who barely escaped the Nazi occupation of his homeland, coined the neologism “genocide” in 1944 by combining the Greek *genos* (race or tribe) with the Latin *cide* (killing). Lemkin conceived of genocide as:

“A coordinated plan of different actions aiming at the destruction of essential foundations of the life of national groups, with the aim of annihilating the groups themselves..... Genocide is directed against the national group as an entity, and the actions involved are directed against individuals, not in their individual capacity, but as members of the national group.”

534. Lemkin thus characterized genocide as a multi- faceted attack on the existence of a human group and identified eight features of the crime, including political, social, cultural, economic, biological, physical, religious, and moral genocide. He added that the more widely- accepted species of the crime were its physical, biological, and cultural manifestations. Physical genocide is the tangible annihilation of the group by the killing and maiming of its members, whether committed over the short or the long term. Biological genocide is the imposition of measures calculated to decrease the overall reproductive capacity or fertility of the group.

Cultural genocide is the destruction of a group's unique cultural, linguistic, and religious characteristics.

According to R.J. Rummel, genocide has multiple meanings. The ordinary meaning is murder by a government of people due to their national, ethnic, racial, or religious group membership. This includes actions such as preventing births or forcibly transferring children to another group. Rummel created the term genocide to include assaults on political groups.

The Genocide Convention

535. Lemkin's academic concept of genocide crystallized into a multilateral treaty on the subject in relatively short order. The Genocide Convention that exists today arose out of a process that included three General Assembly resolutions, three multinational drafting committees, three working drafts, and the participation of numerous states, voting blocs, and ideological constituencies. The final form of the treaty was approved unanimously by the General Assembly on December 9, 1948, and went into effect in January 1951. M. 7 Cherif Bassiouni, *International, Criminal Law Conventions and their Penal Provisions* 1224(1997).

536. Genocide is the intentional, deliberate and systematic destruction, in whole or in part, of an ethnic, racial, religious or national group. Convention on the Prevention and Punishment of

the Crime of Genocide [CPPCG] is the first legal instrument which states that genocide is a crime under international law, contrary to the spirit and aims of the United Nations and condemned by the civilized world, and that at all periods of history genocide has inflicted great losses on humanity.

537 Convention on the Prevention and Punishment of the Crimes of Genocide. Adopted by Resolution 260. (III) A of the U.N. General Assembly on 9 December 1948. Entry into force: 12 January 1951.

“Article II: In the present Convention, genocide means any of the following acts committed with intent to destroy, in whole or in part, a national, ethnical, racial or religious group, as such:

- Killing members of the group;
- Causing serious bodily or mental harm to members of the group;
- Deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part;
- Imposing measures intended to prevent births within the group;
- Forcibly transferring children of the group to another group.”

538. The Act of 1973

“Section (3) (c) Genocide: meaning and including any of the following acts committed with intent to destroy, in whole or in part, a national, ethnic, racial, religious or political group, such as”

- (i) killing members of the group;
- (ii) Causing serious bodily or mental harm to members of the group;
- (iii) deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part;
- (iv) imposing measures intended to prevent births within the group;
- (v)forcibly transferring children of the group to another group;”

539.The Statute of the International Criminal Tribunal for the former Yugoslavia.

“Article 4 Genocide:

- The International Tribunal shall have the power to prosecute persons committing genocide as defined in paragraph 2 of this article or of committing any of the other acts enumerated in paragraph 3 of this article.
- Genocide means any of the following acts committed with intent to destroy, in whole or in part, a national, ethnical, racial or religious group, as such:
 - killing members of the group;
 - causing serious bodily or mental harm to members of the group;

- deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part;
- imposing measures intended to prevent births within the group;
- forcibly transferring children of the group to another group.

540. The Statute of the International Criminal Tribunal for Rwanda.

“Article 2: Genocide

1. The International Tribunal for Rwanda shall have the power to prosecute persons committing genocide as defined in paragraph 2 of this article or of committing any of the other acts enumerated in paragraph 3 of this article.

2. Genocide means any of the following acts committed with intent to destroy, in whole or in part, a national, ethnical, racial or religious group, as such:

- a) Killing members of the group;
- b) Causing serious bodily or mental harm to members of the group;
- c) Deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part;
- d) Imposing measures intended to prevent births within the group;

- e) Forcibly transferring children of the group to another group.

541. Rome Statute of the International Criminal Court

“Article 6: Genocide

For the purpose of this Statute, “genocide” means any of the following acts committed with intent to destroy, in whole or in part, a national, ethnical, racial or religious group, as such:

- Killing members of the group;
- Causing serious bodily or mental harm to members of the group;
- Deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part;
- Imposing measures intended to prevent births within the group;
- Forcibly transferring children of the group to another group.”

542. It is noted that the definition of genocide adopted in the CPPCG is reproduced verbatim in the Act of 1973 except the words “political group”, Article 6 of the Rome Statute of the International Criminal Court (ICC), Article 4 of the Statute of the International Tribunal for the Former Yugoslavia (ICTY) and Article 2 of the Statute of the International Criminal Tribunal for Rwanda (ICTR) are the replica of the definition of genocide as provided in the CPPCG.

543. The Genocide Convention sets forth four restrictive categories of protected groups. By definition, the crime of genocide can be perpetrated only against individuals properly classified as belonging to national, ethnic, racial, or religious groups. Group status is not always an easy question to answer. In the Case of Prosecutor vs Rutaganda, Case No. ICTR-96-3, 156, Judgment dated December 6, 1999, ICTR Trial Chamber held that

“The concepts of national, ethnical, racial and religious groups have been researched extensively and ... at present, there are no generally and internationally accepted precise definitions thereof. Each of these concepts must be assessed in the light of a particular political, social, and cultural context.”

Intent to destroy the group “as such”

544 It is to be noted that first trial on genocide was held by ICTR in the case of the Prosecutor versus Jean-Paul Akayesu, Case No. ICTR-96-4-T, Judgment dated: 02 September 1998, para 545, wherein the ICTR, Trial Chamber I interpreted the genocidal intent of accused to destroy the protected group and observed that;

“On the issue of determining the offender’s specific intent, the Chamber considers that intent is a mental factor which is difficult, even impossible, to determine. This is the reason why, in the absence of a confession from the accused, his intent can be inferred from a certain number of presumptions of fact. The Chamber considers that it is possible to deduce

the genocidal intent inherent in a particular act charged from the general context of the perpetration of other culpable acts systematically directed against that same group, whether these acts were committed by the same offender or by others. Other factors, such as the scale of atrocities committed, their general nature, in a region or a country, or furthermore, the fact of deliberately and systematically targeting victims on account of their membership of a particular group, while excluding the members of other groups, can enable the Chamber to infer the genocidal intent of a particular act.”

545 In the case of the Prosecutor versus Jean-Paul Akayesu, Case No. ICTR-96-4-T, Judgment dated: 02 September 1998, para 545, the ICTR Trial Chamber I emphasized on the element of the crime of genocide and observed that

“Genocide is distinct from other crimes inasmuch as it embodies a special intent or *dolus specialis*. The special intent of a crime is the specific intention, required as a constitutive element of the crime, which demands that the perpetrator clearly seeks to produce the act charged. Thus, the special intent in the crime of genocide lies in the “the intent to destroy, in whole or in part, a national, ethnical, racial or religious group, as such”.

546. In the case of Prosecutor v. Jean Kambanda, the ICTR Trial Chamber stated: “the crime of genocide is unique because of its element of *dolus specialis* (special intent) which requires that the crime is committed with the intent to destroy in whole or in part, a

national, ethnic, racial or religious group as such”. [ICTR 97-23-S, Judgment dated 4th September 1998, para 16]. In Kayishema, Ruzindana, the Trial Chamber also emphasized that “genocide requires the aforementioned specific intent to exterminate a protected group (in whole or in part)”. [ICTR Trial Chamber, Judgment dated 21 May 1999, Para 89].

547. The Trial Chamber I of the International Criminal Tribunal for the former Yugoslavia in the case Ratko Mladic, Case No. IT-95-18-R 61 also stated that the specific intent of the crime of genocide “may be inferred from a number of facts such as the general political doctrine which gave rise to the acts possibly covered by the definition in Article 4, or the repetition of destructive and discriminatory acts. The intent may also be inferred from the perpetration of acts which violate, or which the perpetrators themselves consider violating the very foundation of the group acts which are not in themselves covered by the list in Article 4(2) but which are committed as part of the same pattern of conduct” and further held that “this intent derives from the combined effect of speeches or projects laying the groundwork for and justifying the acts, from the massive scale of their destructive effect and from their specific nature, which aims at undermining what is considered to be foundation of the group”.

548. In the case of the Prosecutor -vs- Radovan Karadzic, Case No. IT-95-5/18-T, Judgment dated 24.03.2016, Para 551, ICC, Trial Chamber considered the “intent” of the notion “genocide” and held that

“The specific intent to destroy the group “as such” makes genocide an exceptionally grave crime and distinguishes it from other serious crimes, such as persecutions as a crime against humanity. The term “as such” has great significance as it shows that the crime of genocide requires intent to destroy a collection of people because of their particular group identity based on nationality, race, ethnicity, or religion. “

549. In the case of the Prosecutor -vs- Radovan Karadzic, Case No. IT-95-5/18-T, Judgment dated 24.03.2016, Para 555, ICC, Trial Chamber further held that “ it is well established that where a conviction for genocide relies on the intent to destroy a group “in part”, such part must be a substantial part of the whole protected group. The targeted portion must be a “significant enough {portion} to have an impact on the group as a whole”. The Krstic Appeal Chamber stated that in determining substantiality, the following considerations can be made:

“The numeric size of the targeted part of the group is the necessary and important starting point, though not in all cases the ending point of the inquiry. The number of individuals targeted should be evaluated not only in absolute terms but also in relation to the overall

size of the entire group. In addition to the numeric size of the targeted portion, its prominence within the group can be a useful consideration. If a specific part of the group is emblematic of the overall group or is essential to its survival that may support a finding that the part qualifies as substantial within the meaning of Article 4.”

550. On scrutiny of the provision contained in CPPCG the ICTY Trial Chamber in the case of Prosecutor vs. Radislav Krstic, Judgment dated 02.08.2001, Case No. IT-98-33-T, Para 585 observed that

“The Genocide Convention itself provides no indication of what constitutes intent to destroy “in part”. The preparatory work offers few indications either. The draft Convention submitted by the Secretary-General observes that “the systematic destruction even of a fraction of a group of human beings constitutes an exceptionally heinous crime”. Early commentaries on the Genocide Convention opined that the matter of what was substantial fell within the ambit of the judges’ discretionary evaluation. Nehemiah Robinson was of the view that the intent to destroy could pertain to only a region or even a local community if the number of persons targeted was substantial. Pieter Drost remarked that any systematic destruction of a fraction of a protected group constituted genocide.”

551. In the case of the Prosecutor -vs- Radovan Karadzic, Case No. IT-95-5/18-T, Judgment dated 24.03.2016, Para 550, ICC, Trial

Chamber also emphasised on the cumulative assessment of the evidence in arriving at a decision as regards genocidal intent and held that” in assessing evidence of genocidal intent, a Chamber should consider whether “all of the evidence, taken together, demonstrates a genocidal mental state”, instead of considering separately whether an accused intended to destroy a protected group through each of the relevant acts of genocide. Where direct evidence of genocidal intent is absent, the intent may still be inferred from all the facts and circumstances. Factors relevant to this analysis may include but are not limited to, the general context, the scale of atrocities, the systematic targeting of victims on account of their membership in a particular group, the repetition of destructive and discriminatory acts, or the existence of a plan or policy. Display of intent through public speeches or in meetings may also support an inference as to the requisite specific intent. “

552. In the instant case, it is alleged that the accused persons aided, abetted, facilitated, participated and had complicity in the commission of the offenses of genocide. In the case of abetment, it is not required to prove the intent of the abettor. In the case of the Prosecutor versus Jean-Paul Akayesu, Case No. ICTR-96-4-T, Judgment dated: 02 September 1998, para 545, ICTR, Trial Chamber I as regards the liability of an accomplice in genocide held that

“In conclusion, the Chamber is of the opinion that an accused is liable as an accomplice to genocide if he knowingly aided or abetted or instigated one or more persons in the commission of genocide, while knowing that such a person or persons were committing genocide, even though the accused himself did not have the specific intent to destroy, in whole or in part, a national, ethnical, racial or religious group, as such.”

553. As regards the intention of an accomplice in genocide, in the case of the Prosecutor versus Jean-Paul Akayesu, Case No. ICTR-96-4-T, Judgment dated: 02 September 1998, para 547, ICTR, Trial Chamber I held that

“Consequently, where a person is accused of aiding and abetting, planning, preparing or executing genocide, it must be proven that such a person acted with specific genocidal intent, i.e. the intent to destroy, in whole or in part, a national, ethnical, racial or religious group as such, whereas, as stated above, there is no such requirement to establish accomplice liability in genocide.”

554. In the Adolf Eichmann case, who was convicted of crimes against the Jewish people, genocide under another legal definition, the District Court of Jerusalem stated in its judgment of 12 December 1961, that serious bodily or mental harm to members of the group can be caused “by the enslavement, starvation, deportation, and persecution [...] and by their detention in ghettos, transit camps and concentration camps in conditions which were

designed to cause their degradation, deprivation of their rights as human beings, and to suppress them and cause them inhumane suffering and torture.” Quoted in the International Law Reports” Vol. 36. 1968. page 340.

A Group

555. The crime of genocide distinguishes itself from other international crimes by protecting a group as mentioned in Section 3(2)(c) of the Act of 1973. It is not the victim in his individual capacity but as a member of a certain group that determines the crime of genocide. In the case of the Prosecutor vs. Musema, Case No. ICTR-96-13-A, Trial Judgment (27 January 2000), Para. 165 the ICTR Trial Chamber held that “the victim of the crime of genocide is, therefore, the group itself and not the individual alone; the individual is just an element of the group.” Furthermore; the victim is singled out not by reason of his individual identity, but rather on account of his being a member of a national, ethnical, racial or religious group.

556. In the Case of the Prosecutor Vs. Stakic, Case No. IT-97-24-A, Appeals Judgment (22 March 2006), Para. 20, the ICTY explained the importance of the group identity of the victims of the crimes of genocide and opined that;

“Article 4(...) defines genocide as one of the several acts committed with intent to destroy in whole or in part a

national, ethnical, racial or religious group as such.’ The term “as such” has great significance, for it shows that the offense requires intent to destroy a collection of people who have a particular group identity.”

557. In the Case of the Prosecutor vs. Jelusic, Case No. IT-95-10-A, Judgment (14 December 1999), Para 70, the ICTY Trial Chamber considered the subjective elements of genocide and opined in the following language;

“to attempt to define a national, ethnical, racial or religious group today using objectives and scientifically irreproachable criteria would be a perilous exercise whose result would not necessarily correspond to the perception of the persons concerned by such categorization.”

558. The ICTY Trial Chamber in the case of the Prosecutor Vs Brdanin, Case No. IT-99-36-T, Trial Judgment dated 1.9.2004, Para 683 confirmed the Jelusic decision, but further held by noting that the protected group: “may be identified by means of the subjective criterion of the stigmatization of the group, notably by the perpetrators of the crime, on the basis of its perceived (...) characteristics. In some instances, the victim may perceive himself or herself to belong to the aforesaid group.”

559. In the case of the Prosecutor Vs. Tolimir, Case No. IT-05-88/2-T, Trial Judgment (12 December 2012) para, 735 the ICTY referred to both Brdanin and Jelusic and confirmed that “the group must have a particular, distinct identity and be defined by its common characteristics rather than a lack thereof.”

560. In the case of *The Prosecutor Vs. Bagilishema*, Case No. ICTR-95-1A-T, Trial Judgment (7 June 2001), para. 65 the ICTR Trial Chamber extended the views as regards genocide and opined that;

“The perpetrators of genocide may characterize the targeted group in ways that do not fully correspond to conceptions of the group shared generally (...). In such a case (...) the victim could be considered (...) as a member of the protected group (...).”

561. In the case of *the Prosecutor Vs Kajelijeli*, Case No. ICTR - 98-44A, Trial Judgment (1, December 2003), Para 811 the ICTR Trial Chamber considered both the objective and subjective criteria of protected group and held that;

“the said concept [of national, religious, racial or ethnical groups] enjoys no generally or internationally accepted definition, rather each concept must be assessed in the light of a particular political, social , historical and cultural context (...) [Membership of a group is (...) a subjective rather than an objectives concept[where] the victim is perceived by the perpetrator of genocide as belonging to a group slated for destruction. A determination of the categorized groups should be made on a case- by –case basis, by reference to both objectives and subjective criteria.”

562. The ICTR in the case of *the Prosecutor Vs. Semenza*, Case No. ICTR-97-20-T, Trial Judgment (15 May 2003), Para. 317

upheld both the subjective and objective criteria of the protected groups and held that;

“ The Statute of the Tribunal does not provide any insight into whether the group(...) is to be determined by objectives or subjective criteria or by some hybrid formulation (...) The determination (...) ought to be assessed on a case-by – case basis by reference to the objectives particulars of a given social or historical context, and by the subjective perceptions of the perpetrators. The Chamber finds that the determination of a protected group is to be made on a case – by-case basis, consulting both objectives and subjective criteria.”

563. The ICTR in the Case of the Prosecutor Vs. Gacumbitsi, Case No. ICTR-2001-64-T, Trial Judgment (17 June 2004), Para. 254, consistently considered that the protected group must be made on a case –by-case basis considering both subjective and objectives criteria and opined in the following language;

“Membership of a group is a subjective rather than an objectives concept. The victim is perceived by the perpetrator of genocide as belonging to a group slated for destruction, but the determination of a targeted group must be made on a case –by-case basis, consulting both objectives and subjective criteria. Indeed, in a given situation, the perpetrator, just like the victim, may believe that there is an objectives criterion for determining membership of an ethnic group (...).”

564. The ICTR Trial Chamber in Muhimana demanded either an objective determination of the victim group or a reliance on the

perpetrator's perception of the group. It recognized that the classification of the victim group was essentially a matter of fact and in the case of the Prosecutor vs. Muhimana, Case No. ICTR-95-1B-T, (28 April 2005), para. 500 the ICTR Trial Chamber affirmed the positive identification of the protected group and held that;

“The Prosecution also has the burden of proving either that the victim belongs to the targeted ethnic, racial, national, or religious group or that the perpetrator of the crime believed that the victim belonged to the group.”

565. The ICJ in the case of Bosnia and Herzegovina Vs. Serbia and Montenegro, Judgment (2007), Para 193 relied on the positive identity of the protected group and observed that;

“It is a group which must have particular positive characteristics- national, ethnical, racial or religious- and not the lack of them (...) the crime requires intent to destroy a collection of people who have a particular group identity. It is a matter of who those people are, not who they are not.”

566. In the case of Prosecutor vs. Radislav Krstic, Judgment dated 02.08.2001, Case No. IT-98-33-T, Trial Chamber, ICTY interpreted the notion protected group and opined that “National, ethnical, racial or religious groups are not clearly defined in the Convention or elsewhere. In contrast, the preparatory work on the Convention and the work conducted by international bodies in relation to the protection of minorities show that the concepts of protected groups

and national minorities partially overlap and are on occasion synonymous... The preparatory work of the Convention shows that setting out such a list was designed more to describe a single phenomenon, roughly corresponding to what was recognized, before the second world war, as ‘national minorities,’ rather than to refer to several distinct prototypes of human groups.”

Racial Group

567. Racial groups are defined primarily by the external physical appearance of their members. These can be categorized as a group individual whose identity as such is distinctive in terms of physical characteristics or biological descent. In the case of the Prosecutor vs Jean-Paul Akayesu, Case No. ICTR-96-4-T Judgment dated 02 September 1998, ICTR, Trial Chamber I has defined them based upon “the hereditary physical traits often associated with a geographical region, irrespective of linguistic, cultural, national, or religious factors.”

Ethnic Group

568. Ethnic groups are composed of individuals who conceive themselves as being alike by virtue of their common ancestry, real or fictitious, and who are so regarded by others. While ethnicity largely depends on self-identification of its members, dominant groups may also assign ethnic labels pejoratively to other groups with the aim of denying them participation in the system. Ethnicity

is a permeable and fluid form of identity since outsiders are usually able to assimilate into an ethnic group. Eric Weitz, *Genocide; Utopias of Race and Nation* (Princeton and Oxford: Princeton University Press 2003 Page 17).

569. In the case of the Prosecutor vs Jean-Paul Akayesu, Case No. ICTR-96-4-T Judgment dated 02 September 1998, ICTR, Trial Chamber I has specified that an “ethnic group is generally defined as a group whose members share a common language or culture.” This view is consonant with both the preparatory works of the Genocide Convention and prior academic writing, which indicate that the term “ethnic” incorporates the social, linguistic, and cultural aspects of the group at issue.” Doudou Thiam, a Special Rapporteur of the International Law Commission articulated the distinction between ethnic and racial groups in the following language;

“The difference between the terms ‘ethnic’ and ‘racial’ is perhaps harder to grasp. It seems that the ethnic bond is more cultural. It is based on cultural values and is characterized by a way of life, a way of thinking and the same way of looking at life and things. On a deeper level, the ethnic group is based on a cosmogony. Doudou Thiam, Special Rapporteur, Fourth Report on the Draft Code of Offenses against the Peace and Security of Mankind, U.N. Doc. A/CN.4/398 and Corr. 1-3, 158(1986).

570. The ICTR in the case of the Prosecutor vs. Kayishema and Ruzindana, Case No. ICTR-95-1-T, Trial Judgment (21 May 1999), Para. 98 identified the “ethnic group” in the following term;

“An ethnic group is one whose members share a common language and culture; or, a group which distinguishes itself, as such (self-identification); or, a group identified as such by others, including perpetrators of the crimes (identification of others).”

Religious Group

571. In the case of Prosecutor vs Jean-Paul Akayesu, Case No. ICTR-96-4-T Judgment dated 02 September 1998, ICTR, Trial Chamber I has opined that a “religious group is one whose members share the same religion, denomination or mode of worship.” This appears to be a functional definition grounded in the objective practices of group members who have a common religious creed, beliefs, doctrines, practices or rituals.

572. Charge Nos. 1 and 2 relates to the offence of genocide alleged to have been committed with intent to destroy the Hindu religious group, in whole or in part, for which it is required to see who is a Hindu.

”Hindu refers to any person who regards themselves as culturally, ethnically, or religiously adhering to aspects of Hinduism. It has historically been used as a geographical, cultural, or religious identifier for people indigenous to South Asia.” Brian Pennington (2007),

Was Hinduism Invented/: Britons, Indians, and the Colonial Construction of Religion, Oxford University Press, ISBN 978-0195326000, pages 111-118.

573."Hinduism has no single founder, no one scripture, no single set of teachings, no unified code of conduct, no central governing body. Hinduism, in fact, is a 'family' of many diverse traditions, or sampradayas, each with its own distinct theology, philosophy, rituals, code of practices, and value system. This inescapable diversity and richness make Hinduism particularly hard to define in simple, precise terms. Nonetheless, like in any family, there are some common elements and unifying themes. These include accepting God or a Supreme Reality, atma (the soul), dharma (the law of righteousness), karma (the law of cause and effect), and the authority of the Vedas, and moksha (liberation)."
[http://londonmandir, baps. org/ what-is-hinduism](http://londonmandir.baps.org/what-is-hinduism) accessed on 23.09.2016.

574. In the case of Bramchari Sidheswar Bhai and others vs State of West Bengal. ETC reported in 1995 SCC [4] 646= AIR [1995] 2089, the Supreme Court of India identified the following features of Hinduism and observed that –

“Features of Hindu religion recognised by this Court in Shastri Yaganapurashdasji (supra) as coming within its broad sweep are these;

- Acceptance of the Vedas with reverence as the highest authority in the religious and philosophic matter and acceptance with reverence of Vedas by Hindu thinkers and philosophers as the sole foundation of Hindu philosophy.
- Spirit of tolerance and willingness to understand and appreciate the opponent's point of view based on the realisation that truth was many –sided.
- Acceptance of great world rhythm, a vast period of creation, maintenance and dissolution follow each other in endless succession, by all six systems of Hindu philosophy.
- Acceptance by all systems of Hindu philosophy the belief in rebirth and pre-existence.
- Recognition of the fact that the means or ways to salvation are many.
- Realisation of the truth that Gods to be worshipped may be large, yet there being Hindus who do not believe in the worshipping of idols.
- Unlike other religions or religious creeds Hindu religion not being tied-down to any definite set of philosophic concepts, as such.”

National group.

575. The Convention's reference to “national” groups implies a definition grounded in nationality and citizenship. The implication of this formulation is that any individual can belong to at least two national groups simultaneously: the nation of birth origin and the

nation(s) of current citizenship. “National Group’ in Article II appears to refer to a distinct people who forms a ‘ nation’ or ‘ people ‘ in the sense that the members of such a group share linguistic, ethnic, religious and cultural similarities(or some of these) which distinguished it from the general population, rather than to any legal criteria concerning citizenship or nationality.” Lyal. s. sunga, the emerging system of international criminal law iii, n. ii (1997).

576. Section 3 of the Act of 1973 protects national, ethnical, racial, religious or political group “as such” (“protected group”). The crime of genocide pertains to the destruction of a race, tribe, nation, or another group with a particular positive identity, not to the destruction of various people lacking a distinct identity. Thus, for a crime of genocide to have been committed, it is necessary that any of the act specified in Section 3(2) (c) is committed against a specifically targeted group, it being a national, ethnical, racial, religious or political group.

577. Genocide is the cruelest, grave, brutal and heinous crime amongst the international crimes. By nature, it is a large scale offence which happens in a broad geographical area. It is alleged that accused persons aided, abetted, facilitated, participated and had complicity in committing the offense of genocide. An accused is liable as an accomplice to genocide if he knowingly aided or

abetted or instigated one or more persons in the commission of genocide that such a person or persons were committing genocide, even though the accused himself did not have the specific intent to destroy, in whole or in part, a national, ethnical, racial or religious group, as such but where a person is accused of participating or executing genocide, it is required to prove that such a person acted with specific genocidal intent, i.e. the intent to destroy, in whole or in part, a national, ethnical, racial, religious or political group as such, there is no such requirement to prove the charge of genocide against an accomplice.

Crimes against humanity.

578. Crimes against humanity are heinous crimes which would constitute crimes in most of the world's national criminal law systems against any civilian population. The concept of crimes against humanity developed after WWII through the jurisprudence of ICTY, ICTR, and ICC. Crimes against humanity are mass crimes committed against the fundamental human rights of a civilian population on a large scale which can be distinguished from genocide in that the accused persons had not targeted a specific group, but a civilian population at large. The "civilian" character of the attacked population and persons applies both in war and peacetime. The notion "civilian population" aims to protect the fundamental rights of every human being against an attack. Status

is not the criteria to determine the civilian, but the actual role of the victim at the time of the commission of the crimes. This includes membership of military forces or other armed groups who had laid down their arms. Perpetrators of crimes against humanity, need not be members of the State or organization involved in the crimes but include any person who acts to implement or support the policy of the state or the organization.

579. In the instant case in hand, the charge Nos. 1 to 4 also relates to the commission of crimes against humanity as specified in section 3(2)(a) of the International Crimes (Tribunals) Act, 1973. The crimes against humanity are an international crime and like the Act of 1973, many other International Statutes defined the notion “crime against humanity.” The definition provided in section 3(2) (a) of the Act of 1973 may be considered as the most modern definition of crimes against humanity. The provision of Section 3 of the Act of 1973 is already quoted above which speaks about the jurisdiction and the definition of the international crimes. Now let us see the development of the law on crimes against humanity emerged from WW 11 to till date. The definition of crimes against humanity provided in other Statutes is quoted below;

Article 6 of the Constitution of the International Military Tribunal (IMT)

Article 6 of the IMT

“CRIMES AGAINST HUMANITY: namely, murder, extermination, enslavement, deportation, and other inhumane acts committed against any civilian population, before or during the war, or persecutions on political, racial or religious grounds in execution of or in connection with any crime within the jurisdiction of the Tribunal, whether or not in violation of the domestic law of the country where perpetrated.

Leaders, organizers, instigators and accomplices participating in the formulation or execution of a common plan or conspiracy to commit any of the foregoing crimes are responsible for all acts performed by any persons in execution of such plan.”

Article II of the Control Council Law No. 10 “

Article II(c) of the CCL No. 10.

“Crimes against Humanity: Atrocities and offenses, including but not limited to murder, extermination, enslavement, deportation, imprisonment, torture, rape, or other inhumane acts committed against any civilian population, or persecutions on political, racial, or religious grounds whether or not in violation of the domestic laws of the country where perpetrated.”

The Statute of the International Criminal Tribunal for the Former Yugoslavia (ICTY Statute)

Article 5

“Crimes against humanity

The International Tribunal shall have the power to prosecute persons responsible for the following crimes when committed in

armed conflict, whether international or internal in character, and directed against any civilian population:

- (a) murder;
- (b) extermination;
- (c) enslavement;
- (d) deportation;
- (e) imprisonment;
- (f) torture;
- (g) rape;
- (h) persecutions on political, racial and religious grounds;
- (i) other inhumane acts.”

The Statute of the International Tribunal for Rwanda

Article 3: Crimes against humanity

“The International Tribunal for Rwanda shall have the power to prosecute persons responsible for the following crimes when committed as part of a widespread or systematic attack against any civilian population on national, political, ethnic, racial or religious grounds:

- Murder;
- Extermination;
- Enslavement;
- Deportation;
- Imprisonment;

- Torture;
- Rape;
- Persecutions on political, racial and religious grounds;
- Other inhumane acts.”

The Statute of the Special Court for Sierra Leone.

Article 2

Crimes against humanity

“The Special Court shall have the power to prosecute persons who committed the following crimes as part of a widespread or systematic attack against any civilian population:

- Murder;
- Extermination;
- Enslavement;
- Deportation;
- Imprisonment;
- Torture;
- Rape, sexual slavery, enforced prostitution, forced pregnancy and any other form of sexual violence;
- Persecution on political, racial, ethnic or religious grounds;
- Other inhumane acts.”

International Military Tribunal for the Far East Charter.

Article 5.

“The following acts, or any of them, are crimes coming within the jurisdiction of the Tribunal for which there shall be individual responsibility:

“5(c)Crimes against Humanity: Namely, murder, extermination, enslavement, deportation, and other inhumane acts committed against any civilian population, before or during the war, or persecutions on political or racial grounds in execution of or in connection with any crime within the jurisdiction of the Tribunal, whether or not in violation of the domestic law of the country where perpetrated.

Leaders, organizers, instigators and accomplices participating in the formulation or execution of a common plan or conspiracy to commit any of the foregoing crimes are responsible for all acts performed by any person in execution of such plan.”

The Crimes against Humanity and War Crimes Act [Canada]

[S.C. 2000, C. 24]

Assented to 2000-6-29.

Act current to 2016-10-11

“Section 4(3).The definitions in this subsection apply in this section.

“crime against humanity”

“crime contre l’humanite”

“crime against humanity” means murder, extermination, enslavement, deportation, imprisonment, torture, sexual violence, persecution or any other inhumane act or omission that is committed against any civilian population or any

identifiable group and that, at the time and in the place of its commission, constitutes a crime against humanity according to customary international law or conventional international law or by virtue of its being criminal according to the general principles of law recognized by the community of nations, whether or not it constitutes a contravention of the law in force at the time and in the place of its commission.”

The Rome Statute of the International Criminal Court.

Article 7: Crimes against humanity

“1. For the purpose of this Statute, “crime against humanity” means any of the following acts when committed as part of a widespread or systematic attack directed against any civilian population, with knowledge of the attack:

- (a) Murder;
- (b) Extermination;
- (c) Enslavement;
- (d) Deportation or forcible transfer of population;
- (e) Imprisonment or other severe deprivation of physical liberty in violation of fundamental rules of international law;
- (f) Torture;
- (g) Rape, sexual slavery, enforced prostitution, forced pregnancy, enforced sterilization, or any other form of sexual violence of comparable gravity;
- (h) Persecution against any identifiable group or collectivity on political, racial, national, ethnic, cultural, religious, gender as defined in paragraph 3, or other grounds that are universally recognized as impermissible under international

law, in connection with any act referred to in this paragraph or any crime within the jurisdiction of the Court;

(i) Enforced disappearance of persons:

(j) The crime of apartheid;

(k) Other inhumane acts of a similar character internationally causing great suffering or serious injury to body or to mental or physical health.

2. For the purpose of paragraph 1:

- “Attack directed against any civilian population” means a course of conduct involving the multiple commission of acts referred to in paragraph I against any civilian population, pursuant to or in furtherance of a State or organizational policy to commit such attack;
- “Extermination” includes the intentional infliction of conditions of life, inter alia the deprivation of access to food and medicine, calculated to bring about the destruction of part of a population;
- “Enslavement” means the exercise of any or all of the powers attaching to the right of ownership over a person and includes the exercise of such power in the course of trafficking in persons, in particular, women and children;
- “Deportation or forcible transfer of population” means forced displacement of the persons concerned by expulsion or other coercive acts from the area in which they are lawfully present, without grounds permitted under international law;

- “Torture” means the international infliction of severe pain or suffering, whether physical or mental, upon a person in the custody or under the control of the accused: except that torture shall not include pain or suffering arising only from, inherent in or incidental to, lawful sanctions;
- “Forced pregnancy” means the unlawful confinement of a woman forcibly made pregnant, with the intent of affecting the ethnic composition of any population or carrying out other grave violations of international law. This definition shall not in any way be interpreted as affecting national laws relating to pregnancy;
- “Persecution” means the intentional and severe deprivation of fundamental rights contrary to international law by reason of the identity of the group or collectivity;
- “The crime of apartheid” means inhumane acts of a character similar to those referred to in paragraph I, committed in the context of an institutionalized regime of systematic oppression and domination by one racial group over any other racial group or groups and committed with the intention of maintaining that regime;
- “Enforced disappearance of persons” means the arrest, detention or abduction of persons by, or with the authorization, support or acquiescence of, a State or a political organization, followed by a refusal to acknowledge that deprivation of freedom or to give information on the fate or whereabouts of those persons, with the intention of removing them from the protection of the law for a prolonged period to time.”

580. The definition of crimes against humanity provided in the Statute of ICTY is similar to that the ICTR does, except that the attack was carried out “on national, political, ethnic, racial or religious grounds.” The Rome Statute offers the most expansive list of specific criminal acts that may constitute crimes against humanity to date. A widespread or systematic attack directed against any civilian population are the essence of the crimes against humanity under the Statute of ICTR, SCSL, and ICC, and crimes committed in armed conflict, whether international or internal in character and directed against any civilian population are the essence of the crimes against humanity under the Statute of ICTY. Like other international crimes such as genocide, crimes against humanity have not been codified in an international treaty. The above-mentioned provisions defined slightly different definitions of the crimes against the humanity. Though Article 10 of the Rome Statute states that the Statute is not to be considered a definitive codification of international criminal law, the definition offered in the Statute does, at least, reflect the latest consensus of the international community. The Rome Statute setting up the International Criminal Court (ICC) was adopted in 1998 and entered into force in 2002. It was signed by 139 countries and 116 are parties to the treaty. Bangladesh signed the Rome Statute in 1999 and became a state party in March 2010. While seven

countries namely Iraq, Israel, Libya, China, Qatar, the United States, and Yemen voted against the Rome Statute.

Murder as “crimes against humanity”

581. The Legislature included the word “murder” in Section 3(2)(a) of the Act of 1973, as “crimes against humanity” although no definition of “murder” has been provided in the said Act. Incorporating section 23 in the Act of 1973, the Legislature excluded the application of the Code of Criminal Procedure, 1898 and the Evidence Act, 1872 in the proceedings of this Tribunal, but the provision of any other law has not been expressly excluded. Furthermore, in view of the provisions as provided in Section 26 of the Act of 1973, “the provisions of this Act shall have effect notwithstanding anything inconsistent therewith contained in any other law for the time being in force” which means that the provisions contained in any other law is applicable in the proceedings of this Tribunal so far not inconsistent with any provision contained in the Act of 1973. At the time of enactment of the Act of 1973, the Legislature was aware of the Penal Code and no provision has been provided in the said Act excluding the application of the Penal Code. In the absence of any Statutory provision, this Tribunal is not legally authorized to exclude the application of the Penal Code in the proceedings of this Tribunal. In view of the above, I am of the view that the provisions of the

Penal Code so far is not inconsistent with the Act of 1973 is applicable in the proceedings of this Tribunal.

582. On a cursory reading of the provisions of section 23 and 26 of the Act of 1973 it appears that the Criminal Procedure Code, 1898 and the Evidence Act, 1872 shall not be applicable in the proceedings of the Tribunal and if any provision contained in any other law for the time being in force in Bangladesh do not contradict or is found to be not inconsistent with any provision contained in the Act of 1973, shall not be excluded and may be relied on by this Tribunal.

583. Mr. Justice Surendra Kumar Sinha, as his Lordship was then, who delivered the unique majority view in the case of Abdul Quader Molla, reported in 22 BLT (AD) 8, Para 143, as regards applicability of the Penal Code observed in the following language;

“True, in the Act, 1973, the offences of ‘Crimes against Humanity’ ‘genocide’ and ‘war crimes’ have not been defined. In offence of Crimes against Humanity, some offences like, rape, murder, abduction, confinement, extermination, enslavement etc. have been included, of them, the appellant was in fact tried and convicted for murder and rape. Similarly in respect of ‘genocide’ and ‘war crimes,’ some offences have been included as constituents of those crimes but the appellant has not been tried in respect of those offences. In the absence of a definition of those crimes, we are unable to follow the

definition given in the Rome Statute as submitted by the learned Counsel for the appellant. The offences of murder and rape mentioned in the Act have been defined in our Penal Code and the definition of those offences given in the Penal Code may be taken in aid since this Code has not been excluded by the Act. Besides, almost all laws prevailing in our country are codified laws, these laws have been promulgated following the concepts, principles, rules and traditions of English Common Law, or in the alternative, it may be said that the concepts, principles, rules and traditions of English Common Law, have penetrated into our jurisprudence and the fabric of our judicial system. The definitions given in respect of these offences in those laws are identical. Therefore, there is no bar to taking the definitions of those laws mentioned in Act, 1973.”

584.Subsequently in the Case of Salauddin Quader Chowdhury vs the Chief Prosecutor, reported in 67 DLR (AD) Page 334 para 102 Mr. Justice Surendra Kumar Sinha, the Hon’ble C.J, reiterated the above view and as regards applicability of other law in the proceedings of this Tribunal observed that;

“More so, under the Act of 1973, though there is a provision that the Code of Criminal Procedure and the Evidence Act may not be applicable to the trial of offences punishable under section 3 of the Act, the Act or the Rules are totally silent as regards the applicability of the affidavits sworn abroad and also the mode of proving the same. In the absence of any procedure, the general laws and procedures for admissibility of an affidavit sworn abroad may be taken as guidance in the interest of justice.”

585. The word “murder” as mentioned in section 3(2)(a) of the Act of 1973 “committed against any civilian population” may be interpreted keeping those terms in a juxtaposition. If any attack is launched against any civilian population, a civilian may be killed at the time of the attack. The Legislature incorporated the word “murder” as crimes against humanity and “murder” includes both “single” and “multiple” murder as per definition provided in section 300 of the Penal Code. In view of the definition of murder as provided in section 300 of the Penal Code intention of the accused or accused persons to cause the death of “any person” or “persons” is the paramount consideration and if death of “a person” is caused at the time of attack directing “against any civilian population” the said “murder” will attract the notion “any civilian population.”

586. Under section 3(2)(a) of the Act of 1973, the following are the elements of “crimes against humanity.”

- There must be an attack,
- The attack must be directed against any civilian population.
- The notion “any civilian population” includes “any civilian”
- The “civilian” character of the attacked population applies both in war and peacetime.
- Status of the victim is not the criteria to determine the “civilian”, but the actual role of the victim at the time

of the commission of the crimes is the main essence to be considered.

- The perpetrators of the crimes need not be members of the State or organization but include any person who acts to implement or support the policy of the state or the organization.
- In the course of the attack, the accused persons committed any of the offence as specified in section 3(2) (a) of the Act of 1973.

587. Since the provisions of the Code of Criminal Procedure, 1898 (Act V of 1898), and the Evidence Act, 1872 shall not be applicable in any proceedings of this Tribunal, the recovery of the dead body of the victim is not the essence of the Act of 1973. Furthermore, as per provision contained in Section 19 of the Act of 1973, this Tribunal shall not be bound by technical rules of evidence; and it shall adopt and apply to the greatest possible extent expeditious and non-technical procedure and may admit any evidence which it deems to have probative value. In view of the above statutory provision, recovery of the dead body of a victim of genocide, war crimes, crimes against humanity, and other international crime as specified in section 3(2) of the Act of 1973 is not required to prove the charge framed against accused person.

588. The events narrated in charges happened in a wartime situation, but in view of the definition provided in section 3(2)(a) and (c) of the Act of 1973, crimes against humanity and genocide

may occur at any time and war or an armed conflict is not the essence of the crimes against humanity and genocide and furthermore under the Act of 1973 “widespread or systematic attack” is not the essence of the crimes against humanity and genocide, although the events narrated in the charges alleged to have been committed launching a systematic attack and the crimes committed is an organized or group crime.

589. It is noted that the Pakistani occupation army launching ‘Operation Searchlight’ on 25th March 1971 killed students, teachers, professionals, and unarmed pro-liberation people and all of them were civilian population and the cruel and barbaric Pakistani army to annihilate the pro-liberation Bengali population formed Razakar, Al-Badr, and Al-Shams Bahini as auxiliary force under the Razakar Ordinance, 1971 and during nine months War of Liberation in 1971, the said auxiliary force actively assisted the Pakistani army and participated in the attacks to annihilating the pro-liberation people, members of Hindu religious group, civilians and freedom fighters and jointly killed about three million unarmed civilian population which impulse to draw the irresistible conclusion that the unarmed civilian population, Hindus and pro-liberation people of Bangladesh were the main target of the Pakistani army, Razakars, Al-Badr and Al- Shams. In the above backdrop, it transpires that the crimes committed during

nine- months War of Liberation in 1971 were an organized or group crimes committed against the civilian population of Bangladesh.

590. The events narrated in charge Nos. 1 to 3 relates to “murder” as “crimes against humanity” as specified in section 3(2)(a) of the Act of 1973 which is punishable under Section 20(2) of the said Act. Article 3(1) (a) of the Geneva Convention Relative to the Protection of Civilian Persons in time of War of August 1947 prohibits violence to life and persons, particularly murder of all kinds, and the provisions of Article 3(1)(a) of the said convention is quoted below;

“In the case of armed conflict not of an international character occurring in the territory of one of the High Contracting Parties, each Party to the conflict shall be bound to apply, as a minimum, the following provisions.

1. Persons taking no active part in the hostilities, including members of armed forces who have laid down their arms and those placed ‘ hors de combat’ by sickness, wounds, detention, or any other cause, shall in all circumstances be treated humanely, without any adverse distinction founded on race, colour, religion or faith, sex, birth or wealth or any other similar criteria.

To this end, the following acts are and shall remain prohibited at any time and in any place whatsoever with respect to the above- mentioned persons:

(a) violence to life and person, in particular, the murder of all kinds, mutilation, cruel treatment, and torture;

(b) the taking of hostages;

(c) outrages upon personal dignity, in particular, humiliating and degrading treatment;

(d) the passing of sentences and the carrying out of executions without previous judgment pronounced by a regularly constituted Court, affording all the judicial guarantees which are recognized as indispensable by civilized peoples.

2) The wounded and sick shall be collected and cared for.

An impartial humanitarian body, such as the International Committee of the Red Cross, may offer its services to the Parties to the conflict.

The Parties to the conflict should further endeavour to bring into force, by means of special agreements, all or part of the other provisions of the present Convention.

The application of the preceding provisions shall not affect the legal status of the Parties to the conflict.”

591. The Trial Chamber of ICC in the case of Prosecutor –Vs- Radovan Karadzic, Case No. IT-95-5118-T Judgment dated 24.3.2016, interpreted the notion “civilian population” in the following language;

“The meaning of civilian for the purposes of unlawful attacks on civilians stems from Article 50(1) of Additional Protocol I which provides that a “civilian is any person who does not

belong to one of the categories of persons referred to in Article 4(A)(1), (2), (3) and (6) of the Third [Geneva] Convention and in Article 43 of [Additional] Protocol [I]. This is a negative definition of “civilian” as it includes anyone who is not a member of the armed forces or an organized military group belonging to a party to the conflict. Article 50(1) of Additional Protocol I also provides that in the case of doubt whether a person is a civilian, that person shall be considered to be a civilian. The protection from attack afforded to individual civilians by Article 51 of Additional Protocol I continues until such time as they take direct part in hostilities, that is until they engage in acts of war which, by their very nature and purpose, are likely to cause actual harm to the personnel or material of the enemy forces. Thus, in order to establish that unlawful attacks against civilians have been committed, the Chamber has to find that the victims of these attacks were civilians and that they were not participating in the hostilities.”

592. In *Radovan Karadzic*, ICC Trial Chamber emphasized that whether an attack was directed against any civilian is to be determined on a case by case basis relying on the evidence need for the parties and held that;

“To constitute an unlawful attack on civilians, the Prosecution has to show that it was directed against individual civilians or the civilian population. Whether this is the case can be determined by a number of factors, including the means and methods used in the course of the attack, the status and the number of victims, the distance between the victims and the source of fire, the ongoing

combat activity at the time and location of the incident, the presence of military activities or facilities in the incident, the nature of the acts of violence committed, the indiscriminate nature of the weapons used, and the extent to which the attacking force has complied or attempted to comply with the precautionary requirements of the law of war. In this respect, the jurisprudence is also clear that both indiscriminate attacks and disproportionate attacks may qualify as attacks directed against civilians or give rise to an inference that an attack was directed against civilians. This is to be determined on a case by case basis, in light of the available evidence.”

593. Considering the Article 7 of the Statute of ICC, the Trial Chamber of ICC in the Case of the Prosecutor –Vs- Radovan Karadzic, Case No. IT-95-5118-T, judgment dated 24.3.2016, has identified the following elements of crimes against humanity.

“(i) There must be an attack;

(ii) The attack must be directed against any civilian population;

(iii) The attack must be widespread or systematic;

(iv) The acts of the perpetrator must be part of the attack, and

(v) the perpetrator must know that there is a widespread or systematic attack directed against a civilian population and know that his acts constitute part of this attack.”

594. Under Section 3(2)(a) of the Act of 1973, a population is considered to be a civilian population if it is predominantly civilian in nature. The presence of any person within a population who do

not come within the definition of civilian does not necessarily deprive the population of its civilian character. The civilian status of the victims and the proportion of civilians within a civilian population are factors relevant to the determination as to whether an attack is directed against any “civilian population”. It is not necessary that individual victims of crimes against humanity be civilians. In the above premises, a person who is a hors de combat may be a victim of an act amounting to crimes against humanity.

595. Horse de combat, literally meaning “outside the fight,” is a French term used in diplomacy and international law to refer to the persons who are incapable of performing their ability to wage war. Examples include fighter pilots or aircrews parachuting from their disabled aircraft, as well as sick, wounded, detained, or otherwise disabled. Person hors de combat are normally granted special protections according to the law of war, sometimes including prisoners of war status, and therefore officially become non-combatants. Under the Geneva Conventions, unlawful combatants or hors de combat are granted the same privilege and to be treated with humanity while in captivity but until lawful combatants, they are subjected to trial and punishment, which includes capital punishment. en.m.wikipedia, org.

596. Article 41 of the Additional Protocol I to the Geneva Conventions defines the notion “horse de combat” which reads as follows;

“Article 41: Safeguard of an enemy horse de combat.

- A person who is recognized or who, in the circumstances, should be recognized to be horse de combat shall not be made the object of attack.
- “A person is hors de combat’ if:
- he is in the power of an adverse party;
- he clearly expresses an intention to surrender, or
- he has been rendered unconscious or is otherwise incapacitated by wounds or sickness, and therefore is incapable of defending himself; “

Provided that in any of these cases he abstains from any hostile act and does not attempt to escape.

3. When persons entitled to protection as prisoners of war have fallen into the power of an adverse party under unusual condition of combat which prevents their evacuations as provided for in Part II, section I, of third Convention, they shall be released and all feasible precaution shall be taken to ensure their safety.”

597. The Trial Chamber of ICC in the Case of Radovan Karadzic as referred herein above emphasized that “population does not mean that the entire population of the geographical entity” but opined that the attack must have targeted more than a limited and randomly

selected numbers of individuals within the population and observed that;

“For the purpose of Article 5 of the Statute, an attack can be considered to have been directed against a civilian population if the civilian population was the “primary rather than an incidental target of the attack”. In order to determine whether the attack was so directed, the Appeals Chamber has identified a non- exhaustive list of relevant factors, such as the means and method used during the course of the attack, the status of the victims, their number, the discriminatory nature of the attack, the nature of the crimes committed in the course of the attack, the resistance to the assailants at the time of the attack, and the extent to which the attacking force may be said to have complied or attempted to comply with the precautionary requirements of the laws of war. The term “population “does not mean that the entire population of the geographical entity in which the attack is occurring was subjected to the attack. However, the attack must have targeted more than “a limited and randomly selected number of individuals within the population”

598. The High Contracting Parties for the purpose of establishing a Convention for the protection of the civilian person in time of war adopted Fourth Geneva Convention, 1949 for the protection of civilian population. In Article 4 of the said convention it has been provided as follows:

“Persons protected by the Convention are those who, at a given moment and in any manner whatsoever, find themselves in the case of conflict or occupation, in the hands

of a Party to the conflict or Occupying Power of which they are not nationals.

Nationals of a State which is not bound by the Convention are not protected by it. Nationals of a neutral State who find themselves in the territory of a belligerent State, and nationals of a co-belligerent State, shall not be regarded as protected persons while the State of which they are nationals has normal diplomatic representation in the State in whose hands they are.

The provisions of Part II are, however, wider in the application, as defined in Article 13.

Persons protected by the Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field of 12 August 1949, or by the Geneva Convention for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea of 12 August 1949, or by the Geneva Convention relative to the Treatment of Prisoners of War of 12 August 1949, shall not be considered as protected persons within the meaning of the present Convention.”

599. Article 50 of the Additional Protocol I to the Geneva Convention 1949 also defined the term “civilian and civilian population” in the following terms;

“Article 50- Definition of civilians and the civilian population.

- A civilian is any person who does not belong to one of the categories of persons referred to in Article 4 A 1), 2), 3) and 6) of the Third Convention and in Article 43 of this Protocol. In the case of doubt, whether a

person is a civilian, that person shall be considered to be a civilian.

- The civilian population comprises all persons who are civilians.
- The presence within the civilian population of individuals who do not come within the definition of civilians does not deprive the population of its civilian character.“

600. In view of the provision of Article 51 of the said Protocol I, the civilian population or any individual civilian is a protected person and the said provision is quoted below;

“Article 51- Protection of the civilian population

- The civilian population and individual civilians shall enjoy general protection against dangers arising from military operations. To give effect to this protection, the following rules, which are additional to other applicable rules of international law, shall be observed in all circumstances.
- The civilian population as such, as well as individual civilians, shall not be the object of attack. Acts or threats of violence the primary purpose of which is to spread terror among the civilian population are prohibited.

3. Civilians shall enjoy the protection afforded by this Section, unless and

for such time as they take a direct part in hostilities.

4. Indiscriminate attacks are prohibited. Indiscriminate

attacks are:

- those which are not directed at a specific military objective;
- those which employ a method or means of combat which cannot be directed at a specific military objective; or
- those which employ a method or means of combat the effects of which cannot be limited as required by this Protocol;

and consequently, in each such case, are of a nature to strike military objectives and civilians or civilian objects without distinction.

5. Among others, the following types of attacks are to be considered as indiscriminate:

- a) an attack by bombardment by any methods or means which treats as a single military objective a number of clearly separated and distinct military objectives located in a city, town, village or other area containing a similar concentration of civilians or civilian objects; and
- b) an attack which may be expected to cause incidental loss of civilian life, injury to civilians, damage to civilian objects, or a combination thereof, which would be excessive in relation to the concrete and direct military advantage anticipated.

6. Attacks against the civilian population or civilians by way of reprisals are prohibited.

7. The presence or movements of the civilian population or individual civilians shall not be used to render certain points

or areas immune from military operations, in particular in attempts to shield military objectives from attacks or to shield, favour or impede military operations. The Parties to the conflict shall not direct the movement of the civilian population or individual civilians in order to attempt to shield military objectives from attacks or to shield military operations.

8) Any violation of these prohibitions shall not release the Parties to the conflict from their legal obligations which respect to the civilian population and civilians, including the obligation to take the precautionary measures provided for in Article 57.”

601. On this point I recall the observation of our Apex Court made in the case of Abdul Quader Mollah vs The Chief Prosecutor reported in 22 BLT (AD) 8 page 119, para 210 wherein Mr. J. Surendra Kumar Sinha, as his Lordship was then, interpreted the notion “crimes against humanity” in the following language;

“The term of Crimes against Humanity has come to mean anything atrocious committed on a large scale. These crimes are committed against the civilian population during the war, or persecution on political or racial or religious grounds in execution of any crime. These offences by nature are heinous.”

602. Subsequently in the case of Salauddin Quader Chowdhury vs The Chief Prosecutor reported in 67 DLR(AD) 295 at Page- 351 Para 167 Mr. Surendra Kumar Sinha, Hon’ble C.J reiterated the

above view as regards the notion “crimes against humanity” and observed that;

“Crimes against humanity and genocides are a heinous form of crime that could possibly exist in the human civilization. Throughout the ages in every civilization, these crimes are considered as the most atrocious, appalling and terrible acts and extremely hated by each and every one.”

603. In the case of the Chief Prosecutor vs Abdul Quader Mollah reported in 22 BLT (AD) 8, at Page-81 Para 146 it has been further observed that

“The phrase “crimes against humanity” has acquired enormous resonance in the legal and moral imaginations of the post-World War II world. It suggests, in at least two distinct ways, the enormity of those offenses. First, the phrase “crimes against humanity” suggests offenses that aggrieve not only the victims and their own communities, but all human beings, regardless of their community. Second, the phrase suggests that these offences cut deep, violating the core humanity that we all share and that distinguishes us from other natural beings.”

604. It is now settled jurisprudence that only in the context of Customary International Law the widespread or systematic attack is the element of crimes against humanity. In the case of Chief Prosecutor Vs. Abdul Kader Molla reported in 22 BLT(AD) 8 our Apex Court held that provision of Public International Law is not ipso facto applicable in the International Crimes Tribunal,

Bangladesh, which is a domestic Tribunal. Subsequently, in the review case of Muhammad Kamruzzaman Vs. The Chief Prosecutor reported in 35 BLD (AD) 158 our Apex Court reiterated the same view.

The history of Razakar, Al-Badr, and Al- Shams:

605. The Governor of East Pakistan, Lieutenant General Tikka Khan promulgated the East Pakistan Razakar Ordinance, 1971. The Ordinance stipulated the creation of a voluntary force to be trained and equipped by the Provincial Governor. Razakars, Al-Badr, and Al-Shams were locally recruited by the Shanti Committee which was formed by several pro-Pakistani leaders and Urdu-speaking migrants who lived in Bangladesh. The Razakars, Al-Badr and Al-Shams were under Pakistani Army command and also trained by them to prevent the independence of Bangladesh. The Razakar force was organized into several brigades armed with Light Infantry weapons provided by Pakistani Army and acted as an auxiliary force to the Pakistani Army. The Razakar, Al-Badr, and Al-Shams were placed under the command of Pakistani Army, and they along with Pakistani Army jointly committed crimes against humanity, war crimes, genocide and other inhuman acts during the War of Liberation of Bangladesh in 1971. At the relevant time, many reports have been published in the International news media. New York Times, on July 30, 1971, published a report on the formation

of the Razakar in the following language; “The Razakars..... should be especially helpful for members of rural communities, who can identify guerrillas [freedom fighters], an army officer said... The government says it has already recruited more than 22, 000 Razakars of a planned force of 35000”.

606. The Razakar, Al-Badr, and Al- Shams were recruited by the Pakistani Army to protect Pakistan and to kill the freedom fighters and civilian population. After setting up Razakar Directorate, the Pakistani Army established Razakar Training Camp and after completing specialized training, the Razakars, Al-Badr and Al-Shams had undertaken specialized operations against the freedom fighters and civilization population. Lt General A.A.K Niazi who led the Pakistani forces as the Chief of the Eastern Commander of Pakistani Army in 1971, in his book titled “The Betrayal of East Pakistan, at page 78 said, “The proposal for raising an organized Razakar Force remained under consideration with HQ CMLA and GHQ for a long time. Although their recruitment had started earlier, the sanction for the raising of this force was given at the end of August 1971. A separate Razakars Directorate was established, and the whole setup started taking proper shape. Two separate wings called Al-Badr and Al-Shams were organized. Well-educated and properly motivated students from the schools and madrasas were put in Al-Badr wing, where they were trained to undertake

‘Specialized Operations’ while the remainder were grouped together under Al-Shams, which was responsible for the protection of bridges, vital points, and other areas.”

607. The Pakistani Army engaged the Razakars, Al-Badr and Al-Shams all over Bangladesh to kill the freedom fighters, Hindus and pro-liberation people. Lt. General A.A.K. Niazi further narrated, “The Razakars were mostly employed in areas where army elements were around to control and utilize them. Being an army of rookies, not fully trained, they were prone to subversion through local influences. Their defection rate was four percent in October 1971 and six percent in November 1971 and it increased tremendously when the war started. Despite these handicaps, this force was useful where available, particularly in the areas where the rightist parties were in strength and had a sufficient local influence. “The Betrayal of East Pakistan, Page 78.”

608. The Pakistani Army recruited the Razakars, Al-Badr, and Al-Shams under the Razakar Ordinance, 1971 and established training school and trained the said forces as paramilitary forces and the young officers of Pakistani Army were appointed as Razakar Group Commander. Lt General A.A.K Niazi in his book “The Betrayal of East Pakistan Page-87” narrated that “seventy percent of the target ceiling of 50,000 Razakars, spread over all the districts of the province, was achieved. Battle schools were

established to train Razakar platoon and company commanders. To provide an effective command structure to this organization, about sixty young officers were selected to be appointed as Razakar Group Commanders. Page-79. He further added, “Since the East Pakistan Civil Armed Forces had disintegrated, local Razakars, mainly consisting of ex-Biharis and loyal East Pakistanis have trained initially to man the border outposts and fall back on to the strong points and fortresses manned by the regular Army. The officers were from the regular Army. They did an admirable job. They gave a tough fight to the Mukti Bahini and fought minor patrolling and tactical actions.”

609. Major Siddiq Salik in his book titled “Witness to Surrender” added that “During these operations, some troops, to the shame of all, indulged in looting, killing and rape. The stories of these atrocities naturally alienated the Bengali population. They were not very fond of us before, but now they hated us bitterly. No serious effort was made to arrest this trend or diminish the hatred. Hence, there was no question of mass co-operation by the Bengalis. Only those people joined hands with us who, in the name of Islam and Pakistan, were prepared to risk everything. These patriotic elements were organized into two groups. The elderly and prominent among them formed peace committees while the young and able-bodied were recruited as Razakars (volunteers). The committees were

formed in Dacca as well as in the rural areas and they served as a useful link between the Army and the local people. At the same time, they earned the wrath of the rebels and 250 of them were killed, wounded or kidnapped. The Razakars were raised to augment the strength of the West Pakistani troops and to give a sense of participation to the local population. Their manpower rose to nearly 50,000 as against a target of 100,000. In September, a political delegation from West Pakistan complained to General Niazi that he had raised an army of Jamaat-i-Islami nominees. The general called me to his office and said, ‘From now on, you will call the Razakars, Al-Badr and Al-Shams to give the impression that they do not belong to one single party.’ I complied. The Al-Badr and Al-Shams groups were a dedicated lot, keen to help the army.” page- 105

610. Husain Haqqani in his book titled ‘Pakistan: between Mosque and Military’ had given a description about the deployment of the Razakars wherein the right wings political parties had sufficient control and stated that;

“The army decided to raise a Razakar (volunteer) force of one hundred thousand from the civilian non-Bengalis settled in East Pakistan and the pro-Pakistan Islamist group. The Razakars were mostly employed in areas where army elements were around to control and utilize them .This force was useful where

available, particularly in the areas where the rightist parties were in strength and had sufficient local influence" [Pakistan: between Mosque and Military, written by Hussain Haqqani, Page 79]

611. It is now a settled history that Razakars, Al-Badr, and Al-shams were the local agent of the Pakistani army and killing squad who were engaged to execute the blueprint of Pakistani army in annihilation of the pro-liberation Bangalee people, Hindus and freedom fighters. They were the local collaborators who used to participate in different killing operation in 1971 along with Pakistani Army and killed freedom fighters, Hindus, and pro-liberation Bangalee people, committed rape upon Bangalee girls and women. They used to abduct the girls and woman, freedom fighters and the pro-liberation people and after inhuman torture raped and killed them to execute the further policy, plan and ill design of the Pakistani Army.

612. The East Pakistan Razakars Ordinance, 1971 was promulgated by the Governor of East Pakistan on 2, August 1971 and created the Razakar Bahini as a "paramilitary force" for "operational and static" purposes and also set up a separate Razakar Directorate for administration and control of the affairs of the Razakars. The Razakar, Al-Badar, and Al-Shams Bahinies were created with intent to kill the freedom fighters and pro-liberation people and during nine months War of Liberation in 1971 the Pakistani

occupation army and the Razakars, Al-Badar, and Al-Shams to implement the further policy and plan of the Pakistani army jointly launched operations and killed about three million unarmed pro-liberation civilians and raped about 45,000 girls and women and forced to deport about 10 million people to India.

613. A brief account of the accused persons.

(1)Accused Md. Solaiman Mollah(now dead)[now dead]

Accused Md. Solaiman Mollah(now dead)(84), son of late Chand Mollah and late Shaharjan Bibi of Kashipur Muslim Para, Ward No. 5, Police Station-Palong, District- Shariatpur was born on 12.06.1931. He passed Dawra Examination. Since 1963 he joined Muslim League[Fazlul Quader group] and became Organizing Secretary of Palong Thana Muslim League, the prosecution alleges. In the year 1970 he joined Jomiatul Ulama-e-Islami and contested in the election to be a member of the Provincial Assembly, but he was defeated. He formed local Peace Committee and Razakar Bahini and led them in aiding Pakistani occupation army in his locality i.e. Palong Thana area of the then Madaripur Sub-Division, the prosecution alleged.

(2)Accused Idris Ali Sardar (absconded]

Accused Idris Ali Sardar [67], son of late Haji Hakim Ali Sardar and late Maju Bibi of village West Kashabhog, Police Station-Palong, District- Shariatpur was born on 01.04. 1948 [as per S.S.C. certificate] and on 03.03.957[as per NID]. He passed S.S.C. Examination in 1966. He was an activist of Islami Chhatra Sangha [ICS] while he was a student of Rudrakar Nilmoni High School, Shariatpur in the year 1962-1966, the prosecution alleged. In the

year 1969, he was a leader of Islami Chhatra Sangha. During War of Liberation in 1971, he was an active leader of Islami Chhatra Sangha. He joined local Razakar Bahini to collaborate with the Pakistani occupation army, the prosecution alleged. Since the War of Liberation of Bangladesh he was a leader of Jamaat-e- Islami[JEI].

Brief Procedural History.

Submission of “Formal Charge” and taking cognizance of offences.

614. After holding an investigation on some atrocious events allegedly committed during the War of Liberation in 1971 directing Hindu religious group and unarmed civilians in different villages under Palong Police-Station of the then Madaripur Sub-Division[now District –Shariatpur] by the Pakistani occupation army in collaboration with the accused –persons, the Investigating Agency submitted its investigation report before the Chief Prosecutor against 2(two) accused persons mentioned hereinabove finding them prima facie guilty of the alleged offences. The Chief Prosecutor considering the investigation report and documents submitted therewith by the Investigating Agency, the nature, pattern of the alleged atrocious events and culpable participation and involvement of the 2(two) accused persons, submitted a single “formal charge” with a view to prosecuting them jointly for participation or contribution or facilitation or abetment to the commission of the alleged offences and they appear to have allegedly acted in furtherance of common criminal plan and design

to the accomplishment of such offences. This Tribunal by order dated 22.12.2015 took cognizance of offences against 2(two) accused persons as mentioned hereinabove.

Framing of Charge

615. Out of 2(two) accused persons, accused Md. Solaiman Mollah(now dead) has been in detention and accused Idris Ali Sardar neither could have been arrested nor did he surrender and remained absconding. After taking cognizance of offences against accused persons a warrant of arrest was issued against accused Idris Ali Sardar and the execution of a warrant of arrest issued against him was returned unserved. This Tribunal on 08.02.2016 passed order for publication of notices in two daily newspapers as required under Rule 31 of the International Crimes (Tribunal-1) Rules of Procedure, 2010 against the accused Idris Ali Sardar. Despite the publication of the notices in two daily newspapers namely 'Daily Janakantha' and the 'The New Age' dated 10.02.2016 and 11.02.2016 respectively the absconding accused Idris Ali Sardar did not surrender for which this Tribunal ordered for holding the trial in absentia against accused Idris Ali Sardar and appointed Mr. Gazi M.H. Tamim Advocate as State defence counsel. This Tribunal also ordered the prosecution for furnishing documents it relies upon to the defence counsel and fixed on 19.04.2016 for hearing the charge framing matter. Accused Md. Solaiman Mollah (now dead) also engaged Mr. Gazi M.H. Tamim, Advocate to defend him. On

19.04. 2016 this Tribunal heard the charge framing matter and by order dated 02.05.2016 framed charge against 2(two) accused-persons as mentioned above.

Witnesses adduced by the parties.

616. The prosecution submitted a list of 28 witnesses along with formal charge and documents out of which prosecution examined only 13 P Ws and none was examined by the defence, but the defence counsel engaged on behalf of the accused Md. Solaiman Mollah(now dead)and the state defence counsel engaged on behalf of accused Idris Ali Sardar has cross-examined all the prosecution witnesses.

Defence case:

617. From the trend of cross-examination, the defence case as it appears is that the accused persons were not Razakar at the time of War of Liberation in 1971 and the prosecution failed to exhibit any documentary evidence to prove that the accused persons were Razakar in 1971 and after long 45 years of the alleged offences, mere oral testimony is not enough to prove that the accused – persons committed the alleged offences as Razakar. It is claimed by the defence that admittedly the Pakistani army committed the alleged offences. It is the further case of the defence that accused persons were not involved with the alleged offences and they also not aided, abetted, facilitated or participated in the

commission of any crimes as alleged by the prosecution and with an ulterior motive the prosecution examined only rival political persons of the locality of the alleged crimes sites who are inimical to the defence. All the allegations brought against the accused persons involving the offence of genocide and crimes against humanity are false, politically motivated and the offences as narrated in the charges have been committed by the Pakistani army and the offences did not take place in the manner as alleged by the prosecution.

Burden of proof and the right of the accused:

618. The fundamental principle of criminal jurisprudence is that the prosecution is legally bound to prove the charge to the hilt beyond reasonable doubt against the accused. The Evidence Act, 1872 and the Code of Criminal Procedure, 1898 shall not apply in any proceedings of this Tribunal and in view of the provision provided in Section 19 of the Act of 1973 “the tribunal shall not be bound by technical rules of evidence; and it shall adopt and apply to the greatest possible extent expeditious and non-technical procedure.” Jurisprudentially, the accused person is presumed to be innocent until prosecution proved the guilt of the accused person beyond all reasonable doubt. Under the Act of 1973, the accused person is not bound to prove any fact and the burden of proof always lies upon the prosecution. In view of the provision as provided in Section

17 of the Act of 1973 during trial the accused person shall have the right to give any explanation relevant to the charges made against him and shall have the right to present evidence at the trial in support of his defence and to cross-examine any witness called by the prosecution.

Abatement of the proceedings so far it relates to accused Md. Solaiman Mollah(now dead).

619. Accused Md. Solaiman Mollah and Idris Ali Sardar were jointly charged for committing offences of crimes against humanity and genocide as specified in section 3(2) of the International Crimes (Tribunals) Act, 1973. During the trial, on 18.10.2016 after concluding cross-examination of P.W.13 by the defence, the learned prosecutor submitted that the prosecution will not examine any other witness and the learned defence counsel prayed for adjournment on the ground of examination of defence witnesses. Since the defence did not file any list of defence witness, this Tribunal fixed the next date on 25.10.2016 for summing up the case by way of argument. On 25.10.2016 the learned prosecutor made submission in part regarding the summing up of the case and next date was fixed on 26.10.2016, but accused Md. Solaiman Mollah died on 25.10.2016 at night while he was in custody. Thereafter on 01.11.2016, the learned prosecutor filed an application for abatement of the proceedings so far it relates to accused Md.

Solaiman Mollah due to his natural death in custody. On consideration of the application filed by the learned prosecutor, this Tribunal on 01.11.2016 passed an order to the effect that “the proceeding of the instant case so far it relates to the accused Md. Solaiman Mollah[now dead] stands abated” and heard the summing up of the defence case by way of argument. Since, the accused Md. Solaiman Mollah died in custody the proceeding against him abated due to his natural death.

Recognition of the accused persons

620. The learned Prosecutor Mr. Zead-Al-Malum appearing with another learned prosecutor Mr. Hrishikesh Shaha on behalf of the prosecution submitted that accused Md. Solaiman Mollah (now dead) was a businessman of Angaria Bazaar and he also contested in the General Election in 1970 from the locality of the crime sites. Accused Idris Ali Sardar as local of the crime sites used to come at Angaria Bazaar before the War of Liberation in 1971, and witnesses examined by the prosecution are also locals and neighbour of accused persons and all the local witnesses were previously known to the accused persons. The prosecution also exhibited the list of local Razakars, Al-Badr, and Al-shams prepared by P.W.1, the Commander of freedom fighters of Palong Thana Unit which has been marked as exhibit-1. The prosecution witness Nos. 1 to 11 as locals of the crime sites at the time of

occurrence recognized the accused persons beyond all reasonable doubt.

621. Conversely, Mr. Gazi M.H. Tamim, learned defence counsel appearing on behalf of the accused Idris Ali Sardar submitted that accused Idris Ali Sardar was not a Razakar and in a wartime situation it was not possible for the witnesses to recognize the perpetrators who actually committed the alleged offences and the presence of the witnesses at the relevant time at the crime sites is not at all believable.

622. To arrive at a correct decision as to whether the witnesses examined by the prosecution recognized the accused persons at the time of commission of the offences, it is required to examine both oral and documentary evidence adduced by the prosecution and the evidence of the prosecution witnesses is quoted below;

623. P. W. 1 Abdul Aziz Sikder [62] is a teacher of Government Children's' Home, Shariatpur. At the time of great War of Liberation in 1971, he was an applicant for S S C examination from the Palong Tulashar High School. Now, he is the Commander of freedom fighters. He stated that after the independence of Bangladesh, he recovered the valuables from the houses of accused Md. Solaiman Molla and his relatives and handed over those valuables to the members of victim families. He also stated that as per requisition of the Upazila Nirbahi Officer of Palong Upazila he

prepared the list of Razakars, Al-Bdr and Al-Shams and the same has been marketed as exhibit-1.

624. P. W. 2 Jalilur Rahman [65] is a retired Office Assistant of local Rudrakar Nilmoni High School. During the great war of Liberation in 1971, he was a candidate for SSC examination from the said School. He claimed that he is a freedom fighter. He stated that while he was a student of class VII, accused Idris Ali Sardar was a student of class IX of the same school for which he was known to him. Accused Md. Solaiman Molla took part in the Provincial Council Election in 1970 but he was defeated. At that time, P.W.2 was a worker of the Chhatra League and took part in the election campaign for the candidate of the Awami League for which accused Solaiman Molla was also known to him before the occurrence.

625. P W 3 Md. Abdul Jalil Howlader [61] used to work in the Office of Social Welfare at Shariatpur and subsequently he retired from service. He claimed that he is the former commander of freedom fighters of Shariatpur. At the time of the great War of Liberation in 1971, he was a candidate for S SC examination. In cross-examination in reply to a question put to him by the defence, he stated that accused Idris Ali Sardar was personally known to him and reason was that he used to read in Rudrakar High School and

accused Solaiman Mollah was the Chairman of Peach Committee of Palong Thana.

626. P. W. 4 Nurul Islam Sardar [69] was aged about 23/24 years at the time of War of Liberation in 1971 and he had a tea-stall at Angaria Bazaar. He claimed that Razakar accused Md. Solaiman Molla was known to him before the War of Liberation in 1971 and reason was that he took part in the Provincial Election in 1970 and got defeated. At that time accused Md. Solaiman Molla had a shop at Angaria Bazaar. P.W. 4 also stated that Razakar accused Idris Ali Sardar was also known to him before the War of Liberation in 1971 and reason was that he was an inhabitant of village West Kashavog and he used to come at Angaria bazaar.

627. P. W. 6 Bijoya Malo [80] was residing in the house of her husband in 1971 at village South Maddhyapara and her husband was a fisherman. At that time she along with her three sisters-in-law namely Usha, Anjali, Jogomaya along with their two aunts-in-law used to live in the house of her husband. She stated that after committing the alleged offence of abduction, confinement and rape they deported to India to take shelter and after the independence of Bangladesh they came back to their houses from India and after coming back to their houses they heard that Razakar accused Md. Solaiman Molla and Idris Ali Sardar along with other Razakars

were present along with the Pakistani army who abducted them and confined in Madaripur Jute Mills.

628. P W 7 stated that at the time of great War of Liberation in 1971, he was an inhabitant of village-Dhanuka and a student of Class VIII of Palong Tulashar High School. He claimed that accused Md. Solaiman Molla and Idris Ali Sardar were known to him before the War of Liberation in 1971 and reason was that they used to come at Angaria Bazaar.

629. P. W. 8 Md. Ismail Hossain Sikder [65] was an inhabitant of the village- Char Kashavog, a crime site of the event as narrated in the charge No. 1. He was a cultivator in 1971 and claimed that the accused Md. Solaiman Molla and Idris Ali Sardar were locals of the crime sites and they used to go to same Bazaar for marketing for which they were previously known to him before the occurrence.

630. P. W. 9 Samvu Nath Das [76] is a retired teacher of a Primary School and in 1971 he was a teacher of Palong Tulashar Government Primary School. P W 9 claimed that the accused Md. Solaiman Molla and Idris Ali Sardar and he used to come in the same bazaar for marketing before the occurrence for which they were previously known to him.

631. P. W. 10 Abul Kalam Hawlader [61] stated that in 1971 at the time of War of Liberation he along with his uncle Raham Ali

Hawlader and cousin Shamsul Haque Hawlader jointly run the business of a tea-stall on the bank of river adjacent to Angaria Bazaar launch dockyard and at that time he was a student of Class-VII of Rudrakar Nilmoni High School. Now he is the Office Assistant of Angaria High School. He stated that he and accused Md. Solaiman Molla was an inhabitant of the same village and he also used to see accused Idris Ali Sardar at Angaria Bazaar for which they were previously known to him before the occurrence.

P.W.11 Mohadeb Das stated that the accused- persons used to come at the bazaar for which they were known to them, and during cross-examination, he stated that accused Md. Solaiman Mollah(now dead)set up a Madrasha in his locality.

632. P. W. 12 Md. Abdus Samad Talukder [61] stated that in 1971 he was a student of the first year of Madaripur Nazimuddin College and at that time he used to reside at the house of his elder brother Abdul Gafur situated at Madaripur town. After initiation of the War of Liberation in 1971, he went to his village home situated at Palong Thana of Madaripur. He stated that in 1971 accused Md. Solaiman Molla participated in the general election from Nezami Islami and took part in the election campaign for which he was known to him and accused Idris Ali Sardar was also known to PW 12 as local before the occurrence.

633. On perusal of the evidence of the prosecution witnesses, it transpires that out of 13 witnesses examined by the prosecution, P.Ws. 1, 2, 3 and 12 are freedom fighters, and P.Ws. 4 and 8 and accused Idris Ali Sarder were an inhabitant of village Kashavog, and Angaria Bazaar was situated about quarter kilometer far from village Kashavog. Village Dhanuka, the houses of P.Ws. 1,7 and 9 were situated one and a half kilometer from Angaria Bazaar and one kilometer from village Maddhyapara, a crime site, mentioned in charge No. 1 and all other crime sites are adjacent villages. P.W. 2 stated that accused Idris Ali Sardar was a student of Rudrakar Nilmoni High School while he was a student of the said school. P.W. 3 stated that accused Idris Ali Sardar was personally known to him. P.W. 4 and accused Md. Solaiman Mollah(now dead)had a shop at Angaria Bazaar in 1971. P.Ws. 7 to 9 stated that accused persons and they used to come at Angaria Bazaar before 1971 for which they were known to them. P.W. 10 and accused Md. Solaiman Mollah(now dead)was an habitant of village Kashipur. P. W. 11 was an inhabitant of village Maddayapara, a crime site, and victim of the event narrated in charge No. 1. P. W. 12 stated that in 1970 accused Md. Solaiman Mollah(now dead)contested in General Election from the locality of crime sites and accused Idris Ali Sardar was an inhabitant of his locality for which they were previously known to them.

634. On scrutiny of the evidence of the prosecution witnesses presented to the Tribunal, it appears that accused Md. Solaiman Mollah(now dead)contested in the General Election in 1970 from the locality of the crime sites and at that time he had a shop at Angaria Bazaar and he was a local of the crime sites and before 1971 he was known to the local people. House of accused Idris Ali Sardar was situated at village Kashavog, a crime site, and before 1971 he used to reside in his village home for which he was also known to the locals.

635. Out of 12 (twelve) witnesses, P. Ws 1 to 11 claimed to be the eye witnesses of the occurrences narrated in the charge Nos. 1 to 3 and P. Ws. 1 to 4, 7,8, 10 and 11 as eye witnesses recognized the accused persons as accomplices of the Pakistani army and stated that the accused persons guided the Pakistani army and identified the victims to implement the further policy and plan of the Pakistani occupation army in annihilating the civilian population and the Hindu religious people. P.W. 4 also claimed that before the event narrated in charge No. 2, he recognized the accused persons as an accomplice of Pakistani army who went to Malopara and abducted 30/35 detainees. P. W. 6 stated that after releasing from the confinement of Pakistani army and Razakars, she heard that the accused persons were present along with the Pakistani army who abducted, confined, raped and killed the detainees.

636. It is noted that during War of Liberation in 1971, the freedom fighters and the pro-liberation people of the locality were very much aware of the members of the locally formed Razakar Bahini. On scrutiny of the evidence of the prosecution witnesses presented to the Tribunal it is proved beyond reasonable doubt that the accused persons were previously known to the prosecution witnesses before the commission of the offences alleged to have been committed at the time of War of Liberation in 1971 and the prosecution witness Nos. 1 to 4, 7 to 11 correctly recognized them at the time of the commission of the alleged offences as narrated in the charges.

637. Prosecution witnesses presented to the Tribunal proved beyond reasonable doubt that P.Ws. 1 to 4, 7 to 12 and the accused persons were locals of the crime sites and they were previously known to each other before the commission of the alleged offences took place and there was good reason for the witnesses to recognize the accused –persons as locals of the crime sites and P.Ws. 1 to 4 and 7 to 11 rightly recognized accused Md Solaiman Mollah[now dead] and accused Idris Ali Sardar at the time of the commission of the alleged offences.

Whether the accused persons belonged to Razakar Bahini

638. The learned Prosecutor Mr. Zead-Al-Malum appearing with another learned prosecutor Mr. Hrishikesh Shaha on behalf of the

prosecution submitted that at the time of great War of Liberation in 1971 accused Md. Solaiman Mollah(now dead)was the Chairman of the Peace Committee of Palong Thana and he also formed Razakar Bahini and set up a Razakar Camp in a Cinema Hall at Palong Thana Sadar. Accused Idris Ali Sardar was the member of Islami Chhatra Sangha before the War of Liberation in 1971 and at the time of War of Liberation in 1971, he joined the local Razakar Bahini. Both the accused persons as member of the local Razakar Bahini guided the Pakistani army and identified the freedom fighters, pro-liberation people, Hindus of the locality and in collaboration with the Pakistani army perpetrated the offences as narrated in the charges and the prosecution examined the local freedom fighters and the locals of the crime sites to prove that the accused Md. Soliman Mollah was the Chairman of the Peace Committee of Palong Thana Unit and the accused persons were Razakar in 1971. Furthermore, the prosecution also exhibited a list of local Razakars prepared by the P.W.1, Commander of Palong Thana freedom fighters, which has been marked as exhibit-1. He further submitted that the prosecution proved the book titled “Bm hcl” written by Selim Mansur Khaled, published from Lahore, Pakistan which has been marked as material exhibit-II and reports published in Daily Ittefaque and the Daily Pakistan dated 13.8.1969 which have been marked as exhibits 5 and 6 to prove

that accused Idris Ali Sardar was the leader of Islami Chhatra Shangha[ICS] before the War of Liberation in 1971. Thus the prosecution proved beyond all reasonable doubt that the accused Md. Solaiman Mollah was the Chairman of the Peace Committee of the Palong Thana and both the accused persons were Razakars in 1971.

639. The learned defence counsel Mr. Gazi M.H. Tamim appearing on behalf of accused Idris Ali Sardar as State defence counsel submitted that the prosecution totally failed to exhibit any documentary evidence to prove that the accused Idris Ali Sardar was a Razakars. He further submitted that the Razakars were appointed under the Razakars Ordinance, 1971 and they used to draw the salary and without proof of appointment of the accused person as Razakar it cannot be held that he was a Razakar in 1971.

640. On perusal of the records it appears that the prosecution examined P. Ws. 1 to 4, 6 to 12 and the list of the local Razakars, Al-Badr, and Al-Shams prepared by P. W. 1 which has been marked as exhibit 1 to prove that the accused persons were Razakar at the time of War of Liberation in 1971. To adjudicate the disputes now let us see both the oral and documentary evidence adduced by the prosecution.

641. P. W. 1 Abdul Aziz Sikder[62] is a teacher of Government Children's' Home, Shariatpur. At the time of great War of

Liberation in 1971, he was an applicant for S S C examination from the Palong Tulashar High School. Now, he is the Commander of freedom fighters, Palong Police Station Unit. He stated that after the declaration of independence in 1971 he along with about 50/60 young man of his locality including Abul Hossain Khan and Sikandar Talukdar started training of rifle with bamboo sticks under the leadership of Sultan Mahmud Simon (now advocate) at Palong Tulashar High School field. A few days later, he came to know that accused Md. Solaiman Molla and Idris Ali Sardar formed the Peace Committee and the Razakar Bahini in collaboration with the local leaders of Jamaat-e-Islam, Muslim League, and others to collaborate with the Pakistani occupation force. The Pakistani army set up a camp at A.R.Howladar Jute Mills at Madaripur. The Razakars were trained at that camp and a permanent Razakar Camp was also set up at local Palong Cinema Hall.

642. P. W. 2 Jalilur Rahman [65] is a retired Office Assistant of Rudrakar Nilmoni High School. During the great war of liberation in 1971, he was a candidate for SSC examination from the Rudrakar Nilmoni High School and stated that he is a freedom fighter. On 23rd May in 1971 at about 11.00 am Razakars and Pakistani army came to his house and detained him and they forcibly took him to the house of Zamindar Pramath Lal

Chakrabarty and he saw the Razakar accused persons who were present there.

643. P W 3 Md. Abdul Jalil Howlader [61] used to work in the Office of Social Welfare at Shariatpur and subsequently he retired from service. At the time of the great War of Liberation in 1971, he was a candidate for S SC examination. He stated that at the last part of April in 1971, Razakar accused Md. Solaiman Molla and Idris Ali Sardar formed the Peace Committee at the Palong Police Station area (Shariatpur Sadar) to collaborate with the Pakistan army. After that accused Md. Solaiman Molla formed the Razakar Bahini with the help of the local anti-liberation people and set up a Razakar camp in a Cinema Hall at Sadar of Palong Police Station. Accused Md. Solaiman Molla was the Commander of that Razakar Camp. There was also an army camp in the A.R. Hawladar Jute Mills at the then Madaripur Subdivision, and the Razakars were trained at that camp. Razakar accused Idris Ali Sardar, Robiulla Matbor, Shamsu Molla and many other Razakars were the members of the local Razakar Bahini.

644. P.W.4 Nurul Islam Sardar[69] was aged about 23/24 years in the year 1971 and he had a tea-stall at Angaria Bazaar. On 22nd May in 1971 at about 03.00/03.30 pm he was present at his shop and saw that a launch anchored at the Angaria Bazaar launch dockyard and 150/200 Pakistani army got down from that launch.

At that time Razakar accused Md. Solaiman Molla and Idris Ali Sardar along with other 10/12 Razakars welcome Pakistani army at Angaria Bazaar launch dockyard.

645. P. W. 6 Bijoya Malo[80] was residing in the house of her husband in 1971 at village South Maddhyapara and her husband was a fisherman. She stated that after committing the alleged offence of abduction, confinement and rape they deported to India to take shelter and after the independence of Bangladesh they came back to their houses from India and after coming back to their houses they heard that Razakar accused Md. Solaiman Molla and Idris Ali Sardar along with other Razakars were present along with the Pakistani army who abducted and confined them in Madaripur Jute Mills.

646. P W 7 Anil Chandra Das [61] stated that at the time of great War of Liberation in 1971, he was an inhabitant of village-Dhanuka and a student of Class VIII of Palong Tulashar High School. He stated that on 22nd May in 1971 at about 03.00 pm Razakar accused Md. Solaiman Molla and Idris Ali Sardar along with other Razakars and the Pakistani army attacked the villages Kashavog and Maddhyapara and killed about 200 villagers.

647. P. W. 8 Md. Ismail Hossain Sikder[65] was an inhabitant of the village- Char Kashavog, a crime site of the event as narrated in the charge No. 1. He was a cultivator in 1971. He stated that on 22th

May in 1971 at about 03.00 pm he along with his father was coming to their house chasing cows and at that time he saw that the Razakar accused Md. Solaiman Molla and Idris Ali Sardar, other Razakars and the Pakistani army were coming from the west side and Razakar accused Solaiman Molla identified his father as a freedom fighter and a Pakistani army gunned down his father.

648. P. W. 9 Samvu Nath Das [76] is a retired teacher of a Primary School and in 1971 he was a teacher of Palong Tulashar Government Primary School. Now he is a business man. He stated that in 1971 on 22nd May at about 03.00 pm the Razakar accused Md. Solaiman Molla and Idris Ali Sardar, other Razakars and the Pakistani army attacked the village-Kashavog and Maddhyapara of Palong Thana and killed about 200 people of those villages.

649. P. W. 10 Abul Kalam Hawlader [61] stated that in 1971 at the time of War of Liberation he along with his uncle Raham Ali Hawlader and cousin Shamsul Haque Hawlader jointly run the business of a tea-stall on the bank of river adjacent to Angaria Bazaar launch dockyard and at that time he was a student of Class-VII of Rudrakar Nilmoni High School. Now he is the Office Assistant of Angaria High School. He stated that on 22.5.1971 at about 3.00 pm he was present at Angaria Bazaar and heard that the Pakistani army came at Angaria Bazaar launch dockyard. At that time he saw that a few pro-Pakistani locals were going from

Angaria Bazaar to Angaria bazaar launch dockyard uttering the slogan “Naraye Takbir” to welcome the Pakistani army. Thereafter he came back to his shop. He stated that he could recognize accused Md. Solaiman Molla, Idris Ali Sardar, Rabiul Master (now dead), Aziz Molla (now dead) amongst the pro-Pakistani people who welcome the Pakistani army. After coming down from the launch, the Pakistani army searched his tea-stall including other shops and at that time the Pakistani army dragged him out from the shop and physically tortured. The Pakistani army, accused Md. Solaiman Molla and Idris Ali Sardar and other Razakars forcibly detained him and started towards east of Angaria Bazaar.

650. P. W. 11 Mohadeb Das [70] was a businessman of Monuhar Bazaar of Palong Police Station. On the 7th day of Bangla month Jyaistha in 1971 at about 03.00 pm, he was present in his shop at Monuhar Bazaar. At that time he saw that people were running, and accused Md. Solaiman Molla and Idris Ali Sardar, other Razakars and Pakistani army were coming towards the north from the east for which he tried to flee away by running from his shop towards his house. While he was trying to flee away by running he received injury by gunshot.

651. P. W. 12 Md. Abdus Samad Talukder [61] stated that in 1971 he was a student of the first year of Madaripur Nazimuddin College and at that time he used to reside at the house of his elder brother

Abdul Gafur situated at Madaripur town. After starting the War of Liberation in 1971 he went to his village home situated at Palong Thana of Madaripur. On 04.04.1971 he along with Sultan Mazi went to India to take training and after taking training he came back in Bangladesh in the last part of July in 1971 and took part in the War of Liberation and in the last part of August in 1971 while he took part in the War of Liberation he came to know that accused Md. Solaiman Molla and Idris Ali Sardar and other Razakars set up Peace Committee and Razakar Bahini at Palong Thana area and they took their position at Palong Cinema Hall and made arrangement for the training of the Razakars in the army camp situated at Madaripur A R Hawladar Jute Mills.

652. Out of 12 local witnesses, P.,Ws. 1, 3, 4 and 7 to 12 stated that accused persons were Razakar, P.W. 5 stated that the accused persons and others Razakars accompanied the Pakistani army who abducted 30/35 male and female from Malopara and subsequently raped the female detainees and killed the male detainees. P.W. 2 recognised the accused persons as Razakar who along with other Razakars accompanied the group of Pakistani army and killed Chandra Mohan Chakrabarti. On scrutiny of the evidence of the prosecution witnesses presented to the Tribunal it transpires that during cross-examination, the defence merely denied that the accused persons were not Razakar in 1971, but failed to assail

the positive statement of the prosecution witnesses and the evidence of the prosecution witnesses regarding the status of the accused –persons remain unshaken and uncontroverted.

653. On behalf of the defence, it is submitted that the prosecution failed to exhibit any reliable documentary evidence to prove that the accused persons were Razakar in 1971 and without relying on any reliable documentary evidence it is not safe to decide that the accused persons were Razakar in 1971.

654. Now it is well settled that after more than long four decades of the atrocities committed it is really difficult to collect documentary evidence to prove all the facts alleged inasmuch as, by this time, the relevant documents might have been destroyed. At this point, I recall the observation of the Appellate Division of the Supreme Court of Bangladesh made in the case of *Allama Delwar Hossain Sayedee* wherein it has been observed that;

"In most cases, the perpetrators destroy and/or disappear the legal evidence of their atrocious acts. Normally the investigation, the prosecution and the adjudication of those crimes often take place years or even decades after their actual commission. In Bangladesh, this has caused because of the fragile political environment and the apathy of the succeeding government. In the case of Bangladesh, the process has started after 40 years." [Criminal Appeal Nos. 39-40 of 2013, Judgment dated 17th September 2014, page 43]

655. The prosecution witnesses presented to the Tribunal proved that accused Md. Solaiman Mollah(now dead) was a very influential person of his locality and admittedly he contested in the General Election as the candidate of Nezami-i-Islam in 1970 from the locality of alleged crime sites and it is suggested by the defence that after the War of Liberation in 1971 he used to reside in the locality. In this regard, I recall the observation of the Appellate Division of the Supreme Court of Bangladesh made in the case of *Allama Delwar Hossain Sayedee* in Criminal Appeal Nos. 39-40 of 2013, Judgment dated 17th September 2014, PDF page- 141 wherein it has been further observed that-

“The trial of the offences of Crimes against Humanity is held after 40 years and in the intervening period there was political change in the country- two Martial Laws were in force the system of Government was changed twice. New political parties were formed and the right-wing minded people like Sayedee were allowed to activate politics on religion by restoring Jamat-e-Islami and ultimately, this political party came to power by forming an alliance with another political party. This political polarization has adversely affected in the process of collecting evidence against the accused who became Member of Parliament twice. The history of our national liberation struggle was distorted; the basic pillars enshrined in the Constitution were also changed. Under such scenario, it will be a difficult task to collect a true and correct history of the liberation struggle of a particular district or the names of the Razakars of that

district. Some persons wrote books touching to the liberation struggle by distorting facts. It cannot be exaggerated if it can be said that the accused has been able to make his name excluded from the list of Razakars by using his political influence.”

656. Out of 12 local witnesses examined by the prosecution, P.Ws. 1 to 3 and 12 are freedom fighters. It transpire's that accused Md. Solaiman Mollah(now dead)as the candidate of Nezami Islami contested in the General Election in 1970 and accused Idris Ali Sardar was the General Secretary of Islami Chhatra Sangha before 1971. Now it is historically well settled that the Jamat-e-Islami, Muslim League, Nezami Islami, Islami Chhatra Sangha, and other pro-Pakistani political parties formed the Razakar, Al-Badr, and Al-Shams Bahinis. On perusal of the exhibit 1, it appears that in the list of local Razakars prepared by P.W. 1, Commander of freedom fighters, the name of the accused persons has been mentioned as Razakar. On scrutiny of the material exhibit -II and exhibits-5 and 6 it appears that accused Idris Ali Sardar was the leader of Islami Chhatra Shangha [ICS] immediate before the War of Liberation in 1971.

657. On scrutiny of the evidence of the prosecution witnesses, it reveals that at the time of War of Liberation in 1971 accused Md. Solaiman Mollah[now dead] formed the Peace Committee at Palong Thana as its Chairman and subsequently formed Razakar

Bahini and set up a Razakar camp in a Cinema Hall at Palong Thana Sadar and accused Idris Ali Sardar joined the local Razakar Bahini. It further appears that the P.Ws. 1 to 4 and 7 to 11 are direct witnesses of the events narrated in the charges and they stated that at the time of occurrence, the accused persons guided the Pakistani army and identified the freedom fighters and the Hindu inhabitants of the crime sites and the Pakistani army gunned down them to death wherefrom it is legally proved that the accused Md Solaiman Mollah (now dead) and accused Idris Ali Sardar were the collaborators of the Pakistani occupation army.

658. In the above facts and circumstances of the case and the evidence on records, I am of the view that the prosecution proved beyond reasonable doubt that the accused Md. Solaiman Mollah[now dead] was the Chairman of Peace Committee of Palong Thana and he also formed the Razakar Bahini at Palong Thana of the then Madaripur Sub-Division (now Shariatpur District) and accused Idris Ali Sardar joined the local Razakar Bahini and both the accused persons were Razakar at the time of great War of Liberation in 1971 and they actively collaborated with the Pakistani army in the locality of Palong Thana and they were also the local agent, source and guide of the Pakistani army at the time of the commission of the alleged offences as narrated in the charges.

Adjudication of charges

Charge No. 1.

[Genocide, murder, plundering and arson committed on 22 May 1971 in the locality of Palong Police Station].

659. That on 22 May 1971 at about 03.00 pm 100/150 Pakistani army men accompanied by Razakar accused Md. Solaiman Mollah(now dead)and Idris Ali Sardar and some other Razakars were going to village Kashabhog via Angaria bazaar launch ghat, adjacent to that bazaar, under Palong Police Station of the then Madaripur Sub-Division [at present District Shariatpur] and on the way, on their instigation one of the Pakistani army men fired gunshot to a farmer Abdus Samad Sikder who along with his son Ismail Hossain Sikder was chasing cow towards their home. Abdus Samad Sikder sustaining bullet hit injury rushed to the courtyard and after a while, he succumbed to his injury. Thereafter, the accused persons and their accomplices having attacked the dwelling house of Abdus Samad Sikder looted valuables therefrom.

660. Then the accused persons and their accomplices began to proceed towards east and on the way they shot one ironsmith Shamvu Nath Karmakar working in his shop to death. Thereafter, the accused persons and their accompanied other Razakars and Pakistani army men having attacked Hindu populated village Madhyapara plundered houses and then set them on fire. At the same time, the accused persons and their accomplices killed more

than 200[two hundred] Hindu people by firing shots with intent to destroy, in whole or in part, the Hindu religious group, and thereafter Pakistani army men came back to Madaripur army camp.

661. Thereby accused (1) Md. Solaiman Mollah and (2) Idris Ali Sardar were charged for participating, aiding, abetting, facilitating and complicity in the commission of offences of genocide, and murder, plundering and arson[other inhumane acts] as crimes against humanity as part of systematic attack directed against unarmed civilians as specified in section 3(2)(a)(c)(g)(h) of the Act of 1973 which are punishable under section 20(2) of the said Act for which accused persons have incurred liability under section 4(1) of the said Act.

662. It is noted that the events narrated in charge No. 1 relates to the killing of Abdus Samad Sikdar, a freedom fighter of village Char Kashavog, blacksmith Shamvu Nath Karmakar, a member of Hindu religious group and killing of about 200 Hindus of Madhhyapara and other inhuman acts committed in the house of Abdus Samad Sikdar and Madhhyapara.

Witnesses examined by the prosecution as regards killing of Abdus Samad Sikdar

663. To prove the event of killing Abdus Salam Sikder, the prosecution examined P.Ws. 1 to 4, 8 and 10.

664. P. W. 1 Abdul Aziz Sikder[62] is a teacher of Government Children's' Home, Shariatpur. At the time of great War of

Liberation in 1971, he was an applicant for S S C examination from the Palong Tulashar High School. Now, he is the Commander of freedom fighters, Palong Police Station Unit. He stated that after the declaration of independence in 1971 he along with about 50/60 young man of his locality including Abul Hossain Khan and Sikandar Talukdar started training of rifle with bamboo sticks under the leadership of Sultan Mahmud Simon (now advocate) at the field of Palong Tulashar High School.

665. He claimed that he is the eyewitness of the killing of Abdus Samad Sikdar and stated that on 22 May in 1971, at about 03.00 pm he went to the Angaria bazaar and saw that accused Solaiman Molla, accused Idris Ali Sardar, Shamsul Haque Molla, Robiulla Master, Abdul Aziz Molla along with other Razakars were waiting in line at the launch dockyard. Thereafter, a launch came from the side of Madaripur and anchored there. The Pakistan army got down from the launch and the awaiting Razakars welcome them. He witnessed all these hiding behind a shop. The Pakistani army and the Razakars searched and messed up the shops of the launch dockyard and after beating shopkeeper Abul Kalam Hawlader [P.W. 10] forcibly dragging him out from his shop compelled him to carry a bag on his head, and all of them went towards the east side along with him. At that time, he also followed them. After going about half a kilometer ahead from the Angaria Bazaar, he

saw that Abdus Samad Sikder, a farmer, was chasing cows towards their home. At that time, accused Solaiman Mollah and Idris Ali Sardar repeatedly told that” Mukti (freedom fighter) is going”, Mukti (freedom fighter) is going.” At that time the Pakistani army shot that farmer and sustaining bullet hit injury he rushed to his house and died after drinking water supplied by his son Ismail Sikder [P.W. 8].Thereafter the Pakistani army, accused Idris Ali Sardar and Solaiman Molla and other Razakars looted the valuables from the house of farmer Abdus Samad Sikder.

666. P W 3 Md. Abdul Jalil Howlader [61] used to work in the Office of Social Welfare at Shariatpur and subsequently he retired from service. At the time of the great War of Liberation in 1971, he was a candidate for S SC examination.He stated that on 20th May in 1971, in the afternoon he along with his friend Khalilur Rahman [now dead] from his house went to the house of his paternal aunt at village Monkhula which was situated at the western side of the Angaria Bazaar. On 22.05.1971 at about 3.30 pm, P. W. 3 along with Khalilur Rahman (now dead) went to Angaria Bazaar. While they were staying at Angaria Bazaar, they heard that the Pakistani armies were coming towards Angaria bazaar from Madaripur. After a while, he and Khalilur Rahman saw from a hide that the Pakistani army came at Angaria bazaar launch dockyard by a launch and the Razakar accused Md. Solaiman Molla and Idris Ali

Sardar were present at the launch dockyard. At that time the Pakistani army detained a boy Abul Kalam Hawlader [P.W. 10] just after they got down from the launch and having beaten him compelled to carry the bag of bullets on his head and started towards the Monuhar bazaar. They also saw that accused Md. Solaiman Molla and Idris Ali Sardar and other Razakars were guiding the Pakistani army towards the Monuhar bazaar. At that time P. W .3 and Khalilur Rahman walking through a different walkway were following the Razakars and the Pakistani army. While the Razakars and the Pakistani army reached the Kashavog area, the Razakar accused Md. Solaiman Molla and Idris Ali Sardar identified Abdus Samad Sikdar as a freedom fighter who after completing his field works was chasing cows towards his house. They told the Pakistani army that he is a freedom fighter. At that time the Pakistani army shot Abdus Samad Sikder and sustaining bullet injury he rushed to the inner yard of his house and died there. He also saw that they looted the valuables from the house of Abdus Samad Sikdar.

667. P. W. 8 Md. Ismail Hossain Sikder[65] was an inhabitant of the village- Char Kashavog, a crime site of the event narrated in the charge No. 1 and the son of victim Abdus Samad Sikdar and at the time of killing he accompanied his father. He was a cultivator in 1971. He stated that on 22nd May in 1971 at about 03.00 pm he

along with his father were coming to their house chasing cows. At that time, he saw that the Razakar accused Md. Solaiman Molla and Idris Ali Sardar, other Razakars and the Pakistani army were coming from the west side. At that time accused Md. Solaiman Molla showing his father Md. Abdus Samad Sikder told the Pakistani army that 'Mukti is going, Mukti is going' (a freedom fighter is going, a freedom fighter is going) and a Pakistani army shot his father on his chest and after receiving bullet injury, he along with his father rushed to their house. After coming to his house, he saw that the Pakistani armies were coming to their house for which he went to the south side of their house wherefrom he heard the gun shots from the Hindupara (Hindu area) of village – Khasavog. In the evening he came back to their house and saw the dead body of his father.

668. P. W. 10 Abul Kalam Hawlader [61] stated that in 1971 at the time of War of Liberation he along with his uncle Raham Ali Hawlader and cousin Shamsul Haque Hawlader jointly run the business of a tea-stall on the bank of river adjacent to Angaria Bazaar launch dockyard and at that time he was a student of Class-VII of Rudrakar Nilmoni High School. Now he is the Office Assistant of Angaria High School. He stated that on 22.5.1971 at about 3.00 pm he was present at Angaria Bazaar and heard that the Pakistani army came at Angaria Bazaar launch dockyard. At that

time he saw that a few pro-Pakistani locals were going from Angaria Bazaar to Angaria bazaar launch dockyard uttering the slogan “Naraye Takbir” to welcome the Pakistani army. Thereafter he came back to his shop. He stated that he could recognize accused Md. Solaiman Molla, Idris Ali Sardar, Rabiul Master (now dead), Aziz Molla (now dead) amongst the pro-Pakistani people who welcome the Pakistani army. After coming down from the launch, the Pakistani army searched his tea-stall including other shops and at that time the Pakistani army dragged him out from the shop and physically tortured him.

669. He further stated that the Pakistani army, accused Md. Solaiman Molla and Idris Ali Sardar and other Razakars having forcibly detained him started towards east of Angaria Bazaar. While the Pakistani army and the Razakars were going to the east side along with him, he saw that two persons were chasing cows to the south side. At that time accused Md. Solaiman Molla showing those two persons told that “Mukti” is going (freedom fighter is going) and a Pakistani army shot the aforesaid two persons, but they rushed to their house situated to the south side by running. At one point in time, the Pakistani army asked him to bring water. At that time, taking that advantage he went to the house of Samad Sikdar who was injured by a gunshot of the Pakistani army and saw his dead body.

670. P. W. 2 Jalilur Rahman [65] is a retired Office Assistant of Rudrakar Nilmoni High School. During the great war of liberation in 1971, he was a candidate for SSC examination from the Rudrakar Nilmoni High School and stated that on 23rd May in 1971 at about 07.00 am he went to the house of farmer Abdus Samad of village Char Kashavog and saw his dead body was lying there. Ismail Sikder[P.W.8], son of Abdus Samad informed that yesterday while the Razakars and the Pakistani army attacked the village, Razakar accused Solaiman Molla and Idris Ali Sardar identified his father as freedom fighter and told that “Mukti (freedom fighter) is going, Mukti (freedom fighter) is going” and a Pakistani army gunned down his father to death. Ismail Sikder also informed that the Razakars and the army also looted their houses.

671. P.W.4 Nurul Islam Sardar [69] was aged about 23/24 years in the year 1971 and he had a tea-stall at Angaria Bazaar. He stated that on 22nd May in 1971 at about 03.00/03.30 pm he was present at his shop and saw that a launch anchored at the Angaria Bazaar launch dockyard and 150/200 Pakistani army got down from that launch. At that time Razakar accused Md. Solaiman Molla and Idris Ali Sardar along with other 10/12 Razakars welcome Pakistani army at Angaria Bazaar dockyard. Thereafter P. W. 4 came back to his shop from the launch dockyard. Subsequently tying up a red towel with a stick he started running towards Kashavog,

Maddhyapara, and Rudrakar and loudly told that Razakar accused Md. Solaiman Molla and Idris Ali Sardar along with other Razakars were coming with the Pakistani army towards those villages. He requested the Hindus and Muslims to flee away. On 23.05.1971 in the morning, he went to the house of Samad Sikder and saw his dead body in the inner yard of his house.

Discussion and evaluation of the evidence

672.The learned prosecutor Mr. Zead –Al-Malum appearing with another learned prosecutor Mr. Hrishikesh Shaha on behalf of the prosecution submitted that on 22.05.1971 at about 3.00 pm the accused persons, other Razakars welcomed the Pakistani army at Angaria Bazaar launch dockyard who came there from A.R. Howladar Jute Mills Army Camp, Madaripur with intent to destroy the Hindu religious group of the locality of the crime site and the accused persons, other Razakars and the Pakistani army sharing the common criminal intent to destroy the Hindu religious group, whole or in part, proceeded to towards Maddhayapara and on the way, while they saw farmer Abdus Samad Sikder, a freedom fighter, who along with his son Md. Ismail Hossain Sikdar [P.W.8] were chasing cows towards their house, accused persons identified the victim Abdus Samad Sikder as freedom fighter and as per their identification, a Pakistani army shot him and both of them rushed to their house and Abdus Samad Sikdar died there. P.Ws. 1

to 4, 8 and 10 who were the locals of the crime site proved the event of killing Abdus Salam Sikder against the accused persons beyond reasonable doubt.

673. The learned Advocate Mr. Gazi M.H. Tamim appearing on behalf of absconding accused Idris Ali Sardar as State defence counsel submitted that there is no allegation of direct participation in the act of killing the victim against the accused person, and he was not also present at the crime site at the time of killing Abdus Samad Sikder. There is material contradiction in the evidence of the prosecution witnesses as regards identification of victim Abdus Samad Sikder as a freedom fighter and thus the prosecution totally failed to prove the event of killing Abdus Samad Sikder against the accused person beyond a reasonable doubt.

674. It is noted that to prove the event of killing freedom fighter Abdus Samad Sikdar, the prosecution examined P Ws 1 to 4, 8 and 10, out of which P.Ws. 1,3, 8 and 10 claimed to be the direct witnesses and P.Ws. 2 and 4 are hearsay witnesses of the alleged killing. P.W.8 is the son of victim Abdus Samnad Sikdar.

675. P.W.1 claimed to be the eyewitness of the killing Abdus Samad Sikder and stated that on 22.5.1971 at 3.00 pm accused persons along with other Razakars welcome the Pakistani army at Angaria Bazaar launch dockyard. Subsequently the accused persons, other Razakars, and the Pakistani army went to village

Kashavog and while Abdus Samad Sikder, a freedom fighter along with his son Ismail Hossain Sikdar (P.W.8) were coming to their house chasing cows, accused persons identified Abdus Samad Sikdar as a freedom fighter and a Pakistani army shot him and sustaining bullet injury he rushed to his house and died there. He also stated that the accused persons also looted the valuables from the house of Abdus Samad Sikdar. On perusal of the evidence of the P.W 1, it appears that during cross-examination, the defence only denied the above evidence of P.W. 1 by giving suggestion to him and no cross-examination has been done as regards identification of Abdus Samad Sikdar as freedom fighter before his killing and looting of the valuables from his house. The defence also did not dispute the killing of Abdus Samad Sikdar.

676. P.W.3 Abdul Jalil Howladar stated that on 22.5.1971 at about 3.00 pm while he along with his friend Khalilur Rahman(now dead) were present at Agraria Bazaar , they saw that the accused persons along with other Razakars welcome the Pakistani army at Angaria Bazaar launch ghat (dockyard) and subsequently went to the village Kashavog and the accused persons identified Abdus Samad Sikdar as freedom fighter who along with his son(P.W.8) was chasing cows towards his house and a Pakistani army shot Abdus Samad Sikdar and sustaining bullet injury, he rushed to his house and died there. P.W.3 also stated that he saw that the

accused persons and the Pakistani army looted valuables from the house of Abdus Samad Sikdar. During cross-examination of P.W.3, the defence merely denied the above evidence regarding the killing of Abdus Samad Sikdar, but the defence did not cross-examine him as regards incriminating statement of identification of the victim Abdus Samad Sikdar as a freedom fighter and looting valuables from his house.

677. P.W.8 Ismail Hossain Sikdar, son of victim Abdus Samad Sikdar, stated that on 22. 5. 1971 at about 3.00 pm while he along with his father were coming to their house chasing cows, the Razakar accused Md. Solaiman Mollah(now dead)identified his father Abdus Samad Sikdar as a freedom fighter to the Pakistani army and at that time accused Idris Ali Sardar accompanied the group of the Pakistani army and a Pakistani army shot his father on his chest. During cross-examination, by giving suggestion to P.W.8, the defence denied the above incriminating evidence but did not cross-examine him regarding the identification of Abdus Samad Sikdar as a freedom fighter. P.W.8 is the star witness of the killing of Abdus Samad Sikdar but the defence did not dispute the killing and also failed to discard the statement of P.W. 8.

678. P.W.10 stated that on 22.5.1971 at about 3.00 pm while he was present at Angaria Bazaar, he saw that the accused persons welcome the Pakistani army and the Pakistani army physically

tortured him and thereafter the Pakistani army and the accused persons along with other Razakar having forcibly detained him started towards Kashavog. While they reached at village Kashavog, he saw that accused Md. Solaiman Mollah(now dead)identified Abdus Samad Sikdar as a freedom fighter and a Pakistani army shot him and he rushed to his house by running and died there. During cross-examination, by giving suggestion to P.W.10 the defence denied his statement made as regards killing of Abdus Samad Sikdar but did not cross-examine him as regards identification of the victim by accused Md. Solaiman Mollah.

679. P.Ws. 2 and 4 stated that on 23.5.1971 in the morning they went to the house of Abdus Samad Sikdar and saw his dead body was lying in his house. P.W.2 claimed that P.W.8 informed him that before killing Abdus Samad Sikdar, the accused persons identified him as a freedom fighter and the Pakistani army shot him and subsequently Razakars and the Pakistani army also looted the valuables from their house. During cross-examination of P.Ws. 2, the defence suggested that P.W.8 did not inform anything to P.W.2 regarding killing of Abdus Samad Sikdar which has been denied by him, but no suggestion was given to P.W.2 regarding witnessing the dead body of Abdus Samad Sikdar in his house and during cross-examination of P.W.4 the defence did not deny that P.W.4 saw the dead body of Abdus Samad Sikder at his house.

680. On perusal of the evidence, it appears that P.Ws. 1 and 3 were locals and claimed that they were present at the crime site at the time of killing the victim Abdus Samad Sikdar and by cross-examining them, the defence failed to bring out any contradiction as regards presence of P.Ws. 1 and 3 and the accused persons at the crime sites at the time of occurrence. P.W.8 is the star witness of the killing of Abdus Samad Sikdar as he accompanied his father while he was returning to his house chasing the cows. By cross-examining P.W.8, the defence failed to bring out any material contradiction or discrepancy as regards his presence at the crime site at the time of killing Abdus Samad Sikdar. P.W.10 is also a very important witness who under compelling circumstances accompanied the Pakistani army and the Razakars and he was also present at crime site at the time of killing victim Abdus Samad Sikdar and during cross-examination, the defence failed to discard his evidence. The evidence of P.Ws 1 to 4, 8 and 10 remain unshaken during cross-examination. Thus the presence of P.Ws. 1,3, 8 and 10 and accused persons at the crime site at the time of killing Abdus Samad Sikdar has been proved beyond reasonable doubt.

681. On scrutiny of the evidence of P.Ws 1,3,8 and 10, it reveals that P.Ws. 1 and 3 stated that both the accused persons identified victim Abdus Samad Sikdar as a freedom fighter, but P.Ws. 8

and 10 stated that accused Md. Solaiman Mollah(now dead)identified victim Abdus Samad Sikdar as a freedom fighter. At the time of identification of the victim as a freedom fighter P.W.8 accompanied the victim and P.W.10 accompanied the Pakistani army and at the relevant time P.Ws. 8 and 10 were close to the Pakistani army, the accused persons and other Razakars for which it was actually possible only for the P.Ws 8 and 10 to hear the language of identification and before killing victim Abdus Samad Sikdar, accused Md. Solaiman Mollah[now dead] only identified the victim as a freedom fighter. P.Ws. 1, 3 and 10 stated that both the accused persons welcome the Pakistani army at Angaria Bazaar launch ghat and P.Ws. 1,3, 8 and 10 stated that at the time of shooting Abdus Samad Sikdar both of them accompanied the Pakistani army and mere presence of the accused persons sharing the common criminal intent of committing the offence at the time of occurrence at the crime site along with the group of perpetrators is enough to prove the charge of participating, aiding, abetting, facilitating and complicity in the commission of the offences of crimes against humanity as specified in section 3(2(a)(g)(h) of the Act of 1973. The evidence of P.W.8 that both the accused persons were present at the crime site along with the Pakistani army at the time of shooting his father is corroborated by the evidence of P.Ws. 1 to 4 and 10 and

the defence could not bring out any contradiction as regards presence of both the accused persons at the crime site while the Pakistani army shot Abdus Samad Sikdar. Thus accused Idris Ali Sardar abetted, facilitated, and substantially contributed in committing the offence of murder as crimes against humanity.

682. It is very pertinent that the victim Abdus Samad Sikdar was not known to the Pakistani army and before identification of Abdus Samad Sikder as a freedom fighter, the Pakistani army did not shot him and only after identification of victim Abdus Samad Sikdar as a freedom fighter, the Pakistani army shot him. The reason of gunshot to Abdus Samad Sikdar by the Pakistani army was that he was a freedom fighter and unless accused Md. Solaiman Mollah(now dead)identified the victim Abdus Samad Sikdar as a freedom fighter, there was no other reason for the Pakistani army to shot him.

683. On scrutiny of the evidence of P.Ws. 1 to 4, 8 and 10, it transpires that killing of Abdus Samad Sikdar was not disputed by the defence and at the time of cross-examination of P.W. 8, the defence affirmed that name of Abdus Samad Sikdar was included in the list of Martyr. Since the killing of Abdus Samad Sikder is admitted by the defence and the evidence of P.Ws. 1 to 4, 8 and 10 remains unshaken during cross-examination, I am of the view that the evidence of those witnesses regarding identification of victim

Abdus Samad Sikder as freedom fighter and presence of the accused persons along with other Razakars and Pakistani army at the crime site at the time of killing is trustworthy and can safely be relied on by this Tribunal in finding the accused person guilty of the offence of murder as crimes against humanity as listed in charge No.1.

684. P.Ws. 1 to 4, 8 and 10 proved beyond reasonable doubt that on 22.5.1971 at about 3.00 pm the accused persons and other Razakars welcomed the Pakistani army when they came at Angaria Bazaar launch dockyard to commit the offences and forming part of a criminal enterprise sharing the common criminal intent of committing the offence the accused persons guided the Pakistani army towards crime site and accused Md. Solaiman Mollah(now dead)identified the victim Abdus Samad Sikdar as a freedom fighter and a Pakistani army shot him and consequently Abdus Samad Sikdar died. Prosecution proved the presence of accused persons along with the group of perpetrators at the crime site beyond a reasonable doubt. Thus the accused Idris Ali Sardar participated, aided, abetted, facilitated and had complicity in the commission of the offence of murder as crimes against humanity.

Witnesses examined by the prosecution as regards killing of Shamvu Nath Karmakar.

685. To prove the event of killing blacksmith Shamvu Nath Karmakar of village Char Kashavog, the prosecution examined P.Ws. 1 to 4, 8 and 10.

686. P. W. 1 Abdul Aziz Sikder [62] stated that on 22.5. 1971 after about 3.00 pm, after killing Abdus Samad Sikdar of Char Kashavog, Pakistani army and accused persons went to the shop of blacksmith Shamvu Karmakar of village Kashavog, situated about 100 yards far from there. At that time accused Solaiman Molla and Idris Ali Sardar pointing Shamvu Nath Karmakar repeatedly told “Malaun, Malaun” and a member of the Pakistani army gunned down him to death.

687. P W 3 Md. Abdul Jalil Howlader [61] stated that on 22.5.1971 after about 3.30 pm after killing Abdus Samad Sikdar, Pakistani army and accused persons went 100 yards towards the shop of blacksmith Shamvu Nath Karmakar and accused Md. Solaiman Molla and Idris Ali Sardar identified him as a “Hindu”, and P. W. 3 and Khalilur Rahman hiding 50 yard far from that place saw that a Pakistani army gunned down him to death.

688. P. W. 2 Jalilur Rahman [65] stated that on 23rd May in 1971 at about 07.00 am he went to the shop of blacksmith Shamvu Nath Karmakar of village Kashavog and saw his bullet pierced dead body was lying in front of his shop.

689. P.W.4 Nurul Islam Sardar [69] stated that on 23.05.1971 in the morning, he went to village Maddhyapara and thereafter he went to village Kashavog and saw the dead body of blacksmith Shamvu was lying in front of his shop. P.W. 8 stated that after killing his father by the Pakistani army, he heard the sound of gunshot from Kashavog Hindu para.

690. P. W. 10 Abul Kalam Hawlader [61] claimed to be the eye witnesses of killing Abdus Samad Sikdar and stated that on 22.5.1971 at about 3.00 pm the Pakistani army and the Razakars including the accused persons having detained compelled him to go with them and while they reached village Kashavog they killed farmer Abdus Samad Sikdar and at that time those Pakistani armies instructed him to bring water for them and taking that advantage he hide in a jungle situated on the west side of the house of Abdus Samad Sikdar and further stated that house of Shamvu Nath Karmakar was situated near the house of Abdus Samad. After a while, he also heard that the Pakistani army also killed Shamvu Nath Karmakar of Kashavog in his shop.

Evaluation of the evidence presented to the Tribunal.

691. The learned prosecutor Mr. Zead-Al-Malum appearing with another learned prosecutor Mr. Hrishikesh Shaha on behalf of the prosecution submitted that on 22.05.1971 at about 3.00 pm after killing Abdus Salam Sikdar a group of Pakistani army along with

the accused persons went to the shop of blacksmith Shamvu Nath Karmakar of village Kashavog and accused persons identified blacksmith Shamvu Nath Karmakar as Hindu and a Pakistani army with intent to destroy Hindu religious group in part gunned down him to death in front of his shop and committed the offence of genocide. The prosecution by examining P.Ws 1 to 4, 8 and 10 who were the locals of the crime site proved the event of killing blacksmith Shamvu Nath Karmakar against the accused persons beyond a reasonable doubt.

692. The learned defence counsel Mr. Gazi M.H. Tamim appearing on behalf of the defence submitted that P.Ws. 1 and 3 who claimed to be the eye witnesses of the event of killing Abdus Samad Sikdar also claimed to be the witnesses of killing Shamvu Nath Karmakar and in a wartime situation, it is not at all believable that after witnessing the killing of Abdus Samad Sikdar, the same witnesses will also witness the another occurrence and the hearsay witness Nos. 2,4 and 10 are also the witnesses of the killing of Abdus Samad Sikdar and they are politically biased against the accused person and also not at all credible witness to prove the event of killing Shamvu Nath Karmakar. Thus the prosecution failed to prove the event of killing Shamvu Nath Karmakar against the accused person beyond a reasonable doubt. There is no specific allegation of direct participation against the

accused- person and the prosecution with ulterior motive falsely implicated him in the instant case in connivance with the inimical witnesses.

693. It is noted that to prove the event of killing blacksmith Shamvu Nath Karmakar, the prosecution examined P.Ws. 1 to 4, 8 and 10, out of which P. Ws. 1 and 3 claimed to be the eye witnesses of the killing and P. Ws 2, 4, 8 and 10 are hearsay witnesses.

694. P.Ws. 1 and 3 as eye witnesses of the killing of blacksmith Shamvu Nath Karmakar of village Kashavog stated that on 22.5.1971 after about 3 pm after killing Abdus Samad Sikdar, the accused persons and the Pakistani army went to the shop of blacksmith Shamvu Nath Karmakar situated about 100 yards far from the house of Abdus Samad Sikdar and the accused persons identified Shamvu Nath Karmakar as Hindu and a Pakistani army gunned down him to death there. During cross-examination of P.Ws. 1 and 3, by giving suggestion to them, the defence denied the above evidence but did not cross-examine P.Ws. 1 and 3 regarding their positive evidence as regards identification of the victim blacksmith Shamvu Nath Karmakar as Hindu.

695. P.Ws. 2 and 4 stated that on 23.5.1971 in the morning, they went to village Kashavog and saw the dead body of blacksmith Shamvu Nath Karmakar was lying in front of his shop and during cross-examination of P.Ws. 2 and 4 their above evidence has not

been denied by the defence. Furthermore by cross –examining P.W.4, the defence affirmed that on 23.5.1971 in the morning he went to village Kashavog and saw 200/250 dead bodies.

696. P.W.10 Abul Kalam Hawladar stated that after killing Abdus Samad Sikdar, the Pakistani army instructed him to bring water for them and taking that advantage he hide in a Jungle on the west side of the house of Abdus Samad Sikdar and heard the sound of gunshots. Subsequently, he came back on the road wherefrom he came to know from the locals that the Pakistani army and Razakars killed about 200 people of village Kashavog and Maddhyapara. He also heard that the Pakistani army gunned down Samvu Nath Karmakar in front of his shop, but during cross-examination, the defence did not deny the evidence of P.W.10 as regards killing blacksmith Samvu Nath Karmakar.

697. It may be mentioned here that during cross-examination of the P.W.1 the defence suggested to him that at the time of occurrence the accused persons were not present at the crime site which has been denied by him, but no suggestion was given to him denying the presence of P.W.1 at the crime site. The defence failed to bring out any contradiction regarding the presence of P.Ws. 1 and 3 at the crime site at the time of occurrence. Furthermore, evidence of P.Ws. 2 and 4 regarding witnessing the

dead body of victim blacksmith Samvu Nath Karmakar has not been denied by the defence.

698. On scrutiny of the evidence of P.Ws. 1 to 4, 8 and 10, it transpires that the defence did not dispute the killing of blacksmith Samvu Nath Karmakar at the relevant time and place of occurrence. The defence case is that the accused persons were not Razakars and they were not involved in the alleged killing Samvu Nath Karmakar. Mere denial of the evidence of the prosecution witnesses by the defence will not negate the incriminating evidence of the prosecution witnesses, unless by cross-examining those witnesses, the defence brought out any favourable statement.

699. In view of the above it is legally proved beyond reasonable doubt that after killing Abdus Samad Sikdar, the accused persons and the Pakistani army again forming part of a criminal enterprise sharing the common criminal intent to destroy the Hindu religious group, in part, went to the shop of blacksmith Samvu Nath Karmakar and the accused persons identified him as Hindu and consequently a Pakistani army gunned down him to death in front of his shop and thus, the accused persons participated, aided, abetted, facilitated and had complicity in the killing of blacksmith Samvu Nath Karmakar.

Witnesses examined by the prosecution as regards genocide.

700. To prove the event of genocide and other inhumane acts as crimes against humanity narrated in charge No. 1, the prosecution examined P.Ws. 1 to 4, 7, and 9 to 12.

701. P W 3 Md. Abdul Jalil Howlader [61] stated on 20th May in 1971, in the afternoon from their own house, he along with his friend Khalilur Rahman went to the house of his paternal aunt situated at village Monkhula under Police Station Palong. The house of his paternal aunt was situated at the western side of Angaria Bazaar. On 22.05.1971 at about 3.30 pm, he along with Khalilur Rahman (now dead) went to Angaria Bazaar. While they were staying at Angaria Bazaar, they heard that the Pakistani armies were coming towards Angaria bazaar from Madaripur. After a while, he and Khalilur Rahman saw from a hide that the Pakistani army came at Angaria bazaar launch dockyard by a launch. At that time they also saw that Razakar accused Md. Solaiman Molla and Idris Ali Sardar were present at the launch dockyard. The Pakistani army detained a boy Abul Kalam Hawlader [P.W.10] just after they got down from the launch and having beaten him compelled to carry a bag of bullets on his head and started towards the Monuhar bazaar. They also saw that accused Md. Solaiman Molla and Idris Ali Sardar and other Razakars guided the Pakistani army towards the Monuhar bazaar. At that time, P. W .3 and Khalilur Rahman

walking through a different walkway were following the Razakars and the Pakistani army.

702. He further stated that on the way to Monuhar Bazaar, they killed Abdus Samad Sikder and Shamvu Karmakar and thereafter, the accused persons and the Razakars went to the Monuhar bazaar. At that time P.W.3 and Khalilur Rahman again followed them. The Monuhar bazaar was a Hindu inhabited area. While they reached Monuhar Bazaar, they saw that the Pakistani army and the Razakars looted the valuables and set fire to the shops of Monuhar bazaar and killed many people. Thereafter the accused persons and the Razakars went to another Hindu inhabited area South Maddhyapara. At that time he and Kahlilur Rahman staying on the south side of Monuhar bazaar where from the South Maddhyapara was visible saw that the Razakars and the Pakistani army looted the valuables and set fire to the houses of South Maddhyapara. At that time the inhabitants of that village were crying and running here and there and the Pakistani army gunned down the villagers of South Maddhyapara to death.

703. He also stated that in the evening the Pakistani army and the Razakars went to Angaria Bazaar launch dockyard from South Maddhyapara on foot and subsequently went by launch. Thereafter they came back to the house of his paternal aunt. P.W. 3 claimed that on 23.05.1971 at about 8:00 am he along with Khalilur

Rahman went to South Maddhyapara and found many dead bodies were lying scattered here and there.

704. P. W. 11 Mohadeb Das [70] was a businessman of Monuhar Bazaar of Palong Police Station. On the 7th day of Bangla month Jyaistha in 1971 at about 03.00 pm, he was present in his shop at Monuhar Bazaar. At that time he saw that people were running, and accused Md. Solaiman Molla and Idris Ali Sardar, other Razakars and Pakistani army were coming towards the north from the east for which he tried to flee away by running from his shop towards his house. While he was trying to flee away by running he received injury by gunshot. Consequently, he fell down on the roadside and became senseless and at about 8/9 pm he regained his sense and went to the house of Ismail Dhali situated near the road. He came to know from the inmates of that house that the Pakistani armies gunned down his cousin Indrajit Das and his paternal aunt to death. He further stated that his two brothers Subash Das and Sohadeb Das (now dead) were also injured by gunshots. His brother Joydeb Das took him from the house of Ismail Dhali to Burirhut of Palong Police Station for treatment. After one week while he came back to his house he found that their houses had been burned for which he took shelter in the house of a Chowkidar of village Tulatola under Palong Thana and after the independence of Bangladesh he

came back to his house and ritual the bones of his cousin and paternal aunt.

705. P. W. 1 Abdul Aziz Sikder [62] is a teacher of Government Children's' Home, Shariatpur. At the time of great War of Liberation in 1971, he was an applicant for S S C examination from the Palong Tulashar High School. Now, he is the Commander of freedom fighters, Palong Police Station Unit. He stated that on 22 May in 1971, at about 03.00 pm he went to the Angaria bazaar and saw that accused Solaiman Molla, accused Idris Ali Sardar, Shamsul Haque Molla, Robiulla Master, Abdul Aziz Molla along with other Razakars were waiting in line at the launch dockyard. Thereafter, a launch came from the side of Madaripur and anchored there. The Pakistan army got down from the launch and the awaiting Razakars welcome them. He witnessed all these hiding behind a shop. The Pakistani army and the Razakars searched and messed up the shops of the launch dockyard and after beating shopkeeper Abul Kalam Hawlader [P.W.10] forcibly dragging him out from his shop compelled him to carry a bag on his head, and they went towards the east side along with him. He followed the army and Razakars in a different walkway. He stated that after killing Abdus Samad Sikdar and Shambu Nath Karmakar, the accused persons, the Pakistan Army and the Razakars went to

village Maddhyapara, but P. W. 1 came back to his house which was situated one kilometer far from village Maddhyapara.

706. He further stated that from his house he saw the flame of fire at village Maddhyapara and heard the sound of gunshots and hue and cry of people. Subsequently, he heard that accused persons, the Pakistani army, and the Razakars set fire and looted many houses and killed many people. On 23.05.1971 at about 07.00 am he went to Maddhyapara along with his villagers and saw about 200/250 dead bodies on the road, garden, canal, puddle etc. and thereafter he came back to his house.

707. P. W. 2 Jalilur Rahman [65] is a retired Office Assistant of Rudrakar Nilmoni High School. During the great War of Liberation in 1971, he was a candidate for SSC examination from the Rudrakar Nilmoni High School and a freedom fighter. He stated that on 23rd May in 1971 at about 07.00 am he went to the house of farmer Abdus Samad of village Char Kashavog and shop of blacksmith Shamvu and saw their bullet pierced dead bodies were lying there. Subsequently, he went to South Maddhyapara which was mainly a Hindu inhabited village and saw that 200/250 dead bodies were lying scattered in the canals, jungles, and fields and also saw the dead body of Hori Das and his wife were lying in their house. At that time a little boy staying beside the dead bodies was timidly saying, "I am a Muslim, don't kill me." Thereafter P.

W. 2 went to the house of Shahji situated at South Madhyapara and saw many bullets priest dead bodies. At that time a few people who were present there informed P. W. 2 that Razakar accused Md. Solaiman Molla and Idris Ali Sarder along with other Razakars and the Pakistani army killed those people. After that, he came back to his house and told wounded Pakhi Das who was staying at his house to go somewhere else.

708. P. W. 4 Nurul Islam Sardar [69] was aged about 23/24 years in the year 1971 and he had a tea-stall at Angaria Bazaar. He stated that on 22nd May in 1971 at about 03.00/03.30 pm he was present at his shop and saw that a launch anchored at the Angaria Bazaar launch dockyard and 150/200 Pakistani army got down from that launch. At that time Razakar accused Md. Solaiman Molla and Idris Ali Sardar along with other 10/12 Razakars welcome Pakistani army at Angaria Bazaar launch dockyard. Thereafter P. W. 4 came back to his shop from the launch dockyard. Subsequently tying up a red towel with a stick he started running towards Kashavog, Maddhyapara, and Rudrakar and loudly told that Razakar accused Md. Solaiman Molla and Idris Ali Sardar along with other Razakars were coming with the Pakistani army towards those villages. He requested the Hindus and Muslims to flee away. Thereafter on 23.05.1971 in the morning, he went to village Maddhyapara and saw about 200/250 dead bodies.

709. P W 7 Anil Chandra Das [61] was an inhabitant of village-Dhanuka and at the time of great War of Liberation in 1971, he was also a student of Class VIII of Palong Tulashar High School. He stated that at the time of War of Liberation in 1971 Palong Police Station was a Hindu inhabited area. On 22nd May in 1971 at about 03.00 pm Razakar accused Md. Solaiman Molla and Idris Ali Sardar along with other Razakars and the Pakistani army attacked the villages Kashavog and Maddhyapara and killed about 200 villagers. At that time he was present in his own house and after the killing of those villagers, the inhabitant of those villages due to fear of their life came to village Dhanuka and P. W. 7 heard from them about the killing of village Kashavog and Maddhyapara.

710. P. W. 9 Sambhu Nath Das [76] is a retired teacher of a Primary School and in 1971 he was a teacher of Palong Tulashar Government Primary School. Now he is a business man. He stated that in 1971 on 22nd May at about 03.00 pm the Razakar accused Md. Solaiman Molla and Idris Ali Sardar, other Razakars and the Pakistani army attacked the village-Kashavog and Maddhyapara of Palong Thana and killed about 200 people of those villages. At that time he was present in his house and heard about the occurrence from the locals.

711. P. W. 10 Abul Kalam Hawlader [61] stated that at the time of War of Liberation in 1971 he along with his uncle Raham Ali

Hawlader and cousin Shamsul Haque Hawlader jointly run the business of a tea-stall on the bank of river adjacent to Angaria Bazaar launch dockyard and at that time he was also a student of Class-VII of Rudrakar Nilmoni High School. Now he is the Office Assistant of Angaria High School. He stated that on 22.5.1971 at about 3.00 pm he was present at Angaria Bazaar and heard that the Pakistani army came at Angaria Bazaar launch dockyard. At that time he saw that a few pro-Pakistani locals were going from Angaria Bazaar to Angaria bazaar launch dockyard uttering the slogan “Naraye Takbir” to welcome the Pakistani army. Thereafter he came back to his shop. He stated that he could recognize accused Md. Solaiman Molla, Idris Ali Sardar, Rabiul Master (now dead), Aziz Molla (now dead) amongst the pro-Pakistani people who welcome the Pakistani army. After coming down from the launch, the Pakistani armies searched his tea-stall and at that time the Pakistani army dragged him out from the shop and physically tortured him.

712. He also stated that the Pakistani army, accused Md. Solaiman Molla and Idris Ali Sardar and other Razakars forcibly detained him and compelled him to go along with them towards east of Angaria Bazaar. While the Pakistani armies and the Razakars were going to the east side along with him, they found two persons were going chasing cows to the south. At that time accused Md.

Solaiman Molla showing those two persons told that “Mukti” is going(freedom fighter is going) and a Pakistani army shot the aforesaid two persons, but they rushed to their house situated to the south side by running. At one point in time, the Pakistani army asked him to bring water. At that time, taking that advantage he went to the house of Samad Sikdar who was injured by a gunshot of the Pakistani army and found his dead body, consequently being frightened, he hide in the jungle and heard the sound of gunshots from the village- Kashavog and Maddhyapara. While Pakistani army and the Razakars left the place, he came out from the hiding and heard from the locals that Pakistani army and the Razakars killed about 200 people of Kashavog and Maddhyapara.

713. P. W. 12 Md. Abdus Samad Talukder [61] stated that at the time of initiation of the War of Liberation in 1971, he was a student of the first year of Madaripur Nazimuddin College and before the War of Liberation in 1971, he used to reside at the house of his elder brother Abdul Gafur situated at Madaripur town. After beginning the War of Liberation in 1971, he went to his village home situated at Palong Thana of Madaripur. On 04.04.1971 he along with Sultan Mazi went to India to take training and after taking training he came back in Bangladesh in the last part of July in 1971 and took part in the War of Liberation.

714. He stated that in the Middle of September in 1971, while he was staying at Madaripur, he came to know through a source that on 22.5.1971 at about 3:00 pm accused Md. Solaiman Molla and Idris Ali Sardar along with 30/35 Razakars and 100/150 Pakistani army of Madaripur A.R. Howlader Jute Mills army camp attacked Hindu inhabited village-Moddhyapara and Kashavu and killed about 200 male and female Hindus including one Muslim. He stated that a monument had been established at village Maddyapara in the year 2010.

Evaluation of the evidence and decision of the Tribunal

715. The learned Prosecutor Mr.Zead-Al-Malum appearing with another learned prosecutor Mr.Hrshikesh Shaha on behalf of the prosecution submitted that during War of Liberation in 1971 the Hindu religious group of Bangladesh were one of the main target of the Pakistani army and to implement the further policy and plan of the Pakistani occupation army created Razakar, Al-Badar and Al-Shams Bahinies. On 22.05.1971 at 3.00 pm the Pakistani army came from A.R. Howladar Jute Mills Army Camp by launch at Angaria Bazaar launch dockyard with intent to destroy the Hindu religious group, in whole or in part and the accused persons, other Razakars as local agent of the Pakistani army welcome them at Angaria Bazaar and sharing the common criminal intent to destroy the Hindu religious group, in whole or in

part, attacked Hindu inhabited village Maddhayapara of Palong Police Station of the then Madaripur Sub-Division and having plundered the houses and shops set them on fire and killed about 200/230 Hindus and thereby committed genocide and other inhumane acts as crimes against humanity. The learned Prosecutor further submitted that the prosecution also exhibited the book titled “GKvĒĥi i ea“fĳg l MbKei” written by “mKqvi vekĳm” which has been marked as material exhibit 1 and also proved the list of Martyrs of Maddhapara and the photograph of the monument built at the crime site which has been marked as exhibit-9. Thus the prosecution witnesses P.Ws. 1 to 4, 7, 9 to 12 who were the locals of the crime sites proved the offence of genocide and other inhuman acts as narrated in charge No.1 beyond all reasonable doubt.

716.The learned defence counsel Mr. Gazi M.H. Tamim appearing on behalf of absconding accused Idris Ali Sardar as State defence counsel submitted that he was not a Razakar and at the time of alleged killing he was not also present at the crime site and there is no allegation of direct participation in the alleged offences and the witnesses examined by the prosecution are also the witnesses of the events narrated in charge Nos. 2 and 3 and it is not at all believable that all the witnesses, witnessed all the events narrated in the charges in a wartime situation and only due to political reason the prosecution falsely implicated the accused person in the

instant case and totally failed to prove the charges beyond all reasonable doubt against the accused person.

717. It is noted that to prove the event of genocide as narrated in charge No. 1, the prosecution examined P.Ws. 1 to 4, 7, 9 to 12, out of which P.Ws. 3 and 11 claimed to be the direct witnesses and P.Ws. 1, 2, 4, 7, 9, 10 and 12 are hearsay witnesses. P.W. 11 claimed to be the victim of the event of genocide narrated in charge No.1.

718. P.W.3 Md. Abdul Jalil Hawladar stated that on 22.5.1971 at about 3.30 pm while he went to Angaria Bazaar along with his friend Khalilur Rahman(now dead), accused persons welcome the Pakistani army at Angaria Bazaar launch dockyard before launching operation at Maddhayapara and at that time Pakistani army detaining a boy Abul Kalam Hawladar(P.W.10) compelled him to carry a bag on his head and at that time accused persons guided the Pakistani army towards Manohar Bazaar and he also followed them in a different walkway. While they reached Manohar Bazaar, they saw that Pakistani army and the Razakars looted the valuables and set fire in the Manohar Bazaar and killed many people. Thereafter the accused persons and the Razakars went to Hindu inhabited South Maddhayapara adjacent to Manohar Bazar. At that time P.W.3 saw that Razakars and the Pakistani army looted the valuables and set fire to the house of the inhabitants of

South Maddhayapara and the Pakistani army gunned down the villagers of South Maddhayapara to death. During cross-examination of the P.W.3 who is the star witness of the event of genocide narrated in charge No. 1, the defence did not deny the killing of Manohar Bazaar and Maddhayapara and the defence also did not deny the fact of looting and arson. The defence only denied that the accused persons did not guide the Pakistani army towards Manohar Bazaar. P.W.3 in his examination-in-chief specifically stated that the accused persons and the Razakars went to Manohar Bazaar and he saw that the Pakistani army and the Razakars looted the valuables and set fire to the shops of Manohar Bazaar and killed many people. But during cross-examination, the defence did not cross-examine the P.W.3 as regards the above incriminating evidence. P.W.3 also stated that the accused persons, other Razakars and Pakistani army after killing of Manohar Bazaar went to Maddhayapara and after looting the houses killed many people. But the above evidence of P.W.3 has not been denied by the defence.

719. During cross-examination of P.W.3, the defence affirmed that he was a local of the crime site, but suggested that due to local dispute he deposed against the accused persons which has been denied by P.W.3. On scrutiny of the evidence of P.W.3, it transpires that the accused persons accompanied the Pakistani

army and other Razakars at the time of the killing of Manohar Bazaar and Maddhayapara and they also participated in looting the houses and set fire. The incriminating evidence of P.W.3 as regards commission of genocide and other inhumane acts as listed in charge No.1 has not been denied by the accused persons.

720. P.W.11 was a businessman of Manohar Bazaar and an inhabitant of Maddhaypara. He claimed to be a victim of the event of genocide as narrated in charge No. 1. He stated that on 7th Bangla month Jyaistha in 1971 at about 3.00 pm he was present at Manohar Bazaar and saw that the accused persons along with other Razakars and the Pakistani army were coming towards north from the west for which he tried to flee away from his shop by running towards his house and at that time he was injured sustaining gunshot on his back side and consequently he became senseless and while he regained his sense he heard that the Pakistani army killed his cousin Indrajit and his aunt and his two brothers Suvash Das and Shah Dev Das were also injured. During cross-examination of P.W. 11, the defence denied that the accused persons were not present along with the Pakistani army at the time of attack and killing of Manohar Bazaar, but the defence did not deny the statement of P.W. 11 as regards killing of Manohar Bazaar and the defence also did not suggest that he was not injured by gunshot. P.W.11 also stated that after returning

his house after one week of the incident he saw that his house had been burned for which he took shelter at the house of Chowkidar Bari of village Tolatala and after independent ritual the bones of his cousin and aunt. During cross-examination of P.W.11, the defence did not cross-examine him as regards the above evidence and his evidence remains undisputed and unshaken.

721. P.W.1 Abdul Aziz Sikder stated that on 22.5.1971 at about 3.00 pm he was present at Angaria Bazar and saw that the accused persons along with other Razakars welcome the Pakistani army at Angaria Bazaar launch dockyard and having captured a boy Abul Kalam Hawladar [P.W.10] compelled him to carry a bag on his head and started towards the east side and after killing Abdus Samad Sikdar and Samvu Nath Karmakar at village Kashavog, the Pakistani army went to the village Maddhayapara and at that time he came back to his house wherefrom he saw the flame of fire at village Maddhayapara and heard sound of gunshots and hue and cry of the people, and that on 23.5.1971 at 7.00 am he went to Maddhayapara along with his villagers and saw about 200/250 dead bodies in the road, garden, jungles, canal etc. P.W.1 is the circumstantial witness of killing Maddhayapara. He specifically stated that after killing Abdus Samad Sikdar and Samvu Nath Karmakar, the accused persons along with the Pakistani army and others Razakars attacked village

Maddhayapara and killed about 200/250 people. During cross-examination of P.W.1, the defence denied the above evidence but did not cross-examine him as regards their involvement in the killing of Maddhayapara and failed to discredit his statement.

722. P.W.2 Jalilur Rahman stated that on 23.5.1971 at about 7.00 am he went to South Maddhyapara which was mainly a Hindu inhabited village and saw about 200/250 dead bodies were lying scattered in the canals, jungle, and field and also saw the dead body of Hari Das and his wife were lying in their house. At that time a little boy staying beside the dead bodies timidly said, "I am a Muslim, don't kill me," but during cross-examination of P.W.2, the defence did not deny the above evidence and his evidence is admitted by the defence.

723. P.W.4 Nurul Islam Sardar stated that on 22.5.1971 at about 3/3.30 pm the accused persons along with others Razakars welcome Pakistani army at Angaria Bazaar launch dockyard and he also loudly stated to the villagers of Kashavog, Maddhayapara and Rudrakar that the accused persons and other Razakars were coming along with the Pakistani army and requested the Hindus and Muslims to flee away and on 23.5.1971 in the morning he went to village Maddhayapara and saw about 200/250 dead bodies and went to the shop of Samvu Nath Karmakar and house of Abdus Samad Sikder and saw their dead bodies. During cross-

examination of P.W.4, the defence did not deny that on 23. 5.1971 in the morning he went to Maddhyapara and Kashavog and saw 200/ 250 dead bodies, and the dead bodies of Abdus Samad Sikdar and Samvu Nath Karmakar and by cross-examining P.W.4, the defence affirmed that on 23.5.1971 in the morning he went to Maddhayapara and saw 200/ 250 dead bodies wherefrom it transpires that the defence admitted the killing of Maddhaypara.

724. P.W.7 Anil Chandra Das stated that after killing of Kashavog and Maddhaypara, the inhabitants of that villages due to fear of their life came to his village Dhanuka and informed him that accused persons, other Razakars, and the Pakistani army attacked those villages and killed about 200 villagers. During cross examination of P.W.7 although the defence denied the killing of Maddhyapara and Kashavog, but did not deny the fact that the inhabitants of those villages to save their lives went to village Dhanuka and informed about the killing of the villagers.

725. P.W.9 Samvu Nath Dash stated that he heard from the locals that on 22.5.1971 at about 3.00 pm the accused persons and other Razakars and the Pakistani army attacked the village Kashavog and Maddhayapara and killed about 200 people of those villages. During cross-examination of P.W.9, the defence denied the above evidence but did not cross-examine him as regards the above evidence.

726. P.W.10 Abul Kalam Hawladar stated that on 22.5.1971 at about 3.00 pm while he was present at Angaria Bazaar, the accused persons, and other Razakars welcome the Pakistani army at Angaria Bazaar launch dockyard and subsequently having captured him went to village Char Kashavog and after killing Abdus Samad Sikdar and Samvu Nath Karmakar, the Pakistani army instructed him to bring water and taking that advantage, he went to the house of Abdus Samad Sikdar and saw his dead body and consequently being frightened he hid in the Jungle and heard sound of gunshots from village Kashavog and Maddhayapara and subsequently heard from the locals that the Pakistani army and the Razakars killed about 200 people of village Kashavog and Maddhayapara. During cross-examination of P.W.10 who is a circumstantial witness of the killing of Maddhayapara, the defence did not deny his above evidence and the evidence of P.W.10 regarding the event of genocide remain uncontroverted by the defence.

727. P.W.12 Md. Abdus Samad Talukder, a freedom fighter, stated that in the middle of September in 1971 he came to know through a source that on 22. 5.1971 at about 3.00 pm accused persons and other Razakars and the Pakistani army of A.R. Hawladar Jute Mills Army Camp of Madaripur attacked village Maddhayapara and Kashavog and killed about 200 Hindus and a

Muslim. He also stated that a monument had been established at village Maddhayapara in the year 2010, but during cross-examination of P.W.12, although the defence denied his above evidence, but did not cross-examine him regarding the event of genocide as listed in charge No. 1.

728. On scrutiny of the evidence of the prosecution witnesses presented to the Tribunal relating to the event of genocide narrated in charge No. 1 it transpires that prosecution examined P.Ws. 1 to 4 and 7, 9 to 12 to prove the event of genocide, out of which P.Ws. 3 and 11 claimed to be the eye witnesses of genocide committed at village Maddhayapara and P.Ws. 1,4 and 10 claimed that before committing genocide at village Maddhayapara, they saw that the accused persons welcome the Pakistani army at Angaria Bazaar launch dockyard and started towards the crime site and P.Ws. 1,3 and 4 claimed that on 23.5.1971 they went to the crime site and saw about 200/250 dead bodies. P.Ws. 7, 9, 10 and 12 stated that they heard that accused persons, other Razakars and Pakistani army killed about 200/250 persons at Maddhayapara.

729. P.W.1 Abdul Aziz Sikder was an inhabitant of village Dhanuka which was situated about 1 ½ [one and a half] kilometer southeast side from Angaria Bazaar, and 1(one) kilometer from Maddhayapara, crime sites of the event narrated in charge No.1. As

regards his presence at the crime site, he stated that on 22.5.1971 at about 3.00 pm he went to Angaria Bazaar and at that time the Pakistani army came there and he saw that the local Razakars welcome them and while they started towards east he also followed them up to the crime sites and saw the killing of Abdus Samad Sikder and Samvo Nath Karmakar. In cross-examination in reply to a question put to him by the defence, he stated that he followed the Pakistani army in such a way that the Pakistani army could not see him. At the time of cross-examination, the defence suggested that the accused persons were not present at the time and at the place of occurrence and that he also did not see them which has been denied by P.W.10. But no suggestion was given to P.W.1 that he was not present at the place of occurrence, and his presence at the crime sites has not been disputed by the defence.

730. P.W.3 Abdul Jalil Hawladar as regards his presence at the crime site stated that on 20.5.1971 he along with his friend Khalilur Rahman went to the house of her paternal aunt at village Monkhola situated on the western side of Angaria Bazaar and on 22.5.1971 at about 3/3.30 pm he along with his friend Khalilur Rahman went to Angaria Bazaar and saw that Pakistani army came there and the accused persons, other Razakars welcome them and they started towards Manohar Bazaar. At that time he along with his friend Khalilur Rahman followed the Razakars and the Pakistani

army in a different walkway and saw the killing of Abdus Samad Sikder, Shamvo Nath Karmakar and killing of many people of Manuhar Bazaar and Maddhayapara. During cross-examination of P.W.3, the defence suggested that he did not see the accused persons at Angaria Bazaar before the commission of the offences or they also did not guide the Pakistani army or he did not follow the Pakistani army which has been denied by the P.W.3. But except the denial of the statement made by P.W.3, the defence failed to bring out any contradiction or material discrepancy to the statement made by P.W.3 as regards his presence at the place of occurrence.

731. P.W.8 Ismail Hossain Sikder stated that at the time of killing, he along with his father Abdus Samad Sikder were chasing cows towards their house and while the Pakistani army shot his father he was present at the place of occurrence. During cross-examination of P.W.8, no suggestion was given to him that he was not present along with his father while the Pakistani army shot his father and by cross-examining P.W.8 the defence affirmed that his father is a Martyr. The defence did not dispute the presence of P.W.8 at the time and place of occurrence.

732. P.W.10 Abul Kalam Hawladar stated that at the time of War of Liberation in 1971 he had a tea stall at Angaria Bazaar launch ghat and while the Pakistani army came at Angaria Bazaar on 22.5.1971 at about 3.00 pm he was present there and saw that the accused

persons, other Razakars welcome them. The accused persons, other Razakars and Pakistani army having captured him compelled to go along with them and started towards the east and he saw that the Pakistani army killed freedom fighter Abdus Samad Sikder. At that time, taking the advantage of bringing water for the Pakistani army, he hid in the Jungle situated on the west side of the house of P.W.8 and heard the sound of many gunshots and subsequently heard from the locals that the Pakistani army killed about 200 people of village Kashovog and Maddhayapara. During cross-examination, the defence suggested that the statement made by him to the effect that the accused persons and other Razakars having captured compelled him to go towards Angaria Bazaar is not correct, but P.W.10 denied the suggestion. The statement made by P.W.10 to the effect that the Pakistani army and the Razakars started from Angaria Bazaar towards east to the crime site has not been denied by the defence. The defence did not dispute the presence of P.W.10 at the time and place of occurrence and by cross-examining P.W.10 the defence failed to bring out any materials contradiction or discrepancy to the statement made as regards his presence at the place and time of occurrence.

733.P.W.1 Abdul Aziz Sikdar, an inhabitant of village Dhanuka and a freedom fighter stated that on 23.5.1971 at about 11.00 am he heard the hue and cry of the local people of adjacent Malopara

of village Maddhayapara and saw the flame of fire and he went to Malopara and saw the burnt and looted house of the villagers and he went to the house of Juga Maya and heard about the occurrence from Malodas. During cross-examination of P.W.1, the defence only denied the evidence of P.W.1 but did not dispute the above statement and no suggestion was given to him to the effect that he did not hear anything from Malodas. P.W.7 Anil Chandra Das, an inhabitant of village Dhanuka, stated that after several days of the event narrated in charge No.2 he heard from victim Jugamaya Malo (P.W.5) and Bijoya Malo (P.W.6) about the occurrence and by cross-examining P.W. 7, the defence affirmed that after 3/ 4 days of the returning of victim Jugamaya Malo (P.W.5) and Bijoya Malo (P.W.6) from the confinement, he went to their house. P.W. 9 Samvo Nath Das, an inhabitant of village Dhanuka, stated that at the time of occurrence narrated in charge No.2, he was present in his house and after the occurrence he heard from the locals about the occurrence. During cross-examination of P.W. 9, the defence did not dispute that he heard about the occurrence from the locals. P.W. 12 Md. Abdus Samad Sikdar, a local freedom fighter, stated that in the last part of July in 1971 he heard through the source about the occurrence narrated in charge No.2. The defence did not dispute the about statement of P.W.12.

734.It is noted that P.Ws. 1 and 3 stated that on 23.5.1971 at about 3.00 pm while the Pakistani army and the Razakars came at Angaria Bazaar, they captured Abul Kalam Hawladar (P.W.10) and compelled him to go along with the Pakistani army and the Razakars keeping a bag of bullets on his head but while P.W. 10 deposed, he only stated that the Pakistani army having captured him from his shop compelled him to go along with the Pakistani army. He did not say that he carried a bag of bullets. It happened due to lack of experience of the learned prosecutor who conducted the trial. No question was put to P.W.10 as regards the cause of his capture by the Pakistani army and the Razakars.

735.P.Ws. 2, 4, 7,9,10 and 12 claimed that they also heard about the events narrated in charge No.1. P.W. 2 was an inhabitant of village Rudrakar, P.Ws.4 and 8 were an inhabitant of village Kashavog, a crime site of the event of killing Samvo Nath Karmakar. P.Ws. 7 and 9 were the inhabitants of village Dhanuka. P.W.10 was an inhabitant of village Kashipur and P.W. 12 was the inhabitant of village Sharnaghosh. P.Ws. 1, 2,3 and 12 are local freedom fighters. The villages Dhanuka, Rudrakar, Kashipur are the adjacent village of the crime sites narrated in charge No.1 and all the P.Ws who claimed to be the hearsay witness were locals of the crime sites. The offences narrated in the charge took place in the month of May in 1971 at the very initial stage of the War of Liberation

and it is quite natural that locals of the crime sites heard about the commission of those heinous crimes which took place in a broad day light. No suggestion was given to P.Ws. 2, 4, 7,9,10 and 12 that they did not hear anything about the occurrence.

736. On scrutiny of the evidence of the prosecution witnesses presented to the Tribunal, it further transpires that during cross-examination of P.Ws. 1 to 4 and 7 to 12, the defence did not dispute the killing of Hindus of Maddhayapara and the material evidence of P.Ws. 2 to 4 and 10 as regards the event of genocide narrated in charge No. 1 has not been denied and the material evidence of P.Ws. 7,11 and 12 were not disputed by the defence. During cross-examination of the witnesses, the defence got the opportunity to discredit the prosecution witnesses, but by cross-examining those P.Ws, the defence totally failed to bring out any favourable statement and the defence also did not cross-examine the P.Ws to contradict the statement made in the examination in chief.

737. The learned defence counsel appearing on behalf of the accused person submitted that P.Ws.2 and 4 are the hearsay witnesses of alleged killing Abdus Samad Sikdar, P.Ws. 2, 4,8 and 10 are the hearsay witnesses of killing Samvu Nath Karmakar, P.Ws. 1,2,4,7,9,10 and 12 are hearsay witnesses of the alleged crime of genocide as listed in charge No. 1 and after long 45 years

those witnesses only stated that they heard about the occurrence from the local people without disclosing any specific source for which the evidence of those hearsay witnesses cannot be relied on by this Tribunal to find the accused person guilty of the offences as narrated in the charge.

738. In this respect the provision of Rule 56 of the International Crimes [Tribunal 1] Rules of Procedure, 2010 is relevant which is quoted below;

Rule“56.(1) The Tribunal shall give due weight to the primary and secondary evidence and direct and circumstantial evidence of any fact as the peculiar facts and circumstances of the case demand having regard to the time and place of the occurrence.

(2) The Tribunal shall also accord in its discretion due consideration to both hearsay and non-hearsay evidence, and the reliability and probative value in respect of hearsay evidence shall be assessed and weighed separately at the end of the trial.

(3) Any statement made to the investigation officer or to the prosecutor in course of investigation by the accused is not admissible in evidence except that part of the statement which leads to the discovery of any incriminating material.”

739. At the time of enactment of the Act of 1973, the legislature made provision in section 19(1) of the Act of 1973 to record any evidence which this Tribunal deems to have probative value and

similarly in the International Crimes [Tribunal-1] Rules of Procedure, 2010 provision has been provided to give due consideration to both hearsay and non-hearsay evidence and as per Rule 56(2) of the ROP, 2010 the Tribunal shall assess and weight the reliability and the probative value of the hearsay evidence. Under the provision of section 19(1) and Rule 56(2) of the ROP 2010, the hearsay evidence is admissible. In other Statutes also made at the instance of the United Nations provided provision for due consideration of hearsay evidence.

740. It is the consistent view of the ICTY, ICTR, and ICC that at the confirmation, hearsay is admissible, even if the source of the evidence is anonymous. In *Katanga & Ngudjeli*, whilst relying on ECHR Jurisprudence (ECHR, *Kostovski V. The Netherlands*, Judgment of 20 November 1989, Application No. 11454/85, para. 44), the Pre-Trial Chamber reiterated the previous finding of the Pre-Trial Chamber in *Lubanga* that “There is nothing in the statute or the Rules which expressly provides that the evidence which can be considered hearsay from anonymous sources is inadmissible per se. In addition, the Appeals Chamber has accepted that for the purpose of the confirmation hearing it is possible to use items of evidence which may contain anonymous hearsay, such as redacted versions of witness statements” (*Prosecutor Vs Lubanga*) Ref: Archbold, page-753).

741. In the ICTY jurisprudence, the hearsay evidence is admissible under Rule 89(c) and in the Tadic, the ICTY made observation in the following language;

“It is well settled in the practice of the Tribunal that hearsay evidence is admissible. Thus, relevant out of court statements which a Trial Chamber considers probative is admissible under Rule 89 (C). This was established in 1996 by the Decision of Trial Chamber II in Prosecutor v. Tadic and followed by Trial Chamber I in Prosecutor V. Blaskic.”

742. In the case of Prosecutor-vs Zlatko Aleksovski, Appeal Chamber, ICTY,(IT 95-14/1-AR 73), the Appeal Chamber made following observation as regards hearsay evidence;

“Accordingly, Trial Chambers have a broad discretion under Rule 89 (C) to admit the relevant hearsay evidence. Since such evidence is admitted to prove the truth of its contents, a Trial Chamber must be satisfied that it is reliable for that purpose, in the sense of being voluntary, truthful and trustworthy, as appropriate; and for this purpose may consider both the content of the hearsay statement and the circumstances under which the evidence arose; or, as Judge Stephen described it, the probative value of a hearsay statement will depend on upon the context and character of the evidence in question. The absence of the opportunity to cross-examine the person who made the statements, and whether the hearsay is “first-hand” or more removed, are also relevant to the probative value of the evidence. The fact that the evidence is hearsay does not necessarily deprive it of probative value, but it is acknowledged that the weight or

probative value to be afforded to the evidence will usually be less than that given to the testimony of a witness who has given it under a form of oath and who has been cross-examined, although even this will depend on upon the infinitely variable circumstances which surround hearsay evidence.”

743. Like other Tribunals created under the respective Statutes made at the instance of the United Nation, in the International Crimes [Tribunal-1] Rules of Procedure, 2010 provision has been provided for due consideration of the hearsay evidence. As per provision of Rule 56(2) of the ROP, 2010, this Tribunal shall also accord in its discretion due consideration to both hearsay and non-hearsay evidence and the reliability and probative value in respect of hearsay evidence shall be assessed and weighed separately. Hearsay evidence is admissible for corroboration of other credible and direct evidence adduced by the prosecution to arrive at a correct finding of fact beyond reasonable doubt.

744. In the case of *Katanga & Ngudjolo* [n.43, ICC. P.T.C. I, 30 September 2008 para 137] the ICC Pre-Trial Chamber held that

“Hearsay evidence will normally meet the threshold of the current admissibility test and it has specifically been confirmed as being generally admissible by the Pre-Trial Chamber.” Such evidence may appear in the form of a witness testifying about the experience of another person. In *Lubanga* [n. 33] ICC Trial Chamber I, June 2008[I] para 28 the Trial Chamber of ICC assessed the hearsay evidence

under the admissibility criteria, acknowledging that “the context and character of the evidence will have an influence on its probative value.”

745. The Pre-Trial Chamber of the ICC II in the case of the Prosecutor vs. Jean-Pierre Bemba Gombo [Case No. ICC-01/ 05-01/08 Para 52, judgment dated 15th June 2009] emphasized on the probative value of the indirect or hearsay evidence and held that

“The Chamber approaches direct and indirect evidence differently and finds it necessary to lay down its approach with regard to indirect evidence. The Chamber adopts and follows a two-step approach. First, it assesses the relevance, probative value, and admissibility of indirect evidence, as it would undertake with respect to direct evidence. Once this assessment is made, it then turns to the second step, namely whether there exists corroborating evidence, regardless of its type or source. Thus, the Chamber is able to verify whether the piece of evidence in question, considered together with other evidence, acquires high probative value as a whole.”

746. The above view is also supported by our Apex Court in the case of Mir Quasem Ali Versus The Chief Prosecutor, Criminal Appeal No.144 of 2014, Judgment dated 8th March 2016 PDF Page 168-169 wherein it has been held that

“**The** expression common knowledge used in sub-section (3) of section 19 of the Act 1973 denotes facts that are commonly accepted or universally known, such as general facts of the history of liberation war or geography or the laws of nature. When there is no direct evidence to connect the

accused with a particular incident even though the common knowledge pointing fingers towards the accused, the tribunal is given the liberty to accept secondary sources, such as the reports, articles, books, video interviews treating them as corroborating evidence without attempting to collect primary sources of evidence because the lapse of time impacts on the quality of evidence. The accused was a powerful central leader of Islami Chhatra Sangha and leader of Al-Badar forces which formed the killing squad. He is also a central leader of Jamat-e-Islami, one of the powerful political parties in the country which maintain a cadre force. This party has influence over a section of people at Chittagong, and also over a good section of people around the country; so naturally, the witnesses remain traumatized all the time.”

747. As regards the credibility of the evidence of eye-witnesses P.Ws.1,3, 8,10 and 11 who testified regarding the events narrated in charge No. 1, the defence submitted that they deposed against the accused person at the instance of the local political rivals of the accused and to get the benefit from the government for which the evidence of those eye witnesses examined by the prosecution in support of the charge No.1 are also not reliable and prayed for acquittal of the accused.

748. On the evaluation of the evidence of the prosecution witnesses, it appears that no specific suggestion was given to the P.Ws. 1,3,8, 10 and 11 who are direct witnesses of the events narrated in charge No. 1 as regards false implication of the

accused person. It is very pertinent to note that the killing of Abdus Samad Sikdar, Samvu Nath Karmakar and killing of about 200 Hindus of Maddhayapara has not been disputed by the defence. The defence case is that the accused Idris Ali Sardar was not Razakar and he was not involved in the commission of the alleged offences.

749. It is settled history that at the time of Great War of Liberation in 1971 the Hindus of Bangladesh was one of main target of Pakistani occupation army, Razakars, Al-Badr and Al –Shams and Senator Edward Kennedy in the summary of his report dated November 1, 1971, submitted to the U.S. Government, mentioned that “the countless eye- witnesses, journalistic accounts, reports of international agencies such as the World Bank and additional information available to the subcommittee document the reign of terror which grips East Bengal (East Pakistan). Hardest hit has been done to the members of the Hindu community who have been robbed of their lands and shops, systematically slaughtered, and in some places, painted with yellow patches marked “H.” All of this has been officially sanctioned, ordered and implemented under martial law from Islamabad.”

750. B.N. Mehrish in War Crimes and Genocide at page 173 para-33 stated that “What has happened in Bangladesh is nothing short of genocide. If what Hitler did in Germany and Poland was an

example of racial genocide, if the tragedy of Jallianwala Bagh was an example of colonial genocide by the use of armed might, what happened in Bangladesh was no less a case of cultural and political genocide on a scale unknown to history. The whole of Bangladesh became truly a Jallianwala Bagh, hallowed and sanctified by the blood of patriotic martyrs and innocent defenseless people; whose only fault was that they were somewhat different than those who came to rule them from Pakistan. If Bangladesh has survived the onslaught and has been able to confine more than three divisions of Pakistan's Army to cantonments and towns, it is because the people of Bangladesh, who laid down their lives at the altar of freedom to pay the price of liberty in the coin of blood and sufferings and did not permit the Pakistani troops to clamp colonial rule on the 75 million people of Bangladesh.

751. Now it is a settled jurisprudence that mere denial of the prosecution evidence by the defence will not negate the incriminating evidence of the prosecution witnesses unless by cross-examining the witnesses, the defence could bring out any favourable statement and made out any material contradiction to the statement made in examination –in – chief. The main purpose of cross-examination is to elicit favourable facts from the witnesses or to impeach the credibility of the testifying witnesses to lessen the weight of unfavourable testimony. During the trial of the case,

the defence got the opportunity to test the veracity of the witnesses and the accuracy of their evidence, but practically the defence remain silent to cross-examine the prosecution witnesses regarding incriminating evidence and impliedly accepted the evidence of the prosecution witnesses. By cross-examining the P.Ws, the defence failed to sift the evidence and discredit P. Ws 1 to 4 and 7 to 12 for which their evidence is legally relied on by this Tribunal to find the accused person guilty of the offences as listed in charge No. 1.

752. P.W, 11 stated that his cousin Indrajit and paternal aunt were killed, and P.W. 2 stated that he saw the dead body of Haridas and his wife at Maddhayapara. P.W.12 stated that he came to know from his source that the accused persons, other Razakars, and Pakistani army killed about 200 Hindus of Maddhayapara and Kashavog and a monument had been built at village Maddhayapara in 2010 and on scrutiny of the exhibit 9 it transpires that the name of 73 (seventy-three) Hindus have been mentioned in the list of Martyrs of Maddhayapara and all the victims of Maddhayapara were Hindu, a religious group, and as such it is legally inferred that the perpetrators had the special intent to destroy the Hindus religious group, whole or in part, which attracts the provision of section 3(2)(c)(i) of the Act of 1973.

753. Under Section 3(2) (c) of the Act of 1973, the main essence of the crime of genocide is “intent to destroy, in whole or in part, a national, ethnic, racial, religious or political group” . It is not required that the perpetrators committed the offence in a broad geographical area. If the perpetrators killed a considerable number of victims or at least a substantial part of the group in a limited geographical area with the intent to destroy the group, whole or in part, the offence will attract the provision of section 3(2)(c)(i) of the Act of 1973. In the instant case in hand, the perpetrators of the crime attacked the village Maddhyapara, a limited geographical area, and killed about 200/250 Hindus of the said village, a substantial number of Hindus, and as such covered by Section 3(2) (c)(i) of the Act of 1973.

754. The ICTY Trial Chamber considered that to constitute an offence of genocide it is not necessary that the perpetrators committed the offence in a broad geographical region and held that

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“It is accepted that genocide may be perpetrated in a limited geographic zone. The geographical zone in which an attempt to eliminate the group is made may be limited to the size of a region ora municipality.” [Case No. IT-95-10, Jelasic Trial Judgment dated December 14, 1999, Para 83, ICTY Trial Chamber]

755. The definition of genocide provided in the Act of 1973 is the replica of the definition of genocide provided in the Convention on the Prevention and Punishment of the Crimes of Genocide except “political group”. “Intent to destroy, in whole or in part” of the protected group is the main essence of the Act of 1973, CPPCG, Statute of ICTR, Statute of ICTY and ICC. The ICTR made a significant role in developing the jurisprudence of the law on “genocide” and in the case of Muvunyi held that –

“At the very least, it must be shown that the intent of the perpetrator was to destroy a substantial part of the group, regardless of the number of victims actually involved.” [Muvunyi, ICTR Trial Chamber, September 12, 2006, Para.483, Case No. 2000-55-A-T] and further emphasized that “An accused can be found guilty of committing genocide even if his personal motivation went beyond the criminal intent to commit genocide.” [Muvunyi, ICTR Trial Chamber, September 12, 2006, Para.479, Case No. 2000,55-A-T]

756. Subsequently, in the Case of Bagosora, the ICTR affirmed the above view and held that -

“The perpetrator must act with the intent to destroy at least a substantial part of the group.” [Case No. ICTR-98-41, Bagosora, Kabiligi, Ntabakuze and Nsengiyumva, ICTR Trial Chamber, December 18, 2008, Para 2115]. “In part’ required the intention to destroy to considerable of individuals who are part of the group.” [Kayishema and

Razindana, Trial Chamber, May 21, 1999, Para.97, Case No. ICTR-95-1]

757. In the Case of Mohimana, the ICTR Trial Chamber emphasized that “complete annihilation of a group” is not the essence of the crimes of genocide and observed that

“In proving the intent to destroy ‘in whole or in part,’ it is not necessary for the prosecution to establish that the perpetrator intended to achieve the complete annihilation of a group.” [Muhimana, ICTR Trial Chamber, April 28, 2005, Para.498, ICTR Case No. 95-1B-T]

758. Subsequently, in the Case of Seromba, the ICTR reiterated the above view made in Mohimana and held that –

“To establish specific genocidal intent, it is not necessary to prove that the perpetrator intended to achieve the complete annihilation of a group throughout the world...”[Seromba, ICTR Trial Chamber, December 13,2006, Para 319, ICTR-2001-66-1]

759. It is noted that the prosecution proved beyond reasonable doubt that the accused persons were the local agent of the Pakistani army and on 22.5.1971 at about 3.00 pm while they came at Angaria Bazaar Launch Dockyard to commit the crime the accused persons and other Razakars welcomed the Pakistani army wherefrom it is legally inferred that the accused persons had the knowledge that the Pakistani army came to perpetrate the offences as narrated in charge No.1 and forming part of a criminal enterprise sharing the common criminal intent to destroy the Hindu

religious group, in whole or in part, they guided the Pakistani army towards the crime sites and as per identification of the accused persons, the Pakistani army gunned down Shamvu Nath Karmakar and about 200 Hindus of Maddhayapara and Kashavog. Thus it is legally proved that the accused persons guiding and remaining presence along with the Pakistani army at the crime sites and identifying the Hindus substantially contributed to the commission of offences as narrated in charge No.1 and thereby participated, aided, abetted, facilitated and had the complicity in the commission of the offences of genocide and other inhumane acts as listed in charge No. 1.

760. It is further noted that the members of the Pakistani army were strangers in the locality of crime sites and without guidance, presence and participation of the accused Md Solaiman Mollah[now dead] and accused Idris Ali Sardar it was not possible on the part of the Pakistani army to identify and kill the Hindus of the crime site for which the accused persons are equally responsible along with the Pakistani army for commission of the offences of genocide and crimes against humanity.

761. The prosecution witness Nos 1,2,3,5,7 and 12 proved beyond reasonable doubt that the village Kashavog and Maddhayapara, the crime sites of the events narrated in charge No.1 were Hindu inhabited areas and it is a settled history that at the time of War of

Liberation in 1971, the Hindus were one of the main target of the Pakistani army, Razakars, Al-Badar and Al-Shams, and the prosecution witnesses presented to the Tribunal proved beyond reasonable doubt that the accused Md Solaiman Mollah[now dead] and accused Idris Ali Sardar along with other Razakars and the Pakistani army with intent to destroy the Hindu religious group of the locality of the crime sites, in whole or in part, attacked those villages and killed about 200/250 Hindus.

762. The prosecution by adducing P.Ws. 1 to 4,7 and 12 proved beyond reasonable doubt that the villages Maddhayapara and Kashavog were Hindu inhabited areas and all the victim of the event of genocide as listed in charge No.1 were Hindus except freedom fighter Abdus Samad Sikdar and the accused Md Solaiman Mollah[now dead] and accused Idris Ali Sardar , other Razakars and the Pakistani army with intent to destroy the Hindu religious group in whole or in part, killed about 200 Hindus of the crime sites which attracts the provision of section 3(2)(c)(i) of the Act of 1973.

763. It is noted that the inconsistency pointed out on behalf of the accused Idris Ali Sardar pertains only to collateral or trivial matters and has no substantial effect on the nature of the offense. In fact, it even signifies that the witnesses were neither coached nor were lying on their stand. There is no inconsistency in complete and

vivid narration as regards the principle occurrence and the positive identification of the accused person as assailant is concerned. There is no material contradiction in the evidence of the prosecution witnesses. Minor inconsistencies in the testimonies of witnesses do not impair their credibility where there is consistency in relation to the principal occurrence and their positive identification. Furthermore, the event of genocide as narrated in charge No. 1 has not been denied by the defence.

764. It is further noted that while the accused Md Solaiman Mollah[now dead] and accused Idris Ali Sardar, other Razakars, and Pakistani army attacked village Kashavog and Maddhayapara, their main target was the Hindus of the crime sites and the perpetrators incidentally saw Abdus Samad Sikdar, an unarmed freedom fighter of village Kashavog and killed him by gunshot as per identification of accused Md. Solaiman Mollah(now dead)and reason was that he was a freedom fighter and thus committed murder as crimes against humanity.

765. “Joint Criminal Enterprise” notion is a mode of criminal responsibility of several persons which was evolved in the post world war trials of international crimes and developed in the judgment of Tadic Case by the ICTY and followed by the ICTR, ICC, and other Tribunals. Provision provided in Section 4(1) of the Act of 1973 and “Joint Criminal Enterprise” are two separate

modes of criminal responsibility of several persons. Under JCE theory, the perpetrators act on the basis of a “common design or ‘common enterprise’ and with a common criminal intent”. “Joint Criminal Enterprise” notion has no direct nexus with the provision provided in section 4(1) of the Act of 1973 inasmuch “common design or common criminal intent” of the perpetrators which are the essence of JCE, are not the element of Section 4(1) of the Act of 1973. Since “CIL will be applicable, so far as it is not inconsistent with the Act of 1973”, accused Idris Ali Sardar incurred the liability under Section 4(1) of the Act of 1973, not under any form of “Joint Criminal Enterprise”.

766. In view of the above evidence, the facts and circumstances of the case, it is proved beyond reasonable doubt that to implement the further policy and plan of the Pakistani occupation army, on 22. 5. 1971 at about 3.00 pm the accused Md Solaiman Mollah [now dead] and accused Idris Ali Sardar and other Razakars welcomed the Pakistani army at Angaria Bazaar launch dockyard who came from Madaripur A.R. Hawladar Jute Mills army camp to destroy the Hindu religious group, in whole or in part, and both the accused persons along with other Razakars and the Pakistani army forming part of a criminal enterprise sharing the common criminal intent to destroy the Hindu religious group, in whole or in part, jointly attacked village Char-Kashavog and killed Abdus

Samad Sikder, a freedom fighter, and Samvu Nath Karmakar, a member of the Hindu religious group, and killed about 200 Hindus of Maddhayapara by gunshots and plundered the houses of the villagers of Maddhayapara and set fire and committed the offence of genocide, and murder, plundering and arson [other inhuman acts] as crime against humanity as specified in section 3(2)(a)(c)(i)(g) and (h) of the Act of 1973 for which accused Idris Ali Sardar incurred liability under section 4(1) of the said Act.

Charge No. 02.

[Genocide, murder, rape, persecution, abduction, confinement, torture, plundering, and arson committed on 23rd and 26th July in 1971 in the localities of Palong Thana of the then Madaripur Sadar Police Station].

767. That on 23 May 1971 at about 11.00 am a group of about 100(one hundred) Pakistani army men accompanied by Razakar accused Md. Solaiman Mollah and Idris Ali Sardar and some other Razakars captured Abul Kalam Howlader from his shop at launch ghat near Angaria bazaar and tortured him and forced him to go with them carrying a bag containing ammunitions. Thereafter, the accused persons and their accomplices having attacked Hindu populated village Malopara [fishermen village] under Palong Police Station of the then Madaripur Sub-Division [at present District Shariatpur] persecuted 15/20 innocent men and 14/15

women after confining them in front of the house of Jogo Maya and also plundered houses and then set them on fire.

768. Then accused persons and their accompanied Razakars and Pakistani army men were divided into two groups, one group remained at village Malopara to guard and torture the confined men and women and the other group including accused persons having attacked village Rudrakar under Palong Police Station confined and tortured Jalilur Rahman and forced him to go with them and went to the house of former Zamindar Pramath Chakraborty and tried to vandalize a Hindu temple by firing shots and killed ailing priest Chandra Mohan Chakrabarty by gunshot and then came back to village Malopara.

769. Thereafter, the accused persons and their accomplice Razakars and Pakistani army men taking the detained 30/35 men including 10/11 women with them came to Pakistani army camp at A.R. Howlader Jute Mills, Madaripur and having confined them there raped the women of different ages for 3(three) days in turn. Thereafter, the accused persons and their accomplice Razakars and Pakistani army men released the detained women and killed all the detained male members of Hindu Community by firing shots, with intent to destroy, in whole or in part, the Hindu religious group, and threw their dead bodies into the Arial Kha River.

770. Thereby accused (1) Md. Solaiman Mollah and (2) Idris Ali Sardar are hereby charged for participating, aiding, abetting, facilitating and complicity in the commission of offences of genocide, and murder, rape, abduction, confinement, torture, and plundering and arson [other inhumane acts] as crimes against humanity as part of systematic attack directed against unarmed civilians as specified in section 3(2)(a)(c)(g)(h) of the Act of 1973 which are punishable under section 20(2) of the said Act for which the accused persons have incurred liability under section 4(1) of the said Act.

Witnesses examined by the prosecution as regards the events narrated in charge No.2.

771. To prove the events narrated in charge No. 2, the prosecution examined P.Ws. 1 to 7, 9, 10 and 12.

772. P. W. 2 Jalilur Rahman [65] is a retired Office Assistant of Rudrakar Nilmoni High School. During the great war of liberation in 1971, he was a candidate for SSC examination from the Rudrakar Nilmoni High School and is a freedom fighter. He stated that on 23.5 1971, at about 11.30 a.m. the Razakars and the Pakistani army came to his house and detained him. Thereafter they along with him went to the house of Zamindar Pramath Lal Chakrabarty. At that time he recognized accused Md. Solaiman Mollah(now dead)and Idris Ali Sardar, Yousuf Miah, Arshad Ali Chowkidar, Aziz Mollah amongst the Razakars who accompanied

the Pakistani army. He stated that except the two accused of this case, none of those Razakars are alive. After going to the house of Pramath Lal Chakrabarty, the Razakars, and the Pakistani army damaged a temple there by shooting and looted the valuables and searched the house to detain the inmates. At one point of the time accused Idris Ali Sardar and Solaiman Molla and other Razakars detained Chandra Mohan Chakrabarty, priest of that temple, and handed over him to the Pakistani army who gunned down him to death at the bank of the pond.

773. He further stated that after killing Chandra Mohan Chakrabarty, the Razakars, and the army kept the bags of bullets on his head and Abul Kalam Hawladar [P.W.10] who was detained earlier and started towards Angaria Bazaar along with them. On the way to Angaria Bazaar, he saw that the Razakars detained 30/35 male and female Hindus at Malopara and the Pakistani army having abducted them from Malopara took the detainees to Angaria Bazaar launch dockyard. The Razakars and the Army took both P.W. 2 and Abul Kalam Hawladar[P.W.10] to the Angaria Bazaar launch dockyard and kept the bags of bullets in the launch and took 30/35 Hindu male and female detainees to the army camp situated at A. R. Hawlader Jute Mills by that launch. P. W. 2 stated that he could recognize his teacher Sukhdev Chandra Shaha amongst the detainees. Since both of them are Muslim, the Pakistani army

released them at Angaria Bazaar launch dockyard and thereafter they came back to their houses.

774. P.W. 2 also stated that after three days, he came to know that out of 30/35 detained male and female who were taken to the Army camp at A.R. Howlader Jute Mills, 20 (twenty) female detainees came back and he went to Malopara to see them and saw Jogomaya Malo, Anjali, Radhika and Bina Rani amongst the detainees who came back to their houses and they informed him that after taking all the detainees to the Army camp, the female detainees were separated from the male and amongst them 5/6 female were selected and tortured brutally. They also informed that the male detainees were taken to the jetty behind the camp and gunned down there to death, and all the female detainees were released.

775. P W 3 Md. Abdul Jalil Howlader [61] used to work in the Office of Social Welfare at Shariatpur and subsequently he retired from service. At the time of the great War of Liberation in 1971, he was a candidate for S SC examination. He stated that on 23.05.1971 at about 8:00 am he and Khalilur Rahman went to South Maddhyapara and saw many dead bodies were lying scattered here and there. At about 11.00/11.30 am while they were returning from the South Maddhyapara, they saw that the Razakars and the Pakistani army were going towards Malopara. At that time they hid

in a garden situated to the south side of Malopara and saw that the accused persons and the Razakars were looting the valuables and setting fire to the houses of Malopara and gunned down about 30/35 people. They also captured about 30/35 males and females from Malopara and detained them in the custody of some Pakistani army men and Razakars, another group of Razakars and the Pakistani army went to village Rudrakar. After a while, those Razakars and the Pakistani army came back to Malopara. On the way to Malopara they detained Jalilur Rahman [P.W.2] and compelled him to carry the bag of bullets on his head. After that, they went to Angaria bazaar launch dockyard along with Jalilur Rahman [P.W.2] and Abul kalam Hawlader [P.W.10] along with about 30/35 Hindu detainees. At that time Abul Kalam Hawladar [P. W. 10] and Jalilur Rahman [P.W.2] carried the bags of bullets on their head. Since Jalilur Rahman and Abul Kalam Howlader were Muslim, they released them at the Angaria Bazaar launch dockyard. Abul Kalam Hawlader had a shop at Angaria bazaar. After that, the Razakars and the Pakistani army took those 30/35 detainees to the Pakistani army camp situated at Madaripur by launch which they saw hiding near the dockyard.

776. P.W.3 further stated that after three days, out of 30/35 detainees, 7 women came back at Angaria bazaar dockyard by launch. At that time they were in exhaustion and went to their

house. Subsequently, they came to know from the said detainees that 15 males amongst those 30/35 detainees were gunned down to death behind the army camp of Madaripur and their dead bodies were thrown into the Arial Kha River, and except those 7 women, the other female detainees had no trace. Out of seven detainees, Bina Rani was aged about 7 years. The female detainees informed that the Pakistani army and the Razakars committed rape on them by turn detaining them in the army camp.

777. P.W.4 Nurul Islam Sardar[69] was aged about 23/24 years in the year 1971 and he had a tea-stall at Angaria Bazaar. He Stated that at about 11.00/11.30 am while he was present at his tea stall at Angaria Bazaar, he saw that Razakar accused Md. Solaiman Molla and Idris Ali Sardar along with other Razakars came at Angaria Bazaar along with Pakistani army. At that time due to fear of his life, he hid behind his shop and saw that the Pakistani army and the Razakars were going towards Malopara through the Angaria Bazaar. After about one and half hours he saw that Pakistani army and the Razakars having detained 15/16 female and 15/20 male came back at Angaria Bazaar launch dockyard and took them to the Pakistan army camp situated at A.R. Hawladar Jute Mills at Madaripur town by a launch.

778. P.W.4 further stated that after three days, from his tea-stall he saw that 15/16 female who were abducted and taken to the

Pakistani army camp, came back with a launch and were going through the Angaria Bazaar. At that time he asked the female victims about the other male detainees who were abducted along with them and the female detainees informed that the Pakistani army after inhumane torture committed rape on them at army camp situated at A.R. Hawladar Jute Mills while they were confined there for three days. They also informed that the Pakistani army gunned down those 15/20 others male detainees to death who were abducted along with them.

779. P. W. 5 Jogomaya Malo[75] was a housewife at the time of War of Liberation in 1971 and at that time she used to live at village South Maddhyapara in the house of her husband who was a fisherman. At that time her three sisters-in-law namely Usha, Anjali and Bijoya[P.W.6] also used to live in the house of her husband. She stated that in the first part of Bangla month Jyaistha in 1971, one day at noon the Pakistani army and the local Razakars encircled their village Sough Maddhyapara and at that time most of the villagers were Hindus. The Pakistani army, Razakar accused Md. Solaiman Molla and Idris Ali Sardar along with other Razakars detained 15 women and 20 men along with her at the inner yard of her house and set fire to all the houses. Thereafter the Pakistani army and the Razakars having abducted the male and female detainees took them to Angaria Bazaar launch dockyard wherefrom

they were taken to the Madaripur Jute Mills by a launch wherein the male and female detainees were confined separately. Amongst the female detainees, some of them had their infant children. Except her four sisters-in-law, Jyotsna, Aroti, Anju and Komala were also confined along with her in the army camp, but she could not remember the name of other detainees. She also stated that Parsha Nath, Mahadev, and Adhari Malo were also confined in A.R. Hawlader Jute Mills but she could not remember the name of other detainees. P.W.5 firmly stated that the Pakistani army and the Razakars committed rape on them while they were confined in A.R. Hawlader Jute Mills for three days.

780. P.W.5 further stated that after committing rape the Pakistani army and the Razakars released the female detainees and sent them by launch to Angaria Bazaar. But the male detainees who were abducted along with them and confined in A.R. Hawladar Jute Mills were not released. Subsequently, she heard that they were killed. After being released, she along with others female detainees came at Angaria bazaar by launch and in reply to a query by the locals present at Angaria Bazaar, she told them about the rape committed on them by the Pakistani army and the Razakars. After coming to their house, she saw that their houses had been burned for which she took shelter at the house of her neighbour who was a Muslim.

781. P. W. 6 Bijoya Malo[80] was residing in the house of her husband in 1971 at village South Maddhyapara and her husband was a fisherman. At that time she along with her three sisters-in-law namely Usha, Anjali, Jogomaya [P.W.5] along with their two aunts-in-law used to live in the house of her husband. She stated that in the first part of Bangla month Jyaistha in 1971, one day at noon the Pakistani army and the Razakars came at their village and captured her along with 20/22 males and 15/16 females and detained them at the inner yard of her house. At that time many of the female detainees had their infant children along with them. Pakistani army and the Razakars after setting fire in the houses abducted her along with male and female detainees and took them to the Angaria Bazaar launch dockyard. She could identify Radhika, Mahadev Malo, Parsha Nath Malo amongst the male detainees and Usha Rani, Anjali, Jogomaya, Sumitra and Arati Malo amongst the female detainees. The Pakistani army and the Razakars forcibly abducted all the detainees to Madaripur Jute Mills by a launch and the male and female detainees were confined there separately. The Pakistani army and the Razakars committed rape on them while they were confined there for three days.

782. P.W.6 further stated that after committing rape all the females detainees were released and they came back at Angaria bazaar launch dockyard by a launch. The Pakistan Army and the Razakars

told the female detainees that the male detainees also will be released later, but they did not release them. While she and other female detainees came back at Angaria bazaar, in reply to questions put to them by the locals present there, they (victims) informed them about the above-mentioned incident. After coming to their houses, the victims saw that their houses had been burned, for which they took shelter in the house of their neighbour Wahab Ali Gorami for three days. Subsequently, they deported to India to take shelter and after the independence of Bangladesh they came back to their houses from India and after coming back to their houses they heard that Razakar accused Md. Solaiman Molla and Idris Ali Sardar along with other Razakars were present along with the Pakistani army who abducted them and confined in Madaripur Jute Mills.

783. P. W. 10 Abul Kalam Hawlader [61] stated that at the time of War of Liberation in 1971 he along with his uncle Raham Ali Hawlader and cousin Shamsul Haque Hawlader jointly run the business of a tea-stall on the bank of river adjacent to Angaria Bazaar launch dockyard and at that time he was a student of Class-VII of Rudrakar Nilmoni High School. He stated that on 23.5.1971 at about 11.00 am he saw Idris Ali Sardar and other Razakars in front of his shop situated at Angaria bazaar launch dockyard. At that time sitting in his shop, P. W. 10 saw that a

launch anchored at Angaria bazaar launch dockyard and accused Md. Solaiman Molla along with the Pakistani army got down from that launch and accused Idris Ali Sardar and other Razakars talked to them. The Pakistani army searched the shops situated at launch dockyard and one point of time beaten him and kept a bag of about half maund on his shoulder. Thereafter Pakistani army and the Razakars compelled him to go towards Angaria Bazaar along with them and subsequently they attacked village Malopara and detained 35 (thirty-five) male and female detainees and having tortured them confined in the house of Bijoy Malo [P.W.6].

784. At that time P. W. 10 saw that an old man came to the Pakistani army and told them something in Urdu which has been recorded as “ Bqv eo gwb` i n`vq, AvtM Pwvj tq, Av` Qv gvj vDb n`vq” Thereafter the Pakistani army divided into two groups, one group started towards Angaria bazaar launch dockyard along with 35 male and female detainees and another group of Pakistani army along with Razakars and P. W. 10 started towards the house of Jaminder Pramath Chakraborti situated at village – Rudrakar wherein the Pakistani army and the Razakars found a temple and tried to vandalize the temple by gunshots and entered the house and finding nobody in that house looted the goods of that house and thereafter,

accused Md. Solaiman Molla and Idrish Ali Sardar, Abdul Aziz (now dead) detained Chandra Mohan Chakraborty and handed over him to the custody of the Pakistani army who gunned down him to death.

785. P.W. 10 further stated that after killing Chandra Mohan Chakraborty, priest of the temple of Zamindar Pramath Chakraborty of Rudrakar, the Razakars, and Pakistani army came back at Angaria Bazaar and at 1.00 pm on that date, while he heard that Pakistani army and the Razakars left Angaria Bazaar, he again came back to his shop and heard that the Pakistani army and the Razakars took 35 male and female detainees to the army camp situated at A.R. Hawlader Jute Mills. After three days he saw that out of 35 detainees only female detainees came back at Angaria bazaar launch dockyard who informed him that they were raped while they were confined for three days and the male detainees were killed.

786. P. W. 1 Abdul Aziz Sikder[62] is a teacher of Government Children's' Home, Shariatpur. At the time of great War of Liberation in 1971, he was an applicant for S S C examination from the Palong Tulashar High School. Now, he is the Commander of freedom fighters, Palong Police Station Unit. He stated that on 23.05.1971 at about 11.00 am, he heard hue and cry of the people and flame of fire at adjacent Malopara (Fishermen's area) of village

Uttar Maddhyapara. After hearing about the incident from his villagers, he along with other villagers went there and found looted and burned houses. He went to the house of Jogomaya of Malopara and heard from Malu Das that two accused persons, other Razakars and the Pakistani army detained about 30/35 male and female and confined them in the house of Jogomaya [P.W.5].

787. He also stated that he heard that after confining them, the army and Razakars went to the house of Promath Chakrabarty of village Rudrakar and after killing Chandra Mohan Chakrabarty, the Razakars, and the Pakistani army came back to the house of Jogomayas' of Malopara and abducted the confined 30/35 male and female and took them by launch to the army camp situated at A.R. Hawlader Jute Mills at Madaripur. After three days of that incident, 15(fifteen) female including two children were released out of 30/35 male and female detainees who were confined in the army camp and they came back to their house. P. W. 1 also heard from Jogomaya[P.W.5] and Aroti that male detainees of that camp were killed and all the female detainees of that camp including her had been raped one after another by the army, accused Solaiman Mollah and Idris Ali Sardar and other Razakars while they were confined for three days. He could only remember the names of Jogomaya Malo, Aroti, and Rani Mondal, amongst the 15 (fifteen) female detainees who came back from army camp, but he could not

remember the name of other detainees. He claimed that the victims were treated by doctors.

788. P W 7 Anil Chandra Das [61] stated that at the time of Great War of Liberation in 1971, he was an inhabitant of village-Dhanuka and a student of Class VIII of Palong Tulashar High School. He stated that at the time of War of Liberation in 1971 Palong Police Station was a Hindu inhabited area. On 23rd May in 1971 at about 11.00 am accused Md. Solaiman Molla and accused Idris Ali Sardar along with other Razakars and the Pakistani army attacked village Malopara and detained about 30/35 males and females and having abducted all the detainees took them to the Pakistan Army Camp situated at A.R. Hawladar Jute Mills at Madaripur town. They confined all the female victims for three days and committed rape on them while they were confined for three days and killed the male detainees. After a few days, he came to know about the incident and went to Malopara and heard from victims Jogomaya Malo [P.W.5]and Bijoya Malo[P.W.6] and their relations about the above-mentioned incident.

789. P. W. 9 Sambhu Nath Das [76] is a retired teacher of a Primary School and in 1971 he was a teacher of Palong Tulashar Government Primary School. Now he is a business man. He stated that on 23.5.1971, at about 11.00 am accused Md. Solaiman Molla and Idris Ali Sardar, other Razakars and the Pakistani army

attacked Malopara of village Maddhyapara and captured 20 males and 15 females from Malopara and having abducted them from Malopara took them to the Pakistani army camp situated at A.R. Howladar Jute Mills at Madaripur town and committed rape on the women while they were confined in the said camp for three days and killed all the males detainees. He heard from the people about the torture, rape, and killing.

790. P. W. 12 Md. Abdus Samad Talukder [61] stated that in 1971 he was a student of the first year of Madaripur Nazimuddin College and at that time he used to reside at the house of his elder brother Abdul Gafur situated at Madaripur town. After starting the War of Liberation in 1971 he went to his village home situated at Palong Thana of Madaripur. On 04.04.1971 he along with Sultan Mazi went to India to take training and after taking training he came back in Bangladesh in the last part of July in 1971 and took part in the War of Liberation.

791. He stated that in the last part of July in 1971, he came to know through the source that on 23.5.1971 at about 11:00 am accused Md. Solaiman Molla and Idris Ali Sardar, other 15/20 Razakars and about 100 Pakistani armies attacked Malopara of Palong Thana and captured about 35 Hindu male and female and after inhumane torture confined them in the inner yard of Jogamaya Malu. He

also came to know that the Pakistani army divided into two groups, one group guarded the confined Hindus and the another group of the army went to the house of Pramath Chakraborty of village Rudrakar and caused damage to the temple. At that time accused Md. Solaiman Molla and Idris Ali Sardar, Abdul Aziz (now dead) detained Chandra Mohan Chakraborty, priest of the temple and handed over him to the custody of the Pakistani army who gunned down him to death.

792. P.W.12 further stated that after killing Chandra Mohan Chakrabarti, a group of army and the Razakars along with accused Md Solaiman Molla and Idris Ali Sardar came back to the house of Jugomaya Malo of Malopara and having abducted 35 male and female from the house of Jugomaya Malo had taken them to the Pakistani army camp situated at A.R. Hawlader Jute Mills, Madaripur. He came to know that there was 15 female and 20 male amongst the 35 detainees. The 15 female detainees were confined in that Army Camp for three days and raped and thereafter they were released. The Pakistani army and the Razakars killed 20 male detainees on the bank of river Arial Kha and floated their dead bodies in the river. He heard about the above-mentioned incident from the source.

Evaluation of the evidence and the decision of the Tribunal

793. The learned prosecutor Mr. Zead-Al-Malum appearing with another learned prosecutor Mr. Hrishkesh Shaha on behalf of the prosecution submitted that on 23.5.1971 at about 11.00 am the accused persons, other Razakars and the Pakistani army attacked Hindu inhabited village Malopara of Police Station Palong of the then Madaripur Sub-Division and having captured about 15/20 innocent Hindu males and 14/15 females confined them in front of the house of Jugo Maya and also plundered the houses and set them on fire. After confining the detainees, a group of Razakars and Pakistani army including the accused persons attacked the house of Zamindar Pramath Lal Chakrabarty of village Rudrakar and tried to vandalize a temple by firing gunshots and killed ailing priest Chandra Mohan Chakraborty by gunshot and came back at Malopara. Subsequently the accused persons and the local Razakars and the Pakistani army having abducted 30/35 male and female detainees took them to A.R Hawladar Jute Mills Army Camp at Madaripur and raped the female detainees while they were confined for three days in the said camp and with intent to destroy, in whole or in part, the Hindu religion group, killed all the male detainees and threw their dead bodies into the Arial Kha River and thereby committed the offence of crime against humanity and genocide as specified in section 3(2)(a)(c)(g)(h) of the Act of 1973 which is punishable under section 20(2) of the

said Act. The prosecution witnesses P.Ws. 1 to 7,9,10 and 12 proved the charge to the hilt against the accused persons beyond all reasonable doubt.

794. Conversely, the learned Advocate Mr. Gazi M.H. Tamim appearing on behalf of absconding accused Idris Ali Sardar as State defence lawyer submitted that there is no allegation of direct participation against the accused person and admittedly the Pakistani army killed the victims, but due to political reason the prosecution falsely implicated him in the case and the witnesses examined by the prosecution are politically biased against the defence. He further submitted that although P.Ws. 5 and 6 claimed to be the eyewitnesses of the alleged abduction and rape but they could not recognize the accused Idris Ali Sardar as the perpetrator, and the prosecution also failed to examine all the victims of abduction, confinement, torture and rape and the neighbours of the alleged crime sites. Thus the prosecution totally failed to prove the charge to the hilt against the accused Idris Ali Sardar beyond all reasonable doubt.

795. It is noted that the events narrated in charge No.2 relate to persecution, abduction, confinement, torture, rape, murder and other inhuman acts as crimes against humanity and genocide committed at village Malopara and Rudrakar. To prove those events narrated in charge No.2, the prosecution examined P.Ws. 2

to 6 and 10 as eyewitnesses of the alleged occurrence and P.Ws. 1, 7, 9 and 12 as hearsay witnesses. P.Ws. 5 and 6 are the victims of the crimes against humanity. The prosecution examined P.Ws. 1, 2, 10 and 12 to prove the killing Chandra Mohan Chakrabarty, out of which P.Ws. 2 and 10 claimed to be the direct witnesses and P.Ws. 1 and 12 are hearsay witnesses.

796. P.W.2 claimed to be the eyewitness of the abduction, confinement, torture, genocide and murder of Chandra Mohan Chakrabarty and he stated that on 23.5.1971 at about 11.30 am, the accused persons, other Razakars, and the Pakistani army came to his house and having captured compelled him to go along with them to the house of Zamindar Pramath Lal Chakrabarty. The Razakars and the Pakistani army tried to vandalize the Temple of that house by gunshots and looted valuables from that house and accused persons and other Razakars having captured Chandra Mohan Chakrabarty handed over him to the Pakistani army who gunned down him to death on the bank of the pond and compelled him and P.W. 10 to carry the bags of bullets on their head and thereafter came back at Angaria Bazaar. On the way to Angara Bazaar, he saw that the Razakars detained 30/35 male and female Hindus at Malopara and the Pakistani army along with the Razakars having abducted them from Malopara took the detainees at Angaria Bazaar launch dockyard. P.W.2 recognized

Sukdeb Chandra Shaha amongst the detainees and subsequently after three days he came to know that the female detainees came back and he went to Malopara to see them. At that time the victims stated to him that they were tortured brutally and the male detainees had been killed. During cross-examination of P.W.2, the defence denied his above evidence but did not cross-examine as regards involvement of the accused persons in the commission of the alleged offences. Evidence of P.W.2 remains undisputed and uncontroverted by the defence.

797. P.W.3 Md. Abdul Jalil Hawladar claimed to be the eye witnesses of abduction and stated that on 23.5.1971 at about 11/11.30 am while they were returning from South Maddhyapara they saw that the accused persons and Razakars captured about 30/35 male and female at Malopara and having confined them in the custody of the Pakistani army and the Razakars, and a group of Razakars and the Pakistani army went to village Rudrakar. After sometimes, they came back from Rudrakar and having abducted 30/35 Hindus from Malopara took them to Angaria Bazaar launch dockyard. The Razakar accused persons, Pakistani army along with 30/35 detainees went to Madaripur by launch and after three days the seven female detainees came back at Angaria Bazaar and thereafter P.W.3 came to know from them that the male detainees were gunned down to death and their dead bodies were thrown

into the Arial Kha river and the Pakistani army and the Razakars committed rape on female detainees one after another confining them in the army camp. During cross-examination of P.W.3, the defence did not deny the evidence of P.W.3 as regards abduction, confinement, torture, genocide, rape committed at village Malopara and the evidence of P.W.3 as regards event narrated in charge No.2 remain uncontroverted and thereby admitted by the defence.

798. P.W.4 Nurul Islam Sardar claimed to be the eye witnesses of the event of abduction narrated in charge No. 2 and stated that on 23.5.1971 at about 11/11.30 am while he was sitting in his shop at Angaria Bazaar, he saw that the accused persons and the Razakars came at Angaria Bazaar and went towards Malopara. After about 1 ½ hour he saw that those Razakars and the Pakistani army were coming back along with 15/16 female and 15/20 male detainees and went to A.R. Hawladar Jute Mills Army Camp situated at Madaripur. After 3 days, while he was sitting in his tea stall, he saw that 15/16 female detainees were going through the Angaria Bazaar. At that time, in reply to a question put to the female detainees, they informed that the Pakistani army raped them while they were confined in the army camp for 3 days and killed 15/20 male detainees. During cross-examination of P.W.4, the defence did not deny his evidence as regards the event of

abduction, confinement, torture, rape and genocide committed at village Malopara and the statement of P.W. 4 regarding the events narrated in charge No.2 is admitted by the defence.

799. P.W.5 Jagomaya Malo, an old lady of aged about 75 years, claimed to be the victim of the event narrated in charge No. 2 and stated that in the first part of Bangla month Jyaistha in 1971 at about noon the Pakistani army and the Razakars having captured 15 female including her and 20 male Hindu of Malopara set fire in all the houses. Thereafter having abducted them from their houses took them at Angaria Bazaar launch dockyard wherefrom they took the detainees to Madaripur Jute Mills. She stated that Jushna, Aroti, Anju, Komola were also abducted along with her and Parsha Nath, Mohadeb, Adhari Malo were also abducted amongst the male detainees. The Pakistani army and the Raazakars committed rape on them while they were confined for three days in the Jute Mills and subsequently released them, but they did not release the male detainees and heard that they killed the male detainees. While the female detainees came back at Angaria Bazaar, in reply to question put to them by the locals, they informed that the army and Razakars committed rape on them and after returning to their home saw that their houses had been burned. During cross-examination of P.W.5, it is suggested that the accused persons and other Razakars did not capture 15 female and 20 male

Hindus and they also did not set fire to their houses which has been denied by P.W.5. But the evidence of P.W.5 as regards abduction, confinement, rape, and genocide was not denied; thereby statement of P.W. 5 is admitted by the defence.

800. P.W.6 Bijoya Malo is an old lady of 80 years and she claimed to be the victim of the event narrated in charge No. 2 and stated that in the first part of Jyaistha in 1971 at about noon the Pakistani army and the Razakars having captured 20/22 male and 15/16 female Hindus including herself from her village Malopara confined them in their yard and set fire to their dwelling houses. The army and Razakars having abducted male and female detainees took them to Angaria Bazaar launch dockyard. She stated that Radhika, Mohadeb Malo, Parsha Nath Malo were also abducted amongst the male detainees and Usha Rani, Anjali, Juga Maya, Sumitra, Aroti Malo were also abducted from Malopara amongst the female detainees and thereafter the Pakistani army and the Razakars committed rape on female detainees while they were confined for three days in the Pakistani army camp and thereafter they were released but they did not release the male detainees. Subsequently, P.W. 6 and the female detainees came back at Angaria Bazaar launch dockyard through launch and in reply to the quarry by the locals present at Angaria Bazaar launch dockyard, they informed them about the torture committed on them and after

coming back, she saw that their houses had been burned. P.W.6 specifically stated that after coming back to their house, she came to know that the accused persons were present along with the Razakars and the Pakistani army who abducted them. During cross-examination of P.W.6, the defence suggested that the accused persons were not present amongst the Razakars and the Pakistani army while they were abducted from their houses, which has been denied by P.Ws. 6, but the defence did not deny the evidence of the P.W.6 made as regards the event narrated in charge No.2 and thereby her evidence so far it relates to the commission of the offences is admitted by the defence.

801. P.W.10 Abul Kalam Hawladar claimed to be the direct witness of abduction and killing Chandra Mohan Chakrabarty. He stated that on 23.5.1971 at about 11.00 am while accused Md. Solaiman Mollah(now dead)and the Pakistani army came down from the launch at Angaria Bazaar launch dockyard, accused Idris Ali Sardar and others Razakars talked to them and detaining him kept a bag of about half maund on his shoulder started towards Malopara and having captured about 35 male and female from Malopara confined them in the house of Bijoya Malo [P.W.6] and along with him went to village Rudrakar and the accused persons and other Razakars having captured Chandra Mohan Chakrabarty, priest of the temple of Pramath Lal Chakrabarty of Rudrakar,

handed over him to the Pakistani army who gunned down him to death and thereafter he came back to his shop at Angaria Bazaar. At about 1.00 pm he heard that the Pakistani army and the Razakars having abducted 35 male and female from Malopara took them to the Army Camp situated at AR Hawladar Jute Mills and after 3 days while the female detainees came back at Angaria Bazaar launch dockyard, they informed that they were raped while they were confined for three days in the Camp and the male detainees were killed.

802. During cross-examination of P.W.10, the defence suggested that on 23.5.1971 he was not present at Angaria Bazaar launch dockyard, and that he also did not meet with the female victims, and that the accused persons were not involved with the occurrence alleged to have been committed on 23.5.1971, but the statement made by P.W.10 as regards event narrated in charge No. 2 has not been denied by the defence and thereby admitted. During cross-examination of P.W. 10, the defence did not deny the killing of Chandra Mohan Chakrabarty, although the defence by giving suggestion to him merely denied the involvement of the accused persons in the killing of Chandra Mohan Chakraborty, but did not cross-examine him as regards the killing and the statement of P.W.10, who is the eyewitness of killing Chandra Mohan Chakrabarty remain uncontroverted and unshaken.

803. P.W.1 stated that on 23.5.1971 at about 11.00 while he was present at his house, he heard hue and cry of the people and flame of fire at adjacent Malopara and South Maddhyapara and thereafter he went there and saw the looted and burnt houses. He went to the house of Juga Maya and heard from Maludas that the accused persons along with other Razakars and Pakistani army captured 30/35 male and female from the Malopara and a group of Razakars and Pakistani army went to village Rudrakar and killed Chandra Mohan Chakraborty and having abducted male and female detainees the Razakars and the Pakistani army took them to Angaria Bazaar launch dockyard and after three days while the female detainees came back, he heard from victim Juga Maya and Aroti that the accused persons along with other Razakars and the Pakistani army committed rape on them while they were confined in the Army Camp and killed the male detainees. He also stated that he could recognize Juga Maya, Aroti, and Rani Mondal amongst the female detainees. During cross-examination of P.W.1, the defence denied his above evidence as regards the event narrated in charge No. 2 but did not cross-examine P.W.1 and evidence of P.W.1 remain uncontroverted.

804. P.W.7 Anil Chandra Das stated that on 23.5.1971 at about 11.00 am the accused persons along with other Razakars and the Pakistani army attacked village Malopara and captured about

30/35 male and female and having abducted the detainees took them to the Pakistani army camp situated at AR Hawladar Jute Mills at Madaripur and committed rape on the female while they were confined for three days and killed the male detainees. Hearing this incident, after a few days, he went to Malopara and heard from the victim Juga Maya Malo (PW.5), Bijoya Malo (PW.6) and their relations about the occurrence. During cross-examination of P.W. 7, the defence affirmed that after 3/ 4 days of returning the victims, he went to the house of victim Juga Maya (P.W.5) and Bijoya Malo (P.W.6).

805. P.W. 9 Samvu Nath Das is a retired teacher of Palong Tolashar Government Primary School and he stated that on 23.5.1971 at about 11.00 am the accused persons, other Razakars and the Pakistani army attacked village Malopara and having captured about 20 male and 15 female abducted them and took them to the Pakistani army camp situated at AR Hawladar Jute Mills at Madaripur town and committed rape on the female detainees while they were confined in the said camp for three days and killed all the male detainees. He heard about the occurrence from the locals. During cross-examination of P.W. 9, the defence denied his above evidence but did not cross-examine him as regards his statement and the evidence of P.W. 9 as regards the event of genocide narrated in charge No. 2 remain uncontroverted.

806. P.W.12 Md. Abdus Samad Talukder, a freedom fighter, stated that he heard through a source that on 23.5.1971 at about 11.00 am accused persons, 18/20 Razakars, and the Pakistani army attacked Hindu inhabited village Malopara and having captured 35 male and female Hindus brought them in front of the house of Juga Maya Malo and tortured them. Thereafter went to village Rudrakar and after killing Chandra Mohan Chakrabarty, a group of Pakistani army, accused persons and the Razakars came back at the house of Juga Maya Malo of Malopara and having abducted 35 male and female detainees forcibly took them to the Pakistani army Camp situated at AR Hawladar Jute Mills at Madaripur and raped the female detainees while they were confined in the army camp for three days and killed 20 male detainees on the bank of river Arial Kha and floated their dead bodies in the river. During cross-examination by giving suggestion to P.W.12, the defence denied his above evidence but did not cross-examine as regards the statement made relating to the event of the genocide and killing Chandra Mohan Chakrabarty as narrated in charge No. 2 and his evidence remains undisputed and uncontroverted by the defence.

807. P.W.2 Jalilur Rahaman was an inhabitant of village Rudrakar, an adjacent village of Maddhayapara. As regards his presence at the crime sites he stated that on 23.5.1971 at about 11.30 am while he was present in his house, the Pakistani army and the Razakars

came to his house and having detained took him to the house of Zamindar Promath Lal Chakrabarty and after killing Chandra Mohan Chakrabarty, Razakars and the Pakistani army having kept bags of bullets on his head and Abul Kalam Hawladar(P.W.10) compelled him to go along with them to Malopara for which he witnessed the occurrence of killing of Chandra Mohan Chakrabarty and abduction of 30/35 Hindus. During cross-examination, P.W.2 affirmed that the Pakistani army keeping the bag of bullets on his head compelled him to go along with the Pakistani army up to Angaria Bazaar.

808. P.W.3 Md. Abdul Jalil Hawladar stated that on 23.5.1971 he went to the village Maddhayapara at 10.00 am and while at about 11/11.30 am he was returning from village Maddhayapara, he saw that the Razakars and the Pakistani army were going to Malopara and hiding in a garden he witnessed the occurrence of the abduction of 30/35 male and female Hindus. During cross-examination of P.W.3, the defence suggested that on 23.5.1971 he did not go to village Maddhayapara which has been denied by P.W.3, but during cross-examination, the defence could not bring out any contradiction or discrepancy regarding his presence near the crime site.

809.P.W.4 Nurul Islam Sardar stated that on 23.5.1971 at about 11/11.30 am while he was present in his shop at Angaria Bazaar, he

saw that Pakistani army, Razakars and the accused persons started towards Malopara and after about 1 ½ hour he saw that the Pakistani army and the Razakars came back along with 15/16 female and 15/20 male Hindus. During cross-examination of P.W.4, the defence did not deny that P.W.4 had a shop at Angaria Bazaar at the time of War of Liberation in 1971 and he also saw the event of the abduction of Hindus. P.Ws. 5 and 6 are the victims of abduction, torture, confinement and rape, and their statement as regards the event narrated in charge No. 2 has not been disputed by the defence.

810.P.W. 10 Abul Kalam Hawladar stated that on 23.5.1971 at about 11.00 am the Pakistani army and the Razakars having captured him from Angaria Bazaar completed him to carry a bag of about half maund and started towards Malopara wherefrom the Pakistani army, Razakars along with P.W.10 went to village Rudrakar and killed Chandra Mohan Chakrabarty and came back at Angaria Bazaar. Thus he saw the killing of Chandra Mohan Chakrabarty, and abduction of 30/35 male and female Hindus. During cross-examination of P.W.10, the defence suggested that he was not present at Angaria Bazaar or he was also not present at his shop which has been denied by P.W.10 and except denial of this statement, the defence could not bring out any contradiction or material discrepancy to the statement made by him as regards

witnessing the killing of Chandra Mohan Chakrabarty and abduction of 30/35 Hindus from their house.

811.P.W.1 Abdul Aziz Sikdar, an inhabitant of village Dhanuka and a freedom fighter stated that on 23.5.1971 at about 11.00 am he heard the hue and cry of the local people of adjacent Malopara of village Maddhayapara and saw the flame of fire and he went to Malopara and saw the burnt and looted house of the villagers and he went to the house of Juga Maya and heard about the occurrence from Malodas. During cross-examination of P.W.1, the defence only denied the evidence of P.W.1 but did not dispute the above statement and no suggestion was given to him to the effect that he did not hear anything from Malodas. P.W.7 Anil Chandra Das, an inhabitant of village Dhanuka, stated that after several days of the event narrated in charge No.2 he heard from victim Jugamaya Malo (P.W.5) and Bijoya Malo (P.W.6) about the occurrence and by cross-examining P.W. 7, the defence affirmed that after 3/ 4 days of the returning of victim Jugamaya Malo (P.W.5) and Bijoya Malo (P.W.6) from the confinement, he went to their house. P.W. 9 Samvo Nath Das, an inhabitant of village Dhanuka, stated that at the time of occurrence narrated in charge No.2, he was present in his house and after the occurrence he heard from the locals about the occurrence. During cross-examination of P.W. 9, the defence did not dispute that he heard

about the occurrence from the locals. P.W. 12 Md. Abdus Samad Sikdar, a local freedom fighter, stated that in the last part of July in 1971 he heard through the source about the occurrence narrated in charge No.2. The defence did not dispute the about statement of P.W.12.

812. P.Ws.5 and 6 are the victim of abduction, confinement, torture and rape narrated in charge No. 2 who stated that the accused persons, other Razakars and Pakistani army having abducted them along with Jyotsna, Arati, Anju, Usha Rani, Sumitra, Anjali, Komala and other males and females confined them in A.R. Hawladar Jute Mills Army Camp and the Razakars and the Pakistani army after inhuman torture committed rape on them while they were confined in the army camp for 3(three) days. P.Ws. 5 and 6 also stated that while they came back at Angaria Bazaar in reply to question put to them by the locals present there, they informed them about the rape committed on the female victims including P.Ws. 5 and 6. P.Ws. 1,2,3,4,7 and 10 stated that they heard from the victims that the accused persons, other Razakars, and the Pakistani army committed rape on the victims while they were confined for 3(three) days in A.R. Hawladar Jute Mills Army Camp. P.Ws. 9 and 12 stated that they heard from the locals that the female victims were raped while they

were confined in A.R. Hawladar Jute Mills Army Camp for 3(three) days.

813. P.Ws. 5 and 6 admitted that accused persons were not known to them, but they heard that the accused persons were present along with the Pakistani army, and stated that the Razakars also committed rape along with the Pakistani army on them. P.Ws.2 to 4 and 10 who are the direct witnesses of the abduction of 30/35 male and female Hindus stated that the accused persons were present along with other Razakars and Pakistani army who abducted the victims from Malopara and took them to army camp. There was no holy purpose of the abduction of young girls and women in a wartime situation from their house and confinement in an army camp. P.W. 5 Jogomaya Malo, P.W.6 Bijoya Malo are aged about 75 and 80 years respectively and both of them stated that the Razakars, and Pakistani army committed rape on them while they were confined in the army camp. Rape is the outcome of the abduction and the perpetrators who abducted the victims are equally liable for commission of the rape on the female victims.

814. On evaluation of the evidence of the P.Ws. 2, 5 and 6, it transpires that Sukdeb Chandra Shaha, Partha Nath, Mohadeb, Adhari Malo and Radhika were abducted amongst about 20 male Hindus. P.Ws.5 and 6 who are the victims of the event of abduction, confinement, torture and rape stated that the accused

persons, other Razakars, and Pakistani army abducted about 20 male Hindus along with them and other female Hindus and the perpetrators did not allow the male Hindus to come back from the confinement of army camp and heard that the male detainees were killed. P.Ws.2,3,4 and 10 who are the direct witnesses of the abduction stated that the accused persons, other Razakars, and the Pakistani army abducted about 30/35 male and female Hindus from Malopara and the P.Ws.1,7,9 and 12 who are the hearsay witnesses of the event of abduction also corroborated the statement of P.Ws. 2 to 6 and 10.

815. Although there is no direct witness of killing about 20 male Hindus but the prosecution witnesses presented to the Tribunal proved beyond reasonable doubt that the accused persons, other Razakars and the Pakistani army on 23.5.1971 at about 11.00 am having abducted about 20 male Hindus along with other female Hindus including P.Ws.5 and 6 from Malopara confined them in A R Hawlader Jute Mills Army Camp and the Pakistani army gunned down the male detainees to death while they were confined in the said army camp. Killing of about 20 (twenty) male Hindus of Malopara has not been disputed by the defence. No suggestion was given to the prosecution witnesses by the defence that the male Hindus came back to their houses. In view of the above facts and circumstances of the case, I am of the view that

about 20 male Hindus were killed while they were confined in AR Hawlader Jute Mills Army Camp and the intent was to destroy the Hindu religious group in part. Genocide is an organized or group crimes and many perpetrators participate in different phases of the occurrence. The killing of about 20 male Hindus is the upshot of the abduction. Since the accused persons, other Razakars, and the Pakistani army abducted and confined about 20 male Hindus and the victims were killed during confinement, the accused persons are equally responsible along with the Pakistani army for killing of those Hindus.

816. On scrutiny of the evidence of the P.Ws.5 and 6, it transpires that the event of rape committed on the victims on the date of occurrence has not been disputed by the defence and no specific suggestion was given to them as regards false implication of the accused persons. Undisputed and uncontroverted statement of the prosecution witnesses presented to the tribunal prove beyond reasonable doubt that the accused persons, other Razakars, and the Pakistani army forming part of a criminal enterprise sharing the common criminal intent to commit rape abducted the victims including P.Ws. 5 and 6 on the date and time of occurrence from their house and the accused persons, other Razakars, and Pakistani army after inhumane torture committed rape on them while they

were confined in A.R. Hawaladar Jute Mills Army Camp for three days.

817. The term rape, sexual assault, and sexual violence are often used interchangeably, but there is no universally accepted definition of wartime rape. At the time of War of Liberation in 1971, the top-down policy of the Pakistani army created a culture of impunity. The girls and young women were particularly targeted by the Pakistan army and its auxiliary force and they committed rape as a tactic of war to humiliate, dominate, instill fear in, disperse forcibly relocate the members of Hindu religious group. The victims of wartime rape are usually civilian women or girls. The purposes of wartime rape are (a).To conquering territory by expelling the population from the country. (b) To eliminating cultural and religious tradition. (c) As a metonymic celebration of territorial acquisition, and (d) For intimidation, humiliation, degradation or destruction of a family.

818. In wartime situation, “the perpetrator invaded the body of a person by conduct resulting in penetration, however slight, of any part of the body of the victim or of the perpetrator with a sexual organ, or of the anal or genital opening of the victim with any object or any other part of the body..... The invasion was committed by force, or by threat of force or coercion, such as that caused by fear of violence, duress, detention, psychological

oppression or abuse of power, against such person or another person, or by taking advantage of a coercive environment, or the invasion was committed against a person incapable of giving genuine consent.” (Elements of crimes (<https://web.archive.org/web/2008120123345>)).

819. In the case of Jean- Paul Akayesu, the ICTR Trial Chamber defined “rape as a physical invasion of a sexual nature committed on a person under circumstances which are coercive. The Tribunal considers sexual violence, which include rape, as any act of sexual nature which is committed on a person under circumstances which are coercive. Sexual violence is not limited to physical invasion of the human body and may include acts which do not involve penetration or even physical contact.” [Prosecutor vs Jean- Paul Akayesu, Case No ICTR-96-4-T, Judgment dated 02.08.1998, para 688, Trial Chamber]

820. As a human being, different people react differently to a given situation or type of situations and there is no clear-cut standard form of human behavioral response when a witness is confronted with a strange or startling or frightful experience. Witnessing crimes in a wartime situation is an unusual experience which elicits different reactions from the witnesses. Undoubtedly, the testimonies of eyewitness P.Ws.2 to 6 and 10 on material points are straightforward and consistent with each other. They personally

saw the accused persons at the crime site at the time of occurrence. Their combined declarations established beyond reasonable doubt the identities of both the accused persons along with other Razakars and Pakistani army as the perpetrators of the crime. Hearsay witnesses P Ws 1, 7,9,10 and 12 also corroborated the evidence of P Ws 2 to 6 and 10.

821. P.Ws. 8 and 9 stated that Malopara is situated within Maddhayapara and it is proved beyond reasonable doubt that on 22.05.1971 at about 3.00 pm the accused persons, other Razakars, and the Pakistani army with intent to destroy the Hindu religious group, in whole or in part, killed about 200/250 Hindus of Maddayapara and committed the offence of genocide, and on 23.05.1971 the accused persons, other Razakars and the same group of Pakistani army again jointly attacked Malopara of village Maddhayapara and having abducted 30/35 male and female Hindus confined them in the army camp situated in A.R. Hawladar Jute Mills, Madaripur and killed about 20(twenty) male Hindus and floated their dead bodies in the Arial Khan River and the killing of about 20 Hindus in the A.R. Hawlader Jute Mills army camp was the part of the policy and plan of the Pakistani occupation army to destroy the Hindu religious group, in whole or in part.

822. On scrutiny of the evidence of the prosecution witnesses presented to the Tribunal, it reveals that P.W.2 Jalilur Rahman

who is the direct witness of the abduction of 30/35 male and female Hindus stated that he could recognize his teacher Sukhdev Chandra Shaha amongst the detainees and the Razakars and the Pakistani army did not cause any harm to P.Ws.2 and 10 as they are Muslim. P.W.5 Jogomaya Malo who is the victim of abduction, confinement, torture and rape stated that she could recognize the name of Partha Nath, Mahadev and Adhari Malo amongst the male detainees who were confined in the army camp and subsequently killed. P.W. 6 Bijoya Malo who is the victim of the abduction, confinement, torture and rape stated that she could recognize the name of Radhika, Mahadev Malo, Parsha Nath Malo amongst the detainees who were abducted and confined along with them in A.R. Hawladar Jute Mills army camp. Above mentioned evidence of P.Ws. 2,5 and 6 were not disputed by the defence. Thus it is proved beyond reasonable doubt that the male detainees who were abducted from Malopara, and killed while they were confined in A.R. Hawladar Jute Mills Army Camp were Hindus and the perpetrators had special intent to destroy the Hindu religious group, in whole or in part, and as such attracts the threshold of the provision of section 3(2)(c)(i) of the Act of 1973.

823. In the Act of 1973 “abduction, confinement, torture, rape and other inhuman acts” has been included in the offence of crimes against humanity and accordingly in charge No. 2 it is alleged that

the accused persons committed the offence of “abduction, confinement, torture, rape and other inhumane acts as crimes against humanity.” At the time of delivery of judgment, this Tribunal will only adjudicate the charges framed against the accused in accordance with the provision provided in the Act of 1973, but not legally authorised to go beyond the Act of 1973. In the Case of Prosecutor Vs- Jean-Paul Akayesu, Case No. ICTR -96-4-T, judgment dated 2nd September 1998, the Trial Chamber I of ICTR judged the accused criminally responsible under section 3(g) of the Statute of ICTR for commission of rape as crime against humanity and unanimously find accused Jean-Paul Akayesu guilty in charge No.13 of the offences of crimes against humanity (rape) and at page 687 observed that-

“The Tribunal considers that rape is a form of aggression and that the central elements of the crime of rape cannot be captured in a mechanical description of objects and body part. The Tribunal also notes the cultural sensitivities involved in public discussion of intimate matters and recalls the painful reluctance and inability of witnesses to disclose graphic anatomical details of sexual violence they endured. The United Nations Convention Against Torture and Other Cruel, Inhuman and Degrading Treatment or Punishment does not catalogue specific acts in its definition of torture, focusing rather on the conceptual framework of state-sanctioned violence. The Tribunal finds this approach more useful in the context of international law. Like torture, rape is

used for such purposes as intimidation, degradation, humiliation, discrimination, punishment, control or destruction of a person. Like torture, rape is a violation of personal dignity, and rape, in fact, constitutes torture when it is inflicted by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity.”

824. “Abduction, confinement, torture, rape and other inhuman acts” are distinct offences and in Section 3(2)(a) of the Act of 1973 those offences have been included in the offence of crimes against humanity. In the instant case, the accused-person and the perpetrators had the special intent to destroy the Hindu religious group, in whole or in part and on 23.05.1971 at about 11. 00 am having jointly attacked Malopara plundered the houses of the Hindus and abducted 30/35 male and female Hindus and confined them in A.R. Hawladar Jute Mills Army Camp, Madaripur and after inhumane torture committed rape on the female detainees and killed about 20 male Hindus. Thus accused Idris Ali Sardar committed the offence of abduction, confinement, torture, rape, and other inhumane acts as crimes against humanity, and genocide. Since the Legislature included those offences in crimes against humanity, there is no scope to merge those offences with genocide. The duty of this Tribunal is only to adjudicate the charges framed against the accused in accordance with the Act of 1973, not to legislate as per its own wisdom.

825. On evaluation of the evidence it transpires that the accused Md Solaiman Mollah[now dead] and accused Idris Ali Sardar, other Razakars and Pakistani army having abducted 30/35 Hindus from Malopara confined them in A.R. Hawladar Jute Mills Army Camp, Madaripur and after inhumane torture committed rape on the female detainees and killed about 20 male Hindus while they were confined in the said camp and killing of those Hindus was a systematic destruction of a fraction of Hindu religious group and as such attracts the provision of section 3(2)(c)(i) of the Act of 1973. It is further noted that while the accused persons along with a group of Pakistani army attacked village Rudrakar, adjacent village of Malopara, the perpetrators did not attack or kill any other civilian of the said village and only killed Chandra Mohan Chakrabarty ,priest of the temple, as part of the same transaction of killing of Hindus of Malopara and the Hindus of the house of former Zamindar Promath Lal Chakrabarty was the main target and intent was to destroy the Hindu religious group in part and thus attracts the provision of section 3(2) (c)(i) of the Act of 1973.

826. P.Ws. 1 to 7, 9, 10 and 12 proved beyond reasonable doubt that on 23.05.1971 at about 11.00 am the accused Md Solaiman Mollah[now dead] and accused Idris Ali Sardar, other Razakars and Pakistani army forming part of a criminal enterprise sharing the

common criminal intent to destroy the Hindu religious group, in whole or in part, attacked Hindu inhabited Malopara of village Maddhayapara and having captured 30/35 male and female Hindus confined them in front of the house of Jogo Maya Malo[P.W.5] and set the houses on fire, and a group of Pakistani army along with the accused Md. Solaiman Mollah[now dead] and accused Idris Ali Sardar, and other Razakars attacked the house of former Zamindar Pramath Lal Chakrabarty of village Rudrakar and tried to vandalize a Hindu temple by firing gunshots and killed priest Chandra Mohan Chakrabarty and thereafter having abducted the 30/35 male and female Hindus from Malopara confined them in A.R. Hawladar Jute Mills Army Camp, Madaripur and after inhuman torture committed rape on the female detainees and killed about 20 male Hindus while they were confined for three days. Thus the accused Md Solaiman Mollah[now dead] and accused Idris Ali Sardar participated, aided, abetted, facilitated and had complicity in commission of the offences of genocide and abduction, confinement, torture, rape and other inhumane acts as crimes against humanity as specified in section 3(2)(a)(c)(i)(g)(h) of the Act of 1973 and accused Idris Ali Sardar incurred liability under section 4(1) of the said Act.

Charge No. 03.

[Murder, confinement, torture and plundering committed in the house of Shailendra Krishna Paul situated at the then Madaripur Sub-Divisional town].

827. That one day of mid-June, 1971 in the afternoon Razakar accused Md. Solaiman Mollah and Idris Ali Sardar accompanied by some other Razakars and 8/10 Pakistani army men attacked the house of Shailendra Krishna Paul [now dead], a leader of Awami League, situated at the then Madaripur Sub-Divisional town[at present Deputy Commissioner's Bungalow, Shariatpur], while he had been taking shelter at a refugee camp in India with his family members, and captured Lalit Mohan Kundu and Suresh Goon alias Shukrai Goon, who were employed by Shailendra Krishna Paul to guard his said house, and having confined in the said house tortured them first and then killed them by stabbing with bayonet, and also plundered that house.

828. Thereby accused (1) Md. Solaiman Mollah and (2) Idris Ali Sardar are hereby charged for participating, aiding, abetting, facilitating and complicity in the commission of offences of murder, confinement, torture and other inhumane acts [plundering] as crimes against humanity as part of systematic attack directed against unarmed civilians as specified in section 3(2)(a)(g)(h) of the Act of 1973 which are punishable under section 20(2) of the said Act for which the accused persons have incurred liability under section 4(1) of the said Act.

Witnesses examined by the prosecution as regards killing of Lalit Mohan Kundu and Suresh Goon @ Shukrai Goon.

829. To prove the event narrated in charge No.3, the prosecution examined P.Ws. 1,3,7,9 and 12.

830. P.W.1 Abdul Aziz Sikder [62] of village Dhanuka is a teacher of Government Children's' Home, Shariatpur. At the time of great War of Liberation in 1971, he was an applicant for S S C examination from the Palong Tulashar High School. Now, he is the Commander of freedom fighters, Palong Police Station Unit. He stated that in the mid of June in 1971, at about 12.00 am he came out of his house and saw that accused Solaiman Molla, accused Idris Ali Sardar, other Razakars, and the Pakistani armies were going towards the house of Jibon Paul (now residence of D.C. Shariatpur) situated about 500 yards far from his house and saw that they entered into the house of Jibon Paul. At that time due to fear of his life, he entered the house of Anil Chandra situated adjacent to that house. Anil Chandra and he hiding in the jungle situated behind the house of Anil Chandra saw that the Razakars and the Pakistani army detained Sukrai, the caretaker of Jibon Paul, from the front side of that house. The accused persons, other Razakars, and the Pakistani army along with Sukrai went to the first floor of the house of Jibon Paul and captured an old man Lalit Mohan who was sitting there. At that time they tortured both the

detainees and stabbed them with bayonets and push down both the injured detainees from the first floor and consequently they died. Thereafter the Razakars and the Pakistani army left the house of Jibon Paul. Subsequently, PW 1 along with the locals went to the house of Jibon Paul and brought the dead bodies of two victims to the front side of the gate of the house of Jibon Paul. PW 1 claimed that he saw the occurrence hiding in the jungle situated 50 yards away from the house of Jibon Paul and buried two dead bodies inside the house of Jibon Paul.

831. P W 3 Md. Abdul Jalil Howlader [61] used to work in the Office of Social Welfare at Shariatpur and subsequently he retired from service. At the time of the great War of Liberation in 1971, he was a candidate for S S C examination. He stated that in the middle of June in 1971 at about 10.00 am he and Khalilur Rahman went to the house of their friend Anil Paul situated at village Dhanuka and house of Zamindar Jibon Paul was situated adjacent to the northern side of that house. At about 11.00/11.30 am while they were staying at the house of Anil Paul they saw that the Pakistani army, Razakar accused persons along with other Razakars came in front of the house of Jibon Paul and detained a man and went to the first floor of the house of Jibon Paul along with that detainee. At that time an old man was staying at the first floor and they also captured him and the Pakistani army killed both the detainees by stabbing

with the bayonets and left the house. Thereafter Abdul Aziz Sikder [P.W.1] along with other locals buried those two dead bodies under the ground beside the house of Jibon Paul.

832. P.W.7 Anil Chandra Das stated that at the time of War of Liberation in 1971 Palong Police Station was a Hindu inhabited area and in the middle of June in 1971, one day at noon he was present at his house and saw that accused persons, 8/10 other Razakars, and 10/15 Pakistani army were coming towards the house of Mukunda Lal Paul. At that time being frightened he along with Aziz Sikdar [P.W.1] and other villagers hid in a jungle beside his house and saw that the Pakistani army detained Shukrai from the front side of the house of Mukunda Lal Paul and took him to the first floor of that house wherein they saw Lalit Mohan Kunda and also detained him. Thereafter the Pakistani army having stabbed both of them with the bayonets pushed down them from the first floor and at that time the accused persons were also present along with the Pakistani army. After killing Lalit Mohan Kundo and Shukrai Goon the Pakistani army and the Razakars left the house. Thereafter he, Aziz Sikdar[P.W.1] and other villagers came out from hid and went to that house and saw the dead bodies of Shukrai Goon and Lalit Mohan Kunda. Thereafter he along with others buried their dead bodies under the ground in front of that house.

833. P. W. 9 Sambhu Nath Das [76] is a retired teacher of a Primary School and in 1971 he was a teacher of Palong Tulashar Government Primary School. Now he is a business man. He stated that in the middle of June in 1971 accused Md. Solaiman Molla and Idris Ali Sardar along with other Razakars and the Pakistani army attacked the house of Mukunda Lal Paul of the village -Dhanuka (presently residence of the D. C Shariatpur). At that time the owners of that house took shelter in India and two caretakers of that house namely Lalit Mohan Kunda and Suresh Goon alias Shukrai Goon used to look after the house. The Razakars and the Pakistani army having detained them took to the first floor and by stabbing with the bayonets killed them and pushed down their dead bodies from the first floor. After killing them, the Razakars and the Pakistani army left the house. Thereafter he went to the house of Mukunda Lal Paul and heard about the occurrence from Anil Chandra Das [P.W.7] and Aziz Sikdar [P.W.1] who were present there. PW 9 stated that Anil Chandra Das and Aziz Sikdar buried their dead bodies under the ground in front of that house.

834. P. W. 12 Md. Abdus Samad Talukder [61] stated that in 1971 he was a student of the first year of Madaripur Nazimuddin College and at that time he used to reside at the house of his elder brother Abdul Gafur situated at Madaripur town. After starting the War of Liberation in 1971 he went to his village home situated at Palong

Thana of Madaripur. On 04.04.1971 he along with Sultan Mazi went to India to take training and after taking training he came back in Bangladesh in the last part of July in 1971 and took part in the War of Liberation.

835. He stated that at the last part of September in 1971, he came to know that in the middle of June 1971 at about 2:00 pm under the leadership of accused Md. Solaiman Molla, other Razakars, and the Pakistani army attacked the house of Zamindar Jiban Krishna Paul and Nil Krishna Paul (presently residence of D.C. Shariatpur). On the way to that house, the Razakars and the Pakistani army detained one Sukria and took him to that house and also detained Lalit Mohan Kunda from that house. Thereafter the Razakars and the Pakistani army took Sukrai and Lalit Mohan to the first floor of that house and killed them stabbing by bayonets and threw down their dead bodies on the ground.

Evaluation of the evidence and the decision of the Tribunal

836. The learned prosecutor Mr. Zead-Al -Malum appearing with another learned Prosecutor Mr. Hrishikesh Shaha on behalf of the prosecution submitted that to prove the event of killing Lalit Mohan Kunda and Sukrai Goon and other inhuman acts as narrated in charge No. 3, the prosecution examined P.Ws.1,3,7, 9 and 12. P.Ws. 1,3 and 7 are the direct witnesses of the killing and P.Ws.9 and 12 as hearsay witnesses also corroborated the evidence of

P.Ws.1,3 and 7. All the witnesses were locals of the crime site and by cross-examining those witnesses, the defence failed to discredit their statement and the prosecution proved beyond reasonable doubt that in the mid of June in 1971, the accused persons along with other Razakars and the Pakistani army attacked the house of Mukunda Lal Paul and captured Lalit Mohan Kundu and Suresh Goon alias Sukrai Goon from that house and after inhumane torture killed them and committed the offence of murder as crimes against humanity as specified in section 3(2)(a)(g) and (h) of the Act of 1973 which is punishable under section 20(2) of the said Act.

837. The learned Advocate Mr. Gazi M.H. Tamim appearing on behalf of the absconding accused Idris Ali Sardar submitted that P.Ws. 1,3,7,9 and 12 who were examined by the prosecution to prove the event narrated in charge No.3 are also witnesses to the events narrated in charge Nos. 1 and 2 and it is not at all believable that all the prosecution witnesses saw and heard all the events narrated in the charges in a wartime situation and due to political reason the witnesses falsely deposed against the accused Idris Ali Sardar in respect of offences narrated in the charge and they are not at all credible witness and the prosecution failed to prove the charge to the hilt against the accused Idris Ali Sardar and he prayed for acquittal.

838. It is noted that to prove the event narrated in charge No. 3, the prosecution examined P.Ws. 1,3,7,9 and 12, out of which P.Ws. 1,3, and 7 are direct witnesses. P.Ws. 1, 7 and 9 were the inhabitants of village Dhanuka, crime site of the event narrated in charge No.3, and P.Ws.1,3 and 12 are freedom fighters. P.W.7 Anil Chandra Das was the neighbour of Zamindar Jiban Paul and P.W.1 Abdul Aziz Sikdar is the neighbour of P.W.7 and P.W.3 Md. Abdul Jalil Hawladar is the friend of P.W.7. P.W.9 Samvu Nath Das stated that immediate after the occurrence he came to the place of occurrence and heard about the occurrence from P.Ws. 1 and 7.

839. P.W.1 Abdul Aziz Sikdar claimed to be the eyewitness of the event narrated in charge No. 3 and stated that one day in the mid-June in 1971 at about 10.00 am he came out of his house and saw that the accused persons, other Razakars, and the Pakistani army were going towards the house of Jiban Paul situated 500 yards far from his house and they entered into the house of Jiban Paul and being frightened he entered into the house of Anil Chandra [P.W.7] and subsequently hiding in the jungle saw that they captured Sukrai Goon, Caretaker of Jiban Paul, from the front side of the house and also captured an old man Lalit Mohan from the first floor who was sitting there and after inhuman torture injured them thrusting with bayonets and the Pakistani army pushed down both the injured detainees from the first floor and consequently

they died and after killing both the detainees, they left that house and thereafter P.W.1 along with the locals went to the house of Jiban Paul and saw their dead bodies. During cross-examination of P.W.1, the defence denied the above evidence but did not cross-examine him to discard the evidence of P.W.1 relating to the event narrated in charge No. 3 and the evidence of P.W.3 remain uncontroverted by the defence. The defence suggested that the accused persons were not present at the house of Jiban Paul at the time of occurrence which has been denied by P.W.3, but the defence did not dispute the killing of Lalit Mohan Kundu and Sukrai Goon.

840. P.W.3 Md. Abdul Jalil Hawladar claimed to be the direct witness and stated that in the mid-June in 1971 at about 10.am, he along with his friend Khalilur Rahman went to the house of their friend Anil Chandra Das situated adjacent to the house of Zamindar Jiban Paul of village Dhanuka. At about 11/11.30 am while they were staying at that house, they saw that accused persons, other Razakars, and the Pakistani army came in front of the house of Jiban Paul and detaining a man along with him went to the first floor of Jiban Paul and captured an old man from the first floor and the Pakistani army killed both of them by thrusting with bayonets and subsequently Abdul Aziz Sikdar (P.W.1) and the locals of the crime site buried the dead bodies of those victims.

During cross-examination of P.W.3, the defence suggested that the accused persons did not go in front of the house of Jiban Paul which has been denied by him but facts of detaining the victim by the accused persons and killing of the victims thrusting with bayonets has not been denied and the incriminating evidence of P.W.3 remains uncontroverted. P.W.3 was an inhabitant of village Cikandi and the house of Jiban Paul was situated at village Dhanuka for which P W 3 could not disclose the name of the victims as they were not known to him.

841. P.W.7 Anil Chandra Das, neighbour of Mukunda Lal Paul claimed to be the direct witness and stated that one day in the mid of June in 1971 at about noon while he was present in his house, he saw that the accused persons along with other 8/10 Razakars and 10/15 Pakistani army were coming towards the house of Mukunda Lal Paul and being frightened he along with Abdul Aziz Sikdar [P.W.1] hid in a Jungle adjacent to his house and saw that the Pakistani army having captured Sukrai Goon from the front side of the house of Mukunda Lal Paul took him to the first floor and they also captured Lalit Mohon Kundu from there and thrusting with bayonets pushed down them from the first floor and consequently they died. At that time accused persons were also present along with the army. During cross-examination of P.W.7

by giving a suggestion, the defence denied the above evidence but did not dispute the killing.

842. P.W.9 Samvu Nath Das of village Dhanuka stated that one day in the mid-June in 1971, the accused persons, other Razakars and the Pakistani army attacked the house of Mokundu Lal Pal of his village Dhanuka and the Razakars and the Pakistani army captured Lalit Mohan Kundu and Suresh Goon @ Sukari Goon from that house and thrusting with the bayonets confirmed their death and pushed down their dead bodies from the first floor and left the crime site. After the occurrence, he went to the house of Mukunda Lal Paul and heard from Anil Chandra Das (P.W.7) and Abdul Aziz Sikdar (P.W.1) about the occurrence who buried the dead bodies of the victims under the ground in front of that house. During cross-examination of P.W.9, the defence did not dispute the killing of Lalit Mohan Kundu and Sukrai Goon and suggested that the accused persons were not present at the time of killing, but did not cross-examine P.W.9 as regards the event narrated in charge No. 3 and his evidence remain uncontroverted and unshaken.

843. P.W.12 Abdus Samad Talukdar, a freedom fighter, stated that in the last part of September in 1971 he heard from the source that in the mid of June in 1971 at about 2.00 pm accused –persons , other Razakars and the Pakistani army attacked the house of

Zamindar Jiban Krishna Paul and Nil Krishna Paul of village Dhanuka and on the way to that house the Razakars and the Pakistani army captured one Sukrai and took him to the first floor of that house and also captured Lalit Mohan Kundo from the first floor of the house of Zamindar Jiban Krishna Paul and killed both of them thrusting with bayonets and had thrown down their dead bodies on the ground. During cross-examination of P.W.12, the defence only denied the above evidence but did not cross-examine P.W.12 to discredit his statement and during cross-examination evidence of P.W.12 remains uncontroverted and unshaken.

844. On scrutiny of the evidence of the prosecution witnesses, it transpires that out of 5 (five) witnesses examined by the prosecution to prove the event narrated in charge No.3, P.Ws 1, 7 and 9 were the inhabitant of village Dhanuka, crime-site of the event narrated in charge No. 3. P.W. 7 Anil Chandra Das is the neighbour of Mukunda Lal Paul, crime-site of the event narrated in charge No. 3, who claimed that at the time of occurrence he was present in his house and saw that accused persons, 8/10 Razakars, and 10/15 Pakistani army were coming towards his house and due to fear of his life, he and Aziz Sikdar (P.W 1), neighbor of P.W 7, hid into the jungle near his house wherefrom he witnessed that the army captured Sukrai from the front side of the house of Mukunda

Lal Paul and Lalit Mohan from the first floor and thrusting with bayonets killed them. At that time accused Md Solaiman Mollah [now dead] and accused Idris Ali Sardar were present along with the Pakistani army. P.W. 1 Abdul Aziz Sikdar stated that while the Pakistani army, accused persons and other Razakars were going to the house of Jiban Paul [son of late Mukunda Lal Paul], he was present in his house and being frightened he entered into the house of Anil Chandra Das [P.W 7] and along with P.W.7 hid into the jungle on the back side of that house wherefrom he witnessed that the army captured Sukrai from the front side of the house of Mukunda Lal Paul and Lalit Mohan from the first floor and thrusting with bayonets killed them. P.W.3 Abdul Jalil stated that on the date of occurrence in the morning at about 10 am he along with his friend Khalilur Rahman went to the house of his friend Anil Chandra Das [P.W 7] and at about 11/11.30 am he saw that accused persons, other Razakars, and Pakistani army entered the house of Jibon Paul and having captured 2(two) persons from the house killed them trusting with bayonets. During cross-examination of P.W. 3, in reply to a question put to him by the defence, he affirmed that at the time of occurrence he, his friend and other 4/5 persons were present at the house of Anil Chandra Das [P.W.7].

845. It further transpires that during cross-examination of P.Ws. 1, 3 and 7 who claimed to be the direct witness of the occurrence, the

defence did not dispute the killing of Lalit Mohan Kundu and Sukrai Goon as stated by them and the defence also did not dispute the presence of those witnesses at the time of occurrence at the house of Anil Chandra Das [P.W.7]. The defence also did not give any suggestion to P.Ws. 1, 3 and 7 that they were not present at the time of occurrence at the house of Anil Chandra Das for which the presence of P.Ws. 1,3 and 7 at the house of P.W.7 at the time of the killing is admitted by the defence. In view of the above, I am of the view that P.Ws.1, 3 and 7 witnessed the killing of Lalit Mohan Kundu and Sukrai Goon. P.W. 9 Shamvu Nath Das, an inhabitant of village Dhanuka stated that after the occurrence, he went to the crime site and saw the dead bodies of Lalit Mohan Kundu and Sukrai Goon on the east side of the house of Mukunda Lal Paul and heard from Anil Chandra Das [P.W.7] and Abdul Aziz Sikdar [P.W.1] about the occurrence and during cross-examination presence of P.W.9 at the crime site immediate after occurrence has not been disputed by the defence. P.W. 12 Abdus Samad Talukdar, a freedom fighter, stated that he heard from the source about the occurrence which has not been disputed by the defence. In view of the about evidence, it reveals that there was a good reason for P.Ws. 9 for hearing the occurrence from P.Ws. 1 and 7, and P.W. 12 also heard about the occurrence from the source of freedom fighters.

846. P.W. 7 Anil Chandra Das, neighbour of Mukunda Lal Paul stated that one day in the mid of June in 1971 at about noon while he was present in his house he saw that the accused persons, other Razakars, and Pakistani army were going to the house of Mukunda Lal Paul and captured Sukrai Goon from the front side of that house and also captured Lalit Mohan Kunda from the first floor and thrusting with bayonets had thrown down them on the ground floor and at that time accused persons were also present along with the group of Pakistani army. Evidence of P.W. 7 as regards the killing of the victims is corroborated in detail and material particulars by P.Ws. 1 and 3 who are also direct witnesses. P.Ws.9 and 12 who are hearsay witnesses of the event narrated in charge No. 3 also corroborated the evidence of P.Ws. 1, 3 and 7. I do not find any reason to disbelieve their statement.

847.The purpose of cross-examination is to directly challenge or test the reliability or credibility of the statement of the prosecution witnesses and to bring out the material contradiction or discrepancy of their statement made during examination in chief relevant to the charge, but on scrutiny of the evidence of the prosecution witnesses presented to the Tribunal it transpires that by cross-examining P.Ws.1,3,7,9 and 12, the defence failed to bring out any material contradiction or discrepancy to their statement made at the time of examination-in-chief and also failed to refute their statement which

remains uncontroverted and unshaken. There is good reason to rely on the evidence of those witnesses to find accused Idris Ali Sardar guilty of the offences as listed in charge No.3.

848. On scrutiny of the evidence of the prosecution presented to the Tribunal it transpires that accused Md. Solaiman Mollah(now dead) and accused Idris Ali Sardar were present along with other Razakars and Pakistani Army at the time of capturing Sukrai Goon from the front side of the house of Jiban Paul and after that, the same group of perpetrators went to the first floor of that house and captured Lalit Mohan Kunda and at that time accused persons were also present there and after killing both the detainees, accused persons and the Pakistani Army left the house of Jiban Paul.

849. It is proved beyond reasonable doubt that before commission of the offences narrated in the charge Nos. 1 to 3, the Pakistani Army came from A.R Hawlader Jute Mills Army Camp, Madaripur, and the accused persons joined along with the group of Pakistani Army from Angaria Bazaar and reason of the accompanying the Pakistani Army who gunned down the victims was to identify the victims to facilitate the killing. Since the Pakistani Army was a stranger in the locality of the crime site, accused Md. Solaiman Mollah[now dead] and accused Idris Ali Sardar as locals of the crime site substantially contributed in killing

Suresh Goon alias Shukrai Goon and Lalit Mohan Kundu in identifying and detaining the victims remaining presence along with the group of perpetrators and thereby aided, abetted, facilitated and had complicity in the commission of the offence of murder as crimes against humanity as enumerated in Section 3(2)(a)(g)(h) of the Act of 1973.

850. The offence narrated in charge No. 3 was committed in a wartime situation and crimes against humanity are an organized or group crime. It is not required that the perpetrators himself committed the offence. The mere presence of the accused at the crime site along with the group of perpetrators sharing the common criminal intent to commit the crime is sufficient to bring the accused within the criminal net. Even, the presence of the perpetrators at the crime site is not required to find the accused liable under Section 4(1) of the Act of 1973.

851. It is noted that the perpetrators having attacked the house of Zamindar Mukunda Lal Paul killed Lalit Mohan Kundu and Sukrai Goon, two members of Hindu religious group. The victims of the crime of genocide are the group itself and not the individual alone, the individual is just the element of the group. At the time of the attack, the perpetrators targeted the members of the group, but not the group itself and as such do not attract the provision of Section

3(2)(c) of the Act of 1973, thus committed the offence of crimes against humanity.

852 The prosecution by adducing P. Ws. 1, 3, 7,9 and 12 proved beyond reasonable doubt that the accused Md Solaiman Mollah[now dead] and accused Idris Ali Sardar along with other Razakars and Pakistani army forming part of a criminal enterprise sharing the common criminal intent to commit the crime, on the date and time attacked the house of Mukunda Lal Paul of village Dhanuka and killed Lalit Mohan Kunda and Sukrai Goon, who were civilians, and the accused persons by remaining presence at the crimes site along with the Pakistani army and detaining the victims participated, aided, abetted, facilitated and had complicity in the commissions of the offence of murder as crime against humanity as specified in section 3(2)(a)(g)(h) of the Act of 1973 for which accused Idris Ali Sardar incurred liability under section 4(1) of the said Act.

Charge No. 04.

[Offence of deportation of Hindu religious people of Palong Police Station of the then Madaripur Sub-Division to India].

853. That during the War of Liberation in 1971 Razakars accused Md. Solaiman Mollah and Idris Ali Sardar and other Razakars in collaboration with Pakistani occupation army committed widespread and systematic killing and destruction of Hindu

religious people in the localities of Palong Police Station of the then Madaripur Sub-Division, and thereby accused persons and their accomplice Razakars and Pakistani army created panic and horror in the said localities in committing genocide and murder, rape, torture, confinement, persecutions, etc as crimes against humanity which forced the Hindu religious people to leave the country facing ineffable harassment. Due to the commission of these offences, thousands of Hindu religious people of different localities of the then Madaripur Sub-Division being frightened were thus compelled to be deported to India.

854. Thereby accused (1) Md. Solaiman Mollah and (2) Idris Ali Sardar were charged for participating, aiding, abetting, facilitating and complicity in the commission of offences of deportation as crime against humanity as part of systematic attack directed against unarmed civilians as specified in section 3(2)(a)(c)(g)(h) of the Act of 1973 which are punishable under section 20(2) of the said Act for which the accused persons have incurred liability under section 4(1) of the said Act.

Witnesses examined by the prosecution as regards deportation.

855. To prove the event of deportation, the prosecution examined P.Ws. 1 to 7 and 9.

856. PW 1 Abdul Aziz Sardar stated that village Kashavog, Maddhyapara, Uttar Maddhyapara, South Maddhyapara, Malopara were the Hindu inhabited areas and after the commission of the

offences as listed in charge Nos. 1 to 3 the Hindu inhabitants of those areas deported to India due to fear of their life. The accused persons and their accomplice Razakars looted the houses of those Hindu people.

857. P W 2 Jalilur Rahman stated that after the commission of the offences as listed in charge Nos. 1 and 2, the Hindu inhabitants of Malopara and Maddhyapara deported to India to save their life.

858. P W 3 Md. Abdul Jalil Hawladar stated that after the commission of the offences as listed in charge Nos. 1 to 3 the Hindu villagers of Malopara and South Maddhyapara being frightened deported to the India and Razakar accused Md. Solaiman Molla and Razakar accused Idris Ali along with other Razakars looted the abandoned houses of the Hindus.

859. P. W. 4 Nurul Islam Sardar stated that after the commission of the offences as listed in charge Nos. 1 and 2 the Hindus of Kashavog, Maddhyapara, Malopara, Rudrakar etc. villages deported to India to save their life.

860. P W 5 Jogamaya Malo is the victim of abduction, confinement, torture, and rape. She stated that after returning to their house from the confinement of three days in A.R. Hawladar Jute Mills Army Camp, she saw that their houses had been burned for which she took shelter at the house of her neighbour who was

a Muslim and after a few days, to take shelter all of them deported to India, and after the independence of Bangladesh, P.W. 5 along with others came back to their houses.

861. P W 6 Bijoya Malo is also the victim of abduction, confinement, torture , and rape. She stated that after the commission of the offences as listed in charge No.2 they deported to India to take shelter and after the independence of Bangladesh they came back to their house from India and heard that Razakar accused Md. Solaiman Molla and Idris Ali Sardar along with other Razakars were present along with the Pakistani army who abducted them and confined in Madaripur Jute Mills Army Camp.

862. P.W.7 Anil Chandra Das stated that in 1971 Palong Thana was Hindu inhabited area and due to the commission of the offences as listed in charge Nos. 2 and 3 many of the Hindus being frightened deported to India. In cross-examination P.W. 7 stated that in 1971 his parents, brother, and sisters deported to India and before that they used to live in the same house.

863. P.W. 9 Shamvo Nath Das stated that after the commission of the offences as listed in charge Nos. 1 and 2, the villagers of Dhanuka and Maddhayapara being frightened deported to India.

Evaluation of the evidence and the decision of the Tribunal

864. The learned prosecutor Mr. Zead-Al- Malum appearing with another learned prosecutor Mr. Hrishkesh Shaha on behalf of the prosecution submitted that during War of Liberation in 1971 the accused persons, other Razakars and Pakistani army jointly killed about 200/250 Hindu religious people of the locality of the then Madaripur Sub-division and created panic in the locality of crime sites as listed in charge Nos. 1 to 3 and committed murder, rape, torture, confinement, persecution and other inhumane acts as crimes against humanity and genocide and compelled the Hindu religious people to leave the country in facing ineffable harassment and due to commission of those offences thousand of the Hindus of the locality of the crime sites as narrated in charge Nos. 1 to 3 were compelled to deport to India and the prosecution by adducing P.Ws. 1 to 7 and 9 proved the event of deportation narrated in charge No. 4 and thereby the accused persons committed the offence of deportation as crimes against humanity as specified in section 3(2)(a)(g)(h) of the Act of 1973 which is punishable under section 20(2) of the said Act for which the accused persons incurred liability under section 4(1) of the said Act.

865. The learned defence counsel Mr. Gazi M.H. Tamim appearing on behalf of the accused Idris Ali Sardar submitted that there is no specific date of occurrence of the alleged crime of deportation and

there is also no specific allegation against the accused Idris Ali Sardar. The allegations brought against him are vague and indefinite, and the witnesses examined by the prosecution did not say anything as regards involvement of the accused person in the alleged offences of the deportation and he prayed for the acquittal of the accused Idris Ali Sardar from the charge.

866. It is noted that the prosecution examined P.Ws. 1 to 7 and 9 to prove the event of deportation as crimes against humanity out of which P.Ws 1 to 3 are freedom fighters and P.Ws 5 and 6 are victims of the event narrated in charge No.2 and all were locals of the crime sites.

867. On scrutiny of the evidence of prosecution witnesses presented to the Tribunal it transpires that village Kashavog, Maddhyapara, North Maddhyapara, South Maddhayapara, Malopara, Monuhar Bazaar were the Hindu inhabited area which are the crime sites of the events narrated in charge Nos. 1 to 3 and after commission of those offences the Hindus of those area being frightened under compelling circumstances left the country and deported to India, but the defence did not cross-examine P.Ws. 1 to 7 and 9 as regards the evidence of deportation. It is noted that at the time of adjudication of charge Nos. 1 to 3 it is held that the accused persons, other Razakars, and the Pakistani army killed about 200/250 Hindus of village Maddhyapara, Kashavog, Malopara,

Dhanuka, and Rudrakar. It is an admitted fact that after the commission of those offences, the Hindus of those villages being frightened to save their lives deported to India.

868. It may be mentioned here that although the deportation has been mentioned as crimes against humanity in section 3(2)(a) of the Act of 1973, but nowhere in the said Act, deportation has been defined. Now it is required to see the jurisprudence and examine the definition of deportation as given by the ICTR, ICTY, and ICC.

869 Deportation is a forceful displacement of civilian population from their country to outside the territory, carried out by expulsion under any form of coercion from the area in which the victims lawfully reside. The victims of the crime of deportation sometimes had no choice but under compelling circumstances to save their lives, liberty, honour, prestige and dignity leave the country due to adverse situation prevailed at the relevant time. Force does not mean actual physical force but includes coercive circumstances or abuse of state power against the victims taking the advantage of coercive or hostile environment.

870. Force-displacement of civilian beyond a state or border, even in the absence of the intent to displace the civilian on a permanent basis is considered as deportation. Forced displacement means that people are moved against their will or without a genuine choice.

The unlawful acts of the accused persons contributed to the deportation. Fear of violence, duress, confinement, psychological oppression, and other such circumstances created a coercive environment in the locality of the crime sites narrated in charge Nos.1 to 3 for which there was no choice but the Hindus of the crimes sites were compelled to leave the country, thus amounting to deportation.

871. The ICC Trial Chamber in the case of Prosecutor vs Radovan Karadzic, Case No. IT-95—5118-T, Judgment dated 24.3.2016 Para 488 interpreted the notion “deportation and forcible transfer” and observed that-

“The elements of deportation and forcible transfer are substantially similar. Deportation and forcible transfer are defined as (i) the forced displacement of one or more persons by expulsion or other forms of coercion, (ii) from an area in which they are lawfully present, (iii) without grounds permitted under international law. There is an important distinction between the two crimes; for deportation, the displacement of persons must be across a de jure border between states or, in certain circumstances, a de facto border, and for forcible transfer, the removal may take place within national boundaries. “

872. To prove the charge of deportation under Section 3(2)(a) of the Act of 1973 it is required that the perpetrators forcefully displaced the civilians from their house or the area where the

victims lawfully reside. If the victims under coercive circumstances or environment leave their residence that also constitutes deportation. In this respect, I recall the observation of the ICC Trial Chamber made in Karadzic in Para 489 wherein it has been observed that –

“To establish deportation and forcible transfer, there must be a forced displacement of persons carried out by expulsion or other forms of coercion. The term “ forced “ may include physical force, as well as the threat of force or coercion, such as that caused by fear of violence, duress, detention, psychological oppression, or abuse of power, or the displacement is determined by the absence of genuine choice by the victim in his or her displacement. As such, while persons may consent to, or even request, their removal, any consent or request to be displaced must be given voluntarily and as a result of the individual’s free will, assessed in light of the surrounding circumstances of the particular case.”

873. It is noted that prior to the enactment of the Act of 1973, deportation was considered as crimes against humanity in other legal instruments such as in the Nuremberg Charter, the Charter of the International Military Tribunal for the Far East, Control Council Law No. 10. Subsequently in the Statute of the ICTR, Statute of the ICTY, Statue of the SCSL and the Statute of the ICC also deportation has been included as crimes against humanity. However, neither the Act of 1973 nor the other instruments referred to above provided a clear definition of deportation.

874. In the High Command case, [the US v. von Leeb, (1948) 11 LRTWC 1 (United States Military Tribunal), 394] the US Military Tribunal considered that

“there is no international law that permits the deportation or the use of civilians against their will for other than on reasonable requisitions for the need of the army, either within the area of the army or after deportation to rear areas or to the homeland of the occupying power. ”

875. “The clear intention of the prohibition against forcible transfer and deportation to prevent civilians from being uprooted from their homes and to guard against the wholesale destruction of communities. In that respect, whether an individual has lived in a location for a sufficient period of time to meet the requirements for residency or whether he or she has been accorded such status under immigration laws is irrelevant. Rather, what is important is that the protection is provided to those who have, for whatever reason, come to “live” in the community- whether long term or temporarily. Clearly, the protection is intended to encompass, for example, internally displaced persons who have established temporary homes after being uprooted from their original community. In the view of the Trial Chamber, the requirement for lawful presence is intended to exclude only those situations where the individuals are occupying houses or premises unlawfully or illegally and not to impose a requirement for “residency” to be

demonstrated as a legal standard.” Prosecutor vs. Mitomir Stakic Case No. IT-97 24-A, Judgment dated 22 March 2006, para 284-285.

876. Right of the citizen to stay in his/her house is the fundamental right in all civilized country and the forcible transfer of any citizen is prohibited. In the case of Prosecutor vs. Milomir Stakic, Case No. IT-97-24-A, Judgment dated 22.03.2006, at para 277 ICTY Appeal Chamber observed that

“The protected interests underlying the prohibition against deportation include the right of the victim to stay in his or her home and community and the right not to be deprived of his or her property by being forcibly displaced to another location. The same protected interests underlie the criminalization of acts of forcible transfer, an “other inhumane act” pursuant to Article 5(i) of the criminalization of acts of forcible transfer, in “other inhumane act” pursuant to Article 5(i) of the Statute.”

877. Forceful expulsion of persons or displacement of persons under coercive circumstances from their house is the main element of deportation. In the case of Prosecutor vs Milomir Stakic, Case No. IT-97-24-A, Judgment dated 22.03.2006, at para 278 ICTY Appeal Chamber observed that

“the appeals Chamber is of the view that the actus reus of deportation is the forced displacement of persons by expulsion or other forms of coercion from the area in which

they are lawfully present, across a de jure state border or, in certain circumstances, a de facto border, without grounds permitted under international law. The Appeals Chamber considers that the mens rea of the offence does not require that the perpetrator intends to displace the individual across the border on a permanent basis.”

878. The ICTY Appeal Chamber in the case of Prosecutor vs. Milomir Stakic, Case No. IT-97-24-A, Judgment dated 22.03.2006, at para 279 emphasized on the forceful displacement or coercive circumstances as element of the deportation and held that

“the definition of deportation requires that the displacement of persons be forced, carried out by expulsion or other forms of coercion such that the displacement is involuntary in nature, and the relevant persons had no genuine choice in their displacement. Factors other than force itself may render an act involuntary, such as taking advantage of coercive circumstances. The Appeals Chamber has previously stated, albeit in the context of forcible displacement, that “it is the absence of genuine choice that makes displacement unlawful”, a statement which is equally applicable to deportation. Therefore, while persons may consent to (or even request) their removal, that consent must be real in the sense that it is given voluntarily and as a result of the individual’s free will, assessed in the light of the surrounding circumstances.”

879. In the case of Prosecutor Vs. Radislav Krstic, Case No. IT-98-33-T Judgment dated 2 August 2001, the ICTY Trial Chamber held that “ despite the attempts by the VRS to make it look like

a voluntary movement, the Bosnian Muslims of Srebrenica were not exercising a genuine choice to go, but reacted reflexively to a certainty that their survival depended on their flight.“

880. The ICTY Trial Chamber in the case of Krnojelac, Case No. IT-97-25, Judgment dated 15th March, 2002 para 475 held that “the term “forced”, when used in reference to the crime of deportation, is not to be limited to physical force but includes the threat of force or coercion, such as that caused by fear of violence, duress, detention, psychological oppression or abuse of power against such person or persons or another person, or by taking advantage of a coercive environment” and the Appeal Chamber in the Case of Prosecutor vs. Milomir Stakic, Case No. IT-97-24-A, Judgment dated 22.03.2006; ICTY Appeal Chamber affirmed the above view.

881. In the case of United States of America v. Erhard Milch Case 1946 - 1947, Case No. 2 P 865 conducted under Control Council Law No.10, the concurring opinion of Judge Philips of Nuremberg Military Tribunal is that “displacement of groups of persons from one country to another is the proper concern of international law in as far as it affects the community of nations. International law has enunciated certain conditions under which the fact of deportation of civilians from one nation to another during times of war becomes a crime. “

882. Article 49 of the Geneva Convention IV provides as follows:

“Individual or mass forcible transfers, as well as deportations of protected persons from occupied territory to the territory of the Occupying Power or to that of any other country, occupied or not are prohibited, regardless of their motive.”

883. Article 17 of Additional Protocol II (dealing with non-international armed conflicts) stated that:

“The displacement of the civilian population shall not be ordered for reasons related to the conflict unless the security of the civilians involved or imperative military reasons so demand... Civilians shall not be compelled to leave their own territory for reasons connected with the conflict.”

884. In 2005, the International Committee of the Red Cross published its study on the current state of Customary International Humanitarian Law. In that study, Rule 129 provided as follows.

“A. Parties to an international armed conflict may not deport or forcibly transfer the civilian population of an occupied territory, in whole or in part unless the security of the civilians involved or imperative military reasons so demand.

B. Parties to a non-international armed conflict may not order the displacement of the civilian population, in whole or in part, for reasons related to the conflict, unless the security of the civilians involved or imperative military reasons so demand.”

885. The ICTY Appeal Chamber in the Case of Prosecutor vs. Milomir Stakic, Case No. IT-97-24-A, Judgment dated 22.03.2006

para 300, emphasized on the displacement of the civilian across a border and held that

“In the view of the Appeals Chamber, the crime of deportation requires the displacement of individuals across a border. The default principle under the customary international law with respect to the nature of the border is that there must be expulsion across a de jure border to another country, as illustrated in Article 49 of Geneva Convention IV and the other references set out above. Customary international law also recognizes that displacement from ‘occupied territory, as expressly set out in Article 49 of Geneva Convention IV’ Individual or mass forcible transfers, as well as deportations of protected persons from occupied territory to the territory of the Occupying Power or to that of any other country, occupied or not, are prohibited, regardless of their motive.” The Appeals Chamber also accepts that under certain circumstances displacement across a de facto border may be sufficient to amount to deportation. In general, the question whether a particular de facto border is sufficient for the purposes of the crime of deportation should be examined on a case by case basis in light of customary international law.

886. Nature of deportation may not be permanent, rather forceful transfer of civilian population outside the territory is the element of the crime of deportation. In the Case of Prosecutor vs. Milomir Stakic, Case No. IT-97-24-A, Judgment dated 22.03.2006, para 304 ICTY Appeal Chamber observed that

“There has been a lack of consistency in the jurisprudence of the Tribunal regarding the requisite means *rea* of the offence of deportation. Several Judgments have entered convictions for deportation without making any findings on a putative intent to deport permanently. Conversely, the Blagojevic and Jokic, Brdanin, Simic et al., and Naletilic and Martinovic Trial Chamber, as well as the Trial Chamber, in this case, all required that the perpetrator act with the intent that the removal of the persons be permanent.”

887. On scrutiny of the evidence, it appears that P.Ws. 5 and 6 are the victims of abduction, confinement, torture and rape and after the commission of those offences they deported to India and after independence, they came back in Bangladesh. The perpetrators committed rape as part of a top-down policy intended to terrorize the Hindus or as part of policy, strategy, tool or weapon of war and the purpose of rape was to deport the victims to India. P.W. 7 also stated that his parent, brother, and sister also deported to India. P.Ws. 1 to 7 and 9 proved that thousand of Hindus of village Maddhayapara, Malopara, Rudrakar, Kashavog and Dhanuka after commission of the offences as narrated in charge Nos. 1 to 3 being frightened to save their lives, honour and dignity deported to India and deportation of Hindus of the crimes sites is an admitted fact.

888. It is noted that at the time of adjudication of charge Nos. 1 to 3 it is held that the accused persons, other Razakars, and Pakistani

army committed the offences of genocide, and abduction, confinement, torture, rape, murder and other inhumane acts as crimes against humanity at village Maddhayapara, Maloara, Rudrakar, Kashavog and Dhanuka of Palong Police Station of the then Madaripur Sub-Division. The event of deportation narrated in charge No. 4 is the outcome of those offences proved beyond reasonable doubt.

889. To constitute an offence of deportation it is required that the accused person by his act or conduct intended forceful displacement of the civilian outside the border, but that displacement need not be permanent. In the case of Prosecutor vs. Radovan Karadzic, Case No. IT-95—5118-T, Judgment dated 24.3.2016, Para 493 it has been observed that –

“The mens rea required for deportation is the intent to forcibly displace the population across a de jure or de facto border. The mens rea for the crime of forcible transfer is the intent to forcibly displace the population within a national border. Deportation and forcible transfer do not require intent that the victims be displaced permanently, only that they be intentionally displaced.”

890. The determination as to whether the victims of deportation had a genuine choice is one to be made within the context of the particular case being considered. In the instant case, the atmosphere in the crime sites at the relevant time was of such a coercive nature

that due to commission of the crime of genocide and crimes against humanity at village Maddhapara, Kashavog, Rudrakar, Dhanuka of the Palong Police Station of the then Madaripur Sub-Division by the accused persons, other Razakars, and Pakistani army compelled the Hindus of the crime sites to leave the country to save their lives, honour and dignity. The prosecution evidence presented to the Tribunal proved beyond reasonable doubt that due to the commission of the offence as listed in charge Nos. 1, 2 and 3 by accused persons, their accomplice Razakars and Pakistani army created panic and horror in the crime sites which forced the Hindu religious people to leave the country facing ineffable harassment and consequently thousands of Hindu religious people of those villages being frightened were thus compelled to depart to India and departure of the Hindus was involuntary and therefore unlawful and the deportation is the outcome of the unlawful acts of the accused persons, other Razakars, and the Pakistani army.

891. From the evidence presented to the Tribunal it is proved beyond reasonable doubt that the accused Md Solaiman Mollah[now dead] and accused Idris Ali Sardar, other Razakars, and the Pakistani army committed genocide and crimes against humanity at villages Maddhapara, Malopara, Kashavog, Rudrakar, and Dhanuka, and consequently under compelling circumstances the Hindu religious people of those villages being frightened to

save their lives, honour and dignity deported to India and thereby accused Md Solaiman Mollah[now dead] and accused Idris Ali Sardar participated, aided, abetted, facilitated and had complicity in the commission of the offence of deportation as crimes against inhumanity as specified in Section 3(2)(a)(g)(h) of the Act of 1973 and accused Idris Ali Sardar incurred the liability under Section 4(1) of the said Act.

The verdict on conviction

892. In view of the above evidence, both oral and documentary and the facts and circumstances of the case and considering the submission of the parties and reasons set out in the judgment I find-

(1)Accused Idris Ali Sardar (absconding) in-

Charge No 1: Guilty of the offences of genocide, and murder and other inhumane acts as crimes against humanity as specified in section 3(2)(a)(c)(i)(g) and (h) of the Act of 1973 which is punishable under section 20(2) of the said Act for which he incurred liability under section 4(1) of the said Act.

(1)Accused Idris Ali Sardar (absconding) in-

Charge No 2: Guilty of the offences of genocide, and abduction, confinement, torture, rape, and other inhumane acts as crimes against humanity as specified in section 3(2)(a)(c)(i)(g) and (h) of the Act of 1973 which is punishable under section 20(2) of the

said Act for which he incurred liability under section 4(1) of the said Act.

(1)Accused Idris Ali Sardar (absconding) in-

Charge No 3:Guilty of the offence of murder as crimes against humanity as specified in section 3(2)(a)(g) and (h) of the Act of 1973 which is punishable under section 20(2) of the said Act for which he incurred liability under section 4(1) of the said Act.

(1)Accused Idris Ali Sardar (absconding) in-

Charge No 4:Guilty of the offence of deportation as crimes against humanity as specified in section 3(2)(a)(g) and (h) of the Act of 1973 which is punishable under section 20(2) of the said Act for which he incurred liability under section 4(1) of the said Act.

Verdict on sentence

893. In Section 20 of the Act of 1973, the Legislature provided a provision in awarding sentence for commission of the crimes as specified in Section 3(2) of the said Act. Under the Act of 1973, this Tribunal has limited discretion in awarding sentence inasmuch as the Legislature made provision in section 20 of the said Act directing the Tribunal to award “sentence of death or such other punishment proportionate to the gravity of the crimes as appears to the Tribunal to be just and proper.” The words “just and

proper” used in section 20 of the Act of 1973 relates to the “gravity of the offence.” Crimes are only to be measured by the injury done to the victims and the society. The discretion of the Tribunal under section 20 of the said Act is not wide but limited to the words “punishment proportionate to the gravity of the crimes as appears to the Tribunal to be just and proper.”

894. Justice demands that Tribunal should impose punishment considering the public abhorrence of the crime. In awarding sentence this Tribunal shall consider all relevant facts and circumstances of the case and impose a sentence proportionate to the gravity of the offence. The principle which this Tribunal has followed in awarding sentence is that the punishment must be appropriate and proportionate to the gravity of the offence committed. Imposition of appropriate sentence is the manner in which the Tribunal responds to the society’s cry for justice against the criminals.

895. In the case of the Chief Prosecutor vs Md. Sakhawat Hossain, ICT-BD.[ICT-1], Case No. 04 of 2015, Judgment dated 10.08.2016, Para 1091 it has been observed that-

“Proportionality is a general principle in law which covers several concepts. The concept of proportionality is used as a criterion of fairness and justice in statutory interpretation processes as a logical method intended to assist in discerning the correct

balance between the restriction imposed by a corrective measure and the severity of the nature of the prohibited act. In criminal jurisprudence, it is used to convey the idea that the punishment of an offender should fit the crime.”

896. In the case of *Bachan Singh vs the State of Punjab* reported in AIR 1980(SC) 898 Para 195, the Supreme Court of India emphasized to award “extreme penalty in gravest cases of extreme culpability” and held that-

“In *Jagmohan*, this Court had held that this sentencing discretion is to be exercised judicially on well-recognized principles, after balancing all the aggravating and mitigating circumstances of the crime. By “well-recognized principles” the Court obviously meant the principles crystallized by judicial decisions illustrating as to what were regarded as aggravating or mitigating circumstances in those cases. The legislative changes since *Jagmohan*- as we have discussed already – do not have the effect of abrogating or nullifying those principles. The only effect is that the application of those principles is now to be guided by the paramount beacons of legislative policy discernible from Sections 354 (3) and 295 (2), namely: (1) The extreme penalty can be inflicted only in gravest cases of extreme culpability: (2) In making choice of the sentence, in addition to the circumstances of the offence, due regard must be paid to the circumstances of the offence also.”

897. In *Mohammed Ajmal Mohammad Amir Kasab Vs The State of Maharashtra* reported in AIR 2012 (SC) 3565 para 566, the

Supreme Court of India relied on its earlier decision made in *Machhi Singh vs the State of Punjab* reported in AIR 1983(SC) 957 wherein the Supreme Court of India confirmed the death sentence affirmed by the High Court Division and observed that;

“The *Bachan Singh* (AIR 1980 SC 898) principle of the ‘ rarest of rare cases’ came up for consideration and elaboration in *Machhi Singh v. State of Punjab*(AIR 1983 SC 957). It was a case of extraordinary brutality (from normal standards but nothing compared to this case!). On account of a family feud *Machhi Singh*, the main accused in the case along with eleven (11) accomplices, in the course of single night, conducted raids on a number of villages killing seventeen(17) people, men, women and children, for no reason other than they were related to one *Amar Singh* and his sister *Piyaro Bai*. The death sentence awarded to *Machhi Singh* and two other accused by the trial court and affirmed by the High Court was also confirmed by this Court.”

898. In the case of *Mohammed Ajmal Mohammad Amir Kasab VsThe State of Maharashtra*, reported in AIR 2012 (SC) 3565 para 585, the Supreme Court of India emphasized on the principle “rarest of the rare cases” in awarding death sentence and held that;

“Putting the matter once again quite simply, in his country death as a penalty has been held to be Constitutionally valid though it is indeed to be awarded in the “rarest of rare cases” when the alternative option (of a life sentence) is

unquestionably foreclosed”. Now, as long as the death penalty remains on the statute book as punishment for certain offences, including “waging war” and murder, it logically follows that there must be some cases, howsoever rare or one in a million, that would call for inflicting that penalty. That being the position we fail to see what case would attract the death penalty, if not the case of the appellant. To hold back the death penalty, in this case, would amount to obdurately declaring that this Court rejects death as a lawful penalty even though it is on the statute book and held valid by Constitutional benches of this Court.”

899. In awarding proper sentence with regard to the offences proved beyond reasonable doubt against the convict the relevant provision of the Act of 1973 is quoted below;

Section 20 of the Act of 1973

“20.(1) The judgment of a Tribunal as to the guilt or the innocence of any accused person shall give the reasons on which it is based:

Provided that each member of the Tribunal shall be competent to deliver a judgment of his own.

(2) Upon conviction of an accused person, the Tribunal shall award sentence of death or such other punishment proportionates to the gravity of the crime as appears to the Tribunal to be just and proper.”

900. In the case of Abdul Quader Mollah Vs The Chief Prosecutor, reported in 22 BLT(AD) 8 para 207 our Apex Court considered the principle of proportionality in interpreting the provision of

section 20(2) of the Act of 1973 and Mr. Justice Surendra Kumar Singha, as his Lordship was then [Majority view] in the unique judgment observed that;

“As regards sentence, section 20(2) provides the ‘sentence of death or such other punishment proportionate to the gravity of the crime ...’ A plain reading of sub-section (2) shows that if the tribunal finds any person guilty of any of the offences described in subsection (2) of section 3, awarding a death sentence is the rule and any other sentence of imprisonment proportionate to the gravity of the offence is an exception. Therefore, while deciding just and appropriate sentence to be awarded for any of the offences to any accused person, the aggravating and mitigating factors and circumstances in which the crimes have been committed are to be balanced in a proportionate manner. In awarding the appropriate sentence, the tribunal must respond to the society’s cry for justice against perpetrators of crimes against Humanity, the perpetrator like the appellant has committed most worst and barbarous types of Crime against Humanity. He participated in the killing and rape of innocent persons without just cause. His horrific crimes have been highlighted in the beginning of the judgment. Entire world raised voice against his barbaric Crimes against Humanity. Justice demands that it should impose a sentence befitting the crime so that it reflects public abhorrence of crime. In Cases of murders in a cold and calculated manner without provocation cannot but shock the conscience of the society which must abhor such heinous crime committed on helpless innocent persons.”

901. Like Penal Code, under section 20(2) of the Act of 1973 death sentence is the normal rule for murder and imprisonment for life is the exception. As per provision provided in section 20 of the Act of 1973 upon conviction of an accused person, the tribunal shall award sentence of death or such other punishment proportionates to the gravity of the crimes as appears to the Tribunal to be just and proper. The extreme penalty should be given in extreme cases. In awarding sentence, the Tribunal is principally concerned with the facts and circumstances of the case which are connected with the particular crimes proved beyond reasonable doubt.

902. In the case of the Chief Prosecutor Vs Abdul Quader Mollah reported in 22 BLT(AD)8, para 208, our Apex Court emphasized on the right of the victims of the crimes in awarding sentence wherein Justice Surendra Kumar Sinha, as his Lordship was then, (Majority view) observed that;

“It is now established by judicial pronouncements by the superior courts that while considering the punishment to be given to an accused, the court should be alive not only to the right of the criminal to be awarded just and fair punishment by administering justice tempered with such mercy as the criminal may justly deserve, but also rights of the victims of the crime to have the assailant appropriately punished and the society’s reasonable expectation from the court for the proportionate deterrent punishment

conforming to the gravity of the offence and consistent with the public abhorrence for the heinous crime committed by the accused” and at para 213 further held that “ if the gravity of the offence is considered as the basis for awarding sentence to the appellant, the highest sentence in respect of the charge No 6 in which the killing and rape were brutal, cold-blooded, diabolical and barbarous.

903. It is the bounden duty of the Tribunal that it shall consider all relevant facts and circumstances of the case and proceed to impose a sentence proportionate to the gravity of the offence. Justice demands that Tribunal should impose punishment befitting the crime. At the time of enactment of the Act of 1973 the Legislature made provision to award capital punishment for the offences as specified in section 3(2) of the said Act and in the case of Kamruzzaman vs Bangladesh [review case] reported in 67DLR (AD)157 our Apex Court made an observation as regards intention of the Legislator and held as follows;

“When our legislators enacted the 1973 Act, the horrendous memory of the genocide committed by Paki army in collaboration with their Bengali cronies, were fresh in their minds. They saw or heard of the extent and the horror that atrocities committed by them left behind, which shattered the conscientious people throughout the world. Their memories were also vibrant at that time as to the ramification this holocaust left behind for generations and with such fresh memories they placed death sentence at the peak of the list of the sentence. Indeed, when we affirmed death sentence, we

had to reminisce the magnitude of the atrocities Paki forces committed with the help of their local outfits. Nobody can remain oblivious of the harrowing events that were followed by the so-called “Operation Search Light”.

904. In the case of Abdul Quader Mollah Vs The Chief Prosecutor ICT reported in 22 BLT(AD) 541 para 69[Review judgment] our Apex Court settled the principles of sentencing and held that;

“The principles of sentencing procedure, are uniform in our country and the court while awarding a sentence shall consider (a) the nature of the offence, (b) the culpability of the offender, (c) the circumstances of its commission, (d) the age and character of the offender, (e) the injury to individuals or to society, (f) effect of the punishment on the offender, amongst many other factors which would ordinarily be taken in mind.”

905. Subsequently in the case of Salauddin Quader Chowdhury vs The Chief Prosecutor reported in 67DLR (AD) 351 Para 166 Hon’ble Appellate Division affirmed the death sentence considering the participation of the convict in the heinous crimes and observed that;

“In view of his conduct and behavior, and also in view of his direct participation, and the brutality exerted in those incidents, awarding of death sentences was proportionate to the gravity of those crimes. The awarding to death sentences were adequate and no leniency should be shown to him. He has directly involved in those heinous crimes and his

participation was intentional with a motive to eliminate a religious community as a whole for political vengeance.”

906. Under Section 20(2) of the Act of 1973, if the Tribunal award any other sentence except sentence of death, it shall follow the principle of proportionality considering the gravity of the offences as appears to the Tribunal to be just and proper. The convict committed the extremely heinous and grave crimes compare to ordinary domestic offences. In our jurisdiction, the offenders are usually convicted for multiple instances of serious mistreatment or large scale killing. It is expected that penalties would be heavier than those imposed under Penal Code. The Tribunal compare the conduct of an accused in particular significance role he played in the commission of the crimes.

907. “One of the fundamental principles of justice is consistency- like cases should be treated alike. The consistency of sentencing can be approached on several levels- the two fundamental ones being consistency in approach and consistency in the outcome. Consistency in approach requires that there is a uniform, consistent approach towards sentence determinations across all cases. Therefore, the sentencing discretion should be exercised in a principled manner. There should be a coherent judicial approach to the exercise of discretion in sentencing, which requires all decisions to be based on common standards- general underlying

principles- that are uniformly applied to the facts of each case.”

Cf. M. Trumble, *Atrocity, Punishment and International Law*, New York Cambridge University Press, 2007.

908. The Act of 1973 gives the Tribunal a limited discretion in awarding sentence for the offence of genocide inasmuch as genocide is the cruelest offence amongst the international crimes and the gravity of the offence has been labeled as the starting point for consideration of an appropriate sentence. The Legislature made statutory provision for awarding sentence of death for the offences enumerated in Section 3(2) of the Act of 1973. The complicity of the convict along with Pakistani army in committing the offence of genocide, and murder and rape as crimes against humanity is the aggravating factor to be considered against him in awarding sentence and an aggravating factor increases the sentence. The maximum penalty is award by the Tribunal in our jurisdiction as the upper limit for punishment. The Tribunal shall impose the sentence according to the seriousness or gravity of the offences. The Tribunal also looks at the injury, harm, loss or damage done to the victims and the mankind as a result of the offence. Where the harm is greater, the penalty will reflect the greater seriousness of the offence.

909. In this respect, I recall the observation of our Apex Court made in Criminal Review Petition No. 58 of 2016, *Mir Quasem Ali*

–Versus-The Chief Prosecutor, International Crimes Tribunal, and Judgment dated 30th August, 2016 wherein our Apex Court observed that-

“The court is only concerned with the culpability to the petitioner and the law governing on the sentencing principles. Crimes against humanity are taken as serious types of offence. The word ‘humanity’ signifies humanness-mankind collectively. The term ‘crimes against humanity’ has come to mean anything atrocious committed on a large scale. These crimes are committed against the civilian population during the war. These offences by nature are heinous. If any person commits crimes against humanity and if the court finds that the offender directly participated in such crimes the court is left with little discretion in awarding the minimum sentence particularly in respect of serious crimes.”

910. It is proved beyond reasonable doubt that before committing the offences the convict and other Razakars welcomed the Pakistani army at Angaria Bazaar launch dockyard who came from Madaripur A R Hawladar Jute Mills Army Camp to commit the offence of genocide and forming part of a criminal enterprise sharing the common criminal intent to destroy the Hindu religious group, in whole or in part, he guided the Pakistani army towards the crime sites and identified the innocent Hindus to kill them and after committing the offence of genocide and crimes against humanity came back along with the Pakistani army and unless the

convict guided, identified, aided, abetted ,facilitated and had complicity in committing the offences of genocide and crimes against humanity, it was not possible for the Pakistani occupation army to commit those cruelest and barbaric crimes and thereby he is equally responsible along with Pakistani army who gunned down about 200/250 Hindus of village Maddhyapara, Malopara, Kashavog, Rudrakar, Dhanuka, and Abdus Samad Sikdar, a freedom fighter of village Char Kashavog, and abduction, confinement , torture and rape of the Hindu females of Malopara. The offence committed by the convict at the time of great War of Liberation in 1971 deeply shocked the conscience of the humanity. Accused Idris Ali Sardar substantially contributed to the commission of the offences as listed in charge Nos. 1 to 4 for no reason other than the victims were mere Hindus and freedom fighter.

911. The prosecution proved beyond reasonable doubt that the convict, other Razakars, and the Pakistani army had thoroughly designed a plan, and forming part of a criminal enterprise sharing the common criminal intent to destroy the Hindu religious group, in whole or in part, as the local agent of the Pakistani army, he guided, aided, abetted, and facilitated them in committing the offences of genocide and eventually participated in the killing mission of innocent members of Hindu religious group and jointly

committed offence of genocide, the rarest atrocities, remaining presence in the crime sites. The convict as local agent of the Pakistani army substantially contributed to the commission of heinous crimes and the manner in which he participated in committing the grave offences to implement the further policy and plan of the Pakistani occupation army against Bangladesh was a reflection of his position and his participation in committing those offences impules this Tribunal to award appropriate sentence considering the gravity of the offences. Genocide is the cruelest, heinous, brutal and barbaric crime committed with intent to destroy the Hindu religious group, in whole or in part, and only the death sentence is proportionate and will match the offence of genocide committed by the convict.

912. Considering the above evidence of the prosecution witnesses presented to the Tribunal and facts and circumstance of the case, the culpable participation of the convict, and findings and reasoning's I am inclined to award the following sentence which I considered to be just and proper proportionate to the gravity of the crimes.

Accordingly, I do hereby render the following **ORDER ON SENTENCES.**

Hence it is

ORDERED

That accused Idris Ali Sardar [67] [absconding], son of late Hazi Hakim Ali Sardar and late Maju Bibi of village West Kashabhog, Police Station- Palong, District- Shariatpur is found guilty of the offences of genocide and crimes against humanity as specified in section 3(2)(a)(c)(i)(g)(h) of the International Crimes (Tribunals) Act, 1973 as listed in charge No 1 and he be convicted accordingly and sentenced thereunder to death under section 20(2) of the said Act.

That accused Idris Ali Sardar [67] [absconding], son of late Hazi Hakim Ali Sardar and late Maju Bibi of village West Kashabhog, Police Station- Palong, District- Shariatpur is found guilty of the offences of genocide and crimes against humanity as specified in section 3(2)(a)(c)(i)(g)(h) of the International Crimes (Tribunals) Act, 1973 as listed in charge No 2 and he be convicted accordingly and sentenced thereunder to death under section 20(2) of the said Act.

That accused Idris Ali Sardar [67] [absconding], son of late Hazi Hakim Ali Sardar and late Maju Bibi of village West Kashabhog, Police Station- Palong, District- Shariatpur is found guilty of the offences of murder as crimes against humanity as specified in section 3(2)(a)(g)(h) of the International Crimes (Tribunals) Act, 1973 as listed in charge No 3 and he be convicted

accordingly and sentenced thereunder to suffer imprisonment for life i.e. rest of his natural life under section 20(2) of the said Act.

That Idris Ali Sardar [67] [absconding], son of late Hazi Hakim Ali Sardar and late Maju Bibi of village West Kashabhog, Police Station- Palong, District- Shariatpur is found guilty of the offences of deportation as crimes against humanity as specified in section 3(2) (a) (g)(h) of the International Crimes (Tribunals) Act, 1973 as listed in charge No 4 and he be convicted accordingly and sentenced thereunder to suffer rigorous imprisonment for 7(seven) years under section 20(2) of the said Act.

The above-mentioned sentences of death be executed by hanging the convicted accused Idris Ali Sardar by the neck or by shooting him till he is dead, as decided by the government.

The sentences of imprisonment awarded to the convicted accused person as above shall run concurrently.

However, as and when any sentence of death awarded to convicted accused Idris Ali Sardar as above will be executed, the another sentence of death and / or sentence (s) of imprisonment awarded to him as above would naturally get merged into the sentence of death executed.

The sentences of death and sentences of imprisonment awarded as above under section 20(2) of the International Crimes (Tribunals) Act, 1973 shall be carried out and executed in

accordance with the order of the government as required under section 20(3) of the Act of 1973.

THE TRIBUNAL'S ORDER ON SENTENCE

That accused Idris Ali Sardar [absconded] son of late Hazi Hakim Ali Sardar and late Maju Bibi of Village West Kashabhog, Police Station Palong, District Shariatpur is held **BY MAJORITY guilty** of the offences of '**genocide**', '**murder**' and '**other inhumane acts**' [plundering and arson] as crimes against humanity as enumerated in section 3(2)(a)(c)(i)(ii)(g)(h) of the International Crimes (Tribunals) Act, 1973 and held **BY MINORITY guilty** of the offences of **genocide**, and **murder** and **other inhumane acts** as crimes against humanity as specified in section 3(2)(a)(c)(i)(g) and (h) of the Act of 1973 **as listed in charge no. 01** and he be convicted accordingly, and **sentenced UNANIMOUSLY to death** under section 20(2) of the said Act.

Accused Idris Ali Sardar [absconded] is held **BY MAJORITY guilty** of the offence of '**genocide**' as enumerated in section 3(2)(c)(i)(ii)(g)(h) of the International Crimes (Tribunals) Act, 1973 and held **BY MINORITY guilty** of the offences of **genocide**, **abduction**, **confinement**, **torture**, **rape** and **other inhumane acts** as crimes against humanity as specified in section 3(2)(a)(c)(i)(g)(h) of the International Crimes (Tribunals) Act, 1973 **as listed in charge no. 02** and he be convicted accordingly, and

sentenced UNANIMOUSLY to death under section 20(2) of the said Act.

Accused Idris Ali Sardar [absconded] is held **UNANIMOUSLY guilty** of the offence of '**murder**' as crime against humanity as enumerated in section 3(2)(a)(g)(h) of the International Crimes (Tribunals) Act, 1973 **as listed in charge no. 03** and he be convicted accordingly, and **sentenced UNANIMOUSLY to suffer imprisonment for life i.e. rest of his natural life** under section 20(2) of the said Act.

Accused Idris Ali Sardar [absconded] is held **UNANIMOUSLY guilty** of the offence of '**deportation**' as crime against humanity as enumerated in section 3(2)(a)(g)(h) of the International Crimes (Tribunals) Act, 1973 **as listed in charge no. 04** and he be convicted accordingly, and **sentenced UNANIMOUSLY to suffer rigorous imprisonment for 07[seven] years** under section 20(2) of the said Act.

The sentence of death awarded as above in respect of **charge nos. 01 and 02** be executed by hanging the convict accused Idris Ali Sardar by the neck or by shooting him till he is dead, as decided by the government.

The sentence of imprisonment awarded to the convict Idris Ali Sardar as above shall run concurrently.

However, as and when any sentence of death awarded to convict Idris Ali Sardar as above will be executed, the other sentence of death and sentence of imprisonment awarded to him as above would naturally get merged into sentence of death executed.

The sentence of death and sentence of imprisonment awarded as above under section 20(2) of the International Crimes (Tribunals) Act, 1973 shall be carried out and executed in accordance with the order of the government as required under section 20(3) of the said Act.

Since the convict Idris Ali Sardar has been absconding, the sentence of death and sentence of imprisonment awarded to him as above shall be executed after causing his arrest or when he surrenders before the Tribunal, whichever is earlier.

The convict Idris Ali Sardar is at liberty to prefer appeal before the Appellate Division of the Supreme Court of Bangladesh against his conviction and sentence within 30[thirty] days of the date of order of conviction and sentence as per provisions of section 21 of the International Crimes (Tribunals) Act, 1973.

Issue conviction warrant against the convict accused Idris Ali Sardar.

The Secretary, Ministry of Home Affairs and the Inspector General of Police [IGP] are hereby directed to ensure the apprehension of the convict accused Idris Ali Sardar, if necessary with the help of Inter-Pol.

Let certified copy of this judgment be provided to the prosecution free of cost, at once.

If the absconding convict accused Idris Ali Sardar is arrested or surrenders within 30[thirty] days of the date of order of conviction and sentence he will be provided with certified copy of this judgment free of cost.

Let a copy of this judgment together with the conviction warrant of the convict accused Idris Ali Sardar be sent to the District Magistrate, Dhaka for information and necessary action.

Let a copy of this order be sent together with the conviction warrant of the convict accused Idris Ali Sardar to the (1) Secretary, Ministry of Home Affairs, Bangladesh Secretariat, Dhaka , and (2) Inspector General of Police [IGP], Police Head Quarters, Dhaka for information and compliance.

(Justice Anwarul Haque, Chairman)

(Justice Md. Shahinur Islam, Member)

(Justice Md. Shohrwardi, Member)